EMPLOYMENT TRIBUNALS

Claimant: **Mr Mark Lawson**

Respondent: **Virgin Atlantic Airways**

Heard by CVP **On: 12 May 2021 and in chambers on 11 June 2021**

Before: **Employment Judge Martin**

Representation
Claimant: **Mr O Segal QC - Counsel**
Respondent: **Clare McCann – Counsel**

RESERVED JUDGMENT
PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The Claimant's clam of disability discrimination has no reasonable prospect of success and is dismissed

2. The Claimant was not a disabled person as defined by s6 Equality Act 2010 at the relevant times

RESERVED REASONS

The issues

1. This was a preliminary hearing held in public by CVP due to the ongoing Covid-19 pandemic. It was listed to consider matters remitted by the Employment Appeal Tribunal and to consider the Respondent's application to strike out the Claimant's claim on the basis it has no reasonable prospect of success or to order that a deposit be paid on the basis it has little reasonable prospect of success.

2. I apologise for the delay in getting this heard, this was due to the ongoing pandemic and my extended absence for ill health.

The hearing

3. I heard evidence from the Claimant and heard submissions from both parties in addition to their written submissions. I also referred to the written submissions made by the parties at the first preliminary hearing. These reasons are to be read in conjunction with the judgment and reasons dated 30 January 2019 ("my judgment"). That judgment sets out my factual findings which have not been disturbed by the EAT.

4. The EAT remitted this case to consider one issue arising from my judgment. This issue is whether – as at 20 May 2017 – the Claimant was a disabled person within the meaning of s6 of the Equality Act 2010 (EqA), having regard to paragraph 2(1)(b) of Schedule 1 to the Act.

Strike out/Deposit Order

5. The application for a strike out or deposit is based on my finding that as at the time of the two SIM tests on 9-10 April & 3 May 2016 the Claimant was not a disabled person.

6. The Claimant's pleaded case under s15 Equality Act 2010 is *"The claimant was treated unfavourably (dismissed) because of his anomalous under-performance in the April and May 2016 SIM tests (in so far as his performance in those tests warranted the Respondent failing him, which is not admitted). That under-performance arose in consequence of the claimant's disability (his adjustment disorder…)"*. [1]

7. His pleaded case in relation to his s21 claim is *"In these circumstances the practice of the respondent relying on its last SIM assessments to dismiss him (itself by no means the inevitable outcome following failed SIM assessments) placed him, as a disabled person by May 2017, at a substantial disadvantage".* The PCP relied on is *"the practice of relying, at a final review meeting, on the failure of a second SIM test taken shortly after a first failed SIM test as requiring a pilot's dismissal."*

The following law is relevant to these applications

8. Rule 37(1)(a) ET Rules 2013 provides that all or any part of a claim or response may be struck out if it has no reasonable prospect of success.

9. **Anyanwu v South Bank Students' Union [2001] IRLR 305 (HL)** which held that as a general principle, discrimination cases should not be struck out except in the very clearest of circumstances given they are often highly fact-sensitive.

10. **Mechkarov v Citibank NA [2016] ICR 1121 (EAT***),* which held that:

i. only in the clearest case should a discrimination claim be struck out;
ii. where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;

[1] Claimant's particulars of claim paragraph 40

iii. the Claimant's case must ordinarily be taken at its highest;
iv. if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and
v. a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

11. Rule 39(1) ET Rules 2013 provides that a deposit order may be made in respect of all or any part of a claim or response if it has little reasonable prospect of success.

12. **Van Rensburg v Royal Borough of Kingston-upon-Thames UKEAT/0096 & 0097/07/MAA (unreported, 16th October 2007)** held that in determining whether to make a deposit order, the Tribunal will consider the strength of the relevant legal contentions and will have regard to the likelihood of the party being able to establish the relevant facts.

A summary of the Respondent's submissions

13. in relation to the s15 claim the Respondent referred to the EHRC Employment Code of Practice ("the EHRC Code") at 5.9, which states that the consequences of a disability "include anything which is the result, effect or outcome of a disabled person's disability". It was submitted that the approach to causation in s15 EqA cases is now well-established and referred to **Sheikholeslami v University of Edinburgh [2018] IRLR 1090 (EAT)**, which held that the provision requires an investigation of two causative issues namely:

(1) did A treat B unfavourably because of an (identified) something? and;
(2) did that something arise in consequence of B's disability?

14. The Respondent also referred to the guidance in **Pnaiser v NHS England [2016] IRLR 170 (EAT)**, which held that *"having regard to the legislative history of s15 EqA: … the statutory purpose which appears from the wording of section 15 , namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability".*

15. The Respondent submitted that as "*C contends that any under-performance in the SIM tests was the "something" that arose in consequence of his disability. It is therefore a necessary component of C's claim that he was a disabled person as defined in s6 EqA as at the date of the two SIM tests".*

16. The Respondent further submitted that the Tribunal has already clearly concluded that, as at the dates of the failed SIMs, (i) the Claimant did not have a mental impairment; and (ii) there was no substantial adverse effect on his ability to carry out normal day-to-day activities and that these findings were not appealed.

17. The Respondent submitted that "*applying the proper approach to the facts in this case the Claimant has no or, in the alternative, little reasonable prospect of showing that his alleged under-performance in the SIM tests arose as a consequence of his disability because, on those dates, he was not disabled and did not even have a mental impairment or any substantial adverse effects on his ability to carry out normal day-to-day activities*"

18. The Respondent submitted that the test for causation under s15 EqA requires a causative link between disability and the "something" that leads to the unfavourable (Sheikholeslami and Pnaiser and and the EHRC Code). The statutory language provides that the term 'disability' in s15 EqA must be interpreted in accordance with the definition set out in s6 EqA.

19. In the Claimant's case, it was submitted, there is no permissible possibility of retrospectively linking any alleged disability back to the date of the SIM tests – by way of the "long term" or "recurrence" tests applied as of May 2017, for example. This is because the Tribunal has already determined that the Claimant had no mental impairment at the time the SIM tests were failed which is a required element of disability. Furthermore, the Tribunal found the Claimant was not experiencing any substantial adverse effects on his ability to carry out normal day-to-day activities at those dates (or, at any time before late July 2016).

20. The Respondent submits that the Claimant's claim under s15 EqA should be struck out and referred to the guidance in Mechkarov. It was submitted that:

    a. The application for strike out is not based on any core issues of fact that turn to any extent on oral evidence. Rather, it turns on the Tribunal's uncontested finding that the Claimant was not disabled as at the dates of the failed SIM tests.

    b. As a result of that finding, the Claimant's case is now wholly inconsistent with his pleaded case that his underperformance in those SIM tests arose as a consequence of his disability.

    c. Therefore, taking the Claimant's case at its highest, his claim under s15 EqA has no reasonable prospect of success and should be struck our or little reasonable prospect of success and the Respondent applied for a deposit order of £1,000 as a condition of continuing with the claim pursuant to rule 39(1) of the ET Rules 2013).

A summary of the Claimant's submissions

21. The Claimant made the following submission.

    "The relevant paragraphs of the Grounds of Complaint are at [26 ff], paras [38] ff. In summary, so far as is material:-

    In the context of his unfair dismissal claim, C had contended (uncontroversially) that R knew he was "increasingly stressed and anxious in

late 2015 and early 2016"; and he relied on that as one of the reasons he says R's dismissal of him was unfair when it relied on the failed SIM tests in April/May 2016, rather than allowing him additional time and training before taking another SIM test when his health was recovered: Grounds of Complaint paras [35-36].

As regards C's complaints under the Equality Act, C contends that by the date of his dismissal R knew he had been diagnosed with an adjustment disorder which had developed following the investigation into the Hong Kong flight (Grounds of Complaint para [37]) – which is not controversial and in any event was a finding at ET/15".

22. The Claimant relies on paragraph 38 of his particulars of claim:

"In these circumstances the practice of the respondent relying on its last SIM assessments to dismiss him (itself by no means the inevitable outcome following failed SIM assessments) placed him, as a disabled person by May 2017, at a substantial disadvantage".

23. The Claimant submits that by the date of his dismissal the Respondent knew he had been diagnosed with an adjustment disorder which had developed following the investigation into the Hong Kong flight. (Judgment paragraph 15).

24. In relation to the s. 21 complaint, it is the Claimant's case that the Respondent should not have relied on the last SIM assessments to dismiss the Claimant "*as a disabled person by May 2017"*, but it should rather have sought medical evidence as to whether or when the Claimant would be fit for further training and testing and then allowed him to be re-tested when he was fit.

25. In relation to the s. 15 complaint the Claimant's case is that although the Tribunal did not find that he was disabled when he took the SIM tests his inability to work, be re-trained or take a further SIM test between 26 May 2016 (three weeks after the second failed SIM) and his dismissal a year later 20 May 2017, was, wholly or in large part because of ill health arising out of his disability. His case is that the Respondent was aware of that disability "*as at the date of the dismissal"* (Grounds of Complaint paras 41). It was submitted that must be for the full-merits hearing to determine whether – assuming the Claimant was disabled and that the Respondent knew or could reasonably have known of that disability – its decision to dismiss was materially influenced by the Claimant's ill health in the year or so prior to the dismissal, or was simply a decision taken in response to his failing the two SIM tests over a year earlier, which decision was in effect delayed by 12 months.

26. In relation to all the claims under the Equality Act 2010 the Claimant submitted that the Respondent's position *"appears to be that an employer who has an employee who suffers from mental ill health at time A, and as a result is unable to perform in the way required of him, but who (at that time) does not suffer from a mental impairment objectively likely to persist for more than 12 months – if that employer later discovers at time B that in fact the same mental ill health has persisted and worsened over a much longer period and, objectively, could well continue at that level for more a total period of more than*

12 months such that the employee is disabled within the meaning of the Act – then if the employer dismisses at time B by reason of the initial under-performance and/or the employee's inability to work since time A – that dismissal is unrelated to the employee's disability. Such a proposition is wrong. It is counter-intuitive, contrary to the purposes of the Act and not required by any of the statutory wording".

27. The above represents a summary of the submissions made by both parties however I considered their submissions both oral and written in detail in coming to my conclusions. I have also re-read the submissions made for the previous preliminary hearing in December 2018.

My conclusions on strike out/deposit

28. I first considered how the Claimant's claims were pleaded and have set out above the relevant parts of his particulars of claim. I considered the Respondent's submission that the pleadings as drafted mean that to succeed the Claimant must have been a disabled person when he undertook the SIM tests as that is what his claim is predicated on.

29. In relation to the Claimant's s15 claim I find that the 'something arising' is the Claimant's performance at the SIM tests which led to them not being successful. I agree with the Claimant's submission that the 'something arising' ie the performance at these tests must have been connected to a disability. As I have found that the Claimant was not disabled (and this finding has not been appealed or disturbed by the EAT) it follows that the reason that the Claimant failed those tests was not connected with a disability as there was no disability at that time.

30. The Claimant's pleading are very clear "*That under-performance arose in consequence of the claimant's disability (his adjustment disorder…)"*. Given that I have found that the Claimant was not disabled at the time of the SIM tests this part of his claim has no reasonable prospect of success and is dismissed.

Reasonable adjustments

31. Turning now to the claim for reasonable adjustments, the pleading as in the particulars of claim is set out above. Subsequently the provision criteria or practice was confirmed by the Claimant's solicitor as: *"the practice of relying, at a final review meeting, on the failure of a second SIM test taken shortly after a first failed SIM test as requiring a pilot's dismissal"*

32. I find that the practice referred to can only have placed the Claimant at a substantial disadvantage in comparison with non-disabled persons if he was disabled as at the date of the two SIM tests. I agree with the Respondent's submission that only in those circumstances would it be a reasonable adjustment, as pleaded, for the Respondent to seek medical advice as to whether or when the Claimant would be fit to undertake further training and testing, provide further training, and administer a further SIM test when the Claimant was fit. It therefore does not matter whether the Claimant was a disabled person as at the time of his dismissal.

33. I have considered the submissions made by the Claimant however I do not accept them considering the pleaded case as considered in conjunction with the PCP as set out above. There is an inextricable link between the SIM tests and the claims. As I have found that the Claimant was not disabled at that time this part of the Claimant's claim must inevitably fail and is struck out.

34. I am aware that it is unusual to strike out a claim of discrimination at a preliminary hearing. However, I find that this is one of the exceptional cases where it is appropriate to do so. There can be no argument that the Claimant was not disabled as at the date of the SIM tests. This was my clear finding which was not appealed. There is no further evidence to be explored in relation to this. I note the guidance in Mechkarov that if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out. This is one of those cases.

EAT remission

35. The other part of this hearing was to consider the remission from the EAT as to whether the Claimant was a disabled person as at the date of termination of his employment in May 2017. Given my findings above this is largely otiose. However, I have gone on to consider this as required by the EAT. The part of the appeal that the Claimant succeeded on was that I had erred in law in applying a test which incorporated the issue of the Respondent's knowledge of the Claimant's disability, which is not relevant to the separate question of whether or not the Claimant was a disabled person at the material time (i.e. 20 May 2017). The relevant paragraph in my judgment is number 53.

> *"I considered whether the Respondent should reasonably have thought that the impairment would last for a year or longer. There is no evidence before me that the Respondent was or reasonably could be aware of this. The Occupational Health report of 20 July 2016 states he should be able to return to work following the successful completion of the CBT. There is no indication of any long-term prognosis. This document was in the Respondent's possession. Apart from this document there is no evidence that the Respondent were in receipt of any other medical information indicating a long- term issue".*

36. I accept that I made an error of law in conflating the Respondent's knowledge with the issue of whether the Claimant was disabled. However, my finding that the Occupational Health report of 20 July 2016 does not give a long-term prognosis leads me to the conclusion that the Claimant, at that time, was expected to recover within a short space of time.

37. The EAT judgment referred to **Nissa v Waverly Education Foundation Limited and another UKEAT/0135/18/DA** (unreported 19th November 2018)), and held "*whether viewed at the time, that is 20 May 2017 and without the benefit of hindsight, the substantial adverse effects of the impairment were likely to last at least 12 months".*

38. The Respondent submitted that:

    a. It is for the Claimant to prove that he was a "disabled person" within the meaning of s6 EqA at the relevant time.

    b. There is no medical evidence of any deterioration at all between 20 July 2016 and 30 October 2016 at the earliest.

    c. That, whilst the Claimant attended Occupational Health for an appointment on 20 July 2016, the report from Dr Flatt was not written until 20 September 2016 and the Claimant did not give his consent for its release until 23 September 2016. The Claimant did not say that the medical picture had changed in any material way (in particular, for example, his fitness to carry out office-based duties).

    d. On 30 October 2016, Andrew White (the Claimant's psychologist) identified that, "*with less control over the situation, he is becoming more and more worried and reports disturbed sleep and stress which can be seen on his face*"; and he recommended that the Claimant should return to Dr Rowlands (the Claimant's psychiatrist) which the Claimant did and that the report from this observed that the lack of further training on offer had caused "*a big disappointment*" and that the Claimant would remain unfit whilst workplace issues were unresolved.

    e. That the Claimant did not see his GP for any substantive appointment after 20 July 2016, until 28 December 2016 when he referred to "*not sleeping well"*

    f. By 27 January 2017 (his final session of CBT with Andrew White prior to his dismissal in May 2017), he had clearly improved from October 2016 and was described as "*remarkably stoic and resolute*"

    g. On the ET's previous finding (unaffected by the EAT Judgment) there was a worsening of C's symptoms following his father's death in February 2017.

    h. Where the substantial and adverse effects of an impairment fluctuate, they are to be treated as continuing throughout the period (see Guidance, at C5).

    i. Consequently, the evidence at its very highest (and being generous to The Claimant) could demonstrate that his impairment is to be treated as having a substantial and adverse effect on his day-to-day activities from – at the very earliest – late October 2016 to 20.5.17 (when he was dismissed) – equating to 7 months at the most.

39. The Claimant submitted that:

    a. The Claimant suffered from stress/anxiety from late 2015, from an adjustment order from at the latest 14 June 2016, and with deteriorating symptoms thereafter up to and including the date on which he was dismissed.

b. The Claimant's symptoms had deteriorated from about April 2016 although he was still able to undertake normal day to day activities until July 2016.

c. At some point after 20 July 2016, the impact on C's ability to undertake day to day activities was no longer minor/trivial, but substantial. Given the symptoms already accepted by the tribunal at ET/47, 49-50 and recorded by the Claimant's GP, Dr Tallent and Dr Flatt in the period 24 May to 20 July 2016 that substantial effect must have arisen very shortly after 20 July.

d. By October 2016, there had been a marked deterioration in C's stress levels and in February 2017 the impact on the Claimant's ability to undertake day to day activities worsened again.

e. As at the date of dismissal, it is submitted that C had been suffering from a substantial impact on his ability to undertake day to dayactivities for many months, in all likelihood 10 months, at the very least 7 months.

f. Throughout that period C had an "impairment" in the sense of "something wrong with them mentally": Rugamer. Given the duration of that impairment, it was, by May 2017, very likely something more serious than an adjustment disorder. However, as made clear by the CA in McNicol, the identification of a precise clinical illness is immaterial.

g. The fact that throughout the period, the Claimant's GP signed him off sick from work with stress/anxiety is itself good evidence of substantial adverse impact: Rayner. In any event, on the symptoms found by the tribunal, it is obvious that this impairment had a substantial impact on C's ability to undertake day to day activities. Those symptoms are similar to the cumulative effects described in the example given in the Guidance: see para 38.2 above. Taken as a whole from about April/May 2016, the development of C's symptoms was remarkably similar to that described at C2:

"The cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person. The substantial adverse effect of an impairment which has developed from, or is likely to develop from, another impairment should be taken into account when determining whether the effect has lasted, or is likely to last at least twelve months, or for the rest of the life of the person affected.

'A man experienced an anxiety disorder. This had a substantial adverse effect on his ability to make social contacts and to visit particular places. The disorder lasted for eight months and then developed into depression, which had the effect that he was no longer able to leave his home or go to work. The depression continued for five months. As the total period over which the adverse effects lasted was in excess of 12 months, the long-term element of the definition of disability was met".

h. The range of C's symptoms as found by the tribunal is far wider than described at C2; and The tribunal found that during the first period of anxiety disorder until July 2016, by reason of C being fit to do office duties, the cumulative effect of the impairment was not yet 'substantial'.

i. As at 20 May 2017, it is obvious that the cumulative effects which C had by then suffered for many months – having suffered lesser effects of anxiety/adjustment disorder for many months prior to that – could well have continued for many more months. It is difficult to identify a basis on which R might argue to the contrary.

My conclusions

40. In oral submissions the Respondent took issue with parts of the Claimant's submissions. There were issues about how the Claimant had presented the facts as found. For the avoidance of doubt, I have only considered the facts as set out in my previous judgment which remain undisturbed by the EAT. The Respondent made criticism that the Claimant is recasting his claim by reference to him having a condition more serious than the adjustment disorder he was diagnosed with in June 2016. I have considered this carefully. There is no evidence of any more serious impairment and I have therefore disregarded this.

41. Having considered the evidence further, I find that the Claimant's impairment had a substantial impact on his ability to carry out normal day to day activities from 30 October 2016. This is the date that it is Andrew White (his psychologist) identified that, "*with less control over the situation, he is becoming more and more worried and reports disturbed sleep and stress which can be seen on his face*"; and he recommended that the Claimant should return to Dr Rowlands. This is the first evidence that the Claimant's condition had deteriorated. From this date I find that the Claimant met the definition in s6 Equality Act 2010.

42. This leads me to consider whether as of 20 May 2017 the Claimant's disability had lasted for 12 months or whether it was likely to last for 12 months. Clearly it had not lasted for 12 months.

43. Before I set out the parties' respective submissions on this, I need to address new evidence which was before me at this hearing. The Claimant gave evidence about a meeting he had with Dr Flatt on 3 March 2017. He covertly recorded this meeting. I was not given an explanation as to why this was not before me at the previous hearing.

44. On 8 February 2021 in anticipation of this hearing, the Claimant sent an email to Dr Flatt making reference to what he said Dr Flatt said on 3 March 2017 suggesting that Dr Flatt said that because of his health he was precluded from any work including office-based duties. It is said by the Respondent that this does not accord with the transcript of the meeting on 3 March 2017, it was submitted by the Respondent that Dr Flatt's view when they met was tentative and he did not express any or any firm conclusions regarding diagnosis or prognosis. It is suggested

by the Respondent that this overstatement shows deception on the part of the Claimant.

45. The Respondent also says that at this meeting the Claimant said he had trouble sleeping the night before in anticipation of the meeting and that he said that the non-resolution of his issues with the Respondent was impeding his ability to get fit and return to work. This, it is submitted is in accordance with what Andrew White said ie getting certainty on his issues would likely cause his condition to abate.

46. Dr Flatt also tentatively suggested that within six months, the Claimant could be fit to fly and get his class 1 medical reinstated. It was submitted by the Respondent that being fit to fly under a pilot's licence is a much higher bar than general fitness for work and other activities. In effect, that would require the Claimant to be fully recovered and asymptomatic which, at that time, Dr Flatt considered might be possible within six months or less. It was Dr Flatt's view that something needed to happen to 'break the cycle' so that the Claimant could recover.

47. I have considered this, and the evidence given by the Claimant. I have decided to disregard this evidence because I am not satisfied that it is reliable. The Claimant's transcript of the meeting on 3 March 2017 is sufficient. I asked myself why the Claimant would contact Dr Flatt in 2021 some four years after the meeting. My only conclusion was that he was coming to another preliminary hearing and was trying to enhance his case. As he had the transcript, he knew what had been said. It is unlikely that four years later Dr Flatt would remember with sufficient detail.

48. This was the only visit to occupational Health since July 2016. The GP had signed the Claimant off work for two months which the Respondent suggests is indicative of him being recovered soon. Given the specialist nature of the Claimant's work I do not place much weight on this, or that the Claimant was only signed off for two months. It is my experience that doctors commonly only sign someone off work for a limited time and will then review the situation. The Claimant's last visit to his GP was in January 2017 and he was not prescribed any medication and nor did he feel the need to undertake more CBT sessions despite having found them helpful previously.

49. The question is whether it was likely that the Claimant would still meet the definition of a disabled person after one year. The date of him meeting the definition was 30 October 2016. The date of termination of employment was 20 May 2017. This is approximately seven months. This means that the Claimant would need to satisfy the definition for a further five months to reach his disability being long term as required by the legislation.

50. I fully accept that the Claimant would not recover immediately his employment issues were clarified by his employment being terminated. I can understand that this would have been a very difficult time for him. I find that it was likely that the Claimant's condition would have satisfied

the definition for two months after termination of his employment and at the outside three months. The reason for this conclusion is that the Claimant and Andrew White both acknowledged that his condition would improve once his employment situation was resolved. The WHO classification of an adjustment disorder states that it is of limited duration, normally about 6 months. Further there is no evidence that the Claimant's medical situation had deteriorated substantially in 2017 save for understandable grief and upset when his father died in January 2017.

51. The Claimant has not proved to my satisfaction that it was likely that his condition would fit the definition for another five months after his employment terminated. The burden of proof is on him and I find that he has not discharged it.

52. Accordingly, even had I not struck the Claimant's claims out as having no reasonable prospect of success, I would have dismissed the Claimant's claim of disability discrimination on the basis that at the relevant times he was not disabled as defined by the legislation.

53. This finding does not affect the Claimant's claim for unfair dismissal. Given that the discrimination claim has been struck out, the final hearing has been reduced to 5 days as agreed by the parties.

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Employment Judge Martin
Date: 16 June 2021