



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms B Noah

**Respondent:** British Airways PLC

**Heard at:** Reading

**On:** 26—27 March 2025

**Before:** Employment Judge Reindorf KC  
Ms H Edwards  
Mr A Kapur

**Representation:**

**Claimant:** In person

**Respondent:** Ms H Kendrick (solicitor)

## JUDGMENT

- (1) The claim for discrimination arising from disability under section 15 of the Equality Act 2010 fails and is dismissed.
- (2) The claim for failure to make reasonable adjustments under section 20 of the Equality Act 2010 fails and is dismissed.
- (3) The claim for unfair dismissal under section 94 of the Employment Rights Act 1996 fails and is dismissed.

# REASONS

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## INTRODUCTION

1. The Claimant was employed by the Respondent as a Baggage Tracing Specialist from 16 April 2013 until she was dismissed under the Respondent's absence management policy with effect from 16 August 2023. After a period of ACAS early conciliation from 30 October 2023 until 10 November 2023 she lodged her ET1 on 11 November 2023. She complained of unfair dismissal and disability discrimination. The disability upon which she relied was depression and anxiety.
2. In its ET3 the Respondent denied the claims and did not concede that the Claimant had been a disabled person at the relevant times. However disability was conceded by the Respondent on 13 March 2025.
3. The issues in the case were set out at a Preliminary Hearing for case management on 29 March 2024. The final claims as formulated at that hearing were for ordinary unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments.
4. The case came before us for Final Hearing on 26 March 2025. It was listed for three days. The Claimant gave evidence on her own behalf and the Respondent called Nicola Dunleavey, Performance Standards Manager. Both witnesses produced written witness statements. The Respondent also relied upon a written witness statement from Katherine Carabini, Strategy and Implementation Manager, but this witness did not attend in person because she was on a family holiday which had been booked before the case was listed for trial. We had an agreed bundle of 354 pages. The Claimant also attached a number of documents to her witness statement, some of which had not previously been disclosed.

## FINDINGS OF FACT

5. The Respondent operates an absence management policy called EG300 under which employees receive two warnings before dismissal is considered. One of the triggers for moving up a stage in the process is if the employee is off sick for 4.5% of their available working hours in a rolling 12 month period.
6. The Claimant has experienced periods of mental ill health for a number of years. She gave evidence about personal difficulties which had contributed to this. She was prescribed Citalopram in July 2015 and continues to take it.
7. From 2018 the Claimant worked 18.75 hours per week. Each shift was 8.5 hours. Therefore 4.5% of her available working hours in any 12 months was 4.76 working days or 40.5 hours.
8. On 2 May 2022 the Claimant hit the 4.5% absence trigger and was invited to a Stage 1 Absence Review Interview on 16 August 2022. The absences which had counted towards this trigger being reached were three days in November 2021 for a cold and flu and two days in May for a sickness bug. Ultimately the interview did not take place until 8 November 2022.
9. In the meantime, the Claimant had several further periods of sickness absence which were not counted towards the EG300 trigger, because they happened during the period when the Claimant was awaiting her Absence Review Interview. These included ten days' absence in July 2022 and ten days' absence in September—October 2022, both of which were for mental health problems, and 4 days in October 2022 for tonsillitis.
10. At the Stage 1 Absence Review Interview the Claimant was not given a warning. An improvement plan was put in place from 6 November 2022 to 5 November 2023. That meant that the Claimant would move to Stage 2 of EG300 if she had another period of absence in that period.
11. The Claimant was off sick again for three days in December 2022. The reason she gave was that she had not dried her hair properly when on holiday in Egypt and had subsequently felt unwell. She told the Respondent that she thought her "immune system had shut down altogether". She was asked about this in oral evidence but was unable to explain the connection between not drying her hair properly and subsequently feeling unwell.
12. On 28 December 2022 the Claimant was invited to a Stage 2 EG300 meeting on 8 February 2023. In the interim period the Claimant had three days' absence in December 2022—January 2023 because of a cold and temperature. This did not count towards the trigger.
13. At the Stage 2 meeting on 8 February 2023 the Claimant was given a first warning, and an improvement plan was put in place for the period 8 February 2023 to 7 February 2024 on the same basis as the Stage 1 improvement plan.
14. The Claimant was absent again at the end of February 2023 for tonsillitis. As a result of this absence she was invited to a Stage 3 Absence Review Interview on 4 May 2023.

15. The Claimant was off sick for 11 days in March and April 2023 because of mental health problems. These were not counted towards the EG300 trigger. She was referred to the Respondent's Occupational Health service ("BAHS") as a result of this absence. The BAHS report, sent to the Respondent on 20 April 2023, said that she was stable and fit to return to work from 23 April with no adjustments. The BAHS adviser signposted the Claimant to support services.
16. At the Stage 3 EG300 interview on 4 May 2023 the Claimant was given a second and final warning and another one year improvement plan. She was then off sick again for three days due to a cough and cold, which triggered the final stage of the process.
17. The Claimant's final Absence Review meeting took place on 8 August 2023 with Ms Dunleavy. A full explanation of the procedure and the absences which had been taken into account was given to the Claimant and she had a proper opportunity to make whatever points she wished to make.
18. At a further meeting on 16 August 2023 Ms Dunleavy informed the Claimant that she had decided to dismiss her with pay in lieu of notice. None of the Claimant's absences for mental ill health had been taken into account during her progress through the absence management process.
19. The Claimant appealed against her dismissal. The appeal was heard on 4 October 2023 by Ms Carabini. At the hearing the Claimant submitted documents to show that she had been receiving counselling. She also disclosed personal information about her domestic life. The Tribunal is satisfied that Ms Carabini took all the information carefully into account. The Tribunal has not been required to attach particular weight to Ms Carabini's witness statement in order to reach this conclusion, since it is apparent from her 6 page letter dated 20 October 2023 dismissing the appeal.

## **LAW**

### **Discrimination arising from disability**

20. By s.15 of the Equality Act 2010 ("EqA") an employer discriminates against a disabled employee if it treats him unfavourably because of something arising in consequence of his disability and cannot show that the treatment is a proportionate means of achieving a legitimate aim. The employer must have known or reasonably have been expected to know that the employee had the disability.

### **The duty to make reasonable adjustments**

21. By s.20 EqA an employer is obliged to take such steps as it is reasonable in the circumstances to take to avoid placing a disabled employee under a substantial disadvantage by reason of a provision, criterion or practice ("PCP").

22. The duty does not arise if the employer does not know and could not reasonably be expected to know that the employee has a disability and is likely to be at the substantial disadvantage (Sch 8, Pt 3, §20 EqA).
23. The duty does not arise if the substantial disadvantage is not because of the employee's disability but for some other reason (*Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley* [2012] EqLR 634 EAT).

### Unfair dismissal

24. In an unfair dismissal complaint, it is for the Respondent to show what the genuine reason was for the dismissal and that it was a potentially fair reason within section 98(1)(b) of the Employment Rights Act 1996 ("ERA"). One potentially fair reason is "a reason related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do" (s.98(2)(a) ERA). This may include incapability arising from ill health. Another permissible reason is "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" (s.98(1)(b) ERA)
25. If the Tribunal is satisfied that the reason for the dismissal was a potentially fair reason, it must enquire into whether the decision to dismiss for that reason was fair or unfair having regard to all the circumstances of the case including the size and administrative resources of the employer (s.98(4) ERA).
26. In conducting its enquiry under s.98(4) ERA the Tribunal should keep in mind that:
  - 26.1. The "band of reasonable responses" test applies to all aspects of the dismissal<sup>1</sup>.
  - 26.2. The Tribunal should not substitute its own view of what is an adequate procedure for that which could be expected of a reasonable employer. The question is not whether there was something else which the Respondent ought to have done, but whether what it did was reasonable<sup>2</sup>.
  - 26.3. In an ill health dismissal case, the basic question is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer.
  - 26.4. The employer should consult with the employee<sup>3</sup> to weigh up the situation "bearing in mind the employer's need for the work to be done and the employee's need for time in which to recover his health"<sup>4</sup>.

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<sup>1</sup> *BHS v Burchell* [1978] IRLR 379 EAT.; *Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] IRLR 759 CA

<sup>2</sup> *Sainsbury's Supermarkets v Hitt* [2003] IRLR 23 CA

<sup>3</sup> *East Lindsey District Council v Daubney* [1977] ICR 566 EAT

<sup>4</sup> *Spencer*

- 26.5. It may also be important for the employer to consult with medical practitioners and to request that the employee undergoes a medical examination.

## **CONCLUSIONS**

### **Discrimination arising from disability**

27. The issues for the Tribunal to decide under this cause of action are whether the Claimant was treated unfavourably by the Respondent because of something arising in consequence of her disability when it subjected her to its EG300 absence policy and when it dismissed her. The something arising is the Claimant's sickness absence.
28. The Tribunal finds that the sickness absence for which the Claimant was subjected to the EG300 absence policy and subsequently dismissed did not arise as a consequence of her disability. None of the periods of sickness absence that were taken into account during the process related to her mental ill health.
29. At the beginning of the hearing the Claimant was unable to explain how she argued this claim, in light of the facts explained above. She was unable to elucidate. After the lunch break she said that coughs, colds and tonsillitis were side effects of citalopram. In evidence she said that the coughs, colds and tonsillitis for which she had taken sick leave were in fact side effects of her own citalopram use, and that this was the explanation for why her sickness absence was something arising from her disability. She said that this was not something that she had realised before and accepted that she had never raised it with the Respondent, had no medical evidence to support it and there was nothing in the bundle to substantiate it.
30. The Tribunal rejects that argument in its entirety. It was wholly unsupported by evidence. Furthermore even if it was true, the Respondent neither knew nor could reasonably be expected to have known about it.
31. The discrimination arising from disability complaint therefore fails.

### **Failure to make reasonable adjustments**

32. The Respondent conceded that it applied the EG300 sickness absence policy to the Claimant and that it was a provision, criterion or practice.
33. As we have already found, none of the sickness absence that led to the application of the absence policy to the Claimant was related to her mental ill health. It follows that the PCP did not put the Claimant at a substantive disadvantage by comparison to persons who are not disabled.
34. The claim for failure to make reasonable adjustments therefore fails.

### **Unfair dismissal**

35. The Respondent has shown that the reason for the Claimant's dismissal was her ill health absence. This was a reason relating to capability, alternatively some other substantial reason such as to justify the dismissal of an employee in the Claimant's position.
36. The Tribunal finds that the Respondent acted reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the Claimant. It carefully applied its EG300 absence management policy over a period of 15 months. At each stage the Claimant had a full opportunity to discuss and explain her absences. Medical advice was taken from the occupational health service about her mental ill health, which advised that no adjustments were necessary. She had sufficient opportunity to explain and improve upon her attendance. Ultimately the amount of time she took in sickness absence was very substantial – reaching 50% of her contracted hours – and was for a variety of largely apparently unconnected reasons. There was no reason for the Respondent to think or enquire further as to whether the absences were connected. We find that the Respondent took reasonable steps to help the Claimant improve her attendance at work before taking the decision to dismiss her. She had a fair appeal.
37. The unfair dismissal claim is therefore dismissed.

Approved by

**Employment Judge Reindorf KC**

Date 30 March 2025

Sent to the parties on:

1 May 2025

For the Tribunal Office

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