Case Number: 3331223/2018

EMPLOYMENT TRIBUNALS

Claimant
Ms F. Biglin

Respondent
British Airways Plc

v

Heard at: Watford

On: 17-21 August 2020
(25 August 2020 in chambers)

Before: Employment Judge Heal
Mr. D. Sutton
Mrs I. Sood

Appearances
For the Claimant: in person
For the Respondent: Miss C. Bell, counsel

RESERVED JUDGMENT

1. The complaint made under section 188 of TULR(C)A 1992 is dismissed upon withdrawal.

2. The remaining complaints of unfair dismissal, disability and sex discrimination are not well founded and are dismissed.

3. The remedies hearing listed provisionally on 30 October 2020 is vacated.

REASONS

1. By a claim form presented on 10 July 2018 the claimant made complaints of unfair dismissal, disability and sex discrimination. A complaint under s188 of TULR(C)A 1992 has been withdrawn.

2. We have had the benefit of an agreed bundle in two volumes running to 661 pages. To that bundle a copy of the respondent's EN 300 policy, pp 178B to H (training plans), pages 745 to 768 (documents relating to a comparator) and the respondent's 'BAHS tracker' were added by consent.

3. We removed pages after page 575 except for pages 618 and 646 with the consent of the parties because they were sensitive, contained private medical information relating to the claimant and were not relevant. (We returned these documents unread to the claimant.)

4. We have heard oral evidence from these witnesses in this order:

Ms Fiona Baglin, the claimant,

Ms Gosia Zbos, Inflight Business Manager;

Mr Seamus Devlin, Fleet manager for Eurofleet and Worldwide;

Ms Anne Pilgrim, Fleet Manager (via CVP)

Mr Ian Brunton, IFCE Resource Planning Manager;

Mr Matt. Dockray, Inflight Business Manager.

5. Each of those witnesses gave evidence in chief by means of a prepared, typed witness statement which we read before the witness was called to give evidence and then the witness was cross-examined and re-examined in the usual way. Ms Pilgrim attended and gave evidence by CVP.

6. The issues were identified by EJ Bartlett at a preliminary hearing on 4 October 2018. We worked through those issues with the parties before we started to hear evidence, to make sure that all involved understood them. We explained that this was an important exercise because the issues would help us to decide what was relevant and irrelevant evidence and our decision making would take its structure from the issues. We would decide those matters only. Those issues are as follows, retaining the *sub* paragraph numbering from EJ Bartlett's list but adapting the paragraph numbering to this judgment. Clarifications made at our hearing are in italics and square brackets:

Constructive unfair dismissal & wrongful dismissal

6.1 Was the claimant dismissed, i.e.

(a) was there a fundamental breach of the contract employment, and/or did the respondent breach the so-called 'trust and confidence term,' i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?

(b) if so, did the claimant affirm the contract of employment before resigning?

(c) if not, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation - it need not be <u>the</u> reason for the resignation)?

[*Ms Bell confirmed to us that she would attempt to argue that the dismissal was fair if the claimant was dismissed. The reason relied on is redundancy which she says was substantively and procedurally fair*.]

6.2 the conduct the claimant relies on as amounting to a fundamental breach of contract/breaching the trust and confidence term is:

(a) the claimant not being permitted to carry out amended duties until 24 April 2018 despite being signed as fit to work on amended duties by her GP 26 February 2018;

(b) the claimant not receiving any salary or sick pay from March 2018 until 24 April 2018.

6.3 If the claimant was unfairly dismissed and the remedy is compensation:

(a) would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to section 122(2) of the Employment Rights Act 1996; and if so to what extent?

(b) did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award pursuant to section 123 (6) of the 1996 Act? [*The respondent said that the claimant was uncooperative and made it difficult to find her an alternative placement and there were examples of insubordination to her line manager which gave rise to the claimant's decision to leave*.]

Disability

6.4 was the claimant a disabled person in accordance with the Equality Act 2010 ('EQA') at all relevant times because of anxiety and depression(s)?

[*This been conceded by the respondent and at the outset of this hearing Ms Bell clarified that the respondent conceded disability on grounds of anxiety, depression and low mood*.]

6.5 The remainder of this issue is not now relevant.

Section 13 EQA 2010: direct discrimination because of disability

6.6 Has the respondent subjected the claimant to the following treatment:

(a) refused to offer her role as a Line Trainer in the Training Department from January 2018;

(b) refused to secure the claimant a place on the Line Trainer Course on 3 March 2018;

(c) stopping payment of salary and sick pay in March 2018;

(d) failing to offer her an interview for the secondment opportunity in recruitment in February 2018.

6.7 Was that treatment 'less favourable treatment', i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ('comparators') in not materially different circumstances? The claimant relies on a hypothetical comparator.

6.8 If so, was this because of the claimant's disability.

Section 13 EQA 2010: direct discrimination because of sex

6.9 Has the respondent subjected the claimant to the following treatment:

(a) refused to permit the claimant carry out training duties and requiring her to carry out flying duties.

6.10 Was that treatment 'less favourable treatment', i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ('comparators') in not materially different circumstances? The claimant relies on [*named comparator whose name is known to the parties but who we will refer to as Mr X*] cabin crew mixed *and/or a hypothetical comparator*.

6.11 if so, was this because of the claimant's sex.

Section 20 and 21 EQA 2010: failure to make reasonable adjustments

6.12 Did the respondent not know and could it not reasonably have been expected to know that the claimant was a disabled person? [*The respondent has conceded this*].

6.13 A 'PCP' is a provision, criterion or practice. Did the respondent have the following PCP:

(a) requiring the claimant to undertake flying duties? [*This is conceded*.]

6.14 Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time? [*The respondent conceded this, using this phraseology, at the outset of our hearing. During submissions both parties agreed that the disadvantage was that the claimant suffered from anxiety (because she is the single mother of two children with severe medical conditions) and that makes her more likely to struggle with anxiety on an aeroplane so that she would struggle to carry out her role as Purser, especially in the event of an emergency*.]

6.15 If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage? [*The respondent conceded this.*]

6.16 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

(a) to permit the claimant to carry out the role of customer service trainer (a line trainer).

6.17 If so, would it have been reasonable for the respondent to have to take those steps any relevant time?

Statement of the law

Direct discrimination

7. We have reminded ourselves in particular of the principles set out in the annex to the Court of Appeal's judgment in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] IRLR 258. It is the claimant who must establish her case to an initial level. Once she does so, the burden transfers to the respondent to prove, on the balance of probabilities, *no discrimination whatsoever*. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing a claimant which it would be very difficult to overcome if she had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of disability or sex. What then, is that initial level that the claimant must prove?

8. In answering that we remind ourselves that it is unusual to find direct evidence of unlawful discrimination. Few employers will be prepared to admit such discrimination even to themselves.

9. We have to make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must at all times be the question whether we can properly infer discrimination.

10. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the *'same, or not materially different'* as those of the claimant.

11. Facts adduced by way of explanations do not come into whether the first stage is met. The claimant, however, must prove the facts on which she places reliance for the drawing of the inference of discrimination, actually happened. This means, for example, that if the claimant's case is based on particular words or conduct by the respondent employer, she must prove (on the balance of probabilities) that such words were uttered or that the conduct did actually take place, not just that this might have been so. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.

12. If unreasonable conduct therefore occurs alongside other indications (such as under-representation of a particular group in the workplace, or failure on the part of the respondent to comply with internal rules or procedures designed to ensure non-discriminatory conduct) that there is or might be discrimination on a prohibited ground, then a tribunal should find that enough has been done to shift the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. However, if there is no rational reason proffered for the unreasonable treatment of the claimant, that may be sufficient to give rise to an inference of discrimination.

13. It was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, [2003] ICR 337 (at paragraphs 7–12) that sometimes it will not be possible to decide whether there is less favourable treatment without deciding *'the reason why'*. This is particularly (but not only) likely to be so where, as in part of this case, a hypothetical comparator is being used. It will only be possible to decide that a

hypothetical comparator would have been treated differently once it is known what the reason for the treatment of the complainant was. If the complainant was treated as she was because of the relevant protected characteristic, then it is likely that a hypothetical comparator without that protected characteristic would have been treated differently. That conclusion can only be reached however once the basis for the treatment of the claimant has been established.

14. Some cases arise (See *Martin v Devonshire's Solicitors* [2011] ICR 352 EAT paragraphs 38 - 39) in which there is no room for doubt as to the employer's motivation: if we are in a position to make positive findings on the evidence one way or the other, the burden of proof does not come into play.

Reasonable adjustments

15. When we deal with a complaint of failure to make reasonable adjustments under sections 20 and 21 of the 2010 Act, we ask these questions. Did the respondent apply the alleged provisions, criteria and/or practices (PCPs)? If it did, did those PCPs place the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? Did the respondent fail to take such steps as were reasonable to avoid the disadvantage?

16. Sections 20 and 21 replace section 4A of the Disability Discrimination Act 1995 so that numerous concepts remain identical and much of the old law remains of use.

17. We must identify:

1. The provision, criterion or practice applied by or on behalf of the employer;

2. (or the physical feature of the premises, but that does not apply in this case)

3. The identity of the non-disabled comparators (where appropriate);

4. The nature and extent of the substantial disadvantage suffered by the claimant. (*Environment Agency v Rowan* [2008] IRLR 20, [2008] ICR 218)

18. Unless we have identified those matters, we cannot then go on to say that an adjustment is reasonable.

19. While it will always be good practice for an employer to consult with an employee, it is not a failure of this duty to fail to consult. (*Tarbuck v Sainsbury Supermarkets Ltd* [2006] IRLR 664.)

20. A proper comparator can be identified only by reference to the substantial disadvantage caused by the arrangements in question (*Smith v Churchills Stairlifts plc* [2006] IRLR 41; [2006] ICR 524. The comparators are not the general population of non-disabled people. The analysis must not be of the way in which an employer has treated the employee generally or their thought processes, but the focus should be an objective analysis of the practical result of the measures that could be taken.

21. If the claimant can satisfy the tribunal that she has proved those matters, then the duty to make a reasonable adjustment arises.

22. We accept Ms Bell's submissions that an employer is not required to select the best or most reasonable of a selection of reasonable adjustments, and nor is it required to make the adjustment that is preferred by the person with a disability. So long as the particular adjustment selected by the employer is reasonable, the employer will have discharged the duty. Nor can there be an obligation on the employer to create a post specifically, which is not otherwise necessary, only to create a job for the person with a disability. (*Linsley v Revenue and Customs Commissioners* [2019] IRLR 604 at paragraph 38; *Tarbuck*, paragraph 49.)

Constructive dismissal

23. To succeed in establishing a claim under section 95(1)(c) the claimant must show that the employer is guilty of a fundamental or repudiatory breach of the contract of employment. Behaviour that is merely unreasonable is not enough. The test is not one of whether the employer was acting outside the range of reasonable responses but the question is whether, considered objectively, there was a breach of a fundamental term of the employment by the employer.

24. Although unreasonableness on the part of the employer is not enough an employee may rely upon the "implied term of trust and confidence". Properly stated the term implied is "*the employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

25. The duty not to undermine trust and confidence is capable of applying to a series of acts which individually might not themselves be breaches of contract.

26. The particular incident which causes the employee to leave may in itself be insufficient to justify her taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship. The question is, does the cumulative series of acts, taken together, amount to a breach of the implied term?

27. The employee must leave in response to the breach of contract, which may mean the tribunal deciding whether it was *an* effective (but not necessarily the sole or *the* effective) cause of the resignation. What is necessary is that the employee resigned in response, *at least in part*, to the fundamental breach by the employer. Elias P (as he then was) in *Abbey Cars (West Horndon) Ltd v Ford* EAT 0472/07 commented that 'the crucial question is whether the repudiatory breach played a part in the dismissal', going on to observe that even if the employee leaves for 'a whole host of reasons', she can claim that she has been constructively dismissed if the repudiatory breach is one of the factors relied upon.

28. There is *no* legal requirement that the departing employee must tell the employer of the reason for leaving, however.

29. A repudiatory breach is not capable of being remedied so as to preclude acceptance. The wronged party has an unfettered choice of whether to treat the breach as terminal, regardless of his reason or motive for so doing. All the defaulting party can do is to invite affirmation by making amends.

30. The fact that a dismissal is constructive does not of itself mean that it will be held to have been unfair (though in practice that will often be the case); we must still go on to consider fairness in the normal way.

Facts

31. We have made the following the findings of fact on the balance of probability.

Chronology

32. On the 11 September 1995 the claimant started work with BA as 'Cabin Crew' at Gatwick. She was selected as a 'line selector/recruiter' in September 1997. She moved to Heathrow in 2000. She retained the selection and recruitment part of her role at Heathrow. We have heard no evidence about what the selection/recruitment role entailed.

33. The claimant began to suffer from anxiety in 2001.

34. The claimant was promoted to Purser in 2004 and appointed Customer Service Line Trainer in February 2005.

35. The respondent has substantive training positions, but the claimant did not hold one of those positions. Many of the respondent's trainers are cabin crew who also have a training role. Their main role was as cabin crew, but they might be rostered to train as well. This was the role which the claimant took on in February 2005.

36. In 2013 one of the claimant's children began to suffer from a potentially serious medical condition.

37. In the autumn of 2013, the claimant was unfit to fly due to anxiety. She was given a uniformed role doing crew training on the ground in around November and as of 27 November 2013 was coping well with this. In time she returned to flying.

38. In 2015 the training department asked trainers to confirm if they wished to stay in training. The claimant applied for this and also applied to train in Avmed (aviation medicine) and SEP (safety and emergency procedures). The claimant was not chosen for this training and as a result did not have these skills at the time with which we are concerned.

39. The claimant went through procedures to apply for flexible working arrangements, but these do not form part of the issues which we have to decide,

40. In July 2017, the claimant's other child experienced a medical emergency while on holiday. The claimant herself found that her anxiety returned. As a result, she was not fit to fly as a purser.

41. As a purser, the claimant was the most senior 'In Charge Crew Member' and was directly responsible for the health and safety of up to 7 crew and 200+

passengers. Her anxiety and risk of panic attacks rendered her unsuitable for this safety critical role and as such she was 'unfit to fly'. This has not been in dispute in this case.

42. Therefore, from 24 July to 31 July 2017 the claimant was off work sick with stress.

43. Because the claimant worked one month on and one month off, she was not rostered during August 2017. Her period of sick absence began on 6 September 2017.

44. The claimant made an application to the Extraordinary Circumstances Board in August 2017 which was rejected; however, this too does not form part of her complaint before us. The claimant was then advised by her line manager to go to the Compassionate Board but she was unsuccessful. In these applications, the claimant was not seeking adjustments because of her disability.

45. In December 2017 the claimant's child who experienced a medical emergency on holiday was diagnosed with a serious lifelong condition.

46. By email dated 2 November 2017 the claimant's line manager Ms Zbos told her that when she felt ready to return to work Ms Zbos would seek further advice from the BA Health Service (BAHS) regarding a rehabilitation plan to support her return to work. This could potentially include grounded duties or a restricted roster.

47. On 22 November 2017 the claimant met with Ms Zbos to discuss her situation and possible return to work. Ms Zbos said that changes could be put in place when she was back at work. She asked what the respondent could do that was reasonable and which would not cause anxiety going forward. The claimant said that she wanted to get back to work and she wanted a 'reasonable adjustment'; she wanted to know that her children were looked after. She said she could not get better until she knew that her children were safe. Ms Zbos was not putting pressure on the claimant to return. She said that they needed to remain in touch, that a referral to BAHS was a good idea and once the claimant had seen her own doctor Ms Zbos would contact BAHS to give her a call. Once Ms Zbos had heard from BAHS she could work with scheduling and manpower to see what could be done to help when they knew the claimant's working pattern.

48. On 9 January 2018 the claimant was signed off unfit to work until to 5 March 2018.

49. On 17 January 2018 Ms Zbos wrote to Ms Cindy Vallis at BAHS saying that the claimant was on sick leave due to significant personal issues impacting on her wellbeing. She had been signed off sick until 5 March 2018. Ms Zbos asked for advice about what support could be given to support the claimant's return to work. Was she fit for any alternative roles and what were the timescales, if they were possible to give?

50. By email dated 13 February 2018 the respondent wrote to the claimant to notify her that her sick pay would cease on 28 February 2018.

51 On 21 February 2018 the claimant applied internally for a secondment to a Mixed Fleet Recruitment and Development Co-ordinator post. We have not seen the

application (neither side has produced it) although the claimant told us that she did not declare on the application that she had a disability: she ticked a box saying, '*prefer not to say*.'

52. We have not seen any of the documents relevant to the respondent's decision-making in this recruitment exercise. We do not know how many applicants there were, who or how many were called to interview, the interview date or the criteria applied to select candidates for interview. The person successful was a CSM grade 3 with a human resources background with working knowledge of the respondent's processes. The exercise was over-subscribed, and Ms Pilgrim was looking to recruit only one person who was a CSM grade 3 and a recruitment trainer; she wanted someone who could 'hit the ground running.' The decision was made by Ms Anne Pilgrim who told us that for GDPR reasons she had no relevant documents on her own computer (they were removed after 2-3 months) and the relevant documents might be in an archive somewhere. Ms Pilgrim first knew about the claim when she was contacted about it a month or 6 weeks before this hearing. We note however that the respondent has known about the precise issues in this claim from at least 4 October 2018 when they were identified by EJ Bartlett.

53. Ms Pilgrim told us that such roles were always over-subscribed and the successful candidate was someone who had knowledge of mixed fleet and had knowledge of HR recruitment: the person was 'recruitment trained'. There was only one post.

54. On 26 February 2018 the claimant was told that her application for the secondment was unsuccessful. She had not been called to interview.

55. On 22 February 2018 Karen Slinger sent all staff details of a voluntary redundancy proposal.

56. Ms Slinger wrote,

'*As a business, it is important that we continue to evolve and change to ensure we remain competitive with our products and service. You have seen some recent examples of this with the investment in Club World transformation, connectivity on our aircraft and the introduction of ceo and neo aircraft on short-haul. We can only afford to make these investment decisions by continuing our drive towards a market competitive cost base and more efficient ways of working. This proposal for voluntary redundancy allows us to play our part within IFCE.*

…

We also began consultation with trade union colleagues earlier today about a proposal to move to a single supervisory structure on Eurofleet. This proposal would see our Purser team operate as the only in-charge crew members on our Airbus-only short haul fleet in the future. Our Eurofleet CSD team are obviously impacted by this proposal and I have sent a separate communication to explain what the next steps are for them top. This voluntary redundancy process does not therefore apply to our Eurofleet CSDs.

We will now be giving you the opportunity to register interest in receiving an individual quote that will be calculated considering your own personal contract history. By requesting a quote, you are not making any commitment to leave and nor does it represent any guarantee that he will be released

Any decision to allow crew to leave the business will be subject to the consultation process and will be based on business need and determined by fleet and grade. We envisage that exit dates, where your application is accepted by the company, will be staggered based on operational need, however it would be our intention to release everybody eligible by December 31, 2018.

The closing date for registering interest in receiving an individual quote is ***Tuesday, March 20, 2018***.'

57. Although the claimant did not understand it, her job as a purser was not at any time under threat of redundancy.

58. On 23 February 2018 the claimant sent an email to Ms Zbos asking if Ms Zbos had been able to see if she was could do the 'Train the Trainer' course for Club World Training on 3 and 4 March 2018. Ms Zbos replied on 26 February that without a BAHS referral she would not be able to discuss any grounded placements but hopefully they would have the BAHS outcome in the next couple of days.

59. The claimant saw her GP on 26 February 2018 and was signed off as fit for alternative duties. The diagnosis was anxiety/low mood. The GP said that the claimant was not fit for work but fit for phased return, amended duties, altered hours, or workplace adaptations. This would be the case for one month**.**

60. On 26 February Ms Zbos made a referral to BAHS saying,

'*Fiona has been on sick leave due to significant personal issues impacting her wellbeing. She has been off sick since 6 September 2017. Fiona has informed me today that she is certified as fit with adjusted hours by her GP. Could you please advise if Fiona is able to return to normal duties; please provide timescales if possible. What support/adjustments would you recommend to assist Fiona returning to work. Please provide details. Is the employee fit for alternative duties? Thank you*.'

61. The claimant registered her interest in receiving an offer of voluntary redundancy and on 1 March 2018 Karen Slinger sent her the terms of the redundancy so that she could make an informed decision. The letter said, amongst other things,

'By submitting the form of electronic acceptance, you will be accepting the following:

- *You have read, understood and agree to the contents of this letter.*
- *You wish to participate in the voluntary redundancy scheme on the terms set out in this letter.*
- *You understand that by supporting the electronic acceptance you are irrevocably asking to participate in the voluntary redundancy arrangement, you will not be able to withdraw your acceptance of this offer and, if the Company allocates you voluntary redundancy slot, you shall leave BA by reason of voluntary redundancy on the terms set out in this letter…*

If you accept this offer your employment will come to an end on the Leaving Date.'

62. The offer was to be accepted by 23.59 hours on 2 April 2018. The claimant accepted the offer at 18.25 on the same day, 1 March 2018. She did not tell Ms Zbos at this point of her acceptance of voluntary redundancy.

63. The claimant was due to meet with BAHS on 2 (not 3) March 2018 but cancelled due to family illness. The meeting was re-scheduled for 9 March 2018. Since the BAHS appointment was for Friday 2 March, Ms Zbos cannot have booked it to prevent the claimant from attending the 'Train the Trainer' course on 3 and 4 March (a weekend course). The claimant's witness statement says that this was the reason she accepted the offer of voluntary redundancy: that is because she thought that Ms Zbos had booked the BAHS appointment as a deliberate tactic to prevent her from attending the course. We do not accept that this was Ms Zbos' motive. It is not supported by the chronology.

64. On 9 March 2018 the claimant went to see Cindy Vallis of BAHS, and showed her the GP's note.

65. Ms Vallis' note of this meeting says:

'..*She informed that she is anxious re. returning to flying due to worrying about her children; that no timescale for returning to flying and doesn't know if she could report fit to return in April; that she has been offered redundancy, which she will probably take, that she has D/W ['discussion with'] counsellor re. this & alternative duties; that she applied for a secondment and was told, 'no'. Believes the barrier to returning to her contractual role is being away if something happens to the children…*

IMPRESSION: unfit to RTW. No timescale for a return to flying or a phased RTW. Fiona appears unclear re. what to do; she appears reluctant to return to flying due to concerns about her children & not being present were there to be a problem. She indicated that she would like to take redundancy or work on ground duties. Fiona aware that ground duties would not be part of a rehab plan & therefore are a management decision re. what they can accommodate.

PLAN agreed with Fiona: unfit for phased RTW. No review planned but would review at her manager's request. I will D/W OHP & update Fiona if any changes to this prior to sending ESS response. Discussed ESS response and verbal consent to send, didn't want to see form before sent. Appeared happy with consult and outcome, nil complaints voiced.

66. There is no mention in Ms Vallis' note of a discussion about ground duties in training. Ms Vallis subsequently produced a BAHS report (received by Ms Zbos on 14 March 2018) which said,

'-*Fiona is unfit to return to flying duties or for a phased return to work at this time. At this stage I don't have a definitive timescale for her to return to contractual duties.*

-Fiona has informed me that she doesn't feel well enough to return to her normal contractual duties at present.

-Fiona would be fit for ground duties up to her normal contractual hours; however, it is a management decision regarding if the business can support this as ground duties are not presently part of a phased return to work.

-In order to advise further I plan to obtain a medical report & Fiona has provided me with her verbal consent to do this. I have posted then consent documents to Fiona & once I have received her consent then I will request the report.

I do not need to review with Fiona until I have received the medical report: I will contact her to arrange a review once I have received it.'

67. The note of the consultation and report do not support the claimant's case that Ms Vallis said she would not sign her fit for work until she had a date to return to flying. Although Ms Vallis did not sign the claimant fit for work and we see that Ms Vallis focussed first on the claimant's possible return to contractual flying duties, we think this is logically the first point to consider. However, this was not the end of the conversation: having established that a return to flying (even with phased return) was not possible, the claimant volunteered that she would probably take redundancy. [In fact, she had already accepted, but she does not seem to have said precisely this to Ms Vallis.] The immediate alternatives then - from Ms Vallis' point of view in her note- were redundancy or ground duties. We find that Ms Vallis advised the claimant that ground duties were a management decision: her note and subsequent report confirm this. She had the discretion not to mention voluntary redundancy in her report to the claimant's manager but did not say or indicate to the claimant that reasonable adjustments would not be made. She did not 'refuse to allow the claimant to return to work.' She said that ground duties were a matter for management.

68. By email dated 11 March 2018 the claimant wrote to Ms Zbos:

'*I had my appointment with BAHS on Friday. Despite my GP signing me fit for amended duties, BAHS have refused to allow me to return to work due to being, "not fit for all duties."*

As you know I have been signed off with severe anxiety caused by the stress of being a single parent and looking after two children who both have chronic, life-threatening conditions. Part of the anxiety is caused due to my flying job; I wouldn't be at the end of the phone or able to get to either of my sons quickly in the event of an emergency. Additionally, as you know, with delays, weather etc I may well get stuck down route and this would exacerbate my anxiety so it would be unwise for me to fly at the moment. I would obviously not be much use as a Purser dealing with customers in a delay situation if I was panicking about getting home myself.

It seemed sensible, as I am a qualified trainer, to come back to work in the Training Department until I feel able to return to full flying duties. There is plenty of training going on and EF trainers are being trained to deliver the Club World Training and I would have enjoyed that. However it seems that BA won't allow this, even though it is part of my contractual role…

…

On the basis that BA have made it clear that despite my mental health issues, they are not prepared to make any reasonable adjustments to accommodate my return to work. I therefore I have no option other than to accept the VR that has been offered, even though I am some way off retirement and have two young children to support on my own.

Please can you therefore confirm if under the VR scheme I will be given 12 weeks' notice period or payment in lieu of notice over and above the redundancy payment, as per my contract?

I feel very sad that it has come to this, but would like to thank you for your kindness over the past few years.'

69. We find that this letter does not accurately set out the situation. In particular the respondent had not made it clear that it would not make reasonable adjustments to accommodate the claimant's return to work. This is not what Ms Vallis' note said and the claimant had, in any event, accepted voluntary redundancy before she spoke to Ms Vallis. We do not find that this was the claimant's reason for accepting voluntary redundancy.

70. On 12 March 2018 Ms Vallis spoke to Dr Houston of BAHS. The advice given was that a medical report should be requested from the claimant's GP to understand her treatment plan and prognosis. The claimant would be fit for ground duties up to her normal contractual hours; however, it was the line manager who determined whether the business could support this and ground duties were not presently part of a phased return to work.

71. Accordingly, Ms Vallis contacted the claimant (finally reaching her on 14 March) and reported the discussion with Dr Houston. The claimant said that she believed she was fit to return to alternative duties but not flying as yet. She was happy to give her consent for Ms Vallis to request a medical report.

72. On the same day, 14 March 2018, Ms Vallis updated Ms Zbos; the claimant was unfit to return to flying duties or phased return to work. At this stage Ms Vallis had no definitive timescale for the claimant's return to contractual duties. The claimant had told her that she did not feel well enough to return to her normal contractual duties at present. The claimant would be fit for ground duties up to her normal contractual hours, however this was a management decision depending on whether the business could support this because ground duties were not presently part of a phased return to work. Ms Vallis planned to obtain a medical report and the claimant had given her consent. Further on 14 March, Ms Zbos wrote to the 'BS team' asking for a grounded placement for the claimant in a customer facing/uniformed role to start as soon as possible 'from now until 30 June 2018.' (This was the claimant's exit date.)

73. Meanwhile, on 13 March 2018 Ms Zbos had replied to the claimant's email of 11 March. She answered the claimant's question about notice payment and said that more updated information would be available soon. She said that she was out of the

office until 23 March and then would be off for a week. She was on a course on 14 March but will try to contact the claimant before the weekend.

74. By email dated 16 March the claimant told Ms Zbos that she had accepted the voluntary redundancy letter. She had not yet been given a leaving date but would tell Ms Zbos as soon as she knew. She said that she hoped to see Ms Zbos before she went, but wanted to thank her for all the kindness she had shown over the last four years through the claimant's difficult circumstances.

75. By email dated 16 March Ms Zbos told the claimant that she had now received the BAHS report. She said that because BAHS were unable to provide her with definite timescales for the claimant's return to contractual duties she believed it was appropriate for her absence from work to be managed under section 4 of the EG 300 Absence Management Policy.

76. Ms Zbos said that she understood the claimant had accepted the voluntary redundancy offer before she spoke to Ms Vallis and before Ms Zbos had a chance to discuss with the claimant the outcome of the referral. With this in mind, she offered the claimant extra time to decide whether voluntary redundancy was indeed the best possible solution for her. She gave the claimant until 2 April 2018 to reconsider accepting the voluntary redundancy offer. This would be considered outside the standard voluntary redundancy process.

77. Ms Zbos said that section 4 would give the claimant an opportunity for a phased return to work to her contractual role as Purser. Grounded duties could potentially be part of this process as well as some restrictions on the claimant's flying roster. These support mechanisms were put in place to enable the claimant to return to her contractual role, all within reasonable timescales, as explained in the EG 300 absence management policy. Ms Zbos urged the claimant to take time to consider, to consult with her trade union representative and to let her know if she had any further questions and she added that she would respect whatever final decision the claimant made.

78. By email dated 26 March 2018 the claimant asked what the section 4 phased return to work would entail. She said that she had been told all along by BAHS and the union the ground duties were not allowed. (Again, we note that this was incorrect, at least so far as BAHS was concerned.) The claimant asked if Ms Zbos was saying that she could be grounded and how long this would be for. She said that she was unable to declare herself fit to fly in accordance with regulations because of her anxiety about not being able to get to her children if anything were to happen. She said her aim was to get fit to do the Train the Trainer course for Club World on 3 March, and she felt confident that being in training and doing a job that she loved and was qualified for would help return to work. She said that once she had full understanding of what she would be able to do and how long, then she would be able to take a considered decision on the voluntary redundancy.

79. By email dated 29 March 2018, the claimant wrote to Mr Devlin, forwarding the email she had sent to Ms Zbos and noting that Ms Zbos was out of the office until 2 April 2018. The claimant said:

'*I am keen to know exactly what is on the table with regards to my return to work. My GP has signed me fit for work (amended duties) on 23 February. I am a qualified trainer and as that is part of my standard duties I have been trying to return into Training until my anxiety issues, which are compounded by flying, are resolved. Please can you state exactly what the return to work offer is so that I can make an informed decision about the VR.*

I'd like to point out that BA have stopped my pay, even though my GP has supported my return to work. Supporting two kids, who both attend a fee paying residential school to allow me to work, on no pay is now compounding the stress and worry and I feel I have been treated very unfairly.'

80. At this point in time, Ms Zbos was on annual leave from 23 March for a week. Nonetheless, she replied on 30 March saying that she was on leave but also replying substantively to the claimant's email. She confirmed that the decision about voluntary redundancy needed to be made by 2 April so as to honour the same deadline for all colleagues in both fleets. Once the decision was made within these timescales it was final.

81. She said that she wanted to give the claimant some extra time to consider her decision and perhaps withdraw the acceptance of voluntary redundancy. As line manager, she would like to treat the offer of voluntary redundancy separately from the section 4 entry meeting which would take place irrespective of the claimant's final decision. She attached the EG300 policy. She said that working on the ground could form part of a rehabilitation plan, however based on the latest BAHS referral, grounded placement was not recommended at the moment.(We note that this too, was not correct in that BAHS has said that grounded duties were a management decision.) What the claimant did and how long would depend on her progress and her recovery towards her contractual role. Because the timescales for returning to the contractual role were unknown it was impossible for BAHS to implement such a phased return to work. Grounded placements were mostly put in place for a short period of time leading up to a return to a crew contractual flying role.

82. At this point in time Ms Zbos was not consciously aware of 11.1 of the IFCE - Unite Line Trainer Agreement (a collective agreement):

'In the event that a line trainer is grounded due to pregnancy, or long term grounding the Grounded Crew Unit, after taking into account their capabilities and the requirements of Training, will place them in the Training School for the duration of their time of working on the ground.'

83. At this point, not knowing about the agreement, Ms Zbos did not make any enquiries about what training opportunities were available to the claimant.

84. By email dated 1 April 2018 claimant wrote to Ms Zbos:

'*I am unable to withdraw my VR request as I discussed with BAHS due to my high levels of stress & anxiety, I am unable to fly for the time being. I am keen and able to return to work in my capacity as a qualified training instructor and this would have*

allowed me to re-adjust to being back at work, and then aid my return to flying in the future I have not been allowed to do this so feel I now have no option but to leave.

In addition, there seems to have been a mistake with my pay this month. I was declared fit by my GP on 23 February, as per the attached sick note. As per EG 300, BAHS should have allowed me to return into training, or another suitable capacity.

I therefore believe that BA have illegally deducted my salary this month of £1732.28.'

85. A meeting took place on 5 April 2018 between the claimant, her line manager Ms Zbos, the claimant's representative Ms Cumming, and a notetaker. So far as Ms Zbos was concerned this was a section 4 entry meeting, that is, it was the meeting that began the application of respondent's section 4 absence management process in relation to the claimant. It was not a return to work meeting because the claimant had not returned to work.

86. The meeting began with a review of the medical history. The claimant explained again that she could not fly due to anxiety. She said that she knew that she could do it and it was just 'a time thing'. The note records her saying that she needed to put on her uniform, and be back with customers so as to gain confidence. Ms Zbos confirmed that was what the section 4 process was intended to do: to support the claimant and help her back to her contractual role.

87. The claimant said that she would benefit from ground duties and that her therapist agreed with this. Ms Zbos said that it was appropriate to manage the situation in section 4 whether or not the claimant took voluntary redundancy. She did not offer a guarantee but asked the claimant to express her preference for a grounded placement. The claimant said that a uniformed role was best, and she referred to the Global Learning Academy ('GLA') because she was a trainer. Ms Zbos said that she would discuss with Cindy Vallis about the hours and the placement etc and would let the claimant know. By this we think she meant she would check with BAHS whether a training placement was appropriate.

88. There was a discussion about the claimant's pay and Ms Zbos said that the claimant's pay had run out because her six-months of sick pay had been exhausted. This was the situation until the claimant was back at work in some capacity. She said that she was not in a position to give back pay in this situation.

89. We do not find that Ms Zbos said, 'we can't make reasonable adjustments for cabin crew, what do you want -a chair to sit on?' This is not recorded in the respondent's notes and furthermore it was not put to Ms Zbos in cross examination for her to answer.

90. On 6 April 2018 the claimant submitted a formal grievance to the respondent. The first point made was that the respondent had made an illegal deduction from her pay. She said that she had been signed fit for work with 'amended duties for 1 month' on 23 February. She attended her BAHS referral on 9 March fully expecting to go back to work. BAHS asked her to specify a date for a return to flying and the claimant had said that she had replied that she would like to return in her capacity as a training

instructor. She said that BAHS said that because she could not give a date for return to flying she was unable to return to work and 'she' (BAHS) would not declare me fit.

91. The claimant said that she had a disability under the 2010 Act and reminded the respondent of the duty to make reasonable adjustments. She said that the adjustment which she considered the respondent had failed to make was failing to allow her to return to work in her standard role as a training instructor prior to returning to flying.

92. She said that she had tried to resolve this at the meeting on 5 April and was not satisfied with the outcome. She said that Ms Zbos had said that she could return to ground duties but there was therefore no reason why she could not have been given ground duties on 9 March and allowed to return to work. Therefore, she said that her wages had been deducted unlawfully due to her disability by not permitting her a reasonable adjustment on 9 March.

93. By email dated 12 April 2018 Ms Zbos wrote to the claimant saying that she had spoken to Cindy Vallis and to the Business Support Hub who would be arranging the grounded placement for the claimant. The Hub team would be in touch shortly regarding a uniform/customer facing role. Ms Zbos said she could see in the meeting that as the claimant discussed her son's condition she became quite upset and emotional and therefore she believed that a role where the claimant could 'take some time out' whenever she needed would be more beneficial than a structured and pressurised GLA environment.

94. The claimant replied by email on or about the same day reiterating her preference for working in training and that she was a 'fully qualified Customer Service Trainer'. She said that she did not feel ready to do a customer facing role and would be more anxious going into a role where she knew no one and would have to with angry customers. When she was called by GCU and told to go to Terminal 5 on Monday morning she could already feel her anxiety palpitations rising. She said that she had raised with the grounded crew unit that she was a trainer and asked if she could be placed in training. The grounded crew unit said that they would look into it. The claimant had also emailed the training managers herself. The claimant said that she would feel more supported and of value going into the GLA where she knew people, knew the job and would be able to reintegrate herself into the crew role by finding out what was new and what had changed.

95. The claimant's first proposed grounded duties were therefore cancelled while the GCU looked into a possible placement in training. The cancelled role had been a 'hosting role' in terminal 5. This involved being available for customers seeking information and assistance. The claimant told us, and we accept that there were times when such a role could be stressful when flights were delayed and customers upset.

96. By email dated 13 April 2018 Lorraine Jenkins wrote to 'scheduling' saying that the claimant had been grounded due to sickness from 5 April to 30 June 2018.

97. Ms Zbos sent an outcome letter relating to the section 4 meeting to the claimant on 16 April 2018. The letter emphasised that it was difficult for BAHS to put a rehabilitation plan in place without knowing the timescale within which a return to

contractual duties was expected. The respondent at this stage was awaiting a further report from the claimant's doctor. The letter explains the possible outcomes of the section 4 process: a return to the contractual role, any reasonable adjustments that may be accommodated to the contractual role or suitable alternative employment. Ms Zbos added that BA would support the claimant back to work however if this was not possible then termination of the contract of employment was available as an option of last resort.

98. By email dated 17 April 2018 'Ground Placement' wrote to Jonathan Brent and Simon Barker at GLA about the claimant:

'*We are looking for a ground placement for [the claimant], she is a trainer, do you have anything available for her? She is 50% contract, equivalent on the ground [2 days one week, 3 days the next week] until 30th June*.'

99. The same day, Mr Barker replied saying,

'*Unfortunately, we (crew learning) who not have capacity at this time for another colleague on a grounded placement*.'

100. Therefore, Lorraine Jenkins of the grounded placement team left a message for Ms Zbos asking her to contact her because there were no placements at the GLA. Meanwhile, the grounded placement team contacted the claimant to tell her of two possible ground placements: one in terminal five hosting and the other at Vanguard House. The claimant's response was that she would contact her union because, being a trainer, she should be accommodated where she could use those skills. Ms Jenkins told her that for there was no position available in GLA at the present.

101. Ms Zbos accordingly sent an email to the claimant on 18 April saying that she had just been advised there was no grounded placement at GLA. She had asked the ground support team to contact the claimant to discuss any other potential placements and also non-customer facing roles. She said however that if the claimant had not agreed about the placement by the end of that week, she would no longer be able to support the claimant's 'fit for grounded duties' status. She said she hoped the claimant would be willing to try one of the placements which would enable her to ease herself back into the work environment. She said that the respondent offered versatile roles from office-based placements to customer facing ones, most of which would perfectly match the claimant's skill set and would give her an opportunity to get back into the work routine.

102. By email dated 20 April 2018 the claimant wrote to Ms Zbos saying that in the light of the ultimatum given, she was prepared to be placed in Uniform Stores in accordance with an offer from the grounded crew unit, for a temporary period until the Train the Trainer course in the GLA could be provided as the claimant had requested in February. The claimant said that she would be working in uniform stores under protest due to the respondent's failure to make a reasonable adjustment that is for her to work in the training department in her existing role as Customer Service Trainer.

103. Ms Zbos replied the following day saying that she had contacted the GLA managers again and they did doublecheck the Train the Trainer course's availability

and the current training academy requirements. No Train the Trainer spaces were available. Meanwhile the Grounded Crew Unit had received an email from GLA operations/logistics of a possible placement there.

104. On 23 April 2018 the claimant wrote by email to Ms Zbos saying that it was disappointing that she was not placed on the Train the Trainer course for Club World in February when she requested the adjustment on her return to work. She said this would have been in accordance with the Line Trainer Agreement. She said that had she been placed on the course then the outlook would have been very different including, '*not taking the VR due to no other job offered*.' In the meantime, she said she would take the position in GLA operations/logistics under protest until the Train the Trainer course for either 'Club World, Neo, Sep or Avmed' became available.

105. At around this time the claimant changed her mind about her consent for her GP to send a report to BAHS. She told Ms Zbos of her change of mind.

106. On 24 April 2018 the claimant reported for duty at the GLA. She had been told to ask for Jonathan Brent but he was not present when she arrived. Instead she began to speak to those about to deliver training on the Club World Train the Trainer course. Contrary to what the claimant had been told about the course being full, it was not full and there were only four trainees. The claimant therefore asked if she could join the course as a trainee. The trainers agreed and she joined the course.

107. It appears that at first this caused a certain amount of displeasure in the GLA, however ultimately Jonathan Brent was pleased, and Simon Barker expressed the view that he would be able to use the claimant's skills. Ms Zbos shared this view.

108. In fact, the claimant did not deliver training while placed with the GLA. Instead she sat with three others at an information desk with little to do because the information mostly being sought was provided on a screen behind the desk.

109. While the claimant was placed at the GLA she sat with two other grounded employees in particular. One was a pregnant member of staff and one was Mr X (who we anonymise). Both of these other members of staff came from 'Mixed Fleet' whereas the claimant was from Eurofleet. They therefore did not receive the £75 daily allowance received by the claimant. Both of these other staff members had been 'upskilled' while on their grounded placements with GLA whereas the claimant was only 'upskilled' because she talked herself onto the Train the Trainer course. The claimant told us that she considered that financial considerations led to the respondent preventing her from doing the course. Mr X was full time whereas the claimant worked 50%.

110. Mr X was used as a trainer while he was on his grounded placement: he had been in the GLA from October 2017, grounded for a year due to an unspecified medical condition. He would have been used as a 'stand by trainer' to cover absence. He delivered the Club World course and the claimant did not. He did go on the SEP upskilling course which would have taken 12 weeks; the claimant did not.

111. The GLA rosters for trainers were produced two months in advance and trainers were fitted into the rosters first, with flying duties being fitted around training duties.

The claimant was in the GLA for two months and 6 days before her contract terminated. Mr X is still employed by BA and indeed appears still to be delivering training. Taking all the evidence together we consider that Mr X was materially different to the claimant given that he had been in GLA considerably longer than the claimant and was expected to stay in GLA in the medium to long term and the claimant was not.

112. We consider that the reason why the claimant was not offered training was because she was not in GLA long enough to be rostered to deliver training. We have not heard any more refined evidence about specific absences which she could have covered.

113. The claimant accepted that non-grounded women were trainees on the Club World Train the Trainer courses.

114. The claimant has not made any specific complaints about the grievance process so we deal with that chapter of events briefly.

115. The grievance was heard by Mr Dockray on 1 May 2018.

116. On 23 May 2018 the claimant wrote to Thomas Dollery ('Manager Eurofleet') asking to retract her voluntary redundancy, subject to the reasonable adjustment of being allowed to deliver training in GLA while on grounded duties.

117. By email dated 30 May 2018 to Thomas Dollery, the claimant asked for her leaving date to be extended because she was still awaiting the outcome of her grievance and there were two further appeal processes.

118. On 5 June 2018 Mr Dollery replied saying that he was unable to change or extend the leaving date. If the full grievance process had not been concluded before the exit date on the end of June the full process would still run.

119. Mr Dockray sent the grievance outcome to the claimant on 8 June 2018. He did not uphold the grievance. He did not consider that the respondent had failed ot make reasonable adjustments. He considered that the delay in making the decision about returning the laiamnt to grounded duties was because the respondent had been making sure that any grounded role would be right for the claimant. The claimant's entitlement to company sick pay had been exhausted and to re-accrue sick pay she would have had to return to work and work in her normal contractual duties for at least 2 weeks.

120. The claimant's employment with the respondent terminated on 30 June 2018. Her subsequent appeals against her grievance outcome were rejected.

Analysis

121. We have used the list of issues to help structure our analysis, however we take the discrimination claims first. We take the issues (set out in italics) step by step.

Disability.

122. The respondent has conceded disability due to anxiety, depression and low mood.

Section 13 Disability

6.6 Has the respondent subjected the claimant to the following treatment:

(a) refused to offer her a role as a Line Trainer in the Training Department from January 2018;

123. The starting date here is incorrect: the claimant was still unfit to work at all in January 2018, having been signed off until 5 March 2018. The chronology shows us that the GP signed to say that the claimant was fit to work on amended duties on 26 February 2018. The claimant was referred to BAHS who she saw on 9 March, having postponed the first meeting on 2 March 2018. Ms Zbos learnt that the claimant was fit for amended duties on 14 March. So, we look at the issue as being about a 'refusal' to offer the claimant a training role from the point when her manager knew that she would have been fit to do such a role on 14 March 2018. The decision to offer training or not was one for management. Until 14 March 2018 management could not and would not have offered her a training, or any, role because they did not have BAHS' approval.

124. On 23 February the claimant asked Ms Zbos to do the Club World Train the Trainer training on 3 March.

125. On 11 March the claimant raised the issue of coming back to work in the training department.

126. The issue of working in the training department was raised on 5 April at the section 4 meeting and Ms Zbos 'refused' (in fact did not follow it up) it because she had a perception that that claimant became upset at the meeting and considered that the claimant would be better in a role that would enable her to take 'time out' if she was upset. She did not consider that a training role would allow this.

127. Therefore, the claimant has proved that she was not placed in a role delivering training from 14 March to the date of her contract ending on 30 June 2018.

(b) The respondent never placed the claimant in a line trainer role in the training department.

128. We think that this issue is a repeat of the previous issue. The respondent did not actually *refuse*, but the respondent did not place the claimant in a line trainer role as we have said above.

(c) the respondent did not place the claimant on the Line Trainer course on 3 March 2018.

129. In fact, this was the Club World Train the Trainer course on the weekend of 3 and 4 March 2018, but we do not think the precise title matters. The claimant was not sent on the course.

(c) The respondent stopped the claimant's salary and sick pay in March 2018.

130. The claimant has proved this, indeed it was not in dispute.

(d) The respondent did not offer the claimant an interview for the secondment opportunity in recruitment in February 2018.

131. This too has not been in dispute.

6.7 Was that treatment 'less favourable treatment', i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ('comparators') in not materially different circumstances? The claimant relies on a hypothetical comparator.

132. The claimant relies on a hypothetical comparator: we have in the main found it appropriate in that circumstance and in this case to look at the '*reason why*'. We take the sub issues one by one:

133. *(a) and (b)* Until the 14 March 2018 the 'reason why' claimant could not be placed in a line trainer or any role was because her line manager did not have confirmation from BAHS that she was certified fit for amended duties. This means that the claimant could not be sent on the course on 3 and 4 March 2018. In particular, it cannot have been the case that Ms Zbos deliberately booked a BAHS appointment to prevent the claimant attending the course, because the dates did not clash.

134. Ms Zbos was unaware of clause 11.1 in the Unite Line Trainer agreement until after it was raised by the claimant in her grievance on 6 April 2018. So, she did not have in mind to start with that training was a first place to start looking for a grounded placement for the claimant.

135. Ms Zbos did not seek a role in training for the claimant on or after 5 April because the claimant became upset in the 5 April meeting: the 'reason why' was the manifestation of distress which made her think that the claimant would need a placement that allowed her to take 'time out'. We have noted the claimant's evidence about Ms Zbos' kindness and we consider that Ms Zbos would have taken the same approach with another staff member who was also grounded and showing distress (after a significant bereavement, say) but who did not have the claimant's disability.

136. When Mr. Barker told the grounded crew unit that he had no grounded placements, that entered into the 'reason why' the claimant was not given a grounded placement: the fact that there were 4 members of staff sitting at the information desk doing almost nothing confirms that there were no grounded *placements*.

137. Once the claimant was present in the GLA she was not given training to deliver because the training delivery roles had been rostered two months earlier. She was not in the GLA log enough to be rostered.

138. *(c)* The respondent stopped paying the claimant's sick pay in March 2018 because Ms Zbos acted on the basis that she had exhausted her entitlement to sick pay and was not yet back working. This was the 'reason why'.

139. *(d)* This allegation gives rise to more complex analysis because of the way the evidence has been presented by both parties.

140. The claimant has to prove her case at least to an initial level.

141. She has proved that she was not invited to interview.

142. There has been a certain inertia in the respondent's disclosure of evidence, especially in this part of the case. Ms. Pilgrim told us that although the information had gone from her computer it would exist in an archive. Ms Pilgrim was very frank and said that she was not able to tell us why the claimant was not offered an interview, although she was looking for someone with very precise skills. We have heard no evidence that the claimant possessed the precise recruitment skills sought: the claimant did not expand on her recruitment skills and did not explore with Ms Pilgrim whether her experience was relevant to the role. The claimant told us that she did not disclose her disability in the application form.

143. There is no actual comparator relied upon in this part of the case. Hypothetical comparators would be applicants with the claimant's skills and abilities who did not have a disability but who also preferred not to say whether they had a disability. We consider that such a person would be judged on their skills and abilities and not on their disability or lack of it, because the recruiters - seeking very specific skills and experience - would on the balance of probabilities not have known of their lack of disability.

144. We bear in mind that respondent has not made disclosure of the documents relating to the recruitment exercise. We remember that lack of explanation is not relevant at the first stage.

145. We do not reach the point of asking whether the burden passes to the respondent however because the claimant has not proved that a hypothetical comparator would have been treated more favourably than she was treated. She too has not disclosed her application form or told us in any detail of her recruitment skills and experience. All we know from her is that she was selected in 1997 as a selector/recruiter and she did not disclose her disability on the form. We consider – doing the best we can on the thin evidence we have – that a hypothetical comparator who did not have a disability and who also 'preferred not to say', would have been judged on his or her skills and abilities. If they did not match the skills and abilities sought, they too would not have been called to interview.

146. If we were wrong about that, whatever the respondent's precise reason for not offering an interview, on the balance of probabilities when we look at the limited evidence we have of recruiter's state of mind, the 'reason why' was not the disability because the recruiters did not know of the disability. The reason, on the balance of probability, was the claimant's skills and abilities, or lack of them.

147. Therefore, the direct discrimination claim does not succeed.

Sex discrimination

6.9 Has the respondent subjected the claimant to the following treatment:

(a) refused to permit the claimant to carry out training duties and requiring her to carry out flying duties.

148. The respondent did not require the claimant actually to carry out flying duties, in the sense of trying to compel her to do so, but did adhere to the view that this was her contractual role and it wanted and expected her to return to her contractual role, at least in time. The claimant did not deliver training.

6.10 Was that treatment 'less favourable treatment', i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ('comparators') in not materially different circumstances? The claimant relies on [a named comparator whose name is known to the parties but who we will refer to as Mr X], and or a hypothetical comparator.

149. Mr. X did deliver training and the claimant did not. She was treated less favourably in this respect than him. However, he was expected to be in GLA long term (a year in total) and had been there since October 2017. She was in the GLA for a little over two months. There is that material difference between the claimant and Mr. X. The difference is material because the rosters for training were drawn up two months in advance of the training courses. Mr. X is not a valid comparator for the claimant. Given the importance of this difference between them, we do not consider that the treatment of Mr X sheds light on how a hypothetical male comparator would have been treated. Moreover, there is evidence of the pregnant woman on grounded duties at GLA who was allowed to deliver training.

6.11 if so, was this because of the claimant's sex?

150. If we were wrong about any of that, is there evidence from which we could properly conclude that the difference in treatment was because of sex? There is evidence that other women were used as trainers on the particular course. The claimant herself was used as a trainer after her own pregnancies. Her pregnant colleague was put on the Club World train the trainer course, albeit she was then taken off it. There is no evidence that women generally were not used as trainers, were thought to be less good at training, or of any negativity towards women as trainers. So, we do not find evidence from which we could properly infer discrimination on grounds of sex. (We note too the claimant's own evidence that she herself thought the difference in treatment was in fact motivated by financial concerns, not by her sex.)

151. We have found that the 'reason why' is that the claimant was not in the GLA long enough to be put on the rosters, the rosters having been prepared two months in advance.

152. Therefore, the difference in treatment was not because of the claimant's sex.

Reasonable adjustments.

Did the respondent have the following PCP:

(a) requiring the claimant to undertake flying duties?

153. The respondent conceded this PCP.

6.14 Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

[The respondent conceded this using this phraseology at the outset of our hearing. During submissions both parties agreed that the disadvantage was that the claimant suffered from anxiety (because she is the mother of two children with severe medical conditions) and that makes her more likely to struggle with anxiety on aeroplane so that she would struggle to carry out her role as Purser, especially in the event of an emergency.]

154. The respondent agreed that the claimant was placed at this disadvantage and that it knew of the disadvantage.

6.15 If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage?

155. The respondent conceded this.

6.16 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

(a) permit the claimant to carry out the role of customer service trainer (a line trainer).

6.17 If so, would it have been reasonable for the respondent to have to take those steps any relevant time?

156. The purpose of an adjustment is to avoid the disadvantage. In this case the disadvantage was one relating wholly to flying. So long as the claimant was not required to fly and did not fly, the disadvantage did not arise and was avoided. The adjustment needed therefore was one that enabled the claimant to work, but not to fly, at least for an unspecified period while she built up her confidence.

157. We accept Ms Bell's submissions that an employee cannot expect to choose her adjustment. The duty is always on the employer to offer an adjustment that is reasonable. One adjustment does not become less reasonable because there is another adjustment which the employee prefers.

158. We do not consider however that the terminal 5 offer would have been a reasonable adjustment, even though it enabled the claimant to work but not fly. It was reasonable for the employer to explore it, but the claimant, knowing her own condition, was in a better position to say (when the offer was made) that it would be more likely to trigger her anxiety even though she was not flying. However, the uniform role (which the claimant accepted under protest because she was aiming at being a trainer) would

not have triggered that anxiety and it was offered to the claimant. It would have avoided the disadvantage.

159. In any event the claimant was also offered grounded duties at GLA which she accepted. They were boring and did not use her training skills but nonetheless they did avoid the disadvantage and they allowed her to work. Moreover, training delivery could not reasonably be offered in the timescale available because the rosters had already been filled and no training was available for the claimant to do. It would not be reasonable to displace another trainer, whose rosters had already been created and flying duties fitted around those duties, to vacate a training course so that the claimant could deliver it.

160. It did take time to identify the uniform position and the GLA position. It is in the nature of such an exercise that it may take time to establish the claimant's medical position, consult with the employee, initiate a search for roles and to locate and then offer and discuss such roles with the employee. Some small delay was also caused because Ms Zbos was on leave. This exercise took from 14 March to 17/18 April when the uniformed role was offered. The duty is to be reasonable, not to act with perfection instantaneously. We consider that the respondent worked through the necessary process in a reasonable time.

Constructive unfair dismissal & wrongful dismissal

6.1 Was the claimant dismissed, i.e.

(a) was there a fundamental breach of the contract employment, and/or did the respondent breach the so-called 'trust and confidence term,' i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?

6.2 The conduct the claimant relies on as amounting to a fundamental breach of contract/breaching the trust and confidence term is:

(a) the claimant not being permitted to carry out amended duties until 24 April 2018 despite being signed as fit to work on amended duties by her GP on 26 February 2018;

(b) the claimant not receiving any salary or sick pay from March 2018 until 24 April 2018.

If so, did the claimant affirm the contract of employment before resigning?

(c) if not, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation - it need not be <u>the</u> reason for the resignation)?

161. The claimant's GP had signed the claimant fit only for amended duties, not for her contractual duties. Therefore, it was not possible for her directly to go back to her contractual work in March and receive pay accordingly. Therefore, alternative work had to be found for her which was suitable, given her condition. This could not be

achieved instantly: the respondent needed medical guidance and steps had to be taken to understand the position, consult with the claimant and identify appropriate alternative duties. The claimant could only be permitted to carry out amended duties of any sort once the respondent knew that it had BAHS approval and identified suitable duties for the claimant to perform.

162. In fact, the claimant was offered duties which – so far as the respondent knew – were reasonable in mid-April when it offered duties at terminal 5. The respondent then listened to the claimant's response to that offer and reacted to what she said. It tried unsuccessfully to find her a grounded placement in training. It then offered the uniform duties which would have been reasonable, although the claimant did not want that placement. It the continued to seek a placement in training and achieved that. This was not a 'failure to permit' the claimant to carry out amended duties. It was a reasonable search for such duties carried out in a reasonable timescale given the circumstances. There was reasonable and proper cause for both the approach taken and the timescale. There was no breach of contract.

163. It was not a fundamental or any breach of contract to withhold pay until the claimant actually started working. The claimant was still not fit for her contractual duties and had exhausted her entitlement to sick pay. We have not been taken to any policy or collective agreement which said that the claimant was entitled to be paid again from the date she was signed off fit for amended duties and nor has the claimant alleged any specific breach of an express term of contract, policy or procedure. Mr Dockray arranged for the claimant to be paid the contested pay, but as a goodwill gesture, not out of entitlement.

164. In any event we find on the evidence of Ms Vallis's notes that the claimant had already made up her mind to accept voluntary redundancy on 1 March, no doubt for her own reasons. Only 2 days elapsed between the GP signing the certificate saying that the claimant was fit for amended duties and her accepting the voluntary redundancy. She never retracted this acceptance. She did not wait until after she had met with BAHS. There was insufficient time for the respondent to have committed the breaches she alleges before she accepted the voluntary redundancy. She did not resign because of the alleged breach, on that chronology.

165. Moreover, we have noticed that the reasons given by the claimant for accepting voluntary redundancy have changed and have not been consistent with the facts. We have not been able to accept the reasons given by the claimant so that even if the respondent had been in breach of contract we would not have accepted that the claimant had resigned as a result of any breach.

_____

Employment Judge Heal
Date: 08.09.2020

Sent to the parties on:

Case Number: 3331223/2018

10.09.2020

…….

For the Tribunal:

T Yeo

……..