EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr R Joselin **British Airways Plc**

v

Heard at: Watford (in public; by video)

On: 17-19 February 2021

Before: Employment Judge Quill (sitting alone)

Appearances

For the Claimant: Mr F Mortin, pupil barrister
For the Respondent: Ms M Tutin, counsel

This was a remote hearing with the consent of the parties. The form of remote hearing was [V: video fully (all remote)]. A face to face hearing was not held because it was not practicable and no-one requested the same. The documents that I was referred to are in a bundle of around 400 pages, the contents of which I have recorded.

JUDGMENT

1. The judgment in this case is that the effective date of termination was 30 September 2017. It was not reasonably practicable for the claimant to submit the claim within the time limit (and not reasonably practicable to commence early conciliation by 29 December 2017) and the claimant did submit the claim within such further period as I consider reasonable.

2. The complaint of unfair dismissal succeeds and there is a *Polkey* reduction of 90%. The respondent is ordered to pay the Claimant £14,438.47 being:

   2.1. Basic award of £12,469.50.

   2.2. compensatory award of £1,968.97.

3. The claim for breach of contract fails.

REASONS

Introduction

1. Judgment with reasons was given orally. Written reasons were requested and these are they.

2. The respondent is a well-known airline and is the claimant's former employee. The Claimant brings claims in relation to his dismissal. The claims are for unfair dismissal and breach of contract.

Issues

3. The issues that I had to decide were:

   3.1 In relation to unfair dismissal.

      3.1.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with s.98(1) and (2) of the Employment Rights Act. The respondent asserts in its grounds of resistance that the claimant was dismissed for a fair reason, namely capability and/or some other substantial reason.

      3.1.2 If I am satisfied that it was for a potentially fair reason then I need to decide if the dismissal is fair or unfair in accordance with s.98(4) and in particular did the respondent in all respects act within the so-called band of reasonable responses.

   3.2 In relation to breach of contract

      3.2.1 both sides agree that the claimant was potentially entitled to 12 weeks' notice and so the issue is did he receive that appropriate notice.

      3.2.2 In particular what notice was communicated to him and when

   3.3 I also had to decide what was the effective date of termination.

   3.4 If a claim was submitted outside of the time limit as extended by early conciliation then was that because it had not been reasonably practicable to do so and if so, was it submitted in such further time was reasonable.

Hearing

4. There was a 400-page PDF and one additional page was added. The claimant gave evidence on his own behalf, as did, for the respondent, Mr Jason Francois and Miss Nicola Porter.

5. The hearing was fully remote via video, namely Cloud Video Platform. There was no significant connection problems. There were some minor ones but nothing that disrupted the hearing. The evidence concluded on day 1 because I had another hearing on the morning of day 2 and I heard oral

submissions at 2:00pm on day 2 both representative having kindly submitted very helpful written submissions by 12:00pm that day.

Findings of Fact

6. The claimant worked as a crew leader aircraft movements based at London Heathrow Airport having joined British Airways in 1998. His job entailed working on a 2-person crew making preparations outside the aircraft so that it can start taxiing for take-off. On the 2-person crew one person is the driver. That is physically less demanding than the other role, because the other person does activities outside such as moving trucks and that requires some exertion and flexibility. The people on the 2-person crew rotate those two roles.

7. Between 2005 and 1 April 2013 the claimant had some periods of absence including three periods that were in double figures. From 1 April 2013 he had the following periods of absence.

   6 days from 15-21 October 2013
   6 days from 7-12 December 2013
   129 days from 20 April – 23 October 2014
   20 days from 9 May – 1 June 2015
   9 days from 9-18 September 2016

8. Then there is an absence which is significant to this claim, which commenced on the 25 November 2016.

9. The respondent has a policy for managing sickness absence which is called EG300. Two versions of that document are in the bundle, one is dated March 2018 and I have ignored that one. The other is dated 1 March 2017, which is the one that was in effect at the time of the claimant's dismissal. I have also worked on the assumption that the March 2017 version is reasonably representative of the policy for earlier periods. That is an assumption which I think is justified based on the letters from earlier periods which appear in the bundle.

10. The policy has five Sections.

    10.1 Section 1 is not particularly relevant to this claim; it deals with reporting absence and related procedures.

    10.2 Section 5 is relevant only to a minor extent, it deals with misconduct.

    10.3 Section 2 deals with timescales and the appeal procedure

    10.4 Section 3 is the absence management process

    10.5 Section 4 is the process for managing absence which is greater than 21 consecutive days or which affects the employee's ability to work for medical reasons.

11. In relation to the time limits, in Section 2 states, the appeal time limits referred to may be extended by British Airways if new medical information is required or other acceptable circumstances prevent the time limit being met. Alternatively, the time limit may be extended by agreement between British Airways and the employee.

12. The procedure states that employees have the right to appeal against decisions made.

    12.1 In Section 3 either at Stage 3 or at the Final Stage

    12.2 In Section 4 against the decision to terminate employment

    Any such appeal has to be submitted within 7 calendar days after the written notification of the decision and has to state the reason for the appeal.

13. Section 3 defines trigger points. When a person reaches a trigger point then an interview will take place and the section describes Stage 1, Stage 2, Stage 3 and then the Final Stage. The trigger points are either

    13.1 there are two absences in any 3-month period,

    13.2 there is a 4.5% absence within a 12 month period or

    13.3 there is 21 consecutive days absence. In the latter case an absence that is 21 consecutive days is dealt with under Section 3 if it is not believed to be likely to be long term.

14. Each of the Stages 1 to 3 involve setting a target for the next 6 months and the employee either achieves the target or they do not. If they fail to achieve the target then they go to the next Stage. If they do meet the target within the 6 months then there is a further 6-month monitoring period after that and if the trigger points are hit within the further monitoring period then they go back into the Section 3 process at the Stage at which they left it.

15. In the Final Stage of Section 3 (which comes after Stage 3), it states that the meeting at the Final Stage has the purpose of reviewing the employee's previous absences, considering all of the facts and merits of the case and, after reviewing all the available information, a decision might be made by the manager

    15.1 that no further action is required or

    15.2 to contact BAHS (British Airways Health Service) for advice (or to arrange for the employee to be referred for advice) on fitness for the job and to consider appropriate action on BAHS feedback, or

    15.3 to terminate the employee's contract of employment (and issuing a letter which states the reasons for dismissal and the rights of appeal), or

    15.4 to issue a final warning which specifies the improvements that are required in attendance.

16. If an employee reaches the Final Stage of the Section 3 process but it is not terminated, and then they subsequently reach a trigger point within 12-months of their improvement plan having commenced then they will move straight back to Stage 3.

17. Section 4 as mentioned applies to managing attendance which exceeds 21 consecutive days or absence which affects the employee's ability to work for medical reasons. Under Section 4, a referral to BAHS is required and that is to give advice on to whether the employee appears able to do their normal job to the required standard in the foreseeable future; if the answer from BAHS is "yes" then the absence is managed under Section 3 instead (or potentially Section 5, if appropriate). Whereas if the answer from BAHS is "no" (ie it is not thought that the employee is able to do their normal job to the required standard in the foreseeable future), then BAHS should also comment on whether the employee might be able to do a suitable alternative role to the required standard.

18. If an employee is unable to return to their own job (or potentially unable), then Section 4 sets out the various issues that the relevant manager should consider, including reasonable adjustments and possibly a rehabilitation plan in their own job, or, potentially, as part of a move to another job.

19. In the case of a move to another job that only happens with the employee's agreement and the agreement would entail the employee agreeing to all the terms and conditions of the new job. There is a department called Career Transition Services which is referred to in Section 4 and Career Transition Service potentially assist with the move to a new job. In 4.6 of Section 4 sets out under the heading "Suitable Alternative Employment";

> "If reasonable adjustments cannot be made to the employee's working environment and the employee is capable of undertaking suitable alternative employment the line manager will discuss with and assist the employee to identify and apply for suitable alternative employment. In doing so the line manager should refer to the employee to the Career Transition Service and support the employee during the career transition process."

20. Paragraph 4.7 deals with dismissal under Section 4: "termination on the grounds of medical incapacity". It states that employment will be terminated in accordance with Section 4 if (i) reasonable adjustments cannot be made to the working environment of the employee's current job and (ii) within a reasonable period of time, the employee is incapable of undertaking a suitable alternative job or no suitable alternative work is available. (This is also a third condition which is not relevant to this claim.)

21. Under Section 4, there is a requirement that when line managers are considering terminating an employee's employment on the grounds of medical capability, they must write to the employee summarising the employee's situation and explain the reasons why the line manager is considering termination of employment and invite the employee to a meeting to discuss. It is also a requirement to seek advice from Policy and Casework Team.

22. The claimant was aware of EG300s since at least in 2012 because he was notified at that time that the respondent was considering moving him onto Stage 2 of Section 3. Following an interview, in fact, they decided to move him to Stage 2 because the absence which had caused the trigger point had been due to heart surgery.

23. In December 2013, the claimant was invited to a Stage 1 meeting and that was in a letter that included phrases such as "*this is slightly more formal than a return to work discussion*". This is the Respondent's standard wording for this type of letter. The letter told the claimant of his right to be accompanied and referred to him to specific paragraphs of EG300. In due course, the claimant was given a target to improve or else he would progress to Stage 2.

24. During the period in which he was due to improve the claimant commenced a long-term absence in April 2014. He had fallen ill in Thailand and was unable to travel. As of 12 June 2014, the claimant was being dealt with under the long-term absence procedure. In other words, Section 4 of the EG300.

25. In June 2014, BAHS advised the respondent that the claimant was likely to be able to return to work from the 3 July 2014. However, that did not happen. On the 30 July, BAHS advised the respondent that the claimant was likely to be able to return to work in one or two weeks. However, that did not happen either. On the 4 August 2014, a letter was sent to the claimant inviting him to a Section 4 meeting and stated that termination of employment would be considered as a last resort. The claimant attended the meeting and received an outcome letter. The outcome letter referred to the OH advice to the BAHS advice and confirmed he remained in Section 4 whilst options were being considered and that those options would include dismissal.

26. The claimant remained absent and he was referred again to BAHS. They were unable to make contact with him in September and the absence manager was unable to contact him by early October. She sent him a copy of EG300 and a warning that he potentially could be considered as absent without leave. By 22 October, contact had resumed and BAHS reported the claimant had declared himself as being fit for work and he had a return to work interview on 28 October (with Mark Balmer). As a result, a standard letter inviting him to a Stage 2 review meeting was sent that was because his absence had commenced during his previous review period. At the meeting in October 2014 the claimant was set a new target and he had to meet that target or else he would move to Stage 3. The claimant did meet that target over the next 6 months and a letter of approximately 6 May 2015 confirmed that he had met that Stage 3 target.

27. His next absence then commenced on 9 May 2015 and it was until 1 June 2015. This led to a Stage 3 interview and a BAHS referral. At the interview the claimant was accompanied - as he was through several later meetings - by Kevin Johnston. The claimant was told that disciplinary action might follow as the respondent believed that a pattern was emerging of the claimant taking sickness absence immediately after annual leave. The EG300 policy was discussed in some detail at the meeting.

28. An outcome letter of 24 August 2015 gave the claimant a Stage 3 target to meet and warned that the result of failing to meet this target was potentially a move to Final Stage. In other words, potentially a meeting to consider dismissal. The improvement plan that the Claimant was given was to cover the period from his return. Since he returned in June, the period covered was from 5 June to 4 December; then there was to be a further 6 months monitoring period after that. So, in other words, up to the 4 June 2016. The claimant met this target. He went through the target period and then the later monitoring period without further sickness absence. His next sickness absence was 3 months after the end of the monitoring period, when he had 9-days absence in September 2016. That triggered the need for an interview under Stage 1 of the process. I have no information on the outcome of that other than the claimant was invited to an interview. I do not know what happened at the interview or if indeed it did take place. In any event the claimant commenced long-term absence on November 2016 due to a knee injury suffered in Thailand. The claimant notified the respondent about his absence. He did not breach the requirements to supply adequate information to the respondent about the reasons for his absence.

29. Jason Francois is an employee of the respondent. Between 10 October 2016 and 28 January 2019, he was employed as an absence manager. In that role, and in accordance with the way the respondent manages absences, Mr Francois was duly appointed to make decisions on behalf of British Airways in relation to all aspects of the EG300 policy in connection with the claimant up to and including dismissal. If Mr Francois decided to dismiss an employee then the employee would have the right to appeal to somebody more senior than Mr Francois. Mr Francois had, at the time, responsibility for managing absences on behalf of the respondent within a cohort of approximately 900 staff and at this time he had several tens of staff who were within some part or other of the EG300 procedure and whose absence or attendance record he was therefore managing.

30. In January 2017, Mr Francois telephoned the claimant and left a voicemail. For whatever reason the claimant did not receive the voicemail. A letter was sent by post on 11 January 2017. However, it went to an address in the UK which the claimant had previously lived at, but had already sold. The claimant was now permanently residing in Thailand and that was his sole home address. Other than when on sickness absence or on annual leave the claimant was commuting to do his shifts at Heathrow and returning to Thailand. The claimant did not work for the respondent at any other location other than Heathrow and his job was not one that could be done remotely.

31. The claimant's recollection is that the 11 January 2017 letter was not forwarded to him. It was a long time ago, he may well be right about that but nothing particularly turns on it. In any event, the information in the letter was information that the claimant was being dealt with under Section 4 and my finding is that the claimant would have realised - having previously had various meetings with the respondent under EG300 and previously having been dealt with under Section 4 – that his absence was likely to be dealt with under Section 4.

32. The 11 January letter also mentioned that Mr Francois was the person managing the absence and that all medical certificates should be sent to him. The claimant says he did become aware of that information even if he did not receive the 11 January letter promptly. He certainly became aware of it by no later than April 2017. By April 2017, Mr Francois and the claimant were able to communicate with each other directly. It seems that the claimant's union rep Mr Johnston had become involved and had managed to put them in touch with each other.

33. The claimant and Mr Francois spoke by phone on 25 April and Mr Francois was told by the claimant that the claimant was signed off until at least 15 June 2017. In other words, that was going to be to a period that was more than 7 months after the start of the absence. During the meeting Mr Francois was told by the claimant that the claimant would potentially require a second operation. The first operation had been in December 2016. Mr Francois was told that there could potentially be a second operation required and that the claimant could not bend his leg 65 degrees. The claimant reported that he was due to see the surgeon on 9 May.

34. Following the meeting the claimant emailed Mr Francois: the claimant and Mr Francois had each other's email addresses by no later than 26 April. The claimant's email attached medical reports and details of his injuries including photographs of his injuries. Mr Francois sent the claimant a letter dated 27 April inviting the claimant to a Section 4 meeting due to take place on 8 May 2017. The wording for this letter was standard for such a letter, it included the warning of possible dismissal and that the meeting was to discuss options such as "returning to your contractual role", "sustaining your attendance", "any reasonable adjustments to your contractual role that may assist you" and "suitable alternative employment if you are not capable of carrying out your contractual role". This letter was emailed to the claimant on the 27 April and he did receive it.

35. The claimant did not telephone or email Mr Francois about the letter. The claimant asked his union representative to tell Mr Francois that he could not come to Heathrow. I do accept that the claimant did rely on his union rep to convey that information to Mr Francois, although of course the fact that the representative failed to speak to Mr Francois to tell Mr Francois that the claimant did not intend to attend on the 8 May is something for which the claimant has to accept responsibility. The onus was on him to communicate properly with his employer; he had, by this stage, been absent for 6 months. The union representative was acting as the Claimant's agent and the Claimant cannot hold the Respondent responsible for his agent's failings. The respondent, through Mr Francois, had been ready and willing to have the discussion on 8 May and it was the claimant who had not. The Claimant had not suggested (and nor had his union rep) that the meeting could take place by alternative means, such as telephone. The claimant, therefore, did have an opportunity as early as the 8 May 2017, of having a further discussion with Mr Francois. He did have an opportunity to discuss all the things set out in the invitation letter, including returning to his contractual role, reasonable adjustments to that role, and suitable alternative employment. If he wanted

to discuss any of those things with the respondent, then Mr Francois was the appropriate person to speak to. However, the Claimant simply spurned that opportunity without making any effort to co-operate with the Respondent.

36. The claimant supplied medical evidence dated 9 May that stated that travel was not recommended and he would continue to need therapy for two or three months thereafter. It was noted in the medical evidence that he had an inability to flex his knee. For what it is worth, on the 29 November 2016 the medical evidence had stated that the claimant would need to stay in Thailand for around two months. So, in other words, several months later, by May 2017, there had not been much progress in comparison to the original time estimates.

37. A meeting was arranged for the 16 May. It went ahead. The invitation letter contained the same standard wording as for the 8 May meeting. Mr Francois made notes of the meeting. They are at page 224 of the bundle. He was told that the claimant was immobile at the time but was keen to come back to work. The claimant said he hoped to be able to travel in a couple of months. The representative stated that he planned to go to see the claimant in Thailand July, which implied it was not expected that the claimant would have left Thailand by July.

38. Mr Francois sent a letter the following day, 17 May, and the claimant received it. Amongst other things the letter summarised that the claimant said he was not able to travel at present and that his union rep planned to visit him in Thailand in July. Mr Francois mentioned that he was not proposing to visit the claimant in Thailand and the letter noted that the claimant had reported he was using a Zimmer frame. The letter also stated (correctly) that Mr Francois had advised the claimant that he was going to continue managing the absence within Section 4 of EG300 and that he had explained the possible outcomes and that those outcomes included returning to his contractual role, reasonable adjustments that could potentially be accommodated, suitable alternative employment and (as a last resort) termination of the contract of employment under Section 4 would be considered. All of those options had been discussed in the meeting and the letter noted the claimant's response to those options; the claimant had said his goal was to return to the same role. The letter mentioned that the claimant could contact Mr Francois whenever he wanted to and supplied a mobile number for that.

39. A referral was made to BAHS. That was made on 17 May and their reply was made on the 18 May. The advice was that the claimant was not fit. It recorded the history about the accident taking place in November and surgery being in December and that a further review was to take place on the 29 May to consider whether additional surgery was going to be required. After 29 May, on 2 June, a further referral was made and Mr Francois asked if the claimant was disabled as per the Equality Act and he also asked if the claimant was fit for duty and if the claimant was fit to travel to the UK to meet Mr Francois.

40. The reply was dated the 6 June and it stated that the claimant was not fit to work and not fit to travel to the UK. It stated he was making slow progress and was due to have a further review with the surgeon, this time on the 21

June. BAHS does not specifically refer to it and so it is unclear whether they had seen the medical certificate dated 5 June which is in the bundle. That medical certificate (and obviously the claimant knew the contents of it by 5 June) stated that the claimant would not be able to fly for at least 3 months. So, that of course meant that he was not going to be fit to meet Mr Francois in the UK within the next 3 months, let alone actually return to work. The medical certificate stated that the claimant needed a period of rehabilitation before he could return to work in the future, but it put no timescale on it. There was no decision made – according to 5 June medical certificate - as to whether the claimant would have further surgery or else whether physiotherapy would be sufficient.

41. Regardless of whether BAHS had seen the 5 June certificate or not, on 6 June the advice BAHS gave to Mr Francois was consistent with that certificate. In particular, the advice BAHS gave was that they could not comment on whether the claimant would be able to return to work either in the short-term or long-term. The advice noted that the claimant hoped to return to work. It gave the opinion that the claimant was not presently covered the Equality Act. There is no further information about why that statement was made. However, a reasonable inference for me to make, and which I do make, is that the senior practitioner was of the view that she could not state, based on the information available to her at the start of June 2017, that the effects were likely to last until November 2017 or later. BAHS had agreed to have a further discussion with the claimant after 21 June.

42. On 17 June, the claimant emailed Mr Francois and attempted to send him the medical certificate from the 5 June. He gave a summary of what the advice to him on 5 June had been and he mentioned that he had an upcoming appointment to consider surgery. In fact, that 21 June appointment went ahead and the outcome was that again no firm decision was made about surgery. Physiotherapy was to continue and that there would be a further review on 12 July.

43. On 19 June, Mr Francois contacted the claimant saying he wanted to arrange a meeting for after the claimant's surgical appointment and by an agreed date. The meeting did take place on the 27 June. The claimant attended that meeting by phone and the claimant's representative was in the same room as Mr Francois.

44. The letter which confirmed that appointment was dated 23 June. Again it was standard wording in relation to a Section 4 meeting, including mentioning the possibility of dismissal. During the 27 June meeting, the claimant and his representative told Mr Francois that there was an upcoming meeting to discuss surgery on 12 July. As mentioned, in the 18 May advice BAHS had referred to an appointment on 29 May (which was already later than the original 9 May date) and the 6 June advice was that there was to be a meeting on 21 June. So, in other words, 6 weeks on from the 17 May meeting the situation was much the same, namely that the claimant was expecting to have an update 2 or 3 weeks into the future.

45. During the meeting on 27 June, Mr Francois told the claimant that the claimant was being dismissed and that the termination date was 30 September 2017.

46. The claimant understood, during the meeting, that this was the decision that Mr Francois had made and so did the union representative. In other words, they both knew that the Respondent was informing the Claimant unambiguously that employment was to terminate on 30 September 2017. The representative asked about the time to appeal and was told that the time limit would be 7 days from the letter that confirmed the dismissal decision.

47. The claimant stated that he understood and he was trying to get fit. The union rep suggested/advised the claimant that if a further operation was going to be necessary then the claimant should make efforts to have that operation as soon as possible. Although it is not recorded in the handwritten notes of the meeting, it was stated by Mr Francois during the meeting that he would potentially be willing to consider the position, including whether to revoke the notice of dismissal or extend the termination date if the claimant was, in fact, fit to return to work by 30 September. Mr Francois did not say that if the claimant was fit by 30 September then the dismissal would not happen. The claimant and his representative knew that Mr Francois had not said that.

48. In any event, the follow-up letter dated 29 June 2017 was clear and equivocal. The letter represents Mr Francois' genuine opinions about his reasons for taking the decision (on behalf of the Respondent) to dismiss the claimant. In the letter, Mr Francois confirms that he and the claimant discussed the fact that BAHS had stated that they could not advise whether the claimant was fit to return to work (either in the short-term or the long-term) and that the claimant, while hoping for a full recover, had no significant new information compared to what had been said by BAHS on 6 June. The only new information was that the 21 June consultation had not resulted in a decision about surgery and that decision had been deferred until the 12 July.

49. The letter noted that the claimant had had a total of 316 days absence since 2013 and said that this was not something that the respondent could sustain. Mr Francois had in mind the fact that the claimant's shifts were being covered by other people, including potentially by overtime payments. Although Mr Francois did not expressly refer to that in the letter it was a fact that was well-known to the claimant and to his representative (being people who had worked for the respondent for a long period of time). The Claimant had had several periods of previous absence and he therefore knew what the arrangements for covering sickness absences were.

50. The letter said that since the claimant had not, and the medical advice had not, been able to supply any particular date for return to work, it was appropriate to dismiss and the letter said that the last day of employment was to be Saturday 30 September 2017. The letter was unequivocal about that. The letter also said, "you have the right to appeal my decision to terminate your employment, should you decide to do this you must write to Nicola Porter within 7 days of the date of this letter stating your reasons to appeal". Again,

the reference to "my decision to terminate your employment" was clear and unequivocal.

51. In fact, in order to progress the termination arrangements what Mr Francois ought to have done was to complete some documents for payroll etc so that the claimant's final salary for September 2017 would have then included the necessary adjustments in relation to annual leave and so on, and also so that a P45 would be generated. Mr Francois did not do this. I asked him why and my findings are that more than 3 years later it is not easy for Mr Francois to remember the precise reasons why this did not happen. His stated reason (the fact that the termination date was due to be a Saturday), even if it is offered as a reason that Mr Francois might have thought that somebody else would action the instructions to payroll rather than him. However, and in any event, my finding is that the respondent's failure to progress the information to payroll etc (on or) prior to 30 September was not the result of a conscious decision made by Mr Francois - and not the result of a conscious decision made by anybody else on behalf of the respondent - that the dismissal was not still due to take effect as notified in June. My finding is that there was a clerical error. It is a clerical error that has contributed significantly to the confusion about the precise legal effects of the events of October and November.

52. In the 29 June letter, Mr Francois said that he had referred the claimant to the Career Transition Service. Had that been done, then the claimant and the respondent could have had discussions during the claimant's notice period about possible roles (if any) that the respondent might have had for the claimant. No evidence was supplied to me by either side about whether any such roles might have actually been available in 2017. In fact, Mr Francois did not refer the claimant to the Career Transition Service. There was no discussion therefore with the claimant about the availability of specific alternative roles either before the dismissal decision on 27 June or in the notice period up to and including the 30 September.

53. In general terms, (as per the standard wording of all the invitation letters and as per the wording of the policy) in each of the meetings with the claimant it was on the table that such alternative roles could potentially be discussed. The claimant made clear that his goal was to return to his current role rather than be moved to a different role. The claimant was, at the time, unfit for any work at all. In particular he was unfit for any work at all at Heathrow because he could not travel to Heathrow. The claimant knew that and so did Mr Francois; in each case, their opinion was based on the medical evidence. The claimant did not suggest to Mr Francois that he, the claimant, could potentially travel to Heathrow for an alternative role and there seems to have been no specific discussion between the two of them as to whether there was any possibility of working somewhere other than Heathrow, in Thailand for example, in an alternative role. Given that this was 2017 my finding is that both Mr Francois and the claimant were working on the basis that there would be no possible alternative work for the claimant unless the claimant was able to travel to the UK to do that work and to do it at Heathrow. There is no specific evidence before me - and therefore I do not know - whether the

Career Transition Service might have had a broader view about what the possibilities were for alternative work.

54. Neither the claimant nor his union representative sought to make contact directly with the Career Transition Service and neither the claimant nor his union representative sought to chase up Mr Francois to find out why there had been no contact from Career Transition Service. This was because the claimant's intention was to try to get to the UK by the 30 September and to try to persuade Mr Francois to agree to either extend or revoke the notice which had been issued. In other words, he wanted to stay in his current role rather than explore the possibility of moving to a different role.

55. There was no appeal against the dismissal, as per the instructions for an appeal in the 29 June letter. To the extent that the claimant suggests during this litigation that he thought that all he had to do was to report for work prior to 30 September and his employment contract would automatically continue, that suggestion is wrong. That is not what the respondent had said to him either orally or in writing and my finding is that at the time the claimant knew that that was not what the Respondent had said.

56. To the extent (if at all) that the claimant is suggesting that the respondent misled him (deliberately or accidently) that there was no need to appeal within 7 days provided he could resume work by 30 September 2017, my finding is that that is not correct. The respondent did not mislead the claimant about the timescale for appeal. As mentioned above, the specific question was asked during the 27 June meeting and the claimant was given a clear and unequivocal answer that the time limit was 7 days from the dismissal confirmation letter. The letter itself clearly gave the same information.

57. The claimant suggests that it was advice from his union representative which caused him not to appeal. That might be correct (although I have got no evidence about what the exact advice was). In any event, my finding is that the claimant decided that he had a better chance of keeping his job if he deliberately refrained from making an appeal (to someone higher than Mr Francois) promptly and instead tried to get fit by 30 September and then tried to liaise directly with Mr Francois. The claimant knew that a fresh decision by Mr Francois (or some other person on behalf of the Respondent) would be required if the claimant's employment was not to end on 30 September.

58. The dismissal letter also stated,

> "6 weeks into your notice period I will contact you to arrange for a meeting or telephone call to check progress and to discuss any change to your medical condition. If there has been a change to your medical condition I may ask you to revisit BAHS to see if your health has improved."

59. That contact did not happen. Neither Mr Francois nor the claimant have any recollection of it having happened. 6 weeks would have been around mid-August 2017. It is unclear what specifically prompted Mr Francois to contact the BAHS on the 12 September 2017 although he did do so. My finding is that it was not the result of a conversation between the claimant and Mr

Francois, given that neither Mr Francois nor the claimant remember any such conversation taking place. Similarly, the claimant has not suggested that he authorised his agent Mr Johnston to have a conversation with Mr Francois at around about this time. For whatever reason Mr Francois did contact BAHS possibly he was taking the initiative of his own accord having reviewed the file. Possibly some reminder that he had set for himself popped up or possibly Mr Johnston acting off his initiative contacted Mr Francois to suggest a further referral. In any event, the referral did take place and the question proposed by Mr Francois was

> "Richard has a termination date of 30.09.17 please assess and advice on ability to RTW to contractual duties in ACM driving, pushing, pulling, lifting, climbing air side. And any support as appropriate."

60. There had been no agreement between the claimant and the respondent that the contract of employment was not going to end on the 30 September, and that was not the reason for the referral. The reply to the referral from BAHS and was dated 3 October. That reply refers to a prior email having been sent to Mr Francois and that prior email, unfortunately, is not in the bundle.

61. The claimant on 28 September, had contacted the respondent to say he was fit for work. According to the claimant this resulted in his being rostered to do specific shift patterns. However, as the claimant knew, both from his general knowledge and from the fact that it had happened to him previously, when an employee in the claimant's role has been absent for a long period of time they do not immediately start their normal duties straightaway on return from sickness absence. Before they can resume those duties, they have to be reaccredited for the role. This is not surprising given the nature of the role and in any event the claimant was aware that it was a requirement. It is not something that the claimant alleges was unfair or unreasonable.

62. According to the claimant's evidence, (and the respondent did not produce any documents or witness evidence to suggest the contrary) once the claimant declared himself fit for work, he was given a shift pattern which placed him on rest days for 28, 29 and 30 September 2017. That account is not 100% supported by the BAHS report of what they understood him to have been telling them. On 3 October, the claimant attended the BAHS premises in person. The notes of that meeting say that the claimant had said that he was intending to "ring fit to start work tomorrow, 4th October". Perhaps there was some mutual misunderstanding between BAHS and the Claimant. In any event, notwithstanding this slight inconsistency, I have no reason to doubt the Claimant's testimony under oath that – technically – he had reported for duty with effect from 28 September 2017. In any event, the claimant did not do any shifts either in September 2017 or from any period from the dismissal decision in June up to and including 30 September. He also did not do any shifts on 1, 2 or 3 October 2017.

63. The claimant knew when he reported as fit for duty on 28 September he would not be returning to his duties either on the 28 September or immediately afterwards. He knew that he would be doing computer training or similar straightaway.

64. The BAHS advice to Mr Francois on 3 October matches what the claimant was told in the meeting. The BAHS advice states,

> "As per recent email to you I saw Richard in clinic this morning as he has now returned to the UK to recommence work and plans to ring fit to start work tomorrow, 4 October. From my assessment, what he tells me, and having gone through all the medical paperwork he provided today, I have assess[ed] him fit to recommence work. Kindly note [he] is likely to find it challenging to start with, as you know one of his lower limbs was badly injured but now feels ready and able to re-engage. He explained that he might need a period of retraining as he has been away for almost a year. He also asked if it was possible to have no starts before 8:00am for 2 blks as he has been out of shift work for some time. I advised him to discuss the latter two matters with you. After that, business permitting, I recommend the standard two blks of 6 hours that you offer. Otherwise he is able for all aspects of his role including driving and is fully aware of how to continue managing his health moving forward."

65. Following that face-to-face meeting with BAHS, the claimant telephoned Mr Francois. The reason that the claimant did that was because the claimant knew that Mr Francois was a person (or at least he believed Mr Francois was a person), who potentially had authority to make a fresh decision on behalf of the respondent in relation to the dismissal. It was not unreasonable for the claimant to hold that belief given that that was what had been stated orally on 27 June and in writing on 29 June i.e. that Mr Francois would potentially consider either extending the notice period or revoking it. I am not satisfied that the claimant believed on the 3 October that his employment was still continuing and that it had automatically continued from the 3 October onwards because he had now done the two things, namely declaring himself as fit on 28 September and having attended BAHS on 3 October and being told by them that they regarded him as fit for work.

66. The reason that the claimant telephoned Mr Francois was specifically because he wanted Mr Francois to agree to do something, namely (speaking loosely) "cancel" the dismissal. In the claimant's mind it was not too late for the dismissal to be cancelled. He did not have in mind the hypothetical differences between revoking a notice of dismissal by mutual agreement prior to the termination date or else re-instatement of a former contract of employment after it had already come to an end or else of re-engagement on a new contract (but preserving continuity). The fact that the claimant did not have these technicalities in mind is not the important point. The important point is that the claimant knew that he had to persuade Mr Francois to agree to do something to affect the decision that Mr Francois had made on behalf of the respondent in June 2017. In other words, the claimant wanted Mr Francois to agree that the claimant's employment would not end on 30 September but would continue from 1 October onwards.

67. The claimant's evidence, which I accept, was that when he telephoned Mr Francois to inform Mr Francois that he was now fit for duty Mr Francois told him that this did not make any difference to the fact that he had already been dismissed with effect from 30 September. The claimant's account of that conversation is consistent with what Mr Francois remembers, albeit he thought it happened on 5 October in a face-to-face meeting. The claimant told me that he was surprised that Mr Francois said the dismissal had already

taken effect from 30 September. I do not accept that the claimant was surprised on 3 October. I accept that he was attempting to give honest evidence during these proceedings, but this was now more than 3 years later. At the time (October 2017), the dismissal letter and the June 2017 conversation were fresher in his memory than they are now. At the time, the claimant knew that he had been told unequivocally (orally and in writing) that his employment was ending on the 30 September unless he could persuade the respondent to change its mind and either by persuading Mr Francois to extend/revoke the notice or else by succeeding in an appeal within 7 days (which he did not attempt for – it seems – tactical reasons based on union advice).

68. The claimant had not been in touch with Mr Francois after the 29 June letter and before 3 October. Therefore, I do not accept that it was a surprise to the claimant when Mr Francois said that the dismissal had already taken effect. It may well be that the claimant had hoped that Mr Francois would be more amenable to simply saying that he would readily agree to change the previous decision, but my finding is that the claimant was aware that it was, to say the very least, a possibility that Mr Francois was not going to agree to do any such thing. As of this conversation, on 3 October (on the Claimant's account), the claimant had not done any shifts, not even any training shift. The only thing that he had done was to attend BAHS (and of course, as mentioned, phone in and report fit for work).

69. On the 5 October, a meeting took place between the claimant and Mr Francois. The claimant was accompanied again by Mr Johnston. During the meeting, Mr Francois re-iterated that it was his stance that dismissal had taken effect and that the claimant's employment had ended on 30 September. During the meeting, the claimant and his representative asserted that the claimant's employment should continue and that the possibility of dismissal should be taken off the table. Mr Francois made it clear that he did not agree to that suggestion and he said so in express terms. During the meeting Mr Francois left because he wished to take advice and confer with colleagues. Mr Francois reported to colleagues that he had been told by the claimant that the claimant needed to urgently go to South Africa for family reasons and that the claimant wanted to use annual leave to do so.

70. As mentioned above there had been an error. The error had been that Mr Francois had not informed payroll of the 30 September dismissal date and therefore the claimant had not received a payment in lieu of annual leave as he should have done. The colleague asked Mr Francois if it was imperative that Mr Francois told the claimant on the day that his employment was terminated or if it was potentially possible to defer the discussion to a later date until after the claimant had been able to complete his visit to South Africa, for urgent family reasons. Mr Francois stated that in those circumstances he did not think it was imperative to give the information to the claimant on the day and as a result the colleague advised Mr Francois that it would be in order to go back to the claimant and say that British Airways agreed that the claimant could take annual leave and that a formal meeting to discuss the situation would take place on his return.

71. Mr Francois arranged that formal meeting with the claimant and it was due to take place on the 20 November. The reason that Mr Francois set that date was because he believed that was the date on which the claimant was to return from the annual leave which the claimant had described to him as being for urgent family reasons. Mr Francois was not told that the claimant was first going to do some further shifts for the respondent, doing computer training and then going to Thailand before going to South Africa. In fact, there is no evidence that was presented during the hearing that that is what actually happened. On instructions from the claimant, in closing submissions, the claimant's representative stated that the sequence of events after the 5 October was that first the claimant did some training shifts in the UK and then he went to Thailand, after 9 October, and then returned to the UK on the 28 October, having a return to work interview and allegedly doing a shift on the 28 October, then booking some annual leave and going to South Africa in November and then returning for the meeting on the 20 November.

72. It is not necessary for me to make a finding of fact as to whether the events that were described (on instructions) during closing submissions did in fact take place. It is sufficient for me to state that that sequence (a) is not what Mr Francois was told on the 5 October and (b) is also not what I was told when the claimant gave his evidence and (c) if it happened, then it implies that the Claimant gave misleading information to Mr Francois. Mr Francois was given the impression by the claimant (as was I during the Claimant's oral evidence) that the claimant's trip to South Africa was very urgent because of a family emergency and was going to take place either immediately after 5 October.

73. On 21 October, the claimant emailed Mr Francois to ask Mr Francois to change the meeting date from the pre-planned 20 November until the 24 November instead. On the 24 October, Mr Francois declined to do that and pointed out that the date had already been agreed, it was already an extended date and was taking account of the claimant's leave requirements. Mr Francois' email of the 24 October confirmed that he believed at the time that the claimant had already gone to South Africa for those urgent family reasons that had been described to him (whereas according to the instructions he gave to his representative for closing submissions, he had not even gone to South Africa yet).

74. The claimant replied acknowledging that Mr Francois had already extended. In due course, on 16 November, the plan was made that the start time for the meeting would be 10 minutes after the start of the claimant's first shift. He had his first shift scheduled for 15:35 on 20 November and Mr Francois agreed that the meeting would start at 15:45.

75. In the meantime, the claimant did have a return to work meeting on 28 October 2017 with a line manager, Mr Balmer. The documents do not record if that was a face-to-face meeting or if it was by phone. They refer to the absence having ended in September 2017.

75.1 As a result of that meeting an automatically generated letter was sent out in Mr Francois' name. That letter referred to the claimant being placed back in Stage 1 of Section 3 having returned from long-term sick.

75.2 The letter, however, did not accurately represent the true situation. The true situation was what had been discussed on 5 October directly with Mr Francois, that a formal meeting was required to discuss what Mr Francois' view that the claimant had been dismissed with effect from the 30 September and the claimant's view that the circumstances were such that the dismissal should be taken off the table.

75.3 The letter sent out in Mr Francois' name used standard wording, as can be seen in the other Stage 1 invitation letters in the bundle. The time chosen by this automatically generated letter was the start time of the claimant's next scheduled shift. So, in other words 15:35. The reason it matched the date (20 November) that Mr Francois had already notified to the claimant was because, not coincidently, Mr Francois had deliberately chosen the date that the claimant was due back at work. The letter was pp'd for Mr Francois rather than signed by him.

76. On the 16 November, Mr Francois sent a specific letter, which he had drafted, and this was in addition to the earlier email correspondence referred to above, including that sent on 24 October. The specific letter stated that the meeting was to consider the claimant returning to his contractual role and also stating that dismissal would be considered. A fair reading of the letter is that the letter implies that dismissal will be considered at a future date if the claimant was not able to return to his role after a reasonable period of time, rather than that an actual dismissal decision could be made on 20 November.

77. The meeting did take place on the 20 November and Mr Francois stated the claimant was dismissed. He followed this up with a letter dated 22 November. That letter stated that the claimant was being dismissed as per Section 4 of the EG300 and the dismissal date being set as 30 November. This new letter referred to the claimant's attendance history from 2013 and re-iterated again that Mr Francois had been told on 5 October that the claimant's absence from work was due to be from 5 October to 20 November. I am satisfied that no suggestion had been made to Mr Francois that the claimant was going to be doing work or computer training on any shifts during that period.

78. The 22 November letter did not offer the claimant a right to appeal. It referred to the right of appeal that had been given by the 29 June letter and stated the claimant had not followed that. On the 28 November, the claimant sought to appeal by emailing Nicola Porter. She replied to say that she would not accept the appeal because it was more than 7 days since the 29 June letter. Ms Porter had the authority on behalf of the respondent to waive the 7 day requirement if she thought it appropriate to do so. If she thought it appropriate to accept the appeal at that stage, 28 November then the appeal would have been referred to a manager who would have considered it on the merits. Ms Porter reviewed the file. However, she did not ask the claimant to explain why he had not appealed earlier. She told me that in cases of significant incapacity, such as when somebody was in hospital, then the appeal deadline

might be extended, but in general the respondent usually stuck closely to the 7 day deadline. Because Ms Porter did not seek further information from the claimant or from Mr Francois, she did not know about the 22 November 2017 letter or the circumstances that led up to that letter, including the events of 3 and 5 October.

79. The Claimant received payments for the months of October and November 2017 which both parties treated at the time as being payments of salary up to 30 November 2017. During that period, there were some periods which both parties treated at the time as being annual leave; if those periods were indeed counted as annual leave, then by 30 November, the Claimant had used his entitlement.

The Law

80. Section 95 of the Employment Rights Act defines dismissal. Section 97 defines the effective date of termination. Section 111 of the Employment Rights Act defines the time limit for bringing a claim of unfair dismissal, including referring to the early conciliation period. Article 7 of the Employment Tribunals Extension of Jurisdiction Order refers to the time limit for bringing a claim of breach of contract. For example:

> ERA s95.— Circumstances in which an employee is dismissed.
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if)—
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice) …
>
> ERA s97.— Effective date of termination.
> (1) Subject to the following provisions of this section, in this Part "the effective date of termination"—
> (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires …
>
> ERA s111.— Complaints to employment tribunal
> (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
> (2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
> (a) before the end of the period of three months beginning with the effective date of termination, or
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
> (2A) … section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a)
> (3) Where a dismissal is with notice, an employment tribunal shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination.
>
> ERA s207B Extension of time limits to facilitate conciliation before institution of proceedings
> …
> (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

> (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
> (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.
>
> Extension of Jurisdiction Article 7.
> Subject to articles 8A and 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented-
> (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim …
>
> (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable.

81. In relation to early conciliation, provided the early conciliation starts (by the Claimant contacting ACAS) within the standard limitation period (3 months from effective termination for the complaints in this claim), the time limit is extended as set out by the early conciliation provisions within the legislation. However, if the ACAS contact is not made until after the time limit has already expired then the ACAS early conciliation period does not extend the standard time limit.

82. In this case the ACAS early conciliation period started on 25 January 2018 ("Day A") and the certificate was issued on the 25 February ("Day B"). The claim was presented on 23 March 2018. It was therefore issued within 1 month after the end of the early conciliation period ("Day B"). Therefore, if the effective date of termination is 30 September 2017, then the ACAS early conciliation did not start until too late (because the ACAS early conciliation would have had to start by the 29 December 2017) and the claim is out of time (subject to consideration of ERA s111(2)(b) and Article 7(c) of the extension of jurisdiction order). If the effective date of termination is 30 November 2017, then the claim is in time (because early conciliation commenced well within 3 months of that date).

83. The effective date of termination ("EDT") is something that has to be determined in accordance with the statutory definition. An employer and employee cannot simply agree between themselves what the EDT is. See for example *Fitzgerald v University of Kent at Canterbury 2004 ICR 737*.

84. The mistaken belief of one or both parties as to the correct effective date of termination is not binding on the Employment Tribunal. See, for example *TB Turbos Ltd v Davies EAT 0231/04* in which the EAT discusses the issues at length. The EAT noted that after 27 May 2003: the employee had received wages and wage slip; been treated as an employee for the purpose of disciplinary proceedings and sick pay; been paid up to 24 July; the employer had written "accepting" a resignation with notice to expire 23 or 24 July. Having discussed the Court of Appeal's analysis in *Fitzgerald*, the EAT went on to say:

17.. [employer] submits that if the parties cannot, by deliberate agreement, change the effective date of termination for the purposes of the Act, it is difficult to see how they can do so accidentally, or in circumstances where the parties are both mistaken as to the true legal position. We agree. Payment of wages and accumulation of other benefits up to the mistaken date cannot change the legally effective date of termination which is determined pursuant to the legislation.

18.. It seems to us that the crucial issue which this Tribunal had to determine, but failed to, was the effect of the notice to terminate served by the Appellants on 28 April 2003. Further, there was no evidence before the Tribunal and no finding to the effect that a new contract of employment between the parties was created after 27 May.

19.. In our judgment, having regard to the undisputed facts, the only conclusion which this Tribunal could properly come to was that no contract of employment existed after 27 May 2003 and that that date was therefore the effective date of termination for the purposes of the 1996 Act and the Applicant's complaint of unfair dismissal.

85. Where one party gives notice to another stating an employment contract is to come to an end then it is possible for the employer to mutually agree before the contract ends to extend that notice period. If that happens then an effective date of termination can instead be the end date of the extended notice period. Alternatively, the parties could mutually agree an earlier termination date. See *Palfrey v Transco plc [2004] IRLR 916*.

86. Where the contract has already ended then it is possible in principle for a contract to be revived such that the contractual relationship is the same as if there had been no dismissal and this is what happens when an employer or upholds an employee's appeal, see the Court of Appeal decision in *Roberts v West Coast Trains 2005 ICR 254*. That describes the situation where an contractual provision specified that the result of a successful appeal was reinstatement, meaning that the outcome revival of the contract retroactively. In *Patel v Folkestone Nursing Home 2019 ICR 273,* the Court of Appeal said that even if there is no express contractual wording to that effect such a term can be implied if an employer offers the right of an appeal to an employee.

87. However, the mere fact alone that there are some circumstances in which a contractual relationship can be revived after termination does not mean that it is to be lightly assumed that that is what has happened on given set of facts.

88. In a summary dismissal case, *Cosmeceuticals Ltd v Parkin UKEAT/0049/17* the EAT was satisfied (on the facts of the case) that the contract had been (summarily) terminated on 1 September. Therefore, 1 September was the correct EDT; the facts that the employer later said it was placing the employee on garden leave and (later still) said it was issuing a notice of dismissal to terminate employment on the 23 October did not (on the facts of that case), change the EDT from 1 September. The events of 1 September had already terminated the contract. Furthermore, the fact that both parties had, up to the commencement of the final hearing, treated the EDT as being 23 October did not prevent the Tribunal finding that the correct date was 1 September. In fact, the EAT overturned the Tribunal's decision and substituted its own

decision that EDT was actually 1 September and remitted so that the Tribunal could consider the issue of reasonable practicability.

89. *Horwood v Lincolnshire County Council EAT 0462/11* concerns an employee resigning. The EDT is determined by deciding on the contractual effect of resignation letter (including taking account of when it was read) and deciding the date on which the resignation letter terminated the contract. A response by the employer which incorrectly stated a (later) termination date did not (on the facts of that case) affect the EDT.

90. Ms Tutin and Mr Mortin each referred me both of them *Mowlem Northern Ltd v Watson* and have supplied the report to me. That case makes clear that when there is a dismissal with notice by the employer, and when the dismissal date is postponed by agreement between employer and employee to a later date (the extension agreement being reached prior to the expiry of the original notice period), then the EDT does not have to be the date specified in the original notice of dismissal, even if – as on the facts of that case – the parties did not mutually agree a new specific end date, and did not mutually agree that the notice of termination was to be treated as revoked. In that particular case, the original decision was to give notice of dismissal by reason of redundancy. When there were subsequent discussions about extension, the employee made clear that he wanted to potentially retain his right to leave employment and to receive the redundancy payment, but was willing to remain in employment, pending potential future agreement as to a new indefinite employment contract. It was on that basis that both sides mutually agreed to postpone the termination date. On the facts of that case, part of the agreement that the parties had reached was that (unless and until a new contract was agreed) the employee could elect a termination date of the contract and the termination reason was still the original decision to make him redundant and the EDT was the date on which the contract ended as a result of the employee's decision that he preferred termination to the alternative of a new contract. The decision in *Mowlem* in not authority, in my opinion, for the proposition that one side can unilaterally extend a dismissal date. In effect it simply makes the uncontroversial point that if there is a mutual agreement for an extension of employment then that extension takes effect on the terms the parties have mutually agreed. It is not inconsistent with the cases mentioned above which deal with disputes, and errors by parties, in relation to the correct EDT; in *Davies*, *Parkin* and *Horwood*, there was no agreement to extend the employment contract past the date originally specified.

91. *Butcher v Surrey County Council* was also mentioned by both sides. That confirms the traditionally understood position that when one party (could be employer, could be employee), gives notice to the other then dismissal takes effect on the expiry of that notice unless there is a mutual agreement between the employer and the employee to completely revoke the notice (meaning that employment continues indefinitely, until some new event brings about termination) or else extend the termination date to some later date (either a specifically agreed new date, or, as in *Mowlem*, a non-specific future date). The person who offers to either revoke or extend the notice does not have to be the same person who issued the notice; the key point is whichever side

makes such an offer the other side has to accept it. As with any offer there has to be a meeting of minds. So, for example, if an employer offers to extend a notice period such that the dismissal would still take effect for the original reason but then the employee does not accept that offer then there is no mutual agreement. Likewise, if the employee offers to continue working on the basis that the dismissal has been completely revoked but the employer does not accept that offer, then there is no mutual agreement for that either.

92. The mere fact alone that an appeal is lodged does not necessarily revive the contract of somebody who has already been dismissed, and the fact that the employee believes that employment is continuing (whether because they incorrectly think that that is the effect of an appeal, or for any other reasons) does not postpone the EDT if the termination of employment was objectively clear at an earlier date. *Avuru v Favernmead Ltd and anor EAT 0312/19*.

93. In relation to reasonable practicability when a claimant argues that it is not reasonably practicable to present the claim in the time limit then it is a question of fact for the Tribunal to decide. In other words, whether it was, in fact, reasonably practicable or not. The onus of proving that it was not reasonably practicable is on the claimant. The phrase not reasonably practicable should be given a liberal interpretation in favour of the claimant. If the tribunal is satisfied that it was not reasonably practicable to present the claim within the time limit then it is necessary to consider whether the period between the expiry of the time limit and when the claim was issued was reasonable in the circumstances. That does not necessarily mean that in that period the claimant has to act as fast as would be reasonably practicable.

94. In *Porter v Bandridge Ltd 1978 ICR 943, CA*, the Court of Appeal held that the correct test is not whether the claimant knew of his rights but whether he ought to have known of them. When a claimant is ignorant about or mistaken about a fact (which is relevant to the calculation of the time limit), the question is whether that ignorance or that mistake is a reasonable one. The assessment reasonableness has to take into account that the potential claimant ought to be aware of the importance of not missing a time limit. Put another way, even if it is true that the claimant did not know the true facts at the time of dismissal then that does not necessarily mean it was not reasonably practicable to issue the claim within time. The claimant must also show that his ignorance as to those facts was reasonable and that he could not reasonably have been expected to have discovered the true situation during the limitation period. Ignorance of the true facts must be the actual reason for failing to issue the claim sooner. If a tribunal decides that an employer has contributed the employee's ignorance, and/or misled him then that could potentially, in some circumstances, be something which meant it was not reasonably practicable to issue the claim in time.

In relation to unfair dismissal, s.98 of the Employment Rights Act deals with unfair dismissal. As per sections 98(1) and (2), the respondent bears the burden of proving on the balance of probabilities what the reason was for the dismissal and - if there is more than one reason - what the principal reason was. A reason for dismissal is a set of facts known to the employer or a belief held by them which caused them to dismiss the employee. See *Abernathy v*

Mott, Hay and Anderson. If the respondent proves that the circumstances existed such that the claimant could have been dismissed for a fair reason then that does not in itself discharge the burden of proving what was the actual reason for the dismissal. The fact that those circumstances existed would not in itself prove that it was those circumstances which caused the decision maker to decide to terminate the claimant's employment.

95. Once the Tribunal has made its findings of facts as the dismissal reason it must then go on to decide, as a question of law, whether the factual reason falls within s.98(1)(b). Here the respondent argues that the reason was for capability or some other substantial reason. If the respondent fails to persuade me that it had a genuine belief that that was the state of affairs and that it genuinely dismissed for that reason, then the dismissal is unfair. Provided the respondent does persuade me that the claimant was dismissed for such a reason then the dismissal is potentially fair and that means it is necessary to consider the general reasonableness under s.98(4):

> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

96. In considering the general reasonableness, I take into account the respondent's size and administrative resources and decide whether the respondent acted reasonably or unreasonably in treating the situation as a sufficient reason for dismissal. In considering the question of reasonableness I must analyse whether the respondent had a reasonable basis to belief as the case maybe that the employee was not capable of doing his job within a reasonable period time or else alternatively that his attendance record was unsatisfactory.

97. In the former case the EAT decision in *Spencer v Paragon Wallpapers Ltd [1976] IRLR 373* gives valuable guidance. It is important to scrutinise all the relevant factors.

> Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?

98. In the latter case there are a range of factors to consider, and some of those are set out in *Lynock v Cereal Packaging Ltd [1988] IRLR 510* which both sides have referred me to. It gives a list of factors but it does not follow that every factor mentioned is something which is relevant in every case; it is just a list of examples of things which might be relevant to reasonableness.

> There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following—the nature of the illness; the likelihood of recurring or some other illness arising; the length of

> the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding …

99. In either case (ie whether the original decision was because the employee was not capable of doing his job within a reasonable period time because his attendance record was unsatisfactory) what may be required, as confirmed by the EAT in *Williamson v Alcan (UK) Ltd [1978] I.C.R. 104 (1977)* is for the employer to consider a change of circumstances between the original date of giving notice of dismissal and the date on which notice was due to expire.

100. This is a point also dealt with by the EAT in *Fox v British Airways plc.*

100.1 In April 2015, in [2015] 4 WLUK 373, the EAT decided that the tribunal had wrongly confined its analysis and decision to the fairness of the decision to give notice of dismissal on capability grounds, rather than the fairness of the dismissal when it took effect, three months later. It had failed to consider whether the changed circumstances during that period required the employer to re-visit its original decision, and whether its failure to do so rendered the dismissal unfair. In September 2015, the case was remitted to the same tribunal.

100.2 In November 2017, in [2017] 11 WLUK 473, on appeal from the new decision (that the dismissal was not unfair), the EAT upheld the new appeal and remitted to a fresh tribunal. This was because the second decision still had not dealt with the change of circumstances and assessed the reasonableness as of the effective date of termination.

101. A Tribunal has to judge the reasonableness of the employer's actions as at the date of the dismissal and should not wrongly confine its focus to the reasonableness of the initial decision to give notice dismiss (although reasonableness as of that date is also relevant). So, if there is a significant gap between the decision being made (for example, in June) and the dismissal taking effect (for example, in September), the Tribunal has to engage with the question of whether there had been a change of circumstances during that period regarding the likelihood of the claimant becoming fit, such it may have been unreasonable for the employer to fail to revisit the original decision.

102. I must analyse, however, whether the dismissal was outside the band of reasonable responses which an employer could adopt. That includes a band of reasonable responses in relation to procedure adopted, not just the actual decision itself. In some circumstances unfairness at the original dismissal stage might be cured at the result of an appeals process. That depends on all the circumstances of the case. Lack of an appeal is something that can potentially be taken into account when considering the overall fairness of the

decision to dismiss (which, of course, requires analysis of why there was no appeal hearing).

103. It is not for me to assess the evidence and decide whether or not I think that the claimant was fit to return to work or whether I think that the claimant's attendance record was such that he should, or should not, have been dismissed. In other words, it is not my role to substitute my decisions for the decisions which the respondent made.

Analysis

104. I decided that the effective date of termination was the 30 September 2017. The reason I came to this decision is based on the findings of fact that I have made. It was unequivocally stated to the claimant that his employment was terminating on the 30 September 2017. He was given that information on 27 June; he was told by phone and his representative was told face-to-face and they both heard it being said. It was also confirmed unequivocally in the letter 29 June, which he received and read.

105. The claimant did not, according to my findings, contact Mr Francois again (after 27 & 29 June) until after 30 September. For that reason, there could not have been a mutual agreement between the claimant and Mr Francois (acting on behalf of the Respondent) before the 30 September that the employment would continue. It is my finding also that there was no such agreement between Mr Francois and the claimant's agent, Mr Johnston.

106. To the extent that it is suggested that when the claimant contacted the employer (on or around the 28 September), and was put back on the shift pattern rota, that meant that there was a mutual agreement that the employment would continue, my decision is that that was not the case.

106.1 I was not given evidence of the exact process of allocating shifts and about whether it was an automated process or whether some human being plays a role in allocating the claimant's shift patterns. It is quite common for employers to have an entirely automated process for that type of thing. However, even if a human being did something to allocate a shift pattern to the claimant, that human being was not Mr Francois and it was not somebody with authority to act on behalf of the respondent to uphold an appeal against Mr Francois' decision or to reach a mutual agreement with the claimant that June decision was revoked or varied and that the employment contract would continue after 30 September.

106.2 Because (in error), the correct internal processing of the dismissal had not been done (payroll had not been informed, etc), the person or computer software which allocated new shift patterns for October 2017 to the Claimant did so without the information that, acting through Mr Francois, the Respondent had told the Claimant that his last day of employment was to be 30 September 2017.

106.3 It would not be reasonable for any objective person looking at the facts of the case, and the conduct of the parties, to think that the employee

and the employer had reached an agreement on or around 28 September that the claimant would remain in employment after the 30 September just because a shift pattern was issued.

107. Had the claimant contacted the employer, say in July 2017, and reported as fit for work, he would have been given a shift pattern for July. He would have been expected to work that shift pattern, whether he had issued a valid appeal in time, or not. Even if the appeal was rejected, (before or after the Claimant declared himself fit) he would have been issued with shifts to cover the period up to the termination date. The fact that he was given a shift pattern for a period after 27 June is not at all inconsistent with a 30 September termination date. The only thing that is arguably inconsistent is not the fact that a shift pattern was issued, but the fact that he received a shift pattern for dates on and after 1 October. However, the only reason he received one for those dates was the clerical error that the appropriate documentation and information were not completed; it was not because the Respondent had agreed, on any date up to and including 30 September, that his employment contract would not cease on 30 September.

108. The fact that Mr Francois contacted BAHS on the 12 September is not an indication that there had been a mutual agreement to extend the period of employment. On the contrary, he states clearly in his 12 September referral to BAHS that - as far as he was concerned - the termination of employment was due to take effect on the 30 September. The claimant had discussions with BAHS on the 3 October. BAHS were not authorised to re-instate the claimant. What they were authorised to do is exactly what they did do: review him and reach a medical assessment. The medical assessment was that he was potentially fit for work. However, it would not have made a difference if they had reached that particular decision before or (as was the case) after 30 September. BAHS's advice to the respondent was that the claimant was fit for work; but that is not the same as the respondent agreeing with the claimant that he would actually remain in employment after 30 September.

109. In terms of the telephone conversation on the 3 October (which took place after the claimant met BAHS and before the 5 October fact-to-face meeting and before the Claimant did any shifts), it is clear that there was no agreement to extend the claimant's contract (or to reinstate the contract, or to re-engage the Claimant). On the claimant's own evidence, Mr Francois said very clearly and unequivocally that as far as he, Mr Francois, was concerned the termination had already taken effect.

110. The nearest that it might be said to be an agreement is the events of 5 October. On that date, there was a discussion between Mr Francois and his colleague, as a result of which Mr Francois went back to the claimant and said that it was ok for the claimant to take his period of annual leave. My decision is that that is not a mutual agreement to reinstate the claimant's old contract. It was also not a mutual agreement to re-engage the claimant on a new contract. It does not change the effective date of termination.

110.1 What was true was that if the clerical work had been done correctly the claimant would, by 5 October, have already received a payment in lieu for his annual leave entitlement.

110.2 He had not received that payment in lieu due to the respondent's error. They agreed that he could be absent from work, pending a formal meeting with Mr Francois to resolve matters, and the period of absence was one which the Claimant and the Respondent both called "leave". It was agreed that he would be paid by the Respondent for that period.

110.3 For the purposes of my decision on the effective date of termination, it is not relevant whether I think that was a reasonable or unreasonable thing to do (ie grant his request to be absent for a period and describe that as "leave", for which he would be paid). The decision was to have the discussion on his return, rather than tell him on the spot that his employment was terminated and he would get a payment in lieu of holiday entitlement (or, alternatively, rather than agree something else with the Claimant on 5 October). That being said, while not relevant to my decision re EDT, in my opinion it was not a particularly surprising decision for Mr Francois and his colleague to make. However, when making that decision (to defer further discussions until the Claimant returned to the UK after his stated family emergency in South Africa), it was not the intention of Mr Francois to re-engage the claimant at that time. Mr Francois made expressly clear both in person on 5 October and in the correspondence of the 24 October that he wanted to meet the claimant formally to discuss the situation (being Mr Francois's view that employment had terminated, and the Claimant's and his rep's view that it should continue). As far as Mr Francois knew, both the meeting on 5 October, and the more formal meeting arranged (in due course) for 20 November were going to be before the claimant did any work (any shift at all, including training) for the respondent. He fixed it for 20 November (10 minutes after the start of claimant's shift on that date) because the Claimant told him that he needed to be absent for a family emergency immediately after 5 October (and because Mr Francois subsequently came to know that 20 November was his return date).

111. The claimant in his witness statement states specifically that as far as he is concerned there was no agreement. The claimant states in paragraph 23 of his witness statement:

> "The termination date of the 30 September 2017 was not postponed to the 30 November. Notice can only be varied with both parties consent and I had not consented to this. When are they saying that this was unilaterally decided anyway?"

112. It is clear from the claimant's written statement and oral evidence, that the Claimant's stance was that all he had to do was report fit and employment would automatically continue. As I have said I do not think that was his view at the time; I think that at the time he was quite clear that he needed to persuade Mr Francois. In my judgment, any reasonable person hearing what Mr Francois said about the situation would have realised that Mr Francois was not agreeing to reinstate the claimant and not agreeing that the contract

of employment would continue indefinitely. So, even if it was hypothetically true that Mr Francois was making an offer to extend the notice period (to 30 November or any other date), such a hypothetical offer was not accepted by claimant, even according to his own evidence.

113. In summary, the Respondent unequivocally notified the Claimant in June that his contract of employment was terminated, and unequivocally stated that the termination date was 30 September 2017. Nothing happened on or before 30 September 2017 which was a mutual agreement to extend the termination date or a mutual agreement to continue the contract indefinitely. Furthermore, nothing happened either before or after 30 September that constituted an appeal and reinstatement on appeal. Nothing happened that amounted to an agreement to re-employ the Claimant on a new contract of employment. Thus, the effective date of termination was 30 September 2017.

114. The claimant did not commence early conciliation within 3 months, that is by 29 December 2017. The claimant accepts he did not do this. There was no evidence addressed head-on in the claimant's witness statement about why he failed to do so. However, he did make clear that it was his view that the EDT was 30 November, and his view that the Respondent believed that the EDT was 30 November (and, indeed, it was the Respondent's position that 30 November was correct). I am satisfied that I can make a decision about what the claimant's reasons were for not commencing early conciliation earlier.

114.1 The claimant has demonstrated in documents which I have seen, that he does have the ability to meet deadlines, but he will potentially leave thing to the last possible moment for meeting the deadline.

114.2 He commenced the early conciliation in January. He was under the mistaken belief that his employment had continued until 30 November. That was a reasonable mistake for him to make and it was a mistake to which the respondent contributed (especially by its letter of 22 November 2017 which expressly stated the termination date was 30 November).

114.3 If the claimant had been aware that his employment was deemed to have had ended on 30 September, my finding is that the claimant would have made sure that he did contact ACAS within the relevant period. During September to November the claimant was doing things such as setting up his own website and his own business. He sent at one stage a lengthy letter to the Chief Executive of British Airways. There was nothing stopping the claimant taking the necessary action to commence early conciliation and as I say, my finding is he would have taken that necessary action, but for a mistake which was a reasonable one.

114.4 Therefore, it was not reasonably practicable for the claimant to commence the claim (because he was mistaken about the limitation date, and the date by which he had to contact ACAS). By commencing the claim within what would have been the correct time limit had the effective date of termination been 30 November 2017 (as he and the Respondent both

mistakenly thought) he has presented the claim within a reasonable further period of time.

114.5 Thus the tribunal does have jurisdiction for both the unfair dismissal and breach of contract complaints.

115. The breach of contract claim fails and the reason that that fails is because the claimant was given appropriate notice. That appropriate notice ran from the 27 June oral communication. Even from the date that the Claimant read the 29 June letter, there was more than 12 weeks until 30 September 2017.

116. The unfair dismissal claim succeeds. The reasons are as follows.

117. The genuine dismissal reason is as stated in the 29 June letter from Mr Francois to the claimant. The letter does represent his genuine opinions and beliefs. The respondent's reason for dismissing the claimant was that he had been continuously absent since 25 November 2016 and there was no definitive date set for the claimant's return to work to his full contractual role.

118. It was not yet known when the Claimant would be fit to even fly to the UK, let alone to work at Heathrow in any role. Mr Francois had been given no information that a suitable role would be available for the claimant. It was not outside the band of reasonable responses to dismiss the claimant in those circumstances. Supplementary to these reasons (as stated at the bottom of page 244) is that the absence on previous occasions was also taken into account; he had been absent for 316 days since 2013.

119. The reason that I found that the dismissal was to be an unfair one (albeit subject to a ***Polkey*** reduction) is that the procedure that was adopted was outside the band of reasonable responses. Contrary to the Respondent's procedures, and contrary to what the Claimant had been promised, there was no contact with the claimant during the notice period. In saying that I do acknowledge that Mr Francois had given the claimant his mobile number and obviously the claimant had Mr Francois' email address as well. So, the claimant could have attempted to get in touch with Mr Francois directly, or he could have done so via his union representative Mr Johnston. He did neither. However, the dismissal letter itself says very clearly that Mr Francois will be contacting the claimant and he did not do that. Mr Francois said that he would potentially refer the claimant to British Airways Health Service if there was a change of circumstances. By implication, one of the things to be discussed during the discussion 6 weeks into the notice period would be whether there had been such a change. A meeting 6 weeks in (that is around mid-August) did not take place. There was a referral to BAHS, but that did not take place until the middle of September.

120. I have accepted the respondent's reasons for not actively doing more to explain - in the dismissal letter or in the prior discussions with the Claimant - why the option of suitable alternative employment had not been thoroughly explored. The reason Mr Francois did not explore alternative employment formally prior to the 27 June decision is that the advice that respondent had received led it reasonably to conclude that the claimant was not fit for an

alternative role. However, the respondent did say that during the notice period it would start helping the claimant to look for alternative work; there was a specific mention of referring the claimant to the Career Transition Service. That did not happen; it should have done, taking into account the express requirements of the Respondent's Stage 4 procedure and the promise made in the letter. Again, I accept that the claimant could have instigated that process himself and that he did not do so. However, that does not change the fact that the respondent said that it was going to do it and failed to do it.

121. Furthermore, by 28 September, the claimant had declared himself as being fit for work. The Claimant being fit to return to work was a change in circumstances which occurred prior to the termination date. On 3 October, he was deemed by BAHS to have been fit for work. Although that was actually after the employment had already been terminated, had the referral to BAHS had been done sooner then potentially (the appointment made with the Claimant and) the BAHS report could have come back to Mr Francois sooner. Potentially, at least had the request to BAHS been made in good time before the end of employment, then information that the claimant was potentially fit to resume work (starting the re-training and reaccreditation) before 30 September could have reached Mr Francois before 30 September and in time for him to investigate further and to give consideration (as he had said he would in such circumstances) to offering to extend or revoke the notice. Based on the available evidence the Respondent did not act reasonably, during the notice period, by failing to obtain the updated BAHS report until after 30 September and by failing to consider (on or before 30 September) the relevant change of circumstances being that the Claimant had declared himself as fit to return.

122. The final point is in relation to the appeal. My finding was that the claimant made a deliberate decision not to appeal within 7 days of the 29 June letter; that certainly counts against him. Nonetheless he then - in rather unusual circumstances - found himself receiving a second dismissal letter which gave him a new purported termination date, being 30 November 2017. He did appeal within what would have been the correct time limit had letter been what it said it was on its face, namely a dismissal letter. So, in those circumstances I think that no reasonable employer would have failed to have arrange an appeal. Furthermore, the decision not to exercise discretion to extend the deadline (as stated in the 29 June letter) for appeal was taken without proper (or any) investigation into the circumstances that had – according to the Claimant - contributed to the delay, and no consideration as to the events of October and November, including his interactions between Mr Francois. Had an appeal hearing taken place, and had the decision-maker taken into account the fact that the original dismissal reason had been on the basis that no return date was known and that a return date was now known, then it is conceivable that the appeal would have been upheld. In any event, the relevant change of circumstances would have been something which the appeal officer would have needed to take into account (if acting fairly). I expect that the decision-maker would probably have wanted to explore what the evidence was for the Claimant's assertion that he had been fit since 28

September, and what the precise reasons were that the BAHS meeting took place on 3 October, rather than earlier. It is certainly not a foregone conclusion that he would have been reinstated, but my judgment is that no reasonable employer would have denied him the opportunity of a substantive appeal decision on the merits had it given proper consideration to his particular explanation for lateness, and to the fact that he was arguing that there had been a relevant change in circumstances shortly before the termination date.

123. Those were my reasons for the decision of unfair dismissal. My reasons for deciding that the appropriate Polkey deduction is 90% were as follows.

124. The claimant has not demonstrated clearly (and I know his position is that that he has not had the opportunity) when he was actually fit to return to his normal duties. Had the claimant put his appeal in within 7 days of 29 June, then it is quite likely that the appeal would have taken place at a time when the claimant was not fit to return; it is therefore quite likely the appeal would have been rejected.

125. Matters unfolded differently. Had the claimant's November appeal attempt been progressed then the possible outcomes include: (i) that his appeal would have been rejected because the appeal officer was not satisfied that he had been fit to resume his duties as of 30 September or (ii) the possibility that the appeal would have been rejected for the reasons which Mr Francois gave in November, namely that the claimant had a very poor attendance record since 2013 albeit that the absences were for genuine medical reasons. I have to take account of the chances of a decision to reject the appeal (a) being made and (b) being such that it cured any earlier defects and rendered the dismissal as a whole being fair.

126. Furthermore, had an appeal (either based on the June dismissal letter or the November purported dismissal letter) been successful then I also have to take account of the likelihood of various things happening after that. Obviously for *Polkey* purposes I am not making findings of fact as to what would have definitely happened. I do not know what would have definitely happened. I can only assess what this employer would have been likely to do. Taking into account what Mr Francois says about the burden on the respondent of the claimant's absences, I think that if the claimant was reinstated he would have been given a strict target that he had to meet: a final warning (in effect) that if he failed to meet the target he would then be dismissed. I think there is a significant chance that the claimant would have been unable to meet the target. Obviously if he had done so then his employment would have continued.

127. In relation to the respondent's arguments about voluntary redundancy, that is a potential reason which would - in different circumstances - have potentially led to the claimant's employment terminating fairly (without a dismissal). Had that happened he would have received a redundancy payment. The figure seems to be something around £23,000. The claimant suggested that - as far as he was concerned – that severance package had not been on offer to him at relevant dates in 2017, and it would not have been available to him

until 2018. The respondent may well be correct in its argument that if he had not been under notice of dismissal from June 2017, the respondent would have processed and approved his request for voluntary redundancy when it was made, and the claimant would therefore have left on voluntary redundancy terms in the second half of 2017. However, it was the respondent's choice not to process the VR application to the stage where a decision was made, one way or the other, as to whether the Claimant was (otherwise) eligible. It simply decided that he was not eligible because of the decision to dismiss for capability. It does not seem to be argued (and I find that it is not the case) that a decision to uphold the appeal would have automatically led to the Respondent informing the Claimant that he was terminated on the grounds of voluntary redundancy. Therefore, had he been reinstated, a further process would have been required by which the Claimant was offered VR, the Claimant decided to apply for VR and the Respondent decided that he could leave on those terms on a specific date. None of that happened and the termination date (if any) is a matter of speculation. The Claimant, on his own case, would have potentially still been interested in VR, but only on terms which – in his opinion – were not available in 2017. Therefore, I do not think it is appropriate for me to take into account, for *Polkey* purposes, that the Claimant could have left by reason of redundancy on 30 September 2017. What I can, and do, take into account for *Polkey* purposes is of course that if he was reinstated then he could have applied again for VR and that may or may not have been approved in the future. It is quite possible that it would have been approved, but in such circumstances he would have left with the £23,000 payment.

128. Therefore, taking all of that into account when I reached my decision that the compensation should be assessed by calculating the losses had the Claimant been employed indefinitely after 30 September, but with an overall *Polkey* reduction of 90% to reflect both the chances of that not happening (ie a hypothetically fair dismissal with termination date of 30 September) and the chances of a fair dismissal (or resignation) not that long afterwards.

129. At the end of my oral liability reasons, I informed the parties that – as part of the remedy phase – I would hear arguments and make decisions in relation to any adjustments because of failure to follow ACAS Code and/or uplift in relation to any alleged contributory fault.

Decision on Remedy

130. Following on from the liability decision, the claimant is entitled to a basic award. The parties agree and I also agree that the correct calculation of that award is £12,469.50.

131. In relation to the compensatory award for the reasons which I will explain my decision is that the compensatory award is £1,968.97.

132. I am satisfied that the claimant was not receiving any benefits in any relevant period and therefore I am satisfied that the recoupment provisions do not apply.

133. Both parties agree that there should be no reduction for blameworthy conduct (if any) and no adjustment for alleged failures to comply with the ACAS Code.

134. I listened to both sides in relation to what I should use in the net weekly figure. I think that the claimant was not sure how the figure in the schedule had been calculated, as it was done by his adviser at the time. I thought it more appropriate to use a figure for net wages from an on-line calculator which gave me £586.14 per week, which is similar to the Respondent's suggestion.

135. In relation to mitigation the respondent has proved that the claimant has not done enough to mitigate his losses. I accept that it is not inherently unreasonable for somebody to seek to start up a business of their own; if successful then that can be very good mitigation and - in theory - replace all of the earnings that they had from the previous employer. In this particular case, the claimant lives in Thailand and his reasons for not seeking new employment were that he had started a safari business in South Africa. He did not have any vehicles or any assets of his own. The business model would have required him, to fulfil any booking to fly from Thailand to South Africa and hire a vehicle in South Africa. So the costs of his own travel and his hiring of a vehicle have to be factored in when assessing likely profits from the venture. Obviously, there might be the possibility of doing several safaris back-to-back during one visit from Thailand to South Africa, sharing the overheads for each booking that way, but that is not guaranteed. In any event, his bookings would have to be arranged some time in advance, so that he would have time to get to South Africa and hire the vehicle in time to mee the customer. During his commute between Thailand and South Africa, there might not be much he could do to help work on the business; it would be difficult to respond immediately to new potential customers, for example, while in mid-air.

136. In fact, the Claimant did not get any bookings at all. Although I have no first-hand knowledge of the market for safaris in South Africa and I do take the claimant's expertise and knowledge into account, it does not seem reasonable to me for the claimant to have thought that he could get a business up and running from scratch while he was in Thailand when the businesses with which he would be competing would be actually in South Africa and - for example - offering their services at airports or hotels and ready to make impromptu arrangements with holiday makers. The fact that he placed some videos on YouTube and had some leaflets distributed in the UK is not a reasonable attempt at mitigating the loss of his income from his employment with the Respondent and his failure to apply for paid employment for around a year after termination with the Respondent is an unreasonable failure to mitigate in these circumstances.

137. In relation to the invoices for those leaflets, and other marketing, there is nothing in principle which would have stopped me awarding those as elements of loss if I had been satisfied that those were losses flowing from the dismissal and were the costs of attempted mitigation. However, the reason I do not award anything for the cost of the marketing as shown in the invoices is that the expenses do not flow from the dismissal. They are not caused by the unfair dismissal. The claimant had already taken steps to set

up this business prior to dismissal and he was going to incur those marketing costs in any event in my opinion. He said that if the dismissal had not occurred, he would still have attempted to get the safari business up and running while in employment with the Respondent with a view to potentially submitting his resignation if the business took off.

138. I have to make a decision as to what the claimant's losses would be had he taken reasonable steps to mitigate his loss. The respondent suggested 6 months and I am satisfied that if the claimant had started looking for work promptly from the 1 December 2017 which is the period I am looking at (because he was paid up to then), he would have been able to find work at the same rate of pay within 6 months. So, £586.14 a week x 26 gives £15,239.64. I am not satisfied though that he would have matched his old employer's pension scheme within 6 months, that might have taken longer. The claimant said he is limiting his loss to the period 1 December 2017 to 30 November 2018. The pension loss for that period has been calculated as £4,000 and I award the full amount of £4,000. £450 for loss of statutory rights has been agreed by the parties. I also think that is a reasonable sum to award. So, £15,239.64 plus £4,000 plus £450 gives an overall figure of £19,689.64. There is a 90% *Polkey* reduction and that leaves the figure of £1,968.97.

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Employment Judge Quill

Date: 10 May 2021

Sent to the parties on: 13 May 21

For the Tribunal Office