



**EMPLOYMENT TRIBUNALS**

**BETWEEN**

**Claimant** MR O. GUETTOCH

**Respondent** TUNISAIR  
(also known as Societe Tunisienne de l'Air)  
Respondent

**Employment Judge Russell**

**HELD AT: London Central ( CVP video audio call) ON: 28 April 2021**

**BEFORE: Full ET Panel**  
**Employment Judge Mr. T Russell**  
**Members Mr. F Benson , Mr. T Robinson**

**REPRESENTATION:**

**Claimant: Mr. Smith , solicitor**  
**Respondent: Mr. Abizid , Respondent's Finance and Administration Manager**

**Judgement**

1. The Claimant resigned voluntarily on 23 August 2019 and was not dismissed under s95(1) (c) ERA 1996 and so his claim for Unfair dismissal under s98 ERA 1996 fails.
2. The Claimant's claims to have been discriminated against because of his Age under section 13 ( direct discrimination ) or related to his age under section 26 ( harassment ) of the Equality Act 2010 also fail .
3. As a result all the Claimant's claims are unsuccessful and are dismissed.

**Reasons**

**Background**

The Respondent is the national airline of Tunisia and operates flights to and from London Gatwick and Heathrow. It has operational office bases at Hammersmith, Gatwick and Heathrow.

The Respondent , even pre the pandemic , had only around 7 flights a week operating out of 2 London airports , Gatwick and Heathrow.

The Claimant, Mr Guettoch , was employed by the Respondent for some 28 years. His employment began on 21 August 1991 and he resigned with immediate effect on 23 August 2019 claiming constructive ( and unfair ) dismissal.

At the time of the effective date of termination of his employment the Claimant was 72 years of age. The Claimant claims he was forced out of work because of his age and reluctance to retire. He also claims he suffered harassment for the same reasons.

The Claimant's duties as Station Manager are not recorded in any contractual ( or indeed any written down ) job description . The Claimant's contract of employment , naturally enough perhaps given it was entered into in 1991 , was silent as to the Claimant's job duties or any flexibility expected of him in his Station Manager's role .The Respondent state that the duties , certainly in 2019, included the following administrative duties

- (a) Completing a daily report on 'station activity' (meaning activity at both Heathrow and Gatwick airports) in order to plan station activities;
- (b) Completing monthly and annual reports relating to 'dashboards', documenting the performance of the London stations;
- (c) Preparing daily flight schedules one day ahead, to include checking passenger connections and anticipating deportee passengers by checking passenger travel documents; and
- (d) Preparing a loading report to be sent daily to the Respondent's headquarters in Tunis.

However the Claimant stated this was inaccurate and that also the role was much wider than this suggested and that the Claimant's duties as station manager ,according to the Claimant's solicitor on his behalf , included :

- *Overseeing operational ground movements both at LHR and LGW*
- *preparation of flights with the handling agent regarding seat allocation for families with children and infants, VIPs and cardholders and any disabled passengers. These matters must be attended to prior to the flight opening for check-in at 14:00 hours (LHR)*
- *liaison with operations regarding passenger and cargo loads, aircraft registration, division of the cabin for economy and business class passengers*
- *in the event of flight delays, organising rebooking of transit passengers*
- *dealing with day-to-day issues such as weather conditions which may affect the operation of the aircraft*
- *being physically present at the opening of check-in and ensuring that there are the correct number of desks open for check-in.*
- *Overseeing check-in of the flight and dealing with any problems that may arise*
- *once the aircraft has landed, meeting the aircraft, greeting in bound passengers and dealing with any enquiries*
- *liaison with the cockpit, cabin crew and flight dispatcher, boarding staff, cleaners and fuellers to ensure the smooth turnaround of the aircraft*
- *attending at the gate in order to deal with any issues that might arise regarding departing passengers*
- *in the event of a technical issue with the flight, liaising with the captain, ground mechanics and operations in Tunis in order to achieve a safe departure of the aircraft with minimum delay*
- *following departure of the flight, dealing with any passengers who have missed the flight (whether this is due to therefore or overbooking) and dealing with arrangements for arrival passengers who have missed their connections*
- *collecting all relevant documentation concerning the flight and emailing management regarding the flight*
- *overseeing compliance with procedures in order to ensure the safety of the aircraft, its Passenger and Crew*
- *rappports activite mensuel et annuel*
- *dealing with immigration issues: our client has provided with senior immigration officers a number of training courses to company staff and managers in Tunisia. The purpose of those courses was to reduce the number of passengers arriving in the UK with forged documents or no Visa. Since that time and due to ongoing security issues in Tunisia, all immigration courses have had to be cancelled, which appears to have resulted in an increased number of immigration issues. Our client deals with UK immigration authorities with regard to passengers who have arrived without visas, on forged documents or their documents have been destroyed. It is however the responsibility of the boarding station (Tunis) to check travel documents before boarding the passenger onto the flight to London. When our client*

*is contacted regarding specific cases prior to boarding in the UK, he will assist by contacting the UK Visa section in Paris for their advice and authorisation.*

*• contesting immigration fines when this is justifiable.*

However the Claimant also clearly states through his solicitor and his own evidence that he is not responsible for collating data for and operating the introduced dashboard data system and that this would make the other duties associated with the role of Station Manager impossible to fulfil. Dashboard is an information sheet for the Respondent prepared for all flights relating to matters such as baggage, passengers flight connections and other incidents on Microsoft excel and stored on the computer as an easily available software data for future use and any necessary checks. And there remains a dispute between the parties as to whether (and if so to what extent) dashboard work was a legitimate part of his duties and for the reports required by the Respondent. The Claimant states that it was not and the insistence by the Respondent that he did this work, to the exclusion of his Station Manager duties or at all, was a unilateral demotion and led to his constructive dismissal. The Respondent, whilst accepting he was temporarily assigned to dashboard work rather than his other station manager duties, state there were legitimate reasons for this and the requirement for him to do this work did not amount to a breach of contract.

It was when the Claimant was required to focus almost exclusively on the dashboard work that matters came to a head and after what he considered to be unwarranted assertions of underperformance and harassment at work, together with what he felt was pressure exerted on him to retire, he resigned on 23 August 2019. Claiming constructive and unfair dismissal as well as discrimination and harassment based on the protected characteristic of age.

The Claimant gave evidence on his own behalf and we heard from 3 Respondent witnesses. Mr. Abizid, Finance and Administration Manager and Mr. Baccouch, station and cargo manager and Ms. Chahin Assistant Station manager all of who had worked with the Claimant for some time. All witnesses chose to give evidence without an interpreter, had comfort breaks when requested and professed to being comfortable with the tribunal procedure which was explained to them in advance and throughout the hearing with questions invited to the extent there was any confusion. The Claimant's line manager Mr. Mhiri was not present because he was detained in Tunisia without access to even an on line hearing.

We read skeleton arguments from both Mr. Smith representing the Claimant and Mr. Abizid for the Respondent (who, despite recent representation by Howard Kennedy, solicitors, chose to be unrepresented by solicitor or counsel at today's hearing). And we heard their respective submissions after 2 days of evidence. Very short by Mr. Abizid for the Respondent and very extensive by the Claimant's representative though we do not criticise either of them for this.

## **AGREED LIST OF ISSUES ( on Liability )**

### Factual issues

1. As Station Manager, what were C's duties and did they include the preparation of:
  - (i) daily reports on station activity; and
  - (ii) monthly and annual reports on R's dashboard?

### Legal issues

Constructive unfair dismissal:

The issue to be determined is whether C terminated his contract of employment with R (without notice) in circumstances in which he was entitled to terminate by reason of R's conduct, pursuant to s.95(1)(c) Employment Rights 1996.

2. Was there a fundamental/ repudiatory breach of C's contract by R? The conduct C relies on as breaching the implied term of trust and confidence is:

- a. C's de facto demotion;
- b. R's failure to state the period for which C's de facto demotion would last;
- c. R's repeated intimidation and bullying of C by Mr Mhiri, causing him to be absent from work due to stress;
- d. R's unfair criticism of C due to his absences for medical appointments;
- e. R's unfair imposition of a disciplinary sanction having followed no disciplinary process;
- f. R's unfair refusal to carry out an appeal of the disciplinary sanction;
- g. R's unfair criticism of C's performance in front of his colleagues;
- h. R's failure to provide support to assist C to improve his performance, if such improvement was in fact required;
- i. R making an allegation of gross misconduct against C whilst giving no indication as to what disciplinary action, if any, was to be taken as a consequence;
- j. R repeatedly informing C that he should retire and requesting his confirmation that he would do so;
- k. Preventing C from taking his planned leave entitlement;
- l. The calling of the meeting on 20 August 2019.

3. Did the breaches occur and were they of a repudiatory nature?

4. In the event that the Tribunal finds that more than one of the alleged acts occurred, whether they comprised a course of conduct constituting a repudiatory breach on the part of R?

5. Was the last breach sufficient to render any series of breaches a breach of the implied term of trust and confidence?

6. Did R's breach or breaches cause C to resign?

7. Did C waive any breaches or affirm the contract? In particular, did C waive any prior breaches and affirm his contract of employment by his email of 19 August 2019 and his return to work on 20 August 2019?

8. Did C delay too long before resigning and affirm the contract?

9. If C is found to have been dismissed, does R show that there was a potentially fair reason for dismissal? If R is found to have dismissed C, R relies on the potentially fair reason of capability.

Age discrimination:

10. R does not accept the basis on which C contends privilege should be waived in respect of a without prejudice discussion between the parties referenced in paragraph 6 of the Grounds of Complaint. Was there, at all material times, an existing dispute such that privilege applies to this discussion?

11. Did R directly discriminate against C because of age? C relies on the following less favourable treatment:

- a. That in May or June 2018, Mr Zakaria suggested C should retire;
- b. That in about mid-February 2019, Mr Mhiri made it clear that he wanted C to retire at that stage;
- c. That in mid-February 2019, Mr Mhiri made highly aggressive and critical comments to C which were considered by C to be designed to encourage him to accept

settlement terms. Mr Mhiri exerted pressure on C by demanding acceptance in a very short period of time;

d. That from about March 2019 onwards, Mr Mhiri continued to engage in a campaign of bullying and criticism of C, mostly in front of C's colleagues in team meetings;

e. That on 20 August 2019, Mr Mhiri was behaving in an extremely angry manner and C felt pressurised to sign the agreement. C felt bullied and harassed;

f. That R's subsequent behaviour and actions as set out in paragraph 25(i) to (xi) of the Amended Grounds of Complaint was motivated by its desire to pressurise/force C to retire.

12. Did R subject C to the above treatment, as alleged?

13. Did R treat C less favourably than it would have treated others? C relies on a hypothetical comparator of a person "of 40 years of age, or younger".

14. If so, does R show that its treatment of C was a proportionate means of achieving a legitimate aim, namely management of C's performance and attendance at work in furtherance of the successful operation of R's business in the UK?

15. Have the claims been presented in time? If not, do the allegations amount to conduct extending over a period such as they are brought in time and/or would it be just and equitable for the Tribunal to extend time.

Harassment because of age

16. Did R engage in unwanted conduct as set out in paragraphs 11(a) to (f) above?

17. Was the conduct related to C's age?

18. Did the conduct have the purpose of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

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

20. Has the claim been presented in time? If not, do the allegations amount to conduct extending over a period such that they are brought in time and/or would it be just and equitable for the Tribunal to extend time.

### **Findings by reference to the Issues and presented evidence**

1. The Claimant did deal with certain administrative duties from home in and out of his normal working hours but there was no contractual agreement with him to work simply from home. His role did require his attendance at both Heathrow and Gatwick airports in order to carry out his duties and it would not have been possible to carry out all of these duties remotely other than on a temporary basis.
2. We do not make a finding as to the Claimant's specific job duties other than as follows. We do find the dashboard work was an expected part of his duties. Of course it was not so in 1991 when he started but it became an important part of the Station Manager's job from around 2010 and as the business evolved over recent years. Asking him to include such reports did not need his consent and did not amount to a different job. We do not accept that this work meant it was impossible for him to carry out his other Station Manager duties. There were only 7 flights a week and Mr. Baccouch is now and has for

some time clearly and capably been carrying out all the tasks expected of the Claimant and in essentially the same job as Station Manager.

3. We do accept the dashboard reports are important and do not accept that the fact they were not produced during the Claimant's absence through sickness ( to the extent this was the case ) shows that they were unimportant . What was necessary was that they were prepared for future reference when this was possible even if this occasionally led to a backlog. The dashboard work was not time critical but part of the reports needed by the Respondent legitimately asked of the Station Manager.
4. When Mr. Mhiri became the Claimant's line manager in August 2018 a more regulated regime as introduced. Although Mr. Mhiri could not give evidence at the hearing the Respondent's 3 witnesses spoke in complimentary terms of his management style. We find that Mr. Mhiri was a well-liked and good and calm manager but it is clear not all the efficiencies he introduced were appreciated or welcomed by the Claimant.
5. The Claimant was pressurised to do some work he did not perhaps enjoy .The Claimant was not given the same opportunities to work from home as previously. But whether this was or was not more efficient we find that Mr. Mhiri was a fair manager and acted in good faith in requiring , as part of that review of the business requirements for the Station Manager role, the Claimant and also Mr. Baccouch ( covering the same and indeed a now slightly expanded role but as an alternate at that time ) to prepare dashboard reports. As part of their duties. This was legitimate and should not have taken an inordinate part of their working week to do . Or caused such a huge ruction.
6. It was therefore important for the Claimant to provide to Mr. Mhiri the required reports and schedules in a timely and accurate manner. He did not do so or always respond to emails requesting updates. And the dashboard was an important part of this reporting procedure. We accept Mr. Baccouch's evidence that the newer version of the dashboard that he assisted in creating enabled the Respondent to easily locate a particular flight and the details contained within it . It was possible to prepare these reports on a laptop and later extract the information quickly and effectively with "a touch of a button " as he said. We accept his evidence in this respect and that he was personally able to quickly do exactly this when a query arose recently as to a 2017 Tunisian Airways flight.
7. The Claimant struggled to undertake the dashboard work. Whether due to the difficulty of making the inputs in the excel spreadsheet or , in some cases, because a backlog of dashboard reports meant the information needed was not easily available or for other technical reasons . However whereas we accept the evidence from Ms. Chahin and Mr. Baccouch that in non-Covid busy times for the Respondent airline this job should have taken around 15-20 minutes a day the Claimant , despite some informal training ,which we accepted he had and on an ongoing basis from Mr. Mhiri and Mr. Baccouch , struggled with what was for him an unfair task. And not one he wished to do . But this is the case for many employees facing changes in working practices and new technology and maybe this is more strongly felt by older employees such as the Claimant. As has been shown during these covid times with the need for many seniors to find a new familiarity with internet based devices. But many older employees also embrace such technology and if it is the case that the Claimant did not then this is down to him given he was offered training and assistance. He was not treated any differently than any other member of staff needing to get to grips with a new skill.
8. The Claimant was absent through illness during March , April and the early part of May 2019. There was no evidence the conduct of Mr. Mhiri caused the Claimant to be absent through illness . When he returned from sick leave he was asked to do only dashboard work including back reports going back to 2018 . He claims this took him half of a working month to complete. We accept he found the task difficult , and to undertake backlog work would inevitably have taken more time , but on his own evidence he was still left

with little to do for much of his working week as he was not expected to do most of the other Station Manager tasks during this period. Secondly this militates against his claim that his workload was excessive as we have found that it was not. Thirdly we have found that once familiar with the dashboard it should not have taken him as long and could then have been undertaken alongside other Station Manager duties.

9. He was not at work all the time from early May until his resignation in 23 August due to taking annual leave from 20 May to 7 June but for that part of this period when he was working he was asked to concentrate on the dashboard work. The reasons he was put in this position are not wholly clear. However we find the principal reasons were a) the Claimant was perceived as underperforming in some of the other Station Manager duties; b) that he was expected to do this dashboard work as part of his duties and needed to get familiar with it if he was going to stay on as Station Manager for the future and c) that he had been suffering from ill health and although the Claimant and his advisers were of the view the more active Station Manager jobs duties should have been assigned to him the Respondent took a different and legitimate view. That the Claimant, with cardiovascular concerns, should have a less stressful office based job for a temporary period which also allowed him to improve his competencies. We do think the Respondents could have been more sensitive in the way they handled this situation and do not rule out the fact the Respondent had hoped the Claimant might be more likely to choose to retire if faced with less fulfilling work, but this is speculative and even if this were the case the Respondent was not in breach of the Claimant's contract by insisting on him undertaking the dashboard duties.
10. When the Claimant returned to work on 15 August 2019 it is accepted that he requested Mr. Mhiri (through his solicitors) to clarify various points concerning his role as requested previously in a letter dated 24 June 2019. It is also accepted that no substantive response was sent to that letter and Mr. Mhiri continued to roster the Claimant causing the Claimant to email Mr. Mhiri again on 19 August 2019 and stating that as from 20 August he would resume his duties as Station Manager. This was refused leading to the Claimant resigning on 23 August 2019 and we find all this August narrative was as a result of the advice given to the Claimant by his solicitor who was, naturally enough, attempting to prepare the ground for a "last straw" constructive dismissal claim. However all this is dependent on a finding by us that being required to undertake the dashboard work did amount to a fundamental breach of contract by the Respondent and we find that it did not.
11. The Respondent was unhappy as to the Claimant's performance and we do find it had fallen away slightly preferring the evidence of Mr. Baccouch to that of the Claimant when Mr. Baccouch stated there was a clear and marked reduction in efficiency and performance from the Claimant from as early as 2014 and certainly apparent in 2018 and 2019. We also note that although the Respondent did not start any performance appraisal process, even in the summer of 2019 when matters came to a head, and although there is a relative dearth of minuted discussions as to the Claimant's perceived underperformance, they did raise genuine concerns as to the Claimant's performance.
12. The importance of the Station Manager reporting relevant information is self-evident and it is clear from the evidence the Respondents (rightly or wrongly) considered the Claimant was not providing accurate enough or comprehensive information. We accept the evidence of Ms. Chahin when she stated that the Claimant had become less adequately organised, a key requirement for the job. At the check in desk she was often uncertain as to matters such as how many passenger wheelchairs were required for instance where she should legitimately have been able to rely on the Claimant for that information. And when trying to check an uncertainty she could never get hold of the Claimant on the phone. She found (and we accept this) that the Claimant would often obstruct her in her work by using her computer when he had his own and or others he could access (and we find that he did and could have accessed others despite his

claims to have struggled to log in etc. ) .

13. The Claimant was often late in providing details of cash sales leading to unnecessary paperwork the following day to securely process cash payments . And Ms. Chahin gave an example , evidence which we accept and was not refuted by the Claimant , of being told ( this was when a drone alert had stopped flights at Gatwick ) after the event and by the handling agents that some 47 Respondent flight passengers had gone through security .When she had also been told by the Claimant they were still in the airport terminal i.e. not air side , leading to considerable tension and passenger displeasure when they were further delayed and then sent home. Mr. Baccouch explained a significant drop off in the Claimant's ability to do his work efficiently and in the Claimant's evidence and equivocal answers to clear questions as to his work performance in the Hearing , the Claimant gave us no reason to doubt the accuracy of Ms. Chahin's and Mr. Baccouch's comments.
14. The Claimant asked us to accept , through his representative, that there is a material difference between operational problems which are bound to happen in the time critical and unpredictable world of airline and airport travel and the Claimant not doing his job properly. Which we accept. But we also accept that Ms. Chahin who was on the organogram as reporting to the Claimant and Mr. Baccouch who had worked with him some time ( and with no evidence of bad blood between any of them ) genuinely found him increasingly inefficient and that this view was shared by Mr. Abizid and Mr. Mhiri . And we find the Respondent's reluctance to begin a formal performance appraisal process was for the same reason that Mr. Baccouch was reluctant to address perceived concerns with the Claimant . That is the Claimant's sensitivity to criticism and deference to his age and seniority . However " age" in this context was the reason for treating him more leniently not unfavourably. However it would have been much better if they had followed a fair process here with better communication.
15. The Respondent did not have any contractual retirement age in force and the Claimant was never notified of any requirement for him to retire at any particular age. Whilst the Respondent and in particular Mr. Mhiri did invite the Claimant's to state his preference in relation to retirement the Claimant was not opposed to considering this option even if there was no ultimate agreement between the parties on this point. Indeed we find the Claimant did indicate that he might be ready to retire. We accept Mr. Baccouch's evidence that he discussed this on a regular basis over some 7 years since he reached 65 years of age or so . Despite asserting the contrary we find that he may even initiated the first discussion on this and certainly indicated that he was contemplating retiring at the end of 2019 after receiving his bonus.
16. And in discussions with the Respondent that were initially without prejudice but then disclosed by the Respondent to waive privilege it is clear that he was close to signing a settlement agreement reflecting his willingness to leave on payment of a severance sum. However these discussions were not fully concluded. Which is fine because he was not obligated to retire even at well past the state pension age. But the point for us is that he entered voluntarily into the retirement discussions and our finding is that he was not forced to retire when he decided not to do so . We find no undue pressure exerted on him by Mr. Zacharia or Mr. Mhiri or anyone else .What he was asked to do was to do the jobs asked of him properly and fully if he was not going to retire . And this became the obstacle for him and an ongoing source of grievance.
17. We accept the Claimant liked his job as Station Manager very much and that this might ultimately have been the reason he chose not to leave until he felt obliged to do so on August 23. However this was leaving the job he expected to do and duties he enjoyed . And his resignation was due to a threatened performance management process and being asked to do duties that he did not regard as part of his regular duties. Tasks he thinks he should not have had to do . We have found that he was mistaken from a



contractual point of view and whilst the Respondent should have been more sensitive and professional in handling the Claimant's concerns ( e.g. giving him the chance to do more of what were , for the Claimant, the enjoyable parts of the Station Manager's job he had done for so many years and or giving him a clear timeline as to when he might expect less dashboard work ) he was not harassed during this time on the basis of his age or otherwise. Nor was he delegated to do the dashboard work as part of any hidden agenda to push him out of the business and or because of his age.

18. The Respondents were not content with the Claimant's performance. But the performance concerns were kept largely in check ( although threatened ) partly because the Claimant had long periods away from work from March through to the period leading up to when he resigned . Their reasons may have include a reluctance to face up to the Claimant on these issues but they should have done so. But we were more concerned to analyze the criticisms against the Claimant to determine if that these concerns were genuinely held and to determine if there is any link to the Claimant's age. The Respondent is at fault for not having and following a clear disciplinary and grievance procedure or following a fair process with the disciplinary action taken against the Claimant in respect of his poor timekeeping. This poor communication did contribute to the dispute and feeling of insecurity which we accept the Claimant had. But we find the concerns were genuinely held and there is no link to the Claimant's age
19. We accept at least one remark was made as to the inconvenience of his lengthy sickness absences/medical appointments. But whilst this is/would be relevant to e.g. an unfair dismissal claim our finding is that it is not material to a claim of discrimination if ( as we find to be the case ) the Respondents' procedural faults were unrelated to the Claimant's age. And nor do we find the procedural faults assist the Claimant in his constructive dismissal claim as they do not amount to a fundamental breach of contract in themselves and certainly do not amount to part of a campaign to force the Claimant out of the business as is claimed . The issues were genuinely raised even if the way they were raised (or not raised) is unsatisfactory.
20. The Respondent did confront the Claimant in a meeting on June 17 2019 which has been documented . This is a good example of a meeting which reflects badly on both the Respondent and Claimant . Clearly it shows the Respondent thought and seemed to have good reason for thinking that the Claimant was undertaking his duties in an unacceptable way. But it was wholly inappropriate to criticise the Claimant in such a public matter especially in a small team and even if not designed to embarrass the Claimant. We suspect the minutes were perhaps prepared in a self-serving way to assist the Respondent's case but we also accept Mr. Baccouch's and Mr. Abizid's evidence that they did not regard the meeting as unduly combative nor one targeting the Claimant because of his age . And the meeting did raise fair criticisms even if they should , as the Claimant rightly stated, have been presented privately.
21. It is clear from the evidence we heard ( including from the Claimant ) that although the Claimant did not welcome the conduct towards him and the tasks assigned to him there are no instances where the Respondent acted differently towards him that they might have done toward someone aged 40 ( to use the age suggested by the Claimant as a hypothetical comparator ) who was not performing and or willing to do the work assigned to them.
22. The Claimant was at all times paid his contractual rate of pay, was not asked to do unfair hours, was not ( we find ) required to do work that the Respondent had no contractual right to ask /expect him to do and the Respondent did not treat him unfavourably or , indeed , disrespectfully other than occasions such as the June 17 meeting referred to above . And their reluctance for him not to undertake his usual Station Manager duties at Heathrow and Gatwick was in part due to their belief that this was a more stressful job at a time when he had just returned from a serious illness and

with a heart condition. The Claimant might disagree as to their decision supported by his own medical advice but we accept the Respondent acted in good faith .

23. Finally we find the Claimant's complaints over a sustained period were genuinely felt and connected and did end with his resignation. Which is relevant to bring more historic complaints "in time" , dealt with further below under legal findings.

The Claimant's alleged breaches of contract and further findings of fact

The Claimant sets out his alleged breaches of contract and on which he relies. Our response to these allegations is set out below each one. Reflecting some finding made above and further findings of fact in some cases .

- a. The Claimant's de facto demotion: It is denied that the Claimant was at any time demoted. ***As explained in our findings we do not find there was a demotion.***
- b. Refusing to state the period for which the Claimant's de facto demotion would last ***Whilst it might have been desirable for there to have been better communication with the Claimant and a clearer pathway for him back to the work he enjoyed more there was no breach of contract by the Respondents in failing to give the Claimant a fixed period for the dashboard work.***
- c. Repeated intimidation and bullying of the Claimant by Mr. Mhiri causing him to be absent from work due to stress: ***There is no evidence that the Claimant was intimidated or bullied by Mr. Mhiri and no evidence to support an allegation that the Claimant's absence was by reason of Mr. Mhiri's conduct. To the extent the Claimant felt under pressure this was principally due to his own unwillingness to do and or inability to cope with the dashboard work.***
- d. Unfair criticism of the Claimant due to his absences for medical appointments: This is denied. ***Any limited criticism of the Claimant when absent through illness and or for medical appointments reflected the frustration of having to reschedule his work of others within a small team . No criticism of the Claimant was made that he was not genuinely ill and none of the discussions with the Claimant as to his absence amounted to a breach of contract.***
- e. Unfair imposition of a disciplinary sanction having followed no disciplinary process: ***We agree this was a formal warning and a proper process should have been followed . However this relates to a warning given on or about 9 May 2019 in relation to his failure to adhere to his contractual hours of work. It has no relevance to the Claimant's claim or his resignation other than to show that the Respondent's procedures were , certainly then, less than desirable and that they were genuinely concerned as to the Claimant 's timekeeping as part of his less than satisfactory performance.***
- f. Unfair refusal to carry out an appeal of the disciplinary sanction: ***The Respondents regarded this as informal though by writing it down this did become formal . However this procedural oversight on its own some months before the Claimant resigned cannot be regarded as a fundamental breach of contract .***
- g. Unfair criticism of the Claimant's performance in front of his colleagues: ***We accept the evidence of Mr. Baccouch that whether in the meeting of June 17 2019 or otherwise the Claimant was not unfairly criticised even though it was in front of colleagues. We have found above that Mr. Mhiri to whom the Claimant aims most of his own criticism was a well-liked and good manager , not prone to aggressive conduct and did not seek to , nor , in fact , did prejudice the Claimant.***
- h. Failure to provide any support to assist the Claimant to improve his performance if such improvement was in fact required: ***There is no evidence that the Respondent failed to provide the Claimant with support and we accept the evidence of Mr. Baccouch in particular that he did so .***
- i. Making an allegation of gross misconduct against the Claimant whilst giving no indication

as to what disciplinary action if any was to be taken as a consequence: It is denied that the Respondent made an allegation of gross misconduct. On 5 July 2019, the Respondent advised the Claimant that the matter was potentially a gross misconduct offence and that the Respondent had not yet decided whether or not to take disciplinary action. **We make no finding on this aspect of the claim other than noting the Claimant accepted blame for his actions and both parties agreed that would be the end of the matter as no substantive evidence was raised as to this , no action was taken and this was some 7 weeks before the Claimant resigned when he did so for different reasons.**

j. Repeatedly informing the Claimant that he should retire and requesting his confirmation that he would do so: **We have found that the initial request may have come from the Claimant and it was legitimate to enquire as to his plans given his age and openness as to a possible retirement. Just as he was free to decide he would not retire . We have found the Respondent did not force him to do so.**

k. Preventing the Claimant from taking his planned leave entitlement: **We accept the Respondent accepted the Claimant's requests for leave even when sought immediately on a return on May 6 2019 from over 2 months of sick leave. He had holiday from 20 May until 7 June as requested , some 19 days leave . We also accept that he was asked to postpone proposed leave in July but in the context of recent long term absence and holiday and outstanding workloads this was not an unreasonable position to adopt. Nor was this issue perused in the evidence .**

**As a general point we do not find that the resignation was a last straw act in a series of breaches all amounting to a fundamental breach of contract.**

#### Legal findings

#### Time and Jurisdiction

The dismissal claim is in time as the ET1 was lodged within 3 months of the EDT allowing for consideration by ACAS. A discrimination claim is brought in time under s 123 ( 3 ) (a) of the Equality Act 2010 if there is conduct extending over a period ending in his resignation and this has been found to be the case. And so these discrimination claims are also in time and the ET has jurisdiction to deal with them .

#### Dismissal

On the Claimant's Constructive Dismissal case we apply the well-known authority of **Western Excavating v Sharp ( 1978) ICR 221** to determine if there is a ( constructive ) dismissal under s95(1)(c) of the ERA 1996.

The court of appeal established four main elements/hurdles for there to be a constructive dismissal:

1. *A repudiatory breach on the part of the employer. This may be an actual or anticipatory breach, but must be sufficiently serious to justify the employee resigning.*
2. *An election by the employee to accept the breach and treat the contract as at an end.*
3. *The employee must resign in response to the breach*
4. *The employee must not delay too long in accepting the breach, as it is always open to an innocent party to waive the breach and treat the contract as continuing (subject to any damages claim that they may have).*

In this case we have found that the Claimant did not affirm what he regarded as a new

contractual position and continued to object whilst temporarily doing the dashboard work. However we have also found that this was not a new job and all that was happening here is that he objected to being in the cargo department undertaking duties he did not like. Duties legitimately part of his existing job.

He has failed to get over the first hurdle . There has been no breach of an express or implied term and no breach of the employer's duty of care toward the Claimant. In particular we did not find that being asked to do the dashboard work (legitimately needed by the business and sensibly assigned to the Station Manager ) was outside what the Claimant could have expected to be asked and/or outside his contractual reporting duties. Even if this was work he had not done to any significant degree throughout his employment and found challenging and or unwelcome. And in consequence , whilst we remain sympathetic to the Claimant after such long and committed service, his claim of dismissal fails. He resigned ( albeit for understandable reasons ) and so his claim for unfair dismissal also fails.

We did consider the authorities conscientiously prepared for us by the Claimant's solicitor. Including *Kaur v Leeds Teaching Hospital* page 21 para 55 *Omlatju v London Borough of Walthamstow* page 44 ref to page 48 *Blackburn v Aldi Stores Ltd* page 57 para 24 & 25 *Gould v McConnell / Richmond EAT* Page 60 .For instance the fact the Respondent failed to adhere to a grievance procedure might amount to a breach of the implied term of trust and confidence. But in this case no formal grievance was submitted in the end. Or that , self-evidently a unilateral variation to an employee's job amounts to a repudiatory breach . But again we have determined there was no material variation. We do not find that any of the cases raised as to the alleged breach of contract need us to go beyond or change the findings we have made and or our reliance on the *Western Excavating* case and the conclusions we have drawn to determine there is no fundamental breach .

### Discrimination

There were 2 heads of claim . Direct Discrimination and Harassment. Both on the grounds of age as the protected characteristic.

#### **Section 13 Equality Act 2010 ( relevant parts only )**

##### **Direct discrimination**

*(1)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.*

*(2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*

The protected characteristic is age under s5 EQAct 2010.

In this case there is no need for us to consider the second limb of Section 13. We have found that the Respondent did not discriminate against the Claimant because of the protected characteristic of his age other than perhaps in a positive way. They did not treat him less favourably than they treated or would have treated others. And so his claim for direct discrimination fails.

We rely on the Claimant not proving his claim under s13 ( 1) but have also found that as the Respondent was attempting to ensure the Claimant was competent in his work and as to the dashboard work assigned to him that even if it were shown that this led to some less favourable treatment to the Claimant based on his age this would be a proportionate means of achieving a legitimate aim. Because they were attempting ( and legitimately so ) to ensure the business was being run efficiently .

#### **Section 26 Equality Act 2010 ( relevant parts only )**

##### **Harassment**

*(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.*

*(5) The relevant protected characteristics [include] age;*

We have found that neither Mr. Mhiri or anyone from the Respondent team working with or otherwise coming into contact with the Claimant at work was guilty of harassing the Claimant. The 2019 June 17 meeting put forward as an example of such “unwanted conduct” does not amount to such treatment even if it led to unwanted and (because of its public nature) inappropriate criticism of the Claimant.

We have been invited to view this simply by reference to how it made the Claimant feel but this ignores the fact that for a claim to be established under s 26 the unwanted conduct must also have the purpose or effect (our emphasis) of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Difficult meetings are not ones easily described as having the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. And the Claimant also has to show, inter alia, whether it is reasonable (our emphasis again) for the conduct to have that effect. And however upsetting the criticisms of the Claimant to him we have found they were genuinely held and the fact some were rather crudely and/or embarrassingly communicated to the Claimant is not sufficient to amount to harassment for these reasons. The Respondent was not in breach of s 26 (1) Equality Act 2010.

In all these circumstances one might ask why the Claimant did not take the severance terms then offered. But of course he had no obligation to do so and every right to pursue his claims to this Tribunal. However we have found, and have had to find, that such claims are not upheld.

EMPLOYMENT JUDGE

29 April 2021

Order sent to the  
parties on: 30/4/21

For Office of the Tribunals



