EMPLOYMENT TRIBUNALS

Claimant: Mr S Quigley

Respondent: West Atlantic UK Limited

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 10, 11, 12, 13, 14, 17 and 18 February 2025

Before: Employment Judge Brewer
Ms F French
Mr C Tansley

Representation

Claimant: In person
Respondent: Mr J Heard, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claimant's claim for detriment because of having made a public interest disclosure fails and is dismissed,

2. The claimant's claim for direct age discrimination fails and is dismissed,

3. The claimant's claim for harassment related to age fails and is dismissed.

REASONS

Introduction

1. This case came before us for a hearing over seven days. Day one was a reading day. We heard evidence over days two to five. We heard submissions on the

morning of day six. We deliberated and gave an oral judgment on day seven. We set out below detailed reasons.

2. At the hearing the claimant represented himself and the respondent was represented by Mr Heard of Counsel. We had written statements and heard evidence form the claimant and, on behalf of the respondent, Christopher Hazell, Pilot Manager, Gregor Little, Managing Director and Accountable Manager, Thomas Heenan, Nominated Person Flight Operations, and Sandra Wake, Head of HR.

3. We had an agreed bundle of documents running to 558 pages.

4. We note that the claimant included a number of witness statements from individuals not called to give live evidence and as we reminded the claimant we could give and have given those little weight.

5. We have adopted and use below the various acronyms used and understood by the parties. We are grateful to them for assisting us with a glossary of terms some of which we have reproduced as Appendix 1 to this judgment.

Issues

6. The issues in this case were agreed at a case management hearing on 29 October 2024. The issues are set out in Appendix 2.

Law

7. We set out below a brief description of the relevant law.

Public interest disclosures

8. By virtue of s.43B, Employment Rights Act 1996, a "*qualifying disclosure*" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the matters set out in the legislation. For our purposes this includes failing to comply with a legal duty and endangering health or safety.

9. Endangerment of health and safety

10. As with the other categories of relevant failure, a worker will be expected to have provided sufficient details in the disclosure of the nature of the perceived threat to health and safety. However, this duty does not appear to be too onerous.

11. In **Fincham v HM Prison Service** EAT 0925/01, for example, the employee perceived herself to be the subject of a campaign of racial harassment. She wrote a letter to her employer containing the statement: *'I feel under constant pressure and stress awaiting the next incident.'*

12. Although an employment tribunal held that this was not sufficient to amount to a qualifying disclosure, the EAT thought otherwise. It said: *'We found it impossible to see how a statement that says in terms "I am under pressure and stress" is*

anything other than a statement that [the employee's] health and safety is being or at least is likely to be endangered… [That] is not a matter which can take its gloss from the particular context in which the statement is made.'

13. And in **Palmer and anor v London Borough of Waltham Forest** ET Case No.3203582/13 the employment tribunal considered whether a worker was required to identify 'a specific risk or a specific person or a specific timescale of risk' but held that, in its view, that would be a gloss on S.43B(1)(d), which refers to the health and safety of 'any' individual.

Breach of legal obligation

14. As there is no further qualification of the term 'legal obligation' within the protected disclosure provisions, S.43B(1)(b) is capable of covering not only those obligations set down in statute and secondary legislation but also any obligation imposed under the common law (e.g. negligence, nuisance and defamation), as well as contractual obligations and those derive from administrative law. This view is supported by the EAT's observation in **Parkins v Sodexho Ltd** 2002 IRLR 109, EAT, that the scope of S.43B(1)(b) is 'broadly drawn'. It does not, however, cover a breach of guidance or best practice, or something that is considered merely morally wrong

15. Following **Twist DX Ltd and ors v Armes and anor** EAT 0030/20, it is clear that a worker need not always be precise about what legal obligation he or she envisages is being breached or is likely to be breached for the purpose of a qualifying disclosure under S.43B(1)(b). However, in cases where it is not obvious what legal obligation is in play, a failure by the worker to at least set out the nature of the legal wrong he or she believes to be at issue might lead a tribunal to conclude that the worker was merely setting out a moral or ethical objection rather than a breach of a legal obligation.

Detriment under s.47B Employment Rights Act 1996

16. Section 47B is in the following terms,

> *"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."*

17. The meaning of an act done "*on the ground that*" the worker has made a protected disclosure is now well-established. In order for a "detriment" claim under section 47B(1) to be made out, the Tribunal must be satisfied that the protected disclosure materially influences (in the sense of being more than a trivial influence upon) the employer's detrimental treatment of the claimant: **Fecitt v NHS Manchester** [2012] IRLR 64 (CA), at paragraphs 38-39 and 43-46. 47

18. It is a prerequisite of a Section 47B claim that the alleged discriminator has knowledge of the actual disclosure.

19. In detriment claims it is for the employer to show the ground on which any act, or deliberate failure to act, was done — s.48(2) ERA. This means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure. However, if the tribunal can find no evidence to indicate the ground on which the respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default — **Ibekwe v Sussex Partnership NHS Foundation Trust** EAT 0072/14.

20. In applying these principles, it may be appropriate to draw inferences, given that there will often be a dearth of direct evidence as to motivation when a worker has been subject to a detriment. The EAT summarised the proper approach to drawing inferences in a detriment claim in **International Petroleum Ltd and ors v Osipov and ors EAT** 0058/17:

    20.1. the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made,

    20.2. by virtue of S.48(2), the employer (or worker or agent) must be prepared to show why the detrimental treatment was done. If it (or he or she) does not do so, inferences may be drawn against the employer (or worker or agent) — see **London Borough of Harrow v Knight** 2003 IRLR 140, EAT,

    20.3. however, as with inferences drawn in a discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

21. The term ‘detriment’ is not defined in the ERA, but it clearly has a broad ambit. Its meaning has been given extensive consideration in case law, much of which has examined the term in the similar context of the anti-discrimination legislation, which makes it unlawful for an employer to discriminate against an employee by subjecting him or her to ‘any other detriment’. In **Ministry of Defence v Jeremiah** 1980 ICR 13, CA, Lord Justice Brandon said that ‘*detriment’* meant simply ‘putting under a disadvantage’, while Lord Justice Brightman stated that a detriment

    > ‘*exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment’.*

22. Brightman LJ’s words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337, HL.

23. Subsequent cases have established that detriment covers such things as failure to promote, refusal of training or other opportunities, disciplinary action and reductions in pay, as well as general unfavourable treatment.

Direct age discrimination

24. In relation to **direct discrimination**, for present purposes the following are the key principles.

25. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337).

26. Given the treatment must be "less favourable" a comparison is required, and a comparator must "be in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class" (**Shamoon** above).

27. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.

28. By virtue of section 136, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, absent any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.

29. In **Madarassy** the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

Harassment related to age

30. The general definition of harassment set out in S.26(1) applies to all protected characteristics except marriage and civil partnership and pregnancy and maternity. It states that a person (A) harasses another (B) if:

    30.1. A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a); and

    30.2. 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 — S.26(1)(b).

31. There are three essential elements of a harassment claim under S.26(1):

    31.1. unwanted conduct,

31.2. that has the proscribed purpose or effect, and

31.3. which relates to a relevant protected characteristic.

'Violating dignity

32. There are few cases examining precisely what is meant by violating a claimant's dignity. In **Richmond Pharmacology v Dhaliwal** 2009 ICR 724, EAT, a racial harassment case, Mr Justice Underhill, then President of the EAT, said:

> *'Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended'.*

33. Mr Justice Langstaff, then President of the EAT, affirmed this view in **Betsi Cadwaladr University Health Board v Hughes and ors** EAT 0179/13.

Intimidating, hostile, degrading, humiliating or offensive environment

34. Some of the factors that a tribunal might take into account in deciding whether an adverse environment had been created were noted in **Weeks v Newham College of Further Education** EAT 0630/11. Mr Justice Langstaff, then President of the EAT, held that a tribunal did not err in finding no harassment, having taken into account the fact that the relevant conduct was not directed at the claimant, that the claimant made no immediate complaint and that the words objected to were used only occasionally. (However, he noted that tribunals should be cautious of placing too much weight on the timing of an objection, given that it may not always be easy for an employee to make an immediate complaint.) Langstaff P also pointed out that the relevant word here is 'environment', which means a state of affairs. Such an environment may be created by a one-off incident, but its effects must be of longer duration to come within what is now S.26(1)(b)(ii) EqA.

35. The meaning of the term '**environment'** was considered in **Pemberton v Inwood** 2017 ICR 929, EAT, where P, a Church of England priest, was refused a licence that would allow him to take up a position as a hospital chaplain because he had entered into a same-sex marriage against the Church's doctrines. The EAT upheld the tribunal's decision that this was not unlawful discrimination or harassment, because a religious occupational requirement exception applied. But the EAT also noted that the tribunal had apparently failed to engage with the question whether the decision not to grant the licence and its communication created an 'environment'. P argued that this could be inferred from the tribunal's findings that the refusal obviously caused him stress, would have been humiliating and degrading for someone in his position, and was a stunning blow. However, the EAT found it hard to see that the tribunal had shown how it found that the requisite environment was thereby created.

36. In order to constitute unlawful harassment under S.26(1) EqA, the unwanted and offensive conduct must be 'related to a relevant protected characteristic'. However offensive the conduct, it will not constitute harassment unless it is so related, and a tribunal that fails to engage with this point will err — **London Borough of Haringey v O'Brien** EAT 0004/16.

37. Whether or not the conduct is related to the characteristic in question is a matter for the appreciation of the tribunal, making a finding of fact drawing on all the evidence before it – **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor EAT** 0039/19.

38. The words 'related to' in S.26(1)(a) have a broad meaning and holding that conduct that cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it — **Hartley v Foreign and Commonwealth Office Services 2016** ICR D17, EAT.

39. Where direct reference is made to an employee's protected characteristic or he or she has been subjected to overtly racist/sexist/homophobic, etc, conduct, the necessary link will usually be clearly established.

40. Where the link between the conduct and the protected characteristic is less obvious, tribunals may need to analyse the precise words used, together with the context, in order to establish whether there is any (negative) association between the two.

Findings of fact

41. Before setting out the findings of fact we note that the parties agree that as a result of prior litigation brought by the claimant in an employment tribunal, on 22 November 2022 the parties entered into a COT3 which settled all claims prior to that date and therefore although we have made findings of fact which predate the settlement, the fact is that nothing before 22 November 2022 is justiciable before us. We would also add that for the reasons which follow we have not found it necessary to deal with time limits.

42. We make the following findings of fact (references are to pages in the bundle).

43. From June 2013 the claimant provided services to the respondent on a self-employed basis. These services were principally around recruiting and assessing new pilots, training and post maintenance check flights.

44. The claimant became an employee of the respondent with effect from 1 March 2021. He signed his contract of employment on 18 March 2021. The contract can be found at [115 – 124].

45. The claimant was concerned to establish that he was employed as "head of training" but his job title was in fact "B737 Captain" The 'B' refers to 'Boeing'. He was therefore employed as a pilot.

46. Alongside his main role the claimant received an additional allowance for holding the position of NPCT. He also received a TRE allowance.

47. Having said that, it is clear that some in the respondent understood that the claimant was *de facto* head of training although we heard no evidence about what that meant on a day-to-day basis. Clearly a number of individuals in the respondent are involved in the recruitment and training of pilots.

48. Pilot training starts with training on simulators ('sim training') during which the pilot is trained on a particular aircraft. This is followed by base training on that aircraft, which is where a pilot who has passed their sim training sits at the controls of a real aircraft. The pilot must complete 6 flights including take offs and landings to complete their base training. The final part of training is called line training which is where the pilot flies under the supervision of a line training captain. This completes what is referred to as type rating training.

49. It is relevant to note that at the time the claimant commenced employment with the respondent he was subject to an OML, which is to say that under his licence he did not meet the requirements to hold a class 1 medical certificate and, therefore, in order to fly he was required to have with him another pilot who was fully qualified, not subject to an OML and who was under 60 years of age. The practical effect of this was that the claimant could not undertake base training.

50. We note paragraph 26 of the claimant's contract [124] which is in the following terms,

> *"The company reserves the right to make reasonable changes to any of your terms and conditions of employment and will notify you in writing of such changes at the earliest opportunity and, in any event within one month after such changes have taken effect. Such changes will be deemed to be accepted unless you notify the company of any objection in writing before the expiry of the notice period."*

51. It is not clear what the references in this clause to "the" notice period.

52. As part of the pilot's licence regime, overseen by the Civil Aviation Authority (CAA) each pilot is required to be fit to fly and given the claimant's age, at the time he became employed by the respondent he was required to have a medical every six months undertaken by an Approved Medical Examiner. The six-monthly medicals were undertaken in June and December of each year and throughout the claimant's employment he was passed fit to fly on each occasion. Pilots are also required to self-declare to the AME any health problems or other restrictions which impact their ability to fly and at no time did the claimant do this.

53. At all material times the claimant lived in County Durham in the North East of England. However, for work purposes his home base was East Midlands Airport. Given that his normal start airport was his home at base, he invariably faced a three-hour drive from home to his home base before any flying duties commenced.

54. The respondent operates a freight service. Their revenue stream is based upon delivering the freight they are contracted to deliver, and if there are delays or failures, they suffer significant financial penalties. We also note that the respondent was able to outsource training, not flying, and accept the general

proposition that during the period about which the claimant complains, the respondent did have a shortage of pilots and rostered their pilots to prioritise flying.

55. All pilots must keep up a training regime and if they do not fly for a period must undergo refresher training before being allowed to fly again.

56. Rostering is undertaken by two teams the first dealing with revenue flying, the second with training.

57. The rostering of pilots is based on a flying pattern of one week on, one week off. Once that pattern has been rostered for all pilots, any leave is overlaid on that. The rostering also has to take into account recurrent training needs and initial training needs. In short, rostering is complex.

58. Changes are of course made to the roster, in particular pilots may agree to swap duties with each other and there will of course be unforeseen circumstances such as sickness. However, it follows that each change will have knock-on effects and so have to be managed in order to ensure that the respondent meets its contractual obligations in order to avoid penalties.

59. The respondent's business is of course subject to a strict licensing regime overseen by the CAA, and there are many rules and regulations governing flying and such things as pilots' hours as well as their fitness to fly.

60. The respondent has a duty to inform the CAA of any safety issues and to investigate those issues. They may also be investigated by the CAA.

61. In order to manage safety issues, the respondent operates a Safety Management System which includes a reporting mechanism, that is to say all employees are encouraged to report any adverse incidents into the system. This is a not infrequent occurrence with the respondent having between 800 and 900 reports a year. The system enables a person to report openly, to report anonymously or to report confidentially. There are very few confidential reports each year.

62. On 24 June 2021 the claimant, in a conversation with the respondent's managing director, Luis Fernandez, was advised that it had been decided to remove from him the role of NPCT on the basis that he was not undertaking the role. That decision was confirmed in writing on 28 June 2021 [129]. We find that this was a reasonable decision and in accordance with clause 26 of the claimant's contract of employment given the circumstances.

63. On 22 September 2022 the claimant sent an e-mail to Mr Little the subject line of which is "*protected disclosure - flight safety*". In the body of the e-mail, which covers a number of matters the claimant states,

> *"Since my e-mail to you 9 days ago, it has come to my attention that a Line Trainer landed deep into Aberdeen, ignoring SOPs and putting his aircraft in jeopardy, in spite of at least 2 x Go Around calls from his First Officer. No action has been taken; the Line Trainer continues flying, the First Officer has resolved to leave the company"*

64. This is the substance of the disclosure (referred to below as the Aberdeen incident) which the claimant says was a protected public interest disclosure and which he says led to the respondent rostering him in a way which was prejudicial and detrimental to his well-being, although in the list of issues the claimant refers to his reiteration of the incident at the meeting which followed this email between him and Mr Little on 26 September 2022, rather than the email itself, as the point at which he made his disclosure and was the cause of the detriment. The claimant blames for that retaliatory rostering Mr Little, Mr Heenan, Mr Bradbury and Mr Hazell. None those individuals were part of the rostering teams who created the revenue flying and training rosters.

65. As referred to above, the Aberdeen incident was discussed between the claimant and Mr Little at a meeting on 26 September 2022 arranged by Mr little following the claimant's e-mail of 22 September 2022 [see for example 130].

66. There are no notes of the meeting of 26 September 2022 but there is no suggestion that the claimant gave further detail at that time of his alleged public interest disclosure.

67. The e-mail of 22 September 2022 states what is set out in the list of issues which we have quoted above. There is no reference to a legal duty in the disclosure. There is reference to the respondent's standard operating procedures but those are internal procedures and whilst no doubt they have a duty to have standard operating procedures, that does not equate to the imposition of a legal duty upon those who have to comply with those procedures. Furthermore, although it was the claimant's opinion that the aircraft was in jeopardy it remains unclear how he reached that conclusion given that he had no first-hand information, and it is unclear how he can establish that he had a reasonable belief that this was the case. This is particularly so given that by his own disclosure the claimant confirmed that the aircraft was landed and there was no adverse impact on anyone's health or safety. It seems to the tribunal that the most the claimant could have reasonably believed by the time he made his disclosure was that the pilot ignored standard operating procedures. Given that at the time the aircraft had landed safely it is difficult to see how he could have reasonably believed health or safety were in fact endangered

68. On balance we find that the disclosure on 26 September 2022, presuming it was substantially the same disclosure made in the e-mail of 22 September 2022, and we have no evidence to suggest otherwise, did not amount to a protected public interest disclosure. Having said that, to ensure we deal with all of the pleaded matters we have gone on to consider what the position would have been had the disclosure been a public interest disclosure.

69. It is apparent from the claimant's e-mail of 22 September 2022 that he had concerns about the rostering prior to the making of the purported public interest disclosure.

70. As we have said, the Aberdeen incident was not a matter which the claimant had first-hand knowledge of, and by the time he was aware of it, it had already been input into the respondent's Safety Management System. This was in fact one of the rare confidential reports and so information about it was not widely circulated

however, it was inevitably the subject of an internal investigation and a safety report which was also seen by the CAA who raised no concerns about the matter.

71. On 28 October 2022 Mr Little emailed the claimant following conclusion of the investigation into the Aberdeen incident [150]. He confirmed that the claimant had not presented an entirely accurate description of what had happened but, in any event, it is clear that there had been a detailed investigation which had concluded, and the flight crew debriefed.

72. The Aberdeen incident seems to have been a catalyst for the claimant to enter into protracted correspondence by e-mail with the respondent raising all sorts of issues, including reference to further incidents, to matters being covered up, poor training, low morale amongst others. The claimant was so disenchanted that he turned down the possibility of becoming the next Pilot Manager [158].

73. On 5 December 2022 the claimant sent an e-mail to Paul Strudwicke (then Pilot Manager) standing himself down from flying duties with immediate effect [169]. Along with complaining about some of the rosters he has been allocated, the claimant specifically suggests that someone in the organisation

> *"has an agenda, whether this is as a result of bringing it personal matters to an employment tribunal, or more recent matters of a flight safety nature to the company's attention, but their actions are costing me sleep, and peace of mind…"*

74. Neither Mr Heenan nor Mr Little gave any response to the matters contained in the claimant's e-mail to Mr Strudwicke.

75. On 26 January 2023 Mr Bradbury, NPCT, sent an e-mail to all of the respondent's trainers regarding crew training courses [174/175]. The claimant sent an e-mail to Mr Heenan on the same day to complain [173]. He wondered why Mr Bradbury had bothered to send the e-mail to him, he complained about the training and described the content of the e-mail as a waste of resource. Mr Heenan responded again on the same day [172] to explain that Mr Bradbury had communicated with all of the trainers about all courses but he assured the claimant that the team concerned with rostering training did the rostering and not Mr Bradbury and he says in terms,

> *"Ben has no input to that planning phase, we need pilots on the line in the next few months"*

76. Mr Heenan then goes further to assure the claimant that he wanted the claimant to be involved and to be part of the team. But again, he makes the point that flying aircraft was a priority.

77. In response to that, on 27 January 2023 the claimant sent a long e-mail [171/172] in which he claims that it is nonsense that the rostering team has sole control over certain training assignments, he complains about morale in the company, being excluded from work he had previously done for the respondent such as recruitment and in general is extremely negative about Mr Heenan, Mr Bradbury and the wider organisation.

78. On 17 March 2023 the claimant, along with Mr Bradley and a Mr Jones, attended a base trainer refresher simulator session. A simulator based training event was planned for two candidates for the following day but this was cancelled because the ATO could not provide a qualified trainer to conduct the training.

79. On 27 March 2023 the claimant raised a grievance against Mr Heenan and Mr Bradbury [178 - 188]. In response Ms Wake, having read the content noted that the person who would normally deal with such a grievance was Mr Little but he was going to be away for some time, and so suggested to the claimant that consideration of the grievance be outsourced. However, the claimant was opposed to this and in the end it was agreed that Mr Little should deal with the grievance.

80. During April 2023 the claimant exchanged a number of emails with Mr Hazell regarding base training. Essentially the respondent understood that because the claimant had an OML he could not undertake base training. Mr Hazell offered to discuss the matter further with the CAA in order to see whether there were any exceptions.

81. Mr Hazell did contact the CAA [270/271] and in an e-mail in response from Mr Ashwin Thomas, Flight Operations (Training) Inspector [272], and in answer to Mr Hazell's question whether it is correct that a TRI with an OML would be unable to conduct base training, he states

> *"correct - unable to conduct with an OML as the student under training is not yet qualified as a co-pilot"*

82. Although the claimant appeared to dispute this at the time, during the hearing the tribunal asked the respondent to provide confirmation that there were no exemptions to the rule set out by Mr Thomas and we were provided with a document which appears to the tribunal to be definitive and which the claimant did not challenge in cross examination, that a pilot with an OML could not undertake base training and there are no exceptions to this rule (save for very exceptional circumstances).

83. Mr Little subsequently went on to determine the claimant's grievance having met with him on two occasions and undertaken an investigation. For our purposes the relevant finding by Mr little was that there was no evidence that the claimant's rosters had been deliberately manipulated by Mr Heenan, Mr Bradbury or anyone else. Part of his investigation was to discuss the rostering with those responsible for the rostering, being a Mrs Cleworth and a Mrs Loader. We accept Mr Little's evidence that Mrs Cleworth and Mrs Loader were '*dumbfounded'* by the suggestion of roster manipulation and that Mr Heenan and Mr Bradbury were *'in disbelief'* that he was asking them about that.

84. The claimant makes a specific allegation that the respondent reneged on an agreement made at the first grievance meeting that he would be rostered each month for three weeks sim training and one week's flying. The notes of the meeting start at [222]. The claimant has not suggested that the notes are inaccurate.

85. At [224] there is an exchange about working patterns and it is the claimant who suggests either

> *"2 sim 2 flying but max this ideal 3 sim 2 flying" [sic]*

86. Mr little's response to that is

> *"Possible solution but route is you feel there is a deliberate move to roster you outside of that pattern or deliberate roster the pattern you will find uncomfortable. Not acceptable if happening" [sic]*

87. There is nothing else in the notes to suggest that any agreement was reached about a particular working pattern for the claimant.

88. Having considered the notes of the second grievance meeting [230 *et seq*], it is not possible to discern at any point the respondent agreeing a specific work pattern for the claimant. The only reference to a particular working pattern suggests that there was no prior agreement. At [239] the claimant comments,

> *"Last meeting 3 sim 1 flying, why not agree to this"*

89. That is posed as a question which suggests to the tribunal, and we find, that there was no agreement to this, or any, specific working pattern.

90. During the course of the grievance process the claimant was asked to undergo an occupational health appointment which he did on 4 July 2023. One of the claimant's complaints of direct age discrimination is that the respondent failed to carry out a stress risk assessment which was a requirement of the occupational health report. We find as a fact that there was no such requirement. The reference to a stress risk assessment is under the heading "*opinions and recommendations*" in the report and the occupational health doctor simply states

> *"I would therefore suggest that a stress risk assessment be performed to help identify work related stresses…".*

91. But to put this in context, the report finds that the claimant is fit to carry out the duties outlined in his job description, that there is no reason for the claimant being unable to undertake training and examination duties, that the claimant has no health issue which would impact his ability to perform mixed duties out of any base but that nevertheless he is suffering from stress. The conclusion is that this is an organisational matter not a medical one.

92. We are satisfied that a risk assessment was undertaken but unfortunately nothing was put in writing and that was undoubtedly a failing on the part of the respondent.

93. As part of his grievance investigation into rostering, Mr Little also corresponded with the claimant's union representatives at BALPA.

94. On 20 September 2023 Mr little sent to BALPA the claimant's roster for the week commencing 8 October 2023. This appears to the tribunal to be not unlike many of the rosters given to the claimant and about which he has complained [245].

95. In response, Ian White, who is a scheduling specialist with BALPA, stated that

> *"I do agree with you that the roster is reasonable and certainly not excessive, there is recovery time, and the transport is catered for i.e. Sam has choices on how he travels…" [244].*

96. Mr little provided his grievance outcome on 4 December 2023 and that is set out at [264 – 267]. The grievance was not upheld. The claimant did not appeal against the grievance outcome.

97. Prior to conclusion of the grievance the claimant had commenced early conciliation on 30 September 2023. The early conciliation certificate it was issued on 11 November 2023.

98. What the respondent did do as a result of the grievance being raised was put in place a number of adjustments to assist the claimant which they did not have in place for the other pilots. So, for example if the claimant was rostered out of his home base he would be provided with hotel accommodation in the East Midlands at the expense of the respondent. The respondent agreed to fund train and taxi travel should the claimant prefer that to driving.

99. The claimant presented his claim to the tribunal on 11 December 2023.

Discussion and conclusions

100. We turn now to our conclusions on the allegations set out in the list of issues.

Detriment claim

101. In relation to the claim for detriment for having made a public interest disclosure, there is no direct evidence that the claimant's rosters were different from any other pilot. There is no doubt that on occasion a particular roster would have been tiring because of the amount of travel, but that is a function of where the claimant lives, his home base and where the sim training takes place.

102. But perhaps the more significant point is that taking the claimant's case at its highest and assuming he could have shown that the rosters he was asked to undertake were prejudicial and detrimental to his well-being, he provided no direct evidence that any of the individuals he accused of being responsible for rostering decisions were in fact responsible for them.

103. That begs the question whether the tribunal could infer from the evidence that the named individuals were subjecting him to a detriment because he made a protected public interest disclosure. The difficulty for the claimant with that argument is that in the circumstances of this respondent individuals are encouraged to make such disclosures and a system is set up to enable them to do so, and to do so openly, anonymously or confidentially should they wish. In this case the incident the claimant referred to was already in the respondent's Safety Management System and was the subject of an investigation and a report to the CAA, so it is illogical to conclude that because the claimant subsequently also drew this to the respondent's attention it was decided that he should in some sense suffer by being rostered in a way which was prejudicial and damaging to his well-being. The respondent is well used to employees making such disclosures, they

have a detailed system for dealing with them and the claimant can give no explanation as to why he should be picked on in this particular instance, in these particular circumstances, and we find that he was not. We also reiterate that the claimant was complaining about rostering before and after the disclosure which suggests the fact of the disclosure changed nothing.

104. In the circumstances we find that there is no basis to the claim under s.47B, Employment Rights Act 1996 which fails.

Direct age discrimination

105. It is a feature of this case that there is a vast amount of documentation particularly in the form of emails and a detailed grievance from the claimant and at no point in any of the documents does the claimant refer to age discrimination until he presented his claim form.

106. We shall deal with each of the specific allegations in turn.

107. The first is that neither Mr Heenan nor Mr Little took action "*in response to the health issues behind the claimant's decision".* The decision referred to here is to stand himself down from duty for the reasons set out in his e-mail to Paul Strudwicke of 5 December 2022.

108. The difficulty for the claimant is that that e-mail was not sent to either Mr Heenan or Mr Little and it is unclear to the tribunal why they and not Mr Strudwicke should be the subject of this complaint.

109. Had the claimant wished to receive a response from either Mr Heenan or Mr Little he could have written to them directly or simply copied his e-mail to them, but he did not, and it seems to the tribunal that the simple answer to his criticism is that they did not respond because they either did not know about the email, which was Mr Little's evidence, or did not believe they were required to respond and there is no evidence from which we could conclude that the reason they did not respond is because of the claimant's age.

110. Furthermore, given the voluminous correspondence from the claimant which is invariably responded to in detail by everyone he corresponded with, there is no basis upon which we could infer a discriminatory motive for there being no particular response to this particular e-mail.

111. For those reasons this allegation fails.

112. The second allegation is that the claimant was rostered a minimum simulator time of 29 days out of 308. He compares himself with Mr George Marshall and external TREs.

113. The claimant did not lead evidence or cross examine on this matter and it is impossible for the tribunal to conclude whether 29 days out of 308 is 'minimal'; we were not taken to the rosters for Mr Marshall or any external TREs.

114. The claimant has simply failed to establish any less favourable treatment in relation to this allegation which fails.

115. The third allegation is that the claimant had two rostered simulator duties removed in February 2023, and he compares himself with pilots named Duhot and Molleville.

116. No evidence was led on this allegation and there was no reference in the hearing to Mr Molleville. There was a brief discussion about the pilot named Duhot who apparently lives in Belgium and is not therefore in the same circumstances as the respondent who lives in the UK, but in any event that discussion was about travel rather than the replacement of sim duties by standby duties.

117. The claimant did not take us to any evidence showing the roster duties for either of his comparators and there is no evidence that he was treated less favourably than they were, and again we find that the claimant has failed to establish any less favourable treatment and this allegation also fails.

118. The final allegation is that the respondent took no action in response to the requirement for a stress risk assessment as set out in his occupational health report.

119. Looking at the allegation strictly, it is simply incorrect to say that there was a requirement for the respondent to undertake a stress risk assessment and therefore this cannot be the subject of an allegation of less favourable treatment. However, allowing the claimant some latitude, and reading the allegation as a failure on the part of the respondent to take up the suggestion of undertaking a stress risk assessment, we find that the respondent did undertake a stress risk assessment albeit they failed to reduce it to writing.

120. Importantly, however the claimant did not lead any evidence that he has suffered less favourable treatment either by a risk assessment not being done or by it not being reduced to writing. In short there is no direct evidence that any other person in similar circumstances was given a stress risk assessment or was given one in writing and no evidence from which we could infer any difference in treatment. For those reasons this allegation also fails.

Harassment related to age

121. Finally, we turn to the allegations of harassment related to age.

122. The principal difficulty for the claimant in relation to these allegations are twofold. The first is that he gave no evidence whatsoever on how he says the conduct complained of violated his dignity and no evidence that his environment was intimidating, hostile, degrading, humiliating or offensive. That is a significant difficulty. The second is that the claimant gave no evidence to support his contention that even if the complaints he refers to amounted to harassment that related to age. That said we shall now look at each allegation in turn.

123. The first allegation is essentially the rejection of the claimant's grievance. It seems to the tribunal that Mr Little undertook a reasonable investigation into the claimant's grievance which essentially centred around rostering. His conclusion was that there was no evidence to support the claimant's complaints, and we can find no evidence to conclude, and no evidence from which we could infer that his

findings were tainted by considerations of age. The same goes for post grievance rostering.

124. For those reasons this allegation fails.

125. The second allegation relates to the stress risk assessment, and we have dealt with that in detail above. In short, we found that the respondent did take the required action although they failed to make a written record of that for which they should rightly be criticised. However, that is not evidence of harassment whether related to age or otherwise and for that reason this allegation fails.

126. The third allegation relates to the removal of the claimant from base training in March/April 2023. It is difficult to understand what it is that the claimant is complaining about because he accepts that because of his OML he was not able to do base training, a matter confirmed by the CAA. The reason for his removal from base training had nothing to do with his age and this allegation fails.

127. The fourth allegation relates to the respondent failing to seek or obtain dispensation from the CAA to enable the claimant to complete base training. The evidence is clear that the respondent did contact the CAA who were themselves clear that there were no dispensations, derogations or exemptions to enable somebody with an OML to undertake base training (save perhaps for the most exceptional circumstances which did not apply in this case). So in short the respondent did seek to obtain dispensation to enable the claimant to undertake base training, but their failure to obtain such dispensation is because the rules are clear and did not allow for such exemptions and therefore in the first instance the respondent did not fail to do what the claimant wanted, which was to seek a dispensation, and in the second place, the fact that they failed to obtain it has nothing to do with the claimant's age and everything to do with the fact that no such dispensation was available. For those reasons this allegation fails

128. The fifth allegation requires there to have been an agreement for the claimant to be rostered for three weeks on sim duties and one week on flying duties but as we have found above, we can find no such agreement in the contemporaneous record which the claimant has not challenged. As far as a proposed two week sim training and two week flying pattern is concerned, we are satisfied that the respondent did not consider that it had entered into such an agreement with the claimant, but even if it had, and even if it reneged on that agreement, there is no evidence from which we could conclude nor from which we could infer that the reason was anything to do with the claimant’s age. We note that throughout this hearing the respondent has consistently maintained that any move from pilots undertaking training to flying is because there was a need, given a shortage of pilots, for more flying to be done by their existing cohorts of pilots given that flying is their sole revenue stream. During the hearing the claimant did not take issue with this, and it seems to the tribunal that what the claimant wanted was to be treated differently to other pilots and allowed to do more non-revenue training rather than revenue-earning flying because that was his preference. We find therefore that any decision of the respondent to require the claimant or any other pilot to do less training for a period of time related to the needs of the business, not the age or any other characteristic of the pilots. For those reasons this allegation fails.

129. The sixth allegation relates to words attributed to Mr Heenan which the claimant says he made during September to December 2023 welcoming new blood into the respondent and saying that he was glad to see the back of old wood and referring to people as dinosaurs who have been negative about the respondent. The claimant did not hear any such comments himself. There was no evidence to support the assertion that Mr Heenan made these comments, and we accept his evidence that whilst he might have used the term new blood, he would never refer to colleagues as dinosaurs. As he himself put it, a dinosaur might be said to be an individual who cannot change as circumstances change and that this certainly did not apply to the claimant who was always willing to adapt to new technology and new ways of working. For those reasons this allegation fails

130. The penultimate allegation relates to the failure of Mr Heenan and Ms Wake to provide the claimant with sim work on specific dates as set out in the list of issues. The claimant led no evidence and did not cross examine on these specific allegations and he has not taken us to any evidence from which we could conclude this was a failure on the part of either of the individuals referred to. We would also point out that the rostering teams at the respondent have to create rosters for a number of pilots across a number of routes taking into account a number of matters, over a given period of time in order to ensure the respondent's revenue stream, but it seems to the tribunal that at a certain point the claimant lost sight of the needs of the business and became interested solely in what he wanted to do and seemed to forget that if either Mr Heenan or Ms Wake, or indeed anyone else, intervened to provide him with some work (flying or training) when he was not otherwise rostered to do it that would inevitably have knock on effects for others, and so even if they had wanted to assist him they may not have been able to do so. The claimant has not provided any evidence either directly or from which we could infer that anything done or not done in relation to these two rostering issues amounted to harassment related to age.

131. The final complaint under this heading is that sim duties were offered to Mr Heenan, Mr Dillon and Mr Jones along with external contracting instructors whom he says had no experience of the Boeing 737-300/400 series aircraft. We accept the evidence of Mr Heenan that those undertaking sim duties have to have and do have the necessary experience to do the sim training but even if they did not it is difficult to see how that amounts to harassment of the claimant whether related to his age or otherwise and for those reasons this allegation also fails.

132. In summary all of the claimant's allegations fail and are dismissed.

_____

Employment Judge Brewer

Date: 18 February 2025

JUDGMENT SENT TO THE PARTIES ON

.....02 March 2025.....

.....

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Appendix 1

Glossary of terms

Accountable Manager - a Regulatory Authority (CAA) appointment. An Accountable Manager in the context of an Air Operator Certificate (AOC) is an individual appointed by an airline or aviation organisation to the assume overall responsibility for the safe and compliant operation of their aircraft.

AME - Aeromedical examiner, a medical professional appointed by the UK CAA approved for the examination of UK CAA licenced aircrew.

AOC - Air Operators Certificate which is the licence issued by the UK CAA to an aircraft operator in the UK allowing the operator to transport passengers and cargo for commercial purposes.

ATO – Approved Training Organisation. An organsation staffed. Equipped and operated to offer approved flying training.

ATPL - Airline Transport Pilot Licence. This is the highest level of aircraft pilot certification and is required to pilot an aircraft with 9 or more passenger seats.

Base Training - Base Training is completed the end of an aircraft type rating course and is the first time a pilot sits at the controls of a real aircraft rather than a simulator. During base training the new pilot will complete at least 6 take-offs and landings to an acceptable standard.

Class 1 Medical Certificate - a full aviation medical required for the operation of a commercial aircraft. A pilot is required to undergo a medical examination every year until age 60, thereafter this examination is conducted every six months.

Crew Roster - schedule showing flight times, flight numbers and operating crew members, including simulator, training, checking and positioning duties, sign on, sign off, standby periods and days off for a specific period.

NPCT - Nominated Postholder Crew Training. The nominated person or his/her deputy should be a current type rating instructor on a type/class operated under the AOC.

OML - Operational Multi-pilot Limitation. When the holder of an ATPL does not fully meet the requirements for a class one medical certificate and has been referred to the licencing authority, it should be assessed whether the medical certificate may be issued with an OML “valid only as or with qualified copilot”. This assessment is performed by the CAA. The holder of a medical certificate with an OML shall only operate an aircraft in multi-pilot operations when the other pilot is fully qualified on the relevant class and type of aircraft, is not subject to an OML, and has not attained the age of 60 years.

TRE - Type Rated Examiner is a person authorised by the CAA to examine pilots for initial or recurrent qualification on specified aircraft types.

TRI - Type Rated Instructor is authorised by the CAA to train and instruct pilots not yet qualified unspecified aircraft types, on an aircraft.

Type Rating - the qualification undertaken by a commercially qualified pilot in order to fly a particular aircraft type.

Appendix 2

Agreed list of issue

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, some of the complaints may not have been brought in time.

1.2 Was the detriment complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

1.2.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Protected disclosure

2.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 What did the claimant say or write? When? To whom? The claimant says they made disclosures on these occasions:

2.1.1.1 on 26 September 2022 in a meeting with Greg Little the claimant disclosed the unprofessional, non-standard, and potentially dangerous flying behaviour of a Captain who had continued to fly an approach to land at Aberdeen airport, although his speed and altitude on the approach were both outside the parameters considered safe by the respondent.

2.1.2 Did they disclose information?

2.1.3 Did they believe the disclosure of information was made in the public interest?

2.1.4 Was that belief reasonable?

2.1.5 Did they believe it tended to show that:

2.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation,

2.1.5.2 the health or safety of any individual had been, was being or was likely to be endangered,

2.1.6 Was that belief reasonable?

2.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

3. Detriment (Employment Rights Act 1996 section 48)

3.1 Did the respondent do the following things:

3.1.1 between 26 September 2022 and March 2024 roster the claimant in a way that was prejudicial and detrimental to the claimant's well-being. The claimant says that Greg little, Thomas Heenan, Ben Bradbury, and Chris Hazell were responsible for the rostering decisions.

3.2 By doing so, did it subject the claimant to detriment?

3.3 If so, was it done on the ground that they made a protected disclosure?

4. Remedy for Protected Disclosure Detriment

4.1 What financial losses has the detrimental treatment caused the claimant?

4.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

4.3 If not, for what period of loss should the claimant be compensated?

4.4 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

4.5 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

4.6 Is it just and equitable to award the claimant other compensation?

4.7 Was the protected disclosure made in good faith?

4.8 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

5. Direct age, discrimination (Equality Act 2010 section 13)

5.1 The claimant's age group is 60 - 65 and they compare their treatment with people in the age group 30 – 59.

5.2 Did the respondent do the following things:

5.2.1 the claimant's e-mail to Paul Strudwicke of 5 December 2022 regarding stepping down from flying duties was relayed to Thomas Heenan and Greg Little who took no action in response to the health issues behind the claimant's decision,

5.2.2 the claimant was rostered minimal simulator time of 29 days out of 308, compared to George Marshall, and external TREs, the claimant had 2 rostered simulator duties removed in February 2023, them being replaced by Standby duties at East Midlands Airport, unlike comparators Duhot & and Moleville, there was no offer of substitution and there was no process followed to remove them from the claimant's duties,

5.2.3 the respondent rostered the claimant on simulator refresher training on 17 March 2023 with base training the following day. Following the training, the respondent removed him from the base training shift the next day, instead appointing Thomas Heenan and Dylan Jones and placing the claimant on reserve without derogation process,

5.2.4 the respondent took no action in response to the requirement for a stress risk assessment to be undertaken for the claimant, caused by the effect of his roster, as set out in the Occupational Health Report which the respondent had commissioned.

5.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant says they were treated worse than the following people (their ages are in brackets)

- Michael Dillon (59)
- Matthew Brown (53)
- Thomas Heenan (48)

- Dylan Jones (46)
- Patrick Duhot (56)
- Remy Moleville (42)
- George Marshall (aged 30s)

5.4 If so, was it because of age?

5.5 Did the respondent's treatment amount to a detriment?

6. **Harassment related to age (Equality Act 2010 section 26)**

6.1 Did the respondent do the following things:

6.1.1 on 25 August 2023 reject the claimant's grievance and choose to exclude the claimant from B737 TRI duties including the recruitment of pilots and command assessments and from Post Maintenance Check Flying,

6.1.2 take no action in response to the requirement for a stress risk assessment to be undertaken for the claimant, caused by the effect of his roster, as set out in the Occupational Health Report which the respondent had commissioned,

6.1.3 the claimant was removed from base training which Thomas Heenan stated to Captain Mark Frame, following the claimant's removal from the training around March/April 2023, was a 'political' decision. The claimant avers that Thomas Heenan's 'political' comment was in relation to removing older staff members like the claimant and promoting younger staff members like Dylan Jones, who, like Thomas Heenan has been appointed a Base trainer,

6.1.4 fail to seek or obtain dispensation from CAA to complete Base training which has resulted in the claimant to losing this role, and Thomas Heenan, NPFO and the man who would have made the argument for dispensation, together with Dylan Jones becoming qualified,

6.1.5 renege on an agreement for the claimant to be rostered 3 weeks Simulator duties and 1 week flying duties each month in their August 2023 grievance meeting nor was the claimant's proposed 2 weeks Simulator, 2 weeks flying pattern accepted,

6.1.6 the claimant was informed that Thomas Heenan, when speaking at two welcome meetings for new crew members, which took place from September to December 2023, stated that he was "*very glad to welcome new blood into the company. Glad to see the back of old wood, the dinosaurs who have been negative about the company who are now leaving and are being*

replaced by you young people. I hope your positive attitude shines throughout the network night after night",

6.1.7 Thomas Heenan, and Sandra Wake did not intervene to provide the claimant with 737 Simulator work or remedy issues with his roster, following his representations to them on the following dates:

6.1.7.1 Thomas Heenan: 26-27.01.2023,

6.1.7.2 Sandra Wake: 25.10.2023,

6.1.8 offer Simulator training duties to Thomas Heenan, Michael Dillon and Dylan Jones and external contracting Instructors having no experience on the Boeing 737-300/400 series aircraft.

6.2 If so, was that unwanted conduct?

6.3 Did it relate to age?

6.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

7. **Remedy for discrimination or victimisation**

7.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

7.2 What financial losses has the discrimination caused the claimant?

7.3 If so is it just and equitable to increase or decrease any award payable to the claimant?

7.4 By what proportion, up to 25%?

7.5 Should interest be awarded? How much?