EMPLOYMENT TRIBUNALS

Claimant: **Mr Michael Osbourne**

Respondent: **British Airways Plc**

Heard at: **Watford Hearing Centre (by video hearing)**

On: **20 to 24 February 2023 (5 days)**

Before: **Employment Judge G Tobin**
Ms B Robinson
Mr A Scott

Appearances
For the claimant: Mr J Barnett (representative)
For the respondent: Ms G Hirsch (counsel)

RESERVED REMEDY JUDGMENT

The Claimant is awarded compensation in the sum of £629,594.04.

REASONS

1. We (i.e. the tribunal) had the benefit of detailed written and oral submissions from Mr Barnett and Ms Hirsch. There were a number of schedules of loss and counter-schedules of loss as the parties' narrowed issues and refined their arguments. We thank the parties for their efforts in this regard. We heard evidence from the claimant who provided 2 detailed remedy statements and also from Mr Simon Cheadle, who was the respondent's Chief Pilot Fleets (who provided 2 remedy statements also).

2. The parties had jointly instructed a medical expert, Dr Max Henderson, who is a Professor of Psychological Medicine & Occupational Psychiatry. Dr Henderson prepared a detail report which was dated 15 December 2020 [HB3288-3337] and which we accepted. Dr Henderson reviewed an extensive bundle of information including medical and occupational health records and conducted a detailed assessment of the claimant. His report answered specific questions from the parties.

3. There were a number of matters no longer in issue or which had already been paid or credited to the claimant. Ms Hirsch make reference to these at the beginning of her submission: the unlawful deduction of wages from the liability decision at £2,020.43; The UN Credit at £2,090.10; the Bank Hours agreed at £490.48; and the Delta/collectively agreed reductions.

4. The following was not resolved between the parties and remained outstanding.

Injury to feelings/personal injury

5. The claimant described his stress and anxiety caused by the respondent in his witness statements and in his oral evidence over 2 hearing. We accept the claimant's evidence in this regard. The events in question arose in August/September 2019. Dr Henderson notes that the claimant had a history of some mental ill-health and that he had been seen by various medical practitioners. Dr Henderson's view, which we accept entirely, is that the claimant was diagnosed in December 2019 with an episode of Generalise Anxiety Disorder and that from around late August 2019 the claimant symptoms of generalised anxiety disorder had re-emerged. Dr Henderson and the psychiatrist instructed by the claimant, agreed that the relapse was related to the claimant's dispute with his employer. Dr Henderson disagreed with the diagnosis that the claimant was given by in respect of complex post-traumatic stress disorder. Dr Henderson opined that in August 2019 the claimant was well but that he had a number of risk factors exposing him to an episode of mental ill-health. Notwithstanding these predisposing factors, the claimant would not, in his opinion, have become psychiatrically unwell in any event. So Dr Henderson attributed the claimant's generalised anxiety disorder of August 2019 to the respondent:

> In my opinion on the balance of probabilities Mr Osborne's illness was precipitated by his interaction with his employer.

And furthermore:

> In my opinion the ongoing dispute with his employer has acted as a maintaining factor for his illness, and in early 2020 as a precipitant for a further episode.

6. So the claimant was free of significant psychiatric symptoms and he was fit to fly prior to this dispute with the respondent. Paragraphs 192 to 198, in particular, of Dr Henderson report detail the claimant on going symptoms and his perception of injustice about the way that he was treated. These acted as a maintaining factor that prolonged the claimant's illness.

7. The claimant's generalise anxiety disorder was in remission in November 2022, and he was fit to return to full duties from that period, subject to retraining on an updated aircraft. So, the claimant's generalised anxiety disorder lasted between 2-3 years, but was not producing significant symptoms at the time of Dr Henderson's psychiatric report and the claimant's prognosis was good. The claimant was certified as fit to work and was returned to the respondent's payroll since 19 January 2023. He was waiting to attend a conversion course and was anticipated to return to full flying (and trade union) duties soon after.

8. In *Vento v Chief Constable of West Yorkshire Police (No 2) 2003 ICR 318*, the Court of Appeal gave specific guidance on how employment tribunal should approach the issue of quantum. 3 broad bands of compensation for injury to feeling (and personal injury) were set out. These comprised of:

    - A top band which should apply only to the most serious cases, such as where there has been a lengthy campaign of discrimination or harassment. Only in very exceptional cases should an award of compensation for injury to feeling exceed the top band. The *Vento* bands are up-rated periodically to reflect inflation, and at the relevant time the high band was from £26,300 to £44,000

    - A middle band which should be used for serious cases that do not merit an award in the highest band. For our purposes, at the relevant time the middle band was all was £8,800 to £26,300.

    - Lower band which is appropriate for less serious cases, such as where the acts complained of are in isolation or one-off occurrences. In general, very low awards should be avoided as they risk being regarded as so low as not to be a proper recognition of injury to feelings. The parties did not regard the low band as being relevant and it is only described here for completeness.

9. The Court of Appeal in *Vento* recommended that, where appropriate, employment tribunals should also have regard to the Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases ("the JSB Guidelines") which was used in the civil courts. The JSB Guidelines have been superseded by the Judicial College Guidelines ("the JC Guidelines") and the respondent have referred to part 4, which deals with Psychiatric and Psychological Damage. Taking into account the factors indicated, including: the injured person's ability to cope with life, work and relationships; the extent to which treatment would be successful; future vulnerability; and prognosis, we would regard the claimant's condition to be between "Moderate" and "Moderately Severe". The claimant's work-related depressive condition did not preclude his return to work, it lasted a significant amount of time, and the prognosis is good.

10. We value the claimant's injury to feeling as £19,070 according to the JC Guidelines. This is broadly mid-band *Vento*, although a little higher. We regard that valuation as consistent, fair and appropriate to the circumstances of this case. We award the claimant **£19,070** injury to feeling.

Aggravated damages

11. Aggravated damages are available where it is determined that the respondent has behaved in a high-handed, malicious, insulting or oppressive manner: see *Alexander v Home Office 1988 ICR 685 CA*.

12. We made no findings consistent with the award of aggravated damages in our previous Judgment. Our judgement on liability criticises the respondent's behaviour. Officials of the respondent attempted to disrupt the work of BALPA trade union representatives during lawful industrial action by reallocating their roles and tying them to unnecessary work and over-crewed flights. This appears to be premeditated as can be seen from the secret document "Flight Operations policy during industrial action". So, the respondent's behaviour was not personal or vindictive. The respondent's behaviour in seeking to disrupt industrial action differed little from many private sector employers when confronted with a well-organised, effective and well-supported trade union. Notwithstanding we find a treatment of the claimant unlawful, we are not persuaded that the respondent went so far beyond the anticipated response that it reached the threshold of aggravated damages.

13. The respondent treated the claimant badly because various officials thought the claimant was engaged in trade union activity when he was off sick, and they would not be persuaded otherwise. They had a planned response and were determined to follow it. That planned response provided no space or time to deal with grievances so that the trade union officials could not open up additional grounds to challenge this preordained behaviour.

14. Whilst we determine aggravated damages are not justified in this case, we have no desire to accept the respondent's behaviour as normal or justified. The respondent should learn lessons from our Judgment, and the claimant will need to be content with our previous findings. The threshold of aggravated damages is particularly high, and the respondent's behaviour does not reach this threshold.

Loss of earnings

15. Flight pay supplement was agreed at £79.27.

16. The claimant's pay stopped on 17 March 2020 and did not start again until 19 January 2023. This equated to 1,039 days. We accept the claimant's annual basic rate increased with effect from 1 June 2022 and 1 October 2022. We accept the claimant's calculation at a loss of basic salary of **£540,375.69**.

    <u>Monthly Variable pay</u>

17. The claimant sought reimbursement of his Daily Overseas Allowance (DOA) and Time Away From Base (TAFB) payments. The respondent contended that these were subsistent payments, so only applicable for relevant work done. The claimant said this was pay so therefore compensable. We accept the evidence of Mr Cheadle and prefer the respondent's approach of treating these payments as derived from subsistence payments so, as the claimant did not make the journeys, he does not qualify for the compensation.

18. We assess that the respondent has calculated the more accurate period for Flying Hour Rate and Flying Pay Supplement (FPS) so we assess this loss as £742.79 plus £542.61 to reflect the normal flying activities and the period of reduced flying. Therefore, we assess this loss at **£1,285.40.**

Furlough reduction

19. The effect of the coronavirus pandemic and the governments furlough arrangements upon the respondent's business was profound. Mr Cheadle dealt with the furlough arrangements in his witness statement and in his oral evidence. The impact of furlough on the respondent's pilots was initially low because the respondent sought agreement with BALPA and the scheme was not agreed until 19/20 November 2020 and then took a short time to be implemented. Mr Cheadle provided some furlough calculations which were based on colleagues who were closest to the claimant's work profile in task and seniority, which reflected the furlough allocation criteria. Consequently, we prefer the respondent's figures as being the more accurate on this point. Therefore, we reduced the loss of earning figure by **(£42,702.20)**.

Benefits received from Loss of Licence ("LOL") cover.

20. As there is a significant absence of contractual documents surrounding this benefit, we were precluded from making clear findings of fact. That said, there appears to be little dispute between the claimant and Mr Cheadle on this point. It seems that some time ago during the course of collective bargaining, BALPA representatives persuaded the respondent to fund insurance cover for this loss of pay. The claimant contended that the respondent agreed to this in return by reducing pilots' annual leave entitlement by one day.

21. We have not seen a copy of any insurance policy, but this is not surprising because at some stage the respondent let the policy lapse and thereafter continue the benefit on a company-funded basis. We were given no corroborative evidence that the agreed reduction of holiday entitlements varied or continued, either after the first year or when the insurance policy lapsed. Indeed, we saw no corroborative evidence that this was deducted from annual leave entitlements in the first place although we accept both the evidence of the claimant and Mr Cheadle that that was how the benefit was originally envisaged.

22. We understand that the benefit was taxed at a notional rate, but this did not equate to one day's holiday. We presume HM Revenue & Customs at some point assessed this benefit at a rate similar to what it might have cost an average pilot to purchase such insurance. There is no evidence that this has been reviewed by HMRC. Ms Hirsch adopted the analogy of a car parking space when assessing the notional benefit.

23. So, over a period of time, the respondent has funded this benefit and it has become part of the claimant's renumeration under his employment contract. Therefore, we are not persuaded that this is some form of voluntary benefit that the claimant has funded himself, it forms part of his renumeration package and, given recent events, a significant part of his renumeration. The claimant is not entitled to an "insurance exemption". That is not just and equable. It is like having you cake and eating it! The respondent funded this benefit so they should be entitled to off set this anainst money they owe the claimant. This conferred a benefit on the claimant in the amount of £37,763.37, to set this off against any shortfall on pay. We deduct **(£37,763.37)** from the claimant's loss of earnings.

Holiday pay

24. We have not seen any contractual provision that allows the claimant to capitalise (i.e. be paid for) any holiday pay not taken in the relevant holiday year. Most employers permit employees to carry over a maximum amount of holiday from year to year or adopt a "use it or lose it" policy. In default of any contractual authority, the Working Time Regulations provide for unused and untaken holiday pay to be capitalised only upon termination of employment. In any event, the claimant is not entitled to compensation for any accrued and unused holidays because his contract of employment has not ended.

Pension loss

25. We are entirely persuaded to settle the claimant's pension loss under the simplified approach set out in the recent addition of the Employment Tribunal Principles for Compensating Pension Loss. We are persuaded by Ms Hirsch submission. Mr Barnett's arguments about missed growth is too speculative and uncertain. The claimant's employment was continuing, he has 10 years to retirement, and he contributes to a good (apparently) well-run pension fund. He has limited his pension contribution to £10,000 per annum so we assess losses simply by adding up the missed employer contribution of £2,302.01 per month. He has 1,039 days of pension loss so £2,302.01 divided by 30 (for a daily rate) multiplied by 1,039 equates to **£79,726.28**. We regard that as fair and appropriate to award in the circumstances.

Staff travel

26. The respondent had withdrawn this benefit and the claimant claimed the difference between what he would have paid under the staff scheme and the actual amount of travel for himself and family members that he paid. The overall amounts are modest in the circumstances and we are entirely convinced that the sum of **£695.84** is due.

Medical costs

27. This loss was accepted by the respondent and we accept the claimant's valuation at **£600**.

Mitigation expenses

28. The claimant remained in employment throughout, so he was not expected to go seek out alternative employment or alternative career opportunities for any of the period under scrutiny. We note that the grounds of resistance contended that the claimant was under a duty to mitigate his loss but that was a misinformed position from someone who clearly should have known the law better. In any event, this loss is not accepted.

ACAS Uplift

29. An award of compensation can be increased or reduced, by at 25%, if the employer has unreasonably failed to comply with a relevant code of practice relating to the resolution of: see s207A Trade Union & Labour Relations (Consolidation) Act 1992 ("TULRCA"). A relevant code of practice will have been issued either by ACAS or the Secretary of State under ss199-206 TULRCA. The relevant code is ACAS Code of Practice 1: Disciplinary and Grievance procedures (2015). The claimant's complaints under both s146 TULRCA and the Employment Relations Act 1999 (Blacklists) Regulations 2010 are both applicable legislation under Schedule A2.

30. The tribunal will normally make a percentage adjustment based on its perception of the employer's default, so the more serious the default the higher the percentage. However, when making an adjustment under these provisions, a tribunal must take into account the absolute value of a given uplift, rather than just the percentage value. Failure to do so when the award yields "a significantly larger amount in absolute terms, is an error of law: see *Acetrip Limited v Dogra UKEAT/0238/2018.*

31. The respondent was cynical and deliberate in not allowing the claimant to exercise his rights under the grievance procedure. The respondent ran the risk of a constructive dismissal. Nevertheless, the claimant did not treat this as a constructive dismissal. The failure to allow the claimant proper redress through the grievance procedure significantly aggravated the claimant's ill-health and precluded his return to work. The claimant sought an appropriate remedy, and this was only available through the employment tribunal. So, the respondent does not emerge unscathed because this is reflected in the injury to feeling award and the claimant's lengthy loss of earnings compensation. In short, the respondent made the claimant ill by the initial treatment and this illness was prolonged and aggravated by the respondent's ongoing default and, in particular, the respondent's refusal to hear the claimant's grievance.

32. Had compensation not been so extraordinarily high in absolute terms we would have awarded an uplift of 25% to show our disapproval of the respondent's behaviour. However, that would amount to an award in excess of £140k and would produce a wholly disproportionate value of the award. Even a 5% uplift would produce compensation over £28,000 which is at a level in excess of the average yearly salary in the UK and that cannot, in our opinion, the justified by the level of default. An award at 1% or 2% would undermine the veracity of this area of compensation, so, in these exceptional circumstances, we make no award in this regard. We are confident that this will not undermine the integrity of such an award generally because we decline from making a very low percentage uplift. Our liability judgement and this public document records our disapproval of the respondent's deliberate and unjustifiable failure. Furthermore, this default caused, or at least contributed, to the claimant's ongoing loss of earnings for which the claimant has recovered a substantial amount.

Tax treatment and grossing up

33. The claimant lives in Canada and pays tax overseas. He invited us to gross up his award. The amount of compensation due is generally calculated net of tax, the claimant being awarded an amount based on his take-home pay. When tax is payable on compensation under s401 Income Tax (Earnings and Pensions) Act 2003 ("ICEPA") the practice often adopted is for Tribunals to 'gross up' the award to take this into account. 'Grossing up means increasing the amount of compensation so that, once the appropriate amount has been paid to HM Revenue and Customs, the claimant is left with the figure the Tribunal originally intended to award.

34. This practice is based on the 'Gourley principle' derived from the House of Lords' decision in *British Transport Commission v Gourley 1956 AC 185 HL*. This was a dismissal case. The principle applies that the tribunal's approach to tax should not put the claimant in either a better or worse financial position than if the dismissal or discrimination had not occurred. Calculating grossed-up figures for total loss inevitably requires accurate information as to both the claimant's earnings and his tax liability. Ensuring that the correct information was available was the responsibility of the parties and, in this regard, this matter was extensively discussed in the January Preliminary hearing and the tribunal issued very clear guidance to the representatives during case management to ensure that this responsibility was met. We initially proceed on the basis that the full amount of compensation will need to be grossed up. *International Petroleum Ltd v Osipov EAT 0229/16* determined that the tribunal could potentially gross up to take account of non-UK tax liabilities. However, in his closing submission Mr Barnett informs us that the Canadian authorities will make no deductions for tax from this award.

35. We were not given an accountant's report nor were we given any form of expert evidence. Mr Barnett's calculations were detailed. However, whilst we are in no doubt he understood his calculations, neither the tribunal nor the respondent was that any tax liability would be limited to a maximum of 10% of the award. We think that £30,000 of the award remains tax free under s406 ITEPA and the claimant can rely on personal allowances and other deductions. The respondent said that they had been somewhat taken by surprise by this shift of the tax position as Ms Hirsch and the respondent witnesses were unaware that the claimant paid any UK income tax at a reduced-rate or at all.

36. Following the hearing, we sought to work through Mr Bartlett's figures, but we were not able to arrive at any consistent or satisfactory computation. Because of the absence of an accountant's report, the lack of expert evidence for what is an extremely complicated tax position, the fact that this grossing up does not relate to dismissal or post-dismissal compensation, and grossing up was eventually pursued on a marginal UK-rate we accept the respondent's submission, and we are not going to award any compensation based on grossing up. In making decision, we note the lower level of UK taxation and we reassure the claimant that we have had in mind the overall just and fairness of the compensation we award. There must be a degree of certainty and finality in litigation; and, if the overall compensation was one in which we did not think was appropriate in the circumstances, then we would have revisited this aspect of compensation and may have ordered further hearing(s).

Interest

37. Interest is calculated a 8% for the full period for the injury to feelings/personal injury award and from the mid-point for the pecuniary losses. Therefore, we calculate interest as follows:

    (1) £19,070.00 times 8% per annum divided by 365 gives a daily rate of £4.18. The period from 17 March 2020 to 24 February 2023 amounts to 1,074 days. The daily rate is multiplied by 1,074 and gives £4,489.32

    (2) £542,217.64 times 8% divided by 365 gives a daily rate of £118.84. £118.84 times 537 equals £63,817.08.

    We calculate interest at £4,489.32 plus £63,817.08, which equals **£68,306.40.**

Summary

38. We award as follows:

Injury to feelings/personal injury		£19,070.00
Loss of earnings		
Basic pay	£540,375.69	
FHR & FPS	£1,285.40	
Less furlough reduction	(£42,702.20)	
Less LOL	(£37,763.37)	
		£461,195.52
Pension loss		£79,726.28
Staff Travel		£695.84
Medical costs		£600.00

Interest	£68,306.40
TOTAL	**£629,594.04**

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Employment Judge Tobin

Date: 5 June 2023

Sent to the parties on: 5 June 2023

For the Tribunal