



EMPLOYMENT TRIBUNALS

Claimant
Ms. J. Khan

Respondent
British Airways Plc

v

Heard at: Watford

On: 2-5 December 2019
(+ 6 December 2019 and 9 January 2020 in chambers)

Before: Employment Judge Heal,
Ms A. Brosnan,
Mr W. Dykes

Appearances

For the Claimant: Mr. P. Powlesland, counsel.
For the Respondent: Ms K. Hosking, counsel

RESERVED JUDGMENT

The complaints of unfair dismissal and disability discrimination are not well founded and are dismissed.

REASONS

1. By a claim form presented on 16 July 2018 the claimant presented claims of unfair dismissal and disability discrimination.
2. We have had the benefit of an agreed bundle initially running to 461 pages, of which the following pages have been added by consent during the course of the hearing:

445 E to H and

447A
3. A further document, an email dated 27 November 2019 was provided to us at the outset of the hearing, but not added to the bundle because the parties agreed that it related only to remedy.

4. We have heard oral evidence from following witnesses in this order:
 - Ms Jabin Khan, the claimant;
 - Dr Stephen Houston, Occupational Health Physician employed by the respondent;
 - Ms Victoria Taylor, In flight business manager (worldwide) and
 - Ms Michelle Murray, Area Manager Worldwide Fleet.
5. Each of those witnesses gave evidence in chief by means of a prepared typed witness statement which we read before the witness was called and then the witness was cross examined and re-examined in the usual way.

Issues

6. The issues were identified originally by Employment Judge Bartlett sitting at a preliminary hearing on 22 January 2019.
7. At the outset of this hearing, to be sure of the exact detail of what this case was about, the tribunal further identified the issues with the assistance of the parties.
8. During the course of the evidence, on the application of Mr Powlesland for the claimant, a further issue (at 9.5 below) was added. We gave the respondent an opportunity to object to this issue however Ms Hosking was initially unable to take instructions. We left it that the matter would remain in issue unless she came back to us and told us otherwise. She has not done so and indeed she confirmed before submissions, including in her written submissions, that she did not object to this issue being part of this case.
9. Taking all of that into account, the final list of issues which we have to determine is as follows. (At about 2 o'clock on 4 December, the third day of this hearing, the tribunal gave the list set out below - albeit with typographical errors uncorrected - in typed form to the parties so that they each could be sure about the issues which we consider we have to determine.) We have tidied up some obvious typographical errors which appeared in the original list.

Unfair dismissal

- 9.1 It is not in dispute that the claim was presented in time, that the claimant qualified to claim unfair dismissal or that she was dismissed.
- 9.2 The parties agree that the reason for the dismissal was capability which is a potentially fair reason for the purposes of section 98 of the Employment Rights Act 1996.
- 9.3 The claimant says that the dismissal was unfair for the following reasons:
 - 9.3.1 at the date of dismissal, the claimant was fit for her contractual role;
 - 9.3.2 in deciding she was not fit for her contractual role, the respondent failed properly to consider the evidence (i.e. the medical evidence from the

claimant). Mr Powlesland identified this evidence at the outset of this hearing as:

the report of Dr Badea dated 24 October 2017;
the letter from Mr. Abdel-Aty dated 8 February 2018;
the report of Mr Belosa dated 18 February 2018;
the report of Dr Alvarez dated 4 March 2017;
the report of Dr Dalton dated 19 June 2017 and
the report of Dr Badea dated 23 August 2016.

- 9.3.3 delaying putting the claimant in the process to gain an alternative role;
- 9.4 the claimant (through her counsel, Mr Powlesland) confirmed that she did not rely upon any allegations of unfairness about consultation, meetings, representation or procedure etc...
- 9.5 The respondent had an unwritten policy in relation to absence management which was not disclosed employees. The policy was applied where BAHS advised that no timescale could be given within which the employee was likely to be fit to return to their contractual role.

10. The respondent does not rely upon contributory fault.

11. The respondent does rely upon Polkey (and under discrimination, Chagger), therefore: what was the percentage chance of a fair (or non-discriminatory) dismissal had the respondent given proper consideration to the medical evidence and the fact that the claimant was fit for her role, and had respondent not delayed in putting the claimant in the process to gain an alternative role?

12. We agreed that we would deal with liability, and 'Polkey/Chagger' issues together in the first stage of this hearing then if necessary, deal with issues of mitigation, reinstatement and calculation of remedy at a second stage.

Disability

13. The respondent accepts that the claimant is and was a disabled person in accordance with the Equality Act 2010 at all relevant times. The parties agree that the relevant impairment is stage 4 metastatic breast cancer.

Section 15

14. Did the respondent treat the claimant unfavourably, by dismissing her on 23 February 2018 because of something that arose as a consequence of her disability?
15. The claimant's primary case is that the 'something arising' was her long-term sick absence.
16. The respondent accepts that the long-term sick absence was something arising as a consequence of the claimant's disability.
17. The respondent says however that the dismissal was not because of the long-term sick absence.
18. The respondent says that the dismissal was because of the future risk of incapacitation.
19. The respondent accepts that the future risk of incapacitation was something arising as a consequence of her disability.
20. The claimant says that there was not a future risk of incapacitation but that, in the alternative to her primary case, she was dismissed because of the perception by the respondent of a future risk of incapacitation.
21. If the claimant was dismissed because of something that arose as a consequence of her disability, was that a proportionate means of achieving a legitimate aim?
22. The respondent identifies its legitimate aim as employing staff who are capable of undertaking the particular role which they are employed to do: in the claimant's case that is the role of cabin crew either with or without adjustments, as required, or an alternative role according to the capability.

Section 20/21

23. Did the respondent apply the following PCPs?
 - 23.1 The requirement to be free of future risk of incapacitation as set out in the respondent's letter to the claimant dated 5 January 2019 (claimant's case);
 - 23.2 The requirement that the risk of future incapacitation be at an acceptable level (respondent's case);
 - 23.3 Requiring a return to full contractual duties (the policy says that an employee must be able to return to their full contractual duties). The respondent accepts that this was a PCP applied.
 - 23.4 Having to be able to fly on worldwide or long haul routes.
24. If so, did any PCPs proved put the claimant at a particular disadvantage in comparison with a non-disabled employee?
25. The disadvantages relied upon are as follows:
 - 25.1 the requirement for the claimant to be free of the risk of future incapacitation affected the claimant's ability to go back to her previous contractual duties;

- 25.2 requiring the claimant to return to full contractual duties was to her disadvantage because of the way the respondent assessed the claimant's condition: she was unable to return to her full contractual duties;
- 25.3 having to fly on worldwide or long-haul routes meant that those who were disabled might require the health care systems that were available under the European scheme.

26. What adjustments were reasonable for the respondent to have taken in order to avoid any disadvantage proved?

27. The claimant relies upon the following adjustments:

- 27.1 extending the period that the claimant was on ground duties or for further medical evidence to be obtained and/or to show that she was well enough to return to contractual duties.
- 27.2 giving the claimant a trial period on actual duties to show that she was well enough to undertake them.
- 27.3 allowing the claimant to continue on ground duties for a further 6 to 12 months.
- 27.4 only requiring the claimant to fly on short haul routes within the UK or European healthcare area.

28. The respondent has confirmed there is no issue about knowledge.

29. Having set out those issues, we record that although we originally agreed with the parties that we would deal with Polkey at this first stage, before we heard submissions we raised with parties some concerns that if our findings, particularly about fairness, agreed with some of the points made by the claimant, then we might be at risk of not having full medical evidence to answer the issues that might arise. We therefore suggested to the parties that we might put off a decision about Polkey until a later stage. The parties took time to reflect and thereafter both agreed that we should go ahead and deal with issues of Polkey this stage on the evidence now available.

Facts.

30. We have made the following findings of fact on the balance of probability.

31. The respondent is a large, well-known transportation company. The claimant began her employment with the respondent as 'cabin crew' on 20 November 1997.

32. The respondent's 'Absence management policy EG300' dated September 2013 contains the following:

Section 4: Managing attendance which exceeds 21 consecutive days, or absence which affects an employee's ability to work for medical reasons

4.1 Managing longer term absence

Where an employee is unable to do their job to the standard reasonably required by British Airways due to the employee's medical incapacity, British Airways will follow the Medical Incapacity procedures in Section 4 of this policy.

If a line manager believes on reasonable grounds that

- the employee's absence, although in excess of 21 consecutive days is not likely to be long-term or affect their ability to do their job the employee's absence should be managed under Section 3 or 5 of this policy*
- the employee's absence or their inability to do their job to the standard reasonably required by British Airways is due to medical incapacity that is likely to be long-term, the line manager will seek occupational health advice from BAHS. The line manager will ask BAHS to give an informed opinion on the employee's ability to do their job, or a suitable alternative job to the standard reasonably required by British Airways in the foreseeable future...*

4.3 Medical incapacity and unable to do their job

Where BAHS advises that the employee is incapacitated and is unable to do their job to the standard reasonably required by British Airways in the foreseeable future, British Airways will follow the procedure set out below.

The line manager should consider all the following matters to determine the appropriate action to take:

- the advice of BAHS, including any recommendations or restrictions they suggest relating to the employee's current job or any potential suitable alternative job;*
- the effect on the employee and on the overall performance of the department if changes to the work environment are made; and*
- whether it is reasonable to make changes to the work environment*

The actions that are taken are:

- Reasonable adjustments to the working environment of the employee's current job on a temporary or permanent basis;*
- appropriate rehabilitation plan;*
- suitable alternative job within British Airways; or*
- modification of employment status on the grounds of medical incapacity (BARP only); or*
- termination of employment on the grounds of medical incapacity...*

4.4 Reasonable adjustments to the work environment

The line manager should consider whether reasonable adjustments can be made to the employee's working environment in order to enable the employee to continue to do their job, or a suitable alternative job to the standard reasonably required by British Airways. BAHS can assist line managers in determining reasonable adjustments to the role...

4.6 Suitable alternative employment

If reasonable adjustments cannot be made to the employee's working environment, and the employee is capable of undertaking suitable alternative employment, the line manager will discuss with, and assist the employee to identify and apply for, suitable alternative employment. In doing so, the line manager should refer the employee to the Career Transition Service and support the employee during the Career Transition process.'

33. The UK Civil Aviation Authority sets medical standards relating to different medical conditions. Relevant to this case is UK AltMOC18 MED.C.025 Oncology:

'(a) after treatment for malignant disease, cabin crew members should undergo satisfactory oncological and aero-medical evaluation before a fit assessment may be considered.

(b) Cabin crew members with an established history or clinical diagnosis of intra—cerebral malignant tumour should be assessed as unfit. Considering the histology of the tumour, a fit assessment may be considered after successful treatment and full recovery.'

34. In late 2016, the claimant was diagnosed with stage 4 metastatic breast cancer.

35. From 13 September 2016 to July 2017 the claimant, by reason of her treatment, was unfit to work in any capacity.

36. On 25 November 2016 the claimant was entered into the EG300 section 4 process in relation to her cancer.

37. On 24 February 2017 Cindy Vallis, an occupational health adviser with British Airways' Health Service, ('BAHS'), decided and recorded that the claimant was unfit to return to work in any capacity at that time until the respondent had further information. The claimant wanted to work on ground duties, but Ms Vallis recorded that this would not be part of a rehabilitation plan because there was no clear timescale for the claimant to return to flying.

38. BAHS continued to find that the claimant was unfit to work and were unable to provide a timetable for her return to contractual duties from February through to April 2017.

39. The claimant had been receiving treatment in Mexico. On 4 March 2017, a Dr Alvarez reported (in an unsigned document not on headed notepaper), giving the claimant a diagnosis of '*metastatic lobular breast carcinoma to peritoneum*'. This was a report based on the findings of a scan. It did not give a prognosis, nor an assessment of the claimant's ability to work or to fly.

40. On 25 May 2017 the claimant met with Natalie Gartell, Inflight Business Manager, to discuss her absence from work and her referral to BAHS. Ms Gartell confirmed this discussion to the claimant in writing on the same date, noting that BAHS thought that the claimant was unfit to return to her flying duties and did not have a definitive timescale to return to flying duties. Although this letter is dated 25 May 2017, somewhat confusingly Ms Gartell refers to a conversation with the claimant on 7 June 2017 in which she advised the claimant that she would not be authorising ground duties. She noted that Ms Vallis had advised that the claimant was unfit for all duties and Ms Gartell decided to refer the claimant back to BAHS at the end of June.

41. Ms Vallis spoke to the claimant on 2 June 2017. The claimant said that she was happy for Ms Vallis to write to her specialist but did not want her treatment in Mexico mentioned to her specialist. She gave verbal consent from Ms Vallis to write to the specialist but then became reluctant and said that she preferred that Ms Vallis write to her GP instead. She said that she was happy for Ms Vallis to send her the consent document and she would think about consent to write to her specialist instead of her GP. At that point, Ms Vallis took the view that the claimant was still unfit to return to work or flying as yet, although she noted claimant felt fit to return on ground duties.

42. On 6 June 2017 Ms Vallis sent consent forms to the claimant. (As things turned out, BAHS did not receive them back until November 2017.)

43. Dr Dalton wrote a letter '*to whom it may concern*' dated 19 June 2017. He noted the claimant's diagnosis and said she had made a dramatic recovery and had been feeling extremely well for the past four months or more. The claimant reported an excellent performance status, was able to carry out all normal day-to-day and household activities and was very keen to return to work either as ground or airborne crew. On examination, Dr Dalton found the claimant to be well and gave his opinion that her physical health at that time was such that she was fit to undertake normal cabin duties or any groundwork.

44. Ms Vallis' note of 30 June 2017 shows that she has received this letter from Dr Dalton. However, Ms Vallis' own advice was that although it appeared that the claimant was able to do her daily activities without problem, there was a risk of sudden incapacitation and concern about this due to her diagnosis. Ms Vallis' note shows that there was insufficient medical information to fully assess this. She noted that further discussion was needed and a discussion as a quorum between herself, Dr Houston and Dr Caddis. Whether a specific discussion took place about this letter on its own is unclear: it appears to have been superseded by subsequent information from Dr Badea.

45. We note that on 30 June 2017 Dr Caddis had advised that he did not foresee the claimant ever reaching a stage of fitness when a flying role could be considered.

46. By letter dated 28 July 2017 the ground placement team wrote to the claimant confirming that ground duties had been allocated to her on a 33% contract with the working pattern of 2, 2 and 1 days a week in the supply chain relationship department.

47. By letter dated 29 July 2017 Victoria Taylor invited the claimant to an EG300 review meeting on 12 October 2017. The meeting was to discuss the claimant's return to her

contractual role, any reasonable adjustments to her contractual role which might assist and/or suitable alternative employment if the claimant was not capable of carrying out her contractual role.

48. The letter noted that the respondent would support the claimant back to work within a reasonable period however if this was not possible then Ms Taylor might need to consider termination of the claimant's contract of employment as a last resort.

49. The claimant started her ground placement on 31 July 2017.

50. On 1 August Ms Taylor became the claimant's Inflight Business Manager.

51. On 6 September 2017 the claimant told Victoria Taylor that she had a certificate from her doctor saying that she had a letter from a consultant saying that she was fit for flying. She had been working on ground duties since 29 July 2017. It was proposed therefore to refer the claimant back to BAHS.

52. On 23 September 2017 a CT scan showed that the claimant had a suspicion of metastatic deposits.

53. On 20 October 2017 the claimant attended a consultation with Cindy Vallis. She told Ms Vallis that she was back to all her normal activities including walking, swimming and badminton. Two weeks earlier the claimant said her specialist had described a CT (scan) as stable and the claimant's blood results as 0/normal. The claimant was now under the care of her UK GP. She was continuing to work on ground duties but keen to return to flying and believed she was able to do this. The claimant had bought two letters to this consultation from her treating oncologist, Dr Badea. One of these letters is now in our bundle misdated 31 August 2016. The parties agree that this date must be a mistake for 2017.

54. This letter is addressed, '*to whom it may concern*'. It confirms the diagnosis of stage 4 metastatic invasive lobular carcinoma from breast primary. It confirms treatment with tamoxifen in a palliative setting. When Dr Badea reviewed the claimant on 31 August 2017, she found a good response to treatment with no clinical suspicion of progressive disease. The claimant was asymptomatic, and her performance status was zero. Dr Badea noted the claimant was very keen to return to work and agreed that she could return to work part-time as she wished.

55. Ms Vallis told the claimant she would review the new information and provide advice from BAHS after that.

56. The claimant's union representative then joined the meeting. He asked Ms Vallis why the claimant could not return to flying when other people had cancer, were in remission and were flying. Ms Vallis said that there were risks of incapacitation down route and that the claimant was in a safety critical role. She was unclear whether the new information provided by the claimant would change BAHS' advice. After some uncertainty, the claimant gave consent for Ms Vallis to have copies of the letters.

57. On 20 October 2017 Victoria Taylor met with the claimant as planned. She then confirmed this meeting to the claimant in writing dated 26 October 2017.

58. On 23 October 2017 the claimant underwent a scan upon referral by her treating oncologist, Dr Badea. The report from the scan does not say that the claimant was in remission. It reports a single metabolically active node in the claimant's neck. The node was of uncertain significance.

59. On 26 October 2017 the claimant attended Dr Houston's clinic together with Ms Vallis. Dr Houston noted a diagnosis of stage 4 metastatic lobular breast cancer with abdominal ascites and bone metastases, which he took from a previous report of Dr Dalton dated March 2017. (This report is not in our bundle.) However, Dr Houston recorded the report saying, '*she accepts that she would be unable to do flight duties but feels there might be some work on the ground that she could manage.*' Since that report, the claimant had pursued the return to flight duties. Dr Houston reviewed the medical reports in BAHS' possession. The claimant reported no difficulty working on ground duties equivalent to 6 hours for 2 days in the week. However, her commute to work and her accommodation while working on ground duties were expensive. (She lived in Lancashire). The last reviews with the claimant's treating oncologist Dr Badea showed that her condition was stable.

60. Dr Houston explained to the claimant that based on the information currently available she was fit for alternative duties but BAHS considered her unfit for safety critical work as cabin crew because of the risk of future incapacitation in the light of regulation requirements. This was also because of the risk of the claimant becoming unwell while down-route where medical facilities might not be as good as in the UK.

61. Dr Houston set out a plan of making a fitness decision on an individual basis because the claimant wished BAHS to review the fitness decision. He was willing to review her case if she provided consent for Ms Vallis to write to Dr Badea to ask specific questions relating to the risk of future incapacitation.

62. Dr Houston emphasised the importance of being realistic because it was possible that the fitness decision might not change.

63. By letter dated 26 October 2017 Ms Taylor confirmed her meeting with the claimant on 20 October 2017. She set out the history of the situation in some detail concluding with a record of the meeting with Dr Houston that day. This included Ms Vallis' note that when she received the claimant's written consent to write to the claimant's specialist then Ms Vallis would request the report.

64. In summary, Ms Taylor told the claimant that since the claimant's first referral to BAHS, Ms Vallis had been unable to give timescales for the claimant's return to her contractual role. She advised the claimant that her absence would continue to be managed within section 4 EG300. She explained the possible outcomes of returning to the claimant's contractual role, any reasonable adjustments that might be accommodated by her contractual role and suitable alternative employment. However, if any of these three outcomes were not possible then Ms Taylor might need to consider termination of the claimant's contract in the last resort.

65. Ms Taylor told the claimant that she had registered her with the British Airways Career Transition Service ('CTS') the purpose of which was to help and support the claimant to make a successful career transition.

66. On 1 November 2017 the respondent's Career Transition Service ('CTS') made contact with the claimant. Their welcome document which they sent to her said that CTS,

'are here to support you in your job search and you will find in this welcome pack a copy of the CTS Three Stage Programme which we advise you to complete to help you with CV writing, application forms and interview practice. We do stress that it is your responsibility to engage with the program in order to fully benefit from the range of job-searching tools and techniques designed to help you make a successful career transition.'

The document told the claimant that she had a career transition adviser who would be in touch with her shortly to arrange an initial meeting. The document also said that CTS would apply for access for the claimant to CTS Jobs online which is an internal recruitment portal, advertising vacancies within the respondent for CTS registered clients.

67. On the same date, Miss Claire Lillywhite-Pinch of CTS wrote to the claimant saying that she had been allocated as her CTS consultant and wanted to make contact with her. She said that she was available to work with the claimant to provide career guidance and support, help with CV preparation and job searching both for the internal BA and external job markets. She invited the claimant to contact her by reply or to call her office hours on a number given.

68. By email dated 10 November 2017 Victoria Taylor asked the claimant to send Dr Houston the photo of her most recent CT scan.

69. By email dated 12 November 2017 the claimant wrote to Ms Taylor attaching a copy of the report arising out of her latest scan. This is our page 444. She said that this was new information after their meeting on 26 October 2017. (This report was therefore in Ms Taylor's possession and was quoted directly in a subsequent report dated 27 November 2017 from Dr Badea which we refer to below).

70. By letter dated 13 November 2017 Ms Taylor invited the claimant to a further review meeting under EG300 section 4. The letter re-capped the latest referral to BAHS. Ms Taylor said that she had received an update from Ms Vallis on 26 October 2017 advising that BAHS required further medical information from the claimant's consultant before they could advise further regarding her fitness to return to flying. Ms Taylor gave a meeting date of 23 November 2017 and said, as she had in her previous letters, that at the meeting they would be able to discuss the claimant's return to her contractual role, any reasonable adjustments to the contractual role that might assist her, and or suitable alternative employment if the claimant was not capable of carrying out her contractual role. Ms Taylor repeated that the respondent would support the claimant back to work within a reasonable period, however if this was not possible then Ms Taylor might need to consider termination of the contract employment as a last resort.

71. On or before 23 November 2017 the claimant contacted Cabin Crew Attendance Support to report fit for work. This caused Ms Taylor to doublecheck with BAHS about

the claimant's fitness for flying. On 24 November 2017 Ms Vallis confirmed that the claimant was fit for ground duties only.

72. On 23 November the claimant met with Ms Taylor who terminated her contract of employment. We take this to be the date of the decision to dismiss. We have seen no note of the meeting of 23 November 2017. However, Ms Taylor wrote a three-page letter to the claimant after the meeting confirming the discussion. The letter says that at the meeting they discussed the claimant's absence from work, her referral to BAHS, how her medical circumstances had impacted on the claimant's return to work and the likelihood of terminating her employment, as well as registration with CTS. The letter noted that since the start of the claimant's absence she had been referred to BAHS on 8 occasions. The letter then set out a record of those 8 occasions. Ms Taylor told the claimant that Ms Vallis had confirmed that since the claimant's first referral in November 2016, Ms Vallis had been unable to provide timescales for the claimant's return to her contractual role.

73. The claimant had told Ms Taylor that she was very eager to return to her full contractual role and had signed and submitted the consent documents given to her by Ms Vallis during her last BAHS review. BAHS received the forms on 20 November 2017. The claimant had said that she was confused about why BAHS were unwilling to allow her to fly because her consultant had said that she was fit to return to work.

74. The letter went on to record that Ms Vallis had confirmed to Ms Taylor that in order to advise further on the claimant's fitness to return to flying duties, the respondent needed further medical information. Without this information, Ms Taylor said, it was unlikely that a return to flying could be considered and BAHS were unable to provide timescales.

75. Ms Taylor went on,

'as you are unable to return to work in your contractual role as Cabin Crew, it is with regret, I will be terminating your contract of employment with British Airways on 23 February 2018, three months from the date of our meeting on 23 November 2017. I will refer this matter to British Airways Health Service to consider whether you meet the criteria for ill-health retirement.

I registered you with the career transition service following our last meeting 20 October 2017. It will be able to advise and help you, together with myself, in finding a suitable permanent alternative job.

I must stress to you that there is an obligation on your part to make every effort to seek alternative employment and to engage fully with the Career Transition Service support on offer to you. Should you identify a role that you are interested in, then please let me know and British Airways Health Service will assess your fitness to carry out this role'

76. Ms Taylor also told the claimant that six weeks into the notice period she would check progress and discuss with the claimant any change to her medical condition. If there was a change then she might ask the claimant to revisit BAHS to see if her health had improved. If before the claimant's termination she was fit to return to work Ms

Taylor would consider the position including whether it was appropriate to revoke notice of her dismissal or to extend the termination date.

77. Ms Taylor also told the claimant of her right to appeal within seven days of the date of the letter.

78. By letter dated 22 November 2017 Ms Vallis wrote to Dr Badea. The core of the letter said as follows,

'Miss Khan is employed by British Airways as a part-time member of cabin crew (33% contract: 2 weeks on, 6 weeks off) based at London Heathrow Airport, which frequently involves working unsocial hours across a number of time zones on long haul travel before having a minimum period of rest down route and working a return trip. It also carries significant responsibilities, including manual handling duties and is potentially an isolated lifestyle. Individuals must be able to participate in an aircraft evacuation in the event of an emergency, operating the aircraft doors and slides and safely evacuating passengers.

Ms Khan has provided me with some medical correspondence, however, we require further information before advising on her fitness to resume her full contractual duties. Miss Khan has provided me with letters from yourself 'To Whom it May Concern' dated 31 August 2017 and 13 October 2017. In addition, Ms Khan has provided a report regarding her PET scan in October 2017 adding correspondence from her GP addressed 'To Whom It May Concern'.

Miss Khan is being supported in the workplace on alternative duties on the ground and her manager has been advised that until we receive further medical information then Miss Khan is not fit to undertake her contractual flying duties.

In order that I can support Miss Khan and advise her managers appropriately, I would be grateful for a medical report on this lady. In your report we would like you to cover the following points:

- 1. Information regarding her current clinical condition, confirming her diagnosis, present and any planned investigations and treatment.*
- 2. Prognosis for recovery and likelihood of the condition improving/relapsing in the short (1-3 months), medium (6-12 months), or long-term (> 1 year).*
- 3. Is Miss Khan in remission from breast cancer, if so from when has she been in remission? Please advise regarding an ongoing treatment& follow-up/review.*
- 4. Information you may be able to provide concerning her physical health regarding functional ability in the long term, time frame for recovery/improvement or when you think she would be able to develop sufficient stamina to allow her to return to work in her contractual duties.*
- 5. Are there any barriers for a return to full function and stamina? Your view concerning whether it would be appropriate for her to resume/return to her contractual duties as outlined above would be of interest.*
- 6. Is Miss Khan at increased risk of incapacitation based on the history thus far? If yes - are you able to quantify this above that of the population average, and is there anything that would mitigate or control this risk?*

7. *Any other information that you feel is relevant and I need to consider with regards to her returning to contractual flying duties.'*

[Pausing there, this letter – now pages 445 E to G in our bundle - was produced to us part way through this hearing not having been previously disclosed. As a result, Dr Houston was recalled by consent of the respondent to deal with further cross examination, on application by the claimant.]

79. By letter dated 27 November 2017 Dr Badea replied to Ms Vallis. We note that she does not explicitly set out the questions and answer them one by one; however, she gave information as follows. She said that she would try to the best of her knowledge to answer Ms Vallis' questions but asked Ms Vallis to be aware that her statements were given only from a professional point of view as the claimant's consultant medical oncologist. She said that the claimant was diagnosed in 2016 and amongst other things said that at diagnosis a CT scan showed malignant ascites, bone metastases, gastric outlet obstruction and indeterminate lung nodules. She said that in November 2016 the claimant began Tamoxifen hormonal treatment in a palliative setting.

80. Dr Badea said that the overall survival at five years from metastatic breast cancer is 22%. However, she also said that the claimant had a very good response to the treatment with one reservation about a new node on the claimant's neck. This node was under investigation.

81. Dr Badea said that the claimant had a complete response to treatment however if the node was proven to be metastatic from breast cancer then the diagnosis would be progressive disease and the management plan would need to be re-discussed. When last reviewed by Dr Badea the claimant had a performance status of zero, was asymptomatic and clinically looked able to work. However, Dr Badea said,

'regarding Mrs Khan's ability to work as a steward, this is a decision to be taken between the employer and employee.'

82. We note that Dr Badea did not in terms answer the express questions asked of her in the letter of instruction. Dr Houston told us however that Dr Badea's report was nonetheless *'a good report'* in the light of the spectrum of reports which he is used to seeing. He considered that it gave BAHS sufficient information to make the decision which he had to make.

83. Dr Houston received Dr Badea's report on 6 December 2017. On 13 December 2017 Cindy Vallis told Victoria Taylor that the report had been received and Ms Vallis planned a case discussion before arranging a review for the claimant. Dr Houston had an opportunity to read the medical report before that case discussion which took place on 21 December 2017. The parties to the discussion were Dr Houston, Dr Caddis, Dr Wilkinson and Dr Dodman. Dr Wilkinson was the Head of Department. All these individuals are experienced aero medical examiners. (The medical team had before them the Badea report which quoted the document of 24 October 2017.)

84. There is no full note of their discussion however the medical team decided unanimously that the claimant was unfit to return to flying duties. They advised that the claimant was having palliative treatment and a poor prognosis was indicated. She was well at that time, however something could change at any minute: she had disease in more than one area e.g. ascites, bone, breast, active pelvic deposits and multi organ involvement. However, she could work on the ground.

85. We note that although laypeople often understand the expression 'palliative' as suggesting that a patient is close to death, that is not the meaning given to it when used exactly by a member of the medical profession. It means treatment which does not set out to cure the cause of the condition. Just because the word was used does not mean that it was understood in the sense of being close to death.

86. Dr Houston gave us three examples of the risks of incapacitation which he and his colleagues thought might arise in the claimant's case.

87. First was that the claimant had already had bony metastases and that might recur. Dr Houston said there was a risk of a pathological fracture, that is a failure of the bone in a situation when that would not normally be expected. Cabin crew might be vulnerable to such injury for example when forcing open a cabin door, bending over to a trolley, pushing a trolley, using a slide in an emergency or during turbulence on a flight.

88. Second was that Dr Houston said breast cancer was known to metastasise to the brain. There were risks therefore of seizures and in an emergency a crewmember could become incapacitated with the potential of harm to everyone on board the aircraft.

89. The third example arose because the claimant had presented originally with a gastric outlet obstruction. If that recurred it might cause the claimant to become very unwell during a flight with the risk of vomiting. It could manifest itself in a totally incapacitating way.

90. Dr Houston said that these risks could develop without warning while the claimant otherwise thought that she was well.

91. On 27 December 2017, Claire Lillywhite-Pinch of CTS sent a chaser email to the claimant.

92. By email dated 28 December 2017 the claimant appealed her termination date. She said that she had successfully recovered from breast cancer and had been given the all clear by her NHS consultant at the end of August and again in October. She complained about the delays in the process of finding answers to BAHS questions, however her main concern was plainly that she had been wanting to return to flying for several months and the termination date was causing her a lot of stress. She wished to discuss the matter further. Although the appeal was out of time the respondent considered it.

93. On 3 January 2018 the claimant attended the BAHS clinic to discover the decision about her fitness to fly. She met Dr Houston and Ms Vallis. She said that she was very keen to return to flying and she reported managing well with her ground

duties. There was nothing that she could not do. She was functionally normal, had a good response to treatment and remained well. Dr Houston's note records a reference to EASR regulation AltMOC 18 MED.C.025 Oncology (a):

'after treatment for malignant disease, cabin crew members should undergo satisfactory oncologic and aero-medical evaluation before a fit assessment may be considered.'

94. We note, in the light of cross examination of Dr Houston on his understanding of this regulation, that contemporaneously he only quoted (a) not (b). We think this was appropriate because (b) appears to be irrelevant.

95. We find as a fact that at the time he considered (a) and not (b).

96. Dr Houston told the claimant that the team of doctors had carefully considered her medical reports and the recent comprehensive report from her oncologist. He told her that they all came to the view that she was unfit for the safety critical role cabin crew because of the risk of incapacitation (in-flight or down route). She would be fit for grounds duties unrestricted. Dr Houston and Ms Vallis advised the claimant to obtain clarity from her manager about the options available to her in the future.

97. On the 5 January 2018 the claimant attempted to contact Ms Lillywhite-Pinch of CTS without success.

98. By letter dated 5 January 2018 Dr Houston confirmed the BAHS decision to the claimant in writing. In the final paragraph of the letter, Dr Houston said,

'as I mentioned in clinic we would be willing to review any new information that you were able to provide.'

99. On 8 January 2018 a meeting took place between Victoria Taylor, Michelle Murray, Cindy Vallis and Dr Houston to establish more information on the claimant's case. Dr Houston was unable to provide any further information but he was satisfied that a recent BAHS referral had been made and his decision had not changed.

100. The claimant's appeal was heard on 15 January 2018 by Michelle Murray. We have not been provided with any notes this meeting by the respondent. Notes were taken but apparently destroyed for 'GDPR purposes' even though proceedings had been issued.

101. The claimant's appeal at the hearing was based on three grounds.

102. The first ground was that BAHS had not declared the claimant fit to return to flying duties although the claimant's GP and oncologist had confirmed that she was cancer free in August and October 2017.

103. Concerning this ground, Ms Murray received information from the claimant after the hearing which we will set out when we reach that point in the chronology. When, after the hearing Ms Murray came to consider this matter, she understood Dr Houston to be highlighting the safety critical importance of having cabin crew meet the very high standards of aviation safety rules. Although the claimant's GP and consultant had confirmed that from the perspective of the treating doctor, they believed the claimant

would be fit to return to work, they were not specialists in aviation occupational health. By contrast, BAHS were specialists in aviation occupational health and it was their opinion, taking into account the aviation safety regulations, that because of the risk of future incapacitation the claimant was not fit to resume her flying duties. Ms Murray considered she had nothing to suggest that the BAHS assessment was wrong and she accepted their specialist view of the claimant's health and the fact that the claimant was not fit to resume her contract flying duties. Ms Murray noted too that Dr Houston had consulted with other BAHS staff will taking into account the claimant's medical report from her treating doctors.

109. For those reasons, but after the hearing when she received further information from Dr Houston, Miss Murray rejected the first ground.

110. The claimant's second ground of appeal was that the claimant had not been offered the option of an ill-health pension. Ms Murray took the view that whether the claimant should be offered an ill-health pension was a question for the pension provider and not a matter within the control of the respondent. So, she did not uphold the second ground.

111. The claimant's third ground of appeal was that termination should be extended to 31 March 2018 so that her first two points could be considered.

112. On this ground, Ms Murray considered that it was not necessary to extend the termination date in relation to the pension point because such applications could be considered once an individual had left the business. Having received responses from Dr Houston, Ms Murray took the view that there was no further reason to delay the termination date. For those reasons Ms Murray did not uphold the third ground.

113. On 10 January 2018 Ms Lillywhite-Pinch tried to contact the claimant and left a voicemail message.

114. The additional information in relation to the claimant's first ground arose as follows.

115. By email dated 16 January 2018, the claimant wrote to Dr Houston. She asked Dr Houston some specific questions. In her first question, the claimant (mistakenly in our view, supported by the claimant's representative's cross examination of Dr Houston) quoted AMC17 MED.C.025 referring to (b) rather than (a). Nonetheless, Dr Houston replied to her that she was correct that an assessment could be considered after treatment and recovery, but this, he said, depends on the particular circumstances of the case.

116. The claimant asked and Dr Houston subsequently confirmed that the regulation did apply to cabin crew not pilots in respect of in-flight incapacitation.

117. In her third question, the claimant asked,

'give me an example of how a re-occurrence of my condition in-flight would impact upon my duties and abilities on board.'

118. When he replied, Dr Houston said.

'We considered that a recurrence of your condition or from metastasis could impact your ability to perform the duties and responsibilities required by aviation safety rules. I would ask that you discuss this with your treating specialist if you needed more information or examples of how this might occur.'

119. In her fourth question that claimant asked whether Dr Houston saw a causal link between breast cancer and flying and Dr Houston subsequently confirmed that he did not suggest any causal link between breast cancer and flying.

120. The claimant's final question asked,

'what is it specifically that prevents me from flying as opposed to the many other cabin crew that have returned to flying after battling cancer?'

121. Dr Houston replied

'I understand how this can seem unfair. We do assess each individual's personal circumstances in order to reach a fitness decision. After successful treatment for cancer some individuals are able to return to flying. We carefully considered your individual clinical circumstances and discussed your case with our doctor colleagues within BAHS before the fitness decision was made. The outcome of this assessment was that we found you unfit to cabin crew duties because of the future risk of incapacitation.'

122. Dr Houston's email with his replies to the claimant was sent on 26 January 2018. We accept his evidence that he referred the claimant back to her own specialist because he did not wish to intrude into the treating relationship between the claimant and her specialist, particularly given that he did not think the claimant understood the full serious implications of her illness and the word 'palliative'.

123. In reply to an email from Claire Lillywhite-Pinch of CTS sent on 1 November 2017, the claimant wrote to Ms Lillywhite-Pinch on 23 January 2018. She said that she had been advised to contact Ms Lillywhite-Pinch as part of her EG300 process. Her main aim was to get back into flying but if this was not possible, she would like the opportunity to consider taking ground duties and would like to know about any ground opportunities at Manchester airport, Heathrow Airport or any in UAE.

124. Ms Lillywhite-Pinch replied to the claimant on 24 January 2018. She referred the claimant to the three-stage programme information sent to the claimant previously. She said that if the claimant was considering looking for different roles, she already had access to the transition job search portal on her homepage which was in addition to the roles which were advertised on job search. She told the claimant that it was really important that she kept abreast of potential opportunities in all the areas listed. She asked the claimant whether she currently had a CV and if so, asked the claimant to send her a copy. She invited the claimant to let her know if the claimant would like to meet up.

125. By letter dated 8 February 2018 Ms Murray wrote to the claimant rejecting her appeal. The letter set out the grounds of appeal and that the claimant had had three absence review meetings on 25 May 2017, 20 October 2017 and 23 November 2017. Ms Murray noted that the claimant had been referred to BAHS on nine occasions. She

understood that the claimant had been assigned to a ground placement from 27 July 2017 and registered with CTS on 20 October 2017.

126. Ms Murray said that the advice that the respondent had consistently received from BAHS was that the claimant was unfit to return to flying duties and there was no defined timescale by which this would change. BAHS had received copies of medical reports which had helped them reach their decision regarding the claimant's ability to return to flying duties.

127. Ms Murray referred to the emails between the claimant and Dr Houston setting out her questions and his answers and she set those questions and answers out in her letter.

128. Ms Murray noted Dr Houston's suggestion that the claimant speak to her treating specialist who would be able to provide more information on how a recurrence of the claimant's condition metastasis might impact on her ability to perform her duties and responsibilities required by aviation safety rules.

129. Ms Murray stressed that she was not a medical professional and therefore she needed to seek the professional advice of BAHS and that advice was that the claimant was unfit to return to flying duties. Therefore, because the latest medical advice stated that the claimant was unable to fulfil a contractual role the termination date would remain for 23 February 2018. Therefore, the claimant's contract would end on that date unless prior to the termination date there was a change in her medical condition which would enable her to return to contractual role or unless she was successful in securing an alternative role within British Airways.

130. The claimant and Ms Lillywhite-Pinch of CTS spoke on 13 February 2018. The claimant confirmed that she did not have a CV and so Ms Lillywhite-Pinch sent her some further information to help her create a CV.

131. By email dated 17 February 2018 claimant wrote to Michelle Murray saying that she had new medical information which she would like a doctor from BAHS to review before a definite decision was made on her termination. She asked for an extension of her termination date.

132. The claimant said that she was also seeing her oncologist on 26 February 2018 and had requested her to write a letter with new information and also to mention that the statistic set out in Dr Badea's report was not specific to the claimant but a national statistic. She said that she would also ask her oncologist to assess the risk of incapacity because she was no longer on any treatment.

133. The two letters attached were as follows:

1. a letter dated 8 February 2018 from Mr Abdel-Aty saying that from a gynaecological point of view the claimant was asymptomatic and he was happy to discharge her from his gynaecology clinic.
2. A letter dated 15 February 2018 from Mr A. Belloso, an ear, nose and throat consultant. Mr Belloso found the claimant totally asymptomatic: there were no palpable neck masses and no abnormalities. An ultrasound that day showed

two benign left level II nodes which were normal in size and appearance. Mr Belloso had reassured the claimant regarding the normal appearance of the neck nodes and there were no suspicious features and no obvious relationship to the previous metastatic cancer.

134. Michelle Murray forwarded those two letters to Dr Houston and asked him review the information see whether it would change the assessment that the claimant was not fit to fly. Dr Houston saw that the node was in fact benign however this did not change the prognosis, risk of recurrence in future or risk of incapacitation to the extent that BAHS would consider the claimant fit for safety such as cabin crew.

135. By email dated 20 February 2018 Ms Murray told the claimant that she had shared the new information with Dr Houston and had a discussion with him to discuss whether the information changed claimant's ability to return to the role of cabin crew. She said that the information did not change the claimant's fitness to return to flying and therefore the termination date of 23 February 2018 stood.

136. The claimant replied on the same day saying that she was seeing her oncologist on 26 February which was why she requested to extend her termination date so that she could provide that new information. She asked Ms Murray to ask Dr Houston how he had evaluated claimant's risk and why he had not accepted the numerous reports stating the claimant was fit to commence her normal duties as cabin crew.

137. By email dated 21 February 2018 Michelle Murray replied to the claimant that she had not shared any further information that provided new evidence that would change the outcome of her appeal. This concluded the appeal and the termination date would remain as 23 February.

138. On 22 February 2018 the claimant met with Victoria Taylor and her union representative for one final review of the situation to establish if anything had changed since the termination date had been set. Ms Taylor took the view that nothing had been changed and therefore the claimant's contract was terminated on 23 February 2018.

Statement of the Law

Unfair dismissal

Capability

139. Ill health can provide grounds for the dismissal of an employee. Depending on the circumstances, there may come a point when the employer can dismiss fairly.

140. The starting point for analysing the duty of the tribunal in deciding whether or not an ill health capability dismissal is fair is the EAT decision in *Spencer v Paragon Wallpapers Ltd* [1976] IRLR 373. In that case Phillips J emphasised the importance of scrutinising all the relevant factors.

"Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?"

141. There is a conflict between the needs of the employer and those of the employee, and the tribunal must be satisfied that the employer has sought to resolve that conflict in a manner which a reasonable employer might have adopted: was it within the reasonable range of responses? In the course of doing this the tribunal will enquire whether the employer carried out an investigation which meant that it was sufficiently informed of the medical position.

142. The significance of consultation emerges from the following passage from the judgment of the EAT in *East Lindsey District Council v Daubney* [1977] IRLR 181:

"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done."

143. The decision to dismiss or not to dismiss is not a medical question, it is a question for the employer to be answered in the light of the available medical evidence.

The effect of an appeal

144. Where an early stage of a dismissal process is defective and unfair in some way, a tribunal will examine the subsequent proceedings: not to see whether there has been a review or re-hearing, but to determine whether due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it in the process and the open-mindedness (or not) of the decision maker, the overall process was fair, notwithstanding any deficiencies at the early stage (*Taylor v OCS* [2006] IRLR 613).

Disability Discrimination

Section 15

145. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Section 15(2) makes it clear that the prohibition from discrimination arising from disability does not apply 'if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability'.

146. Section 15 requires two steps. We have first to focus upon the words "because of something", and therefore have to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. No question of comparison

arises. The tribunal must decide what was the cause of the treatment complained of, or what was the reason for it.

147. The 'something' need not be the sole or main reason, but it must have at least a significant (or more than trivial) influence on the unfavourable treatment and so amount to an effective reason for or cause of it.

148. Motive here is irrelevant. The focus is on the reason for or cause of the treatment. This is an objective question. (*Pnaiser v NHS England [2016] IRLR 170*),

Failure to make reasonable adjustments.

149. In order to determine a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination, an employment tribunal must ask whether there is a provision, criterion or practice ('PCP') which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial in comparison with persons who are not disabled.

150. It is necessary to take a broad and not unduly restrictive approach to defining a 'PCP'. It is unlikely however to be something that arises on a one off basis, for example the application of a flawed disciplinary procedure on a one-off basis —see *Nottingham City Transport Ltd v Harvey [2013] EqLR 4, EAT* which states that 'practice connotes something which occurs more than on a one-off occasion and which has an element of repetition about it.'

151. It is only when the 'provision, criterion or practice' has been identified that it is possible to define the 'pool' of comparators for the purpose of seeing whether there has been the requisite substantial disadvantage of the disabled person in comparison to the non-disabled.

152. In many cases the facts will speak for themselves and the identity of the non-disabled comparators will be clearly discernible from the relevant provision, criterion or practice. The proper comparator can be identified only by reference to the disadvantage caused by the arrangements that are questioned.

153. A disabled employee whose disability increases the likelihood of absence from work is disadvantaged when compared to non-disabled employees as she is at greater risk of being absent on grounds of ill health.

154. The content of the obligation is that the employer must take such steps as it is reasonable, in all the circumstances of the case, for it to take in order to prevent the PCP having that effect. It follows that it is only if the adjustment concerned would remove the disadvantage from the employee that the duty will arise to make it.

155. The Disability Discrimination Act 1995 section 18B(1) gave guidance as to the kind of considerations which will be relevant in deciding whether it is reasonable for a person to have to take a particular step in order to comply with the duty to make reasonable adjustments. Section 18B was not re-enacted in the Equality Act 2010. However, the matters listed therein are largely reproduced in Chapter 6 of the statutory code (Code of Practice on Employment (2011), and HHJ Richardson in *Carranza v*

General Dynamics Information Technology Ltd [2015] IRLR 43 said that he had no doubt that the same approach applied to the [Equality Act 2010](#). It is useful therefore to remind ourselves of those matters.

'18B Reasonable adjustments: supplementary

(1) *In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to—*

- (a) *the extent to which taking the step would prevent the effect in relation to which the duty is imposed;*
- (b) *the extent to which it is practicable for him to take the step;*
- (c) *the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;*
- (d) *the extent of his financial and other resources;*
- (e) *the availability to him of financial or other assistance with respect to taking the step;*
- (f) *the nature of his activities and the size of his undertaking;*
- (g) *...(not relevant).'*

156. It may be a reasonable adjustment not to dismiss a disabled employee or to delay doing so. The duty to make adjustments is, as a matter of policy, to enable employees to remain in employment, or to have access to employment. The duty will not extend to matters which would not assist in preserving the employment relationship.

157. The duty to make adjustments arises by operation of law—it is not essential for the claimant herself to identify what should have been done. It is important however to identify precisely what constituted the 'step' which could remove the substantial disadvantage complained of.

158. The test of 'reasonableness', requires us to apply an objective standard.

Analysis

159. We have approached our analysis using the structure given to us by the list of issues. We set the issues out below in italics.

Unfair dismissal

It is not in dispute that the claim was presented in time, that the claimant qualified to claim or that she was dismissed.

The parties agree that the reason for the dismissal was capability which is a potentially fair reason for the purposes of section 98 of the Employment Rights Act 1996.

The claimant says that the dismissal was unfair for the following reasons:

at the date of dismissal the claimant was fit for her contractual role;

160. We think that the correct question here is not whether the claimant was objectively fit for her contractual role but whether the respondent's decision makers - Ms Taylor and Ms Murray - were within the reasonable range of responses in concluding that she was not fit for her contractual role.

161. We have asked ourselves whether, *at the time they took their decisions*, Ms Taylor and Ms Murray held their opinion within the reasonable range of responses that the claimant was not fit for her contractual role.

162. Both Ms Taylor and Ms Murray did hold the opinion that the claimant was not fit for her contractual role.

163. Ms Taylor and Ms Murray are not of course medical experts. In order to act within the reasonable range of responses in a capability decision of this kind it is incumbent on them to discover the true medical position. They relied upon Dr Houston and his colleagues - who were medically qualified - and also upon the fact that Dr Houston was able to and did seek further information from the claimant's treating specialist. In the absence of some compelling reason to lead them to do so, we would not expect Ms Taylor or Miss Murray to go behind or to second-guess the detail about medical information: it was within the reasonable range of responses that they should not do so.

164. However at the time Ms Taylor made her decision to dismiss and gave the claimant her termination date, she expressed in her own letter the fact that the medical information was not complete. Without more, we consider that to dismiss in the circumstances is outside the range of reasonable responses. Ms Taylor knew that she did not have full medical picture and yet she took the decision to dismiss.

165. However, in those circumstances we ask ourselves, in the light of *Taylor v OCS*, whether the overall process was fair, notwithstanding any deficiencies at the early stage. In this case, after Ms Taylor took her decision to dismiss, Dr Badea's report became available, Dr Houston and his colleagues had an opportunity to consider and evaluate it, information was then fed to the claimant, the claimant had an opportunity to ask questions of Dr Houston and to receive his replies and she also had an opportunity, which she took, to produce further medical evidence in the form of evidence, at least from her from her gynaecologist and ENT specialist. We consider this to reveal a fair, thorough and open-minded process such that the overall process was fair.

In deciding that she was not fit for a contractual role, the respondent failed properly to consider the evidence (i.e. the medical evidence from the claimant)

166. Here we set out in turn the list of medical evidence which Mr Powlesland said had not been considered:

the report of Dr Badea dated 24 October 2017;

167. Our findings show that this report was in Ms Taylor's possession before she made her decision. The evidence is inconclusive as to whether she actually considered it. However, it was quoted by Dr Badea in her later report dated 27 November 2017 which the medical team clearly considered post decision to dismiss but pre-appeal. (See paragraph 83 above.)

the letter from Mr. Abdel-Aty dated 8 February 2018;

168. We note that this letter was produced and sent to the respondent after the appeal was dismissed, so strictly would not be relevant. However, the respondent did in fact consider it as our findings show. Given that that the letter confirms what was uncontroversial: that the claimant was asymptomatic and indeed had been discharged from the relevant clinic, it did not alter the respondent's decision and it was within the reasonable range of responses that it should not do so. (See paragraphs 133-137 above)

the report of Mr Belosa dated 18 February 2018;

169. The same analysis applies to this document which confirmed that the neck node was in fact benign.

the report of Dr Alvarez dated 4 March 2017;

170. This is simply a factual report giving, amongst much other medical detail, the uncontroversial diagnosis and giving no opinion on the claimant's capacity to fly. We cannot find that it has been the subject of cross-examination of the respondent's witnesses. The claimant was very sensitive about her UK doctors not being told of her treatment in Mexico and we think it likely that this document was not in fact before the respondent. In any event, this point has fallen away during our hearing and given the contents of the report and the fact the later reports provide the same diagnosis but are more up to date, we do not consider that it could be said to have a bearing on the decision to dismiss. (See paragraph 39 above.)

the report of Dr Dalton dated 19 June 2017

171. This document was sent to Cindy Vallis who did consider it, as our findings show. Dr Dalton was clear that the claimant was fit to undertake cabin duties. Cindy Vallis saw that but was herself not comforted that the claimant was in fact fit. The medical reports in BAHS possession were reviewed by Dr Houston in clinic on 26 October although it is more likely that when they had their discussion, more up-to-date information from Dr Badea who was the treating oncologist would have had more sway. That Dr Houston and Ms Vallis did not agree with Dr Dalton does not mean that they did not consider his opinion. (See paragraphs 43, 44 and 59).

the report of Dr Badea dated 23 August 2016.

172. Mr Powlesland told us at the outset of this hearing that the relevant document was dated 23 August 2016. There is no such document in our bundle. However, there is a document dated 31 August 2016 from Dr Badea. The year was corrected by consent to 2017. The day remains wrong, however. We have therefore considered both this document and the final substantive report from Dr Badea dated 27 November 2017.

173. Our findings show that the claimant showed a copy of this letter to Cindy Vallis on 20 October 2017. She consented for Ms Vallis to keep a copy. So, the respondent had the letter at the time of making its decisions. (paragraphs 53 to 55)

174. Although Ms Taylor could not have had before her the report of 27 November from Dr Badea, that report was received by Dr Houston on 6 December and duly considered by the medical team on 21 December. That consideration was then available to Ms Murray when she decided the appeal.

175. We consider that the medical evidence which the claimant says the respondent failed to consider can be summarised as medical opinion as to the claimant's uncontroversial diagnosis, that she was asymptomatic and that she was fit to fly/return to her contractual role.

176. Although it is not clear that the respondent had all these pieces of evidence in its possession, it plainly had a body of medical evidence before it which, taken together, gave that view on the claimant's behalf. We consider that the evidence shows that the respondent did in fact consider this evidence of medical opinion. It did not agree with it on the question of fitness to fly, but that does not mean that it did not consider it.

177. Strictly, this answers the point made by the claimant. However, we consider that a more important point lies below it. Was the decision made by the respondent's decision makers within the reasonable range of responses open to a reasonable employer given the weight of the medical evidence produced by the claimant?

178. We consider that it was. We focus on the decision to dismiss in contradistinction to the medical decision. That decision was made by Ms Taylor and then Ms Murray, not by Dr Houston and his colleagues. We have already found that Ms Taylor was acting outside the reasonable range of responses in dismissing before she had available to her the full medical picture. However, before the appeal, the final report from Dr Badea was considered by the medical team. They were doctors experienced in aviation medicine, as Ms Murray knew. It was within the reasonable range of responses for her to prefer the opinions of a group of medical experts in aviation - informed by up to date information from the treating consultant - to the opinions from other medical specialists, however eminent, who did not have experience in aviation.

179. Ms Murray was making a safety critical decision and it was within the reasonable range of responses for her in that context to prefer the opinions of aviation specialists who also understood the full implications of the safety risks.

180. We have also considered the question not identified in the issues, but which has loomed large in cross examination and argument before us. That is that Dr Houston did not reply to the claimant's question to him dated 16 January 2018 that he give her an example of how a reoccurrence of her condition inflight could impact on her duties and abilities onboard. Dr Houston referred the claimant back to her own specialist because he did not wish to intrude into the treating relationship between the claimant and her specialist, particularly given that he did not think the claimant understood the full implications of her illness and the word 'palliative'.

181. We think this question is correctly formulated as: was Ms Murray acting outside the reasonable range of responses in that she rejected the appeal even though, as

she knew, Dr Houston had not given the claimant an example or indeed the examples which he described to us?

182. We consider that the law requires an employer to consult reasonably with the claimant and the medical advisers. The respondent's medical advisers had given an opinion that there were risks of incapacitation if the claimant flew again. These risks had very serious safety implications. We note that this is not a conduct dismissal in which we would expect an employee to be told the detail of the allegations and evidence against her. This is a capability dismissal in which the respondent has to take reasonable steps to be informed of the medical situation and to consult reasonably with the employee. We think the respondent took those steps. It was informed by a team of experienced aviation specialists that the claimant was at risk of incapacitation if she flew. It was within the reasonable range of responses to rely on Dr Houston's professional judgment as to what was and was not appropriate for him to say to an employee who was also a patient of another professional. He invited the claimant to discuss the matter with her own specialist.

183. Just because the claimant can suggest at the tribunal hearing ways in which the consultation could have been carried out differently, improved or made more perfect, does not mean that what was actually done was outside the range of reasonable responses.

184. Had the claimant been able to show Dr Houston that she was likely to stay clear of cancer for 5 years, he might have altered his opinion, but there has been no evidence before us that the claimant could come anywhere close to providing that comfort to Dr Houston.

delaying putting claimant in the process to gain an alternative role;

185. We accept Ms Hosking's submission that there was not a delay in registering the claimant with CTS. She was registered with CTS at the end of October 2017 after the section 4 meeting. This gave her a month before the termination date was set: and therefore just over 4 months in all to use CTS. We consider that this period was within the reasonable range of responses. (The fact that the claimant did not particularly engage with CTS is not relevant at this stage.)

the claimant confirmed that she did not rely upon any allegations of unfairness about consultation, meetings, representation or procedure et cetera.

The respondent had an unwritten policy in relation to absence management which was not disclosed to employees. The policy was applied where BAHS advised that no timescale could be given within which the employee was likely to be fit to return to their contractual role.

186. The respondent did operate an unwritten system about which its managers were trained. By this system after an employee had been unfit for their contractual role for at least 6 months, or 9 months if they had a disability, the manager would register the employee with CTS and hold a formal section 4 meeting. There would be another

section 4 meeting after a month and if there was no timescale to return to the contractual role, a termination date would be set three months ahead. There would be another review after 6 weeks. If new information emerged before the termination date the termination could be revoked or extended.

187. On the face of it, it is troubling that an employer should operate any system without its employees knowing. However, we do not consider that the fact that the claimant did not know about this system was outside the reasonable range of responses on the facts of this case. In fact, it protected the claimant for 9 months by setting a minimum period within which her dismissal would *not* be considered. The respondent worked according to its EG300 process which was clearly published, and it did not breach that policy, as the claimant's own approach set out in the issues in this case shows. There is no evidence before us of anything specific the claimant would have timed differently had she known about this unwritten system. That there was flexibility in reality is shown by the fact that had the timescales in the 'unwritten system' been applied to the claimant, she would have been dismissed in mid-July 2017.

The respondent does not rely upon contributory fault.

The respondent does rely upon Polkey (and under discrimination Chagger): what was the percentage chance of a fair dismissal had the respondent given proper consideration to the medical evidence and the fact that the claimant was fit for her role, and had respondent not delayed in putting the claimant in the process to gain an alternative role?

We agreed that we would deal with liability, and Polkey together in the first stage of this hearing then if necessary deal with issues of mitigation, reinstatement and calculation of remedy at the second stage.

188. Issues of Polkey do not now arise.

Disability

The respondent accepts that the claimant is a disabled person in accordance with the Equality Act 2010 at all relevant times. The parties agree that the relevant impairment is stage 4 metastatic breast cancer.

Section 15

Did the respondent treat the claimant unfavourably, by dismissing her on 23 February 2018 because of something that arose as a consequence of her disability?

The claimant's primary case is that the something arising was her long-term sick absence.

189. No: this was not the reason for the dismissal. Had the claimant been able to come back to work and fly without the feared risks then she would have returned to work, regardless of the length of her absence.

The respondent accepts that the long-term sick absence was something arising as a consequence of her disability.

190. This is not now relevant.

The respondent says that the dismissal was not because of the long-term sick absence.

The respondent says that the dismissal was because of the future risk of incapacitation.

191. We have accepted this.

The respondent accepts that the future risk of incapacitation was something arising as a consequence of her disability.

192. We agree.

The claimant says that there was not a future risk of incapacitation but that in the alternative to her primary case she was dismissed because of the perception by the respondent of a future risk of incapacitation.

193. We consider that this is a distinction without a difference: it is not now objectively provable whether this was a perception of risk or a real risk. It is sufficient that the respondent dismissed because it believed that there was a risk of future incapacitation.

If the claimant was dismissed because of something that arose as a consequence of her disability was that a proportionate means of achieving a legitimate aim?

The respondent identifies its legitimate aim as employing staff who are capable of undertaking the particular role which they are employed to do: in the claimant's case the role of cabin crew either with or without adjustments, as required, or an alternative role according to her capability.

194. We have found that the claimant was in a safety critical role. It is a legitimate aim for the respondent to wish to avoid risk to its crew and passengers while in the air: health and safety, the need to protect the public and the need to protect the claimant are all legitimate aims held by the respondent. Given the examples of Dr Houston and given the safety risks, the claimant was not fit to carry out her contractual role. In that context it is further a legitimate aim for an employer to employ staff who are capable of carrying out the role they are employed to do. The claimant could not carry out her contractual role without a degree of risk that was unacceptable.

195. Was it a proportionate means of achieving that aim to dismiss the claimant? We have asked ourselves whether there was any lesser means of achieving that aim, for example, by providing the claimant with alternative employment? We have found that the respondent has a system of finding alternative employment with which it urged the claimant to engage. Had she found such an alternative or had she been reasonably close to finding an alternative, it would not have been proportionate to dismiss her. However, our findings show that she did not fully engage with the process. We cannot find what might have taken place had she done so; however, it was proportionate to dismiss in these circumstances.

Section 20/21

Did the respondent apply the following PCPs?

The requirement to be free of future risk of incapacitation as set out in the respondent's letter to the claimant 5 January 2019 (claimant's case);

196. We have looked at the letter of 5 January 2018 which is from Dr Houston to the claimant. He does not say that the claimant is required to be *free* of the risk of incapacitation. He says that the respondent is required to consider the risk of inflight incapacitation from a recurrence of the condition or from metastasis that could impact upon her ability to perform the duties and responsibilities required by civil aviation rules. He says that '*we found you unfit for cabin crew duties because of the future risk of incapacitation.*'

197. There was not a requirement to be '*free*' of risk. As Dr Houston told us, no-one is free of risk. The issue was one of degree of risk, in the light of the claimant's diagnosis. So, the respondent did not apply this PCP.

The requirement that the risk of future incapacitation be at an acceptable level (respondent's case).

198. We accept that the respondent did apply this PCP.

Requiring a return to full contractual duties (the policy says that an employee must be able to return to their full contractual duties). The respondent accept that this was a PCP applied.

199. The respondent did apply this PCP.

Having to be able to fly on worldwide or long-haul routes.

200. This became irrelevant because the claimant could not fly on *any* flight, worldwide, long haul, short haul or otherwise.

If so, did any PCPs proved put the claimant at a particular disadvantage in comparison with a non-disabled employee?

The disadvantages relied upon are as follows:

the claimant to be free of the risk of future incapacitation effected the claimant's ability to go back to her previous contractual duties.

201. Yes: the claimant was not allowed to go back to her full contractual duties because her degree of risk was not an acceptable level.

Requiring the claimant to return to full contractual duties was to her to disadvantage because of the way the respondent assessed the claimant's condition: she was unable to return to her full contractual duties.

202. We agree: she was unable to return to her full contractual duties because of the PCP that she must be able to return to her full contractual duties. That is a disadvantage.

Having to fly on worldwide or long haul routes meant that those who were disabled might require the health care systems that were available under the European scheme.

203. This became irrelevant because the claimant simply could not fly as cabin crew at all. So, it became immaterial where she might access medical facilities.

What adjustments were reasonable for the respondent to have taken in order to avoid any disadvantage proved?

The claimant relies upon the following adjustments:

extending the period that the claimant was on ground duties or further medical evidence to be obtained and/or to show that she was well enough to return to contractual duties.

204. On Dr Houston's evidence the period of non-recurrence would have to have been 5 years for him to be satisfied that the claimant's degree of risk was sufficiently low for her to be allowed to fly. We do not consider that it would have been reasonable for the respondent to have to extend the period of ground duties long enough for the claimant to prove this. For the claimant to get further medical evidence would have made no difference in the absence of a five-year period free of recurrence.

Giving the claimant a trial period on actual duties to show that she was well enough to undertake them.

205. Given Dr Houston's view of the risks of incapacitation, the risk of a trial period would have been the same as the risks of long-term flying. These risks were too great to take.

Allowing the claimant to continue on ground duties for a further 6 to 12 months.

206. We have dealt with this. Had the claimant had a medical condition that might have been cured within 6 to 12 months, say, the situation would have been different. It would not have been reasonable to keep her on ground duties for the necessary 5 years because temporary ground duties were needed for redeployees of various types. It had been open to the claimant to apply for a permanent role on the ground, however she did not engage with this process.

Only requiring the claimant to fly on short haul routes within the UK or European healthcare area.

207. This is not relevant now.

208. For all those reasons we dismiss the claims.

Employment Judge Heal

Date: 10/2/2020

Sent to the parties on: 24/2/2020

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For the Tribunal Office