RESERVED **Case No: 2600206/2017**
2600765/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Carter**

Respondent: **British Midland Regional Limited**

Heard at: **Nottingham** **On:** **2-6, 9, 12-13 July 2018**

Before: **Employment Judge Clark**
Ms F French
Mr P Jackson

Representatives:

Claimant: **Mr Hodge of Counsel**
Respondent: **Mr Carter of Counsel**

JUDGMENT

1. The claim of unfair dismissal **fails and is dismissed**.

2. The claim of indirect sex discrimination **fails and is dismissed**.

3. The claim of direct sex discrimination **fails and is dismissed**.

4. The claim of less favourable treatment on grounds of part-time working **fails and is dismissed**.

5. The claim of harassment **fails and is dismissed**.

6. The claim of victimisation **fails and is dismissed**.

REASONS

1. Introduction

1.1. This claim centres on the claimant's employment as a part-time working mother over the last few years of her employment. In her original claim (260206/2017) she presented claims of direct and indirect sex discrimination, harassment, victimisation and less favourable treatment related to her status as a part-time worker. She subsequently resigned and presented a second claim (2600765/2017) making claims of constructive unfair dismissal, direct sex discrimination, further allegations of harassment and victimisation and repeating her claim of indirect sex discrimination.

1.2. The crux of the case is the impact on the claimant of a commercial decision by the respondent in late 2015 to expand the route operating out of East Midlands Airport. This meant the aircraft would operate from Brussels, and not East Midlands. Instead of being able to return home after almost every shift, the flight crew would instead operate a tour of duty each week necessitating a number of night stops in Brussels. Attempts to resolve the issues failed and the claimant resigned from her position as a First Officer Pilot on 24 March 2017.

2. Issues

2.1. The parties agreed a list of issues for each claim presented which appears in the agreed bundle [page 99.9]. We adopted this save that we have structured our analysis on the issues in each type of claim, rather than as they appear under each claim number. It was also agreed that some of the claims are prima facie out of time and that we will have to consider the question of our jurisdiction.

3. Evidence

3.1. For the claimant, we heard from Mrs Carter herself. We also heard from Mr Carter, her husband. For the respondent, we heard from Captain William Gill, Captain Julian Halmshaw, Mr Steve Halliwell and Mr Lee Rennie. All witnesses adopted written statements on oath and were questioned.

3.2. We received a substantial bundle of documents approaching 1000 pages and considered those documents we were directed to.

3.3. Both counsel prepared detailed written closing submissions which they supplemented and respondent to orally. We record out gratitude to both counsel for the helpful and cooperative manner in which they conducted their respective cases before us.

4. Facts

4.1. It is not the role of the Tribunal to resolve each and every last dispute of fact between the parties. Consequently, we do no rehearse every point raised but seek to reach findings necessary to resolve the issues in the case and to set them in their proper context. On that basis, and on the balance of probabilities, we make the following findings of fact.

4.2. The respondent is a commercial airline operating flights between airports in the UK and Europe. The predecessor incarnations of the BMI brand are well

known to the public. In its present form, it is one of the smaller carriers operating on a regional basis across northwest Europe in a very competitive airline market. It employs around 325 staff of which just under half are pilots and has a well-developed employment policy framework with specialised in-house HR support and collective consultation machinery relevant to the issues in this case.

4.3. The claimant obtained a private pilot's licence in 2002 whilst working in her previous career in Insurance. She decided on a career change and commenced training to upgrade to a commercial pilot's licence. She graduated in 2004 and was interviewed by the respondent for the post of first officer. She commenced her employment with the respondent soon afterwards in April 2004.

4.4. We note the commitment and personal investment, in every sense of that meaning, that is needed to train as a commercial airline pilot. The financial cost to the claimant of the initial training was in the region of £100,000. There is then further training on "type", that is the particular model aircraft being flown. Airlines typically offer some support for type raining costs albeit that is usually linked to a tie in and/or payback period from future earnings. The airline provides the in-serve training as part of the ongoing periodic competence/regulatory framework.

4.5. The flight deck is staffed by two pilots. The senior of the two is the commander, or captain. That is the "left seat". The junior of the two is the first officer. That is the "right seat".

4.6. The claimant became an employee employed under a contract of employment which was itself subject to a collectively agreed "memorandum of agreement ("MOA") [118-244]. The operation of the airline, which necessarily touches on matters connected with pilots' employment, is governed by an Operations Manual [see 761 onwards] which also regulates a number of elements of the working practices of pilots, in particular relating to hours and the safety aspects of working time. The MOA is lengthy and detailed and covers just about all aspects of the working arrangements of pilots employed by the respondents. In particular, it recognises the day to day reality of being employed to operate in the business of international travel which, by definition, is not a typical 9-5 job. In summary, it deals with matters one would expect to see in any employment "handbook" including pay, allowances, benefits and further matters specific to the nature of work within an airline such the assignment to a base. Hours of work is obviously a significant issue for pilots. There are rules found within the MOA and terms of employment which we accept comply with the Civil Aviation Authority ("CAA") standards. Control of hours goes further than the hours of work and includes measures to control the effect of fatigue in arears such as travel to work and travel between bases.

4.7. Of relevance to this case are the following specific agreements within the MOA:-

a A "lifestyle agreement" [146], which recognises the intent to provide crews with a stable roster with which to plan their flying and domestic lives while permitting the respondent a predicable resourcing of its operation. This agreement established the BMI rostering committee, a joint committee to monitor and deal with issues anticipated by the agreement. This agreement goes on to define a number of terms with a specific meaning, either within the industry or within this employment.

b A maternity scheme [188] in which the respondent expresses an

intention to support returning to work after a period of maternity leave in a different post or on a different time basis (specifically full-time to part-time) albeit that it is not a contractual obligation.

c A "Pilot's part-time working agreement" [212] which sets out the parameters of identifying and maintaining part-time work as a pilot. The very existence of this specific collective agreement is premised on an implicit understanding that the role of pilot is ordinarily full-time. We return to that issue later.

d A "Basing Policy" [216] by which the parties regulate the practical aspects of the employer or employee changing bases permanently or temporarily.

e A "flexible working policy" [238] which deal with the statutory entitlements for requesting flexible working.

4.8. These agreements flow from the reality of operating and working within a commercial airline. From the employee's perspective, the circumstances in which the work is performed will depend on the nature of the route and schedules the employing airline operates. The routes and the number of individual flights (known as "sectors") flown on any route will determine whether the crew returns to the same base at night, whether they fly a circuit of destinations and whether there are night stops. A crew might fly simply between A and B and back or it might fly a series of sectors on different routes. It might operate a series of routes over a number of days only returning to the base after a number of night stops in a rostering arrangement referred to as a "tour". How any particular route is operated depends, ultimately, on the ability to meet a market need and provide a commercially viable service between destinations. We find the need to keep the aircraft operating and the consequential deployment of its pilots is a key and legitimate objective of the respondent's business. We accept that the market in which the respondent has recently operated has meant this aim of keeping the aircraft operating has become more about maintaining the fundamental commercial viability of individual routes and bases, rather than simply a matter of improving profitability or efficiency. In other words, not making the best use of an aircraft was increasingly likely to lead to routes closing on commercial grounds with the obvious consequential implications to the employment of both flight deck and cabin crew.

4.9. We find one of the practical effects of this working environment is that flight and cabin crew have no absolute long term certainty about their individual working arrangements. Whilst their employment may not necessarily come to an end on the closure of a route or base, they may be deployed on alternative services and it is the reality of this prospect that various agreements within the MOA seeks to anticipate and manage. Even within a relatively stable route, it can be subject to change over time and, on a day to day basis, other events such as weather or technical events could mean an unexpected diversion or overnight stop all of which has to be anticipated and managed in the employment relationship. We accept the incidence of these factors varies from route to route. Some routes out of some bases had more night stops than others, some operated a tour such as the routes out of Chester. Others operated mainly on a "return to base" pattern. For some time in recent years, the claimant had been employed on a route returning to base each day with irregular and infrequent night stopping. The prospect of flying any particular format was provided for in the contract of employment and MOA. We find it is a necessary part of running a commercial airline that its staffing resource can be deployed in such a flexible way to meet the needs of the schedule and this aim is reflected in the collective agreements.

4.10. We find the pilots employed by the respondent operate on an understanding of "seniority" amongst themselves. We find this is a practice universally applied within the industry. In some respects, the foundation of this practice can be seen from the start of a pilot's training and career as it is inherent in the concept of the minimum flying hours which determine various training and then early career milestones. This is enshrined in the MOA and the operations manual which is itself informed by various CAA standards. This all translates into a "seniority list" within the employer. It is simply a long service list within each of the pilot grades. Pilots progress up the seniority list the longer they fly for the operator. Sometimes this seniority is directly linked to career progression, for example it is necessary to reach a certain level of flying experience to be considered for command assessment. In other respects, the seniority list is used as a means of choosing between candidates in various situations such as a voluntary base move or other changes where there are fewer opportunities than applicants.

4.11. We find that the overwhelming majority of captains and first officers work full-time. Again, we find this is an industry wide norm and the respondent is no different. The claimant's experiences in seeking new employment since leaving the respondent have shown this practice to be consistent. We accept there are established reasons for this. They include the efficient deployment of a pilot who does not fill a discrete "post" but contributes his or her available flying hours as a resource to meet a particular flying need dictated by the particular schedule. They also include the regulatory supervision and ongoing assessment of pilots' skills and competencies the burden of which is the same whether the pilot works 100% or 50%. Two 50% pilots double the organisational demands, not to mention the cost, of meeting those obligations. As a resource, the ability to roster a pilot into a complicated programme of flight deck, cabin crew and aircraft asset over various routes, over various dates, and in a way which meets CAA standards is already an extremely complicated process, even using the software available to do this. We accept it becomes more difficult, and is likely to produce less efficient rosters, when staff work to increasingly different hours. That is why when part-time is available, it is limited to 50% or 75% according to how it fits into the resource planning and needs of the schedule. There are also benefits to a pilot's skills and competences, particularly on a change of aircraft type or promotion to captain, by embedding the skills learned in training with longer and concentrated periods of flying time. The claimant's enquiries of part-time working at Easyjet were met with an identical position to that of the respondent in that the initial appointment would be full-time but part-time working would be considered after the initial training and "a period of consolidated flying". We find the notion of consolidating in grade before reducing hours is also an industry phenomenon linked to the pilots developing professional experience and competencies in the particular role or on the particular type of aircraft. We are satisfied this respondent is typical of the industry. Of its 135 pilots, around 15 are part-time.

4.12. We find in recent years, the global demand for pilots has been such that the respondent has struggled to maintain a full complement of pilots necessary to meet the needs of its schedules. Hence why it was that from time to time the claimant received emails sent to all pilots requesting volunteers to cover flights. The concept of a vacancy is not how it exists in other areas of work. Whether first officer or captain, the concept of vacancy is more a question of providing a resource to meet the resource need. We find on balance that at all material times, that resource need has exceeded the equivalent of a full-time pilot's available flying hours. The pilot shortage may be placing some commercial pressure on employers

to revisit the cost/benefit balance of employing part-time pilots and to stand more of the burden associated with a less efficient part-time use of pilots, if it that means retaining a competent pilot. However, that cuts both ways. The pilot shortage has also meant the respondent has lost pilots at a greater rate and its need to fill the increasing resource gap left behind has only served to increase the need for full-time pilots.

4.13. We suspect there is also some element of historical norms at force within the industry but that is changing. It appears to us that the frequency with which the respondent has dealt with requests for part-time working over recent years may be increasing. The mechanism for obtaining a part-time role in this employer is either on an informal basis or, more formally, through the statutory flexible working request process under section 80H of the Employment Rights Act 1996. We have seen some correspondence relating to 32 pilots who sought to change from full-time to part-time working over the last 7 years or so. The applications come from male and female pilots of both grades and are for a variety of reasons including improving work/life balance and family reasons. Having considered the incidence of part-time requests in this employer, we are able to make the following findings. Firstly, the pilot resource need for any particular schedule/base is the governing factor in deciding whether part time working can be accommodated. We find that where requests are made, they are considered genuinely and in good faith. The employer has a resource committee to review need against schedules and to see if individual changes to full-time working can be accommodated within the schedule. In short, if part-time working can be accommodated within the flight programme, rostering and crew resources, we find this employer grants the request. We find the vast majority of requests made have been granted. Some, however, have been granted in principal but subject to delayed implementation, a state of affairs we find is itself linked to the difficulty of fitting part-time working into the rostering of a particular schedule and the need to recruit others into it to release the hours lost by that pilot reducing to part-time. Some applications have been refused because the particular structure of part-time working being sought would not fit within the rostering need for that schedule. Despite this generally favourable position, we find it likely to be the case that even where there was a favourable view of the availability of a command upgrade being performed part-time, on balance there would still be an expectation of a period of some time working full-time to consolidate experience in the role, absent very specific circumstances.

4.14. We have not been provided with comprehensive statistics of gender or work patterns. That which we do have enables us to make the following findings:-

a We have seen some evidence of the gender ratio in respect of the captain grade only [575]. This shows a list of all 87 past and present captains employed between 2013 and 2017. Of those, 5 are/have been female pilots which amounts to around 6%. Perhaps more relevant is the fact that of those 5, 3 were internal promotions from first officer to captain. We have not been provided with evidence of the ratio of female to male pilots within the respondent or across the industry as a whole but have identified nothing to suggest this employer would not be typical.

b We have no statistical evidence of the ratio of female to male first officers but do feel able to infer from the surrounding evidence that women first officer pilots are a small minority of the total pilot workforce.

c We have seen evidence of the incidence of full-time / part-time working against both pilot grades derived from the seniority list as at July 2016.

That shows 129 pilots in post plus 4 further pilots providing zero hours or fixed term cover (3 captains, 1 first officer). The individual breakdown is as follows:-

	Full Time	Part-time	Total
Captain	68 (87%)	10 (13%)	78
First Officer	48 (94%)	3 (6%)	51
Total	116 (90%)	13 (10%)	129

The prevalence of part-time working in this employer is about 10% overall and we accept this is broadly comparable with the industry as a whole. Within this respondent there were, at the material time, 10 out of 68 captains who were part-time compared to 3 out of 48 first officers. That throws up a curious result that the prevalence of part-time working, although low overall, is substantially higher amongst the captain grades. Consequently, we find the respondent does not impose an absolute requirement the command position of captain can only ever be performed on a full-time basis.

4.15. Within those statistics at 575, the claimant relies on two captains in particular who now work part-time. She points to them as actual comparators in her part-time worker claim. They are captain 19 and 21. We accept they are both employed at East Midlands Airport and at a time that the claimant was eligible for command upgrade. Captain 19 was upgraded from first officer to captain on 24 February 2015. Captain 21 was upgraded from first officer to captain on 9 January 2017. The evidence does not show whether they were full-time or part-time first officers previously but, on the balance of probabilities, we find it more likely than not that they were full-time first officers prior to their upgrade, and commenced in the command role as full-time initially.

4.16. The claimant has only ever flown with this respondent. She started her full-time flying career based at Aberdeen before moving to Glasgow, Heathrow, Leeds/Bradford and, more recently, East Midlands. Some of her base moves have been through choice. More often, they have been imposed due to the respondent's routes ceasing and the claimant being relocated. The claimant accepted this risk of imposed base changes is part and parcel of life as a commercial pilot.

4.17. The claimant met her husband whilst they were both training for their commercial pilot licences. He is also a commercial airline pilot working out of a number of national and international bases but now flying long haul routes out of Edinburgh. The claimant and her husband started a family whilst maintaining their respective full-time flying careers. They now have three children all under 10 years old. In respect of each pregnancy, the claimant took periods of maternity leave and returned to flying. After their first and second child, the claimant returned to flying on a full-time basis. After their third child was born, the claimant sought a flexible working variation to her full-time hours. She requested to work on a 50% part-time basis. The respondent agreed to this request. In line with the established MOA, a formal part-time agreement was signed by the parties to take effect from March 2011 [244]. The 50% was formally structured to operate initially on the basis of 3 days one week, followed by 2 days the next. In practice, the demands of rostering the schedule and the claimant's preference meant that this informally evolved, by mutual consent, into a pattern of one week on, one week off.

4.18. The formal agreement governs the technical necessities of maintaining a number of operational days, duty hours and flying hours and governs the effects of part-time pro-rata working on other aspects of the pilot's employment relationship including holiday, training and days off. It also contains an express statement that:-

> ***A part-time pilot will be treated equally in all respects with full-time colleagues in terms of bidding for fleet or base vacancies in accordance with their qualifications, suitability and seniority.***
>
> ***In addition, a part-time pilot taking command or changing fleet or base will only retain their part-time status if vacancies exist …"***

4.19. This requirement that changes between full-time and part-time working are dependent on a suitable vacancy being identified in the relevant rostering for that route, is repeated should the pilot wish to reverse the change and return to full-time working. We are satisfied that the respondent's actions in practice have been consistent with this statement in the agreement.

4.20. In terms of child care, the claimant and her husband have always had in place private arrangements for the care of their children. In particular, they employed a Nanny and continue to do so. That Nanny is employed by the couple on flexible terms which mean she is available as and when required including her sleeping over as necessary. We find the arrangements in place mean she is able to respond as if "on call" or on "standby" in circumstances which essentially mirror the sometimes unpredictable nature of the claimant's work (and no doubt her husband's too). We find there have been no issues or difficulties with the material aspects of arranging child care. In fact, for a number of years, Mr Carter flew for Qatar airlines out of Dohar. He lived there and all the children lived with him and were cared for by the Nanny in their day to day needs and during the time he was working. The children were schooled there. During this time, the claimant was apart from her children and continued to be based in the UK, visiting Qatar as and when she was able. The fact there have never been any problems with arranging childcare was something the claimant was at pains to stress. In her evidence, she drew a clear distinction between a parent's child care responsibility and a parent's natural desire to spend meaningful time with their children. On a number of occasions when giving evidence the claimant was insistent that her issue was not about child care obligations, as that phrase is generally understood, as this was well organised and she had that "sorted" for some time. She explained how she was able to do her job in the knowledge that the children were properly cared for. She referred to that part of her life as a parent as being "easy to organise". In fact, she denounced words attributed to her by the respondent when she had declined an earlier offer of promotion to captain on the basis that "*she would not have said she had child care issues*" as she did not have child care issues. She felt she was more likely to have said that she wanted "*to be there for her children*". Similarly, she challenged the employer's assumption about childcare as being much more than meeting the physical needs. She put it in terms that "*there is much more to being a parent, and particularly a mother, than he seems to have recognised*". We found her desire and concerns were something quite different to the generally understood meaning of childcare, that is in the sense that there potentially remains a social barrier between motherhood and working life. She wanted to have more time to spend with her children. We find this sense that the work was coming between her and her children is at the core of the issues in the case throughout the relevant period of time. We find, however, that it poses a different question in terms of how we go about assessing how the potential disadvantages manifest as

between men and women.

4.21. Around the time of the part-time working agreement, the claimant moved base from Glasgow to Heathrow and remained there for around 16 months. This was a voluntary move as opposed to being imposed by the respondent. The reason for it was the convenience of the available flights out of Heathrow to Qatar which, coupled with her revised part-time working of alternate weeks, meant she could spend every other week with her family in Dohar. There is no suggestion she was put at any disadvantage during this period and no evidence was advanced to explain why this situation was materially different to that which would exist in 2016 when the revised East Midlands Brussels route was implemented.

4.22. The respondent closed its Heathrow operations in October 2012. The claimant was again subject to a compulsory base change and began flying out of Leeds/Bradford airport. The same situation arose again in June 2013 when the respondent closed its Leeds/Bradford operations and the claimant then elected East Midlands as her new base.

4.23. The respondent operated only one route out of East Midlands. That was a morning and afternoon return flight to Brussels. The single route meant whether the claimant flew 2 sectors (one outward and one return flight) or 4 sectors (both outward and return flights) she would, in the ordinary course of events, return to East Midlands each day from where she would drive home. She did not routinely do night stops unless, for example, she was undertaking some training or there were unexpected events during the flights or other reason although the claimant accepted they were part of a pilot's job. We have, however, noted that during the very week of the changes at the heart of this case were announced, the claimant did in fact do two consecutive night stops. We note that there was from time to time cover and repositioning duties requiring her to travel to other airports which will have had its own disruption to normal routing and her home life. In the past the claimant said that she had undertaken frequent night stops. Overall, however, she variously expressed her estimate of the number of night stops in recent years as "about a dozen", "10-15" or "up to 20" which whilst varying, are sufficiently consistent to reach a conclusion that it was a less frequent, rather than regular event. Nevertheless, on this basis, and on the basis that the claimant worked roughly 26 weeks per year, this suggests every other working week had at least one night stop.

4.24. Upon the claimant's family returning to the UK, they moved into her late mother in law's house on the Lincolnshire coast. The issues that arise in this case before us meant the claimant's travel to work featured repeatedly in evidence and requires us to make certain findings. We have already noted how the operations manual governs all aspects of a pilot's working time. There is a complicated system of categorising a pilot's time to ensure they are rostered into a safe flying programme within the relevant CAA standards. Some parts of a pilot's duty will, of course, be flying. Other parts are not flying but are still part of the pilot's duty. Some parts of a duty might be travelling between bases and count towards working time, such as when the claimant drove from East Midlands to Newcastle to take over a different route. Other travelling during the day may not form part of working hours but might still be capable of causing fatigue. In particular, what we might term the commute to and from work. The CAA recognises this as a fatigue risk. This respondent now interprets the CAA regulations to mean that its pilots must live within 90 minutes of their base. For most of the claimant's career this limit was actually 60 minutes and has only recently increased. If pilots live further away,

they are expected to make arrangements for temporary accommodation within that time. The claimant accepted this travel to work was her responsibility to regulate, and not the employers.

4.25. However, the claimant's move to the Lincolnshire coast created a journey of around 110 miles each way to Leeds Bradford, reducing slightly to 95 miles each way when she moved base to East Midlands. The claimant estimated her travel to work time by car to be around 2.5 hours, when based at Leeds Bradford, and around 2 hours to East Midlands. We found those estimates to be extremely optimistic having regard to the available routes and the times of the day she was likely to be travelling. We find travelling during "office hours" was likely to take considerably longer. We find journey times a little closer to the claimant's estimate might be possible but only during the very early or very late hours of the day. In the context of the issues in this case, we find that, in turn, would mean having to leave home before a time when the children might reasonably be expected to be awake, or returning after a time when they might reasonably be expected to be in bed.

4.26. Nevertheless, it is common ground that the journey fell outside the 90 minutes maximum travel to work time in breach of paragraph 7.1.7 of the operations Manual [790]. We also heard from the claimant's Husband on his own experiences of the CAA rule and were surprised to arrive at the conclusion that the whole industry appears to turn something of a blind eye to this ostensibly important rule. However, the claimant accepts where she and her family lived was a matter of her choice and it was her responsibility to comply with the rules. We found this to be particularly relevant in two respects. First, the additional duration of travelling to and from work has an effect on the amount of time the claimant has available to spend with her family. Secondly, any issues of time spent driving is not something the respondent can reasonably be expected to factor in when considering alternative rosters for the claimant.

4.27. For completeness, we record that the family moved in November 2016 to Louth, slightly closer to East Midlands but still outside the 90 minute rule.

4.28. We turn now to consider the career progression for a pilot. It is relatively narrow. Upon first qualification, a pilot obtains a position as first officer. The next move is to a command post. That is the post of Captain or the "left hand seat". In some airlines, there may be opportunities to vary one's experience within grade by training to fly different types but that is not available on the respondent's current fleet which, essentially, operates only the Embraer aircraft. A first officer must possess a minimum period of time, flying hours and continuing training and competency assessment in their first officer role to become eligible for assessment of for their suitability to take a command course. If they are assessed as suitable, they become part of the "command pool", that is potential future captains. They may then be put on an available command course when upgrades are identified. If they pass that course, they can take up a suitable promotion to a command post. Ignoring, for the moment, opportunities in other airlines, once assessed as suitable for command, promotion from first officer to captain requires (a) a vacancy (b) at a suitable base and (c) on a suitable route (d) successful completion of the command upgrade course. The elements have to be mutually acceptable. There is no compulsion to upgrade if the opportunity is offered.

4.29. The claimant was assessed as suitable for undertaking the command course in late 2012/early 2013. Thereafter she was in the command pool.

4.30. We find it highly likely that upgrade opportunities would be at another base and therefore require either a relocation, which would have been financially supported by the respondent but would not have suited the claimant's personal circumstances, or for her to establish a temporary base which would have been equally disruptive to her home life. We find she was not prepared to move home and we find her only viable base to take up a command post was one arising at East Midlands. Because of the changes that were shortly to happen to the routes out of East Midlands, we find it became a reality that the claimant was not prepared to work in either pilot grade out of this base. To that extent, the availability of command upgrade, irrespective of whether they were full or part-time, became irrelevant as we find the claimant would not fly what would become the revised East Midlands - Brussels route and would not relocate.

4.31. All the command opportunities that arose after the claimant passed her command assessment were full-time. Nevertheless, the claimant was offered the opportunity to take the promotion. She became top of the seniority list of first officers. Although she had declined various offers, she remained the first person to whom the respondent would make the offer of promotion as they arose. We find the respondent understood that the claimant did not want to take up a full-time upgrade nor, in due course, would she be prepared to work the revised East Midlands route with its regular night stops. Nevertheless, it honoured the convention of offering according to the seniority list and each time a vacancy arose, the claimant was offered it. The fact that it could anticipate her declining the offer and would often acknowledge the fact the upgrade was to a full-time role or involved night stops we find to be no more than a sensitive recognition of her known choices. We find, as the claimant accepted, that there was no pressure on her to take up full-time working and her failure to accept offers did not lead to future opportunities being withheld.

4.32. We turn now to the changes that lie at the heart of this case. In late 2015, the respondent was presented with a commercial opportunity to undertake additional routes out of Brussels to fly to Nuremburg, Bremen and Strasbourg. The existing deployment of crew and aircraft was to operate 2 sectors in the morning and 2 sectors in the afternoon. In between, the aircraft spent the day parked, idle, at East Midlands Airport. This new opportunity would utilise it to service additional sectors from Brussels during the middle part of the day. As we have already indicated, in the prevailing commercial climate this sort of opportunity was not simply about growing the business, it was a necessary step to secure the viability of the route out of East Midlands. We find without this sort of development, the alternative was for the East Midlands base to close. However, to make this opportunity work in the middle of the day, the East Midlands - Brussels routes would have to be reversed so that the morning and evening shuttles started and finished in Brussels, not East Midlands. This would have a potentially significant effect on the cabin crew based at East Midlands who would be at risk of redundancy. Similarly, the flight deck including the claimant could face a forced base move under the terms of their contracts. The respondent decided that a less drastic option would be to keep the staff "based" at East Midlands for the purpose of their working hours and terms and conditions but to roster them to undertake a "tour". In essence, they would report to work at East Midlands as normal but reposition to Brussels on company time, start and finish their working day in Brussels and undertake an overnight stop there before repositioning back to East Midlands to end their tour. A full-time pilot would undertake 4 night stops during a 5 day working week, 3 night stops on the shorter, weekend roster. For the

claimant, on her 50% working pattern this would mean every alternative week would be away from home.

4.33. On 11 November 2015, the respondent implemented this flight schedule and its effects showed on the pilots' roster to take effect in around 3 weeks' time. The claimant first learned of it by logging on to her own remote roster. She received an email announcement shortly afterwards giving notice of the change and which acknowledged that:-

> ***"we understand that this will be inconvenient for those affected however this is a commercial decision and will hopefully secure the EMA route structure for the long term"***.

4.34. Further emails contained details of the planned route. It seems to us that the commercial reality of this opportunity was so important to the airline and to make the route work, its proposals were the least disruptive to the staff affected. In evidence, the claimant clearly understood the commercial drive behind the change and that it was necessary to secure the route. The changes were within the express terms of the claimant's contract. Her issue was the manner in which it was implemented without consultation and without regard to the effect it would have on her circumstances. We reject the claimant's contention that this change amounted to a forced change of base. She had interpreted "base" as being where the plane "parked" overnight. That is incorrect. The base as defined in the operations manual by reference to where the particular pilot is assigned. It does not relate to the aircraft. The meaning of base is fundamental to a number of a pilot's terms and conditions as well as working and flying time regulations and limits. We find the claimant's base did not change with this change, but remained at East Midlands. However, the fact this option was contractually open to the respondent does not mean to say the manner of its implementation was without criticism. It remains the case that there was no advance consultation with the staff about the planned changes. The response from the staff affected was such that the respondent was forced to hold consultation meetings although the scope of the consultation focused on the effect of the individual implications of the change, not the change of route itself.

4.35. The claimant was one of a number of employees unhappy about the change and the way it was announced. A consultation meeting was held on 30 November 2015 with Mr Schutz, the respondent's Chief Operating Officer, and Peter Simpson, the respondent's Chief Executive Officer. The meeting explored the employees' concerns within the context that the change was going to happen and any changes would be to the mechanics, not the fact, of the new routes. During the course of the meeting, and after a point raised by the claimant about her family circumstances, we find Mr Simpson said to the group that:-

> ***"you have to make your decision and I am very direct now and I am sorry about this but you have to make your decision on what you can do".***

4.36. The claimant took this to mean go along with the change or resign. She resolved that she would not work the roster as it would take her away from her children for 5 days out of every two week period. We find a number of pilots had issues with the increase in night stops for a variety of reasons related to their private lives. They all had expressed their individual reasons for the change causing issues. We find there was a fundamental reality of how the route could operate which had already been structured in such a way as to avoid other forms of disruption to staff.

4.37. The claimant lodged a grievance on 14 December 2015 [280]. She set out her concerns about the practical change of base, even if it did not amount to a change under the MOA. She set out her inability to comply with the change on such short notice and asserted it amounted to a breach of contract, she made clear her view that Mr Simpson's comments were discriminatory and she set out in technical language how she felt this amounted to indirect discrimination as the PCP of requiring pilots to be away from home for 5 days per week put women at a particular disadvantage as women still carry the brunt of domestic responsibilities.

4.38. Unrelated to these developments, the claimant was off duty on sick leave due to a torn muscle in her leg. She would remain off sick until May 2016.

4.39. The respondent arranged to meet with the claimant, initially planned for her return from sick leave. During her absence, the claimant exchanged emails with Mr Gill, the respondent's Fleet Manager at the time. As a result, the meeting was brought forward and arranged for 15 January 2016. The claimant attended with her BALPA representative Mr Russel, also a senior pilot who chaired the staff side of the joint consultative committee. Mr Gill heard the grievance [302-304].

4.40. It is clear that the change of routes was not open to discussion. Mr Gill made clear that Mr Simpson's decision on the route being put in place was not going to change. That is not to say the respondent was being dismissive of the grievance, and we do not accept this was an employer going through the motions with a closed mind to the grievance. The reality of the new route could not be changed without visiting the East Midlands crews with arguably greater disruption as the alternative was to close the base. Consequently, the new routes were to be flown, the only live issue was to explore the options for mitigating the claimant's concerns. During the meeting, the claimant set out her position as a mother of 3 who had had a new roster imposed on her without any notice. Her grievance was magnified by the fact that the respondent had not spoken to her about the proposals in advance in any sort of procedure. Those past events could not be undone but Mr Gill accepted the implementation had been poorly executed. Mr Russel raised again the potential for the change to be indirectly discriminatory. Mr Gill set out his position. He did not believe that the respondent had acted in an indirectly discriminatory way and in explaining his position, he gave various examples of his understanding of indirect sex discrimination. His examples referred to the implications of crew flying to Yemen and the fact that for the past 6 years there had been flight schedule out of Chester rostered on the basis of a 6 day tour which included employees who were also mothers. We accept his examples were his genuine attempt to explain and illustrate the points in discussion, even if they may have come across clumsy. There was no real dispute that the tone of this meeting was amicable.

4.41. The outcome of the grievance was communicated in a letter dated 22 January 2016 [305]. Mr Gill rejected the grievance. He explained how the change did not amount to a breach of contract, he acknowledged the poor implementation, he sought to explain the comment by Mr Simpson about staff needing to make their own decisions and he explained why the change did not amount to a change of base. The claimant was given a right of appeal.

4.42. The claimant appealed this decision to Julian Halmshaw, then the respondent's Chief Pilot. Her letter of 29 January 2016 set out her grounds of appeal [307]. Within that she set out how the original grievance meeting had

referred to there being 3 weeks' notice of the change which was sufficient to arrange alternative child care. The claimant took issue with this as being insensitive but went on to explain childcare as being:-

> ***"rather more than meeting solely the physical needs of a child, feeding, getting to school, putting to bed. There is much more to being a parent, and particularly a mother, than he seems to have recognised."***

4.43. In her appeal, the claimant also alleged that at the end of the grievance meeting, Mr Gill held an off the record meeting with Mr Russel in which he was alleged to have threatened that BALPA's continued to support the claimant's grievance could lead to the complete closure of East Midlands and that would have significant consequences for a number of BALPA members. The first reference to this appears in the claimant's email of 15 January 2016 in relation to the notes of the meeting when she stated, in slightly less specific terms "*I also think it is important you refer to the 'off the record' discussion regarding the potential to shut EMA base which Bill instigated specifically with John Russel, we were all party to that discussion and I am of the opinion that [it] was a thinly veiled threat which has the potential to influence my case*". We do not accept as a fact this was the case. The later account given by the claimant, if correct, could not be described as a "thinly veiled" threat. We find Mr Gill and Mr Russell were two long serving pilots, they knew each other very well and both occupied senior position influencing the management of the business. We find a discussion did take place between the two after the meeting had concluded and as all present were walking out along a corridor. In the course of that conversation we find there was some anodyne discussion about the previous state of affairs at East Midlands including what had been the risk the base could have closed was shared with Mr Russel. Indeed, that possibility was explicitly referred to in the minutes of the earlier meeting. However, we do not accept anything that was said could reasonably be described as a threat to the claimant's continued grievance. BALPA continued to represent the claimant at future hearings and we received no evidence from Mr Russell about the conversation. Mr Gill denied the claimant's account both to us and at the time in the subsequent grievance appeal when it was explored. Neither the tribunal nor the respondent has seen the notes that the claimant said she had taken of this meeting which have not been disclosed. The new route was, by then, in operation.

4.44. That subsequent appeal hearing took place on 7 March. It was chaired by Mr Halmshaw, Chief pilot. The claimant was represented by Mr Stenbridge-King of BALPA [316]. We note the appeal minutes are challenged by the claimant. Whilst they may not be verbatim, we are satisfied that they represent a fair summary of the discussion and are not materially inaccurate.

4.45. Mr Hamlshaw sought to assure the claimant that whilst the decision on the new route was fixed, how it could be made to work for the claimant was not. The meeting appears to have taken on a problem solving tone between Mr Halmshaw and Mr Stenbridge–King and, whilst they continued to disagree about the interpretation of what had happened, they agreed to see if they could find their way through to a solution for the claimant. The parties focused on understanding each other's scope for movement, what the claimant wanted and what the respondent might be able to change to allow her to get home more often on the route. The meeting concluded with some sort of consensus that both would consider their positions with an open mind and see if some proposals could be worked up.

4.46. We find Mr Halmshaw embarked on this in good faith. We have seen how the same day as the appeal meeting he put this issue on the "Resource Meeting"

agenda. On 16 March 2016, Tracey Umphreville, Head of HR, wrote to the claimant [325]. In her letter, she set out the results of the respondent's review of alternatives. These included 3 options. The first was limiting her rostered shifts to the shorter 4 day tour, this would reduce the night stops from 4 to 3 each alternative week. The second option was to revert to a 3/2 pattern instead of the week on week off. This would mean night stops each alternate week were reduced to 2 nights and 1 night respectively. Thirdly, to operate week on/off but with more switchover days to reduce the number of night stops. We are satisfied that the respondent genuinely sought to come up with alternatives that might assist the claimant. Moreover, it came up with proposals which we find did have the effect of reducing, but not eliminating, the amount of night stops that the claimant would have to undertake.

4.47. A meeting was held on 1 April to explore the practicalities of how the proposals for different working patterns might work and the associated costs and disruption to the respondent. We reject the claimant's assertion that the figures produced were incorrect. At its highest, some doubling up of costs was identified within the meeting and Ms Umphreville simply updated the figures in the course of that meeting. Moreover, the issue of the costings was explored in cross examination and the claimant accepted the basis for them. She did not advance any alternative suggestions as to how her objectives and those of the respondent could be reconciled beyond the option that was costed. We are satisfied that the reason for that was not because the claimant was not trying to think of alternatives, but because the reality was there were no alternatives. This was a single aircraft base. The options to mix crews up on any day simply did not exist in the way it might be possible at a multi aircraft base. The respondent did explore trying to structure more switchovers which were prohibitively costly to organise. The reality was that the issue of reducing night stops was not about simply negotiating a mutually acceptable figure, it was fitting it in to the schedule in a way that was commercially viable.

4.48. The proposals to reduce night stops were still unacceptable to the claimant. Her only acceptable roster at that time was one which removed regular night stops altogether. She proposed a bespoke roster which would allow her to terminate her duties at EMA daily and allow her to get home. In reality, this was the only option that the claimant would entertain. Her union acknowledge the impact of this and that it would have to be researched. That research and costing was conveyed in an email from Ms Umphreville of 4 May 2016. The email summarised and attached costings which showed how to achieve the desired roster would require an additional crew member to reposition and would come at an overall cost of over £27,500. That was more than the cost of employing the claimant. The bottom line was that, in order for the claimant to pick up the aircraft at East Midlands in the morning, someone else had to fly it from Brussels. They were then surplus as a pilot and became a passenger until the claimant then returned at the end of the day. Unfortunately, whilst the email clearly set out what we find the respondent felt were unacceptably high financial and organisational obstacles to implementing the claimant's proposed bespoke rota, the email did not explicitly reject the proposal. Whilst the respondent neither expressly agreed to it, its neutral content was read by the claimant simply as a matter of fact that the respondent would carry that cost. Consequently, by email of 6 May 2016 Mr Stenbridge-King purported to accept the respondent's offer of the bespoke work pattern on behalf of the claimant. The misunderstanding was quickly identified and it was made cleat the costings in response was not an offer.

4.49. As innocent as this mistake was, it was unhelpful in reigniting the dispute that had until then appeared to have brought the parties together in a joint attempt to resolve things. The claimant wrote on 7 May 2016 in strong terms, ultimately requesting a formal outcome to her grievance.

4.50. The formal outcome to the grievance appeal was sent by letter dated 13 May 2016 [346]. In that, the appeal was essentially rejected. Captain Halmshaw clarified aspects of the rostering alternatives and repeated an offer to revert to a 3/2 working pattern which had the benefit of a reduced number of night stops (2 and 1 each week respectively) but he made clear that night stops could not be reduced to the sort of level the claimant had previously undertaken.

4.51. Whilst the claimant was then asking for a reduction in night stopping, in reality the claimant was still seeking a daily return to East Midlands. Her position was set out in the claimant's response of 17 May 2016 [349] in which she offered a maximum of 2 overnight stops in any calendar month. We have already identified that the issue between the parties was not one of negotiating, but fitting it into the schedule. Mr Halmshaw responded on 7 June in similarly conciliatory tone but maintaining the difficulty in reducing night stops as had been explored at the earlier meeting, principally because the route was operated by a single aircraft which meant there was not the scope for the necessary crew switches to release her at East Midlands as might exist if the base operated multiple aircraft. He did propose a trial and review after 3 months which was rejected but we accept the reality was the roster was relatively fixed and although the respondent was genuinely suggesting limited night stops as much as possible, it seems to us it was unlikely that many night stops could have been taken out of the rota for flight deck staff out of East Midlands.

4.52. Throughout this time, the respondent had been facing challenging commercial pressures. It was also suffering from a global shortage of pilots which meant retention of its pilots was increasingly difficult and it was having to try to recruit direct entry experienced first officers and captains. It was seeking additional cover from its existing pilot workforce and was offering various incentives to those who could identify candidates for appointment.

4.53. By May 2016, the claimant was fit to return to work. She discovered she was listed on the rostering system as being off programme or "OPG". We find there are a limited number of status codes to apply to individuals on the system. The status code used will determine how the rostering system tries to deploy that pilot. We find that OPG was used deliberately during the time that the claimant's grievances were extant and she was not prepared to fly the route. Anything other than that status would have either been inappropriate (e.g. sickness absence when she was not off sick) or would result in the claimant being deployed to operate the new tour. As that was the substance of the dispute, we accept that made no sense. We find no evidence that this coding was in anyway a punitive response and indeed the claimant accepted it was not done to humiliate her or create a degrading environment. We find it was done for the genuine and practical reasons we have stated. Secondary to this, however, was the fact that it also meant the claimant was not able to be readily deployed on any other ad hoc flying duties, such as covering a colleague's sudden sickness absence or other pilot shortages. In hindsight, that would have meant the claimant maintained some flying experience whilst the parties resolved the grievance and the employer had a short term resource, that it was paying full salary for in any event, to deploy at a time when it clearly had need for more pilots. Whilst the respondent is criticised by the claimant

for not taking advantage of her skills and availability at this time, equally, we find the claimant chose not to respond to any of the general communications requesting pilots to offer her help with providing cover. She explained this initially on the basis that to do so would have been illegal. We do not accept that was the case. We find the claimant was not inclined to offer herself to cover her employer's staffing needs and the criticism we were presented with in evidence "that no one asked me to cover" was not something she contemplated at the time. If she had and was genuinely wanting to work, we find no reason why she would not have made it known that she could provide cover to fly other routes. We find she was content to be off programme until the employer was prepared to roster her in a way that meant return to East Midlands each day. Consequently, whilst the longer term consequence of being off programme would mean the claimant was gradually losing her recent flying hours experience, that is as much down to her decisions and lack of engagement with those issues.

4.54. We find throughout the claimant's absence, whether sickness or otherwise, she and her employer were in touch with each other in the course of progressing the grievances and exploring resolution. No formal return to work interview took place in May for the reason that the other issues overtook the need. Although she was fit, all were aware she was not flying the route she was employed to fly.

4.55. The claimant's coding change to available for training or "AVT", in December 2016. We are entirely satisfied that the reason why the claimant was coded in this way at that time was because she was by then undergoing her periodic competency training and needed to be rostered to undertake line training, that is flying a scheduled flight under supervision. Unless she was coded as AVT, she would not be able to be rostered for this.

4.56. During the time the claimant remained "off programme", she continued to be paid her normal pay but was not rostered to fly. By October 2016 the claimant had been away from flying for one reason or another for around 10 months. She had been fit to fly, but had not, for the past 5 months. The grievance had concluded and for the subsequent 4 months or so, we have an evidential black hole for proper reasons. We know that there was some discussion taking place between the parties, the detail of which is quite properly not been put before us. However, where issues of delay, absence of progress or other gaps require explanation, we find it is for that reason.

4.57. On 27 October, 2016 Mr Schutz wrote to the claimant about the current situation. He described it neutrally as the respondent's inability to offer any suitable alternative to night stopping and her inability to work a roster including regular night stops. Mr Schutz indicated there was now no alternative but to move forward with "dismissal proceedings" subject to any further representations and that arrangements would be made to convene a meeting to consider the matter further.

4.58. The claimant wrote in response on 8 November 2016. This letter raised her second grievance and set out three specific complaints within the context of what the claimant described as a deliberate and wilful approach to engineer her dismissal. They were, (1) deliberately withholding work/employment (off programme); (2) Maliciously withholding professional competency training; (3) Suppression of command training.

4.59. The reference to deliberately withholding work was in part because throughout this period the claimant remained on the pilots' email distribution list

and continued to receive all the usual requests for pilots to cover ad hoc flights where there was a shortage of pilots. This was increasingly an acute problem for the respondent as it was suffering from a high rate of attrition amongst its pilot workforce with the knock effect of needing to cover more gaps in the schedule.

4.60. Mr Schutz agreed to shelve any other considerations whilst the claimant's grievances were considered. He took the view that he was too close to the issues and would appoint an independent manager to determine the grievances. He appointed Steve Halliwell, Head of Compliance, Safety and Security.

4.61. The claimant met Mr Halliwell on 17 November 2016. The claimant was represented by Mark Charlton and Mick Brade of BALPA. We find this meeting was convened to hear the grievance only, and not to deal with what was originally labelled "dismissal proceedings".

4.62. In summary, the grievances were rejected. After dealing with matters of procedure and the arrangements for the meetings he addressed the three allegations. In respect of the first, Mr Halliwell concluded that whilst there was a case to argue that the respondent could have approached the claimant individually to cover ad hoc shifts, so too was it the case that the claimant could have contacted the respondent on receipt of the request had she been prepared to undertake those duties. He concluded that not contacting the claimant, in the absence of her indicating to the contrary, was out of consideration to her stating she could not work night stops and that any other duties out of other bases was likely to incur similar logistical implications for her. He rejected the second grievance relating to her continuing training. Much of this reasoning was that the respondent did not have record of her holding a current Class 1 Medical certificate. Without that, it would not have been possible to schedule the claimant to undertake any training. We accept that the claimant did attend her doctor to undergo her class 1 aero medical assessment earlier in the year. She had not, herself, forwarded a copy of the certificate to the employer as she was required to do but had instead relied on the Doctor emailing it to them. In the ordinary course of events that would not cause an issue but something then went wrong and it was either not received or not actioned. It is only because the claimant was off programme that she wasn't then chased for the apparently missing certificate. Had she been on programme, rostering would have chased her for it. They did not because she was not being rostered at the time. Had she responded to the call for ad hoc duties, we have no doubt the issue of her medical certificate would have been identified and resolved at that time. Mr Halliwell's later enquiries show the respondent received it on 1 December 2016. That date seems, on balance, to flow from the fact the issue was raised with her in the grievance meeting and she took steps to remedy the situation. In any event, we are satisfied that the apparent absence of the class 1 medical certificate meant the claimant was not scheduled to undergo any OPC or LPC refresher training. These courses were mandatory for pilots on a 6 month and 12 month basis. The grievance process brought this matter to light and the claimant was subsequently enrolled in a combined OPC/LPC training. Thirdly, Mr Halliwell rejected the complaint that the claimant's command training had been suppressed. He found that the claimant had passed her command assessment in December 2012 and that since then there had been a number of offers and discussions with her about opportunities for captain roles. He found that all previous captain vacancies had been full-time to date and that the claimant had rejected the offer for that reason.

4.63. On 28 November 2016 a full-time command upgrade became available at

East Midlands. The claimant was offered the position by email in compliance with the usual convention. Unrelated to the full-time nature of the role, Mr Halmshaw who sent the email made clear that the nature of the duties from East Midlands required commanders to be away from home for several nights each week. We find this added qualification was simply because the East Midlands route was flying the revised "tour" roster.

4.64. By letter of 7 December 2016, the claimant appealed against Mr Halliwell's grievance decision. Arrangements were made to hear the appeal and Mr Rennie, the respondents Head of Charter Sales, was appointed to conduct the appeal which was heard at a hearing on 16 February 2017.

4.65. Before the appeal hearing could take place, there were three other significant matters we need to note. Firstly, on 3 January 2017, Mr Schutz wrote to the claimant seeking to reconvene the meetings to discuss where the parties go from here. We find that, on the balance of probabilities, he would have known at that time of the prospect of what was until then a previously unimaginable solution materialising at Birmingham airport but which, for commercial reasons, we find he could not at that time have made public. The second matter is that the claimant undertook her belated competency training. We note the claimant raised a number of criticisms about the duration and circumstances of that training but we find she passed it first time with high marks. The third matter is that the claimant instigated the first set of proceedings in the employment tribunal. We find the claimant had, by then received advice about all her potential claims. We are also satisfied that the claimant had by this time formed her own conclusions as to whether she was going to remain employed by the respondent. We find she had already decided that she no longer wanted to remain with the respondent.

4.66. The claimant met with Mr Schutz on 10 January 2017. She was represented by Mr Charlton of BALPA. At that meeting, Mr Schutz disclosed the plans for a new route operating out of Birmingham starting in March 2017. He explained how he saw this as an opportunity for the claimant to recommence flying with the respondent again on the terms she required. He wanted her to think about the possibilities and he made clear "he did not want to talk about dismissal". We find the basis of this proposal was, at this stage, all subject to the fine detail being worked out but that is not to say it was ethereal. It was a real and tangible solution that could not have been imagined only a few months earlier and provided the basis to resolve the previous impasse between the parties. We find the proposal at this stage included the following key elements which satisfied the claimant's conditions:-

a The Birmingham route was a return to base route meaning the claimant would not undertake a roster based on a week-long "tour".
b Mrs Carter would still have to undertake some night stops but only as would have been the case under the previous route meaning she would return to her previous level of occasional night stops.
c She would retain her part-time 50% contract.
d The respondent would not seek to force a relocation of her base to Birmingham, but would allow her to retain East Midlands as her base.
e She would be rostered in such a way that she reported for duty at East Midlands and the respondent would stand the cost of repositioning her on work time by taxi to perform her role at Birmingham.
f There was no restriction on a command upgrade should a suitable vacancy become available. At the time of the meeting, Mr Schutz could

not say whether any future command opportunity would be full-time or part-time but it is clear to us part time, though less likely, was not ruled out.

g The respondent would ensure the claimant's training was up to date.

4.67. The claimant was shocked by the proposal. By that, we find she had not ever expected the respondent would come up with a proposal that would give her the working routine she had been insisting on. She indicated she would consider it when she saw it in writing. Mr Schutz set out the proposal in writing on 13 January 2017 [486]. It is inevitable that the letter would not reflect, word for word, the discussion that had taken place. However, in all the circumstances of this new opportunity, and the fact it was still at the formative stages, we can identify no benefit to the respondent of stating one thing in the meeting and something fundamentally different in the letter. We are therefore satisfied that the letter does fairly reflect the basic proposition being put to the claimant.

4.68. We find the claimant's shock was not just because the Birmingham proposal came out of the blue, but because it was by then an unwelcome development. We have come to the conclusion that the claimant was by this time not genuinely contemplating returning to flying with the respondent. We find the proposal was entirely workable and demonstrated an employer that was genuinely trying to resolve the impasse in a way which kept the claimant employed on a routine that she could accommodate. The claimant, however, did not interpret it that way. She responded in writing on 9 February 2017. We find the tone of her letter to be combative and not consistent with someone seeking a resolution. We reject her criticism that it was an unworkable schedule or that it amounted to a second change of place of work. We found her dismissal of the repositioning times and other pre-flight timings to be a premature and dismissive response that an employee looking for a workable solution would have first explored further. Looking at the picture as a whole, we found this to be indicative of someone looking for reasons to reject the proposal, rather than get back to work. By the time of this offer, her intention had already crystallised into one of resigning upon a suitable last straw event occurring.

4.69. We found it odd that a focus of criticism should be the change from termination of employment to solution. Until then, we find dismissal was a real possibility. The claimant criticises the process adopted in how this proposal came about which seemed to us to ignore the fact that unless the parties could find a solution, her employment could not continue indefinitely. Mr Schutz's letter referred to night stops only in the same context as the claimant used to experience them. That is, she had never had a guarantee they would never arise or that she was guaranteed of getting home every night. In the context of the dispute between the parties, we find that was clearly no more than a reference to how things used to be under the old East Midlands route, and not the new tour. The claimant interpreted Mr Schutz recognition of her personal circumstances as continuing to belittle her for being a mum and accused the employer of not moving an inch. We find this proposal in fact demonstrated a substantial degree of movement on the part of the respondent. The claimant challenged the inability of Mr Schutz to offer her a part-time command upgrade. He had stated that he would refer resourcing need to the JNCC as that the current upgrade courses were already settled. That positive response was interpreted by the claimant a deficiency.

4.70. The claimant added to her second grievance by letter of the same date. We struggled to understand the first additional complaint which was under the heading

of "reason for the meeting" in which she complained that she had been invited to a meeting to discuss her dismissal yet at the meeting the agenda had changed and she was unable to prepare herself. She described this as unreasonable. The second complaint was her view that in his letter, Mr Schutz had resiled from the verbal discussion in respect of her roster being one that returned her home each night and also in respect of future offers of command upgrade.

4.71. We found this stage of the claimant's correspondence striking in two respects. First, we found it most bizarre that any employee faced with the very real prospect of the termination of her employment could raise as a grievance the fact that the meeting actually took an unexpected route towards a positive resolution. Secondly, if there was a fundamental divergence between the verbal and written offers, which we do not believe was the case, we would have expected to see some evidence from the claimant of her seeking to accept whatever the positive offer she believed had been verbally made to her. We concluded that she must have felt there had been a positive and acceptable verbal offer to her as, were that not the case, she would not then seek to draw the distinction she then did between it and the written terms. She does not put her understanding of the original verbal offer back to the employer as the basis for returning to work. We find that this is consistent with an employee who already has in mind resigning from employment.

4.72. This approach is seen further in the matters which are said to be acts of harassment. Following the meeting on 10 January, the claimant was sent the minutes by email. The attached file containing the minutes was titled "Carter Jenny FINAL Formal Meeting Minutes.pdf". We find, on balance the word final is more likely to refer to a series of drafts than it is to reflect that there will be no more meetings and the next stage would be dismissal. The minutes themselves follow the employer's standard format for noting such meetings. Unfortunately, it is headed grievance meeting. We find that is more likely to be because of an administrative oversight than any other reason. However, the claimant interpreted both matters as deliberate acts of harassment.

4.73. The claimant's grievance appeal was considered on 16 February 2017 by Mr Rennie supported by Claire Coupland of HR. The claimant was represented by Mr Charlton of BALPA. The parties explored the points raised in the original grievance and the matters raised in the additional letter, at least insofar as it related to the claimant's perception that the verbal and written offered differed. Within that discussion, Mr Rennie sought to get to the bottom of the claimant's intentions but she refused to answer whether or not she would fly from the new Birmingham route. Mr Rennie and Ms Coupland suggested the issue of returning to base "most" nights was simply because disruption could not be ruled out and no absolute guarantee could ever be given. The claimant disagreed. We note in that discussion she suggested her night stops were as low as 4 per year which is at odds wither other estimates she has given.

4.74. Mr Rennie looked into the claimant's extended complaints and replied in writing on 24 February 2017. He wrote a detailed and lengthy letter addressing each of the twenty points he had identified at the meeting. In short, the grievance was rejected. Nevertheless, he restated that the respondent wanted to see the claimant back at work. It had found a potential solution whereby the claimant was rostered out of East Midlands as a first officer on a part-time basis flying out of Birmingham with the intent that all duties were rostered to allow (on the whole) a return home every evening. That "on the whole" qualification was explained in

explicit terms that due to the nature of the profession this could not always be guaranteed due to disruption or training. In other words, it was exactly the same level of night stopping as existed under the claimant's old route out of East Midlands. His letter set out the recent history and process adopted in respect of command upgrades. He explored the basis for them being full-time and advanced reasons why job share or part-time had not been available. He closed this part of his letter with a comment that the claimant has "asked me to explain why we cannot offer part-time Command and I hope the above gives that explanation." The claimant did not accept his letter had adequately explained the reason.

4.75. The intention that the claimant's training be brought up to date was actioned. She was scheduled onto a training course and sent an email on 2 March 2017. It was sent by Claire Coupland, an HR officer, who was doing little more than conveying the decision of the rostering team. As was usually the case, the training would have included 2 night stops, something that the claimant had otherwise maintained she was prepared to do. The claimant took issue with the notice she received. The email gave her 6 days' notice of the training and not the 7 days required by the MOA and she replied the same day declining the training. Whilst that did not comply with the MOA, we found the claimant to be standing on her rights in this respect, rather than expressing any genuine difficulty. Nevertheless, she received an update the following morning which, without hesitation, reorganised the training to remove the night stops. We cannot understand the claimant's objections with this and her response only begins to make sense if she had herself already decided she was not going to return to flying with the respondent and undertake the training. That is our conclusion.

4.76. On 3 March, Mr Schutz wrote to the claimant again partly in response to her further concerns about the Birmingham offer and partly as a result of the conclusion of the grievance. He once again set out his position. He concluded with:-

> ***Despite not having all the finer points worked out, Jenny, I had made a commitment to you that the flying programme from [Birmingham] would enable us to roster you a schedule that sees you, in normal circumstances outside of training or disruption, return home at the end of your working day. I therefore completely refute your allegations regarding "unworkable options", we've only ever wanted to find a workable solution and we consider we have done this and look forward to discussing with you your return to work.***

4.77. A further meeting was arranged and took place on 8 March 2017. By this time, Mr Schutz had twice set out the offer in writing. Mr Rennie had explained the qualification of returning to base was limited to disruption or training. The detail of the actual roster was all that was to be finalised. We do not accept the content of the verbal discussions departed from the terms that had already been stated in writing. We are satisfied that Mr Schutz genuinely believed that they had a workable solution and we are satisfied it was in fact workable. The claimant sought the proposal in writing again. He confirmed the offer in writing on 10 March 2017. That claimant now had more detail in the detail of the planed schedule to be operated out of Birmingham. We find the claimant would be fully aware of the difference between the "schedule" and a "roster". She was aware of the intricate operation of AIMS, the rostering software and how it was set up to provide rosters that complied with CAA flight time limitations. The letter showed, for each possible scheduled flight, her start and finish times at East Midlands, and not Birmingham. The transfer being on company time by taxi, not her own travel to work. We found what was contained in Mr Schutz's letter fairly encapsulated the proposal for flying out of Birmingham and was the basis of a workable solution to the claimant's

working pattern. The respondents' position was consistent and the claimant heard nothing of substance she had not known since the original meeting in early January. We did not find persuasive her argument that the additional repositioning from East Midlands to Birmingham was a fatigue risk. Firstly, the transfer was by taxi. Secondly, to the extent she had by then already driven at least 2 hours commuting, that was due to the fact she chose to live outside the stipulated travel to work time. These all add to the reality that this a solution that could have worked.

4.78. On 13 March the claimant received an email sent to her as it was to all pilots. As had happened at various times before, it was in the usual nature of a call for volunteers to undertake additional scheduled flights. The covering email referred to the need for cover "due to an extreme shortage of captains next week". It then attached the gaps in the schedules which despite the covering note included first officer gaps as well as captains. We found it was an email that was sent out from time to time when there were gaps in the roster to be filled seeking volunteers. As with the other similar requests, the claimant did not reply in any form. We note that this correspondence is said to found claims of both harassment and victimisation on the basis that the email said the respondent had an extreme shortage of captains. Whilst we accept as a fact that there was a deficiency in the captain resource available to the respondent, this email did not say that. It said there was a shortage "*next week*" which at face value, could be as much due to sickness absence or unmanaged annual leave as any other reason.

4.79. The claimant resigned with immediate effect on Friday 24 March 2017. Her letter of resignation states:-

> ***Thank you for your letter dated 10th March which followed our meeting on 8th March.***
>
> ***Once again you are implementing a change to my place of work. 18 months ago my place of work was changed to BRU, it now seems it's BHX. It is clear to me that the position for flight crew at EMA has dissolved. There is a process to follow when an employee's place of work is changed. The base move adds an extra 2-3 hours to my commute to work. Understandably this happens from time to time when we are required to work out of a different base but not on a regular basis – you are offering me a very fatiguing roster, which I'm certain days doesn't work because of this very reason.***
>
> ***I have had a close look through the schedule from Birmingham. According to your own rosters, crews are normally allocated 1hr 15 min for the transition between EMA and BHX. Your schedule only gives me a total of an hour. Once again, I get treated differently, is there some reason for this?***
>
> ***Also noted is the report time on a Monday is not sufficient, the aircraft departs BHX at 10.20z.***
>
> ***What is also highlighted, on most days if I operate the late I can't operate the next day due to lack of rest. If Monday is my first duty back to work (has normally been for last 3½ years) I cannot operate the early due to the early report time.***
>
> ***The schedule, which in practices designed to support an effective base move, clearly demonstrates a lack of thought and is clearly unworkable and unattainable in the long term. The schedule cannot be considered to be a reasonable option and, is clearly in breach of the controls that are designed to prevent fatigue. I have no doubt that it would have to be changed quite radically; it is unsustainable in its current form both in the short-term and permanent arrangement.***
>
> ***I am being told what my single option is, once again on a take-it-or-leave-it basis without any consideration of the issues I have repeatedly raised concerning my obligations to my children. This has been the pattern of bmi's behaviour during the last 18 months starting with the initial base change to Brussels which was instigated***

without discussion or consideration on a permanent basis, despite and contrary to the relevant conditions set out in the memorandum of agreement which are agreed with BALPA and incorporated in my contract of employment. In summary while short-term, temporary operation from an overseas base is permissible, permanent transfer is not.

Your actions were a clear breach of contract.

With regard to the "back to work training" my contract states that training on my part time contract will be on that basis. If you require me to work a day off for this reason it must be through mutual agreement. Once again no one has made any such contact or ask me to do such a thing.

During the course of our meeting, you also confirm once more that I would not be promoted or considered to a command postponed as long as I was a part-time pilot. This continues to be the case has been for the last 4 years. I brought to your attention that Keith Taylor was now a part-time captain working a 37% contract. I have also highlighted various male pilots who are part-time and indeed who you have agreed to be part-time over the past year. The continuing refusal to promote me to a command position as a part-time pilot whilst allowing male pilots to do so can only mean that you do not wish for me to ever take command or that female part-time pilots cannot.

Either way, I am left in the impossible situation of my employer providing me with an entirely unworkable and unsafe schedule with no hope of adjustment being made to take account of my situation or progression to a command post despite my proven ability. Accordingly, now that you have finally made your position clear, I consider there to be a complete breakdown in trust and confidence and therefore I am giving you my notice of resignation with immediate effect.

I reserve my position to commence further proceedings or join to those proceedings already commenced claims for constructive unfair dismissal and discrimination.

4.80. That letter sets out a number of matters which were by then long standing and had not prompted a resignation. Before us, the claimant relies on Mr Schutz's proposals for working out of Birmingham as being the last straw. In her words, she described it as "*the final bit for me was the Birmingham schedule. I didn't trust them and that was enough*". We did not accept that this was the point at which she decided she was not returning to work.

4.81. The claimant's resignation email was sent at 18:30 on a Friday evening. It was sent from a personal Hotmail account. She did not copy her resignation to anyone else. Her email went into Mr Schutz's junk mail box and he did not discover it until sometime on the Monday. He responded to it by email on the Tuesday. He indicated that he would follow that up with a more considered response which he did by letter dated 29 March 2017.

4.82. In that letter, he invited the claimant to reconsider her decision and set out his response to the claimant's concerns about Birmingham, confirming compliance with the MOA, assuring her positioning would be in accordance with agreed timings, and explaining why it was felt less disruptive to avoid a forced base move. He reiterated how the recent opportunity at Birmingham had provided the solution that had eluded the parties over the past 15 months and now meant the claimant would have the working arrangements similar to those that had existed previously at East Midlands. He pointed out that the parties had discussed back to work training at their previous meeting and if the arrangements were inconvenient, that the claimant needed only to raise it with rostering. He reiterated that the fact she was part-time did not close the door on command opportunities. We found the claimant's objections to be misplaced and exaggerated. We found Mr Schutz's response fairly and accurately corrected the claimant's descriptions of the matters.

4.83. Also on Monday 28, the claimant received a call from the crewing team to say a taxi was waiting for her. They were expecting her at work. They arranged a taxi. She did not turn up. They tried to make contact with her. We see nothing unusual in that sequence of events.

5. **The Claim of Indirect Sex Discrimination**

Law

5.1. Section 19 of the Equality Act 2010 ("the 2010 Act") provides:-

> ***(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.***
> ***(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if***
>
> > ***(a) A applies, or would apply, it to persons with whom B does not share the characteristic,***
> > ***(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,***
> > ***(c) it puts, or would put, B at that disadvantage, and***
> > ***(d) A cannot show it to be a proportionate means of achieving a legitimate aim.***

5.2. We must be satisfied that the alleged PCP was in fact applied. If it was, whether it puts those with whom the claimant shares the characteristic at a particular disadvantage (At this stage, there is no legal burden on the claimant to explain why any disadvantage exists. It is enough that it does). If it does, whether it in fact puts her at that disadvantage. If the answers at that stage of the analysis establish a prima facie case, it is then for the respondent to satisfy us that applying that PCP was a proportionate means of achieving a legitimate aim. It is not until all four parts of the statutory tort are made out that unlawful discrimination is established. **(Essop and others v Home Office (UK Border Agency); Naeem v Secretary of State for Justice [2017] UKSC 27).**

5.3. In determining whether s.19(2)(b) is made out in any particular case, it may be necessary to consider the appropriate pool of individuals exposed to the PCP. Such a comparison falls within the requirement of s.23 of the 2010 Act in that it is an exercise of comparison in which the circumstances of the individuals in one group must not be materially different to those in the other group. The key is to ensure a comparison which logically tests the particular discrimination complained of (**Eweida v British Airways [2009] IRLR 78**). A pool so narrow that no comparison can be made at all is unlikely to serve this end nor is a pool so large that the comparison is no longer one of like with like (see **British Airways v Grundy [2008] EWCA Civ 1020, [2008] IRLR 74**).

5.4. In determining whether a respondent has justified a PCP we must be satisfied the objective it serves is a legitimate aim. We must be satisfied that the application of the PCP is a proportionate means of achieving that aim. In deciding whether it is proportionate, our task is to weigh in the balance the reasonable needs of the employer achieving that aim against the discriminatory effect on the group and make our own assessment of whether the former outweighs the latter (**Hardys & Hanson PLC v Lax [2005] IRLR 726**).

Discussion and Conclusions

5.5. There are two alternative indirect discrimination claims advanced based on two separate PCP's. The list of issues has addressed them by reference to each of the statutory elements. However, it is easier to digest our reasoning and

analysis if we deal with each PCP separately.

Whether the respondent applied the PCP of "Requiring the command position of captain to be full-time"

5.6. Our first task is to determine whether the PCP is in fact applied. It is pleaded at paragraph 24.2 of the first ET1 as "requiring the command position of captain to be full-time". It is restated in paragraph 28 as "the respondent required the claimant to perform the role of captain on a full-time basis". It goes on to illustrate the absence of a sensible justification for this by reference to a list of 15 captains who perform the role on a part-time basis of which 5 were identified as having recently changed from full-time to part-time. By the time of his written submissions, Mr Hodge described the PCP as requiring command posts "to be full-time as at the time of upgrade".

5.7. There is, therefore, a degree of evolution in how the claimant's case has been put. It was clear to us on our findings that there is no PCP of requiring the command position to be full-time. Put bluntly, there clearly are part-time captains and the flexible working policy applies to them as much as it does to first officers. Indeed, there is a greater prevalence of part-time captains than first officers. Insofar as the PCP is actually said to be requiring the *claimant* to perform the role on a full-time basis, that formulation explicitly singles out the claimant in a way which undermines the fundamental principle of a PCP being a state of affairs which is applied, apparently neutrally, to all irrespective of their characteristics. To the extent it was pleaded, therefore, this claim of indirect discrimination would fail at the first hurdle.

5.8. However, although there has not been a formal amendment of the claim, there is something in the essence of the complaint so far as it applies to the initial promotion to a command post, albeit that part-time working may be available relatively soon afterwards. We are satisfied that all promotions in the past have to date been to full-time positions. We are satisfied that reflects an industry practice which, whilst it may be little to the point, at least means the practices of this particular employer are not inconsistent with it. Whilst we have found that is not a fixed policy(the part time agreement contemplates promotion on a part time basis but only if a vacancy exists) and we suspect the situation is changing, at all material times, every vacancy whether it was first officer or captain, and whether it was offered on promotion or direct entry, has been available in the first instance as a full-time role and whilst a change to part-time would be granted if it could fit with the rostering, even then it was unlikely for at least 3 or 4 months. That was a state of affairs sufficiently within the control and influence of the respondent to amount to a PCP applied by it whether we view it over a period of time, or on a vacancy by vacancy basis. It was a PCP that was applied to all, irrespective of their sex.

If so, whether that PCP put (or would put) women at a particular disadvantage when compared to men?

5.9. The claimant asserts that the particular disadvantage said to arise to the sub group of the pool that shares her characteristic is that "it is more likely that women will have primary childcare responsibilities and will have to work in part-time roles to accommodate those childcare responsibilities". We maintain the claimant's definition of the disadvantage although, strictly, what she has articulated is the underlying reason why there is a disadvantage and not the disadvantage itself. We are satisfied that throughout the proceedings both parties and the

tribunal understood the disadvantage at play was the consequent disproportionate inability for female pilots to comply with a PCP of full-time working.

5.10. This case raises an issue about what is meant by childcare responsibilities. It has not been defined by the claimant and her case is argued on the basis that the disadvantage it is said to present is an obvious truism that we can simply accept. The respondent says it is not self-proving and we must therefore come to a reasoned conclusion. In this case, however, the boundaries of what is meant by childcare responsibilities so far as society erects a disadvantage to women in the workplace are brought into focus for two reasons. First, the disadvantage we are being asked to find has not been proved, rather we are invited to take judicial notice and accept as a fact that the disadvantage exists. Secondly, the evidence we do have of the practical effect on the claimant of what we understand to be encompassed within "childcare responsibilities" has been denounced by the claimant as not being in issue. Her own disadvantage is advanced on a broader parenting basis of spending meaningful time with her children and being there for them. We do not criticise the claimant for that at all, but when we are being asked to take judicial notice of a state of affairs which particularly disadvantages the female group over the male comparator group, it is important that we are able to understand what that disadvantage is and how it arises. The claimant's understandable desire to have more time with, and to be there for, her children is something we consider to be different to what we collectively understand as being the demands of childcare responsibilities going to the practical care and supervision of a child's day to day development and wellbeing that give rise to the social obstacle to many women performing full time roles.

5.11. Our first consideration is to identify the pool which appropriately tests the alleged disadvantage. We do not consider the correct pool to be all working men and women as that includes those to whom the PCP will never be applied. Equally, it is too narrow to limit it to those first officers employed by this employer as it recruits Captains on a direct entry basis as well as promoting from within. We have concluded the pool that logically tests the alleged disadvantage has to be all those qualified pilots who could apply for the position of captains.

5.12. Before considering to what extent we are able to deploy judicial notice, we have considered what little direct evidence we have and whether anything can be drawn from what limited findings of fact we have been able to make relevant to the issue. We take into account the following general propositions:-

a We have found the respondent's gender balance and employment practices to be broadly comparable and consistent with the industry as a whole.

b We have found that there is an industry wide practice of employing pilots into both grades as full-time roles. In terms of the pool for analysis, that means all of those men and women contemplating command posts will already have had to take full-time work in the first instance to begin their flying career. However, it is possible that that practice in itself may be tainted by unlawful discrimination and even though all first officers will have been, or still are, working full-time, it does not take into account the fact that changing circumstances at home could lead to the need to request a change in work pattern at a later stage of one's career.

c As a group, we consider pilots form a particular subset of the professional working population being driven individuals who have

> chosen a particularly demanding career, have self-funded very expensive training and put themselves forward to carry an extremely responsible role. The nature of the role itself could often be disruptive to what many would describe a normal family routine and schedules are likely to involve very early starts or very late finishes. They may incorporate days away from work. Those days away may be planned weeks in advance as part of the schedule or be forced upon all concerned as a result of disruptions.

5.13. We have also taken into account our findings on the statistical evidence, such as it is. About 10% of pilots are part-time, about 6% of captains are female and the proportion of female first officers is broadly the same. There is a history of promotion from first officer to captain and slightly more than half of the female captains were promoted internally rather than appointed by direct access. The prevalence of part-time working is much more likely amongst captains than first officers of either gender.

5.14. We have also considered what conclusions can be drawn from the findings in relation to the various applications for part-time working. A range of reasons applied to both male and female pilots making application. Some were explicitly childcare related, some not. However, family reasons in the broad sense are reasons for both male and female pilots seeking to work part-time but the requests do not give a detailed picture of what is meant by childcare. We are satisfied that the driving factor is the employer's need for the pilot resource on the particular route/base but that if part-time working can be accommodated, it is. Beyond that, the evidence does little more than show both male and female pilots have reason to seek part-time working.

5.15. Those conclusions do not provide an adequate evidential basis for us to conclude the claimant has established the particular disadvantage to the group sharing the characteristic. Neither do they disprove it. At best, they are of some use to inform our approach to the extent to which we can take judicial notice of the disadvantage.

5.16. Before embarking on that task, it is worth defining the exercise we are about to perform. Judicial notice refers to facts which a judge can be called upon to receive and to act upon, either from his general knowledge of them or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer (**Halsburys Vol 18 para 712**). That does not extend to our own private knowledge of specific facts in issue in the case. Judicial notice is a mechanism to accept, rather than find proved, certain contentions. The fact previous cases may have taken judicial notice provides no authority that the proposition remains the case today. Although it may, it is always for us to find the contention proved, or ourselves to take judicial notice of it from appropriate sources.

5.17. We start with the disadvantage arising from the fact that women are said to be more likely to carry the primary responsibility for childcare as it applies within the general population. It is a disadvantage that, anecdotally, we all felt continues to be held as true. Further, we are aware that the 2018 version of the Equal Treatment Bench Book, at chapter 6 paragraph 16, records a similar conclusion in that:-

> ***Women are still the primary carers of children, either as single parents (9 out of 10***

single parents are women), or as a couple. Overall, 73% of women with children work, including 53% of women with children under five, but they still spend three times as much time as men on caring for children.

5.18. Thus, the ETBB accords with our own general understanding of the contention and gives us confidence to take judicial notice of the contention in respect of the general working population as a whole. Whilst we are of the view that the balance is levelling, particularly when *caring* responsibilities are considered generally, as opposed to *child*care responsibility specifically, we remain of the view that female workers in the population at large still face a particular disadvantage in their ability to comply with full-time hours compared to male workers due to being the primary carers of children.

5.19. We then have to review our preliminary conclusion against our specific pool. Are we satisfied that the presence of the contention within the workforce as a whole is maintained within the pool of those affected by this PCP?. We have not found it easy to simply step from the general proposition to its application to this group. There are a number of factors which could well alter the impact of the apparent disadvantage across the sexes such that it may well no longer be appropriate to reach a conclusion based on judicial knowledge alone as far as tis pool alone is concerned. We consider the significant sacrifices necessary for an individual to get into the pool in the first place are likely to mean the pool of men and women is skewed compared to the general working population with responsibilities for childcare. We consider the prevalence of arrangements for childcare being put in place, as the claimant herself has, is likely to be much higher within this pool although many will not. We consider the balance of responsibilities as between parents where the mother is a pilot may well also buck the trend seen in the population at large for reasons connected with earnings or the professional drive. We have a strong sense therefore that the general proposition on which we could take judicial notice may not actually follow through into this pool. However, we have come to the conclusion that where parents are separated, the child care responsibilities would still be more likely to fall to the mother than the father and that would apply as much to a pilot as in any job. We have also concluded that the weight of concern against adopting the general proposition would have to be such that we can be confident in displacing it. We are not satisfied our concerns have reached that level. For that reason, we have concluded that the particular disadvantage faced by the working population as whole does carry into the narrower pool of qualified pilots capable of taking up a command role. Although we do not do so with absolute certainty, we do feel sufficiently able to take judicial notice that the burden of childcare responsibilities still rests with female pilots who as a group are particular disadvantage in complying with full-time work due to carrying the primary responsibility for childcare.

5.20. Finally, we need to note the boundary of what is meant by responsibility for childcare. The claimant's evidence is that childcare is not an issue, but being there for them is. Whilst the claimant does not advance her case in this way, for completeness we record our view that it may be the case that the broader basis on which the claimant articulates her own parenting role may itself establish a disadvantage in an employee's ability to comply with full-time working. However, when we have considered such disadvantage as this broad broader basis may create, it is not something we feel able, or prepared, to use of judicial knowledge alone as a basis for accepting it leads to a *particular* disadvantage for female pilots over their male colleagues.

If so, is the claimant put that Disadvantage

5.21. Claims of discrimination are not considered in the abstract or for academic reasons. It is not enough to show that a PCP discriminates against the group sharing the characteristic. It is an essential element of the claim that the claimant also suffers the same disadvantage that is particular to the group sharing her characteristic. That is, that childcare responsibilities make it disproportionately more difficult for her to comply with full-time working as a captain, at least for the duration it might take before an application for part-time working could be made and granted.

5.22. We have been struck by the claimant's clear and frank evidence, both before us and contemporaneously to her employer, on what she means by childcare responsibilities. She draws a clear distinction between her and her husband's ability to meet their childcare responsibilities and her wish to be there for her children. She has made it clear that she has no issue with organising childcare and that it is something which is easily sorted.

5.23. We are satisfied the claimant has, with her husband, put in place practical arrangements to be able to meet her, and their, childcare responsibilities so as to be able to continue in their roles as pilots. As a result, we are not satisfied that the claimant has established that she is put to the same disadvantage as that which we were able to take judicial notice of as applying to the group sharing the characteristic. We are satisfied the claimant's childcare responsibilities do not prevent her from complying with a period of full-time working on being offered a command upgrade. For that reason, this claim of indirect discrimination fails. We wish to make clear, however, that this conclusion does not mean we have dismissed the claimant's broader contention that there is "much more to being a parent". We do, of course, fully accept and understand the distinction the claimant makes between the more practical childcare responsibilities and the role of being a parent. We accept that those factors are what led her to seek a part-time roster and to wish to return home each night. However, for the reasons we set out above, those are broader factors create a different analysis of group disadvantage and one which we felt unable to accept by the route of judicial knowledge alone. It might be that there is an evidential basis of proving that a particular disadvantage to females over males, but that has not been put before us.

If so, is the PCP a proportionate means of achieving a legitimate aim.

5.24. Whilst we have rejected this particular claim, we still consider whether the PCP is in any event justified.

5.25. In its pleaded form, the respondent did not seek to justify a PCP which it said did not apply. As the claimant's PCP case has evolved to one where the initial upgrade is on a full-time basis, the respondent has advanced a justification based on the aim of the efficient management of its resources against operating requirements. We accept that is a legitimate aim. The question is whether the PCP is a proportionate means of achieving that aim. In other words, is it the least discriminatory means of achieving it.

5.26. We have considered the competing factors that we have to weigh in the balance. Those that point towards the PCP being a proportionate means are that the regulatory burden is disproportionately higher for part-time pilots. The organisation and input into managing that is the same whether the pilot is full-time or half time. A workforce of half time pilots doubles the organisations regulatory

control systems, disruption and costs compared to the same workforce of full-time pilots. There is some industry expectation of consolidating experience. Even then, the period of full-time working may only be for a relatively short period of time. It arises in the context of a promotion and a commensurate higher rate of pay which might facilitate practical solutions to mitigate some of the disadvantage. There is a deficit in the available pilot resource and full-time pilots meet more of that need than a part-time pilot does. There is additional burden in rostering part-time pilots.

5.27. Those factors that point away from proportionality are that it is a PCP that seems to flow from historical practices which is closer to a case of "that is how we've always done it". We have little actual contemporaneous analysis of justification. The fact that the respondent appears to be generally favourable to part-time working requests puts the justification for it being full-time to start with into sharp focus. Indeed, there is a curious fact that there is a greater proportion of part-time working amongst the ranks of captain. The regulatory burden and rostering therefore loses some of its force. Part time clearly can be accommodated in certain situations. The fact that there is a pilot shortage seems to cut both ways. As the claimant put it, half a pilot is better than none. We have not seen evidence any evidence of analysis whether any of the individual command posts could be undertaken on a part-time basis with tangible reasons why it was not possible at all or on an initial basis.

5.28. Overall, we found the relevant factors going to proportionality to be finely balanced but we arrived at the conclusion that the respondent had not satisfied us the PCP outweighs the potentially discriminatory effect.

Whether the respondent applied the PCP when it changed the roster between EMA and BRU to require night stops in Brussels?

5.29. There is no dispute that in changing the roster out of East Midlands such that it required regular night stops as part of a tour amounts to a PCP. The intrinsic nature of the regular night stops was a provision criterion or practice applied by the respondent to all those members of flight crew employed on the East Midlands / Brussels route, irrespective of their gender.

If so, whether that PCP put (or would put) women at a disadvantage when compared to men?

5.30. The particular disadvantage said to arise to the group sharing the claimant's characteristic is said to be "being away from home and not being able to look after children based on the fact that more women than men have responsibility of child care". We repeat the same observations as before in respect of the disadvantage. That is, a diminished ability to comply with the requirements for regular night stops on tour as a result of those child care responsibilities.

5.31. For the reasons we have given already in respect of the first PCP, we accept that this PCP does put women at a particular disadvantage to men insofar as we are able to take judicial notice of the effect on women in the workplace, that they are more likely to carry the primary child care responsibilities as a result of which they are less able to comply with a PCP requiring working away from home. We repeat the same observations concerning any broader extension of parental obligations which we are not able to conclude, based on judicial notice alone, puts women at a particular disadvantage to men. We recognise that the logical pool would be slightly different in that this PCP only applies to those pilots employed or

likely to be employed on the particular route but we see no basis from departing from our previous analysis as to whether there is likely to be any objective reason not to take judicial notice of the disadvantage in the same way.

If so, did it put the claimant at that disadvantage?

5.32. Similarly, for the reasons we gave in respect of the first PCP, we are not satisfied the claimant has shown she is put to the particular disadvantage. The claim based on the second PCP fails for the same reasons.

If so, whether applying that PCP is a proportionate means of achieving a legitimate aim.

5.33. Although we have dismissed the claim, we have considered the issue of justification on which both party has addressed us. There is no dispute between the parties that when the respondent changed the East Midland rosters with the result that night stopping in Brussels became required, it did so in furtherance of a legitimate aim, namely "managing its resourcing needs in line with operating requirements". The issue in this case is whether the PCP was a proportionate means of achieving that end. The legal burden of establishing it rests with the respondent.

5.34. We again set out to weigh the employers need against the potential discriminatory effect. First, the discriminatory effect to women affected by the PCP is significant and could ultimately lead to them being unable to continue on that route. It therefore weighs heavily. On the other side of the scale, the commercial reality of the situation was such that the viability of the East Midlands route was under threat and there was no realistic option of ignoring the commercial opportunity that presented itself or otherwise maintain the status quo. Either the new routes would not be operated, and East Midlands would close, or they would be operated and even that option came with a threat of the East Midlands base closing if it became a mere destination from Brussels. There was a choice in how to implement the new routes and repositioning from East Midlands with night stops allowed the base to stay open. The alternative would have been significantly more disruptive to staff who would then be faced with either a forced base move to one of the remaining UK bases, the next nearest base at that time being Bristol, or their employment would come to an end. We are satisfied that whilst the initial implementation was particularly sudden, the approach to resolving individual issues, as arose in the claimant's case, was genuine and patient.

5.35. There is a harsh reality in this situation that although the discriminatory effect of this PCP is potentially significant, it is in our judgment still outweighed by the employer's need to achieve the legitimate aim. Therefore, this claim would in any event fail at the justification stage.

6. The claims of Harassment

Law

6.1. So far as is relevant to this case, section 26 of the 2010 Act defines harassment as follows:-

> ***(1)A person (A) harasses another (B) if—***
> ***(a)A engages in unwanted conduct related to a relevant protected characteristic, and***
> ***(b)the conduct has the purpose or effect of—***

(i)violating B's dignity, or
(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2)…
(3)…
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect.

6.2. This provision contains three constituent elements. Conduct, which is related to the protected characteristic and which has the necessary purpose or results in the necessary effect. In understanding and assessing any comments made against the resulting effect, we will seek to understand the context and motive of the statement and to objectively apply the reasonable result of the statement. In that regard we consider the dicta in **Richmond Pharmacology v Dhaliwal [2009] ICR 724**) that:-

> ***While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.***

6.3. In assessing the resulting effects, we have regard to the observations of Elias LJ in **Land Registry v Grant [2011] ICR 1390** that in assessing whether conduct can properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment, we must not apply a test that cheapens the significance of these words.

Discussion and Conclusions

Allegation 1 – Mr Simpson's Comments at the consultation meeting on 30 November 2015.

6.4. We have found that Mr Simpson did say, in essence, "You have to make your decision, and I am very direct now and I am sorry about this, but you have to make your decision on what you can do". We have found the comment was made in response to various complaints from staff including points raised by the claimant that the new roster was unworkable for her as a working mother with three young children. The context was an exchange between him, as a representative of senior management, and the affected staff all of whom were articulating a variety of concerns about the substance of the change and its implementation. The concerns were broader than childcare concerns. They all expressed dissatisfaction with the change. We found the response was not singling out the claimant, but was within a series of exchanges between an employer and a workforce displeased with the changes. It was addressed to them all in the context of the reality that there was no realistic option of not taking on the new route.

6.5. This allegation, and all the allegations of harassment, are put as bringing about a proscribed "effect" rather than being done with a purpose of causing the proscribed effect.

6.6. We have found that Mr Simpson's comment did aggravate the claimant's already sense of dissatisfaction with her employer. We are not satisfied however, that the comment can be said to be related to the protected characteristic of sex, even on the much lower causation test applicable in s.26. In any event, and if we are wrong about that conclusion, we have come to the conclusion that it is not

reasonable that it should be held to have the resulting effect. Whilst the claimant took offence, the other circumstances of the case present a harsh reality about the implementation of the new roster for which the words used are blunt but not inappropriate. He does not identify any particular group in the words used and they are as applicable to all with concerns about employees' ability to work the new roster.

6.7. We dismiss this claim on its merits. This is, however, a claim which is prima facie out of time. The claimant does not argue a just and equitable extension of time but argues that this allegation, forms part of a continuing act of discrimination. The circumstances of the continuing act has not been developed to any extent either in evidence or submissions and it is simply said to be "the respondent's ongoing discriminatory regime and practice towards the claimant". As this allegation is one of a number which are prima facie out of time, we will consider below the jurisdiction element of all such claims when we have reached a decision on all the allegations.

Allegation 2 – Captain Gill's comments during the grievance meeting held on 15 January 2016 as set out at para 30.2. and 30.3 of ET1

6.8. We have found that Captain Gill did open the meeting by clarifying that the respondent was not in a position to alter the schedule and that Mr Simpson would not change his decision. We reject the contention that those comments relate to the protected characteristic of sex. It is not enough that the reason for meeting should relate to the claimant as a parent that any comment the claimant takes issue with should be related to. The relevant context was setting the boundaries of the grievance. The comments make clear to the claimant that to the extent that simply not operating the new routes might be seen as a solution, it was not.

6.9. The second element is in respect of Captain Gill's attempt at explaining his understanding of indirect discrimination. In doing so, we have found he did make reference to a working mother who flies out of Chester on a route incorporating night stops and that she accepted it. He also gave an example of indirect discrimination arising in the context of previous flights to Yemen. The fact these are directly attempting to deal with the issue of indirect sex discrimination arising out of being a working parent means they must be "related to" the protected characteristic.

6.10. However, we reject that it should be reasonable that they have the proscribe effect. The words used are not inherently offensive and are applied in the context of Captain Gill trying to explain why he does not believe the change has been discriminatory. It is true that he is not correct in some aspects of his articulation of what discrimination does or does not amount to, and his wording is clumsy at times, but we are unable to objectively view the comments in a way which reasonably attaches to them the discriminatory effect that section 26 is there to prevent. We do not accept it carries the force reasonably rendering it "an extremely distressing thing to hear" as alleged.

6.11. This allegation fails on its merits. In any event, it is also prima facie out of time and we will consider the jurisdiction aspect together with the other claims.

Allegation 3 - Captain Gill making comments to John Russel about BALPA's support for the claimant as set out in paragraph 30.4 of the first Et1.

6.12. We did not accept as a fact the claimant's description of this as an 'off the record' discussion within the grievance meeting itself. Whilst the discussion did include the fact of the viability of the East Midlands base, we did not accept it was a threat to BALPA to abandon their support for the claimant's grievance and the suggestion that it was put in terms of "or else" makes no sense when both men would know and understand that the route was happening whatever the outcome of the claimant's grievance.

6.13. There is nothing in the alleged comments or those we found that explicitly links the comments in any way to the claimant's sex. The most that can be said is that they are said immediately after the grievance hearing which is itself alleging sex discrimination. We are not satisfied this is sufficient in this case for the comments to be said to be related to sex.

6.14. In any event, we reject the contention that it is reasonable for such comments as we found were made in the conversation to have the proscribed effect. This allegation fails on its merits. In any event, it is also prima facie out of time and we will consider the jurisdiction aspect together with the other claims.

Allegation 4 From 9 May 2016, the claimant being coded as "Off programme" when she was available for work as set out at para 30.5 of the first Et1.

6.15. We have found that the claimant was in fact coded on the rostering system as "OPG" or off programme. We have accepted the reason why that decision was taken being in recognition of the fact that the claimant was unable to work to the new roster at East Midlands. We are unable to accept that this decision relates to her protected characteristic and the fact that the underlying reason why she was not working to the roster may have been related to her grievance is too remote in our judgment to render this unwanted conduct as being related to sex.

6.16. In any event, we reject the contention that such state of affairs was reasonable to have the proscribed effect. This allegation fails on its merits. In any event, it is also prima facie out of time and we will consider the jurisdiction aspect together with the other claims.

Allegation 5 - Mr Schutz informing the claimant they would move forward with "dismissal proceedings" and subsequently, on 10 January 2017, emailing the claimant a file with the name "final hearing", with the notes headed up "Grievance hearing" as set out at paragraph 30.6 of first Et1

6.17. This contains three allegations which must be considered separately.

6.18. It is a fact Mr Schutz did write to the claimant indicating an intention to move forward with dismissal proceedings. This was on 27 October 2016 by which time the claimant had not been flying for the respondent for nearly a year, had been in receipt of full pay and had exhausted her first grievance process. There did not appear to be a long-term solution and one needed to be found. Dismissal was clearly a real possibility if a solution could not be found.

6.19. Once again, there is nothing explicit or inherent in the impugned statement which relates to the claimant's sex other than the underlying issues which lead to the claimant not working the new roster include her grievance relating to indirect discrimination. We are unable to accept that that is enough to render this conduct as being related to her sex. We would add that, although the causation test under

section 26 is not one of comparison, where the impugned conduct discloses no explicit reference to the protected characteristic, we have to apply some test to reach a conclusion whether the context gives sufficient connection for it to be related to sex. We have asked ourselves whether if the comparable underlying facts applied to a man, the respondent would have taken any different approach. We are satisfied the same approach would have been taken. We stress, we are not seeking to undertake a 'less favourable" test, but simply exploring the evidential connection between the circumstances and the conduct to be able to answer the "related to" question. We are satisfied it is not related to the claimant's sex.

6.20. In any event, we do not accept it is reasonable that this conduct should have the proscribed effect. We have no doubt that being told that one's employer was contemplating termination of employment is unwanted the effect of it is not in the nature of that proscribed in the context of harassment. This part of the allegation is prima facie out of time and we will consider the jurisdiction aspect together with the other claims.

6.21. The second and third parts of this allegation relate to the file name applied to the notes of the meeting and the way those notes were headed as "Grievance meeting". We have found the file was actually titled "Carter Jenny FINAL formal Meeting Minutes.pdf" This title is in no way related to a protected characteristic. The inference that the claimant seeks to draw from this is that the word FINAL means there will be no more meetings. We found that not to be the case and that the title was a reference to this being the last of various drafts. As to the second allegation, it is correct that the notes were headed "Grievance Hearing". Again, there is absolutely nothing to say that was related to the claimant's protected characteristic. It is clear that the format of the minutes is a standard format and that there was no more than a lack of attention to the title of the meeting. It falls substantially short of any reasonable meaning of harassment and this allegation fails.

6.22. These allegations served only to demonstrate a degree of either hypersensitivity or a desire to find fault where it did not exist. It left us concerned to exercise caution about how much weight we could give to the claimant's view of the respondent's conduct more generally.

Allegation 6 - Mr Halmshaw offering the claimant a full-time command upgrade based at East Midlands knowing that she worked part-time and that the role of Captain could be performed part-time as set out in paragraph 30.7 of the first ET1.

6.23. Mr Halmshaw made this offer on 28 November 2016. There was a full-time command post available, the claimant was at the time assessed as suitable for command and that her seniority meant she was in a position to be offered the post. In those circumstances, this offer was entirely in line with the established practices and seniority list and not offering the claimant the opportunity would potentially have raised more tangible concerns. It is hard to see how an offer of promotion can fall within the concept of harassment or be unwanted conduct. To the extent the claimant may feel being offered the role on a full-time basis amounted to something akin to the punishment of Tantalus, we reject that was the intention of Captain Halmshaw.

6.24. There is nothing in the impugned conduct which is inherently linked to the claimant's sex for it to be related to it. Indeed, we note the premise of the complaint is her part-time status. In any event, we do not accept that it is reasonable for this

conduct offer to have the proscribed effect. The allegation fails

Allegation 7 – The respondent requiring the claimant to carry out her LPC test immediately following refresher training as set out at paragraph 30.8 of the first ET1

6.25. The claimant was required to undertake LPC and OPC assessment on a 6 and 12 month basis. The courses were run together where they coincide. The claimant had at the time been delayed in maintaining her refresher training and this delay was itself a criticism of hers. The training was eventually rostered to take place. In the event, the claimant passed the assessment with high marks. We struggle to see any unwanted conduct. To the extent that the claimant has criticisms of the delay, the time allocated to her in the simulator, the combination of LPC and OPC being assessed together or the time she had to practice prior to the test, there is nothing which can be said to be related to her sex. Still less is it reasonable for any aspect of this to have the proscribed effect to amount to harassment. This allegation fails.

Allegation 8 – The respondent not telephoning the claimant during her absence from work and not arranging a back to work meeting following her confirmation of being fit to work as set out at paragraph 30.9 of the first ET1.

6.26. The unwanted conduct is in the form of two alleged omissions. They occur during a period where the parties are otherwise in communication seeking to resolve the fact that the claimant was not able to work the new roster. We are not satisfied that the claimant has established how these matters were in any way related to her sex.

6.27. In any event, we do not accept that it is reasonable for these omissions, to the extent that they are unwanted conduct, to have the proscribed effects. These allegations are prima facie out of time and we will consider the jurisdiction aspect together with the other claims.

Allegation 9 – Mr Rennie not adequately explaining why the respondent is unable to offer a part-time command role to the claimant as set out at the second paragraph 30.9 in the first ET1

6.28. We found how Mr Rennie responded to the claimant in his letter of 24 February 2017 and in which he sought to explain why command was not offered on a part-time basis. To the extent that he provided what the claimant had asked for, it cannot be said to be unwanted conduct. The issue for the claimant is the quality of the answer, not the fact of it. Mr Rennie's explanation was set out in measured tones and if unwanted conduct is present the quality of the answer, we simply cannot see any basis for saying the quality was related to the claimant's sex. Nothing about the conduct of Mr Rennie in responding to the appeal can be said to be related to the claimant's sex. He was explaining the need that had existed for full-time captains.

6.29. In any event we do not accept that it is reasonable that his response should create the proscribed environment. This allegation fails.

Allegation 10 – The respondent informing the claimant of a training programme that was entirely unworkable as set out at paragraph 18.1 of the second ET1

6.30. We found the email sent by Claire Coupland on 2 March 2017 gave one day short of the 7 days' notice required for training with night stops. We did not find there was in fact any practical issue with compliance, but rather that the claimant was entitled to decline the course under the terms of the MOA and therefore chose to do so. The training that would have included 2 night stops (something that the claimant was otherwise insisting she was prepared to do) was hastily reorganised to remove the night stops. Again, we do not accept the enrolment on the training course itself can be said to be unwanted. The period of notice is the only aspect that could be said to be unwanted but it was all, subjectively, something which the claimant did not want as we have concluded that by this time the claimant had decided that she was not going to return to work with the respondent. That, however, is not a basis for alleging harassment. There is nothing about this allegation which can be reasonably said to be related to sex and, in any event, it is wholly unreasonable that this conduct should be held to have the proscribed effect. This allegation fails.

Allegation 11 – The respondent being unwilling to offer the position of captain on a part-time basis as set out in paragraph 18.2 of the second ET1

6.31. On 8 March 2017, the claimant met with Mr Schutz. We did not accept that the position on part-time captains had changed or was expressed in any different way. The respondent's position was that unless there was a particular need identified, command upgrades would be on a full-time basis but the question would be referred to the resource committee.

6.32. We know that is not what the claimant wanted to hear but it is nothing she did not know already. We are not satisfied Mr Schutz's conduct in this conversation can be said to be related to her sex. In any event, it is not reasonable that it should have the proscribed effect. This allegation fails.

Allegation 12 – The respondent confirming to the claimant that there was an extreme shortage of Captains as set out at paragraph 18.3 of the second ET3

6.33. We found that an email was sent to the claimant as it was to all pilots. Its purpose was to try to fill the gaps in the schedule and not to harass anyone. It has nothing about it which explicitly or inherently relates to the claimant's sex. The email is not directed at the claimant individually, she is merely part of a group in receipt. We found it unlikely that the author would have had any meaningful knowledge of the claimant's situation over the previous 18 months save that she had not been on the roster. We do not accept this email can be said to be unwanted conduct nor is it related to sex. In any event it is wholly unreasonable that it should have the proscribed effect. This allegation fails.

Allegation 13 – Mr Schutz providing an entirely unworkable future working plan as set out in paragraph 18.4 of the second ET1

6.34. We reject this contention on the facts. We found Mr Schutz wrote to the claimant, as she requested following their meetings and that his letters set out the matters discussed. To that extent the letters were not unwanted. In any event, we reject the fact that their content, or the Birmingham proposal as a whole, provided a wholly unworkable future working plan. Our conclusion is to the opposite effect that it did provide an entirely workable future working plan.

6.35. There is nothing about the letter which explicitly or inherently relates to the

claimant's sex. There is nothing that can reasonably be said to be unwanted conduct, if the claimant was genuinely seeking a resolution to the deadlock the parties were then in. We found this was a workable solution. We are unable to accept that it is reasonable for this proposal to have the proscribed effect and it certainly was not done with the purpose of causing it. This claim fails.

7. The Claims of Victimisation

Law

7.1. So far as is relevant to this case, section 27 Equality Act 2010 provides:-

> ***1) A person (A) victimises another person (B) if A subjects B to a detriment because—***
>
> ***a. B does a protected act, or***
> ***b. A believes that B has done, or may do, a protected act.***
>
> ***2) Each of the following is a protected act—***
>
> ***a. bringing proceedings under this Act;***
> ***b. giving evidence or information in connection with proceedings under this Act;***
> ***c. doing any other thing for the purposes of or in connection with this Act;***
> ***d. making an allegation (whether or not express) that A or another person has contravened this Act.***

7.2. There are three constituent elements necessary to make out the claim. The existence of a protected act (or the fact of a belief that the claimant had done a protected act), the subsequent detriment and the causal link between the two that shows a prima facie case that the detriment occurred *because of* the protected act.

7.3. In determining causal link, the correct question is to ask is whether the protected act was the "reason why" and not whether "but for" it, the detriment would have occurred. **(Greater Manchester Police v Bailey [2017] EWCA Civ 425)**

The Protected Acts

7.4. The claimant relies on 3 alleged protected acts. They are:-

a her statement at the meeting on 30 November 2015 to Mr Simpson that she was unable to work to the new rota due to childcare obligations.
b Her letter of grievance dated 14 December 2015.
c Her letter of grievance dated 8 November 2016.

7.5. The respondent properly accepts that the second and third matters amount to protected acts for the purpose of section 27 of the 2010 Act. None of the alleged detriments arise before the earliest of those such that the only purpose of considering the earlier alleged protected act would be in the unlikely case that there is a positive and distinct finding of causation going only to that first matter (i.e. that a detriment was done because of the first act, but not either of the other acts)

7.6. To the extent, therefore, that it is necessary to determine this issue, we are satisfied that the complaint that an imposed change was unworkable in the context of being a working mother is sufficient to bring it within section 27(2)(d). Whilst there is no explicit reference to discrimination or the 2010 Act, her challenge to the effect the new route has on working mothers, parents and families sufficiently

identifies the broad basis of an allegation of discrimination for it to be an implicit allegation of breach of the Act. In any event, the causation test is met on a belief of a protected act, even if in law the act does not ultimately satisfy the protection of the 2010 Act.

7.7. Whilst it is for the claimant to put her case as she sees fit, we note that four of the alleged detriments arise after the presentation of the first ET1 but it is not said that the bringing of proceedings under the Act is a protected act in response to which any detriment was suffered.

Discussion and Conclusions on each alleged detriment

Allegation 1 - Producing inaccurate costings when analysing the possibility of implementing an alternative role for the claimant as set out in the first ET1 at para 32.1

7.8. We dismiss this allegation on the facts. We have not found as a fact that the costs were inaccurate in the sense capable of amounting to a detriment. We heard no contrary evidence to support the contention that repositioning a replacement pilot to permit the claimant to commence and return at East Midlands each day could be achieved at any less cost.

7.9. For completeness, we are satisfied that the entire process of costing the alternatives was done in good faith and in no way whatsoever influenced by the claimant's protected acts.

Allegation 2 - Recording the claimant as 'off programme' on the AIMS system when the claimant was able and willing to perform her duties as set out at paragraph 32.2. of the first ET1

7.10. The claimant was recorded as OPG from May 2016 until December 2016. She then changed to AVT, or "available for training". We are entirely satisfied that the reason why the claimant was coded in this way was because she had made clear that she was not prepared to work the Brussels route. Until such a time as the parties resolved their dispute, the system had to be recorded with some status. This was the most appropriate.

7.11. We have some difficulty accepting that the application of this code amounts to a detriment in the circumstances in this case. It was open to the claimant to raise it and she didn't. It has not been suggested to us what the correct code should have been beyond continuing with AVT throughout which would not have dealt with the fact that she could not have flown the route she was otherwise rostered for and in all likelihood, it would have been impractical for her to take other work at short notice based on the fact she never made any contact in response to the requests for short term cover of other routes. It was entirely reasonable that some code be recorded on the system in order to effectively and efficiently deal with her continued employment as a pilot but her otherwise (non-)availability to fly the route. The OPG code was therefore the most suitable code to use in an extremely unusual situation. Had the claimant stated her position without expressing a protected act, we are satisfied the same coding would have applied. We are satisfied it was in no way whatsoever because of the fact of any protected act. This allegation fails.

Allegation 3 - falling to offer the claimant a part-time Command post as set out at paragraph 32.3 of the first ET1

7.12. By the time of the first protected act, the claimant had already been offered and declined, an upgrade to command due to the fact it was on a full-time basis. The fact that such upgrades have always been offered on the basis of full-time opportunities suggests a forceful starting point that the offers made after the protected acts are highly unlikely to have been because of that protected act absent some particular change of circumstances.

7.13. That is not to say victimisation could not arise if, for example, there was a post suitable for part-time working in respect of which a decision was taken to make it full-time because of the claimant doing the protected act. However, we are unable to accept that, or anything approaching it, arises in this case. To the extent that there remains a dispute between the claimant and the respondent about the basis on which the command posts are established, we are not satisfied there is a prima facie case that that process was in any way linked to any of the claimant's protected acts. This allegation fails

Allegation 4 - Withholding professional competency training during 2016 contrary to normal practices as set out in the first ET1 at para 32.4.

7.14. We have found the timing of the claimant's training did slip during 2016 but we do not accept this can be said to be contrary to normal practices in so far as this was an abnormal situation. During the relevant period of time, the parties were working through the grievances and were also in discussions with the aim of seeking a resolution. The claimant had made clear from the outset that she was not able to work the new schedule from East Midlands and as long as that remained the case, she did not have a programme to fly. That is the reason for the training slipping and if the claimant had not done a protected act, we are satisfied the same situation would have occurred. We are satisfied that the protected acts are not the reason for the training slipping. Moreover, we are not satisfied there was a material detriment. The system is equipped to deal with training lapsing. When it came to a time of the claimant returning to flying, she was scheduled for the competency training, undertook it and passed with high marks. This allegation fails.

Allegation 5 - Sending an entirely unworkable training programme as set out in the second ET1 at para 21.1.

7.15. As with the similar allegation of harassment, we dismiss this allegation on the facts. We do not accept that the training programme was unworkable, still less that there was any mental process by anyone with knowledge of, or belief in, the protected acts influencing the way the programme was arranged. The aim was to get her on a programme. It was a coincidence of timing that the enrolment confirmation was sent out with only 6 days' notice of the training. This allegation fails.

Allegation 6 - Not offering the claimant the position of Captain in a part-time basis as set out in the second ET1 at para 21.2.

7.16. We are not able to discern any material difference between this allegation and that set out at allegation 3 above. We dismiss it for the same reasons

Allegation 7 – receiving an email that there was an extreme shortage of captains as set out in the second Et1 at para 21.3

7.17. We do not accept the factual premise of this allegation insofar as the claimant is seeking to link her desire for a part-time command role with the situation conveyed in this email. We have found as a fact that the respondent did send the email seeking volunteers to cover flights and in the covering letter confirming there was an extreme shortage of captains *next week*. We do not accept this amounts to a detriment. This was sent to all flight crew. The communication and the facts it contained are matters of fact but are not necessarily to be interpreted as the claimant suggests. Further we do not accept that the author or publisher of the statement, so far as it was sent to the claimant as part of a group distribution, had any knowledge of the claimant's protected acts for there to have been any mental process bringing the two together. We dismiss this allegation.

Allegation 8 - Mr Schutz providing an entirely unworkable future working plan as set out in the second ET1 at para 21.4.

7.18. We dismiss this allegation on the facts. We do not accept that the future working plan was unworkable. The claimant accepted in cross examination a number of aspects of the programme which seriously undermine her assertion that it was unworkable. We were satisfied that there was scope within the complexity of the rostering for this schedule to work to both parties' requirements. We accept that there may have been additional pressures on the claimant due to where she chose to live, but that is not relevant to the whether the schedule itself was workable and it simply does not stack up to say that the schedule was constructed in anyway whatsoever with the claimant's protected acts in mind.

7.19. This was simply a solution that until recently neither party had anticipated might be available. It was a reasonable working plan and, in any event, was a reasonable foundation from which any finer detail necessary could have been discussed.

Allegation 9 - Failing to acknowledge the claimant's letter of resignation as set out in the second ET1 at para 22.1.

7.20. There is no dispute that this allegation engages s.108 of the Employment Rights Act 1996 (as it is interpreted in **Jessemy v Rowstock [2014] EWCA Civ 185**).

7.21. The letter of resignation was sent by email after normal office hours on a Friday from the claimant's "Hotmail" email account. It was acknowledged on the Tuesday after it had been chased on the Monday and discovered to be in Mr Schutz's junk mail box. During cross examination, the claimant was unable to maintain any basis on which this response was an unreasonable delay or in any reasonable way amounted to a detriment. Consequently, Mr Hodge abandoned this claim in submission. In any event, we would dismiss it. There was no detriment and in any event, the sequence of events between resignation and its acknowledgement has absolutely no basis for being because of her protected acts.

Allegation 10 - On 28 March 2017, being contacted by the crewing department about a waiting taxi despite having resigned with immediate effect as set out in the second ET1 at para 22.2.

7.22. This allegation foundered in exactly the same way as allegation 9 had and Mr Hodge abandoned it in submissions. We would in any event have dismissed

it. The alleged detriment was no more than the crewing department chasing the claimant as they were expecting the claimant to be working on this day, a taxi was waiting for her and no one knew at that time that she had resigned. There was no evidential basis for that telephone call being either a detriment or done because of a protected act.

8. The Claim of Less Favourable Treatment on Grounds of being a Part-time worker

Law

8.1. Regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provides, so far as is relevant:-

> ***(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—***
> ***(a) as regards the terms of his contract; or***
> ***(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.***
> ***(2) The right conferred by paragraph (1) applies only if—***
> ***(a) the treatment is on the ground that the worker is a part-time worker, and***
> ***(b) the treatment is not justified on objective grounds.***

8.2. The section applies to claimants who are part-time workers, who are treated less favourably than an actual and comparable full-time worker, a hypothetical worker comparison is not permissible. (**Carl v University of Sheffield [2009] IRLR 616**). If there is a difference in treatment, the claim will be made out *only* if that treatment is on the ground that the worker is a part-time worker. Conceptually, it is a claim in the nature of direct discrimination where the casual link requires some conscious thought process to bring about the treatment (on the ground) although it need not be the only reason as long as it is the predominant and effective cause of the treatment (***Carl***).

Discussion and Conclusion

8.3. The first issue is the treatment said to be less favourable. The claimant advances two cases. The first is that the respondent only offers promotion on a full-time basis. The second is that the respondent pressured the claimant to work full-time by offering promotions on such a basis.

8.4. As to offering only full-time promotion, all understand it to mean the specifics of promotion from first officer to captain. We have found that the respondent has in the past only offered appointments/upgrades to command posts on a full-time basis. We also found that the respondent put the claimant through command assessment (and command upgrade) at a time when she was working part-time and that since being assessed as suitable for command upgrade it has offered her the command vacancies that have arisen, albeit they have all been on a full-time basis. The process to identify a command opportunity is directly linked to the respondent's resource need which is, in turn, driven by the need for efficient deployment of pilots to fly a particular schedule within flight limitation times and other obligations on pilots working time. Indeed, at least one of the posts now occupied by one of the claimant's comparators was offered to her first.

8.5. As to being pressured, we have rejected as a fact that when these posts were offered to the claimant on a full-time basis that she was being pressurised into working work full-time. She was under no pressure to accept the post and this

is demonstrated by the fact that she has rejected a number of offers but, each time, further offers were made as they arose. The respondent could easily have been criticised for not offering such opportunities as they arose. It may not have been reasonable to withhold an offer even though it was known the claimant was only prepared to work out of East Midlands but would not work the East Midlands route (in either grade) due to its night stops. Whether the post was full-time or part-time it would not have been acceptable to the claimant on that route. Nevertheless, however much the claimant's negative response might have been capable of accurate prediction, the respondent made those opportunities that arose available to the claimant. There is no evidence of pressure and we reject this element of the claim on its facts so far as that is said to be the treatment complained of.

Whether such conduct amounted to less favourable treatment compared to a comparable full-time worker?

8.6. For regulation 5(1) to be made out, the claimant must show she has been treated less favourably than a comparable full-time worker. We made relevant findings in respect of the two actual comparators relied on, namely Captains 19 and 21. There is nothing arising to suggest these are not comparable full-time workers by virtue or Regulation 2. However, one significant difference between the comparators and the claimant is that by virtue of the route they fly, they were prepared to fly a route including the regular night stops in Brussels.

8.7. The claimant's case is premised on the fact that she was not upgraded when they were and that this is prima facie less favourable treatment. We do not accept that she has been treated any differently. Both the claimant and her comparators were offered the opportunity of the vacancy that the employer had with equal opportunity to take it up. In fact, the claimant was offered at least one of the vacancies before the comparator who now occupies that role.

Whether such treatment was on grounds of her part-time status conduct amounted to less favourable treatment compared to a comparable full-time worker?

8.8. In any event, even if there were less favourable treatment at this comparative stage, we would have to be satisfied that the treatment (offering promotion on a full-time basis) was done on the ground that she was a part-time worker. We are unable to reach that conclusion. We do not accept there was any operative influence on the decision to offer the available upgrade roles on a full-time basis arising from the fact that the fact that the claimant was a part-time worker. The fact that this is how the industry resources its pilots resource and has done for some time is a strong indication that the fact the claimant was a part-time worker had no bearing on the existing practice. Similarly, the fact that the respondent had a resource deficit it was seeking to fill as efficiently as possible. Moreover, the offers of upgrade based out of East Midlands had the added element of night stops. This was an obstacle to the claimant irrespective of whether the role was full-time or part-time. It was a factor known to be central to the claimant's inability to work out of that route, was inevitably going to lead to her declining such offers yet the respondent honoured to convention of making the upgrade available to her. We suspect the essence of the claimant's complaint to be one that requires us to turn regulation 5of the 2000 regulations into something akin to s.19 of the Equality Act 2010 which we were unable to do.

Justification

8.9. As we have concluded there is no less favourable treatment on the ground that the claimant was a part-time worker, the respondent is not called upon to justify the treatment.

9. The Claim of Direct Sex Discrimination

Law

9.1. Section 13(1) of the 2010 Act simply provides:

> ***A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.***

9.2. By that provision, we are required to identify the reason why the treatment complained of occurred. That is the crucial question in cases of direct discrimination (**Nagarajan v London Regional Transport [1999] IRLR 572 HL**) and if we are able to, we will seek to make an explicit finding of the reason why it occurred. (**Amnesty International v Ahmed [2009] IRLR 884 EAT**). In this regard, the "because of" and "less favourable" questions are not always apt for separate consideration, particularly where the comparator is hypothetical.

9.3. Where we are unable to make an explicit finding one way or the other, we will apply s.136 of the Equality Act 2010 which provides:-

> ***if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.***
>
> ***But subsection (2) does not apply if A shows that A did not contravene the provision.***

9.4. We apply the **Barton/Igen** guidance as set out by the EAT and Court of appeal respectively. In doing so, the test is to be considered having regard to all the evidence before us and the mere difference in treatment and difference in characteristic is not enough (**Maderassy v Nomura International plc [2007] IRLR 246 CA**). We remind ourselves that the degree of influence the protected characteristic must have on the impugned act need only be more than trivial. To put it another way, that it was "in no sense whatsoever" because of the claimant's race.

9.5. Sex is a relevant protected characteristic for this provision. It is not necessary to identify an actual comparator and in this case the claimant relies on a hypothetical male first-officer.

Discussion and Conclusion

9.6. We do not entirely accept the claimant's assertion that the respondent is unwilling to offer command posts on a part-time basis. We have found that there could be circumstances were that happens from the outset, but that it has not occurred so far and, for other operational reasons, it is and was the case at the material time that it would be unlikely to occur. Equally, it is clear to us that the greatest prevalence of part-time working is amongst the Captain grade such that the issue is not one of never working part-time, but not initially on appointment/promotion. That aside, we consider the claimant's allegation on the

basis that it has not so far happened and was not likely to in the foreseeable future.

9.7. We first consider the hypothetical comparator. In order to meet the materiality requirements of s.23 of the Equality Act 2010, the essential elements of the male hypothetical comparator are that he is a part-time first officer seeking a part-time command role. In order for the claim to succeed as it is put, the hypothetical comparison must result in him being met with an offer of the command role on a part-time basis from the outset.

9.8. The claim is put on the basis of a hypothetical comparison because there have not been any male first officers offered a command post on a part-time basis from the outset. That in itself creates a significant difficulty for the claimant as there clearly have been numerous male first officers promoted to captain and there are now a number captains of both sex who how have subsequently become part-time. The claimant's argument is based on the fact that the respondent does employ part-time male captains. We agree, but they did not commence their promotion in part-time roles. The comparison to be performed is at the time of the offer of promotion. Not only does the experience of male first officers mean the claimant cannot point to one on whom she can rely as an actual comparator, but the respondent can point to positive evidence in rebuttal which we cannot ignore.

9.9. The exercise of any hypothetical comparison has to be performed within the surrounding evidential landscape. Namely, that all posts are made available on a full-time basis but that individuals can request part-time working within the role. We have not seen any other evidence to provide a basis for any inference to be drawn in support of the claimant's contention and we are left with the firm conclusion that the hypothetical male first officer would not have been treated more favourably than the claimant. We are not satisfied that the claimant has been treated less favourably, still less that her sex was in anyway whatsoever material.

9.10. This claim fails.

10. The claim of Constructive Unfair dismissal

Law

10.1. It is for the claimant to prove she was dismissed. Section 95(1)(c) of the Employment Rights Act 1996 provides that the employee is dismissed by her employer if-

> ***(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.***

10.2. It is well settled that in order to come within this provision the employee must prove a) that the employer has breached a term of the contract of employment; b) that the breach of that term is fundamental to the contract; c) that the employee resigns in response to that breach and not for some other reason and, d) the employee does not delay or otherwise affirm the breach so as to deprive him of the right to resign in response. (**Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**)

10.3. The contractual term the claimant alleges to have been breached by the respondent in this case is the implied term of trust and confidence. This was stated in **Mahmud v BCCI [1998] AC 240** as being–

> ***the employer shall not without reasonable and proper cause conduct themselves in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.***

10.4. Breach of this term can amount to a fundamental breach but whether there has been a breach is a question of fact and degree for the tribunal to determine. As Lindsey P emphasised in **Croft v Consignia Plc [2002] IRLR 851**

> ***it is an unusual term in that it is only breached by acts or omissions which seriously damaged or destroyed necessary trust and confidence. Both sides are expected to absorb lesser blows.***

10.5. This is a last straw case. The last straw need not amount to a breach in its own right and need not share the same character and nature as the earlier acts but, when all acts are considered together, it must contribute something to the breach, even if relatively insignificant (**London Borough of Waltham Forest v Omilaju [2005] IRLR 35)**. The test as to whether the employee's trust and confidence has been undermined is objective. We start by considering whether the last straw amounts to a breach in its own right, if not we consider whether it contributes to the earlier allegations as part of a course of conduct which cumulatively amounts to a repudiatory breach destroying or seriously undermining all trust and confidence (**Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**).

Discussion and Conclusions

10.6. The matter relied on by the claimant as amounting to the "last straw" is Mr Schutz's proposals for working out of Birmingham as discussed in the meeting of 8 March and put in writing by him on 10 March. We have found little changes between that meeting and letter and the parties' earlier meeting and correspondence in January.

10.7. The claimant identifies five areas in which she says the implied term of mutual trust and confidence has been breached by the respondent's conduct entitling her to resign. They are summarised by Mr Hodge as:-

a Failing to provide the claimant with a reasonable a sustainable working pattern.
b Notifying the claimant of return to work training despite no working pattern having been agreed.
c Mr Schutz setting out a working pattern that was clearly unworkable and unsustainable.
d Attempting to change the claimant's place of work on two occasions.
e Failing to offer the claimant a Command position on a part-time basis.

10.8. We start by considering such of those matters that arise within the last straw event, namely the outcome of the discussions the claimant had with Mr Schutz on 9 March and his letter of 10 March. They are the extent to which there was a change of place of work, the feasibility and sustainability of the proposal and the issue of the working pattern of any command position. Looking at those matters in the round, we have a considerable difficulty with the events in March as having any reasonable basis for founding a breach of contract. Against the background to this case, the Birmingham option can only be seen as an extremely positive development. Moreover, the way in which the respondent had sought to structure

it so as to respect the claimant's desire not to relocate is an equally positive factor. The option arises after a year in which the prospect of reconciling the parties' positions seemed impossible. Even if there were elements within the proposal that the claimant required further detail on, the proper response was to explore it further if she genuinely was prepared to continue working for this respondent. We have found that, in the face of a positive proposal, the only explanation for her not doing so is that she was already of a mind that she was not prepared to continue working for the respondent. In other words, her decision to resign had crystallised much earlier.

10.9. We are therefore of the opinion that the matters contained in the last straw event do not amount to a breach of the implied term of trust and confidence in its own right, or that they can be said to be the cause of the resignation. Everything the respondent was proposing at that stage was not only not calculated or likely to destroy or seriously undermine the trust necessary in a contract of employment, it was done firmly within the concept of reasonable and proper cause. We have further concluded that the overall positive nature of the developments in 2017 and particularly the viability of the Birmingham route as a viable option for the claimant mean that this does not add anything to any earlier events so as to form part of a wider breach of the implied term.

10.10. In order to succeed in her claim for constructive unfair dismissal, the claimant must now rely on events that were of some age by the time of her resignation. Of the wider matters she relies on, some of the allegations fall away on our findings of fact. Firstly, we do not accept that the respondent has sought to change the claimant's place of work on two occasions. The first is said to be the late 2015 change to the Brussels route. This did not change the claimant's place of work and she remained based at East Midlands. The second occasion is said to be the 2017 proposal to work out of Birmingham. Under this proposal also the claimant would retain East Midlands as her base. Further, this was a proposal to resolve the impasse, not an imposition, and a positive one at that. It has to be seen in the context of the parties at last having a workable solution. Secondly, we do not accept that the failure to offer the claimant a command position on a part-time basis is a breach of the implied term or contributes to it. The claimant's contract of employment was that of a part-time first officer. She had been granted the change from full-time on her first request. She was entitled to continue working in that contractual relationship indefinitely and there was nothing about the respondent's need for captains which went to undermine her present contractual position or provide a reasonable basis for concluding she could never work at command level on a part time basis. The respondent had repeatedly made clear on each occasion that such command posts as had become available during the relevant time were needed full-time at least at that time. It did not rule out part-time on appointment in the future but, as we found, it was highly unlikely in the current climate. That did not mean, however, that at some point in the future the roster opportunity might present scope for a change from full-time to part-time. The working pattern was not, however, the only obstacle to the claimant's progression. She had made clear that she was only interested in working out of East Midlands. The only route out of East Midlands involved a tour with night stops which she would not undertake. Consequently, even if a command post was available at East Midlands on a part-time basis, the claimant would not have previously been in a position to accept it. In terms of what might happen in the future at Birmingham, the current cohort of upgrade training had already commenced. It was premature to rely on what might or might not happen with upgrade in the future as a basis for resignation.

10.11. Thirdly, the notification of return to work training arose at a time when the parties were exploring what we found to be a real prospect of a workable solution. The claimant required her refresher training and, indeed, in other respects she criticises the respondent for not having maintained her competencies during the time she was not working the revised East Midlands route. We do not see that providing the claimant with her return to work training is capable of contributing to a breach of the implied term of trust and confidence.

10.12. Fourthly, we have rejected as a fact that the Birmingham proposal would lead to an unworkable and unsustainable working pattern. There is a substantial overlap between this allegation and the allegation that "Mr Schutz has failed to provide a reasonable and sustainable working pattern" as this arises in two respects. The first is that the change of the East Midlands/Brussels route removed what had previously been a reasonable and sustainable working pattern as far as the claimant was concerned. The change itself was not a breach of the express terms of the pilot's engagement. The manner of its introduction was swift and potentially capable of contributing to a breach of the implied term, but the claimant was never in a position where she had to work this change. Throughout the first 5 months she was in any event absent due to injury. During this period, the parties were seeking alternative solutions for the claimant to continue flying. The second aspect of this allegation is the proposal to fly the new Birmingham route which, we understand to be allegation (c) and which we have already dealt with.

10.13. We have come to the conclusion that there is no cumulative breach of the implied term. The nearest we have been able to get to identifying a breach is in the manner in which the revised East Midlands route was first implemented at the end of 2015. That occurs some 15 months before the resignation and during that time we are satisfied both parties sought a resolution with a view to enable the employment relationship to continue such that, if there was a breach in the manner of implementation, the claimant's subsequent conduct affirmed it.

10.14. We therefore conclude that the claimant's resignation was no more than a resignation. The claim for constructive dismissal therefore fails.

11. **Jurisdiction**

Law

11.1. By section 123(1) of the 2010 Act, claims must be brought within 3 months of the date of the act to which the complaint relates. So far as is relevant, section 123 further provides:-

> ***(3), For the purpose of this section-***
> ***(a) conduct extending over a period is to be treated as done at the end of the period;***
> ***(b) failure to do something is to be treated as occurring when the person in question decided on it.***
> ***(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-***
> ***(a) when P does an act inconsistent with doing it, or***
> ***(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.***

11.2. The concept of conduct extending over a period of time provided by 123(3)(a) requires there to be some discriminatory policy, regime, rule, practice or

principle in operation which is materially relevant to the earlier conduct in question. (**Barclays Bank plc v Kapur and others 1991 ICR 208 HL**). The notion of a policy, regime, rule, practice or principal is not to be taken too literally in a way that limits the concept. They are to be treated as examples of any such state of affairs which exists over a period of time and is connected and relevant to the matters in issue. (**Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530**).

11.3. It is only later proven acts of discrimination which can form part of an act extending over a period. If the "in time" allegation is not proved, it cannot be used to bring an earlier event within time. **(Royal Mail v Jhuti UKEAT/0020/16).**

Discussion and Conclusion

11.4. We are not invited to consider just and equitable extension of time and have not received evidence going to that issue. We are invited to consider the earlier allegations of discrimination as forming part of an act extending over a period, the end of which is in time such as to bring them all within jurisdiction. The submissions do not identify the state of affairs said to bridge the discrete allegations other than in broad terms of "its ongoing discriminatory regime and practice towards the claimant". That does not help isolate the state of affairs that is said to render an earlier (and out of time) allegation, and a later (and in time) allegation as both forming part of the same discriminatory continuing act.

11.5. However, the result of our conclusions means this is academic in the light of **Jhuti**. That effectively ends the consideration of any continuing act that is prima facie out of time as our findings on the merits means there is no later, in time, act of discrimination for the earlier matter to potentially form part of. Unless we have before us a later act of discrimination established which is itself in time, we cannot consider the relevant evidential landscape which may provide a sufficient basis to conclude both are part of a discriminatory act extending over a period.

11.6. For that reason, those allegations that are prima facie out of time remain so and we conclude that we do not have jurisdiction to determine them on their merits.

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Employment Judge Clark
Date 1 October 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE