EMPLOYMENT TRIBUNALS

Claimant: Mrs T McManus

Respondent: British Airways plc

Heard at: Reading **On:** 23-27 September 2024

Before: Employment Judge Anstis
Ms A Crosby
Ms H T Edwards

Representation
Claimant: Mx O Davies (counsel)
Respondent: Mr J Davies (counsel)

JUDGMENT having been given on 27 September 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. The claimant is employed by the respondent as Cabin Crew.

2. The claimant's claims are of disability discrimination: direct disability discrimination, a failure to make reasonable adjustments and disability related harassment.

3. The respondent accepts that at all material times the claimant was disabled by reason of depression, anxiety and social phobia.

4. The claimant has very long service with the respondent, having worked for them almost all her adult life.

5. The matters with which the claim is concerned arose during and subsequent to Covid-19 lockdowns.

6. The claimant's disability developed during Covid-19 lockdowns, and also during Covid-19 lockdowns the claimant's terms and conditions were changed (in what

has been termed a fire-and-rehire exercise) from "Worldwide Crew" to "Heathrow Cabin Crew" ("HCC"). Whereas Worldwide Crew would fly exclusively long-haul, "Heathrow Cabin Crew" were to fly on a mixed fleet – a combination of long-haul and short-haul routes.

7. There was disagreement between the parties as to which of long-haul or short-haul work was "better", or which attracted (overall) more financial benefits. For now we note that there were clear differences in working practices between the claimant's former Worldwide Crew role and the Heathrow Cabin Crew role, including that long-haul work was likely to include rest days overseas (due to the length of the flights) which was not a common feature of short-haul work. It is also the case that the claimant considered the change to put her in a worse position.

8. The parties had agreed a list of issues for the purposes of the claim. At the start of this hearing Mr Davies proposed a revised list of issues but this was rejected by Mx Davies. At the suggestion of the tribunal Mx Davies revisited the list of issues prior to closing submissions. The version attached as the appendix to this decision is the list as subsequently amended by Mx Davies. Mr Davies had no objection to these amendments and we have proceeded according to that list. We have added in square brackets and italics some concessions made by Mr Davies in his closing submissions.

9. Prior to closing submissions we asked Mx Davies to consider whether any of the claimant's claims of direct disability discrimination were really arguable. We were conscious that the comparator in such a case must be an individual with the same symptoms as the claimant but who was not disabled (see, for instance, para 3.29 of the EHRC Code of Practice). Actual comparators in such a situation will be rare and (except in one respect) the claimant relied on a hypothetical comparator. By the time of closing submissions the allegation in respect of which there was said to be an actual comparator, along with some of the other allegations of direct disability discrimination, had been withdrawn. We were still left with the problem that there appeared to be no basis on which we could construct a hypothetical comparator. We will consider this later in our conclusions, but mention it now to explain why we may have dealt with the claims of direct disability discrimination more briefly than the other claims.

10. We note that although the claimant's witness statement addresses many other matters it was agreed between the parties that this claim relates to a relatively short period of time between the first matter complained of (17 March 2022) and the submission of the claim (12 August 2022). One consequence of this is that the respondent accepts that all of the claimant's claims are brought within the relevant time limits.

11. At the start of the hearing Mx Davies suggested that the claimant wished to amend her claim to including a claim in relation to the handling of her grievance, but on further consideration that application was not pursued. Also at the start

of the hearing we declined (by a majority) an application by the respondent for one of its witnesses to attend by CVP. The witness attended the hearing in person.

THE FACTS

Rostering

12. A number of the claimant's complaints related to a failure to make adjustments in respect of rostering arrangements.

13. Rostering of cabin crew and the flights that each member of staff was assigned to is a complex matter that we were only given a limited description of during the hearing. We note the following basic points:

    a. HCC were rostered for duty in blocks of 21 days.

    b. Even part-time staff would be rostered for duty in a block of 21 days. The only distinction between part-time and full-time staff (and between different levels of part-time staff) was in the number of non-working days between bocks of 21 days work. We heard of contracts described as "21/7", which would be considered 75% of full-time, and denoted 21 days of work followed by 7 days off. "21/21" would be a 50% contract and "21/42" a 33% contract. Each member of cabin crew was subject to a maximum of 900 hours flying time in a year, but this was not a relevant restriction in the claimant's case as she did not come close to meeting this limit. Prior to her period of long-term sickness absence the claimant's contract was a 21/7 or 75% contract.

    c. Having a duty block of 21 days did not mean that you would actually be flying every one of those 21 days. The 21 days could consist of:

        i. fixed flying duties (in which case subject to illness, cancellation of the flight or other exceptional circumstances you would be working as cabin crew on that flight),

        ii. stand-by duties – either at home and available for work on two hours notice or in a stand-by area at Heathrow ready to fly,

        iii. "available" duties – being "available" to fly but differing from stand-by duties in that you may be allocated work at any time up to 6pm the day before the relevant duty (if you had not been contacted by that time you could take it that the following "available" day would be free), or

        iv. rest days, either at home or overseas.

14. Cabin crew were paid a fixed salary, but with additional allowances payable for carrying out flight duties.

15. Staff were given 21 days notice of each block of 21 days work. This was available to be accessed online from 10pm on the relevant day. It is common ground that in practice, although not required to do so, staff would log on almost immediately to check their roster, and that the scheduling system was not able to accommodate access for everyone who wanted to log on at that time.

16. Staff could "bid" for work, meaning that ahead of the compilation of the roster they could pick flights that would be their preferred flights for that particular duty period. They were not guaranteed to get those flights, but it appears that the principle was that where these preferences could be accommodated they were. There was a difference between the claimant and the respondent as to whether this actually worked in practice.

17. There was also the opportunity for staff to trade working days with other crew members via the scheduling system. Cabin crew could swap duties with other suitably qualified members of staff. The respondent particularly emphasised that this was possible with "available" days, which could be converted to fixed flying duties by swapping with another member of cabin crew. Again it was the claimant's position that while this might have been the theory it did not work in practice.

18. Finally, there was provision in the scheduling for booking holidays and "trump days", which appears to be some sort of super-request for particularly important days off.

The claimant's return to work

19. The matters with which we are concerned start in February 2022, when the claimant was able to contemplate a return to work after a lengthy period of sickness absence. Emma Taylor was a "Standards and Policy Support Partner". She says "*Day to day, I work in a team of managers who support and conduct disciplinary hearings and appeals. I also individually manage a small number of Cabin Crew who have been absent from work long term.*" For the purposes of this claim, Emma Taylor was the individual with responsibility for managing the claimant's absence and therefore for, so far as possible, enabling her return to work.

20. It is agreed between the parties that following the introduction of HCC no member of cabin crew had a "line manager" as such. Instead, senior members of staff such as Ms Taylor could be drawn upon at various time for particular purposes.

21. It is apparent that the claimant had been receiving substantial support from various organisations with her disability, and that she held the advice of those organisations or individuals in high regard. The relevant individuals have been described by the claimant as being her "Mental Health Support Team". While it is clear that the claimant benefitted considerably from the support of this mental health support team we were never told who they were or what, if any,

professional qualifications they held. In particular we were never told if any of them were medically qualified or held any occupational health qualifications.

22. On 18 February 2022 the claimant wrote to Emma Taylor saying:

> *"… I have completed a WRAP Wellness and Recovery Action Plan with the help and guidance of my Mental Health Support Team. The following are the Reasonable Adjustments and Rehabilitation Plan that I would like to request in order to facilitate and support my return to my 75% Contractual Role. This Plan I have completed consists of a 12 month plan with a review possible at 6 months before moving to the next step.*
>
> *Reasonable Adjustments*
>
> *1. A Phased Percentage Increase in Contract*
>
> *2.*
>
> *3. a) Initial start of a 21/42 contract starting on the 26th March 22 with a 42 day part time off period 26th March to 6th May inclusive*
>
> *4. b) An increase to a 21/21 contract beginning 1st October 22 with a 21 day part time off period 1st October to 21st October inclusive*
>
> *5. c) A return to my 21/7 contract beginning 18th March 23 with a 7 day part time off period 18th March to 24th March inclusive.*
>
> *6.*
>
> *7. A phased percentage increase in contract will be the most effective way for me to gradually build towards my 75% contractual role. The work to rest ratio will also allow me to continue with other elements of my WRAP which include Exercise, Healthy Eating, Sleep and Regular appointments with my Mental Health Support Team.*
>
> *2. Deferral of Short Haul Conversion Course …*
>
> *3. A Fixed Roster for each working block consisting of CAT 5 USA Trips exclusively. A major trigger for my anxiety is uncertainty. Removing any Standbys or Availables from my roster will give me a stable fixed roster for each working block thus reduce my anxiety. The CAT 5 USA trips being stand alone trips will also allow for 3 days off to recover, recharge and recouperate.*
>
> *4. I would like extra support with IT …"*

23. It is those proposed adjustments which form the basis of the claim of a failure to make reasonable adjustments.

24. On 10 March 2022 Ms Taylor replied with some observations on the proposed adjustments, including:

    a. That a 21/42 (aka 33% contract) "*is now a closed contract which means this option is not available*". It appears to be agreed between the parties that at that time the respondent had taken a decision not to offer any further 33% contracts and not to convert any existing contracts to 33%, although those who were already on 33% contracts and wished to retain them could do so.

    b. That "*Your request for roster stability of no* [stand-bys] *is a reasonable one and something we have touched on during our recent conversations.*"

25. The respondent has its own in-house occupational health service: British Airways Health Services (BAHS). Ms Taylor referred the claimant to BAHS and Judith Akuta was allocated to speak to the claimant. On 16 March 2022 the claimant wrote to Ms Akuta with the same proposed adjustments she had sent to Ms Taylor. Ms Akuta replied the following day, saying, in respect of the Mental Health Support Team "*Kindly note that it is not their remit to make recommendations for you. My job is to assessment you and to make adjustments accordingly.*"

26. While there may have been other ways of expressing this, it seems to us that in saying this Ms Akuta was correct as a matter of law (see for example, para 6.24 of the EHRC Code of Practice). The responsibility to identify and make reasonable adjustments is one that rests with the employer, not the employee. No doubt such adjustments are best made in consultation with the employee, but ultimately the determination of whether to make adjustments and what adjustments to make is the responsibility of the employer.

27. This set the scene for a telephone consultation between the claimant and Ms Akuta on 17 March 2022.

The call on 17 March 2022

28. It is agreed by both sides that this telephone consultation did not go well. It lasted from around 11:00 – 13:00. A number of the claimant's claims (including claims of disability-related harassment) arise from what occurred in the meeting. On the claimant's account (and the account of one of her witnesses) she was in tears and very distressed during the meeting. Ms Akuta accepts that she was annoyed with the claimant during that meeting, although she says she did not let that annoyance show.

29. Having heard from both the claimant and Ms Akuta, it is clear that both had different approaches to the meeting.

30. The claimant was very nervous about the meeting. She was recovering from a prolonged period of illness and a number of other difficulties arising from Covid-19 and the associated lockdowns. She was facing a return to work as HCC in quite different circumstances to those she had known when on the worldwide fleet, and it is clear that she was not happy with the change from worldwide fleet to HCC. She was nervous about her return to work, and placed heavy reliance on the advice of her Mental Health Support Team. Her previous experience of addressing her disability with supporting professionals appeared largely to have been positive. She was not prepared for Ms Akuta's more business-like approach.

31. For her part, Ms Akuta considered herself to be an experienced occupational health practitioner who was well versed in questions that may arise on the return to work of disabled members of cabin crew. She had a job to do and was confident in her ability to do so. She had a range of commonly available adjustments that she could recommend. This was one of a number of appointments she would have had that day, and she approached it in a routine and business-like manner.

32. That contrast in approaches shows itself on the question of the taking and giving of the claimant's medical history. In their closing submissions Mx Davies says Ms Akuta "*refused initially to let C discuss her history, the only way Ms Akuta wants to attain it is through prescriptive questions …*". In her evidence Ms Akuta was clear that she did not want what the claimant apparently wanted to give her – a lengthy narrative of her medical history. For Ms Akuta there were particular key questions that she needed the answers to in order to understand the situation, and matters (such as confidentiality and consent) that had to be addressed even before she got into the claimant's medical history. It is arguable whether Ms Akuta's approach amounted to "*refusing … to let C discuss her history*", but it is clear that she (Ms Akuta) viewed asking direct questions as a better way of obtaining the necessary history than allowing the claimant to give her own narrative account of events.

33. The claimant approached the meeting on the basis that it was to discuss her medical condition and the adjustments that had been proposed by her Mental Health Support Team. Ms Akuta approached the meeting on the basis that it was a meeting for her to gain the necessary information from the claimant from which she could then consider and recommend adjustments according to her own professional expertise.

34. It is not in dispute that during this meeting and in making her recommendations Ms Akuta was working to a "matrix", which we understand to be a pre-determined list of possible adjustments that the respondent's scheduling department had agreed could be accommodated for cabin crew. As well as being described as a "matrix" it was referred to as a menu of standard adjustments that could be recommended by BAHS and which, presumably,

could then be accommodated without further question by those in charge of scheduling.

35. The factual allegations that arise during the meeting are that:

    a. The claimant was "*subject to aggressive and demeaning behaviour by Ms Akuta*".

    b. "*Ms Akuta failed to take seriously, and give due and proper consideration to, the C's disability and/or requests for reasonable adjustments*"

    c. "*Ms Akuta told her that Access to Work was not for people like the C but was meant for people in wheelchairs*"

    These are said to be both acts of direct disability discrimination and disability-related harassment, but at this stage the question for us is simply whether they occurred.

36. An allegation in the form described at (a) above typically requires an explanation of what particular behaviour by Ms Akuta is said to be aggressive and demeaning. That is provided by Mx Davies in para 20 of their closing submissions, and is set out below, along with our findings. The quotes are alleged to have been said by Ms Akuta. We have omitted matters (f), (g) and (i), which are things said to be done by the claimant not by Ms Akuta. At this stage the question for us is whether these were said or done, and not what the legal consequences of them were.

    a. "*I ask questions and you answer*"

       This was said by Ms Akuta. It appears in the near-contemporaneous notes made of the meeting by the claimant and although Ms Akuta did not expressly accept that she said it she did agree this accorded with her approach to such a consultation.

    b. "*You should be better now, you have had over 12 months of support, why are you not better? BA only allow 6 sessions, they have a business to run.*"

       Ms Akuta does not accept that she said it. We take it that this was said, but in the slightly different form recorded by the claimant at the end of the consultation: "*you have had counselling and treatment for over 12 months now, why do you still need it. You should be better now. BA only support short term as they have a business to run.*"

    c. When the C mentioned Access to Work, you said "*Its not for people like you, its for people in wheelchairs.*"

       This was not accepted by Ms Akuta, but we accept that it was said as it is recorded in these terms in the claimant's note.

d. "*have you tried to commit suicide*"

Ms Akuta accepted she had asked this.

e. "*I need to know if have you have tried to kill yourself*"

Ms Akuta accepted she had said this.

f. …

g. …

h. Ms Akuta said she had until 3pm to consent, pressurising the C to consent. C's oral evidence "*First said no, I pleaded, please Judith, please can I have some time. Then she said, ok, you have until 3pm, or I'll close your case*".

Ms Akuta does not accept this. If it happened it was in a separate call almost immediately after the meeting. It is recorded in the claimant's note (except for "*or I'll close your case*") so we accept that this was said, but not including the "*or I'll close your case*" element.

i. ...

Immediately after the meeting

37. As was her usual practice, Ms Akuta had prepared her response to the medical referral during her meeting with the claimant.

38. She sent this response to Ms Taylor later the same day, including the following:

> *"this pleasant lady has been off sick since Oct 2021 due to suffering from a mental health condition that affected her general health and wellbeing. According to my assessment, Mrs McManus has received appropriate treatment via her GP and has made a good recovery. She was on prescribed medication for a short-term and is now able to manage her symptoms better without medication. She tells me that she is having ongoing therapeutic support once a week with a therapist and every two weeks with another therapist. She has had two therapies for one year now. She tells me that, she is currently doing talking treatment to maintain her wellbeing. In view of this, I have advised her to book her appointments on her days off hence her working contract is 75%. I will anticipate a possible return to work from the 18 April 2022. If the business will accommodate, I will recommend no standby for a month. Based upon the information given to me today my interpretation of the disability provision of the Equality Act 2010 is that Mrs McManus's condition is likely to be considered a disability."*

39. The only adjustment recommended by Ms Akuta was "*no standby for a month*", which was one of the possible adjustments permitted by the matrix. This was far from the extensive adjustments that the claimant's Mental Health Support Team had suggested.

Further discussions

40. On receipt of this Ms Taylor set up a review meeting with the claimant to take place on 22 March 2022.

41. The outcome of this (in early April) was a proposal by Ms Taylor for "temporary roster support".

42. What this amounted to is somewhat difficult to follow without a detailed understanding of the rostering arrangements, but we see a "return to work course" from 19-28 April 2022 (there was argument about whether this meant every day during that period or not), a "75% working block" to encompass a trip following the return to work course, but with no standbys, then 50% (i.e. 21/21) working through to mid August with full 75% working (the claimant's standard contract) from mid August. The claimant was to be provided with a crew car park pass and a referral to the Customer Excellence Team to help her with any IT issues.

43. It is important to note that the adjustments proposed by Ms Taylor went further than simply the "*no standbys*" recommended by Ms Akuta. Mx Davies said that it was wrong of Ms Taylor to describe this as going "*above and beyond*" since the adjustments still fell short of what the claimant had been seeking, but it is fair to acknowledge that they went further than Ms Akuta's recommendations. That is both in major matters (such as the introduction of a period of 50% working) and in possibly lesser matters such as the provision of a car park pass and IT support.

44. Ms Taylor met with the claimant on 8 April 2022 to discuss this. By this time the claimant had started to criticise the conduct of Ms Akuta during the meeting on 17 March 2022. Ms Taylor says, "*I adjourned this meeting to enable her to have another BAHS assessment*". It appears to be agreed that the claimant raised the question of a 33% contract in this meeting but was told by Ms Taylor that such a contract was no longer available.

45. Throughout this period and up to 10 July 2022 the claimant submitted fit notes saying that she was unfit for work. At this stage no adjustments were suggested on the fit notes.

46. The reference to "*another BAHS assessment*" was implemented by way of a meeting between the claimant and Hugh Scott of BAHS on 14 April 2022. This meeting was also attended by the claimant's union representative. It is accepted by the respondent that this was not a full reassessment, but it seems

to have proceeded as some sort of combined medical assessment and complaint meeting.

Sick pay

47. Around the end of April or start of May 2022 the claimant's sick pay expired. It is not clear whether this was company sick pay or SSP, but it is not disputed that whatever pay it was had (on the basis of its usual terms) expired. The claimant's complaints in relation to sick pay are based on a failure to extend sick pay beyond its usual period, not improper early ending of her sick pay entitlement.

Temporary ground-based work

48. Ms Taylor had a further review meeting with the claimant and her trade union representative on 25 May 2022. Ms Taylor recorded her understanding of the meeting in a letter later in June:

> *"… you said that you felt listened to by Hugh Scott. You further told me that Hugh recommended you were unfit to fly for a few weeks following a GP review of your medication. With full consideration of your circumstances and having listened to your comments during your review meeting, we discussed the option of a ground placement to support your return to the operation. I had discussed this with you during an informal telephone conversation as an additional reasonable adjustment to facilitate your return to work. I explained that I would be required to refer you to BAHS for an occupational assessment and once in receipt of the outcome from this, I would be in contact with you to discuss the next steps. I also explained that I would review the proposed return to work plan which would continue to include temporary roster support and recommendations from BAHS. I explained that we would remain in contact for me to review your rehabilitation and to ensure I could continue to support you and your eventual return to the operation."*

49. On 10 June 2022 the claimant started a formal grievance process in respect of the conduct of Ms Akuta at the meeting on 17 March 2022.

50. Ms Taylor convened a further meeting on 24 June 2022 to discuss a possible non-flying role she had found for the claimant, working in "Crew Support". There was a subsequent referral to BAHS where the claimant was seen by another practitioner (not Ms Akuta or Mr Scott) of whom no complaint is made. The occupation health practitioner reported:

> *"I have completed a consultation with Teresa today and can update you as follows with her verbal consent. Teresa as you are aware is under the care of the NHS for a significant medical issue. She has received effective treatment and intervention; her symptoms have improved, and I understand a rehabilitation plan on the ground has been discussed.*

> *Teresa is keen to attempt this commencing on July 11th and feels she would benefit from 2 days a week for 1 month. Following this period, she would like a review and is aware the expectation would be to increase her hours at that time with the goal of rehabilitation being a return to flying."*

51. The claimant took up this ground role on 11 July 2022 on the expiry of her sick note. Ms Taylor says that this was a phased return to work starting at six hours a day for two days a week and rising to eight hours a day for two days a week, which Ms Taylor describes as a 50% contract. It was expected that this secondment would last for three months.

52. On 21 July 2022 Ms Taylor spoke to the claimant and it appears that the claimant expressed some concerns about her working hours, wanting to work shorter hours in a day. Ms Taylor said that that was not possible and the secondment proceeded according to its original plan. Nothing in the claim relates to an adjustment of working fewer hours in a day.

53. On 12 August 2022 the claimant submitted her employment tribunal claim. As there has been no application to amend the claim any discrimination we are to address can only have occurred before 12 August 2022.

Subsequent events

54. A review meeting took place on 26 August 2022 which appeared to be generally positive about the secondment the claimant was then undertaking.

55. The claimant submitted a fit note for the period 31 August 2022 to 1 October 2022 saying that she may be fit for work with the following qualification: "*continue 2 x 12 hour days per week until end of September*". By that time that was her working pattern on her ground work secondment. It is clear at this time the parties were working to the claimant resuming flying duties from the start of October, and this was endorsed by a further BAHS referral in mid-September, although for personal reasons the claimant postponed resumption of her flying duties. During September there was a discussion about what adjustments would be made on the claimant's return to flying duties. To some extent both the claimant and respondent repeated their previous positions, although with the addition that a short haul conversion course the respondent said that the claimant needed to undertake was deferred by the respondent.

56. The claimant received a grievance outcome on 28 September 2022, although subsequent appeals stretched across the following years. The claimant resumed flying duties according to the adjustments offered by the respondent from 5 November 2022.

57. There were further complications, but we do not think we need to go beyond this point for the purposes of this decision.

The claimant's fit notes

58. We have found it helpful in our deliberations to consider the claimant's fit notes during the relevant period. Starting with one dated 20 January 2022 they are as follows, with all dates being in 2022:

Date	Duration:	Fit to return with adjustments?
20 Jan	19 Jan – 18 March	No
25 March	19 March – 19 April	No
27 April	27 April - 29 June	No
27 June	27 June – 10 July	No
6 July	30 days	Yes – to work 2 days a week maximum 6 hours a day from w/b 11th July.
1 August	30 days	Yes – to continue doing 2 days a week but to increase up to 8 hours a day from 8 August.
31 August	31 August – 1 October	Yes – to continue 2 x 12 hour days per week until end of September.

59. Thus with the exception of an unexplained gap between 19 & 27 April the claimant has throughout this period been (in the opinion of her GP) unfit to work except that in later months she was fit for work subject to adjustments to her hours which (broadly speaking) the respondent made and were not at issue in this claim. The claimant's evidence generally accords with this. For instance, she says "*I was meant to return to the workplace in March 2022 with reasonable adjustments in place however my recovery was set back following the BAHS referral with Ms Akuta and my GP signed me unfit for duties until 11 July 2022*".

60. The period 19 - 27 April 2022 immediately follows the claimant's meeting with Mr Scott of BAHS, in respect of which it is recorded that "*Hugh recommended you were unfit to fly for a few weeks following a GP review of your medication*".

THE LAW

Direct disability discrimination

61. Section 13(1) of the Equality Act 2010 describes direct discrimination:

> *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

62. The application of this to disability discrimination claims is described in the EHRC Code of Practice, which we are obliged to take into account in this decision. Para 3.29 of the Code of Practice reads:

> *"The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself)."*

63. So for the purposes of the claimant's direct disability discrimination claim her comparator must be someone with the same symptoms that she has, but who is not disabled.

Reasonable adjustments

64. The duty to make reasonable adjustments arises pursuant to s20(3) of the Equality Act 2010:

> *"… where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled* [the employer must] *take such steps as it is reasonable to have to take to avoid the disadvantage."*

65. In this context, "*substantial*" means "*more than minor or trivial*" (s212(1)).

66. No questions arise in this case in relation to knowledge of the disability.

67. This requires first the identification of a relevant provision, criterion or practice (PCP), then a finding that that PCP puts the claimant at a substantial disadvantage (in comparison with persons who are not disabled) and then a consideration of whether the employer has taken such steps as are reasonable to avoid the disadvantage.

68. The IDS Handbook at para 3.77 says that "*While a PCP must have a degree of actual, or potential, general applicability, it need not be applied to the whole workforce.*"

69. As regards "substantial disadvantage", in Chief Constable of West Midlands Police v Gardner (UKEAT/0174/11) it was said that:

> *"There may be many cases in which it is obvious what the nature of the substantial disadvantage is, and why someone with the disability in question would inevitably suffer it. It is not difficult to think of examples, such as that of a man who has one arm, who is plainly at a significant disadvantage caused by his lack of two handedness: there are many others. But there are also cases … which in our view simply to identify a*

> *disability as being a general condition - such as "a knee condition" - does not enable any party, and more particularly a court of review, to identify the process of reasoning which leads from that to the identification of a substantial disadvantage, and an adjustment which it is reasonable to have to make to avoid that disadvantage.* [The tribunal must] *show, or to understand, what it is about a disability that gives rise to the substantial disadvantage, and therefore what it is that requires to be remedied by adjustment. Without knowing that, no assessment of what is, or is not, reasonable by way of adjustment can properly be made."*

70. In considering this, the EAT in Sheikholeslami v University of Edinburgh [2018] IRLR 1090 said:

> "*medical evidence is not a pre-requisite in every case (though there may be cases where the particular facts do make it necessary)*"

71. While we acknowledge that the process adopted to identifying possible adjustments may itself give rise to claims of disability discrimination (to take a crude example, a face to face medical assessment at a location inaccessible to a wheelchair user), on the whole the emphasis in the authorities has been on the end result rather than the process used to achieve that result. The logic is that the law requires the employer to take the necessary steps. If the employer has taken those necessary steps the particular process by which they have achieved that (or even if they have achieved that accidentally with little or no process) is not the issue. See, for example, Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664 and Royal Bank of Scotland v Ashton [2011] ICR 632. Para 3.31 of the IDS Handbook appears to capture the point:

> *"In Ministry of Defence v Cummins EAT 0240/14 the EAT rejected the argument that an employer's complete failure to address or deal with the claimant's request for a proposed adjustment constituted, in and of itself, a breach of the duty to make reasonable adjustments under S.20 EqA. As was made clear by the EAT in Tarbuck … the matter will always boil down to whether, viewed objectively, there were adjustments that could and should reasonably have been made, not whether the employer acted reasonably or unreasonably in dealing with a request for adjustments."*

Harassment

72. Section 26(1) of the Equality Act 2010 is as follows:

> *"(1) A person (A) harasses another (B) if:*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of:*

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B ...

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

The burden of proof

73. For all her claims of discrimination the claimant has the benefit of the burden of proof provisions in s136 of the Equality Act 2010:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

74. The Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37 at para 32 said:

"it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

DISCUSSION AND CONCLUSIONS

Direct disability discrimination

75. As we have already mentioned, there appear to be considerable problems with the claimant's claims of direct disability discrimination and how it could be said that what occurred to the claimant occurred because of the fact of her disability as opposed to anything arising from or in consequence of her disability.

76. Those problems are particularly acute in the case of the claim in relation to sick pay: "*the R stopped her contractual sick pay in April 2022 and/or refused to*

reinstate her sick pay". It is not in dispute that the sick pay payments stopped (in April or May 2022) because the claimant's entitlement to them had expired.

77. In their closing submissions, Mx Davies says "*C*['s sick pay] *was stopped because of* [her] *disability*". That is not correct. She had been receiving sick pay when disabled. What stopped her sick pay was that her ongoing absence meant that she had used up her sick pay entitlement. If that is anything it is a claim of discrimination arising from disability, not direct disability discrimination.

78. The remaining direct disability discrimination claims relate to the behaviour of Ms Akuta during the meeting on 17 March 2022. Parallel allegations of harassment are made in respect of these. It remains the case that there is no comparator nor anything from which we could construct a hypothetical comparator from in respect of these. There is no indication as to how Ms Akuta has or would treat someone with the same symptoms as the claimant but who was not disabled. In those circumstances we cannot find that theses were acts of direct disability discrimination, and it seems that they are better analysed as allegations of unlawful harassment.

79. The claims of direct disability discrimination are dismissed.

Reasonable adjustments

80. There are extensive allegations of a failure to make reasonable adjustments which we will address below. Some can be dealt with relatively briefly, but others require more detailed consideration.

The matrix

81. It is not in dispute that in considering adjustments for cabin crew BAHS worked to a "matrix" or menu of what were effectively set adjustments that the scheduling team had agreed they could accommodate.

82. It is also not in dispute that formal "recommendations" from BAHS would be limited to adjustments set out in that matrix. This was a PCP as the matrix was applied by BAHS.

83. As for adjustments outside the matrix, these were recognised as being possible by both Ms Akuta and Mr Scott. The language they used for this was slightly different to each other, but both agreed that business managers (such as Ms Taylor) were free to consider adjustments beyond what was on the matrix, and that if BAHS thought such adjustments may help they could be mentioned or discussed by BAHS with the business managers, although not formally "recommended".

84. One difficulty with the claimant's case on reasonable adjustments, which we will return to, has been establishing how any alleged "substantial disadvantage" arose. The list of issues describes the substantial disadvantage as being

"*caus*[ing] *… C anxiety, to feel overwhelmed and/or extreme tiredness*". That simply does not seem to apply in respect of the application of the matrix. It has not been explained how it is that application of the matrix may make the claimant anxious and we do not see any basis on which it could have been said to cause her to be overwhelmed or extremely tired. In fact nothing in the claim seemed to relate to an adjustment on account of being tired and possibly only one point relates to being overwhelmed. Anxiety was, of course, the claimant's underlying disability (or part of it).

85. On the whole this seems to be an example of the claimant requiring adjustments to the process used to establish adjustments. As we have explained in our discussion of the law, this is not typically the point of a reasonable adjustments claim. What matters is whether the relevant adjustments were made, not how they came to be made. In principle the employer is entitled to adopt whatever process it sees fit provided that that process itself does not give rise to unlawful discrimination and actually achieves any required adjustments.

86. We accept in principle that an employer ought not to restrict its consideration of adjustments to a pre-determined limited range of adjustments. In principle the range of adjustments that may be required is as broad as the range of disabilities that may be encountered, and it is no answer to a claim of a failure to make reasonable adjustments to say that the necessary adjustment is not on a pre-determined list. However, that is not what happened in the claimant's case. While BAHS may have been limited in their recommendations Ms Taylor went considerably further than that in the adjustments she made for the claimant. The use of the matrix as a tool for recommendations by BAHS did not itself amount to a failure to make reasonable adjustments. The making of adjustments was the responsibility of business managers such as Ms Taylor, not BAHS, and business managers were not confined by the matrix.

87. The application of the matrix by BAHS was not a matter that caused a substantial disadvantage to the claimant in comparison with those who were not disabled, and is not something in respect of which the respondent was obliged to make a reasonable adjustment.

No stand-alone policy for reasonable adjustments for cabin crew

88. It is correct to say that there was no stand-alone policy for reasonable adjustments for cabin crew, but we do not see how that can be said to have placed the claimant at a substantial disadvantage compared to someone who was not disabled. To have some sort of set policy in respect of adjustments may lead to the kind of points the claimant has criticised in respect of the matrix – the respondent unlawfully restricting itself in its ability to make such adjustments.

89. In closing submission Mx Davies says "*this clearly puts the C at a disadvantage: she cannot access reasonable adjustments*". We do not accept that. In our

experience an express policy on reasonable adjustments is unusual, yet that does not prevent employees accessing those adjustments, and we know that in this case the claimant was provided with adjustments (although not to the extent she wanted) even though there was no stand-alone policy for this.

90. Not having a stand-alone policy for reasonable adjustments for cabin crew was not a matter that caused the claimant substantial disadvantage in comparison with someone who was not disabled, and is not something in respect of which the respondent was obliged to make a reasonable adjustment.

No occupational health advisors specialised in mental health

91. We understand this to be accepted by the respondent. BAHS did not employ any occupational health advisors who specialised in mental health. It was the respondent's position that the occupational health practitioners employed by BAHS were all fully and appropriately qualified generalists who were used to dealing with a range of different conditions, including mental health conditions which were a regular feature of the work. Their training encompassed training on mental health issues.

92. Again it is difficult to see how this could be said to disadvantage the claimant, and it seems again to be an improper focus on the process rather than its outcomes. If, for instance, the respondent's failure to designate mental health specialists meant that inadequate adjustments were made, then the claim must lie in relation to the adjustments themselves, not the qualifications or specialisms of the advisor.

93. Not having occupational health advisors specialised in mental health was not a matter that caused the claimant substantial disadvantage in comparison with someone who was not disabled, and is not something in respect of which the respondent was obliged to make a reasonable adjustment.

Not providing a written occupational health report before disclosure to management

94. It is agreed that the claimant was not provided with a written occupational health report prior to disclosure to management, although it is less clear whether this was simply an individual point in the claimant's case or reflected a broader practice on the part of BAHS. But as with the other elements of the claim we have addressed so far it is very difficult to see how this placed the claimant at a substantial disadvantage compared to people who were not disabled.

95. Mx Davies says in closing submission that "*for someone like the C, not seeing a written report before its disclosure increases uncertainty*". The claimant's vulnerability to "uncertainty" has been a feature in the claims of failure to make reasonable adjustments, although it is not mentioned in the list of issues as one of the ways in which the claimant may be put at a substantial disadvantage.

96. Although not mentioned in the list of issues, the question of "uncertainty" has been there from the start. In her original request for adjustments the claimant says "*a major trigger for my anxiety is uncertainty*", and she has repeated that point a number of times.

97. We indicated to Mx Davies that we were concerned about the question of how substantial disadvantage could arise, and what evidence there was in support of the idea that "uncertainty" would put the claimant at a disadvantage. The point was picked up by Mr Davies in his closing submissions, in which he correctly pointed out that degrees of uncertainty were inherent in the claimant's role. Even with a fixed roster, whether that plane would leave on time or at all, and what may occur during the flight, was uncertain, up to and including the core role of cabin crew: addressing in-flight emergencies. At the very least this suggests that uncertainty exists on a spectrum and comes in different forms. The claimant has been keen to return to flying, and has never suggested that the uncertainty that arises from being allocated a flight duty causes her any difficulties.

98. During closing submissions Mx Davies made points about difficulties there may be in perceiving the effect of a "hidden" disability such as the claimant's, in comparison with a more visible disability. We acknowledge that so-called hidden disabilities are as much disabilities as more visible disabilities are, but practically speaking this can bring us within the territory contemplated in Gardner: in some cases, perhaps particularly with visible disabilities, the substantial disadvantage will be obvious, but in others the disadvantage will not be obvious. Perhaps it is inherent in the contrast between a hidden disability and a visible disability that the disadvantages that arise from the hidden disability may not be as obvious as the disadvantages arising from a visible disability.

99. There is no medical evidence from the claimant on the link between uncertainty and her anxiety. Mx Davies pointed to two documents that had been produced during the hearing – one from access to work and one being a later fit note. None make reference to uncertainty putting the claimant at a substantial disadvantage.

100. Mx Davies made various points to the effect that the claimant would be the person best placed to explain her disability, its consequences and necessary adjustments. We acknowledge there is some basis to that, but that does not go so far as to say that we should simply accept the claimant's assertion that particular matters put her at a substantial disadvantage, which is, ultimately, an objective question for determination by the tribunal.

101. There is nothing other than the claimant's assertion to link uncertainty with her disability of anxiety. Even if we were to accept such a link, there is then the obstacle that this is clearly not an intolerance of any uncertainty. If we were to accept the link we would also have to accept that some degree of uncertainty

does not place the claimant at a substantial disadvantage, and there is no evidence before us as to what degree of uncertainty about what may place the claimant at a substantial disadvantage.

102. In any event, there has been no explanation from the claimant as to why she required this report in writing rather than (as Ms Akuta said she did) being read to her over the phone. Perhaps the claimant was worried about the report and its possible consequences, but there has been no evidence as to why that required her to be provided with the report in writing before her employer saw it, and what, if anything, she would then have done. The written report was sent to her by email at the same time as it was sent to the respondent: 15:23 on the day of the consultation. If the claimant had agreed to its release earlier it would have been sent to her earlier since we know that Ms Akuta prepared it during the consultation. What was the uncertainty? Any problems with uncertainty do not seem to be cured by the claimant receiving the report prior to it being sent to the respondent.

103. Not providing a written occupational health report to an employee before it being disclosed to management was not a matter that caused the claimant substantial disadvantage in comparison with someone who was not disabled, and is not something in respect of which the respondent was obliged to make a reasonable adjustment.

Being unaware of guidance

104. We can deal with this point briefly. It is an example of a PCP that appears to concern solely process. As we have stated, the respondent is primarily to be judged on its outcomes, not on its process. If being unaware of particular guidance has in fact led to a failure to make reasonable adjustments then the respondent is answerable – but for the underlying failure to make reasonable adjustments, not being unaware of guidance. If the employer has made appropriate adjustments then it is neither here nor there whether they were aware of particular guidance.

105. Not being aware of particular guidance was not a matter that caused the claimant substantial disadvantage in comparison with someone who was not disabled, and is not something in respect of which the respondent was obliged to make a reasonable adjustment.

Requiring available days

106. The sequence of alleged PCPs that follow relate specifically to flying duties.

107. As we have identified above, it seems that for the period we are looking at the claimant was either not fit for work at all or was only fit for the ground duties she had been given. Medical advice for, for instance, two six hour days, is not compatible with flying.

108. This had led us to wonder whether in fact PCPs in relation to flying arrangements were ever applied by the respondent to the claimant during this period, in respect of which she was never fit to fly. However, that point was not argued by the respondent and we will set it to one side.

109. We have described above the nature of "available days" and this is the first PCP that Mr Davies expressly accepted in his closing submissions.

110. We then have to consider whether this placed the claimant at a substantial disadvantage compared to someone who is not disabled. None of the substantial disadvantages set out in the list of issues seem to apply to this. We are left with the question of the claimant's vulnerability to uncertainty aggravating her anxiety. That brings us back to the problems previously identified. There has been no proper indication of how uncertainty affects the claimant's anxiety and at what point (if at all) uncertainty creates a substantial disadvantage.

111. Requiring available days was not a matter that caused the claimant substantial disadvantage in comparison with someone who was not disabled, and is not something in respect of which the respondent was obliged to make a reasonable adjustment.

Fixed rosters

112. Not permitting fully fixed rosters was accepted by the respondent as amounting to a PCP.

113. In fact this is simply another way of putting the "available days" PCP, since the only sense in which the claimant's roster was not fixed (the respondent having accepted it would remove standbys) is in respect of available days. The claim in respect of this fails for the same reason that the claim fails in respect of available days.

Not permitting cabin crew to reduce their contractual hours

114. It is quite difficult to know what to make of this allegation, particularly as the claimant was not in a position to fly in the relevant period.

115. The respondent had expressed a willingness for the claimant to return on a 50% basis so that cannot be considered to be a PCP. There does appear to have been a PCP that (at the time) no new contracts or variation of contract to 33% would be permitted.

116. We do not understand how it could be said that the claimant was put at a substantial disadvantage by the non-availability of a 33% (as opposed to 50%) contract. There is no point about uncertainty here. A 33% contract is as certain or uncertain as a 50% contract. A general refence to "anxiety" does not seem to apply here, nor do we see how it could be said to be overwhelming to work

33% as opposed to 50%. In some circumstances "tiredness" may be an issue with degrees of part-time working, but it is hard to see how this applied given the unusual working practices cabin crew were subject to. Regardless of the nature of their contract they had to work in blocks of 21 days. The difference between a 33% and 50% contract is whether you then got 21 days or 42 days off before your next block of duty. Without specialist medical evidence we cannot accept that there is a substantial disadvantage caused by tiredness that applies when you have 21 days off but does not apply when you have 42 days off.

117. Not permitting cabin crew to reduce their contractual hours of work to 33% is not a matter that caused the claimant substantial disadvantage in comparison with someone who was not disabled, and is not something in respect of which the respondent was obliged to make a reasonable adjustment.

Short-haul flying

118. In principle it is accepted by the respondent that all HCC have to do a mixture of short-haul and long haul flying, but the simple answer to this point is that this PCP was never applied to the claimant in the period we are dealing with. To start with, she was not flying at all, whether short-haul or long haul. It is unclear if the point came up at this stage or later, but in any event Ms Taylor has always expressed a willingness to postpone the claimant's attendance on the short-haul conversion course that was a pre-requisite to any short haul flying.

119. We also note that this point also suffers from being re-cast as a PCP at a late stage. The original allegation was in relation to the short-haul training that the claimant did not want to do for fear of being overwhelmed with a range of different aircraft types. If it becomes simply a requirement to do short-haul flying we are not sure how that could be said to put the claimant at a substantial disadvantage. There was a suggestion from the claimant that short-haul work may be more prone to cancellation at short notice (possibly leading to the uncertainty point) but that was not accepted by the respondent and was never the subject of any evidence in the hearing.

120. A requirement to do short-haul flying was not a PCP applied to the claimant at any time during the relevant period.

The booking system

121. There is a computerised roster system. Quite how effective it is and how it can be accessed was in dispute. Again this alleged PCP suffered somewhat from being recast at a late stage. Originally it was that the respondent required all cabin crew to access the roster at the same time, to which the respondent had the relatively easy (and correct) answer that they did not require it although many people would choose to do so.

122. This then morphed into the computerised roster system being ineffective and inaccessible. But as Mr Davies points out, if so that disadvantages all cabin crew and there is nothing to say how it is that this puts the claimant at a substantial disadvantage. If the substantial disadvantage is uncertainty then we have the same problems with that as before, as to what level of uncertainty substantially disadvantages the claimant.

123. The respondent's computer system was not a matter that caused the claimant substantial disadvantage in comparison with someone who was not disabled, and is not something in respect of which the respondent was obliged to make a reasonable adjustment.

No line manager

124. It is true that since the reorganisation cabin crew do not have a line manager, it being the respondent's practice to draw in particular managers to address particular issues. The underlying point here seems to be a false argument that it is only a "line manager" as such who can make reasonable adjustments. That may be the wording that is used in various policies, but it is clear from Ms Thomas's evidence that the lack of a line manager did not prevent adjustments being offered, and again the point here must be whether adjustments were made, not how they came to be made.

125. Not having a line manager was not a matter that caused the claimant substantial disadvantage in comparison with someone who was not disabled, and is not something in respect of which the respondent was obliged to make a reasonable adjustment.

Reasonable Adjustments Disability Passport

126. Much the same can be said about a "Reasonable Adjustments Disability Passport". The point is whether the adjustments have been made. A "Reasonable Adjustments Disability Passport" is one way in which such adjustments can be recorded, but it is not the only way, and the point is whether the necessary adjustments have been appropriately made, not how they have been recorded.

127. Not having a Reasonable Adjustments Disability Passport was not a matter that caused the claimant substantial disadvantage in comparison with someone who was not disabled, and is not something in respect of which the respondent was obliged to make a reasonable adjustment.

Harassment

128. Except for the final two points – in relation to part-time working and sick pay – these all relate to the conduct of Ms Akuta during the meeting on 17 March 2022. We have addressed part-time working and sick pay previously under

different headings, and we do not see any way in which they could fail under those headings yet succeed as allegations of disability-related harassment.

129. We have spent some time in our fact finding to set out the background to the meeting of 17 March 2022, the different approaches of Ms Akuta and the claimant to that meeting and what occurred in that meeting.

130. First, we accept Mr Davies's submission that just because the behaviour the claimant objected to occurred during a meeting to discuss her disability, that does not automatically mean that what was done or said "related to" the claimant's disability.

131. Second, it is apparent from Mx Davies's submissions (para 54 "*The effect of this conduct …*") that the claimant is bringing her case based on the effect rather than the purpose of Ms Akuta's comments, so s26(4) comes into consideration.

132. It has been clear from the claimant's evidence that Ms Akuta's comments were unwanted. The questions that follow are (i) whether they related to the claimant's disability and (ii) by reference to s26(4), whether they had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating of offensive environment for the claimant.

133. Looking at the individual allegations:

It was not the Mental Health Team's role to suggest adjustments

134. This arises prior to the meeting. It is in an email. Ms Akuta says "*it is not their remit to make recommendations for you*".

135. Does this "relate to" the claimant's disability? In find that it did not. While the occasion on which it was said was in preparation for an occupational health consultation concerning the claimant's disability that does not necessarily mean that it "related to" the claimant's disability. The more obvious point that it relates to was the correct protocol for identifying reasonable adjustments, not the claimant's disability itself.

136. On that basis we find that this comment did not relate to the claimant's disability.

137. If it did, we would find that it was not an act of harassment because it was not reasonable for the claimant to take this as having the effect of violating her dignity or creating an intimidating, hostile etc. environment. We have already suggested above that what Ms Akuta said was a correct statement of the law. An alternative analysis was that Ms Akuta was herself identifying the possible need for adjustments and taking on herself the task of identifying them. Neither of those can properly be said to have the effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

Aggressive and demeaning behaviour

138. We have made findings of fact as to the various things that were and were not said during the meeting.

139. With the exception of the comments in relation to Access to Work and the question of consent to the release of the report (which are themselves the subject of separate allegations) these relate to matters that we have found were said: "*I ask questions and you answer*", "*you have had counselling and treatment for over 12 months now …*", "*have you tried to commit suicide …*" etc.

140. The claimant did not want these things said. We also find that they relate to the claimant's disability in that they are questions or comments that pertain directly to the claimant's disability. The claimant perceived them as being acts of harassment. The question is whether, taking account of the claimant's perception, the other circumstances of the case, and whether it is reasonable for them to have that effect, they should be considered to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

141. "*The other circumstances of the case*" are particularly pertinent here. This was a medical consultation, and each of the comments or questions had some medical basis. This is most obvious in the case of the questions about suicide, which clearly have relevance to the assessment that Ms Akuta had to make, but each of the questions or comments had relevance to the medical task being undertaken – for instance, the need for specific answers to specific questions in order to take a relevant medical history.

142. The fact that something may have a medical basis is not to be taken as a free pass for the clinician to ask questions in as offensive a manner as possible, but it is not unusual for medical consultations to have to touch on or refer to matters that the subject of that consultation may find offensive or difficult.

143. In considering "*all the circumstances of the case*" we are reluctant to elevate what might be a (for want of a better word) bedside manner that the subject of the consultation finds objectionable into a matter of disability-related harassment. Different clinicians will approach things in different ways and some will be more brisk or direct than others. Difficult questions can properly be asked without amounting to disability-related harassment.

144. Taking account of all the circumstances of the case and whether it was reasonable for the conduct to have that effect, we do not consider that Ms Akuta's behaviour in general in that meeting crossed a line that meant that we should consider the claimant was subject to aggressive and demeaning behaviour or that Ms Akuta's behaviour generally in that meeting amounted to an act of disability-related harassment.

Failed to take the disability seriously

145. This complaint is not made out on the facts. Ms Akuta prepared an apparently orthodox and professional report identifying the claimant as a disabled person and recommending possible adjustments (subject to the constraints of the matrix). Mx Davies's answer to that was that the apparently orthodox and professional report was in fact an attempt by Ms Akuta to put right her attitude during the meeting. We do not accept that, and we note that the meeting itself took two hours. It is difficult to read into any of that a suggestion that Ms Akuta was not taking the claimant's disability seriously nor properly considering adjustments.

Access to Work

146. We have found that Ms Akuta said Access to Work was "*not for people like you, its for people in wheelchairs*".

147. This was not wanted by the claimant. It was related to the claimant's disability, since it draws a contrast between the claimant's disability and the disabilities of others.

148. Having heard evidence from Ms Akuta we take it that she knew very little about Access to Work or its remit. Did this question have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

149. The claimant says that it did. That is the first point we have to take into account. The second thing is "*all the circumstances of the case*" which include that this was one small element of a two hour meeting, and that Ms Akuta was genuinely ill-informed or out of date about Access to Work.

150. We have to consider whether it is reasonable for the comment to have the effect contended for by the claimant. The claimant's account is "*When I mentioned Access to Work, Ms Akuta said* [the words attributed to her]". In closing submissions Mx Davies says "*her reaction – panicking and becoming very anxious – is entirely reasonable in her circumstances*".

151. We know that the claimant did not appreciate Ms Akuta's approach during that meeting, but at the end of this decision this is the only remaining comment we are addressing, having found that the others did not amount to disability-related harassment. In those circumstances it is far from clear that "*panicking and becoming very anxious*" was "*entirely reasonable*". On the face of it, to panic and become very anxious seems to be an unreasonable response to an observation that Access to Work did not have a role in assessing adjustments for her. It is not clear whether Access to Work was an organisation previously approached by the claimant or whether it formed part of the Mental Health Support Team relied upon by the claimant. It is also not clear whether what Ms Akuta said was actually correct or not, although the hearing seemed to proceed on the basis that she was wrong.

152. So what we have is Ms Akuta getting the remit of Access to Work wrong. It seems to us to be going too far to say that this should be taken to have violated the claimant's dignity or created a hostile degrading etc. environment for the claimant. "*Violating … dignity*" and "*creating an intimidating* [etc] *environment*" are deliberately strong words. It is not just a question of incorrect or inappropriate behaviour. Saying that Access to Work did not deal with mental health conditions cannot reasonably be said to do that, and in those circumstances we do not consider this to be an act of unlawful disability-related harassment, despite the claimant's perception of the matter.

Pressurised to consent to the disclosure of the BAHS report - Akuta

153. We have found that Ms Akuta gave the claimant a deadline of 3pm to consent to the release of her report, although without the threat that "*I'll close your case*".

154. This was unwanted behaviour. It was related to the claimant's disability in the limited sense that without the claimant's disability there would have been no report, but that is not sufficient for the purposes of the harassment claim. For that the question must be whether there was something about the claimant's disability or the fact of the disability that had prompted Ms Akuta to say this. It is not enough that it arose from an investigation into the claimant's disability. We find that it did not relate to the claimant's disability in the statutory sense. Instead, it related to a need to secure release of the report (to both the claimant and the respondent) as soon as possible.

Advice on disclosure of the BAHS report - Taylor

155. Advice given by Ms Taylor on the disclosure of the report is not specifically addressed by Mx Davies in their closing submissions. For the same reasons given immediately above in respect of Ms Akuta's handling of disclosure of the report, we find that it did not amount to a act of harassment.

Conclusions

156. The claimant's claims are dismissed.

Employment Judge Anstis
Date: 10 October 2024

REASONS SENT TO THE PARTIES ON
4 December 2024

FOR THE TRIBUNAL OFFICE

CASE NO: 3310704/2022

IN THE WATFORD EMPLOYMENT TRIBUNAL
BETWEEN :

TERESA MCMANUS

C

-and-

BRITISH AIRWAYS PLC

R

AMENDED ~~AGREED~~ LIST OF ISSUES

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1. **Disability**

   a. Was the C disabled at the material times by virtue of depression, anxiety and/or social phobia in accordance with s.6 EqA? R concedes this.

2. **Direct Disability Discrimination (s 39 and s 13 EqA)**

   a. The C alleges that:

      ~~i. she was advised by Ms Akuta in an email of 17 March 2022 that it was not the Mental Health Team's role to suggest what reasonable adjustments the R should implement;~~

      ii. she was subjected to aggressive and demeaning behaviour by Ms Akuta at the occupational health assessment meeting on 17 March 2022;

      iii. Ms Akuta failed to take seriously, and give due and proper consideration to, the C's disability and/or requests for reasonable adjustments, at or after the meeting on 17 March 2022;

      iv. Ms Akuta told her that Access to Work was not for people like the C but was meant for people in wheelchairs;

      ~~v. she was pressurised by Ms Akuta to consent to the disclosure of a BAHS report which the C had not seen;~~

      ~~vi. she was advised by Ms Taylor, on 17 March 2022, to consent to the disclosure of the BAHS report prepared by Ms Akuta;~~

      ~~vii. the R did not allow her to work 33%, 50% and/or 75% of the hours of a full-time member of cabin crew; and~~

      viii. the R stopped her contractual sick pay in April 2022 and/or refused to reinstate her sick pay.

   b. Did the R, its officers, employees, servants and/or agents do the things listed at 2.1.1 to 2.1.8 above?

   c. Was that conduct less favourable treatment?

i. The Tribunal will decide whether the C was treated worse than the R treated or would treat others.

ii. The C relies on a hypothetical comparator and, in respect of 2.1.7 above, the C relies on a further or alternative comparator of former cabin crew employees who had taken voluntary redundancy in 2020 but were later offered 50% contracts.

d. If so, was it because of the C's disability/disabilities?

3. **Failure to make reasonable adjustments (s 39, s 20 and s 21 EqA)**

a. Did the R have the following PCPs:

~~i.~~ Application of the matrix as defined on pages [150] and/or [593] of the bundle ~~a system for determining reasonable adjustments which:~~

~~1. required, or involved, the use of a matrix which was not fit for purpose; and/or~~

~~2. by requiring an overly rigid adherence to the matrix, failed properly to take into account the C's particular circumstances;~~

ii. no stand-alone policy for reasonable adjustments for cabin crew;

~~iii.~~ no occupational health advisors specialised in mental health beyond general level qualification ~~and/or with appropriate mental health qualifications and/or experience~~

iv. not providing a written occupational health report, prepared by BAHS, to an employee before ~~requiring consent to~~ the report's disclosure to management;

v. BAHS and Policy and Standards managers being unaware of, or not being required to follow, guidance provided by the Chartered Institute of Personnel and Development (CIPD)/Disability Confident and the Business Disability Forum;

~~vi. requiring all cabin crew to do standby;~~

vii. requiring available days for cabin crew; *[accepted by the respondent to be a PCP it applied]*

viii. not permitting cabin crew to have fixed rosters; *[accepted by the respondent to be a PCP it applied, if read (as it must be) as meaning not permitting cabin crew to have fully fixed rosters (all rosters were fixed in part, but the claimant sought a fully fixed roster)]*

ix. not permitting cabin crew to reduce their contractual hours of work to 33% and/or 50% (within a reasonable time or at all);

x. requiring all cabin crew to do ~~a~~ short-haul-flying ~~conversion course~~;

xi. Having a computer system that frequently crashes when cabin crew try to access their roster at roughly the same time ~~requiring all cabin crew to access their roster at 10pm on a specific night~~

~~when approximately 12,000 cabin crew are trying to access their roster and the system keeps crashing;~~

xii. not permitting cabin crew to have a line manager ~~and, consequently, cabin crew have~~

xiii. not allowing Cabin crew to have/set up ~~no way of setting up~~ a Reasonable Adjustments Disability Passport. ~~And an inflexible sick pay policy and/or refusing to reinstate the C's sick pay after it was stopped in April 2022 when the proximate cause of the C's remaining on sick leave was the conduct of Ms Akuta on 17 March 2022 and/or the R's failure to comply with its duty to make reasonable adjustments following the R's request for reasonable adjustments in or around February 2022?~~

b. Did any of the PCPs put the C at a substantial disadvantage compared to someone without the C's disability/disabilities, in that they each separately, or all together, caused the C:

i. anxiety,

ii. to feel overwhelmed, and/or

iii. extreme tiredness?

c. Did the R know or could the R reasonably be expected to know that the C had a disability and/or that she was likely to be placed at the disadvantage relied upon?

d. What steps could have been taken to avoid the disadvantage? The C suggests:

i. A phased return to work under which she would work 33% of the hours of a full-time member of cabin crew for the first 6 months, then 50% of the hours of a full-time member of cabin crew for the following 6 months, and, thereafter, 75% of the hours of a full-time member of cabin crew;

ii. Deferral of her short-haul-flying conversion course for a period of 6 months, due to the substantial amount of training this would involve and the requirement to pass approximately 24 examinations;

iii. No standby or available days for 6 months and a fixed roster;

iv. Extra support with IT;

v. a reasonable adjustments passport, which should be reviewed in 6 months.

e. Was it reasonable for the R to have to take those steps?

4. **Harassment (EqA, ss 26 and 40)**

a. The C alleges that:

i. she was advised by Ms Akuta in an email of 17 March 2022 that it was not the Mental Health Team's role to suggest what reasonable adjustments the R should implement;

ii. she was subjected to aggressive and demeaning behaviour by Ms Akuta at the occupational health assessment meeting on 17 March 2022;

iii. Ms Akuta failed to take seriously, and give due and proper consideration to, the C's disability and/or requests for reasonable adjustments, at or after the meeting on 17 March 2022;

iv. she was told by Ms Akuta that Access to Work was not for people like the C but was meant for people in wheelchairs;

v. she was pressurised by Ms Akuta to consent to the disclosure of a BAHS report which the C had not seen;

vi. she was advised by Ms Taylor, on 17 March 2022, to consent to the disclosure of the BAHS report prepared by Ms Akuta;

vii. the R did not allow her to work 33%, 50% ~~and/or 75%~~ of the hours of a full-time member of cabin crew; and

viii. the R stopped contractual sick pay in April 2022, and/or refused to reinstate her sick pay, when the proximate cause of the C's remaining on sick leave was the conduct of Ms Akuta on 17 March 2022 and/or the R's failure to comply with its duty to make reasonable adjustments.

b. Did the R, its officers, employees, servants and/or agents do the things listed at 4.1.1 to 4.1.8 above?

c. If so, was that unwanted conduct?

d. Did that unwanted conduct relate to the C's disability/disabilities?

e. Did that conduct have the purpose of

i. violating the C's dignity, or

ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for the C.

f. If not, did it have that effect, taking into account the C's perception, the other circumstances of the case and whether it was reasonable for the conduct to have had that effect?