EMPLOYMENT TRIBUNALS

Claimant: Mr Michael Lawson

Respondent: Virgin Atlantic Airways Ltd

Heard at: Croydon (remote public hearing via CVP)

On: 29-30 November and 1-3 December 2021

Before: Judge Brian Doyle

Representation
Claimant: Mr Oliver Segal, Queen's Counsel
Respondent: Ms Claire McCann, Counsel

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.

2. The claimant's application for a reinstatement order is refused.

3. The respondent is ordered to pay to the claimant as compensation for unfair dismissal (a) a Basic Award of £9,780.00 and (2) a Compensatory Award of £80,541.00.

4. The Recoupment Regulations do not apply to this award.

REASONS

Paragraph 256 corrected under a Certificate of Correction on 23 February 2022

Introduction

1. At the conclusion of the hearing on 3 December 2021, the Tribunal announced its decision, and it gave outline reasons, expressed to be subject to fuller reasons being required if an application under rule 62 were to be made by either party. These written (and fuller) reasons are now provided following a timeous request made by the claimant on 6 December 2021 in accordance with rule 62.

2. This introduction draws upon the opening note presented by the respondent. References in square brackets are to pages in the hearing bundle.

3. The claimant presented his ET1 claim on 9 October 2017 [3-27], following Acas early conciliation that concluded on 27 July 20217 [28]. The claim contained complaints of unfair dismissal (section 98 Employment Rights Act 1996), disability discriminatory dismissal (section 15 Equality Act 2010) and failure by the respondent to make reasonable adjustments (sections 20-21 Equality Act 2010). See the grounds of complaint at paragraphs 36–42 [26–27].

4. The respondent's ET3 response and grounds of resistance were presented on 6 December 2017 [29-54].

5. A case management hearing on 21 March 2018 resulted in case management orders issued on 11 April 2018 [55-58]. Further correspondence between the parties and the Tribunal then resulted [59-65]. The claimant's original schedule of loss is dated May 2018 [66]. An initial list of issues was settled on 27 March 2019 [68]. Further case management followed in December 2020 [71-73].

6. The claimant's Equality Act complaints were struck out as having no reasonable prospect of success at a second substantive preliminary hearing on 12 May 2021 (before Employment Judge Martin) [78-89]. That hearing resulted from an appeal to the Employment Appeal Tribunal against an earlier preliminary judgment. Judge Martin found that claimant was not disabled at any material time up to and including his dismissal in May 2017 [78].

7. The only claim remaining before this Tribunal for determination is the claimant's claim for ordinary unfair dismissal.

8. The respondent has admitted that the claimant's dismissal was unfair by reason of the procedure followed. There remain significant issues between the parties in respect of remedy, particularly since the claimant confirmed in correspondence on 12 November 2021 that he was seeking reinstatement. The respondent's position is that an order for re-employment would be entirely unjust, given it lacks confidence in the claimant's ability to operate safely as a pilot; and that the Employment Tribunal cannot be satisfied that it would be practicable for the respondent to comply with such an order (that is, it is highly unlikely that an order for re-employment could be implemented with success).

9. The claimant presented a Schedule of Loss originally totalling £1,704,824.58 [67]; and an updated Schedule of Loss on 18 November 2021 totalling £2,471,548.06 [1131]. The respondent reminded the Tribunal that the statutory cap for unfair dismissal claims as at the date of the claimant's dismissal in May 2017 was £80,541. The maximum basic award which could be ordered is agreed to be £9,780. Absent the question of re-employment, the maximum that the claimant could be awarded is £90,321.

10. The respondent offered in open correspondence on 12 November 2021 to have judgment entered against it for this amount as a way of obviating the need for this remedy hearing. That opportunity was rejected by the claimant because he sought re-employment by the respondent.

Basis of admission of liability for unfair dismissal

11. In pre-hearing correspondence dated 11 November 2021, the respondent has accepted liability for unfair dismissal on the basis that it acknowledges that due to the process followed it did not act reasonably in treating the claimant's capability as a sufficient reason for his dismissal in all the circumstances (section 98(4) Employment Rights Act 1996).

12. In making such an admission of liability, the respondent did not accept that it acted unreasonably in treating capability as a sufficient reason to dismiss the claimant, having regard to: (1) the fact that the claimant failed the LPC/OPC checks on 10 April and 3 May 2016; (2) the way that the LPC/OPC checks on 10 April and 3 May 2016 were carried out; and (3) the training provided to the claimant in the period between 10 April and 3 May 2016.

13. Accordingly, the respondent conceded that the dismissal was unfair only by reference to the following matters.

14. (1) The long gap between the failed LPC/OPC checks on 10 April and 3 May 2016, and the decision to dismiss the claimant on 15 May 2017 (paragraph 31 of the claimant's grounds of complaint). (2) The fact that a formal training review was conducted on 12 September 2016, but no formal outcome letter was provided to the claimant within 14 days [109] (and paragraph 25 of the grounds of complain). (3) The fact that the letter documenting the desktop review (dated 15 May 2017) was not provided to the claimant in advance of – but only during – the Formal Training Review meeting on 15 May 2017, after which the claimant was dismissed, by letter dated 19 May 2017 (paragraph 32 of the grounds of complaint). (4) The fact that the respondent did not permit the claimant any adjournment of the Formal Training Review meeting on 15 May 2017 (requested by the claimant on ill-health grounds) (paragraph 31 of the grounds of complaint). (5) The fact that – while the respondent had considered the issue of further training – the claimant was not offered any further training or the opportunity to undertake a further LPC/OPC check prior to the decision to dismiss (paragraphs 32 and 35 of the grounds of complaint). (6) The fact that the claimant was offered only the second, but not the first, of the two appeals allowed for under the respondent's procedure [112] (paragraph 34 of the grounds of complaint).

15. The respondent accepted that – by reference to the matters immediately above – the dismissal of the claimant was unfair, contrary to section 98(4) of the Employment Rights Act 1996, and the claimant was entitled to an appropriate remedy. The issues above are relevant to the question of remedy, as will be discussed further below.

Agreed issues

16. Considering the respondent's written admissions dated 11 November 2021, the respondent accepted liability for the claimant's dismissal under section 98(4) of the Employment Rights Act 1996, in that it acted unreasonably in treating the claimant's capability as a sufficient reason for his dismissal due to the dismissal

procedure followed. The respondent made no admission of liability in respect of the factual allegations made by the claimant (see List of Issues dated 27 March 2019 at paragraphs 2.1, 2.2 and 2.4) regarding: (a) the way the Licence Proficiency Checks ("LPC") and/or Operator Proficiency Checks ("OPC") (on 10 April and 3 May 2016) were carried out; and (b) the training provided to the claimant in the period between 10 April and 3 May 2016.

17. As to remedy, the claimant seeks reinstatement or re-engagement (re-employment) and the following issues arise.

18. (1) Is it practicable for the respondent to comply with an order for re-employment, in that it is capable of being carried into effect with success (section 116(1)(b) and (3)(b) Employment Rights Act 1996)?

19. (2) Would it be just for the Tribunal to make a re-employment order where the claimant's conduct caused or contributed to some extent to his dismissal (sections 116(1)(c) and 116(3)(c) Employment Rights Act 1996)? – (a) The respondent relies upon the claimant's significant failures of the LPC/OPC on 10 April 2016 and again on 3 May 2016 following continuation training; (b) The respondent also relies upon the undocumented historical issues as set out in the Grounds of Resistance at paragraphs 16, 29, 46, 47, 56 and 59.

20. (3) If a re-employment order is made, the Tribunal is to specify the terms of the order, as prescribed by section 114(2) or section 115(2) Employment Rights Act 1996, as the case may be.

21. (4) Will the respondent refuse to comply with a re-employment order? – (a) If the respondent refuses, has it shown that it was not practicable to comply with the order (section 117(4)(a) Employment Rights Act 1996)? and (b) If not, what award of compensation for unfair dismissal should be made calculated in accordance with sections 118-126 Employment Rights Act 1996 (section 117(3)(a) Employment Rights Act 1996)? and (c) Further, should an additional award of between 26 and 52 weeks' pay be made (section 117(3)(b) Employment Rights Act 1996)?

22. (5) If no re-employment order is made under section 113 Employment Rights Act 1996, the Tribunal shall consider what award of compensation, if any, should be paid by the respondent to the claimant – The maximum compensation that the claimant may be entitled to receive is capped at £90,321.00, comprising (a) a basic award of £9,780.00 and (b) a compensatory award of £80,541.00 (with the statutory cap applied, as at the effective date of termination, 20 May 2017).

23. (6) In considering the question of compensation, the following issues arise – (a) What is the extent of the claimant's loss? (b) Has the claimant mitigated his loss? (c) Should there be any *Polkey* reductions to any compensation awarded? (d) Is it just and equitable to reduce the basic award by reason of any conduct of the claimant before the dismissal (section 122(2) Employment Rights Acts 1996)? (e) Was the dismissal to any extent caused or contributed to by any action of the claimant; and, if so, by what proportion is it just and

equitable to reduce the compensatory award (section 123(6) Employment Rights Act 1996)?

The evidence

24. The Tribunal had before it a final hearing bundle of documentary evidence comprising 1,430 electronic pages, inclusive of a 25 pages index. In addition, there was a supplementary bundle in two parts of 45 pages and 3 pages. A small selection of further documents was provided during the hearing. There was also a cast list and a chronology.

25. The Tribunal heard witness evidence from the claimant, Mr Mike Lawson (formerly Captain Lawson), and on his behalf, from Captain David Singleton (a Boeing 787 Captain) and Captain Steve Johnson (a former Training Captain and former Airbus Captain). The respondent called two witnesses on its behalf: Mr Luke Corkill (Principal Flight Crew Manager since June 2021) and Captain Ken Gillespie (Senior Training Manager).

26. The core documentation, which the Tribunal has considered to the extent as relevant is: (1) The claimant's Statement of Terms and Conditions of Employment [90-103]; (2) the respondent's Training Operations Manual (TOM) [104-113] and [139-155];[1] (3) the respondent's Operations Manual Part B (Cabin Safety & Security Manual) as amended [114-119]; (4) the respondent's Corporate Safety & Security Manual [120-138]; (5) the Civil Aviation Authority (CAA) Policy and Guidance for Examiners [156-236];[2] the respondent's Employment Policy Handbook ("Red Book") [237-300]; and the respondent's Training Summary Reports in respect of the claimant [312-321 and 323-337].[3]

Rule 50

27. As will be apparent below, the respondent has taken a conscious decision not to call to give evidence key witnesses – witnesses whose evidence would have assisted the Tribunal in relation to the issues to be determined. In addition, there are various third parties who were referred to in the evidence, but who have not been called to give evidence. Accordingly, the Tribunal stresses that in making its findings of fact it has not heard evidence from several persons who must be referred to in these reasons; about whose actions it may be necessary to make critical findings; and/or findings that impinge upon their right to a private life – but crucially for this purpose, without having had an opportunity to hear from those persons.

28. Rule 50 of the Employment Tribunals Rules of Procedure 2013 (as amended), so far as is relevant, provides that a Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person within the meaning of

[1] See, in particular, section 3.20.3 (Initiation of Formal Process) at [108].
[2] See, in particular, in their context: section 17.2 (Conduct of the Test/Check/AOC); section 19.4 (Conduct of Examiner); section 20.2 (Training Alongside Testing).
[3] See, in particular, the comments recorded at [314, 316].

section 1 of the Human Rights Act 1998. In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

29. Such orders may include an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, in any documents entered on the Register or otherwise forming part of the public record. Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.

30. Having invited representations from the parties, and with their consent, but having given full weight to the principle of open justice and to the Convention right to freedom of expression, the Tribunal has resolved to order that the identities of persons (other than the claimant or other witnesses) referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, in any documents entered on the Register or otherwise forming part of the public record. This order does not apply to the parties themselves or to any person who appeared as a witness at the hearing.

Assessment of the evidence

31. The limited nature of the respondent's witness evidence caused the Tribunal some difficulty in resolving the outstanding factual matters. In its opening note on remedy, the respondent explained its position, as follows. Given the ramping up of the respondent's operations due to the recent opening up of international air travel (in particular, to/from the US on 8 November 2021, for the first time since March 2020), the respondent says that it cannot afford to release up to nine crucial operational employees from the business, of whom seven are senior colleagues in the respondent's pilot training department, in order to give evidence in the Tribunal at this important juncture for the respondent's economic recovery. In addition, one further witness is unable to give evidence as he passed away in 2018; and one other witness left the respondent's employment in 2018.

32. The Tribunal would have been greatly assisted if it had been enabled to hear direct evidence from the two Training Captains who carried out the OPC/LPC testing of the claimant; the Training First Officer who conducted remedial training of the claimant between those two tests; the further three Training Captains who were involved in the process and decisions that led to the claimant's dismissal; and the Senior Manager (Safety) who conducted an appeal against the dismissal. They were directly involved, to some degree or another, in the events that contributed to or led to the claimant's dismissal. Their evidence would have been relevant to some degree or another to the Tribunal's task of deciding whether to make a re-employment order and, if not, as to whether any award of compensation should be reduced to any extent.

33. The respondent says that this position regarding its witness evidence – in addition to the respondent's acknowledgment of the procedural unfairness set out above – has prompted the admission of liability, as detailed above. Instead, the respondent called two witnesses to deal with the remaining issues in respect of remedy (including the request for re-employment).

34. Captain Ken Gillespie (Head of Training and Standards) was offered as a witness as he attended the Final Formal Review Meeting on 15 May 2017, which resulted in the claimant being dismissed by the Training Captain whose decision it was. His evidence addressed the LPC/OPC checks which the claimant failed (on 10 April and 3 May 2016); the issue of training; the reason for dismissal; and other evidence relevant to the respondent's position that re-employment would not be practicable or just (for reasons asserted, including that the claimant caused or contributed to the dismissal and that the respondent has no trust and confidence in the claimant).

35. Captain Gillespie was patently an honest witness, who was trying to do his very best to assist the Tribunal. The difficulty is that Captain Gillespie did not become involved in the claimant's case until May 2017. His witness evidence in paragraphs 5-42 and 54-62 of his witness statement is thus effectively an explanation of the industry background and a commentary on events and documents of which the primary witnesses of fact have not been tendered as witnesses at this hearing. His evidence of his involvement in the dismissal process and of the implications of any potential re-employment order, however, is relevant and it is set out immediately following the Tribunal's primary findings of fact.

36. Mr Luke Corkhill (Principal Flight Crew Manager) was also patently an honest witness, who was trying to do his very best to assist the Tribunal. He gave evidence relevant to the respondent's position that it would not be practicable for the respondent to comply with a re-employment order, including on matters such as the redundancies made in 2020, the current state of the business and pilot vacancies, training capacity and cost, and crew resource management and employee relations issues. That evidence is also set out immediately following the Tribunal's primary findings of fact.

37. The claimant, Mr Lawson, was a straightforward and candid witness. He gave little impression of a claimant anxious to embellish or exaggerate his evidence, as had been the case when giving evidence before Judge Martin, except perhaps for a tendency towards unnecessary adjectival emphasis. Under cross-examination he was willing to make concessions or admissions, or to re-evaluate his evidence, as would be appropriate. Of course, he had the advantage of being the only witness (apart from Captain Gillespie in the very latest stages of the claimant's employment) to have been directly involved in the key incidents of the Hong Kong flight; the later sim tests and re-training; and the larger part of the process that led to his dismissal. The Tribunal approached his evidence with some care, knowing that, apart from cross-examination by the respondent's counsel, his evidence would not be exhaustively tested by comparison with the key protagonists on the respondent's part who were not called to give evidence.

38. Captain Singleton and Captain Johnson were honest and helpful witnesses, doing their very best to assist the Tribunal, although occasionally straying into matters of which they could only give opinion evidence.

39. The Tribunal has been particularly alert to the difficulty that it faced with large parts of the evidence before it taking the form of evidence as to opinion and hearsay (sometimes multiple hearsay). In respect of opinion and hearsay evidence, the Tribunal has reminded itself that, while it is not bound by the formal rules of civil evidence, it should take some care with how it assesses such evidence. In many places the Tribunal has regarded such evidence as being evidence that someone held the opinion in question or that someone had related a second-hand or third-hand account – rather than treating that as being evidence of the truth or fact of the matter being opined or recounted.

Submissions

40. The Tribunal was greatly assisted by written submissions from both counsel which comprised: (1) the respondent's opening note; (2) the claimant's note on remedy; (3) the respondent's note on remedy; (4) the claimant's closing submissions; and (5) the respondent's closing submissions. The parties' written closing submissions were amplified by oral submissions from each counsel. The Tribunal does not propose to reproduce these opening notes or closing submissions here, as that will add unnecessarily to what will already be a lengthy judgment. Instead, it will deal with the contentions of the parties when resolving conflicts in the evidence, and in its discussion and conclusions, below.

Findings of fact

41. The claimant is now aged 50. He obtained a commercial pilot's licence in December 1994, aged 23. In January 1995, he joined Air UK Leisure as a First Officer (FO) and he trained to fly the Boeing 737. He distinguished himself in training. In 1996, he transferred to the A320 aircraft with Air UK Leisure.

42. The claimant joined the respondent, Virgin Atlantic Airways (VAA), in June 1998. He started his long-haul career on its Airbus 340 fleet. His training over the next 18 years was provided by the respondent. He completed a full training course on what was a new aircraft for him, the Airbus A340. He flew the A340 as a First Officer (FO) and then he gained command (became a Captain) in 2007 [311]. The training records show that the claimant passed the command course to a high standard [301-311].

43. The respondent alleges in its response to the claimant's claim to this Tribunal that his command was delayed by reckless behaviour. See the events referred to in paragraph 16 of the respondent's grounds of resistance [38]. The claimant had not heard of them prior to reading the grounds of resistance. He denies these allegations. He provided a reasonable explanation of that denial. Had such events taken place, he would have expected to have faced disciplinary action. These alleged events were never mentioned to him. They are undocumented and unrecorded. There is no direct evidence of them before the Tribunal, other than uncorroborated and unsubstantiated reference to them in

the respondent's witness statements. The Tribunal agrees with the claimant that it is hard to believe that a high-profile airline would allow a pilot who it believed to be reckless to fly its customers and aeroplanes for 17 years, let alone as a Captain.

44. It appears to the Tribunal that it is likely that the respondent took those alleged events of the early 2000s into account in some way in its decision-making process to dismiss the claimant in 2017 and without giving him the chance to respond to those by now historic allegations. The Tribunal agrees with the claimant that this calls into doubt the operative reason for his dismissal – namely, unsubstantiated rumours, including those surrounding the Hong Kong flight (to which the Tribunal will come below) – rather than real concerns about the claimant's flying ability.

45. The claimant flew the Airbus A340 until the Airbus A330 was introduced in 2011. He passed his A330 type rating without incident. He then flew the A330 and A340 for the respondent until 2015, when the Boeing 787 was introduced. The claimant's Boeing 787 conversion course took place in 2015. The training reports from this course are all positive [353-377]. The Boeing 787 conversion course was completed in April 2015. One of the final stages of the training course was Zero Flight Time Training (ZFTT) or "Circuit Training" in which the pilot carries out 6 take-offs and landings in the simulator with a Training Captain. The claimant's Circuit Training was carried out by the Senior Training Captain and Type Rating Examiner (TRE) at the time of that claimant's dismissal in 2017, and who was involved in events leading to the claimant's dismissal. It was completed on 23 May 2015 [324] and it was passed to a good standard. He then joined the respondent's Boeing 787 fleet.

46. The respondent's training and testing regime meant that pilots are tested in a flight simulator approximately every 6 months. These tests consist of a Licence Proficiency Check (LPC), which is a Civil Aviation Authority (CAA) requirement to validate the type rating on a pilot's licence for 12 months, and an Operator Proficiently Check (OPC), which was a company requirement every 6 months, and which was embedded in the LPC. Content and conduct of an LPC and OPC is very similar and prescriptive. One test is very much like another. They are administered by a Type Rating Examiner (TRE). These are Training Captains employed by the respondent, but who act on behalf of the CAA when administering an LPC to sign-off the type rating on a pilot's licence. LPCs are conducted in accordance with CAA Standards Document 24 [156].

47. Between 1998 and 2015 the claimant estimates that he sat at least 34 LPC/OPC checks, in addition to type rating training and command training. Every year pilots also have a line check, which is conducted on a normal commercial flight with a Training Captain, who assesses the pilot's performance. The claimant's last line check was on a Boeing 787 with a Training Captain (not subsequently involved in the events that led to his dismissal) in July 2015 [332]. He was graded as above company standard on 8 of the 9 items. Training for a new aircraft consists of simulator training and tests, followed by aircraft line training and tests with a Training Captain for approximately 8 flights. During this 17 years period, the claimant passed every one of more than 50 simulator and line flying tests.

48. At the heart of this claim is the so-called Hong Kong incident of 25 September 2015. On that date, the claimant operated flight VS206 from London Heathrow (LHR) to Hong Kong (HKG) as Captain. The Tribunal stresses that it is no part of its role in these proceedings to decide whether the decisions taken by the claimant as commander of that flight were correct or above reproach. This Tribunal is not required or qualified to make such an assessment in order to be able to decide the matters that are within its jurisdiction.

49. There were two co-pilots on the flight, Flight Officer 1 and Flight Officer 2. Flight Officer 1 was a Training First Officer (TFO) and a Type Rating Instructor (TRI) – and later he would become involved in the events that led to the claimant's dismissal. The Hong Kong route was one that the claimant had flown on many occasions during his employment with the respondent, on average perhaps once per month, and he was very familiar with it. The flight takes around 11 hours. On flights of this length, the three pilots take it in turns to have periods of rest away from the flight deck, with two pilots usually remaining on the flight deck.

50. At check in at LHR both Flight Officers advised the claimant that they had experienced upset stomachs after recent trips to Delhi. By checking in for the flight duty they were confirming that they were fit to operate. Approximately 2½ to 3 hours into the flight, while one of the FOs was taking his rest in the crew rest area, the other pilots had toilet breaks. The requirement is that there should always be two crew members on the flight deck. Accordingly, and quite properly, the Flight Service Manager was present on the flight deck for that purpose. Her positive impression of how the claimant handled the matter can be seen in her email of 9 October 2015 at [407-408].

51. After FO 1 left the flight deck to use the toilet, the claimant was told that FO 1 had briefly fainted while returning. The cabin crew took care of FO 1. Neither he nor the cabin crew were concerned. He requested that he take crew rest at that time. The claimant therefore called FO 2 back from rest to join him on the flight deck so that the FO 1 could rest.

52. However, approximately 4½ hours into the flight, FO 2 felt the need to use the toilet. The claimant was told that FO 2 did not quite make the toilet in time. The cabin crew found FO 2 a seat next to the toilet so that he could more conveniently manage his symptoms.

53. At this point in the flight the aeroplane was over central Russia. The closest airport was Koltsovo Airport, a remote and unfamiliar Russian airfield. In the claimant's judgement, to land the plane at such an airfield would only be attempted in an absolute emergency, where continuing with the flight was not an option (for example, fuel or fire problems). Both FOs were discussing their fitness with the cabin crew. The weather en route was good. The claimant was familiar with the route to HKG. After a discussion with the crew, the claimant took the decision that the safest course of action would be to continue to HKG.

54. Both FOs were asked if they needed medical assistance. Both turned down the option. Both FOs were aware of the onboard MEDLINK facility, but they made

it clear that it was not needed. Neither FO requested medical assistance. In the claimant's assessment, if the FOs had been incapacitated, medical advice would be sought through the MEDLINK system and a different decision might have been made. The claimant interpreted "incapacitated" as being that they could not be communicated with and were unable to continue their work duty for the reminder of the flight.

55. There was communication between the cabin crew and the FOs themselves. The crew came to the flight deck to check on the claimant. It was determined by the claimant that the FOs were suffering from common conditions that arise on most flights and there was no need of any immediate medical attention. Diversion to a remote Russian airfield to seek urgent medical attention would only have been undertaken if discussing this option with the pilots themselves was not a possibility. This was not the case, in the claimant's view, and so consequently there was no need to divert. In addition, in his analysis, landing in Russia at that time of day would have caused any number of further issues. For example: the safety aspect of landing an aircraft in an unfamiliar airfield in Russia; a lack of visas or landing permits or potentially suitable medical care; and sufficient accommodation for the crew and passengers, as they would not have been able to leave Russia until the respondent either flew a relief crew out or the existing crew had taken the necessary legal rest.

56. During the flight, the claimant contacted the respondent's Integrated Operations Control Centre (IOCC) by satellite telephone to discuss the situation and his course of action. He made the first call at around 02:30, witnessed by a cabin crew member, to advise that both FOs were suffering from common conditions, but were OK to continue. The second call was at 05:00, with the Flight Service Manager and the Cabin Service Supervisor present. The IOCC team can provide information to assist the Captain's decision-making. It is necessary to inform them of any unusual events for them to be able to assist should any organisational issues arise – such as ground handling, arranging accommodation, onward travel and so on – if there is a change in destination airport.

57. In the claimant's view, the cabin crew on the flight were very senior and experienced. Using the medical training provided by the respondent, they assessed that the FOs were not seriously ill or incapacitated. They were keeping the claimant constantly updated. Both FOs also came back to the flight deck at various points to check if the claimant was OK or if he needed any assistance. The claimant was therefore satisfied that both FOs were available if he needed them, and at least one cabin crew member always remained with him on the flight deck.

58. The first FO returned to the flight deck at 06:45. He reported that he was feeling much better after his rest. They were due to land at 09:20. The second FO spoke to the cabin crew and offered to come back to the flight deck around that time. As the first FO was already on the flight deck, the second FO remained close to the toilet as a precaution should he need the toilet during the approach and landing.

59. A normal approach and descent were made into HKG. The weather was fine in HKG. However, the claimant felt an “Autoland” was the best option. The first FO also agreed that this was the safest option. The Cabin Service Supervisor sat on the flight deck for the landing so that she was available if either of the two pilots needed anything. The landing was at 09:21 and uneventful.

60. After a discussion in-flight with the Flight Service Manager and the FO 1, the claimant completed the necessary Air Safety Report (ASR). FO 1 insisted that the claimant should not use the word “incapacitated” in the report. The ASR was sent off electronically from the on-board computer console. The claimant was not aware at the time that a hard copy also had to be submitted. This procedure was particular to the Boeing 787, and he had not filed an ASR before on this new aircraft. It is likely that FO 1 would have known this, as he was a Type Rating Instructor (TRI) on the Boeing 787, but he did not point this out.

61. A photograph was taken of the crew in HKG airport after disembarking [397]. It was taken as it was some of the local HKG cabin crew's final flight. On landing, the crew met with the respondent's HKG manager, who was on the phone to IOCC as she greeted them, as she had already been made aware of the FOs’ illnesses by the operations team. She asked if any medical attention was needed at the airport and both FOs demurred. At the airport the claimant also asked both FOs if they wanted to see a doctor before going to the hotel and they both declined.

62. The return flight to LHR was in the evening of 28 September 2015. Neither FOs had seen a doctor. The claimant decided that he needed to be sure that they were fit to operate. He wished to avoid a repeat of the circumstances of the outbound flight. He contacted the respondent's down-route medical service, MedAire. In the afternoon of 28 September 2015, a doctor was sent to the hotel. Both FOs told the claimant that they did not need to see a doctor. The claimant arranged for the doctor anyway. The doctor cleared both FOs to fly. However, the doctor gave the first FO medication for his symptoms. The doctor later informed that FO, after he had taken the medication, that he could not operate heavy machinery. This meant that the first FO was then unable to operate the return flight. The claimant discussed this with the respondent's Operations Department in the UK. A Crew Controller arranged for another FO (who was already in HKG) to replace the first FO, who then positioned back with that flight as a passenger.

63. Following the HKG flight, all crew continued to operate their rosters as normal. They were not informed that there were any issues. The claimant’s first duty following the HKG flight was an OPC with a Type Rating Examiner (TRE) Training Captain, not subsequently involved in events leading to the dismissal, on 7 October 2015. It was passed with no issues [398].

64. An internal investigation into the HKG flight commenced on 12 October 2015. The claimant was stood down [409], as crew are supposed to be during an investigation. However, the rest of the crew of the HKG flight were permitted to continue flying. It is the claimant’s understanding that Operations Manual Pt A 3.8.7.2 states that all crew should be stood down when there is an investigation into a flight. This part sets out the procedure for how investigations are to be

conducted. It also states that the crew should be informed of the recommendations made by the Event Review Group (ERG) as soon as possible.

65. On 14 October 2015, the claimant had a conversation with another pilot, FO 3, not previously involved in the events above. He was the head of the British Airline Pilots Association (BALPA) Virgin Atlantic Company Council (VACC). The claimant was a BALPA member at the time. FO 3 had been discussing matters with the Flight Safety Manager, a member of the respondent's Safety Department. He told the claimant that there was nothing to worry about from the investigation [411].

66. The claimant also reached out to the Senior Training Captain on the Boeing 787 (who would later become involved in the testing of the claimant that contributed to his dismissal). The claimant wanted to ensure that he received an accurate version of events directly from the claimant before it was embellished by gossip. When the claimant first sent the email to the Senior Training Captain, he replied to say that he was on a trip [415]. The claimant then followed up when the Senior Training Captain returned, but he did not respond [416].

67. The claimant was called into a meeting with the Flight Safety Manager on 13 October 2015. He was surprised to see the Head of Aircraft Operations there as well. During this meeting the claimant was asked to go through what had happened on the HKG flight. He explained it in detail. During the meeting, the Head of Aircraft Operations asked the claimant whether he had had “40 winks”. In the claimant’s view, to ask him if he had slept while in charge of 200 passengers and crew was shocking. He wondered why the Head of Aircraft Operations would think that any pilot in the company would do that. The Flight Safety Manager’s follow-up to that meeting is at [413].

68. The Flight Safety Manager sent the claimant Issue 1 of the Corporate Safety Report on 20 and 21 October 2015 [421-425; 426-430; 431-440]. There were then some exchanges by telephone and email in respect of errors in the report [441-445].

69. The claimant was sent a version entitled "Final Investigation Report" [446-454] on 23 October 2015 [445, 455-457, 467, 477]. The claimant considered that there were still errors in this report. Although the Flight Safety Manager did make some amendments [458-466, 468-476], she did not amend it further to the claimant’s satisfaction. This was the only version of the report that the claimant was provided with at the time. This version of the report does not contain the recommendations of the ERG as that had not yet taken place. It made no formal criticism of the claimant’s handling of the HKG flight.

70. On 25 October 2015 the claimant was asked to complete a Discretion Report Form in respect of the HKG flight, which he complied with [478-482]

71. From 30 October 2015 the claimant started to become aware of negative rumours about the flight. He was contacted by a member of the cabin crew on the HKG flight, the Cabin Service Supervisor. She told him that she had been

humiliated by a pilot down route in relation to the flight and her involvement in it. She said that a text message was read out in front of her, supposedly sent from a Training Captain. It said: "Apparently the flight was one big fuck up", and this pilot went on to say to her that: "It didn't look good for Mike Lawson and he will probably get the sack". The claimant found this concerning to hear considering the investigation into the flight was still on-going.

72. The claimant found it unsettling to hear such negative rumours about him in a professional capacity. He had heard personal rumours before. Pilots like to gossip. He knew that it was necessary to be thick-skinned in the job. Rumours from other pilots about his professional competency was a new experience for him. His abilities had never been questioned before.

73. On 3 November 2015 the claimant attended what the Flight Safety Manager described as a “debrief” [483]. Present were the Flight Safety Manager and two other Captains (neither of whom were involved in subsequent events). The claimant maintained his position that the flight had been conducted safely and that he had made correct decisions based on the circumstances that he faced. During the debrief the claimant’s actions were questioned, but no one said what he should have done differently. He felt that he was being pressured to admit wrongdoing that did not occur. When he did not submit to that pressure to admit wrongdoing, and he had explained his actions, they appeared to him to have accepted his account.

74. Later that day he was advised that they were happy for him to return to flying. It was suggested that his next flight should be with a Guardian Pilot. A Guardian Pilot is an experienced Training Captain, to whom he would be able to talk confidentially, and who would support him in his role on the next flight. This was partly because he had not operated a flight since his duty on 7 October 2015.

75. That is what the claimant knew and felt at that time. He now knows that an ERG had taken place before that “debrief” and that it was critical of his actions and decision-making. However, he was not informed of this or told the outcome of it. At no point did the respondent tell the claimant that he had done anything wrong on the HKG flight. He was told that he was to be returned to flying.

76. After the meeting on 3 November 2015, the claimant was emailed by the Flight Safety Manager to thank him for coming and completing the “formal review”, as she now described the meeting [484]. The claimant therefore assumed that the matter was closed, as he had been told that he was to return to line flying.

77. What the claimant would not have been aware of was an exchange of emails on 3 November 2015 between the Senior Training Captain and the Head of Aircraft Operations [485-486 and 487-488]. From that exchange, it appears that the Senior Training Captain had recently flown with First Office 2 (who had been on the HKG flight with the claimant). He had received an account of the HKG flight from him. The Senior Training Captain stated: “I am adamant Mike Lawson should not return to the line until further investigation … Having heard the events on the flight to Hong Kong, I cannot accept the decisions taken by the Captain and the reasoning behind them. It leaves me completely baffled as to why the flight continued for another 8 hours, if there was no motive behind

it." The Senior Training Captain referred to safety being comprised; his concern that the airline would have been disgraced if news of the flight had reached the press; and to the claimant breaching his duty of care by not getting the co-pilots to hospital. He referred to "many people state how they do anything to avoid flying with Mike Lawson. Many have also said they refuse to fly with him … I cannot let this lie … [and he prompted] further investigation whether he is deemed fit to fly our aeroplanes."

78. That email exchange was also brought to the attention of the Flight Crew Manager) and the Director of Flight Crew and Training that day [489-490].

79. The Head of Aircraft Operations asked the Senior Training Captain to itemise the allegations made by FO 2. He did so in an email later on 3 November 2015 [491-492]. The Senior Training Captain described these matters as "concerns" rather than "allegations". He suggested that FO 2's return to the flight deck had been refused by the claimant. The Senior Training Captain expressed his concern that the claimant had not accounted for the possibility that he himself might become ill, thereby compromising safety. Later, on 23 November 2015, the Flight Crew Manager invited the Senior Training Captain to meet him to discuss his concerns [524-525].

80. The claimant was rostered to fly to Shanghai on 6 November 2015. He was initially going to be taken off that flight so that he could operate with a Guardian pilot. However, the respondent was short of pilots to cover the flights. If the claimant had missed that flight, he would have lost his "recency". Pilots must land an aircraft at least once per month to maintain "recency". In the claimant's view, at least, he had done nothing wrong. He was allowed to continue with his roster as normal. The background to whether the claimant could return to flying with a Training Captain can be seen from the emails at that time [493-512].

81. The claimant was told on 4 November 2015 that he would operate that flight. On the night of 4 November 2015, he checked his roster and he had been taken off the flight. He did not know why at the time, although he now knows that another Captain (not subsequently involved) had sent an email to remove him from that flight [499]. However, the claimant was then reinstated on the morning of 5 November 2015. He operated the flight without incident.

82. What appears to be the final investigation report into the HKG flight was issued on 5 November 2016. It is marked as "Issue 4" [513-522]. The report records the Incident Details [514-516], the Investigation and Analysis [517-520], the Findings [520], the Recommendations [520-521] and the Event Review Group Conclusions [521-522]. The Tribunal must allow that report to speak for itself. It makes no attempt to summarise it here.

83. On 17 November 2015 the claimant heard that four of the cabin crew from the HKG flight had been contacted by the Flight Safety Manager. They had been asked to come in for what was described as "critical meetings" because of "additional questions that have arisen and review the findings of the investigation". They included the Flight Service Manager, the Cabin Service Supervisor and two other cabin crew members [523]. They were interviewed separately on 18, 23 and 24 November 2015 and 1 December 2015. This

unsettled the claimant. He was under the impression that the investigation into the HKG flight had been concluded. He did not know why the cabin crew were still being interviewed. The day before, he received a text message from another Captain [1075] saying that he had heard that the claimant was leaving the company due to the HKG flight.

84. The claimant attended an "Ops Day" on 18 November 2015. This was a two days' training event. This is required once per year. There were approximately 20 pilots on the Ops Day. The claimant was aware there was a rumour that he had left the company because of the HKG flight. In his assessment, the pilots on the course looked surprised to see him when he arrived on the first morning. The claimant felt that he was treated like a "pariah" all day. Only one pilot spoke to him, and no one sat near him all day. He found this disturbing behaviour. He believed it was a result of the rumours surrounding the HKG flight. That evening, the pilots went out for drinks and a curry, but the claimant did not feel welcome, or encouraged to go by the course managers, and so he did not go. He stayed at the hotel and ate alone. He was seated in the bar area when they returned from the meal. None of the pilots approached him, except the two managers. The claimant explained his concerns to them both. They told him not to worry and that it would all go away. They confirmed that they knew exactly what the rumours were, but they did nothing to assist or offer any kind of help and, in his view, simply brushed off his concerns.

85. The cabin crew kept the claimant informed of their meetings with the Flight Safety Manager. The claimant was informed that pressure was being put on the crew by the Flight Safety Manager to agree to events that did not happen. They reported that they were threatened with having to appear before the Air Accidents Investigation Branch (AAIB), and that they "needed to tell the truth", as the Flight Safety Manager had the cockpit voice recorder (CVR). In the claimant's view, this would not be possible. The CVR records on a continuous loop. It can only be accessed and obtained by an engineer on the ground after a flight, with the permission of the Captain, and after trade union consultation. The claimant believed that the cabin crew were aware of this and so knew that they were being threatened with a lie.

86. The claimant was also told by the cabin crew members in question that they should have followed the "Double Pilot Incapacitation Drill". However, it was pointed out to the Flight Safety Manager that this was not in the manual at the time of the HKG flight [114]. This had been added later, without (in the claimant's view) proper procedure being followed [115]. The claimant's assessment was that this new "Pilot Incapacitation Procedure" [118] attempted to explain to cabin crew, on a single page of instructions, how to fly a Boeing 787 in the event there were no pilots. Confusingly, in his view, this procedure could only be obtained by access to the company intranet. Moreover, again in his view, crew were only told how to access it in yet another manual. What was also concerning to the claimant, in his understanding, was that the cabin crew were also asked if he had left the flight deck at any point.

87. The claimant was told by the Cabin Service Supervisor that in her meeting with the Flight Safety Manager on 24 November 2015 she was told that it was a pilot rumour that the claimant had left the Cabin Service Supervisor alone on the

flight deck while he took a physiological break; that she had the CVR for the whole flight; and that “a sleazy story might come out of it”. The Cabin Service Supervisor explained that this did not happen and that she did not fly a Boeing 787. In the claimant’s view, as already stated, it would not be possible for the Flight Safety Manager to have the CVR for the whole flight. If such a recording did exist that proved wrongdoing on the claimant’s part, he questioned why he was not informed about it and why he was not disciplined by the respondent.

88. The rumours about the HKG flight continued while the claimant operated his roster. He felt ostracised. He felt that no one wanted to speak to him. He stopped socialising with other pilots. In the crew room before flights, pilots that he did not know would not introduce themselves. In his account, they would just come up to him and say: "So you're Mike Lawson", and then walk off. If the claimant tried to raise the HKG flight with colleagues, they would ignore him. This was a difficult atmosphere to work in and to operate commercial aircraft. He was aware that his professionalism was being questioned and discussed behind his back. He felt that he had no recourse to defend himself. The issues he was experiencing were caused in large part by the fact that the report into the HKG flight had not been released by the respondent. No article had been placed in the company safety magazine, Fly Safe, to give a definitive version of events, as had happened in respect of a similar event in 2012 [1108]. Therefore, the rumours were allowed to circulate, and to be exaggerated, unchecked.

89. The claimant’s evidence speculates as to the reasons for the respondent’s apparent inaction. The Tribunal does not consider that it is necessary to resolve that matter here. What the respondent did do was release additional procedures and amend the manuals [119]. It also released notices to crew about what to do in these situations, all things that the claimant believed they did on the HKG flight. As people were being reminded in these notices about what to do, everyone assumed that they were being told this because the claimant and his crew did not do these things [1078 and 1080]. This further undermined his position.

90. On 25 February 2016 the claimant operated a flight to San Francisco (SFO). His co-pilot was FO 4, someone that he knew well, and who was happy to talk to him. He told the claimant that he had been informed that the pilots were: "Out cold over Denmark", and that the claimant had been suspended until the respondent figured out how to sack the crew. The claimant also heard rumours that the cabin crew had poisoned the pilots because they were being made redundant; that he had left a stewardess alone in the flight deck while he took a break; and that he had had sex with that stewardess while the other pilots were unconscious in the flight deck. He was also told that people were saying that he was going to be failed in his next simulator test as a reason to sack him.

91. At this time, the claimant continued operating passenger aircraft while aware of these rumours circulating. He had no way to defend himself as the respondent did not release a final version of events. This was a difficult environment to continue operating in as a professional pilot.

92. On 6 March 2016, the claimant was told by the Cabin Service Supervisor that she had spoken to FO 3 while they were on a trip. As noted above, FO 3 was the head of the British Airline Pilots Association (BALPA) Virgin Atlantic Company Council (VACC). The Cabin Service Supervisor reported that FO 3 had said that the CAA was not happy with the Captain of the HKG flight, and that the Senior Training Captain was not happy with the Captain of that flight. The claimant was not aware that this was the case, as the version of the Corporate Safety Report [513] that he had seen was not critical of him.

93. On 10 March 2016, the claimant was told by the Cabin Service Supervisor that FO 3 had called her while she was at home. He told her that a story about a HKG flight was going to "hit the press over the weekend". It is apparent to the claimant that his agenda was to try to get the Cabin Service Supervisor to admit that something inappropriate had taken place on the HKG flight. When this did not happen, FO 3 then said: "It wasn't your flight, it is another HKG". He then followed this call up with a text saying: "Between Virgin and BALPA we have killed this story" [1106]. The claimant believed that this call was to intimidate the Cabin Service Supervisor. It demonstrated (in his eyes) a cosy relationship between BALPA and the respondent at the time.

94. On 11 March 2016, the Cabin Service Supervisor told the claimant that she had been emailed by the Safety Department to advise that there were no cabin crew sanctions in the company recommendations. This concerned the claimant. It left open the possibility of sanctions against the flight crew. The report that he had, and that he had been told was the final version, included no such sanctions.

95. On 29 March 2016, the claimant operated to San Francisco (SFO). He met another Flight Crew Manager (FCM) there. The FCM was organising a party for a pilot that was retiring. The claimant had not been invited. The party was in the hotel that he was staying in. He looked in at the party, but no one spoke to him. He spoke to the FCM. He told him that it was not getting any easier for him with all the rumours and the way that the respondent was handling the fallout from the HKG flight. The FCM confirmed that he had heard many of the rumours about the flight. The claimant told the FCM that he felt that the respondent had not handled it well. The FCM told him that things had come out of the investigation that the company had learned from, but he did not explain what this was. The claimant told him how concerned he was, and the FCM told him not to worry and that it would go away.

96. On 2 April 2016 the claimant was told by the Cabin Service Supervisor that the Flight Service Manager on the HKG flight had informed her that she recently met with a Captain, who was part of the Safety Department and closely tied to the training department. She reported that that Captain had told the Flight Service Manager that the Flight Safety Manager "hated" the claimant and wanted him out [1107]. He said that the Flight Safety Manager was "gunning" for him. This concerned the claimant. He barely knew the Flight Safety Manager. He did not know why she would feel that way about him. The claimant was still working and operating, but the rumours were getting more alarming, in his view. He also knew that his next simulator test was approaching. He had been told from numerous sources that he was being set up to fail this simulator.

97. On 6 April 2016, on the claimant's last flight before the simulator duty on 9 April 2016, he operated to Delhi with FO 5, who he had not met before. After the flight had landed back into LHR, and as they were saying goodbye, FO 5 said to the claimant that he was "really nice to work with" and that he "didn't know what everyone was on about". For the claimant this again showed that the negative rumours about him were prevalent among the pilots and his poor reputation preceded him, with still no way to defend himself.

98. The claimant's next "sim" check (simulator check) was an LPC with a Training Captain, to whom the Tribunal will refer as Training Captain AA, on 9 and 10 April 2016. The claimant felt that the respondent wanted to fail him in the sim, but he was confident in his ability to pass, as he had never had any issues with sims before. Not only had he never failed a sim in his career of 23 years, but he had never met another pilot who had failed a sim. However, the weeks of increasing stress had taken their toll. He did not know Training Captain AA. He was not sure what to expect. He was very nervous.

99. All sim checks are operated with two crew, with one acting as Pilot Flying (PF) and the other as Pilot Monitoring (PM), and then swapping roles. The other pilot in the sim with the claimant was First Officer 6. When they arrived at the simulator, they went to the coffee area. Training Captain AA said to them: "OK guys, any gossip?" The claimant said: "Please don't talk about gossip, I keep hearing I let a girl fly the plane". Training Captain AA ignored the comment, then changed the subject, and got up to get a coffee.

100. The briefing before the sim was a long one. Both FO 6 and the claimant agreed that they were confused before they set foot in the sim. The claimant was to be PM on day 1, with FO 6 doing the flying (PF). The claimant was told by Training Captain AA to let FO 6 "run the ship" while he was the PF. This was a normal comment when in the simulator. It means not to be overly controlling as a Captain to allow the FO space to make decisions by himself. It provides valuable experience for FOs.

101. Nevertheless, during the briefing after the first day, even though the claimant had not flown the simulator, he was criticised by Training Captain AA – but FO 6, who had been flying, was not. Training Captain AA told the claimant that he was close to failure, but he did not say why or what he had done wrong. Training Captain AA told him that his performance the next day as PF had to be "exemplary". The claimant found this to be aggressive and intimidating. He felt that he was being asked to perform to a standard higher than required by the respondent or the CAA.

102. In the hotel that evening the claimant was confused and upset. After a sim it is normal to go back to the hotel with the FO, and to have a meal and perhaps a drink together. The claimant suggested this to FO 6, but he was reluctant. He eventually agreed to meet the claimant for a coffee. FO 6 told the claimant that he thought that the respondent was "getting" the claimant for the HKG flight. He was clearly very anxious about being paired with the claimant in the sim.

103. On day 2 of the sim, the claimant was very nervous when they attended the briefing. Training Captain AA put a slide up on the projector saying that it was cost prohibitive for airlines to employ non-military pilots. Both the claimant and FO 6 looked at each other, as neither of them were from a military background. Training Captain AA then said quite aggressively: "Who here has been in the Air Force?". No answer came, so he put his own hand up and said: "I am employed by the airline to train people like you up to standard". The claimant found this to be an incredibly aggressive and unsettling way to start a sim check and it made his nerves even worse.

104. As the claimant had not flown on day 1, he was briefed by Training Captain AA that they would start with a practice windshear on take-off to "get your hand in". FO 6 had done the same on day 1. He had discussed with Training Captain AA that the controls were twitchy during the procedure. The claimant asked for clarification. Training Captain AA snapped at him and said: "Twitchy, it's twitchy, you will get to practise". During a windshear, the PF is controlling the aircraft and the PM is constantly feeding information to the PF, such as changing altitude, vertical speed, and position etc. This is standard practice and good airmanship. The claimant felt that the windshear was executed satisfactorily, and the aircraft was kept under control. Practice windshear events in the sim are always extreme, as there is no point in practising light windshear events in the simulator. Training Captain AA made no comment about how it had gone.

105. The claimant then went through, and successfully performed, all his test items. No comment was made, and everything went well, in the claimant's view. Training Captain AA commented on the report [525A] that the claimant flew these items at above company standard.

106. They completed the sim and Training Captain AA told them to go to the coffee lounge. The claimant and FO 6 sat there for almost an hour, which was unusual. This had never happened in any sim check that the claimant had been involved in before. The claimant and FO 6 discussed how strange and awkward the last two days had been, and how unfair and confusing Training Captain AA had been. It is the claimant's belief that the delay was due to Training Captain AA being in conversation with the Senior Training Captain to find a reason to fail him. The Tribunal has no positive evidence on which to make such a finding that this was the case.

107. Training Captain AA then called them back to the training room. He informed the claimant that he had failed on the windshear. The claimant questioned this as he had been told it was a practice. Training Captain AA aggressively replied: "No, that was a fail". The claimant was not informed of anything else that had been failed, which he now believes is against DOC 24 policy and as set out in section 5.11 of the respondent's Training Operations Manual (TOM). Training Captain AA asked if the claimant had any comment, to which he replied: "None".

108. When the claimant went back into the briefing room, Training Captain AA was in conversation with another Captain – a Training Captain who the claimant had known for many years. He greeted the claimant and told him that he did

not know that the claimant was on the Boeing 787. The claimant found this odd as it was this Training Captain who had conducted his final line check on the Boeing 787 to Los Angeles (LAX) in July the previous year. The claimant regarded this as another example of how people were acting differently towards him due to the rumours following the HKG flight.

109. A note prepared by Training Captain AA appears at [338] and his report is at [341-345] and also at [526-534E].

110. As he had never failed a sim before, the claimant had no knowledge of what he was supposed to do next or that he could appeal against the result or the conduct of the sim. He is aware now that there is a “conduct of check” procedure, set out in CAA Document CAP 1049, to challenge the conduct of a sim check. He did not know this at the time. It is something that Training Captain AA should have made him aware of upon notifying him of his failure. This is also set out in section 5.11 of the TOM: "The examiner will detail any further training requirement and explain the trainee's right of appeal". This CAA procedure involves appealing to the CAA in respect of the sim report and requesting that the CAA reviews the conduct of the test to determine whether it was properly conducted. He would not have been able to follow this procedure even if he had known about it. He also raised the conduct of Training Captain AA in the later informal training review, but again he was not informed of the CAA conduct of check procedure.

111. It does not appear that the claimant’s failed sim reports themselves were submitted to the CAA. The claimant contacted the CAA to request copies and the most recent report they had was dated 22 May 2015 [1021]. The respondent has provided an acceptable explanation of this in the hearing.

112. The claimant contacted the VACC Chairman (FO 3) to let him know that he had failed the sim. He told the claimant not to worry and just to follow the process. In circumstances when sims are failed, a consultation with the BALPA simulator specialist, another Captain, sometimes happens, but that it was not necessary at this point. BALPA was the claimant’s only source of help at that time, but he felt that BALPA was not supporting him. Although he was a senior Captain in the airline (that is, senior by service), he found it strange that no one in the training department contacted him to discuss what had happened.

113. The claimant was then contacted by the Senior Training Captain on 14 April 2016 to say that he had put a training package together for him, including a simulator session, so that he could subsequently re-take the LPC/OPC [535]. The claimant had still not seen the report of the sim at this point, and he was not told what that training package was. He found it strange that a training package could be put together without discussing the sim with him and where he had failed.

114. On 15 April 2016 the claimant received an email to advise that the sim report was ready to view on the internal training filing system where reports are posted [536]. When reports are posted there, the pilot involved is notified, and so is the Senior Standards Captain, so he would have seen the report, but he raised no issue with how the sim was conducted. This was the first time the claimant had

been informed of what items he was supposed to have failed. He was so upset and traumatised by the whole situation, he could not read the sim report properly or process its content. He knew that he had passed all the mandatory items.

115. The claimant considered that there were several anomalies with the report of the sim check. In the General Comments section of the report [325A], Training Captain AA who conducted the examination referred to "Retests on day 2". The claimant did not consider that there had been such retests. Retests happen when a pilot has failed items at the first attempt. The pilot is then briefed on those items in the training room before going back into the sim to retest them. This did not occur. The claimant was not briefed on any failed items from day 1 and then retested. He had passed all the PF items on day 2 at the first attempt, and to above company standard, except (according to Training Captain AA) for the windshear, which he believed had been briefed as a practice. The report stated that Training Captain AA had asked for exemplary performance on day 2, and that day 1 included 5 failed items at the first attempt. The claimant was not flying the aircraft on day 1. He was not told that he had failed anything at the end of day 1 and neither had FO 6 been. If an item is failed, the pilot is supposed to be briefed, provided with training, and then retested. This did not happen.

116. The report referred to the windshear resulting in the aircraft at 27 degrees nose up and FO 6 talking the aircraft back under control. It is good practice for the PM (Pilot Monitoring) to feed the PF (Pilot Flying) constant information to assist their handling of the windshear, but the claimant was at the controls, and he believed that he maintained control of the aircraft. He knows now that the maximum allowable angle in a windshear manoeuvre for a Boeing 787 is 30 degrees, as stated in the 787 flight crew operations manual [1081]. Even if 27 degrees was reached, it would be within acceptable limits. By their nature, windshear manoeuvres in the sim are extreme to allow practice in extreme conditions, but the claimant believes that he maintained control of the aircraft throughout. By whatever measure one looks at this, in the claimant’s opinion, it was a successful manoeuvre. As briefed, it was also a practice element, not a mandatory tested item.

117. The report states that Training Captain AA stopped the test after the windshear. That is not correct. The windshear manoeuvre was the first thing that the pilots did on day 2. The claimant believed it to be a practice manoeuvre to get him used to the controls before the test properly started. The report then shows that they continued with all the test items and that the claimant passed to above company standard.

118. There is a reference in the first paragraph of the report to an engine surge. The simulator was being flown by FO 6 on that first day, when FO 6 was the PF and the claimant was the PM. An engine surge is where the engine power fluctuates, which distresses the aircraft. During a sim, pilots often must deal with an engine failure on take-off, which is dealt with by shutting the engine down. The decision of FO 6 to deal with the surge was to shut the engine down. As FO 6 was flying at that point, and they were in a sim, the claimant gave FO 6 the leeway to make that call rather than take over the decision, as he would

do if they were flying for real. That decision was criticised by Training Captain. AA.

119. The only item marked as a fail on the report is the windshear, which was briefed as a practice, and the claimant considers that he did not fail that item based on the published parameters of the aircraft. In respect of the items marked "Attempt 2", the claimant was not told that he had failed these items at the first attempt. He was not given any immediate training in respect of those items. He was not retested on them. The claimant therefore believes that Training Captain AA incorrectly marked these items as a fail after the event in order to fail the claimant's sim. The Tribunal considers that the conduct of the sim and the report of it gives that impression or appearance.

120. The claimant had been removed from active line operations because of the failed sim check [537, 538]. An email from the Senior Training Captain resulting from that referred to the plan being for the claimant to have "one session in the sim (if that) for SOP and checklist discipline training" and that the sim would incorporate leadership and management competencies [539]. The claimant's "complacency" was highlighted and "thus a search of his technical knowledge will be necessary."

121. On 18 April 2016 the claimant received a letter from Captain BB, a Training Captain and senior manager, inviting him to an informal training review on 25 April 2016 [545]. The background to that invitation can be seen at [541-544, 546-551]. The informal meeting was said to be in accordance with sections 3.19 and 3.20 of the Training Operations Manual (TOM). The claimant would not have seen the Senior Training Captain's comment to Captain BB: "Serious concerns over all of his pilot competencies as a commander. Known to the company with history of issues" [551].

122. BALPA did not offer to assist the claimant at this meeting, so he reached out to his Flight Crew Manager, who he had previously discussed his issues with. They arranged to meet before the informal review, and he agreed to come into the meeting with the claimant. They went over the issues that the claimant was concerned with; the rumours around the HKG flight; and the suggestion that the Flight Safety Manager wanted him out. The Flight Crew Manager said: "While that might be the case, do not bring it up in the meeting".

123. The claimant therefore did not raise any of the issues that were bothering him at that meeting, relying on that advice. He did bring up the conduct of Training Captain AA who had conducted the sim, but no comment from the reviewers (Captain BB and the Senior Training Captain) was made in response. Captain BB looked at the sim report and said that he thought his daughter could do better. (It is not clear to the Tribunal whether that is a comment in relation to the claimant's performance or in relation to the writing of the report itself or the conduct of the sim). In the claimant's view, this should have set alarm bells off to the reviewers that he was flying perfectly safely just three days before the sim, and the previous 17 years of his career with the respondent, but now he appeared to be a professional pilot that supposedly could not fly competently. As the report showed that he passed all the mandatory elements to above company standard, this comment did not make sense to the claimant.

124. The claimant was told during the meeting that he would be provided with re-training by a Training Captain and that a re-test would not be scheduled until his standard was high enough to pass a further test. The details of the training package that supposedly had been put together previously were not discussed. It was said that the training would include some time in the classroom static Boeing 787 trainer and at least two sim sessions with a Training Captain.

125. The claimant did not receive the minutes of that meeting. However, a note [552] apparently prepared by Captain BB and the Senior Training Captain recorded that “the goal is to retrain Mike to Company Standard and then he will be retested for his LPC/OPC. The retraining will be conducted by a Company Training Captain … [It] will concentrate on Management and Leadership together with Electronic Checklist discipline. In addition, manoeuvre-based training of the failed item will be retrained. Any other areas for retraining will be at the Training Captain’s discretion.”

126. On 27 April 2016 the claimant received an email from a Pilot Training Coordinator informing him that "a couple of Training Sims" (which he took to mean two) were planned before his next LPC/OPC [553]. The first one was scheduled for the next day.

127. However, later that day, he received a further email saying that fleet management (the Senior Training Captain and another Captain) had stated that there was no need for the second sim [555]. In the claimant’s view, they could not have known that he did not need the second sim when he had not yet done the first sim. He interpreted this as showing that they had no intention of training him to the relevant standard before the re-test. His belief is that this was because he was already at the required company standard, and they were going to fail him on the second test, no matter what. He considered his fate to be pre-determined at that point and it seemed that there was nothing that he could do to change that.

128. Later that day, Captain BB informed the claimant that the retraining the next day would “concentrate on Technical and SOPs as well as general decision making and teamwork. You will also have time to practice some general handling” [556].

129. The one training sim that the claimant did do was with a Training First Officer, who had been the first FO who had been ill on the HKG flight in September 2015, FO 1. He was a Training First Officer, not a Training Captain. That meant that he was not able to train the claimant in any command issues, which is what the Training Captain in the sim test had criticised. He was also not a TRE, only a TRI, and so did not have the knowledge or the authority to advise that the claimant was ready for the re-test (or not).

130. The claimant is suspicious of the involvement at this stage of FO 1. His belief is that FO 1 was used for the training partly to unsettle the claimant, as he had been on the HKG flight; partly to keep a limited number of people involved in his planned removal from the company; and partly because he was more junior and looking to gain a command at some point in the future, and so

he would be more liable to do what he was told, whereas an experienced Training Captain would have more integrity.

131. The sim session with FO 1 took place on 28 April 2016. The claimant assessed FO 1 as looking very uncomfortable to be there. He was avoiding eye contact with the claimant and kept repeating the phrase: "Get that monkey off your back". The claimant considered that the detail went well. At the end, FO 1 said that the claimant's standard was very good, and there was no reason why he would not be ready for a test. He asked the other pilot taking part in the sim (two pilots being necessary for a sim session) if he agreed with those comments. That pilot, FO 7, said: "Absolutely, yes". FO 1 conducting the sim session then said: "I don't know why you are even here, but we won't go into that".

132. After the session, they bumped into another Training Captain, who asked why they were all there. FO 1 explained it was because the claimant had failed a sim check. That Training Captain then said: "Why, has someone got it in for Mike?". After the sim detail, the claimant emailed FO 1 to thank him.

133. A note prepared by FO 1 appears at [339] and his report is at [346-352]. The report is also at [557-559B]. The objectives appeared to have become more generalised and, specifically, leadership and teamwork were not tested [557].

134. Despite the sim detail going well, in the claimant's assessment [563-564], and FO 1 telling him that he had performed perfectly well and that he was ready for a re-test, FO 1's report is critical of the claimant's performance. See, for example, the comment towards the bottom of [559B]. The claimant's belief is that, if his performance was poor, why was this not pointed out and discussed at the time? Why was he being put in for the re-test after being told that it would not be scheduled until he had been trained to the correct standard? Again, this added to the claimant's concern that his fate was pre-determined.

135. The next sim check was on 3 May 2016 with the Senior Training Captain, who had been part of the earlier review meeting. He arrived late to the simulator and, in the claimant's experience, worked relatively fast and aggressively. In his experience, this was the only sim in the claimant's career that had such an intimidating atmosphere. Given the stress and anxiety the clamant had been suffering from for some months, this was the worst possible environment for him.

136. The Senior Training Captain began with very detailed technical questions that the claimant believed anyone would struggle with. He believed that this was done to catch him out. When he could not answer some of the questions, the Senior Training Captain said: "Mike, what on earth have you been doing these last few days?". The claimant found the sim was intense and a very uncomfortable atmosphere. At one point he heard a camera click and saw that the Senior Training Captain appeared to be taking pictures of him with his iPad. The claimant had no idea why he would be doing this, although he speculates as to why in his evidence. The Tribunal does not consider it necessary to resolve that question. During the sim the Senior Training Captain threw

different situations at the claimant in quick succession. The claimant's opinion is that this was done to overload him, to overwhelm him and to force mistakes.

137. One of the items necessitated a simulated landing at Dubai. The Senior Training Captain was acting as the Air Traffic Controller (ATC) in the tower. He advised the claimant that there was a tail wind at the landing runway. It is important to try to land into the wind if possible. The claimant therefore instructed the FO (the pilot acting as the PM alongside the claimant as the PF) to ask the tower if the claimant could land the aircraft on the other runway so that he was landing into the wind. The Senior Training Captain, acting as ATC, denied this request. As the claimant was within tail wind limits, and the situation also included an uncontrollable fuel leak, so that he had to land as soon as possible, the claimant executed the landing with the tail wind. The Senior Training Captain subsequently criticised the claimant for not insisting to the ATC (that is, the Senior Training Captain acting out that role) that he divert to the other runway. In the claimant's analysis, this is a good example of how the result of a sim check can be manipulated to gain the result that the TRE is trying to achieve. Another TRE would likely have passed that element, in the claimant's view, but the Senior Training Captain made it impossible for him to do so. He has no doubt that if he had insisted on diverting to the other runway the Senior Training Captain would have failed him for not prioritising the fuel leak. Many tests are subjective, to a certain extent, and apart from items that must remain within certain parameters, are reliant on the interpretation of the TRE.

138. The FO in the sim with the claimant was FO 8. He commented to the claimant during the break about the technical questions: "I couldn't answer those, he's after you, isn't he?". He also commented that he thought it was a "chop ride". A "chop ride" is where a pilot is intentionally failed in a test by the examiner to remove them from flying. After the sim, FO 8 said: "OK, well done, good job, just low viz to do tomorrow". The claimant replied: "No, you watch we will go back up and [he] will fail me". When they went back up for the debrief, and the Senior Training Captain told the claimant that he had failed, FO 8 went white and fell silent.

139. In the debrief the claimant explained to the Senior Training Captain that he believed his performance was affected by the rumours and gossip surrounding the Hong Kong flight. The Senior Training Captain said: "No, that is all finished". The last paragraph of the sim report [573E] states that the claimant was aware of his failings, embarrassed, lacked confidence and recognised a failure for knowledge to sink in. The claimant did not report any of this to the Senior Training Captain after the sim. His belief is that the Senior Training Captain added these comments to give credence to his poor report of the claimant's performance.

140. A note prepared by the Senior Training Captain appears at [340] and [564A]. His report is at [565-573E]. The Tribunal suggests that the report must speak for itself. It will not attempt to summarise or reproduce it here.

141. In the car park after the sim, as they had only used one day of the two days session, the Senior Training Captain told the claimant that he was going to try

to arrange a Formal Training Review meeting for the next day – in other words, a meeting the very next day at which it might be recommended that the claimant be dismissed. At that stage, he had not been informed of what he did in fact fail or view his report that should have been submitted to the CAA, which in his view was the procedure set out in DOC 24 and the respondent's TOM.

142. The claimant did not respond to this suggestion. He did not receive any invitation to this review meeting and so he did not attend any meeting on 4 May 2016. He spoke to the Chairman of the VAACC, who suggested a meeting to discuss matters with him and the BALPA national officer.

143. The claimant did not receive the report until 10 May 2016 [564A]. It states that the sim was stopped after 6 failed items. This is against the training guidance. Pilots are supposed to complete the detail and then there is a count of how many failures there have been. If there have been more than 5 failures, the test is failed. It is not the procedure for the TRE to keep a running tally of how many items have been failed and stop as soon as it exceeds 5 failed items. In the claimant's mind, this showed that the Senior Training Captain wanted him out of the sim as soon as possible rather than let him complete the detail. He knew that he was going to fail him, no matter how he performed, and wanted it over with as soon as possible.

144. In respect of the items failed on that test, in the claimant's view, many are subjective. The misidentification of an engine rundown rather than severe engine damage is, in the claimant's assessment, irrelevant to a large extent, as the procedure to remedy the issue is the same – that is, to shut the engine down, which is what the claimant did. To correctly identify the issue with an engine, it would need to be inspected by an engineer. All that the claimant knew at the time is that there was a major issue with the engine and that it needed shutting down. He therefore believed that he handled the situation correctly and the outcome was positive.

145. The claimant met with the Chairman of the VACC (FO 3) and the BALPA National Officer on 8 May 2016 at Gatwick. He took his brother, who is a Captain with another airline. He discussed his situation starting from the Hong Kong flight, and the rumours that had developed since it, and that he had been told he was to going be failed on these sims. The Chairman of the VACC was not receptive to the idea that the Hong Kong flight and its rumours were a contributory factor. He told the claimant that the company was not accepting it, but he did not say who told him that. This was very frustrating for the claimant, as he knew that the Chairman of the VACC had been aware of the HKG flight and its rumours for months. The claimant believes that he was personally involved in gossip and that he had said to crew down route, a month before the claimant's sims, that the CAA were not happy with the claimant, and neither was the Senior Training Captain. The Chairman of the VACC told the claimant that he thought it was highly likely that the company would bypass any more training and go straight to dismissal. He said that the claimant would be lucky to get 5 months' money if that was to be the case. The claimant thought this was a very odd statement for his trade union officer to be making. He was not offering the support he would expect. He told him he would go into the office at some point, and he would have a chat with relevant managers to find out more.

146. On 12 May 2016 the claimant received a letter from Captain BB requiring him to attend a Formal Training Review Meeting on 19 May 2016 [592-601]. The background to the preparation of that letter can be seen at [577-589]. The letter stated that the conclusion from the meeting may lead to dismissal from the company. Two pdf files were attached to the email [594] – one that is entitled "ML Final Letter", and another that should be the relevant section of the TOM, but it is only 5 pages long and contains just the odd pages of that section. The claimant was distressed by the letter. He contacted the Chairman of the VACC for advice. He again told him that he would enter into a dialogue with the relevant managers.

147. The claimant met with the Chairman of the VACC and the BALPA National Officer again on 15 May 2016. They advised him that, if he were to attend the Formal Training Review on 19 May 2016, he would be summarily dismissed from the company that day. They then advised him that his only options were to resign and to allow them to negotiate a leaving package, what he now understands to be a settlement agreement, or to take the matter to an Employment Tribunal. They said that Training Captain AA, who had conducted the first sim test, and FO 6, who had been the other pilot in that test, were denying that any comment had been made about Air Force pilots. The Chairman of the VACC explained that it was better if he negotiated the agreement alone, and that way the claimant would not have to go to the Training Review or need to see anyone again. He said: "You would just hand your uniform back, and that would be it". The claimant was shocked at his comments and said: "Go? Where? I have a 787 rating. Norwegian [another airline that operated the 787] is out because [the Senior Training Captain who conducted the second sim] used to fly with them". He responded: "No it's ok I will get you a reference". The claimant asked who had made this decision. He hesitated and started to say a few different names, but then seemed to settle on Captain BB**.**

148. The Chairman of the VACC told the claimant on 18 May 2016 that he had begun discussions with the respondent to negotiate a leaving package. See [603-604]. The claimant was not involved in those discussions.

149. On 22 May 2016 the claimant was contacted by the Cabin Service Supervisor from the HKG flight, who had just flown with a BALPA union representative, CC. She told the claimant that CC was very concerned about the way the claimant had been treated by BALPA and the respondent.[4] He told her that he was ready to resign from BALPA after emails he had received earlier that week [612-613]. He told her to get the claimant to call Dave Singleton. Both Dave Singleton and CC were involved with the VACC. Dave Singleton had been the Chairman before FO 3. In the claimant's view, Dave Singleton was very well respected by the pilots and known to be completely straight. CC was well known on the Airbus fleet as being quite an opinionated union representative.

[4] See CC's separate email at [605-611] in which he shared his assessment of the claimant's situation; and FO 3's reply at [612-613]. It is apparent that the case was causing some concern within the trade union. See also [614-620]. The Tribunal is not concerned with this matter.

150. In the claimant's first contact with Dave Singleton, as a result, Dave Singleton was primarily concerned with the claimant's health, as he knew that he was dealing with this stress on his own with no support. He advised the claimant to go and see his Air Medical Examiner (AME) and GP, which he did, to get some medical assistance.

151. The claimant felt let down by BALPA until Dave Singleton and CC stepped in to support him. He believed that the Chairman of the VACC at the time was trying to help the company get rid of him quickly and quietly rather than representing his best interests. In the claimant's opinion, there had long been issues within the respondent's pilot community in respect of (what the claimant believed to be) the sometimes overly close relationship between the VACC and the respondent's management, which had led to the creation of an alternative trade union, the Professional Pilots Union (PPU), that the claimant turned to for support later.

152. The claimant saw his AME on 26 May 2016 as he was due for his annual medical examination anyway. The AME asked if he was OK as he appeared stressed. They discussed the events of the preceding months and the claimant's physical and mental state. The claimant explained how the rumours following the HKG flight, and the way he had been made to feel ostracised by his colleagues, had left him feeling depressed, anxious and unable to sleep. The AME suspended the claimant's medical certificate and referred him to a CAA psychiatrist for a consultation. This led to a referral for cognitive behaviour therapy (CBT) from 29 June 2016 to 23 January 2017 which he found to be helpful.

153. During the time that he was signed off, the claimant's managers did nothing to support him. He emailed his sick notes, but it is not clear what, if anything, was done with them. There are procedures in the Red Book [240] for what happens when pilots are signed off sick, whether short-term or long-term, but none of these were followed. There is an income protection scheme that pilots are supposed to be referred to after being off sick for 21 days. This did not happen, even though the claimant was off sick for almost a year. Even when he notified his manager that his medical had been suspended, he did not acknowledge this for almost a week and did nothing to support him.

154. The claimant's health had deteriorated. See [628-630, 634]. He was struggling to cope. Dave Singleton helped him to draft a letter [650] to the respondent's General Manager of Flight Operations. This was someone who the claimant had known for a long time on the Airbus fleet, and someone (he believed) who knew him to be a good pilot. As he was in a senior position, and the claimant knew him, and Dave Singleton knew him to be a reasonable individual to work with, the claimant reached out to him as a last attempt to get his career back on track. He was, in the claimant's opinion, the first manager who took the slightest interest in the claimant's health. He recommended that the claimant should see the company doctor. He asked his Flight Crew Manager to arrange this, but it took him 20 days to action this request, despite him telling the claimant that it had been done a week before it actually was.

155. The claimant saw the company doctor on 26 July 2016. The company doctor was aware of the circumstances of the HKG flight as he had been consulted in respect of the medical aspects. The claimant explained to him the timeline of events that resulted in his then medical condition [622-626]. He explained that he had not received the final report and he had been informed that safety manuals had been changed after the flight. The company doctor said: "Between you and me, the company were quick to change the manuals because they were scared of outside investigations, the AAIB and the Belgrano". The reference to “Belgrano” is a reference to the CAA building near Gatwick which supposedly looks like a ship. He agreed to send the claimant his medical assessment for his approval and confirmation, before releasing it to the company.

156. The rumours about the claimant, the HKG fight, and his sims were constant throughout this period. The claimant was told by a cabin crew member that pilots were now saying that he had failed the sims on purpose to get a pay-off. He also heard that some pilots thought he had already been sacked and was working for Norwegian.

157. On 12 August 2016 the claimant received the invitation to the Formal Training Review, to take place on 12 September 2016, from Captain BB [690]. In the letter Captain BB said that the company doctor had advised him that the claimant was fit to attend the meeting. The claimant found this disturbing as he had asked the doctor to let him have any information before it was sent to the respondent. Captain BB did not ask the claimant how he was or whether he was fit to attend a meeting. The fact that the Senior Training Captain was going to be at the meeting was very intimidating for the claimant. The claimant felt at that point that there was nothing he could do to change his fate. Objecting to the Senior Training Captain's presence would not help his case. He felt that it would have opened an argument as to why he did not want him there. The claimant preferred to avoid the confrontation.

158. Together with CC, the claimant met with Captain BB for the Training Review Meeting. The claimant was told that he would be informed of the decision within 14 days. Captain BB did not ask any questions regarding any mitigating circumstances. Captain BB also said he would read a letter from FO 6 criticising the claimant’s performance in the sim. The claimant found this to be very unsettling. It contrasted with what was discussed between him and FO 6 on the day of the sim. This was highly unusual. The claimant has found no reference to this letter in any of his files following a data subject access request. He questions whether such a letter ever existed or whether it was being used to intimidate him.

159. In a separate meeting on the same day, CC took the claimant to meet with the Director of Flight Crew and Training. He told the Director his concerns, and that this situation stemmed from the HKG flight, and the incorrect and malicious rumours that had spread from it. The Director told him that the company reported its findings on that flight to the CAA and the AAIB. He said that if he found out that people had done wrong, they would be brought to task. The claimant told him that he had still not seen the final report, as he should have, and the Director agreed to email it to him. He did not do so.

160. There was another meeting with the Director of Flight Crew and Training on 17 October 2016, in which he told the claimant that he was not going to be given any further training. Dave Singleton recommended that the claimant write to him to try to build bridges and to request help with his health and getting back to work, which the claimant did on 31 October 2016 [730]. Dave Singleton drafted the letter for the claimant. At the time he was finding it very hard to process what was happening to him. His mental health was not in a good state. He had not yet seen all the emails between the various actors involved. That came later out of his data subject access request. It was difficult to believe at that stage that the Senior Training Captain and Captain AA and others were conspiring (in the claimant's view) to remove him from the company, despite the rumours that this was exactly what was happening. The claimant knew that he had not been in a good frame of mind for some time since the HKG flight. He believed that this could have affected his performance in the sims. He therefore laid this all out to the Director of Flight Crew and Training in the hope that he would help him, but he did not.

161. By this time, the Cabin Service Supervisor from the HKG flight had commenced a grievance in respect of how she was being treated because of the HKG flight. As part of this, she had a meeting with the respondent's Head of Safety, on 6 December 2016. The Cabin Service Supervisor told the claimant that she mentioned to the Head of Safety that she had not seen the final report and that the Head of Safety showed her a report dated 5 November 2015 entitled "Issue 4". At that point, the claimant had only seen "Issue 2" dated 23 October 2015. The Cabin Service Supervisor said that she had been told by the Head of Safety that it had been determined by the safety team that "rules were broken for company gain". The Head of Safety did not say what rules were broken or who had broken them. Of concern to the claimant was that it was reported that the Head of Safety had admitted that the company was aware of the rumours the claimant had been subjected to, but she had decided not to address them. In the claimant's opinion, the respondent could have addressed rumours that circulated, either by an article in Fly Safe magazine or by a notice to crew [1018 and 1108].

162. Because the respondent had not provided the claimant with the final version of the report into the HKG flight, the claimant contacted both the CAA and the AAIB to ask for a copy. The relevant manager from the CAA called him on 22 November 2016. That manager told him that they did have the report and that he had read it. The manager said that after consulting with colleagues more senior than himself, they had taken the unusual step of calling the claimant directly. He told the claimant that they could not send the report to him directly, but that he should contact their whistleblowing department if he wanted to take this further.

163. On this basis, the claimant considered that he had now received confirmation that there was a further version of the report that he had not seen. He contacted SafeCall, the respondent's own whistleblowing processing service. He felt that he should follow the respondent's procedure for whistleblowing, as laid out in the Red Book, before he followed up on his contact with the CAA. He telephoned their contact centre on 13 December

2016. He spoke to a call handler. He detailed the events since the HKG flight. The call handler said he was unsure that SafeCall could help him. He explained that his company were only processors and not investigators, and that the claimant's report would only go back to the very people he was calling in about. The call handler wanted to talk to his own manager. They agreed that they were obliged to send something to the respondent. They would reduce the report to two issues: the manual changes and the fact that the claimant had not seen the final investigation report.

164. The claimant received a follow-up call from SafeCall on 18 December 2016. He was told that the respondent's HR Manager and Legal Counsel had contacted them. The claimant was told that he had in fact already received the investigation report.

165. As a result, the respondent's HR Manager and Legal Counsel emailed the claimant on 22 December 2016 [751]. He attached the investigation report dated 23 October 2015 ("Issue 2"), but he also included (in the body of the email) the ERG recommendations that the claimant had not seen before. The respondent did not respond in respect of the changes to the manuals and the claimant had still not been sent the final version of the investigation report ("Issue 4"). The ERG recommendations did not make any sense to the claimant.

166. The first recommendation under "Captain" read: "The Captain's formal review should be with a Guardian and an HF [Human Factors] representative so as to allow for an escalation path should the Captain continue to have difficulty in understanding why his decision making was poor. This review should also cover the use of the Company's decision making tool as it is believed that had this been used, the Captain would have made a different decision". This was the first time that the claimant had heard that he should have a formal review with anyone in respect of the HKG flight. No such review had taken place. It was not clear to him what was meant by an escalation path or why one was needed. No one had told him that his decision making was poor or that a different decision should have been taken. If he had been told that his decision making was poor, as a professional pilot he would not have wanted to operate a passenger jet until it had been resolved. He also did not understand the reference to the company decision making tool. It was not clear what was being referred to here or what decision he would have reached if this tool had been used. Whatever the different decision they referred to was, it was not contained in these recommendations.

167. The second recommendation under "Captain" read: "During the Captain's review, the reason for the inaccurate recording of rest and lack of discretion reporting should be explored." In the claimant's opinion, on each flight almost always the FO records the rest that has been taken by each pilot. After the HKG flight this had been done by FO 1. After a flight a Captain would sign the form, but he would not feel the need to check that their FO was filing in the paperwork correctly. They are trusted to be able to do so accurately. FO 1 was also a Training FO and TRI, and so he should know what he was doing. The claimant had submitted a discretion report in respect of him not taking any rest, retrospectively, when asked to do so by Crew Records. He was not trying to

hide any information. He did not know why the ERG stated that this needed to be explored.

168. The third recommendation under "First Officer" read: "As well as the two FOs, this recommendation should apply to all company pilots by way of a notice". In the claimant's analysis, what recommendation should apply to all pilots? This made no sense to him.

169. The fourth recommendation under "Organisation" read: "Recommendation #3 should be Avmed training (not SEP training)". It was not clear to the claimant what recommendation #3 was and he did not understand this.

170. The fifth and final recommendation under "Organisation" read: "The organisation should consider mandating a call to Medlink for any flight crew member illness (rather than incapacitation)". This recommendation was understandable. However, the claimant did not know how this would have changed anything for the HKG flight. If the crew had called Medlink to discuss the health of the pilots, in the claimant's view, Medlink were not going to suggest diverting the aircraft to an unfamiliar and remote airfield to get urgent medical attention for two people with minor common illnesses.

171. By March 2017 the claimant regarded himself as still in a state of limbo. He was signed off as sick, but he had not been referred to the Permanent Health Insurance Scheme and he remained on full pay. He had had no discussions with the respondent about whether he would be able to return to work and he had not received the outcome of the Formal Training Review. He saw the company doctor again on 3 March 2017 and he confirmed that the claimant was not fit for any duties. He also told him that he suspected that the reason the respondent had not sacked him by then was because he had not signed a non-disclosure agreement.

172. On 18 April 2017 Dave Singleton informed the claimant that CC had spoken to Captain BB while abroad. CC told Captain BB that he was not acting for the claimant anymore, but that the claimant was still waiting for the Training Review outcome. It was reported that Captain BB had told CC that it was nothing to do with him (Captain BB), and that he had wanted to give the claimant training and to get him back on the line. However, he had been overruled and stopped in doing this from above. To the claimant's mind, this removed any doubt about his competency. It called into question the entire Training Department. It threw a spotlight on (what the claimant believed to be) Captain AA's and the Senior Training Captain's dishonesty.

173. In May 2017, as the claimant believed that he had been severely let down by FO3 and BALPA, and because having CC represent him had not improved his position, the claimant sought advice from the other pilot union at the respondent, the PPU. They advised him to file a formal grievance, which he did on 11 May 2017 [847]. On the same day, he received an unsigned letter sent from the respondent's HR department. This was purportedly from Captain DD, a Senior Flight Crew Manager. It advised him that Captain EE, Senior Training Standards Captain, had completed the Training Review. It invited the claimant to a formal meeting on 15 May 2017 [843].

174. Although there had been a delay of almost a year in completing the Review, the claimant felt that giving him notice on a Thursday of a meeting that could (and did) result in his dismissal the following Monday was insufficient. He requested a short delay to allow him time to process what was happening and to prepare himself for the meeting. This request was denied. The claimant was told that if he did not attend it, the meeting would go ahead without him. Given the state of his health at the time, which was well known to the respondent even though they refused to acknowledge it, the claimant believed that this was unreasonable.

175. At the meeting on 15 May 2017, the claimant attended with Steve Johnson, his PPU trade union representative. The meeting was chaired by Captain DD, who was accompanied by a senior HR member. Although this was a Formal Training Review Meeting, it was originally intended to go ahead without a representative from the Training Department. The claimant and Steve Johnson objected to this. The respondent then agreed that the Head of Training, Ken Gillespie, would also attend.

176. The main part of the meeting was Captain DD reading out the report prepared by Captain EE, the Senior Training Standards Captain [858]. This report had been prepared without Captain EE ever speaking to the claimant. This report concluded that: "To continue further training for Mike in the LHS (Left Hand Seat) [the Captain's seat] would be a risk that is not backed up by a history or reasonability of success".

177. The claimant was surprised that Captain EE had reached this conclusion without speaking to him as part of the Training Review. The last contact he had had with Captain EE was a Pre-Command Assessment training session on 16 December 2006 [309], which, as the report shows, he passed without any issues being raised. The claimant was also amazed at the conclusion that his “history” demonstrated that it was not “reasonable” to anticipate that further training would be successful. Up until the sim on 9 April 2016 the claimant had had a consistently excellent training record over many years, and he had served the respondent loyally and reliably, in his view. Moreover, in the claimant’s opinion, there was every reason objectively to infer that, to the extent that he had underperformed in the two recent sims (which the claimant challenges in his evidence to this Tribunal), this was explicable by the unique circumstances which affected him at the time. In his view, any objective person would have concluded the opposite – that his long and successful history, coupled with the stress and anxiety affecting him in April and May 2016, suggested that there was an excellent prospect of further training having a successful outcome.

178. The claimant now understands from the respondent’s ET3 [38] that the respondent took into account some incidents that allegedly took place in the early 2000s in making this decision. The claimant now assumes that that is the "history" that Captain EE referred to, and as a result of which he recommended dismissal rather than re-training. The claimant is not aware of any such incidents taking place. They were not raised with him either formally or informally at any stage. They also do not appear within his records. Therefore,

in the claimant's view, they were either invented by the Senior Training Captain or by someone else at the respondent in order to support a decision to dismiss him; or they were just another example of the unfounded rumours that circulate within the airline.

179. In the claimant's opinion, all that Captain EE should have taken into account were the two LPC/OPC reports from Captain AA on 9 April 2016 and the Senior Training Captain on 3 May 2016, and that the only training he had been provided with was one sim session with FO 1 on 28 April 2016. The claimant's position was that there were issues with the conduct of the two LPC/OPC tests, and the consistency of the reports, that an experienced trainer like Captain EE should have picked up, if he was being impartial. It also did not make sense to the claimant that Captain EE could state that he was essentially untrainable when he had not been given the proper training with a Training Captain that he was supposed to have following the first LPC/OPC test. In the claimant's assessment, Captain EE's report [858] was a "hatchet job" designed to remove him from the company. To say that a Captain with over 20 years of flying experience – who he had not spoken to and who had not been given proper training – was suddenly untrainable was not credible.

180. The outcome letter from that meeting [867] confirmed that the Training Review was delayed due to the company exploring other options on a "without prejudice" basis and due to the claimant's personal circumstances. The claimant believes that this is a reference to the death of his father in February 2017. Although this was clearly a very distressing event for the claimant at the time, he did not consider that it necessitated an 8 months' delay to the procedure.

181. The suggestion of a settlement was first made by FO 3 as Chair of VACC and then pushed by the respondent. The claimant was not interested in agreeing a compensation figure in exchange for his job. He loved being a pilot. He knew he was good at it. The only thing that he wanted was the chance to resume his career. To do that, he believed, all he needed was some support to recover from his illness, some training, and a repeat LPC/OPC with a fair and unbiased TRE. If that had occurred, he had no doubt that he would have been able to return to the high levels of performance that he had displayed for his 17 years with the respondent prior to April 2016. However, the respondent did not provide that support and training.

182. The letter of 19 May 2017 confirmed that he was dismissed with effect from the following day [867].

183. The claimant received the minutes of the Training Review Meeting [871] on 15 May 2017 at the same time as the dismissal letter. He had not had the opportunity to give his input as to their accuracy. He therefore emailed his comments on the minutes to Captain DD on 25 May 2017 [883], even though he suspected that it would have no impact on the decision. He also submitted his appeal against the dismissal outcome to the newly appointed Head of Aircraft Operations [891].

184. The appeal was heard by the Head of Aircraft Operations on 22 June 2017 [931] and rejected [973]. Despite the TOM procedure setting out a two-stage appeal process when a Training Review results in dismissal [112], the claimant was not allowed a further appeal.

185. The claimant's grievance was also still being dealt with. The initial grievance meeting took place on 8 June 2017 [914]. The claimant received the outcome rejecting the grievance on 10 July 2017 [955]. He appealed the outcome of the grievance on 14 July 2017 [961]. An appeal meeting took place on 14 August 2017 [981]. The outcome letter dated 17 October 2017 [1013] was emailed to him on 27 October 2017 [1012] and rejected the appeal.

186. Following his dismissal, the PPU supported the claimant by giving him some *ad hoc* work. One task was representing them at the European Transport Federation Conference in September 2017. At the conference he met some pilots from the Icelandic airline, Wow Air, who suggested that he join them. It was a time when there were not many pilot jobs available. Monarch Airlines had just failed, putting a large number of pilots onto the job market. The claimant then applied to Wow. He was interviewed on 12 October 2017 and he was offered a job with them. He started with Wow Air on 31 November 2017. He was sent to the Airbus facility at Toulouse to do an A320 type rating conversion course. He passed the type rating course with no issues [1102], further showing (in his mind) how unreasonable Captain EE's statement was that he was untrainable.

187. The claimant flew for Wow Air until 19 October 2018, when he returned to the UK in the hope of gaining employment closer to home. He applied to BA CityFlyer, the short-haul subsidiary of British Airways, and also to EasyJet, roles that he was more than qualified for.

188. The interview with BA CityFlyer was on 1 November 2018 and it went well, in the claimant's view. The claimant's speculation is as follows. During the interview process the claimant had a meeting with a British Airways Boeing 777 pilot and someone from HR. He did not know the pilot, but they will have known a lot of the same people, both of them having been in the industry for many years. As he was applying for a job that might be seen by some as a significant stepdown from the long-haul job he had been doing at the respondent, and on a much lower salary, she may have wondered why he was there. The claimant has no doubt that she will have picked up the telephone to any contacts she may have had at the respondent, or indeed mutual contacts at BA, to find out more about him and no doubt heard the false malicious rumours. The claimant believes that this is why he did not get this job. The Tribunal notes that this is the claimant's speculation or assumption rather than a finding of direct fact.

189. On 9 November 2018 the claimant interviewed with EasyJet. He had a very good day, he passed all the tests, and he was offered a job due to commence in April 2019. As he was waiting to start with EasyJet, he got a job with Brussels Airlines on 4 January 2019, which was a fixed term contract until 30 October 2019, intending to resign once the EasyJet job started. The EasyJet job offer was then suddenly withdrawn without reason on 22 January 2019, again he

believes due to his unfounded poor reputation, and so he completed the contract with Brussels Airlines.

190. Towards the end of his contract with Brussels Airlines the claimant applied to Beijing Capital in China. This involved passing the notoriously difficult CAAC (Civil Aviation Administration of China) tests and sim checks. He completed these checks on 25 October 2019 and he started the process of getting a visa to work in China. However, this coincided with the start of the Covid-19 outbreak in China and so that job did not materialise.

191. The claimant also applied for a job in Japan with JetStar Japan. On 27 December 2019 he was offered this job and he was sent a contract commencing on 17 February 2020, for a 3 years' term. He took the JetStar job, but he was on the last new joiners' course prior to the Covid-19 shutdown. They agreed to allow him to complete his Japanese licence, which involved spending March to November 2020 in Japan without being allowed to come and go due to Covid-19. He passed the test with the Japanese Civil Aviation Bureau, which is said to be even more onerous that the CAAC tests. By November 2020 they allowed him to come back to the UK as there was not going to be any flying for him to do. The claimant is still under contract with JetStar, getting paid the Japanese equivalent to furlough, a contribution of around £3,000 per month. There is very little prospect of him going back to Japan, as the earliest he could go would be spring 2022. With the time it would take to bring his training back up to date, it would mean that once he had been trained, his contract would be over. He would be free to join another airline, having been trained at their expense. It is also unlikely that he would be offered an extended contract as flights are still limited. They have accelerated their internal promotions procedure, so they do not have to bring back all of the foreign Captains.

192. The claimant has contacted Beijing Capital again, but he has heard nothing back.

193. The claimant also now has a young family to consider, so working in the Far East is not really a viable option for him. He has a son who was born in July 2019, and a daughter in August 2021. He has already missed a large chunk of his son's short life by being stuck in Japan and he does not want the same to happen again. In order to support his family, the claimant had to sell his house in the UK, and his flat in France. He and his family now live in rented accommodation. He has no prospect of getting a mortgage unless he can find a full-time position.

194. The claimant's position is that if he had not been unfairly dismissed by the respondent, he would still be employed by them. The respondent has made redundancies in reaction to the Covid-19 pandemic, and the impact it has had on the aviation industry. However, the Boeing 787 continued flying throughout the pandemic as they were able to convert the aircraft to carry freight and none of the 787 pilots was made redundant. Because of his unfair dismissal, the claimant considers that he is now at the mercy of one of the worst jobs markets that pilots have ever known, with little prospect of finding anything. Even if he does find an opportunity, as he did previously with BA CityFlyer and EasyJet, the nature of his dismissal and the respondent's failure to do anything to curb

the rumours surrounding the HKG flight, have left him (in his own words) with "a toxic reputation".

195. The claimant is considering putting himself through an A330 renewal course to renew his UK licence. He is looking at doing this at an approved training organisation at a personal cost to himself so that he will at least have a current licence if a job does become available.

Findings as to the employer's perspective

196. Although not strictly part of the Tribunal's primary findings of fact, it is important that the Tribunal should incorporate into its decision the employer's perspective as represented by those parts of the evidence of Ken Gillespie and Luke Corkill which go beyond the provision of a commentary on the events that led to the claimant's dismissal.

Ken Gillespie's evidence

197. By May 2017, as the evidence of Ken Gillespie shows, matters in respect of the claimant had not been resolved. Discussions with his union representative and lawyers had not concluded things and the claimant was still unable to fly. The Director of Flight Crew and Training tasked Captain EE with undertaking a desktop review of everything that had happened with the claimant's case to date. Captain EE would then write to Ken Gillespie (as Head of Training and Standards) with the outcome of that review, as Head of Department [page 832]. The intention was to convene a final Formal Training Review meeting.

198. Ken Gillespie did not know the claimant and only met him for the first time at the Formal Training Review meeting on 15 May 2017. He was not involved in the claimant's case until this point in May 2017, a year after the relevant SIM checks had taken place. He was asked to attend the Formal Review Meeting with the claimant with the intention that he could provide the perspective of the training department and address any points about training, testing and standards. He was not the decision maker regarding the termination of the employment, but he did provide input to Captain DD (Flight Crew Manager at the time), who was the decision maker.

199. Captain EE's letter to Ken Gillespie dated 15 May 2017 [858] concluded that "to continue further training for Mike in the LHS [left-hand seat] would be a risk that is not backed up by a history of reasonability of success." The left-hand seat is where the Captain sits in the cockpit. He agreed with this conclusion, having looked at the records of the SIM tests and the continuation training provided to the claimant. He considered then and now that the claimant had had enough training at an appropriate level to be put forward for the second SIM. The business could not take the risk and cost of further training to put the claimant back in the left-hand seat (Captain's seat). Even if VAA had offered further training and another test, in his opinion, this was only likely to have delayed the claimant's dismissal by another three to four weeks, given the likelihood that he would not have passed. He strongly believed that given the serious failures in 2016, the claimant was unlikely to have passed if he had been given another chance in 2017. In addition, the claimant would have

needed a significant amount of training (outside of typical financial parameters) to be in a position to have presented himself for a test in 2017.

200. Captain EE wrote: “The reports outline a trend, over two concurrent LPC/OPCs, of below Company competency standard in Professionalism/Leadership and Teamwork/Situational Awareness/Workload Management/Decision Making and Problem Solving/Manual Aircraft Handling/Knowledge and Procedures." He went on to say: "These are all areas we would expect to be at Company Standard or above befitting the role of Captain within VA, however have not been reached by Mike in 2 x LPC/OPC or indeed with the help of Continuation Training as noted above." He also noted that: "One of these competencies remaining at below Company Standard over such a time frame of observation would be cause for concern for a Captain. It seems however we are dealing with a much more serious state of affairs with Mike`s level of competency displayed well below that acceptable in all these areas on an on-going basis."

201. In Ken Gillespie’s view, putting it simply, the claimant had failed two SIM tests. If a pilot fails a SIM test, they are given re-training before they are re-tested. After re-training it is rare for pilots to fail a second time. It is even more unusual for an experienced Captain to fail an LPC/OPC twice. If a pilot fails a second SIM after a period of re-training, there are immediate safety concerns to consider. It would have been less serious if the claimant had passed the LPC element and failed the OPC element. However, pilots at VAA are required to pass both the LPC and OPC, and the claimant failed both aspects of the check on both occasions [533 and 572].

202. His view was that the claimant was an experienced Captain and should not have needed extensive retraining. Despite this, he displayed serious shortcomings. VAA had to draw the line somewhere and he believed it was reasonable for VAA to draw the line where they did, given the claimant had failed in so many areas. Firstly, the areas of concern were not going to be fixed quickly, easily or economically and, secondly, the two failed SIMs gave the respondent concern that the claimant was not a safe pilot. In his opinion, the claimant's failures in the second SIM included skills that are difficult to retrain, as they are developed with experience. For example, in his view you cannot easily train someone to have professionalism if they are lacking in that area. The range of failures suggested deep-rooted issues and he would not expect to see those issues in a Captain. For example, Situational Awareness (SA) is something that comes with experience. If there is a FO with low SA, they would not be put forward for command (as a Captain) until the business is confident that they had been displaying this skill over a sustained period of time, as it is not something that can be trained easily.

203. Ken Gillespie explained that it is very expensive to run a SIM test, so a business like VAA cannot justify retraining a pilot repeatedly until they pass. Essentially, VAA is not a flying school, but an airline business that deals with training as necessary to comply with its obligations to the CAA and to ensure adherence to its own high standards. For completeness, it is clear that the CAA would not get involved in the question of whether VAA should have given the claimant more training and a chance to do a third SIM test. It is a question for

VAA to decide how much time and money they are prepared to invest in pilot training. Significant funds had already been spent with the two SIM tests and period of re-training.

204. Ken Gillespie commented upon the claimant's claim that he displayed discomfort during the formal review meeting on 15 May 2017 when they were discussing Captain EE's letter. Given the passage of time, he does not recall the meeting well, but he accepts that it was an uncomfortable situation given the potential for the claimant to be dismissed. Ken Gillespie had only recently joined the company and he had never met the claimant before. He was not uncomfortable with the conclusion that Captain EE had reached. Having reviewed the SIM records, he agreed with that conclusion and he still does.

205. From Ken Gillespie's perspective, the Captain is the most senior member of staff on board when the plane is in the air. The claimant was no longer trusted as either sufficiently competent or safe in that important position. He understands that there had been historic concerns on the part of flight management about his competence – going back many years – but which had not been documented or properly dealt with at the time. He does not have any first-hand knowledge of these historic concerns, but he had heard things about the claimant on the grapevine. However, this did not impact on his view of the claimant's capability.

206. In terms of sanction, demotion to a FO position was not something that VAA was able to offer as an alternative and not something that the claimant sought at the time. This is set out in Captain DD's letter to the claimant dated 19 May 2017, terminating his employment [869]. As an airline, VAA is very conscious of the need to maintain a safe environment in the cockpit. If the claimant had been demoted to FO, there is the potential that this could have created a "cockpit gradient" that could have had a negative impact on a safe operation in a two-crew operating environment – for example, if the claimant began flying with other Captains as their FO. Those Captains would likely know that the claimant had been a Captain and had been demoted for failures in the SIM, creating difficult situations for other pilots.

207. Ken Gillespie stood by the decision that the SIM failures were so serious that it was not reasonable to offer the claimant further training or an opportunity to undertake further SIM tests. VAA's primary obligation is to the general public to ensure their safety. It is also a business with finite resources. It cannot continue to train pilots who are not up to the required standard. It had lost trust and confidence in the claimant's ability to operate safely as a pilot.

208. Ken Gillespie was aware of the claimant's ill health and that, by the time of the Formal Training Review on 15 May 2017, the claimant was saying that his stress had been a contributory factor [860]. He notes that in the claimant's appeal letter [894] the claimant says that the fall-out from the HKG flight "led to grave confidence issues which have, in all probability, had a clear and detrimental effect on my performance". In his view, although the claimant's performance in the SIMs in 2016 may well have been due to stress or confidence issues arising from the HGK flight and the resulting rumours from it, the claimant was not upfront with VAA about his ill-health/poor performance

or any other extenuating circumstances at the time of the SIMs. He only mentioned this at a later date, and he turned up to the first SIM, the continuation training and the second SIM as fit and well. In addition, if the claimant really believed the SIMs were carried out in bad faith, and that this was due to a conspiracy to get rid of him (as he now alleges), it was incumbent upon him to say that (in the informal/formal review process and/or via the 14-day appeal/challenge, either internally or to the CAA).

209. Whether the claimant failed the SIMs due to his ill health issues or not is not key, in Ken Gillespie's view, because the fact is that he did fail the tests twice, having turned up as fit and well. In a highly skilled job, such as Captain, it is necessary for the pilot to show the required skills on the day of assessment and on any given flight. Under paragraph 17.11 Document 24, a pilot cannot claim ill-health after a failed test [174].

210. Turning to the claimant's intention to return to VAA, Ken Gillespie considers that it would be completely wrong for the Tribunal to make such an order when the company still has genuine and serious doubts about his ability to operate safely. Due to the period of time that has passed since the claimant was dismissed, the respondent would only allow him to fly for VAA following an intensive period of re-training and testing. There is no alternative to this, as it would not be prepared to let anyone fly a VAA plane without having shown that they can pass the necessary tests and display the necessary standards. The fact that the claimant has flown for other airlines since his dismissal from VAA does not change the position.

211. The respondent is currently very limited in terms of training capacity and does not have capacity to train the claimant as an additional individual. With regards to training, the company has planned its training programme for the next 8 months and it would be extremely difficult to change this to accommodate the claimant. It would also be unfair and unreasonable. That is particularly so when there are many pilots being brought back into the business who were previously made redundant, about who there are not training concerns. Whereas the company does have concerns about the claimant's capability arising from the failed SIM tests in 2016. This increases the burden on the training team at a time when it is already very stretched.

212. In Ken Gillespie's assessment, there is a very real possibility that, if the claimant were to be re-employed, he would not pass the necessary SIM tests to enable him to return to flying for VAA, given the significant reasons for him being failed in the tests in 2016. The role of pilot is distinguishable from other roles where an individual may return from a period away from employment without undertaking training and taking tests. That is not the case for a pilot where they are not permitted to carry out their role if they have not demonstrated that they have the necessary skills. As a regulated airline, VAA must follow the procedures in place. VAA's policy is that, if a pilot fails a SIM test, they are provided with a period of re-training and then tested again. If the claimant were to be allowed to return after that point, it would undermine VAA policy and procedure. Fundamentally, this relates to safety concerns and VAA's trust in a pilot's ability to safely fly a passenger plane that is carrying a large number of people on board. As a general point, if VAA had to re-employ a pilot

who has previously failed in tests to reach the standard required by VAA, this would no doubt raise concerns among the pilot workforce who would have to operate with him. They might have doubts about his ability to guarantee a consistent safe operation.

213. There are also real concerns about the claimant returning to VAA given the allegations he has made about the most senior echelons of VAA's training department and flight crew management. He claims that they effectively conspired to exit him from the organisation, and that Captain AA and the Senior Training Captain deliberately failed him in the SIM tests, and that Captain AA created a misleading SIM record. The claimant also alleges that FO 1 created an inaccurate training record and that he wanted the claimant to fail his second SIM test. These are serious accusations levelled at well respected, senior individuals who remain employed by VAA in the training department and in whom there is complete confidence. Conversely, Ken Gillespie does not have confidence in the claimant, which is fundamental in the aviation industry where VAA must feel 100 per cent comfortable with each pilot that is in command of its aircraft and *vice versa*.

214. Finally, if the tribunal orders re-employment, the costs of putting together and running the appropriate training package would be significant. At a rough estimate, it would come to around £30,000 for the costs related to a full type rating SIM, the instructor's costs, 17 days in ground school and a cover pilot in the other seat as a support pilot. As the claimant is not part of the pre-planned training calendar, the claimant's SIM would have to be run as a singleton with another pilot as cover. This would add to the cost. A minimum of 12 training sectors – which would involve dedicating a training pilot to fly with the claimant and instruct him – would be expected, which would also add to the overall cost. On top of this would be the claimant's salary for 3 months' while in training (roughly a further £35,000 gross). In total, just to get the claimant through a training process would cost VAA something in the order of £65,000, without any confidence that he would even succeed.

Luke Corkill's evidence

215. Luke Corkill has only worked at the respondent since June 2021 when he joined the company as Principal Flight Crew Manager. He is head of VAA's flight crew management team. He manages those who manage the pilots at VAA – currently around 750 people in total. His responsibilities include establishing high expectations with regards to performance, behaviours and attendance, together with a relentless focus on employee engagement. He also manages the collective relationship with the BALPA trade union (VAA's recognised trade union for pilots). Although he was not employed by VAA when the claimant was dismissed, his evidence addressed the issue of remedy, the current state of the business and pilot vacancies.

216. He articulated the respondent's view that it would be neither fair nor reasonable for the Tribunal to make a re-employment order, and that it would not be feasible for VAA to comply with an order to re-employ the claimant. An order to re-employ the claimant would be telling the company to put a pilot in the air who it considered is not capable and so is not safe. This would create

doubt and concern on the part of its flight crew. Flight crew are a tightknit sector of its workforce. They would either already know or would in all likelihood quickly come to know about the circumstances of the claimant's departure and return, and they would lack confidence in him. It will add further disruption and concern during what is already a period of significant uncertainty for those who work in aviation.

217. An order to re-employ the claimant would require VAA to invest money, likely to exceed £65,000, in retraining someone whose capabilities it doubts and who it reasonably considers may fail the recruitment training. In addition, such an order would be extremely disruptive to employee relations and to the respondent's relationship with BALPA. It would force the respondent to give the claimant preference over all the pilots in its "holding pool" who were made redundant during the pandemic. These are pilots who were competently flying for VAA at the time of redundancy and who will have to re-apply for their jobs in accordance with a collective agreement with BALPA.

218. The COVID-19 pandemic has destroyed international travel and with it much of VAA's business. To survive, VAA made over 4,500 redundancies in 2020 and grounded most of its fleet. The company had to appeal for funding and is still in survival mode. International travel was expected to start recovering in the summer of 2021, but this did not happen. This required VAA to seek further funding from its shareholders in anticipation of recovery starting when the US travel market re-opened for UK travellers.

219. Overall, 460 of VAA's pilots were made redundant or retired in 2020, and around 550 were retained. Of those made redundant, 311 were placed into a "holding pool" and were ranked in order of seniority, by length of service. It was agreed with BALPA that pilots in the holding pool would be the source of pilot recruitment as the business recovered. There was no expectation that recruitment outside of the holding pool would be required. It was also agreed that pilots would be invited for interview in order of seniority. The arrangements are documented in an agreement that runs to the end of September 2023 [1122-1128]. There is no certainty that all pilots in the holding pool will be rehired by this time due to reduced flying demand and more efficient ways of working which require a lower pilot headcount.

220. VAA is now in the process of ramping up again as customer demand for international travel starts to recover. This is enabled by vaccination roll-out, both here and abroad, and the reopening of the US borders for citizens of the UK and other countries. The requirement for nine senior colleagues to give evidence for the liability hearing was part of VAA's decision to admit liability, as these individuals are engaged fully in the ramping up of operations at this crucial stage of VAA's business recovery.

221. To cater for the increased demand, VAA is re-hiring pilots from the holding pool, in line with the collective processes agreed with the BALPA trade union [1123]. Interviews started in March 2021. At the time of the preparation of Luke Corkill's witness statement, the first 236 pilots in the holding pool have been invited to interview and have started or have planned interview or start dates. The vast majority meet standard at interview. Start dates and training courses

are planned through to Summer 2022, covering the currently anticipated recruitment requirements for 2022. The company will review any future requirement for recruitment from the holding pool above the first 236 pilots during 2022. This will be driven by the extent to which international travel demand actually recovers and availability of aircraft for VAA to operate. If there is less demand for travel, it will require fewer planes and fewer pilots as a result.

222. When ranked by seniority, the majority of Captains are classed as more senior than most First Officers due to their length of service. The holding pool is managed by seniority, meaning Captains were first to be called for interview. As a result, VAA currently has more Captains than required. This means there are no Captain vacancies. The recruitment through to summer 2022 is for First Officers and is ring-fenced for those who were made redundant in 2020. Based on current plans, there are still insufficient vacancies to offer interviews to all of those in the holding pool. In the respondent's view, as articulated by Luke Corkill, it would not be fair or reasonable for the claimant to return to VAA before other pilots who were made redundant with clean records, in turn delaying the start date (probably until at least part way through 2022) for a pilot currently in the holding pool. Not only would it not be the right thing for VAA to do, it would also mean VAA undermining the essential basis for the agreement that it has made with BALPA, which was to exhaust the holding pool before recruiting any other pilots.

223. Although VAA does have some vacancies as described above, there is also a danger of VAA having too many pilots, so it cannot just offer jobs to everyone in the holding pool. This risk partly arises from the fact that VAA is highly impacted by international travel restrictions, which could be reintroduced on short notice at any time, with no certainty over when they may be lifted. For example, the US, which accounts for the majority of VAA's routes, opened to international travel much later than was expected, on 8 November 2021, after 20 months of its borders being closed to UK citizens. Developments with the pandemic could lead to another u-turn. Business travel has not recovered to anywhere near the level that it was pre-COVID and, as a result, there is less demand for flights than VAA had hoped. It is uncertain whether this will ever return to pre-pandemic levels and, if so, when. This risk of over-provision is being managed through selective use of fixed term contracts (around 100 in the period October 2021 to April 2022), rather than traditional permanent hires, and meticulous planning of the precise numbers to be invited back from the holding pool at each stage.

224. The respondent only has a limited amount of capacity for pilot training and testing. It has limited capacity in the VAA training team and a programme of recruitment and ongoing training that is already scheduled through to summer 2022. It sometimes works with external partners, but they also have limited capacity given that many other airlines are restarting their operations at the same time. Involving an external partner can create even more expense. If re-employed, the claimant would need to be added to that programme, ahead of other pilots being brought back from the holding pool. This would also be problematic as it could strike other rehires and the respondent's existing flight crew as hugely unfair, risking further upset and irritation.

225. Crew Resource Management ("CRM") is the effective use of all flight crew personnel to assure a safe and efficient operation, reducing error, avoiding stress and increasing efficiency. Safety is paramount and underpins all of VAA's operational decisions, so any issues with a potential impact on CRM are taken very seriously. If the claimant were to return to flying for VAA as a pilot, there is the real possibility that other pilots would be concerned about the impact on CRM of his presence on any given flight. As a result, they may feel uncomfortable and even refuse to fly with the claimant due to their knowledge of the reason for his dismissal.

226. Although VAA employs a relatively large number of pilots, these are divided by aircraft fleet (for example, Boeing or Airbus) and then further subdivided by type of aircraft within the fleet. This means there is a relatively small community who need to work together. Word spreads quickly. That is just the nature of the industry. Questions would be asked about safety, protocol and potential unwillingness from pilots and cabin crew to work with the claimant. There would also be concerns about how pilots and cabin crew would act around the claimant, and the potential for them to try to avoid working with him, even if this does not reach the level of official concerns being raised with management. It is also likely to filter through to those pilots who remain in the holding pool, affecting their morale, creating friction and potential financial hardship (if their return is delayed).

227. It is understood that demotion (to First Officer rank) was considered as an alternative sanction by those who decided to dismiss the claimant. It was deemed unsuitable at the time. Luke Corkill's evidence is that it is considered that it remains unsuitable now due to the safety critical nature of the pilot role, particularly as there are some exceptional circumstances when a First Officer needs to be able to take competent command of an aircraft, such as in the event the Captain becomes incapacitated. There are also concerns about how the claimant would react to taking instructions from Captains who had previously been his peers.

228. There is also the continuing effect of the so-called "historic allegations" or concerns. VAA did not have confidence in the claimant's abilities going forwards and did not consider it appropriate to invest time and money in his retraining and re-testing. These historic concerns did and continue to exist. They cannot be ignored now in the context of the claimant's aspirations to be re-employed by VAA. They add to the concern about having him back at VAA and operating its aircraft.

229. The claimant makes serious accusations about senior members of VAA's training department and flight crew management that are not accepted by the organisation. Many of these individuals are still employed by VAA. Management of flight crew and training consists of a relatively small team of around 12 individuals. Although VAA is a relatively large employer, if the claimant were to return to the organisation, he would definitely come into contact with these individuals. This would cause friction and obvious employee relations issues, which would be very difficult for the respondent to manage. It is hard to have confidence in a pilot who has made unfounded allegations about senior management conspiring together and acting in bad faith. It is even more

difficult, as in this case, to have any confidence in a pilot who has insisted on making these accusations rather than accepting that his performance in the SIM checks was really poor and being upfront about that. There are concerns about the organisation's ability to confidently train and performance manage the claimant. This is particularly worrying in a safety critical environment and whether could be an effective employment relationship is questioned. There is too much suspicion on each side.

Closing submissions

230. The Tribunal is very grateful to both counsel for the high quality of the hearing advocacy in this case. That continued into the preparation and presentation of written closing submissions from both parties, supplemented by oral submissions. The Tribunal does not propose to add to what is already a lengthy reasoned judgment by reproducing or summarising the submissions here. It incorporates those submissions by reference. However, how those submissions have been addressed, considered and applied by the Tribunal should be apparent from the Discussion section below.

Relevant legal principles

231. The Tribunal had the advantage of the parties putting before it the relevant statutory provisions and case authorities, and in developing them in the various opening and closing submissions. The Tribunal also draws assistance from the commentary on re-employment orders in IDS Employment Law Handbook *Unfair Dismissal* Chapter 13 (Remedies) and from the annotations to the Employment Rights Act 1996 in Part Q of *Harvey on Industrial Relations and employment Law*. Of course, this commentary and those annotations are no substitute for the Tribunal engaging directly with the relevant statutory provisions and the applicable case law authorities, which the Tribunal has done.

232. Acting in accordance with section 116 Employment Rights Act 1996, the Tribunal must consider whether the claimant wants a re-employment order to be made and, in the case of re-engagement, what sort of order the claimant wants: section 116(1)(a) and (3)(a). Then the Tribunal must consider whether it is practicable for the respondent to comply: section 116(1)(b) and (3)(b). Finally, the Tribunal must consider whether it would be just to make either type of order where the claimant's conduct caused or contributed to some extent to his dismissal and, if so, in the case of re-engagement, on what terms: section 116(1)(c) and (3)(c).

233. The requirements of section 116 are mandatory. However, the Tribunal has a general discretion to consider a wide range of other factors, including the consequences for industrial relations if the order is complied with: *Port of London Authority v* Payne [1994] ICR 555 CA.

234. A factor that should not be taken into account is the fact that no compensation would have been awarded for the unfair dismissal under the principles established in *Polkey v AE Dayton Services Ltd* [1988] ICR 142 HL. See: *Manchester College v Hazel* [2014] ICR 989 CA; *Arriva London Ltd v*

Eleftheriou [2013] ICR D9 EAT. The principles on *Polkey v AE Dayton Services Ltd* [1988] ICR 142 HL are concerned with compensation, not reinstatement. In some cases, matters relevant to a Polkey reduction may also be relevant to the statutory criteria according to which a tribunal must decide whether or not to order reinstatement. For example, in a conduct case, the nature of the employee's conduct may be relevant to both the *Polkey* question and to section 116(1)(c).

235. Practicability is an important factor when considering whether or not to make an order for re-employment. It is a question of fact for the tribunal. The tribunal has discretion to decide whether to make a re-employment order. See *Clancy v Cannock Chase Technical College* [2001] IRLR 331 EAT. The tribunal should not attempt to analyse in too much detail the application of the word "practicable", but it should look at the circumstances of each case and take a "broad common sense view": *Meridian Ltd v Gomersall* [1977] ICR 597 EAT. Nevertheless, practicable in this context means more than merely possible, but rather "capable of being carried into effect with success": *Coleman v Magnet Joinery Ltd* [1975] ICR 46 CA. The test is one of "practicability" not "expediency": *Qualcast (Wolverhampton) Ltd v Ross* [1979] ICR 386 EAT.

236. At this first stage, in deciding whether to make a re-employment order at all, the tribunal has only to take the question of practicability into account and it does not need to make a final determination on the issue: *Timex Corporation v Thomson* [1981] IRLR 522 EAT; *Port of London Authority v Payne* [1994] ICR 555 CA. The test is one of "practicability" rather than "possibility" or "impossibility". At this stage, prior to making an order, the tribunal need only make a provisional determination or assessment on the evidence before it as to whether it is practicable for the employer to reinstate or re-engage the employee. The relevant date at which this assessment is made is the date of the remedies hearing. The tribunal must address all the relevant considerations and take into account the available evidence: *Lincolnshire County Council v Lupton* [2016] IRLR 576 EAT.

237. Reinstating a dismissed employee should never necessitate redundancies or significant overstaffing. In *Freemans plc v Flynn* [1984] ICR 874, the EAT rejected the argument that the effect of a re-engagement order was to impose a duty on the employer to find a place for the dismissed employee irrespective of whether there were vacancies. This placed too high a duty on employers. That reasoning was also followed in *Cold Drawn Tubes Ltd v Middleton* [1992] ICR 318 EAT. Tribunals should carefully scrutinise the employer's reasons for opposing re-employment, but at the same time five due weight to the employer's commercial judgment: *Port of London Authority v Payne* [1994] ICR 555 CA. It is a matter of what is practicable in the circumstances of the employer's business at the relevant time.

238. Employing a permanent replacement for a dismissed employee will not of itself make re-employment impracticable. Section 116(5) states that, in deciding whether to make a re-employment order, a tribunal must ignore the employment of a replacement, subject only to the exception in section 116(6). A large employer will find it difficult to rely upon this exception. On the facts of the present case, section 116(5) and (6) has not been engaged.

239. The personal relationship between the employee and his or her colleagues is a relevant factor that will affect the question of practicability and/or the tribunal's exercise of its discretion. Re-employment is unlikely to be practicable if relations at work have become irretrievably soured. However, not all incidences of impaired workplace relations will necessarily present a bar to re-employment. This is a matter for the exercise of the tribunal's discretion. Similarly, a threat to industrial relations that might arise from a re-employment order is a proper consideration to be accounted for.

240. A breakdown of trust and confidence between employer and employee may be sufficient to render re-employment impracticable: *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680 EAT. Lack of trust on the employee's part may also make re-employment impracticable: *Nothman v London Borough of Barnet (No.2)* [1980] IRLR 65 CA (where the employee's allegations of a long-standing conspiracy by colleagues to oust her from her job made it impracticable to order reinstatement). However, in *Kelly v PGA European Tour* [2021] ICR 1124 CA, Underhill LJ cautioned that the words "trust and confidence" may carry unhelpful echoes from other contexts (such as the implied term of mutual trust and confidence). In the context of re-instatement and re-engagement, they simply connote the common-sense observation that it may not be practicable for a dismissed employee to return to work for an employer that does not have confidence in him or her, whether because of previous conduct or because of the view that it has formed about his or her ability to do the job to the required standard.

241. One of the most common grounds on which lack of trust and confidence is asserted is that the employer genuinely believes that the employee has committed misconduct. (The present case is, of course, a capability dismissal rather than explicitly a conduct dismissal.) The relevant test when considering whether re-employment is practicable following dismissal for misconduct is whether the particular employer genuinely and rationally believed that the claimant was guilty of the misconduct alleged: *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680 EAT. The question of a loss of trust and confidence must be approached from the perspective of the employer in question, not that of another employer, and still less that of the tribunal: *United Lincolnshire Hospitals NHS Foundation Trust v Farren* [2017] ICR 513 EAT.

242. The Court of Appeal has approved that approach in *Kelly v PGA European Tour* [2021] ICR 1124 CA. Lewis LJ reasoned that where the employer asserts that the employee's conduct renders re-engagement impracticable, the question is whether the employer had a genuine and rational belief that the employee had engaged in conduct which had broken the relationship of trust and confidence between the employer and the employee. Similar principles apply to the consideration of whether it is practicable to order re-engagement in cases where an employer contends that the employee lacks the ability to perform the role in question. The employer will need to establish that it genuinely believes that, if re-engaged, the employee would not be able to perform the role to the requisite standards and that that belief is based on rational grounds.

243. Conduct during the litigation may be a consideration. The manner in which a dismissed employee has pursued his or her successful complaint of unfair dismissal may have so soured the relationship with colleagues that reinstatement or re-engagement is impracticable because working relationships have been irreparably damaged. Tribunals should, however, be careful not to hold against the employee allegations made in the course of litigation and should be wary of assessing an employee's attitude solely from his or her performance during the litigation. Where, however, the employee makes specific and personal allegations, this may have such a disruptive effect that a harmonious working relationship is no longer possible.

244. Issues of capability will also be relevant to the question of practicability. It may not be practicable for the employer to re-employ am employee in whom it had genuinely lost confidence, whether the reasons for doing so were well-founded or not. To resist a re-employment order, it is not necessarily enough for the employer to say that the employee is not the best candidate, or that he or she would require additional training. That is because "practicability" requires that an order for re-employment would be capable of being carried into effect with success, taking some account of the size and resources of the employer. An employer might be capable of carrying a re-employment order successfully into effect, even if it would involve giving the claimant some training.

245. The existence of a duty owed to the public will not necessarily determine the issue of practicability. Even where an employer genuinely believes that a dismissed employee could pose a risk to the public, re-employment will not automatically be impracticable. A tribunal must judge each case on its merits. Even where there is no risk to the public, an employer's public image and relations may have some relevance.

246. Tribunals are required to consider whether it would be just to make a reinstatement or re-engagement order where the employee caused or contributed to some extent to the dismissal: section 116(1)(c) and (3)(c). Contributory conduct will also be highly relevant to the question of practicability. For example, where the employee's misconduct has soured the working relationship and thus diminished trust and confidence. However, there is no reason in principle why a tribunal should not make a re-employment order even where there is a large degree of contributory conduct, provided it forms a reasonable view that the circumstances warrant it.

247. In the case of re-engagement, tribunals must also take contributory conduct into account when considering the terms of the order: section 116(3)(c). The correct approach is first to consider whether re-engagement would be just in light of the conduct, and only then go on to consider the effect the conduct should have on the order's terms. However, where there has been significant contributory fault, it is unlikely to be correct to order re-engagement of a senior employee in a demoted position.

Discussion

248. The Tribunal's consideration of its decision proceeded under the following headings: (1) Agreed evidence/disputed evidence/findings of fact; (2)

Substantive unfair dismissal; (3) Does the claimant genuinely seek re-employment? (4) Has the claimant caused or contributed to some extent to his dismissal such that it would not be just and equitable to order re-employment? (5) Is it practicable for the respondent to comply with an order for re-employment? (6) If there is to be no order for re-employment, then what would be the calculation of the claimant's Basic Award and Compensatory Award? (7) What effect does *Polkey* have upon that calculation? (8) Is a deduction to be made for contributory conduct? (9) Has the claimant mitigated his loss? (10) Has the claimant proved his loss?

(1) Evidence and findings

249. The Tribunal accepted the claimant's characterisation of the respondent ignoring its own written procedures and the express advice of its senior HR manager in determining that the claimant should be dismissed at the first formal stage of the FTR process, rather than be offered at least one further opportunity to be given training to enable him to pass a further LPC/OPC check. The respondent's pre-existing procedure [599] provided that there are normally three stages to the procedure. Captain BB wrote to the claimant on 12 August 2016: "As this is the First Formal Review you should be aware that this might lead to further Formal Reviews that could result in your dismissal".

250. However, then it appeared that someone within the respondent's management structure was pressing for immediate dismissal. The senior HR manager wrote to Captain BB stating her concerns [725-726]. She pointed out that the new procedure, applicable in May 2017, provided for two formal stages.

251. By May 2017, Captain DD and Captain EE had taken over the process. The respondent wrote to the claimant in respect of the adjourned First Formal Review that one of the outcomes of this process could be his dismissal [843]. The respondent's only relevant witness (Ken Gillespie) could not explain this.

252. The respondent then ignored its own written procedures in refusing the claimant a second right of appeal. This was conceded by the respondent. See [601] and compare [869]. The respondent's witness could not explain this.

253. Several facts were in dispute. The Tribunal agrees with the claimant's counsel in his identification of these as follows. (1) Did Captain AA conduct the April sim improperly because (inferentially) it had been decided that the claimant should fail? (2) Did he not re-train and re-test on some/all items – and if he did not, is the explanation that the claimant was retrospectively failed at first attempt on some item(s) he had passed? (3) Did he behave in a hostile/aggressive manner in connection with the slide on day 2? (4) Did he tell the claimant that the windshear was a practice on day 2? (5) Did he fail the claimant on that item when he should, or at least could, have passed him? (6) Did the respondent arrange for what it understood to be the appropriate training for the claimant after the April sim, designed to ensure he would pass the May sim? (7) Did the respondent know that some at least of that training had to be with a Training Captain who could (among other things) train on leadership/management? (8) Did FO 1 and/or the respondent know that the objectives of the training had not been met by the time of the May sim, in

respect of training on leadership/management and in respect of the claimant not yet meeting company standard on knowledge and procedures, and yet signed off the claimant as ready to pass the next sim? (9) Did the Senior Training Captain conduct the May sim improperly because (inferentially) it had been decided that the claimant should fail? (10) Did he arrive late and work fast and aggressively? (11) Did he ask unusually difficult/detailed technical questions in order to catch the claimant out? (12) In relation to the landing at Dubai in a mayday situation, with the Senior Training Captain acting as the Air Traffic Controller in the tower, did he fail the claimant on that item when he should/could have passed him? (13) Did the respondent take into account the "historic" allegations (it may be that it did not, following evidence of Ken Gillespie)?

254. The Tribunal leans towards the claimant's concerns as to whether the respondent has failed to lead relevant evidence or to challenge the claimant's evidence. Counsel described this as "a remarkable feature of this case" that the respondent had chosen not to call any of its key witnesses as to the primary disputed facts: the Senior Training Captain, and Captains AA and DD. Ken Gillespie was not able to say what Captain DD did or did not take into account in deciding to dismiss the claimant. He had not spoken to the Senior Training Captain or Captain AA either before or after the dismissal, and he was only able to give evidence based on the written reports of the sims.

255. The Tribunal accepts the claimant's submission that the weight of evidence supporting the proposition that from some point following the HGK flight there were senior people within the respondent who wanted the claimant out is striking. See in particular the claimant's evidence about the conduct of the sims themselves, including the hostility shown by both trainers; the respondent's disregard for its own written procedures and HR advice; the Senior Training Captain's evident hostility to the claimant before the sim he conducted, especially at [551]; Dave Singleton's evidence about what he was told in confidence by a Flight Crew Manager; and the decisions made to provide obviously inadequate training to the claimant after the April sim. That is the backdrop against which the Tribunal must evaluate the evidence in relation to the disputed facts about the conduct of the sims.

256. The report of the April sim makes no obvious sense. The evidence of Ken Gillespie did not serve to improve that position. The windshear manoeuvre was the first thing to happen on day 2. The sim appeared to continue as normal with all the other items where claimant was the Pilot Flying (PF) and **FO 6** the Pilot Monitoring (PM). See, for example, [1115]. There is no indication that following that on day 2 there was then extended re-training and/or re-testing with the claimant returning to his role as PM and FO 6 as PF. As appears from the evidence the Tribunal heard, what should happen if a pilot fails items on day 1 is that the trainer continues with the remaining items, with that pilot flying all items at a first attempt prior to retesting any item (the second attempt): [173] and [176].

257. The Tribunal agrees that it is inconceivable that in a statement specifically requested to show that Captain AA had conducted the sim fairly, FO 6 would not have mentioned the re-training and re-testing on day 2 if it had happened.

If Captain AA had retrained and retested all these items, then FO 6, who was PF on day 1, would have had to carry out many or all of the PF items again, including the training. Instead, he wrote: "We finished the evaluation stage and the single engine work and the SIM was complete" [Supplemental bundle/2]. The windshear (whether practice or test) was the first thing to happen on day 2. From the report at [534E] the test was 'stopped' after that. There was no re-testing after that.

258. As Ken Gillespie's evidence shows: "The report does not clearly show which events took place on each day". There was not time in any event for all the retraining/re-testing alleged. Ken Gillespie agreed that it can take around 10 minutes to retrain each item, depending on complexity (some items as little as 2 minutes), and a further time, perhaps an average 10 minutes, to retest it.

259. What is more likely to have happened? The Tribunal agrees that after the conclusion on day 2 (whether or not Captain AA spoke to the Senior Training Captain during the hour he was absent) the more likely explanation is that Captain AA re-marked certain item(s) as not having been passed at first attempt. The claimant accepted that some were failed at first attempt. Captain AA then did not re-test any of the failures at first attempt. It is only because the claimant was marked as failing 6, rather than 5, items at first attempt that the sim was an overall fail.

260. The claimant's evidence was that Captain AA started day 2 by putting a slide up on the projector saying that it is cost prohibitive for airlines to employ non-military pilots. Neither the claimant nor FO 6 were from a military background. Then Captain AA said aggressively: "Who here has been in the Air Force?" He put his own hand up and said: "I am employed by the airline to train people like you up to standard". The claimant found this to be very unsettling. If that happened, which the Tribunal finds that it did, Ken Gillespie accepted it was wrong. There is no proper basis for regarding this as a joke or said jocularly. Paragraph 19.4 at [176] states: "The examiner shall establish a friendly and relaxed atmosphere. A severe or hostile approach by the examiner shall be avoided".

261. The claimant said in unchallenged evidence that he was briefed by Captain AA that he would start with a practice windshear on take-off to "get your hand in". The other pilot had done the same on day 1 and had discussed with Captain AA that the controls were twitchy during the procedure. The claimant asked for clarification. Captain AA responded: "Twitchy, it's twitchy, you will get to practise". The Tribunal finds that this happened as described. Ken Gillespie agreed that, if so, the claimant should not have been marked as failing that item, whatever his performance.

262. As to the actual performance of that item, Captain AA commented on this manoeuvre [528] that the aircraft was at 27 degrees nose up, putting it in an "Upset". However, the pitch limit for the Boeing 787 is 30 degrees, as stated in the Boeing 787 Flight Crew Operations Manual [1081-1082]. The claimant did not exceed the Pitch Limit Indication and, the Tribunal accepts, it is far from obvious that this constituted a fail. Ken Gillespie's evidence was that the key factor would be whether the claimant ignored the flight director guidance. It is

not clear why a pilot would do that. He agreed that the report does not say that happened. He would expect a trainer (at least one who commented in detail on the reasons for failing that item, as Captain AA did) to state in terms that the pilot had ignored the flight director guidance if that had happened.

263. Ken Gillespie also agreed that it was unusual for a trainer to disappear for an hour before the de-brief, although he said that Captain AA might have been collecting his thoughts. Captain AA had already determined early that day which 6 items the claimant had not passed at first attempt.

264. Turning next to the training arranged in April 2016, it is agreed that the purpose of this training was to get the claimant ready to pass the next LPC/OPC. If the trainer does not believe that, in the initial training of 3 hours the claimant was ready to pass the next test, that should be explained to him and further training scheduled. The formal document setting out the retraining package is at [552]. It is to be conducted by a Training Captain and concentrate on Management and Leadership, among other things. As to [553], two training sims were planned – one with FO 1 and a second to be arranged.

265. Ken Gillespie accepted that he had understood that the decision to reduce to one training session had been taken only after the first session and only because the claimant had been signed off as "objectives met" [559]. He accepted on being taken to emails at [552, 553, 556] that in fact, even before the training with FO 1, it was decided only to offer one session; and the focus had shifted from Management and Leadership (which FO 1 could not assess: [557]) to Technical and SOP: [556]. The Tribunal agrees that those changes are not explicable at that stage unless the respondent was taking an insufficiently supportive approach to this training.

266. Ken Gillespie accepted that in fact the comment "objectives met" [559] was not accurate, given that the key objective [557] was "to achieve company standard or better in all competencies". FO 1 had not been able to assess that for Management and Leadership, and the claimant had not achieved company standard on Knowledge & Procedures [558]. What should then have happened is that the claimant ought to have been provided with the second training session that was originally planned.

267. The Tribunal accepts the claimant's counsel's invitation to find that the respondent knew that it had taken an inappropriate and insufficiently supportive approach to this training. That is explicable only on the basis that it was not genuinely concerned to allow the claimant the opportunity to continue in employment. That is not a surprising inference considering the Senior Training Captain's correspondence at [487, 491] and, in particular, just before this training was arranged at [551]. It is obvious that the Senior Training Captain did not want the claimant flying again for the respondent.

268. The Tribunal then turns to the May sim. The Tribunal broadly, but not entirely, accepts the claimant's interpretation of events. It is not able to conclude that the Senior Training Captain set out to fail the claimant or arranged his marking of the claimant so as to achieve that result. At best, this sim was not conducted fairly or in accordance with policy and procedure.

269. Counsel for the claimant asked the Tribunal to find as a fact that the Senior Training Captain was determined, if possible, to fail the claimant. Reliance is placed upon the Senior Training Captain's correspondence (referred to immediately above); the "absurdly" low score he gave the claimant, no more than a week after the claimant had passed almost all of the same items with FO 1 and having passed well the same items on the same aircraft in both May and October checks the previous year [388 ff, 398 ff]; and the way he conducted the test (see below).

270. The claimant's evidence, which the Tribunal accepted, was that the Senior Training Captain arrived late and worked fast and aggressively. That was not challenged and (if true) Ken Gillespie agreed was not acceptable. The Senior Training Captain asked the claimant very detailed technical questions. As Ken Gillespie agreed, if as trainer you wanted to catch a pilot out, you can make that more or less likely by the precise questions you ask. Moreover, the claimant gave unchallenged evidence that the other pilot in the sim with him, FO 8, commented during the break about the technical questions: "I couldn't answer those, he's after you, isn't he?". This looks like a "Chop ride".

271. One of the items necessitated a landing at Dubai in a mayday situation. The Senior Training Captain was acting as the Air Traffic Controller in the tower. The claimant's unchallenged evidence was that the Senior Training Captain refused permission when sought by the FO (acting as PM) to land into the wind at an alternative runway. Ken Gillespie accepted this would not be normal. The Senior Training Captain then criticised the claimant because he himself did not insist on doing so. It is recorded at [537B] that the claimant did not ask the Senior Training Captain for permission. In any event, as Ken Gillespie twice volunteered, a pilot might have to land into the wind if possible anyway if the situation was severe. The claimant was within the tail wind limits, and he successfully executed the landing with the tail wind.

272. On the question whether the claimant was "within tail wind limits" – which was not challenged during the claimant's evidence – the claimant's counsel submitted, on instructions, that Ken Gillespie gave honest but inaccurate evidence about the limit for the Boeing 787. He stated that the Boeing 787 tailwind limit is 10 knots, whereas the correct limit is 15 knots, as stated in the Boeing 787 FCOM 1, Limitations Section.

273. Ken Gillespie referred to additional factors which might have made that the less preferable course (on the erroneous assumption that the tailwind was right at the limit), though none of those is referred to in the report. The natural inference, the Tribunal accepts, is that the Senior Training Captain failed the claimant on that item when he should or could have passed him.

274. As for the "historic allegations", the respondent has stated at several places in setting out its case that historic concerns did factor into the decision to dismiss rather than re-train the claimant. The claimant's counsel describes this as "a complete fallacy". First, the decision makers (Captain DD and the Head of Aircraft Operations) effectively deny that at [869, 976]. Second, both Ken

Gillespie and Luke Corkill accepted that there was no basis for saying so. Third, Ken Gillespie accepted that, based on what he knew, the statement was untrue.

275. The Tribunal accepts the claimant's counsel's submission that this shows that the claimant's fate may have been covertly and indirectly decided on unattested, undocumented specious grounds, principally by the Senior Training Captain [551], and that he was not going to get a "fair crack at the whip". That is one possible explanation why the Senior Training Captain was so hostile to the claimant (see [551]) and part of the reason why Captain EE wrote, inexplicably in light of the evidence as a whole, at [858] that "to continue further training … would be a risk that is not backed up by a history of reasonability of success" – which was the finding on which Captain DD principally relied at [869] when writing that on the basis of the evidence before him "no further training can realistically be given to you".

276. The Tribunal regards it as remarkable that this undocumented and unsubstantiated so-called "historical" material was allowed to influence the process in any way.

(2) Substantive unfair dismissal

277. Taking care not to substitute its assessment for that of the employer, and viewing matters through the prism of the range of reasonable responses test, and on the basis of the analysis of the evidence and findings above, the Tribunal finds that the dismissal of the claimant was substantively unfair, as well as (as admitted) procedurally unfair.

278. The respondent acted unreasonably in treating capability as a sufficient reason to dismiss the claimant, having regard to: (1) the fact that the claimant failed the LPC/OPC checks on 10 April and 3 May 2016; (2) the way that the LPC/OPC checks on 10 April and 3 May 2016 were carried out; and (3) the training provided to the claimant in the period between 10 April and 3 May 2016.

(3) Does the claimant wish to be re-employed?

279. The respondent's counsel questions whether the claimant as a matter of fact wishes to be re-employed by the respondent. It is not enough for the claimant simply to assert that he wishes to be re-employed. The Tribunal must decide that the claimant does genuinely wish to be re-employed. There are said to be many factors suggesting that the claimant does not genuinely wish to be re-employed.

280. The claimant does not say so in his witness statement, which is silent on the issue. The respondent accepts that the claimant ticked the reinstatement or re-engagement box on his ET1 in October 2017. However, as the litigation progressed and the issues were identified, it is apparent that the claimant was not initially seeking re-employment, as is clear from the original List of Issues [68–70]. At that time, the claimant was seeking uncapped losses (as he was pursuing claims for both disability discrimination and unfair dismissal). The only remaining claim the claimant now pursues is his claim for ordinary unfair dismissal. That meant that he could no longer seek uncapped losses.

281. Counsel suggests that the claimant did not confirm that he was seeking re-employment until the respondent conceded that the dismissal was unfair by reason of the procedure which it followed, while making clear that it stood by its decision that it was entitled to rely on the failed sims to dismiss him. At the time of dismissal (and to the present date) the respondent has no sufficient confidence in his safety as a pilot and it cannot sanction him flying its aircraft. Accordingly, it stands by its dismissal decision substantively; and is adamant that it would be entirely impracticable for it to comply with an order for re-employment and unjust to make such an order.

282. The respondent then confirmed in open correspondence that, to obviate the need for a remedy hearing, it would agree to judgment being entered against it for unfair dismissal, with an award made in respect of the full basic award and the full compensatory award (at the statutory cap). In response, the claimant stated that he was seeking re-employment.

283. The respondent submitted that the claimant is not seeking an order for re-employment in good faith. It is said to be notable that his witness statement fails to mention any desire to be reinstated or re-engaged. His counsel did not question either of the respondent's witnesses challenging their stated beliefs that there could be no effective employment relationship and that they have no confidence in the claimant. The claimant's evidence in chief and under cross-examination makes it clear that he himself does not have one iota of trust in his former employer.

284. The respondent's position is that the claimant is using the opportunity of this remedy hearing to ventilate his sense of grievance against the respondent, and to seek to clear his name. It is contended that he is alive to the amount of arrears in pay he can seek in connection with an order for re-employment (out of all proportion to the usual compensation for unfair dismissal).

285. The Tribunal can deal with this point relatively briefly. It is against the respondent on this point.

286. The claimant signalled his wish to be reinstated at the earliest opportunity in the ET1. This is not a matter of pleading or of evidence. There is no requirement or expectation that it should be repeated within his witness statement. Section 112 of the Employment Rights Act 1996 is clear that the issue may arise at any time and as late as the Tribunal making a finding of unfair dismissal, subject only to any repercussions arising from any need to adjourn a hearing as a result. The claimant was entitled to take a fresh view of remedy once his disability discrimination complaint had fallen away. This Tribunal is unable and unwilling to draw the negative or adverse inferences that the respondent invites it to make as to the claimant's good faith, his motives or the genuineness of his wished to be re-employed by the respondent.

(4) Has the claimant caused or contributed to some extent to his dismissal such that it would not be just and equitable to order re-employment?

287. Section 116(1)(c) of the Employment Rights Act 1996 requires the Tribunal to ask itself whether the claimant has caused or contributed to some extent to his dismissal? If so, is it just to order reinstatement?

288. This question does not appear in this way in the agreed list of issues. No doubt that is because the agreed list of issues proceeded on the assumption that the remedy in this case would be compensation only. That means that contributory conduct was only relevant in the terms of section 122(2) or section 123(6) rather than section 116(1)(c) of the Employment Rights Act 1996. This question is also not addressed in the respondent's note on remedy issues. There the contributory conduct relied upon, for compensation purposes, was the failure of the LPC/OPC checks in April and May 2016, and the so-called "historical issues". The question is put in issue in the respondent's opening note, specifically at paragraph 56, which refers to the failure of the checks in question; the claimant not being prepared for those checks; and his failure to raise ill health or unfair conduct in relation to those checks.

289. The Tribunal notes what the claimant says about this at paragraphs 51-53 of the claimant's written submissions. The Tribunal agrees with what the claimant's counsel says about the failure of the checks at paragraphs 55-56 of those written submissions. This is not blameworthy or culpable conduct as required by the case law authorities. The Tribunal agrees also with what the claimant says concerning the "historic allegations" at paragraph 56 of his counsel's written submissions. They are unproven allegations. The extent to which they were relied upon by the respondent is by no means clear. The Tribunal also agrees with how the claimant deals with the additional or new allegations at paragraphs 57-58 of the submissions.

290. In summary, the Tribunal is not persuaded that the claimant caused or contributed to some extent to the dismissal, or that it would be unjust to reinstate him, at least in the terms expressed in section 116(1)(c).

(5) Is it practicable for the respondent to comply with an order for re-employment?

291. This is the real issue in these proceedings. The respondent's position is set out in its written submissions at paragraph 6.2 and in its opening note at paragraph 55. The claimant's position is set out in the written submissions at paragraphs 59-87.

292. The arguments here are finely balanced, in the Tribunal's assessment, and they are not easily reconciled or determined one way or another. The answer to this question is not clearcut by any means. However, in the final analysis, the Tribunal is marginally persuaded by the respondent's submissions that it would not be practicable for the respondent to comply with an order for reinstatement of the claimant.

293. The test is what is the respondent's view of practicability, tested by the Tribunal as to the genuineness of that view and whether it has a rational foundation or reasonable basis. The respondent's view set out in paragraph 6.2(1)(a) to (d) is the stronger compared to that set out in paragraph 6.2(2)(a) to (e) of its written submissions, but both views are genuine and both views have a rational foundation or reasonable basis, even if the respondent has now conceded procedural unfairness and the Tribunal has in addition found substantive unfairness. On balance, the Tribunal prefers the arguments and reasoning put to it by the respondent at paragraphs 10-18 – without for the purposes of this judgment accepting them in their entirety or without any reservation – to the arguments put on behalf of the claimant at paragraphs 59-87 of his counsel's written submissions.

294. The Tribunal does not accept that this is a paradigm case where reinstatement or re-engagement is practicable in the normal sense. Rather it is a case that is at the extremes of what might be practicable. It illustrates the fundamental difficulties that arise in the consideration of making a re-employment order. Accordingly, the Tribunal refuses to make an order for reinstatement. It does not consider that an order for re-engagement arises as a practicable alternative.

(6) If there is to be no order for re-employment, then what would be the calculation of the claimant's Basic Award and Compensatory Award?

295. The parties are agreed that if there is to be no order for re-employment then, subject to any reductions that might fall to be made, the claimant would otherwise be entitled to (a) a Basic Award of £9,780.00 and (2) a Compensatory Award of £80,541.00.

(7) What effect does Polkey have upon that calculation?

296. For the reasons advanced by the claimant at paragraphs 94-96 of the written submissions, the Tribunal agrees that a Polkey reduction is not appropriate in this case. The respondent did not develop a Polkey reduction argument with any obvious emphasis or expectation in paragraph 26 of its counsel's written submissions. Knowing what the Tribunal now knows about the facts of this case, the Tribunal considers that the respondent is correct not to have made its point on a Polkey reduction more forcefully than it did.

(8) Is a deduction to be made for contributory conduct?

297. Section 116(1)(c) is concerned with whether the claimant caused or contributed to some extent to his dismissal. Section 122(2) and section 123(6) is in slightly different terms. The reference there is to "any conduct" such that it would be just and equitable to reduce the basic award that would otherwise be payable to the claimant. The question is also whether the dismissal to any extent was caused or contributed to by any action on the part of the claimant so as to require the compensatory award to be reduced.

298. The Tribunal has already found that the claimant had not acted in a way that can be fairly described as culpable or blameworthy. This was a capability

dismissal rather than a conduct dismissal, although that distinction is not necessarily a conclusive one. The respondent seeks an 80 per cent reduction. See counsel's written submissions at paragraph 27; and see also paragraph 28.2 in the respondent's opening note and paragraphs 65-75. The claimant deals with contributory conduct in his counsel's written submissions at paragraphs 51-58.

299. The Tribunal prefers the claimant's arguments rather than the arguments advanced on behalf of the respondent. The Tribunal is unable to conclude that the claimant contributed to his capability dismissal in a way that can fairly be described or concluded as being blameworthy or culpable. The Tribunal declines to make a reduction to the basic award or the compensatory award.

(9) Has the claimant mitigated his loss?

300. Turning next to mitigation, the respondent's case as to mitigation is found in its written submissions at paragraphs 23-25, but not earlier. The claimant's response is at paragraphs 97-98 of his counsel's written submissions.

301. The Tribunal is satisfied that the claimant has taken reasonable steps to mitigate his loss. It was reasonable for him to seek fresh employment as a pilot in other airlines. He has largely succeeded in doing so, no doubt despite the difficulties that could arise from the circumstances of his dismissal by the respondent. He has mitigated, although not extinguished, his loss pretty much across the whole of the period since his dismissal and to date. This is especially noteworthy given the severe restrictions on the airline industry since March 2020 and the shake-up of this specialist labour market since COVID-19, as illustrated by the evidence of the respondent's own position regarding its commercial prospects and the employment of its flight crew and cabin crew.

302. In summary, the Tribunal agrees with the submissions made on behalf of the claimant. The claimant has taken reasonable steps to mitigate his loss. No reduction in his compensation follows.

(10) Has the claimant proved his loss?

303. The respondent raised an issue concerning proof of loss. This arises in respect of the schedule of loss and the claim therein for recovery of expenses incurred. The challenge to this item was brief and largely left unexplored. The Tribunal can see no reason to doubt the claimant's evidence as contained in his schedule of loss. If this was to be challenged, then it needed to be done in cross-examination to a greater extent than it actually was. Perhaps the respondent's counsel sensibly recognised that it really made no difference to quantum, which in the Tribunal's judgment it does not. The Tribunal has no concerns regarding proof of loss.

Conclusion and disposal

304. The claimant was unfairly dismissed by the respondent. The claimant's application for a reinstatement order is refused. An application for re-engagement has not been pursued either at all or with any enthusiasm, but in

any event the Tribunal does not consider that such an order should be made in the circumstances it has described above. The claimant is entitled to compensation for unfair dismissal without reduction. The respondent is ordered to pay to the claimant as compensation for unfair dismissal (a) a Basic Award of £9,780.00 and (2) a Compensatory Award of £80,541.00. The Recoupment Regulations do not apply to this award.

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Judge Brian Doyle
Date: 10 January 2022
Corrected under a Certificate of Correction on 23 February 2022

JUDGMENT WITH WRITTEN REASONS
AS CORRECTED
SENT TO THE PARTIES ON
28 FEBRUARY 2022

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