EMPLOYMENT TRIBUNALS

Claimant:		Respondent:
Miss S Sylvester	V	British Airways Plc

Heard at:	Reading	On: 24, 25, 26, 27 and 28 September 2018
Before:	Employment Judge Finlay Members: Mrs AE Brown and Mr G Edwards	

Appearances
For the Claimant: Ms J Bowen of Counsel
For the Respondent: Ms N Owen of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1. The claimant was unfairly dismissed by the respondent.

2. The dismissal of the claimant by the respondent was in breach of contract.

3. The complaint of direct disability discrimination fails and is dismissed.

4. The complaint of discrimination arising from disability succeeds (in part).

5. The complaint of indirect discrimination is dismissed upon withdrawal.

6. The complaint of failure to make reasonable adjustments succeeds.

7. The complaint of harassment related to disability succeeds (in part).

8. The complaint of victimisation fails and is dismissed.

REASONS

THE HEARING

1. The hearing took place between 24 and 28 September 2018 and dealt with liability only. Both parties were represented by Counsel.

2. The claimant brought the following complaints against the respondent arising from her employment by the respondent and the termination of that employment:

    - (Constructive) Unfair dismissal
    - Breach of contract (wrongful dismissal)
    - Direct discrimination
    - Discrimination arising from disability
    - Indirect discrimination
    - Failure to make reasonable adjustments
    - Harassment
    - Victimisation

3. The relevant characteristic for the complaints of discrimination is disability. The respondent had conceded prior to the hearing that at all material times, the claimant had been a disabled person within meaning of the Equality Act 2010 (EqA). As at the start of the hearing, the respondent's knowledge of the claimant's dismissal (actual or constructive) remained in issue.

4. There had been a Preliminary Hearing on 5 April 2017. As at that point in time, the parties had agreed the list of issues to be decided in the case, as set out in an Agenda for Case Management sent to the Tribunal on 13 March 2017. We will refer to that list of issues as the 'preliminary hearing list of issues'.

5. In relation to the issue of liability, the parties had prepared a further list of issues which was agreed, save for a small number of points which were noted on the document itself. The representatives explained that although this document was stated to be a draft list of issues, it was intended to replace the preliminary hearing list of issues in relation to the complaints of discrimination. Before hearing evidence, we went through this list with the representatives and noted amendments to it. For ease of reference, this list is annexed to these Reasons as an appendix and we will describe it henceforth as the 'agreed list of issues'.

6. The agreed list of issues also incorporates two alterations which were made by the parties during the hearing, which were the claimant's withdrawal of her complaint of indirect disability discrimination and the respondent's concession that it had the requisite knowledge of the claimant's disability with effect from 20 June 2016 (albeit that it did not concede that it had the requisite knowledge of the 'substantial disadvantage' required for the complaint of failure to make reasonable adjustments).

7. The complaint of indirect disability discrimination is therefore dismissed on withdrawal.

8. It was also agreed by the parties and the Tribunal that in dealing with liability, the Tribunal would consider the following limited questions of remedy:

   8.1 Breach of the ACAS Code on Disciplinary and Grievance;

   8.2 (Contributory) conduct by the Claimant;

   8.3 Polkey reduction.

9. During the hearing, having heard part of the evidence and considered the correspondence following the initial decision by the respondent to terminate the claimant's employment, we referred the parties to section 95(2) of the Employment Rights Act 1996 (ERA) and invited them to consider whether that section applied.

10. Put simply, if section 95(2) applied, then the claimant would be taken to be have been dismissed by the respondent (rather than constructively dismissed) and the reason for the dismissal would be the reason for which the Respondent's notice had been given.

11. Whilst this was not the basis upon which the complaint of unfair dismissal had been brought or responded to, both representatives agreed that the Tribunal had power to consider this point and should do so. Having considered the matter, Ms Owen confirmed that she did not require leave to recall Ms Phipps who had given her evidence before the point had been raised. We have therefore gone on to consider the termination of the claimant's employment both in the context of "ordinary" unfair dismissal and constructive unfair dismissal.

12. The parties had prepared an agreed bundle of documents in three folders running to well over 800 pages. We considered those documents to which we were specifically referred and those documents referred to in the witness statements of those who gave evidence before us. In addition, we had the benefit of an agreed cast list and chronology. Both representatives prepared written closing submissions which they amplified orally once the evidence had been given. Those submissions were of considerable assistance to the Tribunal.

13. We heard evidence from four witnesses. The claimant gave evidence on her own account and for the respondent we heard from Ms Alexandra Phipps who had been the Claimant's line manager for much of the relevant period, Ms Judith Akuta, an occupational health professional and Ms Berangere Vincent who had heard the claimant's appeal against dismissal. We have formed our conclusions based upon the evidence we heard from those witnesses and the documentation which we have read.

14. We did not find the claimant to be an entirely credible witness. It was apparent that the claimant's loss of trust in the respondent was such that the claimant found it difficult to have faith in almost anything which was said by the respondent. This had led her to make assertions which were
simply not credible in the light of the other evidence available. Amongst those assertions were:

    14.1 A suggestion that notes of meetings had been deliberately fabricated by note-takers. This seemed to be part of a 'conspiracy theory' and a belief by the claimant that those employed by the respondent were 'all in it together'. We say at the outset that we believe that the meeting notes available to us, whilst not verbatim, were a relatively accurate record of the relevant meetings. As set out below, we had the benefit of listening to a recording of part of one of those meetings.

    14.2 The recording related to a meeting on 10 October 2016. The claimant continued to assert, despite the evidence of the recording, that Ms Vincent had been rude and aggressive to her during that meeting. The evidence of the recording was to the contrary.

    14.3 At one point, when discussing bereavements in her personal life, the claimant vehemently denied that her Uncle had died, despite evidence in the bundle of an email from her to the respondent referring to the death of her Uncle.

15. That is not to say that we considered all of the claimant's evidence to be unreliable. The fact that she may have exaggerated incidents does not mean that we reject other areas of her evidence, many of which we found to be compelling.

16. We have also noted that there were occasions when the claimant's evidence to us did not entirely accord with statements made by her to the respondent at the time. However, we can well understand why the claimant would wish to try and tell the respondent what she believed the respondent wanted to hear, bearing in mind the claimant's primary motivation was to retain her employment and return to flying duties. In our view, the events at work during 2016 clearly had a significant impact on the claimant and the fact that on occasions, she may have tried to make light of that impact in her communications with the respondent does not mean it did not happen.

17. Finally, we note from our impression of the claimant during the hearing that she seemed to be able to present a calm and unflustered appearance despite what she may have been feeling inside. There were occasions during the hearing when the claimant became upset very suddenly and apparently without warning. We have been conscious to take into account the claimant's apparent ability to mask the impact of events and recollections of those events when considering the evidence she gave. We have also noted that at all relevant times, she was suffering from a significant mental health condition.

18. As for the respondent's witnesses, we considered that both Ms Phipps and Ms Akuta gave their evidence in an honest and truthful manner which was consistent with the other evidence available to us. Whilst we strongly questioned some of the conclusions and decisions they made, we consider them to have been reliable witnesses, in that they recalled events to the best of their knowledge. Similarly, whilst we found a number of Ms Vincent's statements and decisions confusing, we consider that she gave her evidence in a straightforward and reliable manner.

THE FACTS

19. The relevant facts which we have found are as follows.

20. The respondent is a public limited company of significant size and resources. It employs over 27,000 staff at Heathrow Airport alone. As a large company, it has separate support departments for HR (known as "PCS"), occupational health (known as "BAHS"), payroll and other areas of operational support. We make the general comment that there appeared to us to be a general lack of collaboration between these separate departments or sections which tend to act in isolation.

21. The claimant joined the respondent on 25 July 2014 as Cabin Crew working on a full-time basis. Competition for such roles is high and the claimant described this as her "dream job". Prior to the issues which formed the subject matter of this claim, she thoroughly enjoyed working for the respondent and was considered to be a good worker. There was reference to the claimant having triggered a first warning under the respondent's short-term absence procedure at some point prior to 2016, but no suggestion that her attendance or conduct had ever been a particular issue otherwise.

22. There were some six occasions in 2015 when the claimant was late for work. For obvious reasons, it is important to the respondent that cabin crew attend on time and the claimant was then put on a performance improvement plan by her manager, Alexandra Phipps (AP).

23. AP felt that an explanation given by the Claimant for one of these instances of lateness may have been false and she initiated a formal investigation. On the advice of PCS, this was then treated as an allegation of gross misconduct. However, the manager charged with conducting the investigation decided that the case should not proceed on that basis and that it should be managed informally by AP. The claimant was not disciplined but the issue did colour her relationship with AP and the trust which the claimant had in AP. She also objected to the way in which one of the meetings had been conducted by the respondent. These incidents in 2015 are not part of the claimant's complaints before the Tribunal but are relevant to the context in which the subsequent events occurred.

24. The claimant has suffered from health problems throughout her life, most recently and currently depression and anxiety, low mood and anxiety attacks. She has

experienced a number of traumatic events in her personal life. In 2015, due to events in her personal life, she was suffering from low mood, anxiety and depression such that she commenced a period of sickness absence on 2 January 2016. She has alleged that the respondent's treatment of her over the attendance issues in 2015 exacerbated her ill health. We have no evidence on which to make such a finding, but it is certainly not unreasonable to assume that the stress of the disciplinary process may have contributed to her ill health.

25. The claimant was referred to BAHS for assessment which took place on 20 January 2016. The assessment was by telephone, at the claimant's request. It is notable, however, that from the start of the period of sickness absence on 2 January 2016 until the end of her employment in November 2016, she was only seen face to face by BAHS on one occasion and that occasion was after the initial decision to dismiss her had been made. This is despite the fact that she was absent from work for all but approximately three weeks of that period.

26. The occupational health advisor was Judith Akuta (JA) who became the BAHS case manager for the Claimant. JA has ten years' experience in occupational health but had only joined the Respondent in 2015. She was and is employed directly by the Respondent.

27. JA's initial assessment following the discussion on 20 January was that the claimant was unfit for all duties. There is a dispute as to how much the claimant told JA about her symptoms and the background to her medical condition during this telephone conversation and subsequent review discussions in February and March. We are satisfied that the claimant's line management and JA were aware that she was suffering from a mental health condition which rendered her unfit for all duties, that she was having emergency counselling and also that she had suffered a recent bereavement.

28. The relevant documentation is a referral form completed by AP's line manager, Zianne McQuitty ("ZM") on 15 January 2016. ZM was managing the claimant's absence at this time due to the difficulties in the relationship between the claimant and AP following the lateness issues in 2015.

29. This form has space for narrative and a number of boxes to tick including one which states: "the disability discrimination provisions of the Equality Act 2010 may apply". JA explained that unless a specific box has been ticked, her invariable practice is not to consider the question. She would not, for example, offer her own thoughts as to whether a particular employee has a disability. Whilst we consider this to be unusual, and perhaps indicative of the general lack of collaboration between departments within the respondent, we accept JA's evidence that this is how she worked. Accordingly, whatever JA's views might have been, those views were not communicated to the claimant's line management at that time.

30. The claimant remained off work providing sick notes from her GP up to 16 March 2016. She had further telephone conversations with JA on 24 February and 10 March. JA assessed her as being unfit for work throughout, noting on 10 March that she had suffered a further bereavement.

31. The respondent has a "Managing Absence" section in its staff handbook (entitled "Our Colleague Guide"). Within this, there is both a short-term and long-term absence procedure.

32. Under the long-term procedure, an initial review meeting is held after one month's absence with further review meetings at the end of three months and five months if required. Under this procedure, the claimant met with ZM on 1 February and following that meeting, ZM and AP had a discussion with the claimant and it was agreed that from then on, AP would resume day to day management of the claimant.

33. By mid-March 2016, the claimant felt able to return to work on a phased return basis. Her GP supported this, providing a fit note on 22 March stating that she may be fit for work and recommending a phased return to work "gradually increasing to full time". The respondent's procedure meant that she was not able to return to work without being reviewed again by BAHS and there was a short delay due to JA's unavailability. The claimant did then meet with JA on 31 March 2016.

34. The claimant was due to commence a further course of counselling on 4 April 2016 which would last for seven weeks. JA did not consider her to be fit for flying duties at that time and it was therefore agreed that she would undertake ground duties during this period with a view to returning to flying duties thereafter. The claimant knew that if she missed more than one counselling session, the course would be cancelled, and it was therefore agreed by JA that she should work four days a week for this seven-week period with Thursdays off so that she could attend her counselling sessions. She was not required to come into work on Thursdays at all, the counselling sessions taking place local to her home.

35. There is significant dispute regarding this discussion on 31 March. The claimant is scathing about JA's attitude towards her, describing her as rude, hostile, aggressive and negative. She makes a specific allegation that when she informed JA of the further counselling sessions, JA's response was along the lines of "no, six sessions is enough, people have to put into practice what they have learned, live their lives".

36. Having heard evidence from JA, we have no doubt that she can be forthright and blunt in her opinions. She came across to us as someone with an assertive personality. However, we are satisfied that she acted professionally in her dealings with the claimant and that she did not say these words. We note that rather than attempting to dissuade the claimant from having the additional

counselling sessions, JA recommended a full day off work each week in order to attend those sessions.

37. We also consider that as at this discussion on 31 March, the approach taken by JA, and also by the claimant, was sensible and reasonable. There are obvious reasons why anyone undertaking flying duties should be fit for work and the temporary ground duties for four days a week seemed a sensible adjustment on a temporary basis. It would have been impractical for the respondent to arrange a rota for flying duties for the claimant, whether short or long haul, which allowed her to attend her Thursday counselling sessions and which satisfied the need for her to be fit to fly.

38. Almost immediately, however, the claimant developed concerns about these return to work arrangements, emailing JA at 23:50 on 31 March. The claimant, who lives in South East London, had a significant commute to and from work – as much as four hours a day. In her email of 31 March to JA, she stated that whilst she understood the respondent might not be able to arrange flying duties for her but enquired whether there were any other options. She wrote:

> "I am just concerned that solely ground duty days for seven weeks will in fact be the opposite of a phased return because the travelling every day will put me under increased pressure which I am not under with one of my usual rosters. I am very much looking forward to returning to my role."

39. Nevertheless, the claimant did return to work on ground duties on 6 April 2016. It had been agreed that she could commence work at 10:00 am to allow her additional time to travel to work, although there is a dispute as to when the claimant could and did finish work on a daily basis. The respondent suggested that it was agreed that she could leave at 3:00 pm. The Claimant's evidence was that she could leave at 3:00 pm (or when she had finished her duties) only if her manager approved her departure at that time and her manager was not always there to give her approval. There is no clocking in or out for ground duties and we have not heard from the claimant's line manager when she was undertaking ground duties. There is clear evidence that on occasions, she did leave before 5:00 pm but we accept also that on occasions, she stayed until 5:00 pm.

40. On 8 April, AP met with the claimant who confirmed that she was unhappy with the arrangements. She advised AP of a further bereavement. By this point in time, concerns were being expressed by the claimant's colleagues on ground duties regarding her behaviour.

41. Even though the claimant was by then working four days a week, AP wrote to her on 8 April 2016 inviting her to a further long-term absence review meeting, three months having elapsed since the start of her absence in January. The letter of invitation warns the claimant that if she is not able to return to work, "I may need to consider termination of your contract under section 2.7 managing attendance of the Our Colleague guide as a last resort".

42. The long-term absence review meeting took place on 12 April. AP issued the claimant with a formal warning which was valid for six months and she registered the claimant with the respondent's Career Transition Service with a view to finding her a new role within the respondent, this despite the fact that the she was on a seven week phased return with a view to getting back to her contractual flying duties on a full time basis and despite the
fact that both she and JA had expressed the intention that she would be flying at the end of it. AP's follow up letter advised that if she was not able to obtain another role having been continuously absent for five months and/or was unlikely to return to work in the next month, consideration would be given to termination of her employment.

43. Over the next week, the claimant's health deteriorated. She was drinking excessively and had suicidal thoughts. She was not coping with the commute four days a week but had been unable to persuade the respondent to adjust the phased return arrangements. She consulted her GP on 14 April 2016 and the GP signed a doctor's note stating: "Miss Sylvester feels that she can only work five hours a day, three days a week at present Please consider a more thorough occupational health assessment if a more detailed specification is required. Thank you."

44. In AP's absence, the claimant spoke to ZM on 20 April 2016, again expressing her concerns about her hours and expressing lack of trust in JA. The doctor's note was then referred to JA's line manager who reviewed the medical reports and despite the doctor's clear statement in the note of 14 April, decided not to make any adjustment. She did not speak to the claimant before doing so. By this point, the claimant's mental health had worsened considerably and on 25 April 2016, she attempted suicide by taking tablets and drinking alcohol. She did not return to work for the respondent again after that date.

45. The claimant was then put into the care of her local treatment team and on 28 April 2016, she telephoned ZM and handed the telephone to her consultant psychiatrist. ZM reported that day to AP by email. Some words have been redacted but there is no real dispute as to the meaning of that email which states (our interpretation of the redacted words being in square brackets):

> "From the phone call the [doctor] advised me that Sarah had been telling him, she was receiving a lot of phone calls from work and she didn't feel up to receiving them, so he wanted to speak to me to establish that I would stop calling her. My response was very firm with him and I outlined that it is an expectation that she maintained contact and that not reporting for work for three days was unacceptable. I outlined the care and support she had received and that I could refer her to BAHS if needed. I have agreed that going forward contact is to be maintained once a week – his team will contact me by phone and I told him that Sarah had to at least contact me or Alex by text. I advised him that she had just had a recent absence meeting (3-month) and due to this, she may be [dismissed] due to the timescales of

the policy highlighted (just to make a point) – as he tried to tell me that she may be signed off for work for a long time."

46. Whilst ZM did not know at that point that the claimant had attempted suicide, the fact that she had asked her consultant psychiatrist to talk to the respondent direct should have alerted ZM to the seriousness of her

mental health condition. This email by ZM betrayed a particularly insensitive approach.

47. Although an email was sent by the claimant's doctor to the respondent on 16 May, the treatment team failed, for reasons unknown, to adhere to the agreement to maintain contact. The claimant also did not contact the respondent. It is clear, however, that during next few weeks, the respondent made various attempts, by text and telephone, to speak to the claimant direct. It is not clear how many texts or calls were made but there were clearly a number. In her witness statement, AP states:

> "It was not my intention to harass the Claimant with messages as she now claims. I sent a reasonable number of texts and made a reasonable number of calls to maintain contact with her. In accordance with the policy, she had an obligation to maintain contact with her line manager."

48. One such occasion was on 2 June when AP texted the claimant. The content of this text was not available to us, but it appeared that AP was suggesting a further referral to BAHS which by that time had closed its file on the claimant. She did respond to this text but not to the request for a rereferral. AP then wrote to her on 2 June inviting her to a meeting on 13 June. The letter urges her to allow the respondent to re-refer her to BAHS and to contact AP as soon as possible to facilitate the referral. The letter also invites her to a further long-term absence review meeting and warns the claimant that if it is not possible to support her back to work, AP may need to consider termination of her contract.

49. By this point, the claimant had developed Bell's Palsy which gave her the appearance of a stroke victim.

50. The claimant did not consent to the re-referral to BAHS prior to the meeting on 13 June but at that meeting, she presented an email to AP as well as a letter from her care co-ordinator dated 10 June. Her email goes into considerable detail about her illness and the background to that illness advising AP that she had attempted to take her own life. The email concludes with the claimant stating: "Even with the turmoil of the last six months, I still have hope, there has been continual progress and I hope to return to work soon. I am happy to get a new BAHS referral to facilitate this." The letter from the care co-ordinator provided further detail of both the mental health condition and the diagnosis of Bell's Palsy.

51. It was therefore agreed at the 13 June meeting that the claimant would be referred back to BAHS. The referral form was completed by AP on 13 June asking for a response from BAHS by 20 June. In the referral, AP requested to know if recent changes to the claimant's condition were covered by the Equality Act and also potential timescales for a return to work.

52. During the meeting, the claimant had also advised AP that she had a phobia of her telephone ringing and this was a condition caused by her mental health condition. She therefore tended to keep her phone on silent most of the time.

53. Sometime between 13 and 16 June, and without waiting for the outcome of the occupational health referral, AP made the decision to terminate the claimant's employment, advising her of the decision in a meeting on 16 June and confirming the decision in a letter dated the same date. The letter gives the reason for dismissal as the claimant's inability to return to work/be fit for an alternative role. The termination date is stated to be 16 July 2016. In her evidence to the Tribunal, AP noted that the claimant had not, so far as she was aware, applied for any alternative roles within the respondent, but her letter of dismissal supports the claimant's position which is that she was told there were no roles available for her.

54. Prior to dismissing the claimant, AP had taken advice from PCS and appears to have been told that the dismissal outcome could have been changed with an extended termination date to allow the claimant to show that she was in fact fit enough to return to her contractual duties. There is no mention of this in the letter. Nevertheless, the referral went ahead on 20 June and JA's conclusion was that: "In my opinion, she is able to return to normal duties. However, in order to ensure a smooth transition back into her working environment, I will recommend the following restricted flying duties please: no back to back for one calendar month". JA, having now been specifically asked, also stated that the claimant's condition was likely to be considered a disability in accordance with the relevant wording of the Equality Act. Despite this report from BAHS, AP took no action and the claimant was left to pursue an appeal.

55. The claimant's appeal was heard by Berangere Vincent (BV). BV had been employed by the Respondent since 2007 but had only joined the "mixed fleet" team in which the claimant worked on 1 June 2018. BV did not know any of the protagonists prior to her involvement in the appeal.

56. The claimant submitted a lengthy appeal letter to BV on 30 June and she stated in her opening paragraph: "The main focus of my appeal is that I feel I am being discriminated against and penalised for experiencing very serious mental health issues and a subsequent mental health crisis". In her letter, she makes complaints against JA in particular and also confirms that she had not been capable of making contact on a weekly basis. She concludes by stating that she believes that she is now fit to return to work, in that her condition was being monitored and under control. She confirms that she wanted to return to her role.

57. Although the letter of appeal was emailed to BV on 30 June, it was ignored by BV until she was prompted by a voicemail from the claimant and an instruction from BV's own line manager. Odd that it may appear, we accept BV's evidence that having just taken up a new role, she had been inundated with work and had simply not opened any emails save those from her direct team. Having been alerted to the

appeal, BV wrote to the claimant on 15 July to extend her termination date to 29 July in order to allow time for the appeal to take place.

58. The appeal meeting took place on 25 July 2016. The claimant was accompanied by her trade union representative. It is clear from the notes that BV went through the grounds of appeal letter in a thorough and structured manner.

59. Following the appeal meeting, BV exchanged emails with AP who confirmed to BV the advice that AP had received from PCS that the termination date could be extended and also confirmed that she had had no contact with the claimant after receiving the assessment on 20 June. BV also spoke to JA who confirmed that the claimant was likely to covered by the Equality Act and that in JA's opinion, the claimant was able to return to normal duties with a restriction for a month. Finally, BV exchanged emails with ZM regarding the events in April 2016. In her reply, ZM stated: "When I came back to the hub at 3:30, I had been told she had left for the day and had not started until 10:00 am. She had full time hours". Despite the respondent's protestations to the contrary, we consider ZM's statement to be a criticism of the claimant.

60. Having carried out those further investigations, BV concluded that the claimant's complaints were not merited. She also concluded that the decision to terminate her employment was correct at the time it was made. However, she took note of the BAHS report of 20 June and decided that the claimant should be reinstated so that she could have a further opportunity to demonstrate – within a reasonable period of time - that she could fulfil her contractual duties. She considered the beginning of January 2017 would be such a reasonable time.

61. BV was due to go on annual leave between 18 August and 5 September. On 8 August, she telephoned the Claimant to tell her that she was to be reinstated and that BV hoped to complete the outcome letter before the end of that week. The terms of the reinstatement were not explored in any detail during that conversation.

62. In the event, BV failed to complete the outcome letter before her annual leave, eventually sending it on 21 September 2016, almost three months after the appeal had been presented. BV explained that part of the reason for the delay was that her initial draft letter had been sent by PCS to external lawyers for comment and those lawyers had advised her that it made little sense and should be rewritten completely. Whatever the reason, the claimant received no payment from the respondent during the period of the appeal process and what is worse, she had been receiving threatening letters regarding an alleged salary overpayment of £952.37 from another of the respondent's departments (People Services) which continued even after the outcome had been communicated.

63. There are elements of BVs' outcome letter which are not easy to comprehend. BV confirms that the appeal was rejected, a point confirmed by BV when she gave evidence to the Tribunal. At the same time, she states in the letter that she believes

that more could have been done following the 20 June BAHS report and the respondent should have contacted the claimant on receipt of that report in order to review the original outcome. As a result, BV has decided to reinstate her "albeit with an extended termination date of 4 January 2017".

64. Otherwise, the letter is comprehensive and it does deal with the points raised by the claimant on appeal. It is notable, however, that BV expresses criticism of the claimant's (lack of) communication stating that the process had not been helped by the claimant's general lack of engagement and that she had not engaged fully with the absence management process.

65. The claimant responded to the outcome letter by an email to BV on 30 September referring to a number of mistakes/discrepancies and seeking an opportunity to clear them up. In response, BV wrote to her on 3 October inviting her to a meeting "to discuss your appeal outcome letter". The claimant responded by email the same day stating that she was very unhappy with the outcome of the appeal and that she no longer wished to be managed by AP, citing a lack of trust. Whilst she understood that BV had stated in the outcome letter that it was her final decision, she hoped that BV would reconsider it based upon concerns that she had raised.

66. In the event, the meeting on 10 October between BV and the claimant turned out to be something of a disaster, primarily because BV and the claimant had totally different expectations of that meeting. Relying on the wording in the invitation quoted above, the claimant expected to revisit the points at issue in the outcome letter. On the other hand, BV clearly had no intention of looking backwards and was only prepared to discuss the arrangements for the claimant's return to work, considering that those other matters had already been dealt with and the process had been exhausted.

67. The claimant has alleged that BV was rude and aggressive, hostile and continually speaking over her. We have had the benefit of listening to a recording of some 17 minutes of the meeting and it is abundantly clear that while both parties were clearly frustrated, BV acted professionally and was in no way rude or aggressive. On the contrary, there were a number of occasions when the claimant spoke over her and it tended to be the claimant's voice which was raised. Having heard the recording and review the note taken by ZM of the meeting, we also consider that those notes were a reasonably accurate record of the meeting.

68. The only real outcome to the meeting was that BV agreed that the claimant should henceforth be managed by a different line manager, SM. The claimant was unhappy with this as SM was still part of BV's team. It is also apparent from the notes and what we heard that BV continued to be critical of her lack of engagement.

69. SM contacted the Claimant on 20 October to introduce herself. The claimant made it clear that she was not unfit for work at that time. Having been dismissed, there were various procedural and administrative steps which needed to be taken before

she could return to flying duties, including the need to attend a course, but despite repeated contact between the claimant and SM, it seems that very little progress was made by the respondent in getting her back to work. The respondent again appears to blame the claimant for failing to confirm that she was fit for work, but we do not accept that this is a justifiable excuse for the delay, particularly as the decision to reinstate the claimant had been taken as early as 8 August. We note again that during this period, the claimant was not being paid.

70. By this point, the claimant's mother had been diagnosed with cancer, a fact communicated by the claimant to SM. During this period, SM contacted her on multiple occasions to explain that she was making her way through the list of things that needed to be completed in order to reinstate a crew member. The claimant has complained about this contact from SM but we do not criticise SM for it. It seems that she was not aware of the background to the claimant's health and whilst the claimant might well criticise the respondent for the fact these communications from SM did not appear to speed the process up, we do not think it is fair for her to criticise SM for the fact of those contacts.

71. On 7 November 2016, SM spoke to the claimant. SM recorded that the claimant had declared herself fit for duty in that conversation and that she had been fit since having been reinstated. She then records that the claimant told her that she did not wish to return to the company and that it had been "too stressful" and with her mother being unwell, it had all "got too much". SM advised BV of this conversation and BV emailed the claimant asking her to confirm in writing if she did not wish to return to the respondent.

72. On 11 November, the claimant emailed SM and BV denying that she had ever said that she did not wish to return to the respondent and advising them that she lodged a request for early conciliation with ACAS. Although the claimant has denied it, we believe that she did indicate to SM on 7 November that she did not wish to return to the company. We can see no reason for SM to make this up.

73. In any event, the claimant did resign in writing on 16 November 2016. This followed letters and emails to her earlier that day by BV, firstly inviting her to a further absence review meeting and secondly detailing some of the arrangements for her return to work (for example, a return to work interview and fitting of a uniform) on the assumption that she did not intend to resign. The claimant's letter of resignation was emailed at 23:49 on 16 November and was stated to be with immediate effect. The letter states:

> "I am resigning in constructive dismissal circumstances due to the accumulative effects of the conduct I have been subjected to by British Airways over the last year. This conduct was in breach of the duty of trust and confidence, which is implied in all employment relationships and therefore I can no longer continue to work for the company. I believe there has been a repudiatory breach of my contract of employment because of

> discriminatory acts; I am therefore resigning in response to this discrimination."

THE LAW

74. The relevant law which we have taken into account is as follows.

Dismissal

75. Under section 94(1) ERA:

> "An employee has the right not to be unfairly dismissed by his or her employer. To make a complaint that this right has been contravened, the employee must first establish dismissal."

76. Constructive dismissal is defined by Section 95(1)(c) ERA which states that an employee is dismissed by his or her employer if:

> "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."

77. The case of Western Excavating Limited v Sharp [1978] ICR 221 determined that there are three elements for a claim for constructive dismissal: (1) A repudiatory or fundamental breach of contract going to the root of the contract; (2) A resignation by the employee in response to that breach of contract - the case of Nottinghamshire County Council v Meikle [2004] IRLR 703 confirms that the breach does not need to be the effective cause as long as it "played a part" in the decision to leave; and (3) That the employee must not have affirmed the contract before leaving (for example, by delaying too long before resigning).

    The test is objective.

78. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following what is known as a "last straw" incident. There is no requirement that the "last straw" actually constitutes a breach of contract, but it must contribute to the breach of the implied term of trust and confidence and an entirely innocuous act by the employer cannot be a "final straw".

79. In relation to the question of affirmation, Lord Denning stated in Western Excavating that the employee "must make up his mind soon after the conduct of which he complains: if he continues for any length of time without leaving, he will lose his right to treat himself as discharged". However, more recent cases have clarified that the issue is essentially one of conduct, not simply passage of time (for example, Chindove v William Morrisons Supermarket Plc UKEAT/0201/13).

80. An employee may continue to perform the employment contract under protest for a period without necessarily being taken to have affirmed the contract (see for example Cantor Fitzgerald International v Bird & Ors [2002] IRLR 867). There comes a point, however, when delay will indicate affirmation (see for example WE Cox Toner (International) Ltd v Crook [1981] ICR 443).

81. Finally, as noted in the case of Chindove, there are circumstances on which an employee's absence from work during the time he was alleged to have affirmed the contract may be a pointer against a genuine affirmation (see for example Bashir v Brillo Manufacturing Company [1979] IRLR 295).

82. The Claimant relies upon a breach of the implied duty of trust and confidence. In the case of Mahmood v BCCI [1997] ICR 606, it was established that every contract of employment contains an implied term that the employer must not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee, without reasonable and proper case. Any breach of this implied term will be sufficient to fulfil the second element above and will constitute a "repudiatory" breach of contract (Morrow v Safeway Stores Ltd [2002] IRLR 9). In determining whether there has been a breach of the implied term, the impact of the employer's actions on the employee is more significant than the employer's intentions.

83. Not every constructive dismissal will constitute an unfair dismissal. Once a dismissal has been established, it is for the employer to show the reason or principal reason for the dismissal and that it is either a reason falling with subsection (2) of section 94 or some other substantial reason of a kind such as to justify the dismissal of the employee holding the position which the employee held.

84. Section 98(2) sets out five potentially fair reasons, one of which is a reason which relates to the capability of the employee for performing of the kind for which he was employed by the employer to do (section 98(2)(a)). Once the reason for the dismissal has been shown by the employer, the Tribunal applies section 98(4) to the facts it has found in order to determine the fairness or unfairness of the dismissal. The burden of proof is neutral and section 98(4) provides:

> "In other cases where the dismissal has fulfilled the requirement of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reasons shown by the employer):
>
> (a) Depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and;
>
> (b) Shall be determined in accordance with equity and the substantial merits of the case."

85. In considering section 98(4), the Tribunal asks itself whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer. It is not for the Tribunal to substitute its own view for that of the decision makers in the case. In many cases, there is a band of reasonable responses in which one employer might reasonably take on view, whilst another might reasonably take another. The function of the tribunal is to determine whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

86. In the case of Polkey v AE Dayton Services Ltd [1988] ICR 142, the House of Lords made it clear that procedural fairness is an integral part of the reasonableness test. The House of Lords concluded that the failure to follow the correct procedures was likely to make a dismissal unfair, unless, in exceptional circumstances, the employer could reasonably have concluded that doing so would have been futile. The question: "Would it have made any difference to the outcome if the appropriate procedural steps had been taken?" is relevant only to the assessment of remedy.

87. By section 122(2) ERA:

> "Where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly".

88. By section 123(6) of the ERA:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.".

89. According to the case of Nelson v BBC (No. 2) [1979] IRLR 346, three factors must be present for a reduction of the compensatory award for contributory fault: (1) The claimant's conduct must be culpable or blameworthy; (2) it must have actually caused or contributed to the dismissal; and (3) the reduction must be just and equitable.

90. By section 207(2) of the Trade Union & Labour Relations (tion) Act 1992:

> "If, in any proceedings to which this section applies, it appears to the employment tribunal that
>
> (a) The claim to which the proceedings relate concerns a matter to which a relevant code of practice applies,

(b) The employer has failed to comply with that code in relation to that matter, and
(c) The failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

91. Section 95(2) ERA provides that:

"An employee shall be taken to be dismissed by his employer if –

(a) The employer gives notice to the employee to terminate his contract of employment, and
(b) At a time within the period of that notice, the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given."

92. As suggested in Harvey, this section appears to be a protective mechanism to allow an employee to serve a counter-notice without losing the right to bring an unfair dismissal claim. That employee's right is protected in which he is dismissed with notice but wishes to serve a shorter notice period, thereby avoiding any argument that the employee has resigned such that he cannot claim unfair dismissal.

93. The question then is whether a claimant can rely upon the section where an employee under notice has terminated the contract of employment with immediate effect, as in this case. In other words, does the wording "the employee gives notice to the employer to terminate the contract of employment" include the situation in which an employee effectively gives no notice.

94. There appears to be very little case law on this section (or indeed its predecessor, section 55(3) of the Employment Protection (Consolidation) Act 1978). The parties have referred us to the Employment Appeal Tribunal case of Ready Case Ltd v Jackson [1981] IRLR 312. That case determined that the notice given by the employee does not have to be equal to statutory or contractual notice, but it left open the question of whether the notice can be immediate. The relevant section in the judgment reads as follows:

"This, of course, does raise the question as to whether a notice can be immediate. It can clearly be argued that if an employee can give a notice expiring on a date three or four days later, he can also give one expiring on the following day, which is a day earlier than the notice given by the employer. If that is right, one asks rhetorically, why should he not give notice expiring on the very date which is a

> date earlier than that when the employee's notice is due to expire? If that is right, why should he not give notice to terminate the contract immediately? It can be said that, if that is right, here the ordinary meaning of terminating with notice is departed from and that notice is no more than notification. This point did not arise in the case to which we have referred because, there, no notice had been given so it does not seem to us necessary to decide the point in this case, because we have not heard full argument on it and since it does not arise."

95. We consider that the words of subsection 95(2) should be given their natural meaning which in our view is that an employee should have the benefit of the subsection if he gives notice to his employer that he is terminating his contract of employment with immediate effect. This is consistent with the proposition that the aim of the subsection is to give protection to the employee. We have therefore decided the complaint of
unfair dismissal on this basis, although we have also gone on to consider the situation if our interpretation of section 95(2) is incorrect.

Discrimination

Limitation

96. Section 123(1) of the Equality Act 2010 provides that:

> "Subject to sections 140A and B, a complaint (of discrimination at work) may not be brought after the end of –
>
> (a) the period of three months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.

97. By section 123(3):

> "Conduct extending over a period is to be treated as done at the end of that period and a failure to do something is to be treated as occurring when the person in question decided on it."
> and
>
> "failure to do something is to be treated as occurring when the person in question decided on it."

98. By section 123(4):

> "In the absence of evidence to the contrary, a person is taken to decide on failure to do something when he does an act inconsistent with it or otherwise on the expiry of a period in which he might reasonably have been expected to do it.

99. The tribunal has a wide discretion in determining what, if any, period of extension is "just and equitable". However, the burden is on the claimant to show that time should be extended and there is no presumption in favour of extending time.

100. The Employment Appeal Tribunal in British Coal Corporation v Keeble [1997] UKEAT 496 set out a number of factors to which a tribunal may have regard when considering whether it is just and equitable to extend time. Those factors include:

1. The prejudice that each party may suffer if the extension is refused;
2. The length of and reasons for the delay;
3. The extent to which the cogency of evidence is affected by the delay;
4. The extent to which the party sued had co-operated with requests for information;
5. The promptness with which the claimant acted when he knew of the possibility of taking action; and
6. The steps taken by the claimant to obtain appropriate professional advice.

101. The tribunal is not required to go through the list to make a finding in respect of each factor. However, it must not leave any significant factors out of its deliberations and on every occasion, the tribunal is required to establish the extent of, and the reasons for, the delay (Habinteg Housing Association Ltd v Holleron [2015] UKEAT 0274).

Direct Discrimination

102. By section 13 of the Equality Act 2010 ("EqA"):

> "(1) 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.

103. Treatment will be found to be because of a protected characteristic if that characteristic is the substantial or effective reason for the treatment. It is not necessary for the characteristic to be the sole or intended reason for the treatment. In the case of Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, the question to be asked was framed as: "What, consciously or unconsciously, was the [alleged discriminator's] reason?"

104. The fact that a claimant has been treated less favourably than an actual or hypothetical comparator is not sufficient to establish that direct discrimination has occurred unless there is "something more" from which the tribunal can conclude that the difference in treatment was because of the claimant's protected characteristic (Madarassy v Nomura International PLC [2007] IRLR 246.

105. Where there is no actual comparator, the treatment should be compared with that if a hypothetical comparator. In the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, the House of Lords stated that: "The comparator required for the purpose of the statutory definition of discrimination

must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class." The EHRC Employment Code provides at paragraph 3.23 that: "What matters is that the circumstances which are relevant to the treatment are the same or nearly the same for the claimant and the comparator".

Discrimination arising from Disability

106. Section 15 EqA provides that:

> "(1) A person (A) discriminates against a disabled person (B) if
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

107. Subsection (2) provides that:

> "The above subsection does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

108. In the recent case of Sheikholeslami v University of Edinburgh UKEATS/0014/17, it was confirmed that there is a two-stage approach to causation –

- Whether A had treated B unfavourably because of an (identified) something; and
- Whether that something had arisen in consequence of B's disability.

The first question involves an examination of the alleged discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment. The test is whether the identified something arose "in consequence" of the disability rather than being "caused by" that disability. The second question is a matter of objective fact to be determined by the tribunal on the basis of the evidence heard.

Reasonable Adjustments

109. Section 20 (3) EqA provides that:

> "Where a provision, criterion or practice of an employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer has an obligation to take such steps as is reasonable to avoid the disadvantage."

110. It may be a reasonable adjustment for an employer to ignore disabilityrelated absences when applying its absence management policy.

Harassment

111. By section 26 EqA:

> "(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."

112. By subsection (4):

> "In deciding whether conduct has the effect referred to in sub section (1)(b), the tribunal must take into account the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect."

113. In the case of Land Registry v Grant, Elias LJ cautioned against 'cheapening the significance' of the words in section 26 and described them as an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

114. Constructive dismissal cannot amount to harassment for the purposes of the Equality Act. However, an employer's repudiatory acts which lead to constructive dismissal can constitute harassment. Actual dismissal can amount to harassment (see, for example, Urso v Department for Work and Pensions UKEAT/0045/16).

Victimisation

115. By section 27 EqA:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> (a) A does a protected act, or
> (b) A believes that B has done or may do a protected act.

116. Subsection (2) lists a number of protected acts including making an allegation that A or another person has contravened the EqA.

117. There is no requirement for a comparator in a victimisation complaint. A detriment is made out if a reasonable worker would or might take the view that he or she had

been disadvantaged in circumstances in which he had to work (Shamoon). The protected acts need not be the whole reason for the treatment and victimisation need not be consciously motivated.

Knowledge in disability discrimination cases

118. If a claim for direct discrimination is to succeed, the tribunal must be satisfied that the alleged perpetrator(s) of the less favourable treatment had actual or constructive knowledge of the claimant's disabilities. The requisite knowledge is of the impairment, rather than knowledge that the specific technical definition of disability applied to that impairment.

119. Similarly, if a claim for discrimination arising from disability is to succeed, the tribunal must be satisfied that the respondent knew or ought reasonably to have known, that the claimant had the disability. The knowledge required is of the disability, rather than knowledge that the "something" leading to the treatment was a consequence of the disability.

120. If a claim for failure to make reasonable adjustments is to succeed, the tribunal must be satisfied that the respondent knew both that the claimant was disabled and that the claimant was likely to be placed at a substantial disadvantage because of the disability.

Burden of proof in discrimination cases

121. Section 136 EqA sets out the burden of proof provisions in relation to a complaint of contravention of the EqA.

122. By subsection (2) and (3):

> "(2) 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
>
> (3) But subsection (2) does not apply if A shows that it did not contravene the provision."

123. There is therefore a two-stage approach. Stage 1 is whether the claimant can show a prima facie case. If so, the burden of proof shifts to the respondent and the claimant will succeed unless the respondent's explanation is sufficient to show that it did not discriminate.

124. The case law has confirmed that these rules should not be applied in an overly mechanistic or schematic manner and tribunals will often make positive findings about matters without recourse to the "shifting burden of proof".

CONCLUSIONS

Respondent's knowledge of disability

125. The respondent concedes knowledge of the claimant's disability from 20 June 2016 onwards. The first specific allegation against the respondent is the rude, aggressive and offensive attitude towards the claimant and her disability including unpleasant and intimidating meetings. The first such meeting took place on 1 February 2016 and the Tribunal is therefore concerned whether the respondent had the requisite knowledge during 1 February 2016 and 20 June 2016.

126. By 1 February, the respondent was aware of the following:

126.1 The claimant had experienced extremely traumatic events inn her private life;
126.2 She had been off work for a month with a mental health condition;
126.3 She was having emergency counselling, suffering from anxiety and depression, being tearful, with low mood and having suicidal thoughts;
126.4 She had self-harmed in November 2015 which led to weekly counselling and CBT sessions.

127. By 31 March 2016, the respondent was aware of the following:

127.1 The claimant had been suffering from a mental health condition for three months and had commenced medication for that condition;
127.2 The claimant had been advised to have a further six sessions of counselling.

128. By the end of April 2016, the respondent was aware of the following:

128.1 The claimant had been unable to cope with the phased return ground duties for four days a week;
128.2 The claimant had suffered a number of bereavements;
128.3 The claimant's consultant psychiatrist had spoken to the Respondent's line manager personally and intimated that continued direct continued contact between the claimant and the respondent would exacerbate the claimant's mental health condition such that the psychiatrist was volunteering to maintain contact on behalf of the claimant.

129. It can sometimes be difficult for an employer to know the full extent of an employee's health condition, particularly a mental health condition. Employees can be reluctant to divulge the full extent of their condition, particularly where it emanates from extremely personal matters. An employer has to find a balance between an understanding of the employee's health in order to support that employee and not "pry" into matters which an employee does not wish to discuss.

130. Nevertheless, whilst we accept that the claimant may not have been entirely forthcoming immediately with JA, we have no hesitation in concluding that from 1 February onwards, the respondent knew (or ought to have known) that the claimant was a disabled person. We base that conclusion on both the actual knowledge which the respondent had, as set out above, but we also note that the respondent appears to have had limited curiosity about the claimant's ill health. There were sufficient warning signs for AP to have made further enquiries of JA. As early as February 2016, JA had sufficient knowledge of the claimant's health condition to have advised AP that she may be covered by the Equality Act.

Specific allegations of direct discrimination and harassment

131. We have set out below our conclusions on the various acts or treatment listed in the schedule to the agreed list of issues.

A.
Rude, aggressive and offensive attitude towards the Claimant and her disability including unpleasant and intimidating meetings

132. We conclude that neither JA nor AP acted in a manner which was rude, aggressive and offensive towards the claimant and her disability. We have already remarked that while JA might come across as forthright and assertive, but this is not the same as being rude, aggressive or offensive. As for AP, we consider that whilst the claimant may not have liked messages given to her by AP, we accept AP's evidence that she did not deliver those messages in a rude, offensive or intimidatory manner.

133. In relation to direct discrimination, the claimant has not shown less favourable treatment sufficient for the burden of proof to pass to the respondent. There is no reason to suggest that either JA or AP would have treated a hypothetical comparator any differently.

134. As for harassment, the attitude of JA and AP towards the claimant did not have the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. It was certainly not intended to do so either. We say this despite the perception of the claimant and taking into account whether it is reasonable for the conduct to have had that effect.

135. Finally, the attitude of JA and AP did not breach the claimant's contract of employment.

B.
Issuing the Claimant with a written warning and attendance improvement plan

136. This took place on 12 April 2016.

137. In our judgment, it did not constitute direct discrimination. The respondent can be heavily criticised for what Ms Bowen described as its robotic implementation of its absence management policies. It simply does not seem to recognise, through its line managers or HR advisers, any element of discretion in implementing these policies. However, this does not amount to direct discrimination as the claimant is not able to demonstrate that she has been treated less favourably than a hypothetical comparator would have been treated. We have no doubt that by its slavish adherence to the wording of the policies, the respondent would have treated any employee who had been absent for three months in the same manner, regardless of the nature of the condition and regardless of whether the condition constituted a disability.

138. We also do not consider that this incident in isolation constituted harassment. Whilst it may have been insensitive and unnecessary to impose the warning, we do not consider that it fell within the wording of section 26 (4) EqA.

139. This incident was also not, in isolation, a breach of the claimant's contract of employment, being provided for within the respondent's absence policy.

C.
Dismissing the Claimant

140. The claimant was given notice of termination of employment by AP on 16 June 2016. As with the issuing of the warning, the rationale for AP appears to have been that the wording of the absence management policy permitted her to dismiss at that point in time. Again, AP has failed to even consider exercising discretion in the claimant's favour, but this is not direct discrimination, for the same reasons as given in relation to paragraph B above.

141. The dismissal does, however, constitute harassment. The dismissal clearly related to the Claimant's disability and we have no doubt that the wording of section 26 is engaged. Whilst the purpose may not have been to create an intimidating, hostile, degrading, humiliating or offensive environment for her, the effect on the claimant was certainly degrading and humiliating and the dismissal was related to her disability.

142. To dismiss before waiting for the updated occupational health report was also a breach of the implied duty of trust and confidence. We have formed this conclusion despite the fact that dismissal was a potential outcome in the respondent's absence procedure. However, there is a duty to implement that policy in a manner which is not likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee, which was breached by the respondent.

D.
Failing to appropriately assess the Claimant's disability

143. We conclude that the respondent did fail appropriately to assess the claimant's disability. It is notable that despite the documentary evidence available to AP and to BV, and despite BV's evidence, it took until the third day of the hearing for the Respondent to concede that it knew of the claimant's disability even from 20 June onwards. We do, however, doubt whether the failure to assess someone as disabled can constitute direct discrimination in these circumstances. This is an allegation which is properly considered as an allegation of harassment, not direct discrimination.

144. This allegation does succeed as an allegation of harassment. The failure by the respondent to consider the claimant as a disabled person was degrading and humiliating for her and it was reasonable for her to have perceived it as such. It was clearly related to her disability.

145. This failure by the respondent also contributed to the respondent's breach of the duty of trust and confidence and was likely to destroy or seriously damage the relationship of confidence and trust.

E.
Harassing the Claimant through text messages and telephone calls during and following her attempted suicide; F.
Expecting the Claimant to maintain her line of communication despite the serious nature of her disability

146. As suggested by Ms Owen, we have treated these two allegations together. We consider this to be another example of the way in which the respondent will robotically follow its procedure regardless of individual circumstances. The attitude of ZM in her email referred to in paragraph 45 above gives a clear illustration of this. No account was taken of the claimant's ill health and the effect of that ill health upon her. However, this is not direct discrimination for the reasons set out in paragraph B above.

147. As to whether the respondent's actions constituted harassment, we have taken on board that the claimant was not "bombarded" with contact and that AP in particular genuinely believed that she was trying to contact the claimant in order to support her. Nevertheless, it is remarkable that having been advised by a consultant psychiatrist that the claimant's mental health condition was such that she was not up to receiving calls, the respondent continued to try to reach her direct. Whilst we also consider that the failure by the medical team to maintain contact does not excuse the respondent's actions and in our view, there is no reason why the respondent could not have tried to make contact with the medical team rather than continuing to text and message the claimant. This is conduct which clearly falls within section 26 EqA and is clearly related to the claimant's disability.

148. For the same reasons, the actions of the respondent in trying to contact the claimant having been asked not to by her consultant constituted a breach of the duty of trust and confidence.

G.
Failing to address the report of JA of 20 June 2016

149. This was the report which confirmed JA's view that at least by that point in time, the claimant was disabled. It is correct that AP did not take any action on receipt of this report. She was criticised by BV for her failure to do so. Nevertheless, this is not direct discrimination. The reason why AP failed to take action was because by that point in time, she had made her decision to dismiss the claimant and she was then leaving it for appeal. She would not have treated a hypothetical comparator any differently. Further, the treatment was not because of the claimant's disability because she had been dismissed.

150. In isolation, this allegation also fails as an allegation of harassment. AP's omission would not have been significant if the claimant's appeal had been dealt with promptly and appropriately. In itself, it did not come within the wording of section 26 and we also consider that it was not sufficiently related to the claimant's disability. The omission was simply due to AP's understanding, perhaps misguided, that her role had been concluded and this is not an allegation which is made against BV.

151. As for breach of contract, whilst this failure by the respondent contributed to the breach of the duty of trust and confidence, it was not itself a breach of contract. It was the dismissal itself which caused the breach rather than any failure by AP to review her decision in the light of the new medical evidence.

H.
Failing to deal with the Claimant's appeal in a reasonable and timely manner

152. The claimant lodged her appeal on 30 June but was not told of the outcome until 21 September, a period of almost three months. There was an initial delay between 30 June and mid-July where BV failed even to open the email attaching the appeal. There was then a further delay between the appeal meeting on 25 July and the outcome letter of 21 September. Although BV was on holiday for some of this period, there appears to us to be no reasonable explanation for this amount of delay and even taking into account the fact that BV telephoned the claimant in early August to tell her, perhaps misleadingly, that she had been reinstated. In general, the appeal was not dealt with in a timely manner.

153. It was also not dealt with in a reasonable manner. The outcome letter and BV's own evidence are confusing. On the one hand, BV stated that the appeal was unsuccessful, but on the other hand, she purports to have reinstated the claimant. However, this was not a complete reinstatement. Rather than determining the dismissal was unsafe in the light of the medical evidence obtained only a few days

afterwards, the decision by BV meant that the claimant remained under notice of dismissal albeit with a longer period of notice than had originally been the case. This was at a time when according to the medical evidence available to BV, the claimant was fit for work.

154. However, this was not disability discrimination for the same reasons as why the dismissal itself was not direct disability discrimination. BV would have treated a hypothetical comparator who would be dismissed with the claimant's absence record in exactly the same way. The delays were not because of the claimant's disability, they were because of BV's apparently excessive workload at the time. Bearing in mind the fact that BV had only just taken up a new role heading up the claimant's team, we consider that for the respondent to give her the responsibility of conducting the claimant's appeal against dismissal was inopportune (particularly in a company as large as the respondent) and was bound to lead to some delay. However, this does not lead to a finding of direct disability discrimination.

155. Similarly, the delays do not constitute harassment under section 26. They are not "related to" the claimant's disability but to BV's workload and apparent failure to prioritise. On the other hand, the decision to keep the claimant under notice of termination of employment does fall within section 26, in the same way as the decision by AP to dismiss the claimant constituted harassment. For the claimant to remain under notice of termination had the effect of creating a degrading and humiliating environment for her and was sufficiently related to her disability.

156. The failure by BV to deal with the appeal in a reasonable manner compounded the effect of the dismissal by AP and therefore contributed to the breach of the implied term of trust and confidence.

I.

Failing to recognise and acknowledge the discriminatory actions the Claimant had been subjected to and the Claimant's concerns as well as criticising the Claimant in the appeal outcome letter

157. This is an allegation against BV. It incorporates a number of elements. Firstly, we accept that BV did not recognise as discriminatory the actions of JA and AP prior to her involvement. However, she did investigate the claimant's allegations which were set out in her appeal letter and she did come to the conclusions albeit with which the claimant disagreed.

158. The second element is the criticism of the claimant in the appeal outcome letter. We do consider that BV's references to the claimant's lack of engagement with the absence management process can properly be considered as criticism. This is in the context of the claimant's disability and the reasons given by the claimant for that lack of engagement.

159. However, these allegations do not constitute direct discrimination. There is no evidence that BV would have treated a hypothetical comparator any differently

and in any event, the treatment was not because of the claimant's disability. The criticism is a further example of the respondent's robotic reliance on the strict wording of its procedures.

160. We also do not consider that failure to acknowledge and recognise the prior discriminatory actions can constitute harassment under section 26. Whilst the actions themselves may constitute harassment, we do not consider that BV's reluctance to acknowledge them as such falls within the wording of section 26.

161. However, we do consider that the criticism of the claimant in the appeal outcome letter does constitute harassment of the claimant. It is clearly related to her disability, because her inability to engage was caused by her disability, at least in part. BV's criticism in this respect was and unwanted and created a humiliating and degrading environment for the claimant.

162. For the same reasons, the criticisms also contribute to the breach of the implied term of trust and confidence.

J1
The attitude towards the Claimant following her appeal, specifically in the meeting of 10 October 2016 and the respondent's correspondence following this meeting

163. We have found as a matter of fact that BV did not conduct herself in a rude, aggressive or hostile manner in that meeting. Similarly, we do not consider that there is anything in BV's email of 13 October which can be seen as rude or aggressive, or intimidating, hostile, degrading, humiliating or offensive. This allegation fails as an allegation of direct discrimination, harassment and/or breach of contract.

J2
Failing to address the Claimant's complaints about procedures of BAHS, processes during the dismissal, reinstatement and appeal

164. We consider that BV did address the claimant's complaints as part of the appeal. She may not have come to the conclusions which the claimant wanted but she did deal with the points raised by the claimant. Accordingly, this allegation also fails as an allegation of direct discrimination, harassment and/or breach of contract.

K.
Reinstating the Claimant with no backdated pay and failing to action the reinstatement

165. We are not entirely clear why the claimant was left without pay once she had been reinstated. We are not convinced that it is incumbent upon an employee in the claimant's circumstances to make a formal statement that she is fit for work, where the employer's occupational health advice states that she is fit and there is no current doctor's note to the contrary. Furthermore, we believe that the claimant

did advise the respondent that she was fit for work after she had been on notice of termination of employment.

166. It is not entirely correct to state that the respondent failed to action the reinstatement because steps were clearly being taken in that regard. However, there were undoubtedly delays due to an apparent lack of urgency by those involved and the respondent's bureaucratic procedures.

167. However, the failure to pay back pay was not direct disability discrimination, because it was not done because of the claimant's disability. It was implemented by a department which, as far as we are aware, had no knowledge of the claimant's health condition and there is nothing to suggest that a hypothetical comparator would have been treated any differently. It also does not fall within the definition of harassment because it was not related to the claimant's disability.

168. Similarly, the delays in reinstating her were not because of disability and we reject the claimant's argument that she was not reinstated because she had become a "nuisance". Whilst the delays were unfortunate, we consider they would have been the same for a hypothetical comparator.

169. The delays were also not sufficiently related to the claimant's disability to constitute harassment.

170. As for breach of contract, we do not consider that these matters in isolation constituted breach of contract but that they contributed to the breach of the implied duty of trust and confidence.

L.
Harassing the Claimant over alleged salary overpayment

171. The respondent's payroll department did send the claimant a number of letters seeking repayment which can properly be described as threatening. We are far from convinced that this repayment was even due but have not heard sufficient evidence on it to form a definite conclusion. However, the
letters cannot constitute direct discrimination as they were not sent because of the claimant's disability. There is no doubt that they would have been sent by the payroll department to any employee considered to have been overpaid regardless of disability.

172. The matters are also insufficiently related to the claimant's disability to constitute harassment.

173. As for breach of contract, we have not heard sufficient evidence to determine that the 'overpayment' was not due. If the money is due, the respondent is entitled to seek repayment and, in our judgment, the chasing letters were not 'harassment' such as to constitute breach of contract.

M.

Constantly contacting the Claimant whilst she was caring for her mother when the Respondent had no information to provide the Claimant with

174. As stated in paragraph 70 above, we do not criticise SM for making contact in the circumstances as new line manager. Even though she may not have had any positive information to impart, the calls were made with the genuine objective of facilitating the claimant's return to work. SM making a few attempts to contact the claimant did not constitute less favourable treatment (so as to shift the burden of proof) nor do they come within the definition of harassment or constitute breach of contract.

175. In summary, the allegations of direct disability discrimination all fail. We have concluded that a number of the specific allegations of harassment fall within section 26 EqA but we note also that a number of those allegations, on the face of it, are out of time, occurred before 12 July 2016. We return to the question of jurisdiction below.

Discrimination arising from Disability (Section 15 EqA)

176. The claimant relies upon four allegations of unfavourable treatment, which we will deal with in turn.

177. The first is the issuing of a written warning on 1 April 2016, by AP. The claimant's disability resulted in her inability to attend work between 2 January 2016 and 6 April 2016. This inability to attend work is therefore something arising in consequence of her disability.

178. The decision by AP to issue the claimant with the formal warning was clearly unfavourable treatment. We note that this is not the same test as for direct discrimination and there is no requirement for a comparator. Furthermore, the warning was issued because of the claimant's inability to attend work during the period in question. Thus the claimant was treated unfavourably because of her inability to attend work which is something arising from her disability. The allegation therefore falls within section 15 and constitutes discrimination arising from disability, unless the respondent can show that it is a proportionate means of achieving a legitimate aim. We do consider that it had a legitimate aim, namely the need to apply its absence management procedure in order to manage its workforce effectively and efficiently. However, whether or not this has been pleaded by the respondent, we do not consider that the issuing of the warning was

a proportionate means of achieving that aim. There is no necessity for the policy to applied robotically and the policy itself allows for elements of discretion. It was not proportionate to issue the warning.

179. The second allegation relates to the dismissal of the claimant on 16 June. This again relates to the claimant's inability to fulfil her duties and responsibilities and attend work and dismissal is therefore unfavourable treatment because of something arising in consequence of the claimant's disability. The dismissal was not a proportionate means of achieving the respondent's legitimate aim. It was entirely disproportionate. A proportionate response would have been to defer the dismissal pending the further evidence from BAHS and then to take into account the content of that report.

180. The third allegation of unfavourable treatment is the alleged failure to deal with the claimant's appeal in an adequate or timely manner. Whilst this was unfavourable treatment, it was not "because of something arising in consequence of the claimant's disability". The unfavourable treatment in relation to the delay was because of BV's excessive workload and insofar as the failure to deal with the claimant's appeal was inadequate, it was because of BV's misguided understanding of the dismissal procedures. It was not because of any of the matters set out in paragraph 6 of the agreed list of issues.

181. The final allegation of unfavourable treatment is delaying the claimant's reinstatement. Whilst this was unfavourable treatment, it was not because of something arising in consequence of the disability. Again, there was insufficient connection between the treatment and that as set out in paragraph 6 of the amended list of issues, particularly since we have rejected the claimant's argument that her return to flying duties was delayed because she was seen as a nuisance.

182. Accordingly, the first two allegations of discrimination arising from disability are well founded but the third and the fourth are not. The first two allegations both pre-date 12 July 2016 and are therefore considered further below in the context of the tribunal's jurisdiction to hear them.

Reasonable Adjustments (Sections 20/21 EqA)

183. The allegation of failure to make reasonable adjustments relates to the period between 6 April and 25 April 2016 when the claimant was undertaking ground duties for four days a week.

184. We find that the relevant PCP was the requirement for the claimant to work the adjusted hours and duties for a temporary period until the she would be fit to return to flying duties.

185. We consider that although this PCP was itself an adjustment to the claimant's normal working, it did place her at a substantial disadvantage in comparison with persons not disabled. The fact that the claimant was commuting to and from work

for some four hours a day, four days a week, ultimately led to her being unable to carry on with the phased return to work which led to her attempting suicide leading to further absence from work which ultimately resulted in her dismissal. An employee without the claimant's disability would not have been subject to this same disadvantage.

186. The respondent failed to take such steps as were reasonable to avoid this disadvantage. This was particularly the case after 8 April 2016 after it had received the specific recommendation of the claimant's GP that she work three days a week, not four. This would have brought her more in line with the level of commuting she had to do when she had been on flying duties. It would also have been a reasonable adjustment for the respondent to have formalised the ability for the claimant to leave work at 3:00 pm every day. In our view, there can be absolutely no justification for the respondent failing to act upon the recommendation put forward in the doctor's fit note.

187. Finally, the respondent knew, or ought reasonably to have known, that the claimant was likely to be placed at a substantial disadvantage. She expressed concerns about the arrangement as early as 31 March 2016 and repeated those concerns to AP during April. Her GP's note was also evidence which the respondent should have heeded. In addition, the claimant's erratic behaviour whilst on ground duties was noted by her colleagues.

188. The complaint of failure to make reasonable adjustments is therefore well founded. However, it pre-dates 12 July 2016 by some three months and out of time and therefore considered further in the context of the tribunal's jurisdiction to hear it.

Victimisation (Section 27 EqA)

189. The claimant relies upon five alleged detriments which are set out at paragraph 23 of the agreed list of issues.

190. The first is the decision to dismiss. The second is the failure to discuss recommendations contained in the OH report and the third allegation is the delay in dealing with the appeal against dismissal. We consider that all three are detriments within the meaning of section 27. A reasonable worker would or might take the view that he or she had been disadvantaged by these three matters.

191. The fourth allegation is the alleged failure to address the discrimination allegations raised by the claimant in the appeal outcome of 23 September 2016. For the reasons explained above, we consider that BV did address those allegations, albeit coming to a conclusion which the claimant did not like. This was not a detriment within the meaning of section 27 as a reasonable worker would not take the view that he or she had been disadvantaged.

192. The final allegation of detriment is the manner in which the meeting of 10 October 2016 was arranged, conducted and followed up. For the reasons explained above, and whilst the meeting itself turned out to be entirely unconstructive, we attach little or no blame to BV for this and do not consider it to constitute a detriment. No reasonable worker would or might take the view that he or she had been disadvantaged.

193. The second question for us to consider is whether those detriments which are proven, or any of them, were because the claimant did a protected act. We consider that all of the matters set out in paragraph 24 of the agreed list of issues do constitute protected acts under section 27(2)(c) (doing any other thing for the purposes of or in connection with this Act); or (d) (making an allegation (whether or not express) that the Respondent had contravened the Act).

194. Nevertheless, we do not consider that any of the proven detriments was because the claimant had done any of those protected acts. The only protected acts which pre-date the decision to dismiss in June 2016 and the failure to discuss recommendations contained in the OH report were the requests for adjustments in April. We remind ourselves that the protected act does not have to be the whole reason for the detriment, but we have concluded that there is insufficient connection, consciously or unconsciously, between the protected acts and the motivation of AP. Her decision to dismiss was due to her robotic adherence to the respondent's absence management policy and had nothing to do with the fact that the claimant had requested adjustments to her ground duties two months earlier.

195. As for the appeal, we have found that the appeal was delayed because of BV's workload and inability to manage her time adequately. We have rejected the claimant's argument that she was treated detrimentally because she was considered to be a 'nuisance' due to her repeated complaints and as with the other detriments, there is insufficient connection, consciously or unconsciously, between the protected acts and the motivation of the BV.

196. The complaint of victimisation therefore fails, regardless of the jurisdiction issues.

Time Limits / Jurisdiction

197. It is common ground between the parties that any allegation which predates 12 July 2016 is, on the face of it, out of time.

198. The following allegations have been found proven:

192.1 Discrimination arising from disability occurring on 12 April 2016 (item 7a in the agreed list of issues), and on 16 June 2016 (item 7b).

192.2 Harassment by:

- giving the claimant notice of termination of employment on 16 June 2016;

- failing appropriately to assess the claimant's disability. In the agreed list of issues, it is stated that this took place from 31 March 2016. We are required to determine the time when the person in question decided on it and in line with our earlier findings, we conclude that this was on receipt of the GP's note of 14 April 2016 stating that the claimant should only work for five hours a day, three days a week. We therefore conclude that this failure occurred on or about 15 April 2016;
- text messages and telephone calls during and following the claimant's attempted suicide and expecting her to maintain her line of communication despite the serious nature of her disability. These messages were sent direct to the claimant in the period between the beginning of May and beginning of June 2016.
- Failure to deal with the appeal in a reasonable manner. The appeal outcome letter was sent on 21 September 2016.

192.3 A failure to make reasonable adjustments occurring in April 2016.

199. Save for the final allegation of harassment, all of the proven allegations occurred more than three months prior to 12 July 2016 and are therefore not within the period laid down by section 123 (1) (a) EqA.

200. The next question is therefore whether the proven allegations of discrimination are part of a continuing act, culminating in the incident which is within time. We consider that they are. Although, as the respondent points out, there are different protagonists at different time, we consider the continuing act to be the application by the respondent of its absence management processes to the claimant in a discriminatory manner, culminating in her dismissal and an unsuccessful appeal. Although different managers were involved at different times, it would be artificial to treat each allegation in isolation.

201. Ms Owen has referred in her submissions to the case of Hale v Brighton and Sussex UKEAT/0342/16, seeking to distinguish it from the present circumstances. We do not agree with her. This was an ongoing state of affairs and we consider that the allegations proven against the Respondent were part of a continuing act within the guidance set out in the case of Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530.

202. The Tribunal therefore has jurisdiction to determine the allegation of unlawful discrimination against the claimant.

Dismissal

203. As set out in paragraph 95 above, we consider that section 95(2) ERA applies to the circumstances of this case. The claimant is therefore taken to have been dismissed by the respondent.

204. We are satisfied that the reason for dismissal was the claimant's capability which is a potentially fair reason. The decisions taken by AP and BV were on the basis that they believed that the respondent's absence management policy provided for dismissal in relation to an employee absent from work for five months.

205. However, the respondent failed to act reasonably within the meaning of section 98(4) ERA. The decision made by AP to dismiss the claimant before receiving the occupational health report which she had asked to be produced in a matter of days was a decision that no reasonable employer would have made. The unreasonableness is compounded by the fact that that report stated that in JA's opinion, the claimant was then fit to return to work with a restriction of only one month. We have reminded ourselves that it is not for us to substitute our view for that of the respondent, and it is our conclusion that no reasonable employer would have dismissed the claimant in those circumstances. A reasonable employer would have waited for the report and then acted upon it without dismissing the claimant. AP's decision to dismiss the claimant was well outside the range of reasonable responses.

206. Although the respondent argues that the claimant was reinstated on appeal, the outcome of the appeal was not a true reinstatement because the claimant remained under notice of dismissal. BV had the BAHS medical report of 20 June 2016 available to her when she heard the appeal. No reasonable employer would have taken the action she did. A reasonable employer would have reinstated the claimant unconditionally whilst monitoring her capability to perform her role over the forthcoming weeks and months. This is not the same as obliging her to prove to the respondent's satisfaction within a short period of time that she was capable of undertaking her duties, in order to have the notice period revoked. BV's decisions and actions were not those of a reasonable employer also fell well outside the range of reasonable responses. The claim for unfair dismissal therefore succeeds.

207. Having concluded that the claimant was unfairly dismissed in accordance with section 98 (ERA) we have gone on to consider the question of whether the claimant was constructively unfairly dismissed in the event that our interpretation of section 95(2) ERA is incorrect and that section does not apply to the circumstances of this case.

208. The claimant must then show a repudiatory breach of her contract of employment. She relies upon the matters set out in the schedule to the agreed list of issues in support of her claim that the respondent breached the duty of trust and confidence.

209. In our view, there was a repudiatory breach of contract, by virtue of the breaches of the implied duty of trust and confidence (either in isolation or cumulatively) which we have discussed above, specifically items C to I and K in the schedule to the agreed list of issues.

210. The next question is whether the claimant resigned in response to the repudiatory breach or repudiatory breaches. There is some confusion as to the precise reason for the claimant's resignation at the time. Her pleaded case is that the final straw was the respondent's failure to address the outcome of the appeal (on 10 October) and the refusal to accept or even address her concerns that she had been discriminated against. In her evidence to the Tribunal, however, she suggested that the last straw was actually the suggestion by SM that in a conversation on 7 November, the claimant had indicated that she wished to resign (see paragraphs 71 and 72 above). It is the respondent's case that the real reason for the Claimant's resignation was the fact that her mother had been diagnosed with cancer.

211. We have noted the content of the claimant's resignation letter and considered her evidence in its totality. We reminded ourselves that it is not necessary for the repudiatory breach to be the sole reason for the claimant's resignation – it merely needs to have played a part in the claimant's decision to leave. Considering all the evidence available to us, we have no doubt that the respondent's failure to act upon advice from her GP and her consultant psychiatrist, the decision by AP to dismiss her, the handling of the appeal process and the failure to reinstate her in a prompt manner all played a part in the claimant's decision to leave.

212. Finally, we have gone on to consider whether the claimant affirmed the contract of employment by delaying her resignation until November 2016.

213. The decision to reinstate the claimant but to retain her notice period was communicated to her on 21 September. There was then a period of almost two months before the claimant resigned. However, the claimant was absent from work throughout this period and we do not consider that she did anything specific to affirm the contract during the period. Her insistence that BV revisit her complaints against JA and others is not, in our view, commensurate with an affirmation of the contract of employment. During this period, the claimant initiated very little contact with the respondent and in all the circumstances of the case, we do not believe that her delay can be deemed to constitute an affirmation of the contract.

214. Accordingly, the complaint of constructive unfair dismissal would also succeed.

Breach of Contract

215. Having found (in the alternative) that the claimant was constructively dismissed, in that she accepted the respondent's repudiatory breach of her contract of employment, we also therefore conclude that her claim for breach of contract succeeds and that she was wrongfully dismissed.

Limited Remedy issues

216. Although the question of remedy is to be determined at a later date, we have gone on to consider the limited remedy issues in the agreed list of issues.

217. Firstly, the respondent argues that the claimant contributed to her dismissal such that compensation for unfair dismissal should be reduced. In support of this argument, Ms Owen has pointed to two actions by the claimant.

218. The first is the failure by the claimant to consent to the re-referral to BAHS between 2 June 2016 and 13 June 2016. Whilst it is correct that this failure by the claimant contributed to her dismissal, we do not consider it to be culpable or blameworthy, particularly considering the effect of the claimant's disability. Nor do we consider that it would be just and equitable to make a reduction of the basic award because of this conduct. The claimant attended the meeting on 13 June with a document confirming her consent and the decision by AP to dismiss the claimant without waiting for the medical report was entirely unreasonable.

219. Secondly, Ms Owen pointed to the failure by the claimant to keep in touch with the respondent as is required by the respondent's absence management policy. Again, this can hardly be seen as conduct which is culpable or blameworthy in light of the claimant's situation at the time and her reasons for the lack of communication, particularly as those reasons were supported by her consultant psychiatrist. For the same reasons, it would not be just and equitable to make a reduction of the basic award because of this conduct.

220. There should therefore be no reduction to any compensation as a result of the claimant's conduct.

221. The next issue is the respondent's argument that there was a high probability (if not 100% probability) that the claimant would not have been able to sustain contractual duties up to 4 January 2017 and thus could have been fairly dismissed at that point. We reject this argument. Firstly, the claimant was an employee with a disability and we do not accept that she could necessarily have been fairly dismissed even had she not manage to sustain her contractual duties for the remainder of 2016. A reasonable employer cognisant of its duties under the Equality Act would not have been automatically in a position to dismiss the claimant fairly.

222. In addition, the claimant had been certified fit for work by the respondent's own occupational health department in June 2016. We are required to speculate as to what might have happened had the respondent acted reasonably and properly on receipt of the 20 June 2016 medical report, but in the light of the content of the report and the claimant's repeated express desire to return to flying duties if she could, we do not believe that there is sufficient evidence for us to determine that there was even a remote probability that the claimant could have been fairly dismissed in January 2017.

223. The third limited remedy issue is the claimant's application for an uplift in compensation on the basis that the respondent was in breach of the ACAS Code. Ms Bowen submits that the respondent failed to deal with the complaints of

discrimination in a proper grievance process and when they did deal with them, they did so with unreasonable delay.

224. It is correct to say that at the time, BV did not consider the complaints made by the claimant during the appeal to be a formal grievance. However, we have found that the claimant had the opportunity to air her complaints at the appeal hearing and that BV did investigate them, maing findings on them.

225. It is also correct that there was significant delay in the appeal process overall and that the claimant was not given the opportunity to take her grievance further, BV having found against her.

226. Viewing the process as a whole rather than looking at isolated aspects of it, we do not consider that any failure by the respondent to comply with the provisions of the code was unreasonable such that it would be just and equitable to increase compensation.

227. In summary, the following complaints succeed:

227.1 Unfair Dismissal
227.2 Breach of contract (wrongful dismissal)
227.3 Discrimination arising from disability (items 7a and 7b in the agreed list of issues)
227.4 Harassment (items C, D, E and H in the schedule to the agreed list of issues)
227.5 Failure to make reasonable adjustments.

228. The claim will now be listed for a remedy hearing with a time estimate of one day.

_____

Employment Judge Finlay
Date: 15 November 2018

Sent to the parties on: .....

.....
For the Tribunals Office

See also APPENDIX attached

Public access to employment tribunal decisions

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

APPENDIX

IN THE EMPLOYMENT TRIBUNAL Case No: 3347636/2016

SITTING IN READING B

E T W E E N:

MS S SYLVESTER

Claimant

AND

BRITISH AIRWAYS PLC

Respondent

DRAFT LIST OF ISSUES

RELATING TO LIABILITY

All references to statutory sections refer to the Equality Act 2010 unless otherwise stated.

Disability – definition s6

1. It is now conceded by R that C was disabled for the purposes of s6, in relation to her low mood, anxiety symptoms, depression and panic attacks.

2. It is conceded that C was disabled from 2 January 2016. It is not conceded that R had the requisite actual or constructive knowledge that C was disabled. R conceded that it had the requisite knowledge with effect from 20 June 2016. This concession was made on the morning of the third day of the hearing (26 September 2018). R did not concede that it had the requisite knowledge that C's disability was likely to disadvantage her substantially (for the purposes of the 'reasonable adjustments' complaint).

Direct disability discrimination – s13

3. Was C treated less favourably by R because of her disability? C relies upon the acts set out in the Schedule below.

4. Has C been treated less favourably than a hypothetical comparator whose circumstances are not materially different to hers – s23? C relies upon a non-disabled Cabin Crew Member who shares C's abilities.

Discrimination arising from disability – s15

5. Was C treated unfavourably by R because of something arising in consequence of her disability?

6. C relies upon her inability to fulfil her duties and responsibilities, attend work and report/keep in touch in accordance with R's Attendance Management Policy, which was due to:

    a. Her disability;
    b. R's OH Service failing to assess C appropriately;
    c. R failing to put reasonable adjustments in place; and
    d. R failing to support C during her period of sick leave.

Note that the respondent asserts that the phrase 'report/keep in touch' does not appear in the preliminary hearing list of issues, nor in the Grounds of Complaint.

7. Did R subject C to the following unfavourable treatment:

    a. Issuing C with a written warning on 12.04.16 (AP);
    b. Dismissing C on 16.06.16 (AP);
    c. Failing to deal with C's appeal in an adequate or timely manner (BV);
    d. Delaying the Claimant's reinstatement.

Note that the respondent asserts that item d is not pleaded in the Grounds of Complaint, nor does it appear in the preliminary hearing list of issues.

8. If so, was that treatment because of any of the four matters listed at 6(a)-(d) above?

9. If so, can R show that the treatment is a proportionate means of achieving a legitimate aim? R relies upon the need to apply the absence management procedure in order to manage its workforce effectively and efficiently. C does not accept that this has been pleaded by R.

10. Did R know, or ought it reasonably to have known, that C had the disability?

~~Indirect disability discrimination – s19~~

C's complaint of indirect disability discrimination was withdrawn at the beginning of C's closing submission.

11. ~~Did R discriminate against C by the application of a PCP arising from the following circumstances:~~

~~(a) C was required to return to work in a new environment for four days per week on a 9am to 5pm basis. C was required to work without appropriate reasonable adjustments (or proper assessment); reduced hours or a formal phased return to work plan as was proposed by her GP.~~

~~(b) A requirement to return to work or maintain a level of attendance.~~

~~12. Did R apply, or would it apply, the PCP to persons with whom C does not share the characteristic?~~

~~13. Does (or would) the PCP put persons with whom C shares the characteristic at a particular disadvantage when compared with persons with whom C does not share it? C relies on:~~

~~(a) The preclusion from successfully undertaking the job role whilst grounded and not flying because being grounded resulted in C working longer hours with a worse commute. (b) Being subject to an attendance improvement plan, written warning and/or dismissal.~~

~~14. Did the PCP in fact put (or would it put) C to that particular disadvantage?~~

~~15. Can R show that the PCP was a proportionate means of achieving a legitimate aim? The alleged PCP was implemented with the aim of facilitating a return to work in accordance with R's absence management policy. Grounds duties are the means used to ensure that R's employees are eased back into the working environment before returning to flying which, in itself, can be isolating and stressful. Also, with specific reference to C's circumstances, the phased return was a proportionate means of ensuring that C could attend her Thursday appointments without risk of delayed/cancelled of flights.~~

Harassment – s26

~~16.~~ Did R engage in unwanted conduct? C relies upon the acts set out in the Schedule below.

~~17.~~ Was that conduct related to C's disability?

~~18.~~ Did that conduct (by reference to the factors in s26(4)) have the purpose or effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

Reasonable adjustments – ss20/21

~~19.~~ Did R impose a PCP on C? C was required to return to work in a new environment for four days per week on a 9am to 5pm basis. C was required to work without appropriate reasonable adjustments (or proper assessment); reduced hours or a formal phased return to work plan as was proposed by her GP.

Note that the claimant accepted that the highlighted section was not part of the PCP, but, if anything, relates to the adjustments which the claimant says should have been made. Both parties accepted that the start time was changed to 10:00 am. The respondent asserts that the PCP was not pleaded, beyond 4 days per week, 9am to 5pm.

~~20.~~ Did that PCP place C at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? C relies upon the disadvantage of being unable to attend work and ultimately being dismissed by R.

~~21.~~ Did R take such steps as it is reasonable to have to take to avoid the disadvantage?

~~22.~~ Did R know, or ought it reasonably to have known, that C was disabled and likely to be placed at a substantial disadvantage because of her disability?

Victimisation – s27

~~23.~~ Did R subject C to a detriment(s)? C relies upon the following acts:

(a) Decision to dismiss;
(b) Failure to discuss recommendations contained in the occupational health report dated 20 June 2016;
(c) Delay in dealing with the appeal against dismissal;
(d) Failing to address the discrimination allegations raised by C in the appeal outcome of 23 September 2016;
(e) The manner in which the meeting of 10 October 2016 was arranged, conducted and followed up.

24. Did R subject C to those detriments because C did a protected act? C relies upon

a. Raising a grievance in C's appeal against dismissal on 30 June 2016;
b. Letter following the appeal (page 363 to 368 of bundle 1);
c. Requesting reasonable adjustments:
    i. in April 2016 (para 30 onwards of C's WS);

ii. following C's GP recommendations on 14 April 2016;
iii. Appeal against dismissal dated 30 June 2016; iv. Complaint/grievance of 30 September 2016; and
v. Letter following the appeal (page 363 to 368 of bundle 1).

Constructive unfair dismissal – s95/98 ERA 1996

25. Did R commit any fundamental breaches of C's employment contract? C relies upon the acts set out in the Schedule below as well as that stated at para 48 of C's Grounds of Complaint. The final straw is as set out at para 51 of C's Grounds of Complaint which is in relation to the meeting on 10 October 2016 and the correspondence between C and R thereafter.

26. If so, did C resign, at least in part, due to the breach(es)?

27. If so, did C affirm her contract of employment and so waive the right to rely upon the breach(es)?

Wrongful dismissal/breach of contract

28. Did R repudiate C's contract of employment?

29. If so, did C accept the repudiation as ending her contract of employment?

30. Is C therefore entitled to her notice pay?

Back payments – s114 ERA 1996

31. No separate claim. Loss to be dealt with as compensation for discrimination.

Jurisdiction

32. Was the claim form submitted more than 3 months after some of the conduct of which C complains (allowing time for ACAS early conciliation)?

33. If so, did that conduct form part of a chain of continuous conduct which ended within 3 months of the claim form being submitted (allowing time for ACAS early conciliation)?

34. If not, would it be just and equitable for the ET to extend time so as to bring the claims in time?

Limited remedy issues

35. Was there a breach of the ACAS Code on Disciplinary and Grievance Procedures so as to entitle C to an uplift of up to 25% - s207B TULR(C)A 1992.

36. Is there a chance that C would have been dismissed fairly, at the latest by 4 January 2017, due to her being unfit for work? R alleges that it was not clear by the time of her resignation whether C was fit or unfit to work.

37. Did C cause or contribute to her dismissal by her conduct prior to dismissal? R relies upon C's failure to comply with R's absence management policy by not keeping in touch with R as required whilst on sickness absence. Furthermore, it is alleged that there was a failure by C to comply with BAHS by delaying providing C's consent so that a referral could take place following the closure of C's BAHS file on 20 May 2016 (this consent was eventually given on 13 June 2016). C does not accept that this has been pleaded by R.

Schedule of acts

~~[C please to clarify – there is a great amount of detail in C's witness statement re: 2015 lateness/conduct/disciplinary process that was dropped on 11.01.16. This matter does not appear to form part of the claims within the GofC (see para 15). R cannot see how this is relevant to the list of issues as set out in the case management agenda, used to produce this list. Could C please confirm that this is the case and the 2015 lateness/disciplinary matter is not relevant to the issues?] It is relevant for background information.~~

	Act/treatment	Alleged perpetrator	Date	Reference in GofC (paragraph #)
A	Rude, aggressive and offensive attitude towards C and her disability including unpleasant and intimidating meetings	JA, AP		21, 22,31

B	Issuing C with a written warning and attendance improvement plan	AP	12.04.16	25
C	Dismissing C	AP	16.06.16	32
D	Failing to appropriately assess C's disability	JA	31.03.16 onwards	21, 23, 24
E	Harassing C through text messages and telephone calls during and following her attempted suicide	ZM, AP		27, 28, 29
F	Expecting C to maintain a line of communication despite the serious nature of her disability	ZM, AP		27, 28, 29
G	Failing to address the report of JA of 20.06.16	AP	20.06.16 to when SM took over as OLM (23.09.16)	33
H	Failing to deal with C's appeal in a reasonable and timely manner	BV	30.06.16 to 23.09.16	35, 36, 37, 38
I	Failing to recognise and acknowledge the discriminatory actions C had been subjected to and C's concerns as well as criticising C in appeal outcome letter	BV	23.09.16 (outcome letter)	37

J1	The attitude towards C following her appeal, specifically in the meeting of 10 October 2016 and R's correspondence following this meeting	BV	10.10.16 & 13.10.16	40, 41, 42
J2	Failing to address C's complaints about procedures of BAHS, processes during the	AP, BV, ZM		48
	dismissal, reinstatement and appeal.			
K	Reinstating C with no backdated pay and failing to action the reinstatement	BV	23.09.16	43
L	Harassing C over alleged salary overpayment			43
M	Constantly contacting C whilst she was caring for her mother when R had no information to provide C with	SM		42