EMPLOYMENT TRIBUNALS

Claimant: Mr Michael Mora

Respondent: Exeter and Devon Airport Ltd

Heard at: **Exeter** **On:** **16-19 September 2019**

Before: Employment Judge Housego
Ms S Christison and
Ms R Clarke

Representation

Claimant: In person
Respondent: Mr D Lewis of Counsel

RESERVED JUDGMENT

The claims are dismissed.

REASONS

Background

1. The claimant was dismissed by the respondent. They say this was a capability dismissal, after extended sickness absence, and that they did all that they could to help him return to work, but there came a point where it was reasonable for them to end his employment, particularly given an asserted lack of engagement with the process by not revealing medical information. They deny anything they did or did not do breached the Equality Act 2010 and say that they met all their obligations in regard to reasonable adjustments. They agree that the claimant was, at all material times and to their knowledge, disabled by reason of PTSD.

2. The claimant says that dismissal was not fair, and that it amounts to disability discrimination connected to his PTSD from an incident at work, and that in various ways their actions or inactions breached the duties of employers under the Equality Act 2010, and that he suffered detriment as a result.

Law

3. The claimant claims unfair dismissal and disability discrimination.

4. Section 13 of the Equality Act 2010:

> "13 Direct discrimination
>
> (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.
>
> (2) ...
>
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
>
> (4) …

5. S15 of the Equality Act 2016:

> "15 Discrimination arising from disability
>
> (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.
>
> (2) Subsection (1) 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."

6. Section 26 of the Equality Act 2010, relevant parts emboldened:

> ***"26 Harassment***
>
> (1) A person (A) harasses another (B) if—
>
> (a) **A engages in unwanted conduct related to a relevant protected characteristic**, and
>
> (b) **the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B**.

(2) ..."

7. The claimant also says that the respondent failed in its obligation to make reasonable adjustments:

> "20 Duty to make adjustments
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
>
> (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
>
> (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
>
> (8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
>
> (9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—
>
> (a) removing the physical feature in question,
>
> (b) altering it, or
>
> (c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column."

8. In respect of a claim for unfair dismissal, the respondent has to show that the dismissal was for a potentially fair reason[1]. The respondent says this was capability which is one of the categories that can be fair[2]. It has to show that the dismissal was fair[3]. It must follow a fair procedure throughout[4], and dismissal must fall within the range of responses of a reasonable employer[5]. It is not for the Tribunal to substitute its own view of what should have happened, for it is judging whether the actions of the employer were fair, and not deciding what it would have done.

9. The claimant also claims that the dismissal was unfair on the basis that it was for health and safety reasons, and so within Section 44 of the Employment Rights Act 1996:

"44 Health and safety cases.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

[1] S98(2) of the Employment Rights Act 1996
[2] Also S98(2) of the Employment Rights Act 1996
[3] S98(4) of the Employment Rights Act 1996
[4] Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA
[5] Iceland Frozen Foods Ltd v Jones [1982] UKEAT 62_82_2907

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) An employee is not to be regarded as having been subjected to any detriment on the ground specified in subsection (1)(e) if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did."

10. The burden of proof as to the reason for dismissal is on the employer, on the balance of probabilities. There is no burden or standard of proof for the Tribunal's assessment of whether it was fair to dismiss[6]. If the dismissal was

[6] Section 98(4) of the Employment Rights Act 1996

procedurally unfair the Tribunal has to assess what would have happened if a fair procedure had been followed[7].

11. As it is asserted that the dismissal was by reason of unlawful discrimination the Tribunal must be satisfied that in no sense whatsoever was the dismissal tainted by such discrimination. For the discrimination claim, it is for the claimant to show reason why there might be discrimination[8], and if he does so then it is for the employer to show that it was not.

Issues

12. These were set out by the claimant pursuant to an Order made by Employment Judge Fowell on 18 February 2018.

13. The claimant set out his claims in detail. They may be summarised thus. He said that his worry was that the system of air traffic control was such that there was and is a risk of mid air collision. He had been off work with PTSD following an *"airprox"* incident (a self explanatory term) on 02 January 2015. On that occasion the primary radar was not working, awaiting repair, and there is no controlled airspace ("CAS") around the airport. The pilot of a commercial airplane saw a glider late and altered course. There was no suggestion that the claimant had done anything wrong, but he was very concerned by this. (He had no way of knowing the glider was there without the primary radar working, and because the glider had no transponder such as would be picked up by the secondary radar, he had alerted the pilot appropriately of the level of cover he was able to offer, and had reacted entirely appropriately when the pilot notified him of the sighting.) It was his only airprox incident in 25 years of being an air traffic controller. The DWP later declared him 35% disabled by reason of an accident at work. He had only about 12 days off work sick in 25 years. He was off sick from 03 February 2015 by reason of this incident. He attempted to return to work, but had a relapse when he was at work as an assistant in the control room when the radar went off for maintenance. He had not known this was to happen. He did not return to work. Ultimately, on 10 September 2018, he was dismissed for capability reasons. This was unfair, he says. His inability to return to work was by reason of the PTSD which would have been ameliorated had there been CAS around the airport and new radar installed. The respondent was at fault, he said, in not providing a safe system, and that had placed him – the person operating it – in harm's way. The effect of the incident and the worry about the possibility of another with potentially serious consequences caused him to suffer PTSD. Inadequate notice was taken of the Civil Aviation Authority ("CAA") doctor's report which he said meant that that his work issues needed resolution before he could return to work as a controller. His concerns amounted to a health and safety concern for which he had been dismissed, automatically unfairly. His CAA licence to be an air traffic controller had been suspended only temporarily (and automatically by reason of the medication he took for PTSD) and he wanted to return to work when these matters were resolved.

14. The disability discrimination claim is based on the same matters. He had PTSD which fell within the definition of disability. He had been under

[7] Polkey v AE Dayton Services Ltd [1987] UKHL 8
[8] Igen v Wong [2005] ICR 931, Madarassy v Nomura International plc [2007] EWCA Civ 33, Laing v Manchester City Council [2006] I.C.R. 159, and Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913

treatment since being off from work, and his treatment had been in breach of the Equality Act duties of the respondent, including his dismissal.

15. The basis of these assertions is set out below.

16. Case law indicates that a list of issues is not a pleading, but a tool to facilitate a hearing, and could not be approached with the formality one might approach a commercial contract or pleading[9]. Nor must a Tribunal stick slavishly to them[10]. Nevertheless the respondent has to know the case it has to meet, and the Tribunal used the ET1 and the statement of case of 2 pages and the 5 page additional response document from the respondent filed soon after the statement of case as a guide, particularly as the claimant had not provided a witness statement. These documents served as his witness statement (with his approval and as directed before the hearing, and the ET3 and further response identified the issues.

Evidence

17. The claimant gave oral evidence. For the respondent, Sue Hodgkinson of human resources, Stephen Wiltshire, Operations Director at Exeter Airport, and Marshall Barrand, projects director of Regional and City Airport Ltd, the parent company, who took the decision to dismiss the claimant gave oral evidence. All were cross examined. The Tribunal also considered two lever arch files of papers running to 523 pages.

The hearing

18. The hearing extended over three days, and the Tribunal reserved its decision, which was made in chambers on the fourth day of the hearing. The claimant was offered breaks at frequent intervals. Counsel for the respondent conducted the case in a manner as helpful to the claimant as possible, such that at the end of the hearing the claimant, unprompted, thanked him for so doing. I made a full typed record of proceedings which can be read by a higher Court if required. In summing up Counsel for the respondent provided (at the start of the hearing) a skeleton argument, to which he spoke. The claimant replied. The submissions took from 09:45 am until 12:45 pm on the third day of the hearing, and I made a full typed note of them. The relevant parts of the documentary and oral evidence and submissions find their way into the decision below and are not repeated here.

Uncontentious facts, and the causative incident

19. The claimant was an air traffic controller ("ATCO") at Exeter Airport. He had worked there for 30 years by the time he left. He had been an air traffic controller for 25 years. He had never had an incident relating to air traffic control in that time. Before 03 February 2015 he had only 12 days off sick since starting work. He was entirely competent.

20. Exeter airport does not have CAS around it. It had applied for this in the past, but it had been refused. It is the CAA that makes such decisions. One

[9] Leslie Millin v Capsticks Solicitors LLP and Others: UKEAT/0093/14/RN
[10] Saha v Capita UKEAT/0080/18/DM

measure of when this is needed is 1m passengers a year. Exeter airport is now approaching that level, but was not when the application was refused, nor in 2015. There is an application in process now for CAS, perhaps in part prompted by the claimant's representations since early 2015. CAS involves an area much larger than the airport, and other fliers object to it. There is an airfield at Dunkeswell nearby which would be much affected by CAS, as all flights from it would have to be authorised externally.

21. Exeter airport has a radar system that is far from new. It is a former military system. It needs maintenance from time to time, and is then not operational for a short period, usually only a few hours. On the occasion of the airprox incident something had malfunctioned, and the radar needed assessment, parts needed to be ordered, to arrive, and then be fitted. There was a 217 hour outage on the primary radar on this occasion. There is secondary radar system, but it does not detect planes without transponders. When the primary radar is not working the air traffic controller tells the pilots the procedure to be followed in a set form of words, which the claimant did on this occasion. It is then the pilot's responsibility to make careful observations in case (as here) of planes without transponders. This airprox involved a glider (without a transponder). The airline pilot observed it as he came down through cloud, and told the claimant, who gave appropriate instructions. The pilot reported this to the CAA, who investigated. It was a category D, meaning risk could not be evaluated, in part because the glider pilot did not file a report. The claimant was not involved in the CAA investigation, doubtless as it was common ground that the glider was invisible to him, and no one suggested that his actions both before and after the pilot reported the glider to him were other than entirely correct. The report was handed to him once received by Exeter Airport. The claimant suffered PTSD as a result of this incident, and this affects him still: the worry he has is of a tragedy for which he would not be responsible but where he would still be the air traffic controller, and of the possible consequences of the airprox incident on 02 January 2015.

22. It is important to bear in mind that while for the claimant these fears and concerns are very real and debilitating there has never been any CAA concern at the way the airport is run.

23. An air traffic controller is employed by the airport at which he works. Every air traffic controller has to obtain and retain a licence issued by the CAA. If an air traffic controller is prescribed certain medications such a licence is automatically suspended. The claimant was prescribed such medication within a few weeks of the incident, and has been on such medication from then until now, continuously, save for a short period when he was not fit for work by reason of the symptoms for which the medication was prescribed. His current licence runs until 2020.

24. The respondent takes out insurance policies. One is loss of licence insurance (105 et seq). For bodily injury this is at 100% of cover and for psychiatric disorders 50%. The insured period is 2 years with a 6 month waiting period. The company sick pay is full pay 6 months and half pay for a further 6 months. The combined result of these was that the claimant did not suffer any substantial diminution in income for 2 years, and after that he had accrued holiday entitlement which he was permitted to take sequentially so as to maintain his income for a further period of about 6 months. The maximum total cover for the claimant was £89,265 based on his annual salary of

£59,510 (114). This replaced an earlier scheme (115 et seq) which had total cover of £120,000, but did not cover psychiatric illness.

Facts found

25. The claimant's medical and other history after 02 January 2015 is as follows.

25.1. On 05 February 2015 the claimant was signed off sick with *"work related stress"* from 02 February 2015, for 3 weeks. He was prescribed medication.

25.2. On 09 February 2015 the claimant provided the sick note to the respondent (64). He had told the CAA (as he was obliged to do) and Dr Renouf of the CAA had suspended his licence.

25.3. The claimant was signed off for 2 weeks on 17 February 2019 and on 25 February 2015 with *"anxiety"* (65) and *"anxiety/stress"* (66) and on 19 March 2015 and on 17 April 2015 for 4 weeks (68 and 76) and referred for assessment for PTSD.

25.4. By late March 2015 the respondent offered the claimant counselling, but the claimant had already started NHS therapy and as it was advisable not to have two different therapies contemporaneously he did not take that up (70: emails to and from David Burrows and claimant). He was then having high intensity cognitive behavioural therapy (CBT) (74)).

25.5. On 20 April 2015 the NHS mental health team wrote (78) to the claimant to say that it *"was clear that you are suffering from post-traumatic stress disorder in relation to a single event trauma that happened in January at your workplace".* That letter recorded that he had been prescribed Citalopram and Mirtazapine (the CAA automatically suspend the licence of an air traffic controller for anyone prescribed these medications).

25.6. On 18 May 2015 the Airprox Board emailed their report on the incident to the claimant, but sent it to a generic email address at the respondent. On the same day David Burrows (Air Traffic Services Manager and the claimant's line manager) sent it on to him (81), without comment. This report states that it does not apportion blame or responsibility. The risk could not be defined as there was only the one pilot report to go on. There was a reduced deconfliction service at the airport (as the primary radar was out of service). The report states in terms that the controller (the claimant) could not have been aware of the glider (87 and 89). The controller had advised the pilot appropriately. The glider was entitled to be in the airspace (89). The pilot saw the glider as the plane he was flying emerged from cloud, and the cause was that late sighting.

25.7. On 02 June 2015 David Burrows enquired of the claimant how he was getting on, and the claimant responded the next day (93-94). He said that the eye movement desensitisation and reprocessing ("EMDR") he was now receiving involved minimising exposure to areas associated with

the trauma event, and so he did not wish to have much connection with work.

25.8. On 05 June 2015 Julia Dennis of human resources emailed the claimant (96) to say that a referral to occupational health was now due, and sent the claimant the necessary form to fill in.

25.9. The Airprox Board report was reported in the local paper on 07 June 2015 and in the Daily Mirror on 09 June 2015 (95). The Daily Mirror stated *"Exeter Airport was not available for comment."* The claimant says this means they were approached but declined to comment. The respondent says they were not asked. While it is normal practice for newpapers to write that when someone is asked but does not comment, and while newspapers should offer the opportunity to comment, there is force in Counsel's observation that there is insufficient evidence to make a finding of fact either way, as newspapers do not always follow their voluntary code. The Tribunal does not think it that whichever it was makes any difference. The respondent was not concerned about the claimant precisely because he was in no way at fault, and no one had ever suggested that he might be.

25.10. On 08 June 2015 the claimant emailed David Burrows about the paper as he had seen it, saying that it was a surprise to him (97). On 09 June 2015 David Burrows emailed the claimant to say that an occupational health report was now needed (99). The claimant emailed David Burrows again on 10 June 2015 (98) saying how upset he was about the reports, which he had now heard reported on local radio and television, and as he worked there people asked him about it. On 11 June 2015 David Burrows emailed the claimant (98) to say that an occupational health report would not be obtained now, but that he, the claimant, might ask for one anytime if he thought it would be helpful. He said the press reports were without any input from the airport. On 16 June 2015 human resources emailed David Burrows to say they and Stephen Wiltshire agreed that the claimant was presently too ill to go to occupational health, and perhaps it might interfere with his EMDR (100).

25.11. On 18 July 2015 the claimant indicated that he did not want a home visit or other support, which had been offered by David Burrows who had expressed concern that there had been no contact between the claimant and work since the claimant went off sick (122), and the policy required it. The claimant voiced the view that his employer had not done enough to prevent the incident occurring. This is a recurring theme.

25.12. The issue of contact was pursued by email on 23 July 2015, because the long term sickness policy required weekly catch up calls (124), and then it was followed up again by letter on 27 July 2015 (127). There was a meeting on 01 September 2015 (131 et seq) and there was to be a referral to occupational health (130).

25.13. From 05 October 2015 Hiscox insurance started paying the claimant £1785.30 monthly (2% of the sum assured) with effect from 04 August 2015 (136). The policy paid for 2 years (and so to July 2017).

25.14. On 12 October 2015 Wellbeing@work, to whom the claimant had been referred by Workways (a counselling service), reported to the respondent (71), to say that EMDR was the best course and that was what the claimant was having. He was unlikely to be fit to return to work for 8-10 weeks.

25.15. The sick notes were now stating *"PTSD"* and were for 5 weeks or so at a time (137).

25.16. Occupational health saw the claimant on 16 September 2015 and gave their report the same day (142 et seq). It was hoped he might return to work in January 2016. It was not possible to say whether he would ever be able to return to his ATCO role. Return to alternative duties should be considered, when he was able to return to work. The claimant was sent a copy.

25.17. By 03 November 2015 the EMDR sessions had concluded (148).

25.18. There was a home meeting on 25 November 2015 (150). The claimant suggested that he might be involved in training as a Unit Training Officer ("UTO"), which would not require a medical. Alternatively he could return to air traffic control as an assistant ("ATCA"), which the claimant felt might be stressful but was a possibility (152). The claimant suggested 30 hours a week, perhaps by a reduction in the number of shifts weekly.

25.19. On 21 December 2015 there was a further medical examination and Dr Hillary, occupational physician, opined that the claimant would be fit for a phased return to work to limited duties in the New Year (157). Subject to medication not being a bar he expected the claimant to be able to return to the ATCO role in six weeks to two months. In the meantime he should avoid the ATCA role and look at half time hours. The psychiatrist was to be asked for a report.

25.20. On 04 January 2016 the claimant returned to work part time. By 23 December 2015 it was agreed that would start as UTO working on training plans that needed updating. It was hoped that he could then become an ATCA, to swap positions with someone who had been an ATCA and who had recently become an ATCO (161).

25.21. The claimant had been paid full pay when off sick for the first 6 months, then half pay. From July 2015 this was augmented by the insurance payments, so that his net pay was about the same as before he went off in February 2015. Then from January 2016, although working part time at a lower role, the claimant was being paid at the pay rate of his full salary of £59,510, but pro rata as he was working half time. He was allowed to take the holiday accrued while off for a year, so that he was actually paid his full ATCO pay. This lasted until July 2016 when the holiday ran out. In addition to his salary he was receiving the insurance payments of £1785.30 monthly (164) until July 2017 (171) when they had been in payment for two years, and so was better off for a period, as he was getting full salary and the insurance payments on top. After that he was worse off financially, for the insurance payments stopped, and he was on half pay (albeit at ATCO salary). Then there came a time when he

was not in receipt of salary, sick pay or insurance payments. He was then assessed by the DWP as 35% disabled and received a level of state benefits.

25.22. On 21 January 2016 the claimant (168) emailed to say that his medication would continue for 6 months, to July 2016, so that he would not be seeing the CAA's Dr Renouf before then, and so his licence would remain suspended. He indicated to Mike Burrows that being in the operations room made him nervous so Mr Burrows felt that the ATCA role was not suitable (170). The respondent's human resources team indicated that it had to be considered whether the situation was sustainable (167).

25.23. The respondent's insurance broker advised that if at the point when the two years of payment ended there was a permanent loss of licence there would be a payment of the remainder of the insured sum (£89,265), which would be £67,841 (172). This was generated because in February 2016 Stephen Wiltshire realised that the earliest return to the ATCO role would be January 2017 (172).

25.24. On 23 February 2016 the occupational physician Dr Hillary saw the claimant again. He was working two days one week and three the next, in training. The claimant told the Dr that he felt able to be an ATCA and was confident that he could cope with an emergency situation.

25.25. On 16 March 2016 Stephen Wiltshire met with the claimant, who wanted to return to air traffic control, and was willing to be an assistant. He would prefer not to work full time.

25.26. On 25 April 2016 the claimant wrote an email to Dave Burrows (179-180) which referred first to changes to his contract of employment. However it was mainly expressing safety concerns, including the phrase, in capitals *"TOTALLY AND COMPLETELY UNACCEPTABLE".* He thanked Dave Burrows for his attention to his well being and health. He said he was upset by the position and did not want to discuss his personal situation further.

25.27. Nevertheless Dave Burrows had a lengthy discussion with him about it, on 26 April 2016 (181), and on 28 April 2016 human resources told the claimant his email of 25 April 2016 was being dealt with as a grievance. He was asked if he felt that another procedure was more appropriate. He did not say otherwise.

25.28. On 11 May 2016 an investigation started and a report was prepared (186 et seq) by Stephen Wiltshire and Jacqui Cousins of human resources. The claimant was assisted by Vicky Stretton of hr, he says to a very limited extent. Stephen Wiltshire then set out the two main points raised by the claimant – first that he objected to a temporary change of contract from ATCO to ATCA while he was unable to work as an ATCO, and secondly that the airport could and should have acted in a way that would have precluded the PTSD, notably by obtaining CAS.

25.29. On 14 May 2016, the claimant added that the radar was inadequate and the insurance effected was not sufficient, and that the flexible working policy did not address his circumstances.

25.30. On 10 June 2016 there was a grievance hearing with the same people as at the initial interview and in addition an adviser from Workways (an organisation which helps keep people in work and which was assisting the claimant). The claimant's focus was on the air safety concerns he had, centering on CAS and new radar.

25.31. The outcome (240) was sent to the claimant on 13 June 2016. It was that flexible working would be considered afresh, and the respondent would do all it could to help the claimant regain his ATCO licence from the CAA, and that the airport would take positive steps to seek CAS for Exeter Airport. It has since done so, and is making (or has made) such an application. This is not a simple process.

25.32. On 27 June 2016 the claimant appealed that outcome (243). He was content with what was said about flexible working. He disagreed with the contents of the outcome letter about gliders and set out technical reasons why he thought there should be changes, with reference to other airports and solutions.

25.33. On 04 July 2016 there was another referral to occupational health. This report hoped for a restoration of the CAA ATCO licence in 3 months (146).

25.34. On 14 July 2016 there was the grievance appeal hearing (248 et seq), taken by Matthew Roach, CEO of the respondent. Again the Workways representative was present to assist the claimant. Again the claimant focused entirely on his airport wide safety concerns, as that was the whole point of the appeal, from his point of view. The outcome letter (255) upheld the first decision, on the basis that the CAA procedures were fully followed, and there was nothing new to lead to a different conclusion.

25.35. There were some short term absences at this point, and the claimant told Vicky Stratton (of hr) that he attributed this to the reduction in medication at the time, which he was doing as he wanted to get back his CAA licence, the medication being a bar to doing so.

25.36. On 06 September 2016 the claimant wrote a letter (259) *"resigning"* the UTO position he had undertaken since returning to work on 04 January 2016. He retained his safety concerns and did want to influence the trainees. After the grievance outcome he did not feel confident to fulfill the role. He thanked Stephen Wiltshire for giving him the opportunity to learn new skills. At the same time he made application for a part time ATCO contract, coupling this with the observation that he did not want to stay on medication long term, and his doctor had recommended not working as an ATCO full time (260- 261). When able to work as an ATCO he wanted to work part time at least until Exeter had CAS. He raised concern that a colleague had been promoted to be an ATCO, effectively taking his job. The respondent refused that request on 20 September 2016, on the basis that when he was again an ATCO they would be

happy to consider any such request, but that it was not possible to do so when he was not in the role, and it was uncertain when he could resume it.

25.37. On 22 September 2016 Sam Horne, an hr manager, wrote to the claimant (264) to review the situation including formally to pro rate the salary to the hours the claimant worked. There was a meeting on 27 September 2016 (265 et seq). The claimant was wanting to come back as an ATSA, was intending to stop all medication by 15 October 2016, then take 2 weeks holiday, return as an ATSA and make application to the CAA for his ATCO licence, with some training. He planned to book an appointment with Dr Renouf (of the CAA) for early November 2016. The respondent noted that ATCOs get 2 hourly breaks and ATSAs do not, but that they would make sure he got such breaks as an ATSA (270). Asked about what would the plan be if he was not able to return as an ATCO, the claimant said this was completely alien to him, and he regretted that the senior ATCO post had now been filled (273). At the end of the meeting it was flagged up that if it was not possible for the claimant to return there would have to be discussions as to how long they could go on with this situation (274).

25.38. On 04 November 2016 Stephen Wiltshire formally recorded a change in contract to 24 hours a week at an annual salary of £36,423.57. (This was still based on the ATCO salary, not the (much lower) ATSA salary. The claimant signed to agree this on 10 November 2016 (277). This marked the point where the claimant started work as an ATSA (01 November 2016)

25.39. On 10 November 2016 Sam Horne of hr met the claimant (278). The Tribunal regards this a marking a sea change in the history, for reasons set out below. He had been to see Dr Renouf (of the CAA), who wanted a psychiatric assessment. The claimant declined to say whether he was off medication or not. He would not be up to early shifts. He was focused on being an ATCO.

25.40. On 17 November 2016 Dr Renouf emailed Sam Horne (283). He said that the claimant was unlikely ever to return to work as at ATCO full time. He stated: *“Once the problem of the radar and controlled airspace has been resolved, I believe that M Mora would be able to return to work in a part-time capacity."* He would have to see a CAA psychiatrist before he could return.

25.41. On Tuesday, 22 November 2016 there was an email (286) from Flybe (the airline based at Exeter) concerning proposed radar outage the following day. Exeter Airport had sought a temporary controlled airspace order from the CAA and they had supported it. However the CAA was *"reticent to apply any temporary airspace restrictions or mandated transponder requirements".* They wanted mitigations such as delaying the radar fix until a Saturday afternoon or Sunday morning or other measures.

25.42. On 23 November 2016 Sam Horne replied to Dr Renouf (289–290) voicing concern at Dr Renouf’s factual assertion that there was any problem with the radar and a controlled airspace matter to be resolved.

She pointed out that this was not correct, from the respondent's point of view, and asked why he stated this as fact. She set out that her understanding was that Dr Renouf was to assess the claimant's health after he ceased all medication to help him regaining his CAA ATCO licence. Other observations about the claimant's grievance and part-time working request were outwith Dr Renouf's brief. She asked whether in fact the claimant had ceased taking all medication. She asked whether a psychiatric appointment was likely to take place, and if so when.

25.43. Dr Renouf replied on 24 November 2016 (292) agreeing that his sole concern was assessment about fitness to work as an ATCO. He said that what the claimant saw as a lack of resolution had left the claimant in an anxious state. By reason of that anxious state, *"even though he is off medication"* Dr Renouf *"cannot yet recommend he return to work".* For that reason he had not yet asked the CAA's psychiatrist to see him because by reason of anxiousness he would not be fit for work.

25.44. On 25 November 2016 Sam Horne again emailed Dr Renouf (293) asking specifically whether the claimant was still taking medication for PTSD, asking whether he was not fit for any form of work, asking why he thought that there was the possibility of return to work as an ATCO part-time but not full-time, and whether he was able to work unsupervised as an asset, at present.

25.45. On 01 December 2016 Dr Renouf stated that the claimant was off all medication but needed time to adjust. He was not able to work as an ATCO but *"may well be fit to do other work"*. He could work unsupervised as an ATSA but *"a weatherly eye"* needed to be kept on him.

25.46. The claimant was being observed while at work, although he did not know this. The reports of this from the 01 to 17 November (281 – 282) and on 27 November 2016 (294) indicated that the claimant was tired, and that training him was quite difficult because he was only at work part-time.

25.47. On 24 November 2016 Sam Horne emailed the claimant and David Burrows (291) concerning a catch up meeting to review the first month of the claimant working three days a week as an ATSA, as part of an ongoing review process *"whilst you complete your journey to regain your ATCO licence".*

25.48. On 29 November 2016 the claimant went off work with stress. This was when there was a radar outage, which he found very stressful as he was in the control room. He felt he should have been told. He never returned to work before he was dismissed on 10 September 2018, almost two years later.

25.49. On 01 December 2016 the claimant responded to an email from Sam Horne sent earlier the same day (298). The email from Ms Horne stated that the claimant had refused (in an earlier email of 30 November 2016 (299)) to advise whether or not he was in receipt of medication. The move to ATSA role was intended to be temporary until he could return to being an ATCO, and the ATSA role was to be reviewed after 1 month. Ms Horne was to arrange occupational health involvement as the claimant

was unable to come to work. In reply the claimant said *"I do feel where I am not obliged to discuss medication with you this is justified under the circumstances."* and *"I did not wish to tell you about my medication, unless it is company procedure as I felt uncomfortable."* He said that if someone else had asked he might have been more comfortable and so not have refused. So far as the UTO role was concerned he said that his GP had advised him to make changes to his work which is why he had ceased the UTO role.

25.50. On 06 December 2016 the senior air traffic controller emailed David Burrows and Sam Horne (304) to say that the claimant had telephoned him. The claimant had been signed off for two months with PTSD and was back on medication. The claimant so confirmed in an email of 13 December 2016 (306).

25.51. On 03 February 2017 David Burrows wrote to the claimant, following a meeting on 26 January 2017. He noted that the claimant did not feel comfortable talking about his ill-health and medical situation. There would be another meeting in four to six weeks with a view to referral to occupational health (311).

25.52. On 23 March 2017 the appellant sent Sue Hodgkinson a long and rambling email (313–314) largely about safety at Exeter airport. He was concerned because he did not do anything wrong but outside people could not understand this (a reference back to the airprox incident of 02 January 2015).

25.53. On 27 April 2017 Sue Hodgkinson asked the claimant to sign and return an AXA PPP form for an examination and report (316). On 28 April he signed that form to consent (318). There was a telephone conversation on 12 May 2017 between the claimant and AXA and it was concluded (by an occupational health adviser) that he was unfit for work in any capacity but was able to attend procedural meetings at work.

25.54. There was another report from Dr Girgis of AXA on 02 June 2017 (323 et seq) following a telephone assessment on 25 May 2017. The conclusion was *"The prognosis for Mr Mora returning to work depends upon the management meetings described above and whether trust in the employment relationship can be restored."* In answer to the fifth question asked by hr Dr Girgis said *"Mr Mora told me that he was (sic) not want to be redeployed to another role within the organisation."* He suggested a further referral in four months' time by which time medication might have been reduced further and the prognosis.

25.55. On 23 June 2017 the claimant notified Sue Hodgkinson (325) that his reduction in medication was continuing and had now been reduced further. He was now on half a dose, and was having further EMDR sessions. He was appreciative of Mr Wiltshire's approach to wellbeing. By 21 July 2017 his medication had been reduced further (328). He was concerned about the role to which he might return, and later (18 August 2016, 330) he referred to returning in September 2017.

25.56. On 08 September 2017 he wrote a long letter (333-337) to Matt Roach (CEO of Exeter Airport), which indicated that he felt that the legal

system was the only one which would support him. It is difficult to summarise a letter which has no focus, and picks out all manner of matters in no particular order, and makes unparticularised allegations about many people and circumstances. This was discussed at a long meeting that day, recorded by Stephen Wiltshire in a letter of 25 September 2017 (245-247). In it Mr Wiltshire records *"You felt an assistant's position was not really an option for you as controlling was what you know".* It was agreed that the claimant would visit his GP on 15 September 2017 for a discussion about reducing his medication, and he would come to the airport for two afternoons to build his confidence, and would again be referred to AXA occupational health for an updated assessment. The letter was also treated as public interest disclosures.

25.57. The subsequent fitness to work certificate dated 12 October 2017 stated that the claimant was not fit to work, and the boxes concerning amended duties, phased return to work or altered hours were not ticked (349).

25.58. On 03 November 2017 Dr Burgess provided an updated report (351). This stated that the claimant continued to take medication and to have intrusive thoughts concerning the incident on 02 January 2015. Dr Girgis' reported that the claimant told him that *"The environment at the airport reminds him of the airprox and so even an alternative role within the airport may exacerbate his post traumatic stress disorder symptoms."* The doctor wondered whether the claimant would meet the criteria for ill-health early retirement.

25.59. On 06 October 2017 Sue Hodgkinson completed her report into the letter of 08 September 2016 (which was treated as public interest disclosures) concerning 11 incidents as detailed in the first pages of that report (380–381). Some of these went back 12 years. In his oral evidence the claimant explained these had been brought to the forefront of his mind by his EMDR. None of the matters raised in that letter are dealt with this decision. They are either long out of time, not substantiated by any evidence or not relevant to the issues before us.

25.60. On 18 December 2017 there was a further occupational health referral for which the claimant gave signed consent. However AXA then wrote to the claimant, who did not participate in the process despite being chased (an email 29 December 2017 (399) from AXA so states).

25.61. On 14 December 2017 the claimant emailed at length saying how meeting the respondent felt unsafe for him. On 04 January 2018 Sue Hodgkinson wrote to the claimant (400–401). She pointed out that the occupational health process could not proceed as the claimant had not signed the consent forms. She said that the situation remained as set out in September 2017 – which was that either he regained his licence and worked at Exeter (or another airport), he took an alternative role, or he was dismissed if there was no other position available. Resignation had been mentioned but only as this was, logically, one option.

25.62. The claimant responded on 06 January 2018 (404) to say that he was attending Priory Clinic so had not been able to reply sooner. He said he had filled in, signed and returned the form. He wrote again on 11

January 2018, with a long exposition about safety and about how he sought the restoration of his CAA licence.

25.63. On 19 January 2018 the respondent's pension provided quotations for the claimant's early retirement, but not ill heath early retirement (407).

25.64. On 25 January 2018 the claimant was assessed as 35% disabled by the DWP (481).

25.65. On 14 February 2018 the claimant was provided with a list of internal vacancies (386–387). This is a full list, not specific to the claimant, and included roles such as seasonal cleaners.

25.66. On 23 February 2018 Stephen Wiltshire wrote to the claimant informing him that he was required to attending a capability hearing on Tuesday 13 March 2018 at noon. Bullet points to be considered were set out. These were not only the lack of likelihood that he would return to work either as an air traffic controller, or in an alternative position, within six months, but also that he was said to have failed to cooperate in providing medical information.

25.67. The letter's penultimate heading is that he could apply for ill health early retirement, but that it was premature to do so now, but all information would be provided if he were dismissed (it was not).

25.68. In his letter dated 23 February 2018, not received until 08 March 2018, the claimant asked for more time, and the hearing was rescheduled from 13 March 2018 to 26 March 2018 at 2:30 pm. The claimant's mother was assisting him. She did not like email. He was not in receipt of income. He asked for resources to enable him to correspond by post. The respondent provided stamped addressed envelopes for him to do so. If he wanted to attend meetings they would pay for taxis. The claimant sent in written representations.

25.69. By letter of 10 April 2018 Mr Wiltshire said that the information the claimant had provided had been assessed and he was asked for some further information and a new hearing was set for Thursday, 11 May 2018 (later postponed to 29 May 2018).

25.70. On 16 April 2018 Matt Roach wrote to the claimant (449) saying that on 18 April 2018 the claimant reached 30 years' service. He was offered a gift to the value of £400, and asked to contact the personal assistant to the directors, and her contact details were given. The claimant says that his certificate was included. The Tribunal find that he was mistaken about this. The letter does not say so, and the certificate (511) had a compliments slip with it, indicative of being sent separately.

25.71. The claimant returned the letter, writing on it *"I find this disturbing under the circumstances and not comfortable to discuss and ask for vouchers if cash cannot be paid by letter to me".* Understandably the respondent took the reluctance to discuss to relate to the long service and the gift. Hence it later posted the certificate to the claimant.

25.72. On 30 April 2018 the claimant's mother signed a letter which objected to the involvement of Mr Wiltshire, on the basis that he was involved in High Court proceedings related to the airport's radar. It also said *"It is no longer within the capacity of M Mora, considering his condition and state of mind, to reasonably contribute any informed way [hearing] and make judgements as would reasonably be expected of a person of such a sound state of mind."*

25.73. On 22 May 2018 Matt Roach wrote to the claimant to give him a choice of vouchers (456) and this was returned with one company circled and ticked. The vouchers were then sent to him, with the certificate, with a compliments slip.

25.74. On 31 May 2018 Mr Wiltshire wrote to the claimant (458). He had taken the meeting of 29 May 2018 in the absence of the claimant. He had adjourned the hearing for more information from AXA because the claimant had signed against action point 2 in his earlier letter, so it seemed that he was willing to agree to the release of information. He enclosed an Access to Medical Records form so that they might write to his GP, and so form an opinion as to the prospects (from both) as to the prospects of return to work as an ATCO.

25.75. On 15 June 2018 the claimant's mother signed a letter which objected to Mr Wiltshire being involved (460) and which said that he could not give consent for (unspecified) data protection reasons and states that the respondent had said they will pay for taxis to get to meetings. The form about medical records was returned, with one of the possible responses circled, that being: *"I do not consent to my employer, Exeter and Devon Airport Ltd, applying to my GP [NAME], for a medical report."* (463)

25.76. On 04 July 2018 Matt Roach wrote to the claimant (469-470). Mr Wiltshire was replaced by Marshall Barrand, projects director with the parent company (which runs a series of airports) who had no previous involvement with the claimant. The letter stated: *"It is important that we obtain up to date medical evidence so that we can fairly assess your situation. As such we were disappointed that you chose not to sign the consent forms".* There is then a passage in which Mr Roach tries to put the claimant's mind at ease. He then wrote *"I hope you will reconsider consenting and I enclose further copies of the forms for your consideration."*

25.77. The claimant sent a long reply dated 20 July 2018 (471-2) signed by his mother, which is incomprehensible. The forms were not returned.

25.78. On 06 July 2018 (482) AXA wrote to the respondent to say that the GP report request was cancelled when consent was withdrawn, and to proceed they would need a new consent form.

25.79. On 16 August 2018 Marshall Barrand wrote to the claimant (477-478) to say there would be a meeting on 28 August 2018 at 2pm to decide what to do. One of the points to be decided was that he had failed to sign consent forms. This is covered at length in a paragraph of the letter. In the absence of consent he would have to decide on the basis of

the information he had. He also sent a list of three vacancies (475). One was a passenger services agent, one a security officer and the third head of HR for the parent company. None would have been likely to be suitable for the claimant, but he could not be an ATCO, had declined to be a UTO, had found working as an ATSA too stressful, and did not want to go to another airport, so sending all the vacancies was simply information for the claimant.

25.80. In the morning of 28 August 2018 Mr Barrand telephoned the claimant's mother. His evidence was that she told him that her son was not in, and that he just wanted it over so that he could get on with the rest of his life. The Tribunal accepted the evidence of Mr Barrand for two reasons. First there was no evidence to counter it – his witness statement had been served some time before the hearing and clearly stated what his evidence was. There was nothing to counter it. Secondly the Tribunal found Mr Barrand to be an impressive witness, and someone who had plainly taken his responsibilities seriously. He was a witness of truth.

25.81. The letter of dismissal was dated 10 September 2018 (487). It stated: *" I concluded that you have been unable to attend work since February 2015 as an ATCO or November 2016 as in ATSA and you are unlikely to return to work in either capacity in the foreseeable future. Based on evidence considered, and the discussion in the call of 28th of August 2018 with your mother you are not in a fit state to respond in any manner and therefore are not fit to return to work. I am therefore left with no choice but to terminate your employment by reason of capability."*

25.82. The claimant did not appeal that decision. The Tribunal finds that it accurately set out the situation.

25.83. As a postscript, on 18 March 2019 the insurer, Hiscock's global flying asked for a long term unfitness assessment issued by the licence issuing authority, on receipt of which they would make a payment of £23,208.90 (493). The issued and acceptance form for signature. On 04 April 2019 (496) this offer was declined by the claimant's mother, on his behalf on the basis that insurance should have been of £120,000, and resulted from accident and so should not be reduced by 50% from the lower insured level.

25.84. The claimant continues to take medication which would preclude him from holding a CAA ATCO licence. His oral evidence was that he had done so ever since February 2015, but it appears that is not correct, for shortly before he left work in November 2017 it was reported by both the claimant himself and by Dr Girgis that he was on no medication for a short period. The Tribunal assessed the claimant to be a truthful, but perhaps not always an accurate, witness, for understandable health reasons. It seems likely that the absence of medication at that point did not assist in the claimant's ability to work, given that relapse.

Submissions

26. I made a detailed typed record of proceedings and the submissions, which were of about 1½ hours for each party, and which can be read if required by a

higher Court. Counsel for the respondent had provided a detailed skeleton argument which can (and should) be read.

The claimant's case, with the Tribunal's findings on each head of complaint

27. The claimant says that on 11 May 2016 at the grievance investigation meeting Vicky Stratton of hr was there notionally to support him but in reality he was questioned by the other two such that it was oppressive. The Tribunal notes that at the formal grievance hearing the respondent allowed an adviser from Workways to attend to help the claimant. He was treated appropriately in all meetings.

28. The claimant is unhappy that he was not allowed to change his ATCO contract to a permanent part time one as his flexible working request asked. He was given a part time contract. His objection is that he was not given a part time ATCO contract, which he wanted so as to know that he would not have to return to work full time in that role: and that assurance would, he said, help him return. This was never voiced to the respondent, and accordingly it is hard to fault their stance: which was that it was academic and when he was fit to return he should make a request then. Given that the respondent had given him everything he had ever asked for, he cannot have had much concern that they would deny that request later on.

29. He was taken by surprise by the press reports of the incident. Exeter Airport must have known as the Daily Mirror stated *"no one from the airport was available for comment"* and because they sold the local paper at the airport. Whether this is so or not has no significant bearing on any matter before us. It is common ground (and has always been the case) that no one has ever suggested (let alone alleged or found) that the claimant was in any way at all responsible for the airprox incident on 02 January 2015. On the contrary, everyone has stated (including the Airprox Board) that the glider would have been invisible to him, and that when the pilot saw it his actions were entirely appropriate. He had notified the pilot of the restricted confliction service he was able to offer. He was never going to be criticised in any way by anyone for that incident (and he was not). The respondent made that clear to him at all times, and the respondent was not to foresee the catastrophic effect this incident has had on the mental health of the claimant.

30. A later airprox report of 30 November 2016 was a great blow to him and he should have been told about it, not get the news as a surprise while working as an ATSA in the control room. He had gone off sick the day before the report, so it cannot have been an operative factor. The respondent might have told him there was an airprox report coming out, but that might have been worse than not telling him. There is no criticism of the respondent to be made here.

31. The claimant also said that the trigger to him leaving work on 29 November 2018 was that when he was in the control room as an ATSA there was a radar outage. He said that he should have been told about it in advance. Perhaps he should, or perhaps it was right to treat this as a matter of routine and not make too much of it. If he should have been told, it is not a matter which makes his dismissal unfair, or is disability discrimination. It is simply a clear demonstration of the depth and severity of the claimant's PTSD that a routine matter such as this (with which he was thoroughly familiar by reason

of his 25 years as an air traffic controller at Exeter with the same radar system) should have such an immediate and deep impact on him.

32. The report of Dr Gurgis of 07 November 2017 was date stamped 10 December 2017 and he considers that was not when it was read – that there was a false date stamp applied to it to cover up inactivity for a month. It is certainly unusual to print and file an emailed report and date stamp it the date it was printed, and this was the only occasion it was done. There was a delay in actioning that report. That is all. That delay was down to Sue Hodgkinson, whose responsibility it was, but it is not supportive of any complaint by the claimant. At the time she was tasked with taking on Bournemouth airport which was a big job, at a time when she was also burdened with personal matters of some gravity which meant that she was not at work all the time, and which will inevitably have deflected her attention from work matters. After the length of the claimant's absence his case was not urgent (and did not come to a conclusion for another 8 months).

33. The radar was inadequate and should have been modernised. This is outwith the remit of this case. The CAA are content. There is no more to be said.

34. The flexible working policy did not meet his situation. The difficulty with this argument is that the claimant (understandably) wanted to return to work as an ATCO. He was trying to come off medication when he made the request, so that he could get back his CAA licence. He was applying to work part time as an ATCO, hence the request. There is nothing in the request about working part time in my other role. The respondent said that they were happy to consider that request when he was fit to return to work as an ATCO, which is entirely logical. On 22 September 2016 the respondent was suggesting formalising the pro rated salary: that it to make the claimant's employment part time. On 04 November 2016 a formal change to the contract to 24 hours a week was agreed: the claimant *was* part time. The claimant feels that he wanted the assurance that he could return to ATCO work part time as a help to being able to return to that role. He did not explain that to the respondent. The respondent regarded the question as academic until he could return as an ATCO. The respondent had accomodated the claimant in every way imaginable and he cannot have had any serious doubt that this would not be facilitated if he was able to return as an ATCO.

35. The insurance was inadequate and had been reduced. This is not right, for the claimant was not insured at all under the previous policy which did not cover psychiatric illness. That the sum insured was reduced is not right, for in the claimant's case it was new cover. The claimant says that he is classified by the DWP as disabled from an industrial accident so that there should be no 50% reduction. This cannot found a disability discrimination claim, but in any event it is simply wrong. The appellant was not in an accident. He has suffered PTSD. There was no physical accident to him (or at all).

36. The locker should not have been emptied as it was. Some considerable time after he had been dismissed his locker was emptied, and this was video'd. The claimant objects that this involved some colleagues and not just hr people. It contained only a bottle of aftershave. The Tribunal finds no connection with disability in this management action. The locker could not be left indefinitely. There was no embarrassment to the claimant from its contents.

37. He should not have been asked to resign. He was not.

38. Long service award and vouchers were posted to him not awarded in person with his colleagues present. He had asked for this not to happen and had said that attending the workplace was bad for his mental health. If his manuscript endorsement was meant to mean something other than the way the respondent read it, they cannot be criticised for reading it as they did.

39. He was not named in the newsletter for his long service. Newsletters were monthly. Then they became seasonal: in effect summer and winter. There was no standard practice. In monthly newsletters people were named, even those who had left. Later no one who had left was named. That was the case for the claimant, but he was not the only person with a long service award not mentioned. The newsletter before the one in which the claimant would have appeared referred only to the presentation of long service certificates but named no one. There is nothing personal in the non naming of the claimant in the newsletter.

40. The claimant said that he was given insufficient time for prepare for the hearing. The notice was twelve days, and there were twelve documents to consider. Of them nine were provided for the previous hearing. Most emanated from him or had been sent to him before. There is no merit in the assertion that he had to re read every policy to see if it had changed. In any event last time he had asked for more time and it had been given to him. He did not ask for any alteration in the date.

41. Asking for GP notes when this was not part of the procedure: they were to go to AXA who would report. The form sent was a standard Access to Medical Reports Act form. The claimant said he wanted only the AXA PPP personnel to see his GP records. But he had not signed their forms either.

Conclusions

42. The claimant finally went off work on 29 November 2016 never to return. This followed him coming off medication in an attempt to regain his CAA ATCO licence, and then suffering a relapse so that he had to resume medication.

43. The claimant latterly refused to consent to medical records being released, as the narrative above shows (pages 463 469 482 in particular).

44. The claimant had never wanted to return to employment other than as an ATCO. He resigned from a post as UTO. He did not want to be an ATSA. He never requested retirement. More than a year before dismissal the respondent had said that they would provide such information if the claimant was dismissed, but they did not do so. At the end of his evidence, and following a Tribunal enquiry about the situation, Mr Barrand volunteered to see whether it was still a possibility (it may depend on the definition of “Incapacity” in the scheme, and on time limits). But whatever the position it cannot be relevant to unfair dismissal. It cannot be seen as harassment, victimisation or detriment for a disability reason.

45. The claimant has, at all times since 04 February 2015 and until dismissal on 10 September 2018 been unable to work as an air traffic controller, by reason

of his mental health, which is the PTSD from which he suffers (which has waxed and waned through the period as his medication and therapies have been in place or finished or been reduced), and because he is unlicensed by reason of medication. That remains the case a year after his dismissal.

46. The respondent took every conceivable step to aid the claimant over a period of years. He had 6 months on full pay and 6 months on half pay. He was able to return to work at a lower rated job on the same pay (UTO). When he became an ATSA eventually his pay was pro rated, but at the much higher ATCO salary. He was given a break every two hours when working as an ATSA, which other ATSAs did not get. While off sick was supported by contact to the extent that he would permit. Every email and conversation was as helpful as possible (and the claimant does not say otherwise). Every matter he raised was fully investigated, even though some were very difficult to follow and some very old. The claimant was offered the opportunity to transfer to another airport (where his issue with CAS would not apply, for he could have gone to an airport which had CAS). He did not want to go. He did not want to be an ATSA in Exeter. He did not want any other role in Exeter. He wanted only to return to being an ATCO in Exeter.

47. After 25 years in that role, which he loved, this is understandable, but given the effect on him of the airprox of 02 January 2015 this was simply not possible by the time he was dismissed, and nor was it likely to be possible in the foreseeable future.

48. The history indicates that with therapy and medication the claimant's condition improved, but as these interventions ended or were withdrawn his symptoms returned. His last period of sickness absence commenced at a time when he was trying to cope without medication in an effort to regain his licence: he then had to go back onto that medication. The prognosis for return to ATCO was so unlikely that dismissal was inevitable when the claimant was unable to settle on any other role or location.

49. In terms of process, the claimant was allowed more time when he asked for it. He was allowed to bring his counsellor to meetings. The respondent offered to pay for taxis for him, and sent him stamped addressed envelopes to use when he did not want to use emails. Even though he did not attend meetings held by Stephen Wiltshire, Stephen Wiltshire carefully examined the evidence and when he saw that something raised by the claimant might need investigation he adjourned to give such an opportunity to the claimant. There were patient requests for consent to get medical evidence. The claimant was treated courteously when he raised, over and over again, issues (as he sees it) of safety. When the claimant objected (for no good reason apparent to the Tribunal) to Stephen Wiltshire being part of any process, the respondent appointed someone else (about whom the claimant makes no complaint). The whole process took 3½ years. The respondent kept in touch in accordance with its policy and at the same time respected the claimant's wish to have no contact with work when off sick. Occupational health was involved throughout. Counselling was offered. Reading through the history there can be no fair criticism of the respondent about the way they dealt with the (entirely genuine) illness of the claimant.

50. It follows that the dismissal was fair. Indeed it was inevitable. The claimant wanted to return to a job which he was not permitted to do. The respondent

has nothing to do with that – it was the regulator, the CAA, which withdrew the licence and without that the respondent was not permitted to employ the claimant in that role. The claimant's advisers were telling the respondent that mere presence at the airport could exacerbate his condition. This was unsustainable.

51. In these factual circumstances, no sophisticated analysis of discrimination law is required. There was no less favourable treatment. There was no provision criterion or practice affecting the claimant (not justified by the proportionate aim of public safety and regulatory compliance). There was no harassment or victimisation. When the claimant raised matters that concerned him there was full investigation in a process which gave him a right of appeal, which he exercised. The respondent asked the claimant whether he agreed that the right policy was being used. There was no detriment that was not a proportionate means of achieving a legitimate aim. The proportionate aim is, of course, the safe and efficient running of the airport in accordance with regulations. As Mr Barrand pointed out, victimisation by reason of the claimant wanting Exeter to have CAS is highly unlikely, as that is what the airport wants too, and it has applied in the past and is applying again. This was not a dismissal for raising health and safety concerns, but by reason, solely, of incapability.

52. As to reasonable adjustments, the respondent could not have done more. Extended sickness absence was allowed. Not one but two alternative roles were given to the claimant. He was paid at his full salary rate for them. He was permitted to work part time on a long term basis, and when that was arranged he was paid the pro rated salary of his contracted job even though he was undertaking a role at a much lower salary. He was asked if he wanted a transfer to another airport, but he did not.

53. The claimant wanted only the unachievable, which was to return to being an ATCO at Exeter Airport with CAS (and new radar).

54. The timescales were adjusted when the claimant asked. He was offered taxis to attend meetings and provided with stamped addressed envelopes when he wanted to use Royal Mail. Allowance was made for him in the provision of medical information, and there were repeated attempts to get him to cooperate. His refusals were categoric. From 03 November 2017 through to the dismissal in September 2018 the claimant found even going to the workplace stressful to the extent that it was harmful to his health, and from December 2017 to September 2018 he declined to provide consent for medical information to be provided. There was only one possible outcome, that his employment would end.

55. There is no need in this case to have consideration of the burden of proof, for the findings of fact are inevitable. If the shifting burden of proof were relevant, the Tribunal finds that the burden does not shift to the respondent. The claimant has not set out matters that could lead any Tribunal to find that there was unlawful discrimination. (Even if the burden did shift, the evidence provided by the respondent, in documentary and oral form, would satisfy any burden upon them.)

56. In coming to our conclusions we have noted that the claimant is an entirely genuine man, whose entire working life has been at Exeter Airport, and 25

years as an air traffic controller. That is what he wanted to be for the rest of his career, perhaps becoming chief controller. The personal consequences of the airprox incident of 02 January 2015 have been life changing for him, even though he was in no way responsible or at fault, and when there was never any suggestion of responsibility or blame for him. Unfortunately this has led him to suspect his former employer's motives and actions when it has been as supportive as any employee could hope.

57. We record that Mr Mora presented his case alone, and did so with great courtesy.

Employment Judge Housego

Date : 20 September 2019
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