Reserved judgment

EMPLOYMENT TRIBUNALS

Between:

Claimants: **Mr N J Baker and Mr T Neale**

Respondent: **Civil Aviation Authority**

Heard at London South Employment Tribunal on 6-9, 12-15 November & 5 December 2018.

Before Employment Judge Baron

Lay Members: **Ms B Brown & Ms B Leverton**

Representation:

Claimant: ***Catrin Lewis***

Respondent: ***Andrew Tabachnik QC and Jennifer Thelen***

JUDGMENT

It is the judgment of the Tribunal that these claims be dismissed.

REASONS

Introduction

1 These claims have many features in common, but they are separate claims and have been considered as such. Each of the Claimants was employed by the Respondent as a Training Inspector and resigned from that employment. Mr Baker gave three months' notice and his employment ended on 12 September 2015. Mr Neale resigned by giving notice on 11 August 2015 with effect from 28 October 2015.

2 Each of the Claimants alleges that he made a protected disclosure, and that as a result he suffered various detriments sufficient to amount to a repudiatory breach of contract entitling him to resign. That is a claim of automatic constructive unfair dismissal within section 103A of the Employment Rights Act 1996. In addition each of the Claimants also alleges that various actions of the Respondent amounted to conduct entitling him to resign, irrespective of any protected disclosure, as a result of which there is a claim for 'ordinary' constructive unfair dismissal. Miss Lewis had prepared a list of issues in respect of each claim, which list had

not been specifically agreed with Mr Tabachnik. However, we consider that it accurately summarises the matters to be decided.

3 Mr Baker relied upon an email of 9 February 2015 as containing a protected disclosure. Miss Lewis set out in her submissions the information alleged to have been disclosed for the purposes of section 47B of the 1996 Act as follows:

> Specifically in respect of the decline in numbers of subject matter experts within Flight Crew Standards (and other disciplines associated with the regulation of aircrew training) – now well below 'critical mass' where CAA might hope to influence the [training] standards across industry and within Approved Training Organisations with any real effectiveness.[1]

4 The matters of which Mr Baker complained as being detriments on the grounds of having made a protected disclosure were set out as follows:

> On 22 April 2015 Rob Bishton issued new instructions including a total ban on working from home (WAH); a requirement to attend Gatwick between 9am and 5pm (with time worked outside these hours no longer considered working time) and for Mr Baker to work on 3 days per week – no more or less – later stipulated as Tuesday, Wednesday, and Thursday.

5 The matters on which Mr Baker relies as entitling him to resign without notice and so make a claim that he was dismissed within section 95(1)(c) of the 1996 Act were as follows:[2]

1. Lesser allowance for base relocation awarded
2. Line flying stopped as a condition of part-time working
3. Flying budget to revalidate flying licence qualifications severely restricted
4. Other changes to terms and conditions: Loss of company car; medical insurance provision downgraded; travel and related expenses reduced …
5. Pay dispute never satisfactorily resolved – ensued over additional hours C had worked at the behest of CAA – 75% instead of 60% - as was required by C's part-time contract
6. No pay rise between 2011 and 2015
7. PMR performance grading calibrated down 2 grades, as a consequence of part-time working (the first year of the part-time contract)
8. Application to work full time was ignored
9. April 2015: a disagreement over annual leave owed – a legacy of 2013 pay dispute – 4 or 5 days leave entitlement lost
10. 12 February 2015: Public criticism of C's letter of 9 February by Rob Bishton during a teleconference
11. April 2015 PMR calibrated down – 1 performance grade lower than line manger's recommendation – from above average to average (grade 2 to 3)
12. May 2015: Co-incident with the decline in numbers of FCSIs, and the eventual closure of the FCS section, job titles changed for FCSI to FOTI, removing Flight Crew Standards SME status
13. May/June 2015: work patterns and work activity challenged by C's line manager.

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[1] That reflects paragraph number 1 in the Particulars of Claim.
[2] Copied from paragraph 47 of Miss Lewis' closing submissions.

6 Mr Neale relied upon a presentation he made on 1 October 2014 to the Executive Committee of the Respondent as having included a protected disclosure. Again Miss Lewis set out the information alleged to have been disclosed as follows:

> That the number of inspectors throughout the CAA and Flight Crew standards had dropped from 8 to 3.2 (including two part-timers at .6 each) – that meant the CAA were unable to participate in activities such as external committee work (EUROCAE – European Organisation for Aviation Equipment and the like) and the only means the CAA had of keeping in touch was through line flying modern [airplane] types and through limited and dwindling participation in OEB (Operational Evaluation Board) and OSD (Operational Suitability Data) work.

7 The matters of which Mr Neale complained as being detriments on the grounds of having made a protected disclosure were as follows:[3]

1. Down grading performance rating from 3 to 5;
2. The Respondent's announcement in April 2015 in respect of office attendance - end of WAH arrangements - implying that C (along with the other FCSIs) was not to be trusted
3. Challenging C's accuracy in respect of his working hours;
4. Rejecting C's expenses claims
5. Made unfavourable decisions about line flying and aircraft ratings;
6. Unfavourable changes to his working conditions

8 Mr Neale also relied on the same matters for the purposes of his claim of 'ordinary' constructive unfair dismissal, but with the addition of an allegation that the Respondent failed to award him a pay rise between 2011 and 2015.

9 Each of the Claimants gave evidence, and we also heard from Dr Stephen Jary of the Prospect trade union. At the end of that oral evidence Miss Lewis sought to introduce a witness statement dated 12 November 2018 made by Ben Bamber, a Flight Operations Training Inspector. Mr Tabachnik generously did not object to its introduction, and we accepted it on the basis that there was no opportunity for the witness to be cross-examined on behalf of the Respondent.

10 Evidence for the Respondent was given by the following:

Robert Bishton – Head of Flight Operations;
Maria Boyle – CEO of a subsidiary of the Respondent;
David McCorquodale – Technical Lead;
David Simmonds – former Training Inspector.

11 We were also provided with a witness statement made by Stuart Lindsey but he did not give oral evidence. We accepted it on the same basis as the statement of Mr Bamber.

12 Yet again the Tribunal was provided with an inordinate number of documents which were contained in nine lever arch files and one standard size ring binder. Further documents were added during the hearing.

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[3] Copied from paragraph 64 of Miss Lewis' closing submissions.

13 At lunchtime on the third day of the hearing Miss Lewis told me that from a comment I had made during the proceedings concerning the London Central Employment Tribunal Dr Jary had thought it proper to point out that he sat as a lay member in that Region. I sat as an Employment Judge in the London Central Region from early 2002 for six years. I have no recollection of sitting with Dr Jary, and indeed I did not recognise him when he was pointed out to me. Miss Lewis told me that Dr Jary also had no recollection of sitting with me. Mr Tabachnik did not raise any objection concerning the matter. I did not consider that there was any reason whatsoever for there to be any actual likelihood of bias, nor of any perceived likelihood of bias.

The law

14 We now provide a brief summary of the law, and address below some points more specifically. Mr Tabachnik made reference to the legal background in some detail in paragraphs 13 to 44 of his written submissions, and Miss Lewis did not dissent from any of the propositions made. As each of the Claimants and the Respondent is professionally represented we will not set out each of the material statutory provisions. What is particularly important is section 43B(1) of the Employment Rights Act 1996 which is as follows:

> **43B Disclosures qualifying for protection**
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> (e) that the environment has been, is being or is likely to be damaged, or
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

15 Thus there are several elements. There must have been (a) a disclosure of information (b) which the worker reasonably believed tended to show one or more of the matters in paragraphs (a) to (f) inclusive. Further, the worker must also have reasonably believed that the disclosure of information was made in the public interest.

16 If the relevant Claimant can establish that he made a qualifying disclosure then it is not in dispute that in these circumstances it will have become a protected disclosure within section 43A by reason of having been made to the employer within section 43C.

17 If the Tribunal were to find that there had been any detriment(s) caused by the protected disclosure in question then the next matter is whether the detriment(s) was/were sufficient to establish that the Respondent was in fundamental repudiatory breach of contract, and that the relevant

Claimant resigned as a consequence of that breach and did not affirm the contract.

18 As far as the allegation of what we might call 'ordinary constructive unfair dismissal' is concerned the relevant Claimant must establish the fact of what he alleges did occur, and that the incidents were singly or collectively sufficient to amount to a fundamental repudiatory breach of contract. Then the point as to resignation mentioned in the preceding paragraph will apply.

19 We have left to the end of this section the question of the burden of proof in cases where the claim is of automatic unfair dismissal under section 103A of the 1996 Act, and of having been caused detriments short of dismissal under section 47B. There is a recent useful summary by Simler P in *International Petroleum Ltd. v. Osipov* UKEAT/0229/16:

> 115.[Counsel for the employer] submits and I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:
>
> (a) The burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.
>
> (b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see **London Borough of Harrow v. Knight** at paragraph 20.
>
> (c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.
>
> 116. In a s.103A ERA 1996 case, the correct approach to the burden of proof was set out in **Kuzel v. Roche** at paragraphs 58-60 as follows:
>
> (a) The employee must produce some evidence to suggest that his dismissal was for the principal reason that he made protected disclosure.
>
> (b) The burden then shifts to the employer to show that the dismissal was for a potentially fair reason.
>
> (c) If the employer fails to show the reason for the dismissal, then the employment tribunal may draw an inference (where such inference is appropriate) that the true reason for the dismissal was that suggested by the employee.
>
> (d) However, at paragraph 60 of **Kuzel v. Roche** the CA held:
>
> **"As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason".**

Submissions

20 It was agreed by counsel at the outset of the hearing that the eight days allocated for the hearing would be insufficient for all the oral evidence to

be adduced and also for proper submissions to be made. Fortunately we were able to arrange for a further day on 5 December 2018 be made available for submissions. Counsel had exchanged written submissions beforehand and they made oral submissions in addition. We will address the details of those submissions below as appropriate.

The facts

21 Our general approach is to set out the facts common to both claims principally in chronological order, and also include those matters specific to the claims being made by Mr Baker, and where appropriate to Mr Neale. We will then set out matters relating solely to the claims being made by Mr Neale. We will not of course recite all the evidence we heard, nor make findings on every disputed point.

22 Although we were not provided with any specific evidence on the matter, it is common ground that one of the functions of the Respondent is regulation of matters relating to aviation safety. These claims relate to that function. More particularly the claims relate to the oversight of the training of pilots in commercial airlines. The relevant part of the Respondent was known as Flight Crew Standards ('FCS').

23 Details of the structure and functions of the FCS are helpfully and clearly set out in the statement of Mr McCorquodale and documents to which he referred. FCS consisted of three different types of inspectors. The first category was Training Inspectors ('TIs'). Each of the Claimants was a TI. Their job purpose was summarised as follows:

> Oversight of flight crew training and testing in aeroplanes and/or helicopters and flight simulators to ensure the maintenance of standards and compliance with relevant legislation and requirements. Initial and recurrent training and standardisation of CAA Training Inspectors in the various functions they are required to perform.[4]

Mr McCorquodale said that their responsibility was to ensure the quality and standard of the training and examining being delivered internally by commercial airlines. This included assessing the suitability of the examiners, and also the delivering of training by the TIs to instructors and examiners employed by airlines.

24 The secondary category of inspectors was Flight Operations Training Inspectors ('FOTIs'). Their job purpose was stated to be:

> Interface with public transport and police operators to ensure that they are operating in a safe and competent manner in compliance with relevant legislation and requirements.[5]

25 Mr McCorquodale described their principal function as being the operational oversight of aircraft operators by auditing policies and procedures (70%), and also providing some elements of training and regulatory oversight of operators (30%).

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[4] As stated in a document dated 12 May 2017 at **[A111]**

[5] **[A262]** dated 26 January 2015

26 The third category was Licensing Standards Inspectors ('LSIs') who oversaw the licensing and regulation of Approved Training Organisations ('ATOs'). They have a relatively peripheral relevance to these claims.

27 There had been some reorganisations in the past, and not all the details are material. Mr McCorquodale had been the direct line manager of the Claimants from 2008. More recently the FCS team was moved to the Shared Services Centre from Flight Operations in August 2014, but then moved back to Flight Operations in February 2015. Mr Bishton was the second line manager of the Claimants throughout but became their direct line manager of the TIs for a short while from February 2015 until Mr McCorquodale resumed his position as the line manager from 1 April 2015. Thus from then onwards the Claimants again reported to Mr McCorquodale who in turn reported to Mr Bishton.

Mr Baker's move to Gatwick and his relocation allowance

28 Mr Baker had been a pilot in the Royal Navy for 19 years and first became employed by the Respondent in January 1991. Mr Baker lives in Somerset, and he was employed at the Respondent's premises at Weston-super-Mare as a FOTI. He was seconded to Gatwick for six months from October 2011 working in FCS. On 22 February 2012 Mr Baker wrote to Mr McCorquodale saying that he wished to remain at Gatwick on a part-time basis to 'fill the gap vacated by David Simmonds' planned reduction to his working hours.'[6]

29 The request was approved and formalised in a letter dated 17 May 2012.[7] The letter referred to the role being undertaken on a 'flexible working basis'. The paragraph relating to hours of work was as follows:

> As discussed, your hours of work are 21 hours per week (net) which will be worked on days to be agreed with your line manager. This will be reviewed flexibly in light of departmental need with as much advance notice as possible for any change from/to both parties.

30 That provision reflects the contents of an email sent by Mr McCorquodale to Susan Wyatt of HR on 14 May 2012 in which Mr McCorquodale said the following:[8]

> It is not intended that there will be any particular 'days' that John will work (they will vary continually from week to week) as there will be neither pattern nor routine to his tasking activities. So long as we secure 0.6 FTE days of work from John, evidenced by his time sheets, that will give us the necessary flexibility that FCS require in order to attend to the various tasks to which he will be assigned.

31 The letter of 17 May 2012 also included reference to overtime pay and time off in lieu. The other relevant point is that Mr Baker sought financial assistance because of the significant additional financial burden being caused to him. Mr Baker was told on 16 March 2012 that as the move was a voluntary one rather than one enforced by the Respondent there would

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[6] **[A98]**
[7] **[A126]**
[8] **[A123]**

not be any relocation allowance.[9] An exceptional payment of £2,500 was later agreed following a request made by Mr McCorquodale, subject to statutory deductions.[10] In a text message of 30 March 2012 from Mr Baker to Mr McCorquodale Mr Baker said:[11]

> I have your message about the one off payment and transfer to FCS. I am entirely comfortable with both . . .

32 Mr Baker now complains that that allowance was lower than the amount received by others. The Respondent decided to close the Weston-super-Mare office with effect from 31 March 2013 and the staff were to be relocated to Gatwick. Details of the proposals for relocation were set out in a document, the copy in the bundle being undated.[12] It included a relocation allowance of up to £50,000. The document referred to the Respondent's relocation policy of which we did not have a copy.

33 We can deal with the point at this stage. We find that the reason that the payments made to the Claimant on the one hand when his base location was moved to Gatwick in May 2012, and to the other staff at Weston-super-Mare in 2013 on the other hand when that office closed, differed was simply because the two sets of circumstances were different. The remaining staff had the benefit of the relocation policy, whereas Mr Baker did not. The relocation of his base to Gatwick on a permanent basis was as a result of a request by him.

Mr Baker's disclosure

34 As mentioned above, Mr Baker relies on an email of 9 February 2015 as a protected disclosure.[13] The Respondent does not accept that that email constituted such a disclosure.

35 It is common ground that Mr Baker was passionate about aviation safety matters. In September 2013 Mr Baker prepared a paper of 11 pages entitled 'A Safety Case for Improving Instructor Standards in Aviation'.[14] The thrust of it as we understand it was that regulatory emphasis ought to be placed on the quality of instructors in the industry, rather than examiners, with in-house experts being responsible for oversight. The final sentence was as follows: 'Addressing inadequate instructor training is the biggest single initiative that could improve flight safety globally.'

36 That paper was provided to Bob Jones, who was then Head of Flight Operations. It was later provided to others and Mr Baker provided a copy to Mr Bishton shortly after Mr Bishton joined the Respondent in March 2014. Mr Bishton was of the view that Mr Baker was seeking to have more TIs employed, and that that was simply not a feasible option. He asked Mr Baker to consider other ways of addressing the standards of instructors.

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[9] **[A108]**
[10] See **[A117]** & **[A125]**
[11] **[A122]**
[12] **[A135]**
[13] **[A270]**
[14] **[A186]**

We record here that there had been a significant reduction in the number of TIs over the immediately preceding few years, as set out in Mr Neale's alleged disclosure mentioned in paragraph 6 above.

37 Much at least of the relevant functions of the Respondent are governed by the European Aviation Safety Agency ('EASA'). At this time EASA was in the process of changing its requirements so that the Respondent would become responsible for evaluating the systems which ATOs had in place for the training of instructors in commercial airlines, rather than evaluating the instructors themselves.[15] That required fewer resources. Mr Bishton decided that he had to create a plan to make the best use of all training resources in the Respondent, being both TIs and FOTIs.

38 On 9 February 2015 Mr Baker sent an email addressed to Deirdre Hutton (Chair), Andrew Haines (CEO) and Mark Swan (Group Director Safety and Airspace Regulation).[16] This is the email upon which Mr Baker relies as being the protected disclosure. The subject of the mail was 'Flight Safety and Safety Regulation'. It is too long to set out in full, but we record passages which appear to be potentially particularly relevant taking into account Miss Lewis' summary set out above. The first paragraph reads in part as follows:

> This is an open letter to CAA senior management about the situation now facing the "Safety Regulation" part of SARG. . . . . Like my colleagues in APP/FCS I have years of experience working at the interfaces between Regulation, Flight Operations, and Training, and feel able to comment on many of the issues that affect us, and the safety concerns these bring.

39 Mr Baker then said that there were recent developments at the Respondent which raised serious concerns about how the Respondent was dealing with pilot safety risk. He then referred to the planned move of Mr McCorquodale out of FCS, saying that he had enabled the limited resources of FCS to be focussed on aviation safety. The fifth, seventh and final paragraphs of the email are as follows:

> One has to ask if the managers (or consultants) making these manpower decisions have considered the full implications of the specialist knowledge and expertise that is being lost from our capability teams at such an alarming rate. In December yet another dual qualified flight ops/training inspector (FOTI) resigned from the CAA, the second high value asset to do so in a matter of weeks. He had been with us only a few years; just long enough to have gained that useful insight into how the practical disciplines of "training" and "flight Ops" blend with "regulation". This knowledge and expertise cannot easily be replaced and the number of training inspectors, flight examiners and licensing standards inspectors are now well below the "critical mass" where we might hope to influence the standards across industry and within the ATO is without any real effectiveness.
>
> Consequently, within the FCS team we are hoping that the present trend of losing hard-won expertise (admittedly high cost but also high-value) can be reversed, and also, at an individual level, that David McCorquodale's specialist knowledge and personal attributes will not be lost to the organisation altogether, as has occurred with so many others recently. Since it was the CAA's own Safety Action Group (under ESP) that first raised the safety concerns over pilot

[15] This was referred to as 'performance based regulation' or 'PBR' for short.
[16] **[A270]**

> performance, I am sure the irony of the loss of a management post entitled "Head of Advanced Pilot Performance" will not be lost on you.[17]
>
> I hope you can accept this letter as it is intended, written with flight safety at the heart of the matter.

40 A copy of that email was forwarded to Mr McCorquodale, the Claimant's colleagues and others by a separate email.[18] The text of that email is material:

> This morning I have sent an open letter (below) to the CAA chair, CEO, and group director, and thought you ought to know of its existence, but without complicating your situation by giving you prior knowledge of it. I have agonised for some time as to whether to speak out, but whatever the personal risk (I would very much like to keep my job!) I felt it would be on my conscience if I said nothing about the safety implications for the future if the CAA is allowed to decline in the way we have seen.
>
> Let us hope it is taken in the spirit it is meant.

41 Section 43B of the Employment Rights Act 1996 provides as follows insofar as material:

> **43B Disclosures qualifying for protection**
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> (e) that the environment has been, is being or is likely to be damaged, or
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

42 Miss Lewis submitted that the email contained the information identified in the introduction to these Reasons, that Mr Baker had a reasonable belief that information tended to show that there was a breach of a legal obligation being Commission Regulation (EU) No 290/2012

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[17] The reference to 'Safety Action Group' is a reference to a report of the Safety & Airspace Regulation Group which was then in draft form. The report is over 200 pages. The conclusion to the Executive Summary on page 15 of the report is as follows:
'SARG fitness for purpose is currently rated 'Adequate' with some areas of strength and weaknesses identified. Of most concern is that the areas currently rated weak are those most likely to features contributory causal factors in aircraft accidents: Pilot Competence and the Operator's supervision and control. Resources are the main concern across the organisation with all areas on minimums and some dipping below this level. There are also concerns that, in some areas, technical tasks are not matched with appropriate skill level. There are recommendations throughout the report to address immediate issues identified.'

[18] **[A272]**

ARA.GEN.200(a) and also that there was a risk to the safety of the travelling public.[19]

43 Mr Tabachnik cited the most recent authority of *Kilraine v. London Borough of Wandsworth* [2018] EWCA Civ 1436. Although that case was heard in connection with section 43B as it was before being amended with effect from 25 June 2013 the guidance is still valid on this point. At paragraph 35 Sales LJ said the following:

> In order for a statement or disclosure to be a qualifying disclosure according to [the language of section 43 B(1)], it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).

44 Mr Tabachnik also referred to *Eiger Securities LLP v. Korshunova* [2017] ICR 561 EAT. He submitted that 'a potential legal liability must be specifically identified' for the purposes of section 43B(1)(b). We note the following sentences from paragraph 46 of the judgment by Slade J:

> The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation.

45 There is of course always a danger of taking a short passage from a judgment and applying it where circumstances are different. We are satisfied that that extract contains a correct statement of the law as set out by Slade J.

46 Mr Tabachnik submitted that Mr Baker did not disclose any information in his email, but rather was expressing his professional opinion about internal staffing and resource allocation. Further, no legal obligation was identified, nor did what Mr Baker said tend to show that the health or safety of an individual was likely to be endangered.

47 We have not found it easy in coming to a conclusion on these points. What is quite apparent is that Mr Baker did not set out precisely what information was being conveyed, nor that it was intended to be a disclosure, nor to exactly what legal obligation(s) he was referring. However, the section does not require that level of precision. The law does not require a document in the form of a legal pleading. On balance we have concluded that these elements of the definition have been met. It is the fifth paragraph read along with the preceding one which we consider to be important. The information conveyed was that there had been a reduction

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[19] Commission Regulation (EU) No 290/2012 of 30 March 2012 which is as follows:

> **ARA.GEN.200 Management system**
>
> (a) The competent authority shall establish and maintain a management system, including as a minimum:
> (1) . . . ;
> (2) a sufficient number of personnel to perform its tasks and discharge its responsibilities. Such personnel shall be qualified to perform their allocated tasks and have the necessary knowledge, experience, initial and recurrent training to ensure continuing competence. A system shall be in place to plan the availability of personnel, in order to ensure the proper completion of all tasks;

in the numbers of staff with appropriate specialist knowledge and expertise, and further that the skills of Mr McCorquodale were also to be lost.

48 We do not accept that this case falls within paragraph (b) of section 43B(1). There is nothing from which we could possibly read into the email any reference to the EU regulation mentioned by Miss Lewis. However, we do find that this falls within paragraph (d) of the subsection. The subject of the email is clearly that of aviation safety with particular reference to the competence of pilots. The final one line paragraph refer to 'flight safety at the heart of the matter.'

49 We accept the submission by Mr Tabachnik that Mr Baker was expressing an opinion. However, the statutory provision does not exclude matters which are opinions. The question is whether there was information disclosed and whether Mr Baker reasonably believed that a safety risk existed or was being created. We find that he did. Mr Tabachnik submitted that the email 'does not point to any specific health and safety risk'. In our judgment in these circumstances it is quite obvious what the risk of an aircraft being flown by an incompetent pilot is. Further Mr Baker had referred to three major aircraft accidents. The implication is clearly there.

50 The other element of section 43B(1) is that Mr Baker must reasonably have believed that the writing of the email was in the public interest. Mr Tabachnik submitted that that was not the case, and that the 'email was primarily about staffing in one department of the CAA and thus impacted a limited group of individuals. In particular, the key reason why the email was written was to support and protect [Mr McCorquodale's] position.' True it is that there was reference to a general reduction in numbers and specific reference to the then proposed loss of Mr McCorquodale also, but in our judgment the overriding purpose of the email was Mr Baker's concern about aviation safety. That clearly is in the public interest.

51 We therefore find that Mr Baker made a protected disclosure.

<u>The immediate aftermath of Mr Baker's disclosure and conference call of 12 February 2015</u>

52 This matter is item 10 in the list of elements claimed to justify resignation. Mr Swan forwarded a copy of the email constituting the disclosure to Mr Bishton on the same day saying as follows:[20]

> Not my preferred way of doing business but open culture and reporting to be commended. Can I have a formal response worked up that I can copy Andrew and Deirdre pse, and the research project will need to be unpacked by way of explanation? The DM piece is already in hand.

53 Mr Bishton was due to be on leave for two weeks from the afternoon of 12 February 2015. He had asked Mr McCorquodale to arrange a teleconference of the TIs to discuss management issues and specifically their role In Flight Operations. Mr McCorquodale sent an email to the TIs

[20] **[A277]**

saying that the conference was to be at 9 am on 12 February.[21] The Claimant then sent an email to Mr Bishton simply saying he would not be available. Mr Bishton replied immediately as follows:[22]

> I think we need to discuss prioritisation, especially in light of your letter and concerns – not meant to sound grumpy, but statement of fact nonetheless.
>
> This meeting is the forum for deciding how we go about training oversight and the lack of attendance of all dedicated TIs to date is making it hard to get traction.
>
> I have asked DM to arrange a conf call (TIs, DM & me)) and we can have a open discussion about events of the last week – will deal with all the elephants in the room.
>
> As a team, if you take a look at your collective calendars for FEB, MAR and APR, perhaps you can help Ali/me find a way to actually engage.

54 The teleconference did take place and Mr Baker participated. There is a material difference of evidence concerning this conversation. Mr Baker said in his witness statement that Mr Bishton had criticised the letter of 9 February saying that it had brought unwarranted attention on Flight Operations, that it had contained narrow minded views and did not capture the bigger picture. However in his subsequent grievance hearing Mr Baker did say that he could not remember the exact words used by Mr Bishton. Further Mr Baker accepted that Mr Bishton had not named him in this context.[23]

55 Mr Bishton said in his witness statement that he had raised a concern that team issues were being escalated without observing the appropriate channels. That referred to the letter from Mr Baker of 9 February 2015 and also another letter sent on behalf of all the TIs to senior management about the then employment position of Mr McCorquodale. The point was about proper communication and channels, said Mr Bishton.

56 Each of Mr Baker and Mr Bishton were cross-examined on the matter and reiterated the evidence in their respective witness statements. Mr Neale participated in the call but did not provide any evidence similar to that given by Mr Baker. Each of Mr Simmonds and Mr McCorquodale gave evidence that the conversation was proper and professional.

57 Mr Bishton sent an email to Mr Swan on 12 February after the conference call headed 'Briefing on John Baker: Flight Safety and Safety Regulation'.[24] It was prepared at the request of Mr Swan with his assessment of Mr Baker's concerns and their context. The contents of Mr Bishton's email are as follows:

- Spoke to him today, along with the TI team – I made it clear that making statements that *the industry isn't as well protected as it once was* is inappropriate;
- He's a broken record – his passion is 'instructor standards' and he thinks it is the 'be all and end all' to safety, which of course isn't – it's an important element within a broad range of considerations;

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[21] **[A273]**
[22] The chain is at **[A274]**
[23] **[A458]**
[24] **[A290]**

- He wants us to employ more people – I told him that we are going through a process to free up the FO(TI)s to do more work in support of training-related objectives in the 15/16 plan;
- He is not an experienced [Commercial Air Transport] pilot or trainer so his approach is based on how the Central Flying School did things 30 years ago;
- He has done some good in-house work in support of instructor competency training about TIs and FO(T)Is.

58 Mr Swan had sent a short email to Mr Baker on 11 February 2015 thanking him for the note and saying that he would be happy to discuss his concerns face to face. To that Mr Baker replied sending a copy of his 2013 paper and expressing his concern for both examiner and instructor standards.[25] There was a brief meeting between Mr Baker and Mr Swan on 25 March 2015 about which we were told very little. Mr Swan asked Mr Baker to 'wait and see' as the Respondent moved towards PBR.

59 Mr Swan wrote to Mr Baker on 16 February 2015.[26] The letter was written with the assistance of Mr Bishton. The first paragraph is as follows:

> I am very pleased you feel you can openly share your thoughts and concerns with us on issues that have clearly struck a chord in Flight Ops; investing in an open reporting culture is firmly at the top of my agenda. I also acknowledge the passion you clearly have for safety and in particular pilot training; this remains a top priority of the CAA as is reflected by the SAG.

60 Mr Swan then stated that he disagreed with the view of Mr Baker that the UK was no longer as well protected as it had been. He also said that the Respondent was taking training and pilot competence seriously. Mr Baker accepted in cross-examination that it was a 'nice letter' but he disagreed with at least some of the contents.

61 Having taken those matters into account we find that during the conference Mr Bishton did make the statement as set out in his own email to Mr Swan of 12 February 2015, but that he did not go further than that. To that extent we find that there was public criticism of Mr Baker's letter of 9 February 2015.

<u>Working from home – 'WAH'</u>

62 The detriments of which Mr Baker complains arising from the protected disclosure relate (in general terms) to his working arrangements. Mr Neale also complains about the WAH issue. The allegation as set out in the submissions of Miss Lewis is reproduced above but we repeat it for convenience. It is as follows:

> On 22 April 2015 Rob Bishton issue new instructions including a total ban on working from home (WAH); a requirement to attend Gatwick between 9am and 5pm (with time outside these hours no longer considered working time) and for Mr Baker to work on 3 days per week – no more no less – later stipulated as Tuesday, Wednesday, and Thursday.

63 We state immediately that there is no document from either Mr McCorquodale of Mr Bishton to either of the Claimants containing any

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[25] **[A287]**
[26] **[A291]**

such instructions. Further, there is no clear unambiguous evidence to enable us easily to make findings of fact.

64 The evidence of the Claimant was that previously he had been in the habit of travelling to Gatwick from Somerset when necessary on one day, working late that day, then working a long day the next day, and working early on the third day but leaving in sufficient time to be home that evening. The result was having to find accommodation for only two nights, whereas under the new arrangements he would have to stay near Gatwick for three nights at extra cost. Mr Baker did not raise that issue with either Mr McCorquodale or Mr Bishton.

65 We have recorded the contents of the letter to Mr Baker of 17 May 2012 above.[27] The place of work was stated to be Gatwick and the letter did not make any reference to being allowed to work from home. However there were material provisions in the Staff Manual or Workload, Time and Attendance Management policy.[28] It provided that staff could only work from home when (a) it was the most efficient location to complete the task, (b) the line manager's prior approval had been sought and (c) the exact nature of the work to be undertaken had been agreed.

66 Linked to this matter are issues concerning the use by Mr Baker and Mr Neale of the Outlook Calendar. The document also provided that the Calendars were to be used to record appointments, visits, leave and meetings. There were further provisions relating to time off in lieu. Staff could only use TOIL with the prior approval of the line manager and had to be recorded in the Outlook Calendar, and had to be annotated with the relevant date when the extra time had been worked. No more than three days of TOIL should be accumulated, and any TOIL accumulated should be taken within three months of the extra hours which had been worked, and ideally as soon as possible.[29]

67 We have mentioned the desire of Mr Bishton to create new training plans involving the TIs and the FOTIs. Mr Bishton's managers were wishing to know how the TOIL/WB arrangements were being managed and what was being done to limit the substantial amounts being accrued.[30] Mr McCorquodale was not able to supply the relevant information because of a failure by the TIs to complete the Outlook Calendars as required. Mr Bishton also made it his business to look at the Calendars himself to see what the Inspectors were doing.

68 Mr McCorquodale had at times raised the need to complete Outlook Calendars in advance (rather than retrospectively) with the team at meetings and on other occasions. The first written record we can trace is an email to all TIs and Flight Examiners dated 4 August 2014.[31] In the

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[27] **[A126]**
[28] **[D52]**
[29] See **[D45]** and **[D51]**
[30] TOIL was also referred to as 'Work Balance' – 'WB'
[31] **[A238A]**

email Mr McCorquodale pleaded with the recipients to populate the diary each and every day. That message was repeated in a further email dated 5 February 2015 from Mr McCorquodale to the TIs.[32] He set out the reasons why the Calendars needed to be completed, and said at the end:

> I can not stress strongly enough how important this is so please, go back through your calendars and ensure that the detail is readily apparent for all to see – even those who perhaps are not entirely familiar with the nature and significance of your work.

69 As far as TOIL is concerned Mr McCorquodale sent an email to Mr Baker, Mr Neale and others on 23 August 2013 reinforcing the policy stating that a business case was required showing that TOIL was necessary and that prior approval was also required.[33] There was a table attached to that email which showed that Mr Neale had accrued 72 days of TOIL despite the fact that the policy provided that no more than three days should be accumulated. Mr Baker was shown as not having any accumulated TOIL at that time.

70 Mr McCorquodale had been in the habit of allowing TIs to work at home when they asked, and we find that he had had a relaxed approach to the matter. However, he knew that his consent was necessary and he reminded the TIs of that if they had not asked in advance.

71 In early 2015 Mr Bishton wished to ascertain what the TIs were doing as he could not readily see that from their Outlook Calendars. He also wanted to utilise the TIs to assist arrears of work for the LSIs and to limit the building up of WB hours by TIs. Mr Bishton was often not able to ascertain where the TIs were and was told on occasions that they were working at home, although this was not shown in the Calendars. On 22 April 2015 Mr Bishton sent a short email to Mr McCorquodale saying that working from home was not to be approved until he knew what the TIs were doing.[34] We accept Mr McCorquodale's evidence that this arrangement was to apply until Mr Bishton 'had a better feel of what the TIs were doing' and that it was not intended to be a permanent ban.

72 The evidence concerning what Mr McCorquodale told the Claimants and their colleagues was not entirely clear. We find on balance that following receipt of the email, Mr McCorquodale told each of Mr Baker, Mr Neale and the other TIs that the amount of WAH was to be limited for the reasons stated above for the time being. There were no written instructions given by Mr McCorquodale about these matters which makes it more likely that there was no definitive requirement imposed not to work from home, or for Mr Baker to work from 9 am to 5 pm on Tuesdays to Thursdays. We find that the Claimants were aware that there was not to be a total ban on WAH. We further find that Mr Baker was told that, at least for the time being, he was normally expected to work on Tuesdays, Wednesdays and Thursdays at Gatwick from 9 am to 5pm, but nothing beyond that.

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[32] **[A268]**
[33] **[A183B]**
[34] **[A341]**

73 We have seen correspondence between Mr Baker and his union in April and May 2015 on the subject. We have noted that on 30 April 2015 Mr Baker referred to being able to ask for special permission to vary the hours of work for work tasks, and also on 19 May 2015 he referred to Mr McCorquodale having 'softened the line'.[35] We also saw the Claimant's Outlook Calendar for the relevant period which clearly shows that the Claimant did not in fact work a regular pattern.[36] He told Mr Jary on 19 May 2015 that he would continue with flexible hours and days as before, and it is clear that that is what he did.[37] That accords with the written evidence of Mr McCorquodale where he said that he did not recall Mr Baker's general working patterns changing after 22 April 2015.[38]

74 In his first email to his union on 30 April 2015 Mr Baker said the following:[39]

> I am not so concerned about the WAH issue, as I never routinely planned to take work home. WAH has tended to occur on non working days to deal with urgent pop-ups or to catch up with report writing etc, so being banned from that activity is no bad thing.

75 In a similar vein Mr Baker also sent an email to Mr Simmonds on the same day:[40]

> Just one thought. Like David I never routinely plan WAH. It occurs through pop ups, or urgent work tailing over from the working days. So the 'no WAH' part of the new rules is probably a good thing.

76 We ought to mention a note which Mr Baker made of a conversation with Mr McCorquodale on 21 May 2015.[41] That records that Mr McCorquodale had refused to allow Mr Baker to update course material on a Friday. Mr McCorquodale had not seen the note until immediately before the hearing and his response in cross-examination was that what Mr Baker was proposing to do looked like an administrative function, and he then tellingly added that he agreed that some activities were better done at home.

77 We have mentioned the Outlook Calendars above. The fact of the completion or otherwise of the Calendars was not explored in detail in cross-examination with Mr Baker. It was put to him by Mr Tabachnik that some TIs did not complete their Calendars fully to show how much WB had accrued, and he simply said that he disagreed. Mr Neale asserted that he did complete his Calendar with all relevant details and that Mr Bishton and Mr McCorquodale had simply not used the software properly to be able to see those details. We reject that evidence. We found Mr Neale's evidence to be unreliable on this point. Ian Burns, a former TI, was interviewed on 1 June 2016 following a grievance put in by Mr

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[35] **[A354M-O]**
[36] **[A258-261]**
[37] **[A354M]**
[38] Paragraph 72
[39] **[A354O]**
[40] **[A344]**
[41] **[B179]**

Neale.[42] The subject of WB was raised, which Mr Burns described as 'thorny'. He then said:

> [Mr Neale] was a very effective Training Inspector (TI). I remember some time ago he didn't want to put things in his diary so Managers didn't know what he was doing. Terry was often referred to as Lord Lucan, I remember people saying "Where the hell is Terry"?

78 We did not hear from Mr Burns, but what he said supports our view as to the lack of credibility of Mr Neale's evidence on the matter.

79 We have to decide whether what occurred in relation to Mr Baker's working arrangements was as a result of the making of the protected disclosure. We find that there was no causal link. Mr Tabachnik listed four reasons in his submissions.[43] What occurred was 10 weeks after the disclosure, the instruction as to working arrangements applied to all TIs and not only to Mr Baker, it was consistent with the Respondent's policies, and there were legitimate management reasons for what occurred. It is the final point which weighs most heavily with us. We are satisfied that Mr Bishton had genuine concerns about the working arrangements of the TIs and wished to find out what was going on. This was nothing more than proper management.

80 We would also have had to be satisfied that what occurred was an actual detriment to Mr Baker, and further that that detriment was such as to constitute a breach of contract entitling him to resign. We are not satisfied that in fact Mr Baker did suffer any detriment. He welcomed the WAH restriction. We have found that his working pattern continued much as previously. He conceded in cross-examination that he was considering what might happen in the future as opposed to any disadvantage which had actually been caused to him.

81 For those reasons the claim of automatic unfair dismissal in accordance with section 103A of the Employment Rights Act 1996 fails. We turn to the other matters of which Mr Baker complains.

Line flying and ratings

82 This is a matter of which each of Mr Baker and Mr Neale complain but the complaints are different. Mr Baker complains that he was prevented from line flying as a condition of working part-time, and that the budget for revalidation of flying licence qualifications was severely restricted. Mr Neale simply refers to 'unfavourable decisions' concerning these matters.

83 Line flying is an arrangement reached between the Respondent and a commercial operator to allow qualified CAA pilots to fly one of the operator's own aircraft as part of its normal scheduled operations. Line flying was only possible where the operator agreed. Neither Mr Baker nor Mr Neale had any contractual right to line fly. Further, of necessity, it was secondary to the principal duties of each of Mr Baker and Mr Neale. The maximum number of days allowed by the Respondent for line flying was

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[42] **[F246]**
[43] Paragraph 83

four per month. It was apparent to us during this hearing that flying in any capacity was a matter of considerable significance to Mr Neale.

84 We find that Mr Baker was told that when he ceased working on a full-time basis and started on a part-time basis that he would not be allowed to continue line flying. He said in cross-examination that he accepted the position, and that he had not raised the issue with Mr Bishton. Miss Lewis did not raise this topic in cross-examination, and in his submissions Mr Tabachnik said that 'it must be treated as abandoned.'

85 Whether it has been abandoned or not, we find this point has no merit. Mr Baker elected to work on a part-time basis, and not being able to line fly was part and parcel of that arrangement. Further it appears to us to have been an entirely sensible requirement of the Respondent. Mr Baker was required to fulfil the role for which he was employed and not be distracted from that role during his reduced hours by line flying.

86 A related matter is the retention of ratings by pilots which authorise them to fly a certain type of aircraft. The cost of maintaining a rating falls on the Respondent. At the request of Mr Bishton an email was sent by Mr McCorquodale on 15 May 2014 to all TIs concerning the flying budget.[44] It stated that the flying budget was to be centrally and efficiently managed so that scarce funds were not wasted.

87 Mr Baker put in a bid on 16 December 2016 for his licence to be revalidated for three types of aircraft at a cost approaching £6,000. Mr McCorquodale replied the same day granting approval for one type of aircraft, but refusing the other two.[45] Mr Baker replied on 5 January 2015 thanking Mr McCorquodale and saying that the other two requests were put on hold.[46] He did not protest about the refusal to fund the licence revalidations. In cross-examination Mr Baker accepted that maintaining a rating was at the discretion of management and that business need was the principal element in the exercise of the discretion.

88 The issue of line flying also arises in the claim by Mr Neale. Mr Neale described himself as 'a lifetime pilot'. He had been line flying with a company until 2014 when it became insolvent. It appears that Mr Neale had then been discussing the possibility of line flying with an operator, Fayair, and the operator had made an offer to the Respondent to allow Mr Neale to fly its aircraft. Mr McCorquodale sent an email on 6 August 2014 to Fayair (or an agent) thanking them for the offer but saying that business considerations had to be taken into account.[47]

89 Mr Bishton sent a long email to Mr Neale on 17 October 2014 saying that the Respondent would not support line flying with Fayair at the time and that line flying would be restricted to complex aircraft operating

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[44] **[A219]**
[45] **[A248]**
[46] **[A266]**
[47] **[D179l]**

certificates.[48] He added that at that time the Respondent did not have any requirement to place a further pilot into the business jet sector. Mr Bishton also said that he had taken into account that Fayair ran business jets which did not fly scheduled routes, and that that could be disruptive to the operation of the Respondent. The point was that with an ordinary commercial operator line flying could be pre-planned and fitted into Mr Neale's working life, whereas a business jet operation did not work to programmed schedule.

90 Mr Neale became 65 on 10 January 2015, which meant that he was unable to fly with ordinary commercial operators, but could continue to fly with some business jet operators. Mr Neale continued to pursue the matter and approached TAG UK, another business jet operator. Mr Neale wrote to Mr Bishton on 25 February 2015 concerning line flying the Gulfstream G650, having a five day induction in April, and evaluating a simulator in Savannah, Georgia. Mr Bishton replied saying that Mr Neale could not attend the course, that he (Mr Bishton) needed to understand the business case to justify such line flying, and that his primary concern 'is the resource message the dedicated TI team is promoting internally and externally.'[49]

91 It is apparent that there was a meeting in about mid-April 2015. Mr Bishton wrote on 21 April 2016 to Mr Neale saying that at that time the Respondent would not 'support anything other than line flying with complex CAT operators' and that TAG was not included.[50]

92 Mr Neale then changed tack and sought to fly in his own time, for which the consent of the Respondent was required. There was correspondence on 24 and 25 June 2015 which appears to have petered out.[51] Mr Neale said in his witness statement that the Respondent refused to allow him to fly in his own time, but there is no evidence to support that assertion.

93 Mr Neale is also alleging that he was denied the opportunity to keep his ratings valid, and he also says that Mr Bishton 'removed an incumbent inspector from Line Flying a new Boeing model (B787) and awarded himself a qualification on this new type to take over flying this aircraft.' In July 2015 Mr Neale had ratings on two different Gulfstream models, the A380 and the B747. He accepted in cross-examination that his complaint was limited to the B747 rating which was allowed to lapse. He also accepted that by then he was 65 and so unable to fly commercially, that the number of 747s in service was reducing, and that the flying budget was under pressure.

94 We do not accept that allegation concerning the Boeing 787 but at the very most it is peripheral to these claims and we will not pursue it.

<u>Changes to terms and conditions and no pay rise</u>

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[48] **[D191B]**
[49] **[D448]**
[50] **[D474]**
[51] **[D518]**

95 Mr Baker and Mr Neale both rely on this point. Mr Baker made specific reference to the loss of a company car, the downgrading of medical insurance and the reduction of travel and related expenses. There is a specific issue concerning the expenses of Mr Neale to which we refer below. As pointed out by Mr Tabachnik in his written submissions these matters were not pursued in evidence. Further, they were general changes applying to many, if not all, employees of the Respondent. We do not doubt that there were such general changes and the point was accepted by Mr Baker in cross-examination.

96 A related matter is that there were no pay rises between 2011 and 2015. That was not in dispute. Again, we assume that applied to all employees, and such policy was applied across at least most of the public sector. We comment that we would find it surprising, to say the least, if that matter could properly form an element leading to a successful constructive unfair dismissal claim.

Mr Baker - Pay dispute not resolved and disagreement over annual leave

97 These are matters numbered 5 and 9 in Mr Bakers list of matters he says entitled him to resign without notice. They are historic matters going back to 2013. We did not have detailed evidence about the matter. On 22 May 2013 Mr Baker sent an email to Mr McCorquodale saying that his contractual hours for 2012/13 were 911.4, but that he had in fact worked 1133.4 hours, a difference of 222 hours.[52] He asked to be paid for 200 hours and that it be treated as salary, and so pensionable. The Claimant was in fact paid for the 222 hours as a non-pensionable lump sum in October 2013.[53] The emails appear to have fizzled out in June 2014.

98 However, an extension of the matter arose in 2015. Mr Baker maintained that he had 3.5 days leave carried over from 2013/14.[54] It is apparent from an email of 16 April 2015 from Mr Baker to Alison Jarvis that he was not pursuing the point.[55]

99 We were not taken to the detail, but Mr Baker accepted in cross-examination that Mr McCorquodale had told him to take the accrued leave but, said Mr Baker, he had not ben able to do so. It was a minor point. None of the Respondent's witnesses were cross-examined on the matter.

Mr Baker's PMR 2013

100 Item 7 in the list of complaints is the downgrading of Mr Baker's rating. This matter was not covered in Mr Baker's witness statement. He did give some evidence in cross-examination. We deal with it briefly. It relates to the grade awarded to Mr Baker for the year ended 31 March 2013. Mr McCorquodale initially awarded a Grade 4 which is 'Developing Performer' whereas Mr Baker had been described as 'Good Performer' in

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[52] **[A229]**
[53] See **[A228]**
[54] **[A337]**
[55] **[A334]**

the preceding year at Grade 2.[56] Following various discussions which we do not record the grading was changed to Grade 3, apparently on 25 April 2015.[57] Mr Baker did not mention the matter again until he lodged a grievance after his resignation.

Mr Baker's PMR 2015

101 Mr Baker complains that he was downgraded from 2 to 3 for the year to 31 March 2015. We find that in the interim review for the first half-year Mr McCorquodale had awarded Mr Baker a Grade 2.[58] There is text in the review document as follows:

> If you continue to perform in the second half of the year as you have for the first half of the year, you can reasonably expect the following rating at the year-end.

102 At the year end Mr McCorquodale rated Mr Baker a Grade 3.[59] Mr Baker did not complain. He accepted in cross-examination that this was a 'small add-on' to his complaints.

Mr Baker's job titles

103 Mr Baker says that in May 2015 job titles were changed to FOTI, thus 'removing Flight Crew Standards SME status.' This is another point about which Mr Baker did not provide any evidence-in-chief. We do not know exactly what facts are being alleged, and any consequences.

Mr Baker's resignation

104 Mr McCorquodale and Mr Baker met at the end of the day on 11 June 2015. Mr Baker said that he was resigning. Mr McCorquodale was surprised and asked Mr Baker if there was anything which he could do to change the decision to leave. Mr Baker said he did not like the working arrangements and it was becoming inconvenient to be based at Gatwick and live in the South West. Mr Baker then gave Mr McCorquodale a short formal letter resigning and giving three months' notice to expire on 12 September 2015.[60]

105 Mr Baker sent an email to Mr McCorquodale on 12 June 2015 which email was rather more expansive than the letter.[61] Two points were made. The first related to his working pattern. We consider the relevant part to be as follows:

> . . . it now seems that joining up whole weeks of work on occasions as I previously did to cover the DI and other tasks, followed by time-off in bigger chunks, is no longer acceptable. This constitutes a change to what were my contractual arrangements over the last three years (written and verbally agreed) and has now made the job untenable.

106 Mr Baker then referred to instructor standards. In a substantial passage Mr Baker makes it clear that he disagreed with the view taken by

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[56] Confusingly each of Grade 2 and Grade 3 use the description 'Strong Performer'.
[57] **[A205]**
[58] **[A249]**
[59] **[A325]**
[60] **[A367]**
[61] **[A368]**

individuals at senior level as to the strategy to be adopted by the Respondent, and he referred back to his letter of 9 February 2015.

107 Mr Baker did not take up Mr McCorquodale's offer of discussing any matters which would enable Mr Baker to change his mind.

108 The other evidence we have is an email from Mr Baker to Mr Jary of 17 June 2015.[62] He referred to two reasons for resigning. The first was the 'change in work conditions' but the second was different from that expressed in the email to Mr McCorquodale. He referred to FOTIs joining Flight Operations and a change of his title to FOTI, removing his status as FCS specialists. Mr Baker said that life was being made difficult and that it 'makes the part-time untenable, so I have decided to leave earlier than intended.'

109 The Outlook Calendar shows that during the notice period of some 39 working days Mr Baker actually only worked for 15 days, the remainder being annual leave or WB days. Further, of course, by resigning on notice Mr Baker accrued entitlement to leave in respect of the notice period. The exact calculation is not clear to us. It appears that it was agreed that as at 17 June 2015 there was a balance of leave due to Mr Baker of 9.5 days based on his employment ending on 12 September 2015.[63] The reason given by Mr Baker in his witness statement for not resigning without notice is that he was scheduled to tutor a course over the two subsequent days.[64]

110 It is convenient to record here that Mr Baker sent to Mr Neale a copy of his email of 12 June 2015 to Mr McCorquodale. Mr Neale replied on 16 June saying that '[t]he lunatics are definitely running the asylum!'[65] He then referred to pursuing constructive unfair dismissal cases and seeking guidance on what evidence to collect before he left.

Conclusions concerning Mr Baker

111 We have already concluded above that the claim of automatic constructive unfair dismissal following the making of a protected disclosure fails. We now deal with the accumulation of matters which Mr Baker says amounted to a breach of contract such as to entitle him to resign without notice.

112 In her submissions Miss Lewis said that Mr Baker 'relies on the refusal to restore flexibility to his working arrangements and the denigration of his safety concerns as the last straw in a series of acts which cumulatively undermined the implied term of mutual trust and confidence.'[66] She then set out the list of other matters we have listed at the beginning of these Reasons.

113 Mr Tabachnik submitted that the Claimant had not demonstrated that there had been any breach of contract by the Respondent, let alone one which amounted to a repudiation of the contract by the Respondent.

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[62] **[A357A]**
[63] **[A375]**
[64] Paragraph 37
[65] **[A369A]**
[66] Paragraph 46

Further, he said, the resignation must be in response to any breach, and here Mr Baker had a 'disagreement with the CAA's general direction of travel and a feeling of ennui based on a view that the CAA is "*defunct*"'. Finally, he said, an employee must not have affirmed the contract, and working out a long notice period for an employee's own financial benefit can constitute such affirmation.[67]

114 We will deal first with the items numbered 1 to 13 inclusive as the proverbial weights on the camel's back before the last straw was placed on it. We can summarise our decision on those matters very simply. We do not consider them, either singly or collectively, to be of any great weight. While it may be disappointing, for example, not to receive a pay rise for several years, and may cause an employee to become disenchanted, more is required to be an element of sufficient gravity to count towards an entitlement to resign without notice. That is even more so when a pay-freeze is a general one, and the employee in question has not been singled out.

115 What was the real reason (or were the real reasons) for Mr Baker resigning? Mr Tabachnik submitted that Mr Baker resigned for personal reasons which can really be summarised under two heads, although Mr Tabachnik sought to break the first down into sub-categories. The first head is that Mr Baker had decided that the Respondent was no longer a place where he wanted to work because of his view of the direction of travel of the Respondent as decided by more senior management. The second head was that Mr Baker wanted to spend more time on his boat in Cornwall.

116 We can dispense with the second point quickly. There was insufficient evidence that wanted to spend more time on his boat was a cause of Mr Baker's resignation, but of course having resigned he would have had more time to enjoy that hobby.

117 We stand back and consider the evidence overall and the clear attitude of Mr Baker towards the changes being made in the safety strategy of the Respondent. It was clear from the tone of Mr Baker's evidence and some comments made that he had little, if any, respect for the more senior management of the Respondent. He also disagreed with policies being adopted. We find that was a significant factor influencing Mr Baker. There had been a running sore going back at least to September 2013. We also find that the tightening up by Mr Bishton through Mr McCorquordale of compliance with the Respondent's policies contributed to Mr Baker's disenchantment. We do not accept that any of the other matters in Miss Lewis' list had any significant relevance. They appear to us to have been added to this claim as make-weights.

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[67] *Cockram v. Air Products plc* [2014] ICR 1070 EAT & *Malik v Cenkos Securities plc* UKEAT/0100/17

118 There has been focus on the changes to the working arrangements. We note in passing that the case was presented not on the basis that there were any changes that were themselves a breach of contract, but rather conduct going towards a breach of the *Malik* implied term relating to mutual trust and confidence.[68] A breach of that term does, of course, require that the conduct of the employer occurred without reasonable and proper cause.

119 Further, what was significantly lacking from the evidence was anything to demonstrate to us that whatever occurred at that time did in fact cause Mr Baker any difficulty. Further there is no evidence that Mr Baker sought a relaxation of the rules which he now says were imposed on him, but that such relaxation was refused as he alleges.

120 The simple question before us is whether what occurred was done without reasonable and proper cause, and also was sufficient to destroy or seriously damage the relationship of trust and confidence between Mr Baker and the Respondent. The answer to those questions is in the negative. We accept Mr Tabachnik's submission that what occurred in April and May 2015 was that perfectly reasonable and proper management instructions were given. It is clear that Mr Baker became disenchanted, but he is very far from persuading us that those matters which we found to have occurred constitute a repudiation of the employment contract. The 'ordinary' constructive unfair dismissal claim therefore fails also.

121 Notwithstanding that conclusion we ought to address the further submission made by Mr Tabachnik. He submitted that Mr Baker worked out his notice for personal gain and thereby affirmed the contract. We have recorded above that Mr Baker gave three months' notice, and that during that three months he accrued a further entitlement to leave which he took before his employment ended on 12 September 2015. Miss Lewis did not dispute the authorities cited by Mr Tabachnik, but submitted that what occurred did not amount to a waiver.

122 The facts of the two authorities are of course different. In *Cockram* there was a contractual notice period of three months, but the claimant gave notice of seven months. I was the judge who heard the matter at first instance and I specifically found that the reason that longer notice was given was for the Claimant's own financial reasons, and that in so doing he had affirmed the contract. In the EAT Simler J upheld the decision, saying the following at paragraph 25:

> The question whether a party has affirmed the contract is fact sensitive and context dependent. It does not generally lend itself to bright line or rigid rules. As Jacob LJ said in *Buckland* 'the law looks carefully at the facts before deciding whether there has really been an affirmation' [54]. Similarly the statutory protection provided by the unfair dismissal scheme is also fact dependent. Within that legal framework there is no basis for inferring that s.95(1)(c) provides an inflexible rule that post-resignation affirmation as a concept (however rare as a matter of fact) is excluded from consideration. Where an employee

[68] [1998] AC 20 at 34A

> resigns on notice and despite doing so, his conduct is inconsistent with saying that he has not affirmed the contract, that conduct must be capable of consideration by a fact-finding tribunal. Where he gives notice in excess of the notice required by his contract, he is offering additional performance of the contract to that which is required by it. That additional performance may be consistent only with affirmation of the contract. It is a question of fact and degree whether in such circumstances his conduct is properly to be regarded as affirmation of the contract.

123 In *Malik* Choudhury J summarised the law as to affirmation making reference to earlier authorities.[69] We have noted in particular the statement that 'an innocent party who does acts which are only consistent with the continued operation of the contract will be taken to have affirmed it.'[70] Although not referred to at this hearing we are aware that in *Brown, Bhoma & O'Reilly v. Neon Management Services Ltd* [2018] EWHC 2137 Choudhury J stated *obiter* that if an employee worked out a contractual notice period of six or twelve months that would amount to affirmation.[71]

124 This is not a case in which the issue is whether there was any delay between the conduct constituting the putative breach of contract justifying resignation and the resignation itself. It is the giving of the notice and the steps taken by Mr Baker during the notice period upon which Mr Tabachnik relies. In this case Mr Baker gave notice in accordance with the contract, and then took steps to agree his total contractual leave entitlement up to the expiry of the notice. If Mr Baker had resigned without notice then he would have been entitled to be paid his accrued leave to that date. He obtained an additional entitlement by the giving of notice. That is of course an inevitable consequence of the provisions of the Working Time Regulations 1998.

125 What we are faced with here is a relatively normal notice period of three months, as opposed to the long notice periods in *Neon* or notice being given in excess of the contractual period as in *Cockram*. The question is whether as a matter of law the working out of notice of that length, including the taking of leave accrued and accruing due, of itself amounts to an affirmation and waiver. We do not accept that by the giving of the contractual notice of three months and then calculating what leave is due amounts to a waiver by Mr Baker of any breach by the Respondent. If we were to conclude to the contrary then we would have to consider what is the minimum notice which could be given without affirming the contract.

<u>Mr Neale's disclosure</u>

126 We reproduce the evidence of Mr Neale from paragraphs 3 and 4 of his witness statement:

> 3 On 1st October 2014, on the instruction of my line manager, David McCorquodale, I made a short presentation to the CAA Board (or Exceutive Committee – ExCo) on aviation aspects of

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[69] See paragraph 125 which is too lengthy to set out in full.
[70] Paragraph 125(c)(iii)
[71] The logic of reference to resigning with notice in section 95(1)(c) was explored by Denning MR in *Western Excavating Ltd v. Sharp* [1978] 1QB 761 at 768D-F.

> Automation. The topics were: 'What Has Changed', 'What Is Coming in the Future' and 'What is the CAA Doing to Prepare for it'?
>
> 4 When I made the presentation (at which the CEO Andrew Haines was present), I respectfully pointed out that we, the CAA, were not actually doing very much to prepare for the future because of the very reduced number of inspectors throughout the CAA and which, in Flight Crew Standards (my section), had dropped from 8 full timers and 2 part-timers. That meant we were no longer able to participate in activities such as eternal committee work (EUROCAE and the like) and the only means we had of keeping in touch was through Line Flying (flying as a qualified pilot with a UK airline to keep up our flying skills and to keep up-to-date with aviation's rapidly changing environment) on modern aircraft types and through our limited (and dwindling) participation in OEB/OSD work. My comments were delivered in a calm and positive way.

127 We were provided with a copy of the PowerPoint pack.[72] The presentation was entitled 'Challenges for Fixed Wing Pilots'. In paragraph 6 above we have set out the information alleged to have been disclosed. There is nothing in those slides which clearly demonstrates that the information was provided as alleged. There is nothing relevant in the notes prepared by Mr Neale in relation to each slide.

128 The presentation was attended by Andrew Haines, the then Chief Executive of the Respondent. The presentation was intended to focus on the effect on the Respondent of increasing automation in the industry. Mr Haines reported back to Mr Bishton that Mr Neale had focussed on promoting line flying to keep in touch with what was happening in the industry. Although we did not hear from Mr Haines we find that that account is accurate. It accords with the emphasis placed by Mr Neale on line flying, a matter dealt with above.

129 The only evidence which could possibly support Mr Neale's case in this respect (apart from his evidence-in-chief) is an email he sent to Mr Jary on 20 April 2015.[73] He said as follows in the context of discussing his PMR rating and technical competence:

> I was instructed to prepare a presentation on Automation for the Exco board. One of the questions I was asked to address was what the future was going to bring in aircraft automation and what was the CAA doing to prepare for it. I told them the truth – we were doing little to prepare for it other than through picking up new technologies through line flying as we didn't have the resources. I outlined the reduction in manning levels in Training Standards (down from 7 full time inspectors to 32. – two full timers and two x .6 as part timers) and how morale was poor.

130 Miss Lewis submitted that Mr Neale was expressing his views that the impact of reduced numbers of TIs meant that the Respondent was not able to carry out its function as a safety regulator, thus being in breach of legal obligations and creating an increased risk to the travelling public.

131 We find that Mr Neale did not make the protected disclosure as alleged. There is simply a woeful lack of evidence to support the necessary findings of fact as to what information was provided, and whether the provision of that information satisfied the requirements of section 43B(1)

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[72] **[F379]**
[73] **[D475A]**

of the 1996 Act. The complaint of automatic constructive unfair dismissal therefore fails.

132 We must therefore look at the question as to whether there was an 'ordinary' constructive unfair dismissal. The six matters upon which he relies are set out in paragraphs 6 and 7 above. We have dealt with the issues relating to attendance at the office, the Outlook Calendar, line flying and aircraft ratings, changes to working conditions and the lack of a pay rise between 2011 and 2015 above.

Mr Neale's PMR

133 The allegation is that the 'grading for 2014/15 was mysteriously changed from the Level 3 (i.e. middle grade) discussed with, and recommended by, my line manager to the lowest level – Level 5.'[74] He further alleged that that had been 'directed by management at the highest levels.'

134 In 2012, 2013 and 2014 Mr Neale was graded at Grade 3, although he was upgraded to that level in 2013 following an appeal. Mr Bishton and Mr McCorquodale gave evidence on the matter and explained what had occurred. In 2013 Mr McCorquodale had commented that Mr Neale 'could contribute and engage so much more than he currently does to both the FCS team efforts and the organisation as a whole.'[75]

135 During the interim appraisal in the autumn of 2014 Mr McCorquodale expressed other concerns.[76] For the final appraisal for 2014/15 Mr McCorquodale initially proposed a Grade 3. That proposed grade for Mr Neale, along with the grades proposed for others who reported to Mr McCorquodale, was provided to Mr Bishton in accordance with usual practice. Mr Bishton had concerns about the non-technical aspects of Mr Neale's performance. He met Mr McCorquodale and other managers at a calibration meeting. The result was that Mr Neale was downgraded to Grade 5.[77] Mr Neale referred to this as being part of the attack on him following the presentation on 1 October 2014.

136 Mr Neale sent an email to John Nicholas on 22 April 2015 asking that he be reinstated to Grade 3, and Mr McCorquodale commented on the points made by Mr Neale later that day.[78] Various adverse criticisms of Mr Neale were made. We quote the third and fourth paragraphs to give a flavour:

> He is not, I believe, a 'company man' and in truth that has always been an issue for him. It has become more and more apparent as well as he is now working 'to rule'. Last week it was reported that he worked 44 hours during he week so elected, without previously requesting to do so, to tale a day's TOIL this Monday.

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[74] Mr Neale's witness statement, paragraph 6
[75] Mr McCorquodale's witness statement, paragraph 102.3
[76] **[D357]**
[77] This is an anomaly – Grade 5 was in fact only one grade lower than Grade 3 in the circumstances.
[78] **[D479A-C]** Reproduced with apparent typing errors.

> Overall, whilst Terry's technical competence is sound, his CAA Values and Behaviours are somewhat skewed to his own interest and he manages his time predominantly to suit his own agenda rather then the interests of the company.

137 We note that in his email to Mr Nicholas Mr Neale suggests that the downgrading may have been caused by the necessity to comply with a forced distribution policy. No mention was made of the presentation of 1 October 2014.

138 Mr Nicholas awarded a Grade 3 to Mr Neale on the basis, so we were told by Mr Bishton, that Mr Neale had not been given sufficient warning of the matters which caused a reduction to Grade 5 on calibration. His appeal had therefore been successful.

Mr Neale's expenses

139 This element of the claim has the potential for being seen as trivial, but a considerable amount of time was spent on it at the hearing. The Respondent had a policy concerning expenses which was apparently in the Employee Handbook. We did not have a copy of that document, but we did have a copy of the 'T&RE Guidelines'.[79] The underlying principles were that expenses must be:

- Necessary
- Actually incurred
- Additional (for example, to normal daily expenditure)
- Reasonable in all the circumstances
- The most effective way to meet a necessary cost
- Justifiable if subjected to external scrutiny
- Supported by receipts wherever possible

140 There was a footnote to the final point as follows:

> For the avoidance of doubt, receipts need to be provided to support claims otherwise T&RE payments become liable to income tax. The absence of receipts should be exceptional, even in respect of incidental expenditure.

141 'Receipts' could in appropriate cases be completed by the individual concerned so as to create an audit trail. In the document there were other detailed guidelines, including one to the effect that tea, coffee and snacks etc were to be regarded as normal day to day expenditure. There was an allowance of £5 (UK) or £10 (overseas) per day for 'incidentals' with the cost of tips being given as an example.

142 The evidence of Mr Neale in his witness statement was limited to him saying that 'claims were frequently and unfairly rejected and then approved when challenged.'[80] We were shown an exchange of emails from March 2012 concerning expenses claimed by Mr Neale.[81] Although not part of Mr Neale's claim we do note a short email from Mr Neale to other TIs on 27 March 2012 sent after some expenses had been allowed:

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[79] **[D132-5]**
[80] Paragraph 9
[81] **[D57A-C]**

> Well, a positive result but what a waste of time. I guess we continue to challenge as much as possible and let them worry about the time.

That is an interesting illustration of the mindset of Mr Neale and his attitude to the Respondent.

143 There was obviously a further problem in late 2014 because on 19 December 2014 there was an exchange of emails between Mr Neal and Mr McCorquodale apparently relating to tips given to hotel porters.[82] Mr McCorquodale said that there had been problems in the Respondent with claims having been made where no expenditure had been incurred. He told Mr Neale that he required receipts to be provided in the future.

144 As we understand it the dispute relates to claims made by Mr Neale in July 2015 for various tips for which no receipts had been provided, and also for the cost of an ice cream and a frozen yoghurt.[83] Mr McCorquodale and Mr Neale met on 31 July 2015 to discuss various matters, including the issue of expenses.

145 We reject the suggestion put to Mr McCorquodale in cross-examination that Mr Neale was the subject of particular scrutiny concerning expenses. Although a somewhat tedious and time-consuming matter Mr McCorquodale felt he had to enforce the Respondent's policy. We agree with that attitude because otherwise the policy would become discredited. Mr McCorquodale applied the policy to all those who reported to him, some 40 or so individuals.

Resignation of Mr Neale

146 Mr Neale resigned by a long and closely typed letter of 11 August 2015 giving notice which expired on 10 November 2015. He said that he was tempted to have left immediately but was staying on because a colleague was due to have a planned operation and if Mr Neale left then it would 'cause considerable disruption to industry which [he] did not think should suffer through no fault of its own.' Mr Neale's last day of work was 1 October 2015 and he then took the remainder of the time as accrued and accruing leave.

147 Before he resigned Mr Neale had been seeking other employment for some time and was planning to leave the Respondent. He had started applying for jobs in April or May 2015. On 3 July 2015 he was interviewed by CAE of Burgess Hill and started his employment with that company in late October 2015 with the agreement of the Respondent. We were not told of the date when the offer of employment was made to Mr Neale.[84]

Conclusions concerning Mr Neale

148 We have to decide whether the seven matters of which Mr Neale complained were sufficient to amount to a repudiatory breach of the *Malik*

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[82] **[D281]**
[83] See **[D33-37]**
[84] Mr Neale said in cross-examination that there was an email in the bundle but we were not directed to it.

implied term. The only matter which was unique to Mr Neale was the issue of the change of his grade for 2014/15. All the other matters were ones where the Respondent applied a decision or policy to Mr Neale and to others. That of course does not by itself prove fatal to his claim because the conduct of the Respondent may have been sufficiently bad towards all or a group of employees to justify resignations. However it does make it that much harder for Mr Neale to demonstrate a repudiatory breach.

149 The one individual item is the reduction in the grade for 2014/15 from Grade 3 in previous years to Grade 5, and then back again on appeal. We fail to see what weight that adds to Mr Neale's case. In our view there were perfectly justifiable concerns about Mr Neale's performance, other than in a technical sense, resulting in him being marked down during the moderation process. His grade was however reinstated on appeal. That is an example of the appraisal procedure working properly.

150 We find that the conduct of the Respondent in respect of the matters about which Mr Neale complains was not sufficiently serious so as to breach the *Malik* term. We will not repeat the points made above concerning those aspects which are common to the claim made by Mr Baker.

151 The final matter with which we should deal is again the question of affirmation of the contract. Here the circumstances are not dissimilar from the case of Mr Baker in that Mr Neale said that he was not resigning without notice because of the operation planned for a colleague, although we were not provided with details.[85] We were not provided with further details. However what we do know is that he, like Mr Baker, accrued further leave during his notice period and so benefitted from the continuation of the contract. For the same reasons as set out above we do not accept that the simple facts of giving three months' notice and so accruing further leave entitlement amount to a waiver and affirmation.

152 For those reasons the claim of 'ordinary' constructive unfair dismissal is also dismissed.

Employment Judge Baron
Dated 20 March 2019

[85] It will be recalled that Mr Baker said that he had to tutor a course.