Neutral Citation Number: [2023] EAT 97

Case No: EA-2022-000148-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 July 2023

Before:

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE
CHARLES EDWARD LORD OBE
STEVEN JOHN WILLIAM TORRANCE

- -

Between:

MR B. GARCHA-SINGH **Appellant**

- and -

BRITISH AIRWAYS PLC

Respondent

- -
- -

Carolyn D'Souza (instructed by Premier Solicitors) for the **Appellant**
Katharine Newton KC (instructed by Harrison Clark Rickerbys Limited) for the **Respondent**

Hearing date: 7 June 2023

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The claimant's appeal against the Employment Tribunal's ("ET") dismissal of his claim for unfair dismissal failed.

The claimant was employed as Cabin Crew Long Haul. He was dismissed by reason of incapability, following lengthy sickness absence. The decision to terminate his contract of employment was made on 31 August 2017 and was due to take effect on 5 January 2018. Thereafter, the respondent extended the termination date on seven occasions and in December 2018 declined to extend it further. The claimant's effective date of termination was 21 December 2018. At the time when the termination decision was made in August 2017 the claimant had been unable to fly for over a year. The respondent's absence management policy ("AMP") was incorporated into the claimant's contract of employment. The policy could only be changed at national level.

The Employment Appeal Tribunal ("EAT") rejected the contention that the successive extensions to the claimant's termination date constituted a deviation from the AMP and a breach of his contract. The AMP envisaged a decision, in the singular, to terminate an employee's employment and identified the steps to be taken before making that decision (about which there was no complaint in this case). However, it did not prevent a manager from subsequently postponing the termination date for the employee's benefit, as had occurred here on the ET's findings. In the alternative, the ET had found in respect of the wrongful dismissal claim that there had been no breach of contract and that conclusion was not the subject of a live appeal.

Even if the successive postponements of the termination date had amounted to a breach of contract (contrary to the EAT's primary conclusion) it would not follow that the dismissal was unfair. The tribunal still had to ask itself whether the procedure adopted by the employer was within the range of reasonable responses. It was quite clear from the ET's findings that in this case there was no substantive unfairness to the claimant and that each of the extensions was to his advantage.

The EAT also rejected contentions that the absence of an appeal from the 21 December 2018

decision was a breach of the claimant's contract and that the ET erred in failing to find that the respondent's approach to the appeal was outside of the band of reasonable responses. Pursuant to the AMP, the claimant was entitled to an appeal from the decision to terminate his employment. On the ET's findings he was given this, namely a full and fair appeal against the decision to dismiss him, which he initiated in July 2018 and was determined in October 2018. Furthermore, the ET lawfully found that the additional matters that the claimant wanted to raise in December 2018, had he been given a further appeal, added "very little to what had gone before" and did not address the respondent's reason for terminating his employment.

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE:

Introduction

1. This is the unanimous judgment of all three members of the appeal tribunal, to which the lay members have made a valuable contribution. We will refer to the parties as they were known below.

2. The claimant appeals from the judgment of the Watford Employment Tribunal ("the ET") promulgated on 30 November 2021, dismissing his claims. He was employed by the respondent airline in the position of Cabin Crew Long Haul under a contract of employment dated 12 February 1997. His employment was terminated with effect from 21 December 2018 following a lengthy period of sickness absence. His unsuccessful claims were for unfair dismissal, wrongful dismissal, victimisation, race discrimination and disability discrimination. The latter entailed allegations of indirect discrimination, breach of a duty to make reasonable adjustments and discrimination arising from disability.

3. Before the ET and in the drafting of his Notice of Appeal, the claimant was represented by Mr M Duggan QC (as he then was). Very sadly he has since passed away. Mr Garcha-Singh was represented by Ms D'Souza in relation to this appeal. The respondent was represented by Ms Newton KC, both before the ET and on this appeal. We are grateful to them for their helpful submissions.

4. By order sealed on 17 October 2022, HHJ Wayne Beard directed that Grounds 1, 3 and 6 of the claimant's grounds of appeal be set down for a full hearing. The letter from the Employment Appeal Tribunal ("EAT") dated 24 September 2022, indicated he had concluded that the other proposed challenges disclosed no reasonable grounds of appeal.

5. The claimant relies upon an Amended Notice of Appeal dated 7 March 2023. By order sealed on 15 May 2023, HHJ Auerbach granted permission to rely on paragraph 6.3.7 (which added a new contention to Ground 3), but refused permission in relation to an entirely new Ground 5A. The respondent relies upon an Amended Answer dated 26 May 2023.

6. Grounds 1 and 3 relate to the unfair dismissal claim. There is no challenge to the ET's finding that the claimant was dismissed by reason of incapability. Ground 6 concerned the ET's rejection of the claim brought under section 15 of the Equality Act 2010 for discrimination arising from disability. At the outset of the hearing we pointed out to Ms D'Souza that Ground 6 concerned the ET's conclusion that there was no unfavourable treatment and the conclusion (expressed in the alternative) that any unfavourable treatment was justified, but there was no challenge to the further conclusion that if there was unfavourable treatment it was not because of something arising in consequence of the claimant's disability. After having had the opportunity to take instructions over the lunchtime adjournment, Ms D'Souza accepted that in these circumstances she could not succeed in overturning the ET's rejection of the section 15 claim and Ground 6 was withdrawn. Accordingly, the appeal before us is confined to the ET's rejection of the claim for unfair dismissal.

The grounds of appeal

7. As originally drafted, Ground 1 contained a broad attack on the ET's conclusion that the claimant had been fairly dismissed. However, some of the original sub-paragraphs were deleted in the Amended Notice of Appeal (sub-paragraphs 6.2.1, 6.2.2, 6.2.3, 6.2.5 and 6.2.14). Ms D'Souza then indicated in her skeleton argument for this hearing that some of the remaining sub-paragraphs were not pursued. We confirmed the position with her at the outset of the hearing. She told us that this applied to sub-paragraphs 6.2.8, 6.2.10, 6.2.11 and 6.2.12. She also clarified that the points made in sub-paragraph 6.2.13 (regarding the question of whether dismissal was a proportionate means of achieving a legitimate aim), related to discrimination arising from disability, rather than to the case on unfair dismissal. As we have already indicated, the appeal in relation to this discrimination claim was subsequently withdrawn during the course of the hearing.

8. Accordingly, the following remains in respect of Ground 1:

> "6.2.4 The undisputed evidence was that where there had been sickness absence the Respondent would give notice of termination to end the employee's employment, in this case the Claimant, and would then state that there was a right of appeal and/or that the date of termination may be moved if the Claimant could demonstrate that he had made efforts to return to work.

> 6.2.6 The Tribunal erred as a matter of law by failing to find that the Respondent failed to operate its own Sickness Absence Procedure, which did not provide for a process whereby the employment could dismiss or set a termination date which it would the[n] vary.
>
> 6.2.7 Despite the fact that the Tribunal found that the process was one that they had not experienced and that there was no reference to this quite unique approach in the Absence Management Policy the Tribunal stated at paragraph 151 that it could not say that it was not one which no reasonable employer could adopt. The Tribunal erred in law in its approach since a policy of dismissal first, then consultation is so against all employment law notions of fairness that any reasonable employer and Tribunal should find it to be unfair.
>
> 6.2.9 The Tribunal failed to give sufficient weight to the unfairness of repeatedly setting termination dates in circumstances where they had an adverse effect upon the Claimant's health."

9. Ms D'Souza accepted that sub-paragraph 6.2.4 was narrative, rather than a free-standing ground of appeal and that sub-paragraph 6.2.9 did not disclose a free-standing error of law, as the amount of weight to be accorded to a particular factor was a matter for the ET's assessment. Accordingly, the crux of the appeal in respect of Ground 1 is contained in sub-paragraphs 6.2.6 and 6.2.7 of the amended grounds.

10. Ground 3 concerns the ET's conclusions in relation to the extent to which the claimant was permitted an appeal from his dismissal. In its substantive parts, it says:

> "6.3.1 The Claimant was given notice of termination on of [sic] his employment contract on 31st July 2018 and, appealed the dismissal via way of submitting a grievance on 19th July 2018.
>
> 6.3.2 The Respondent purported to follow through an appeal process, which was unfair in itself in the manner that it was carried out.
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> 6.3.4 However, the Claimant's employment was terminated on 21st December and the Claimant was not given a right of appeal against that termination.
>
> 6.3.5 The refusal of an appeal in respect of the termination on 21st December was unfair and the Tribunal should have so found since:
>
> > 6.3.5.1 The grounds for an appeal on that date were completely different from the appeal that was made on 19th July 2018 and decided on 24th October 2018.
> >
> > 6.3.5.2 The Respondent refused to permit an appeal from the termination on 21st December 2018 and decided that the appeal decision of 24th October 2018 was the only appeal to which the Claimant was entitled.
> >
> > 6.3.5.3 The Tribunal should have found that the refusal of an appeal rendered the termination unfair as an appeal decision on 22nd October 2018 could not cover a termination on 21st December 2018, in respect of which there were different grounds/reasons for the appeal. The findings of the Tribunal at paragraph 154 that it was not persuaded that the dismissal was unfair because there was no subsequent right of appeal is a mistake of law and is, as a matter of fact and law, in this case, perverse:
> >
> > > (i) Ms Caruso Lorenzo did not merely decide not to interfere with the termination date [paragraph 154]. She decided not to extend employment, as it had been on previous occasions by someone more involved in the process.

> (ii) The grounds of appeal against her decision were totally different to the earlier appeal and the Tribunal were wrong to take the view that the earlier appeal was sufficient.
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> 6.3.6 If the Claimant had been permitted to appeal the termination on 21st December, he would have been able to demonstrate that he was fit for work and there was a likelihood that [he] would not have been dismissed.
>
> 6.3.7 The Tribunal directed itself (at §120) on the question of appeal to ***Gwynedd Council v Barratt & Hughes*** [2021] EWCA Civ 1322 (a case concerning rights of appeal in redundancy cases). The Tribunal was not directed to ***West Midlands Cooperative v Tipton*** [1986] IRLR 112 or ***Westminster City Council v Cabaj*** [1996] IRLR 399. Had it been, it would have been bound to find that C was denied a contractual right of appeal which denied him the opportunity to show that R had a sufficient reason for dismissing him as at 21 December 2018. It thereby erred in law."

The contract of employment and the sickness policy

11. In light of the grounds of appeal, it is necessary to refer to the claimant's contract of employment and to the respondent's "EG300: Absence management policy" (the "AMP"). We have seen the April 2018 version of the AMP. We were told by counsel that the earlier iteration of the policy was not materially different.

12. The ET found that the claimant was employed under a contract of employment dated 12 February 1997 (paragraph 10, ET's Reasons). His job title was Cabin Crew (clause 1). Clause 7 stated that the nationally agreed provisions (as amended from time to time,) relating to sickness absence were incorporated into the contract of employment.

13. Clause 9 provided that the claimant was "required to undergo full medical examination from time to time as required by the Company in order to verify fitness to fly".

14. The first part of the AMP was headed "Policy". The text indicated that the AMP replaced all local Attendance Management Processes, and that the policy could not be "added or changed by any local agreement. Any change can only be made through the Employment Policy Committee".

15. The next part of the document was headed "Principles" and included the following:

> "British Airways employees are required under the Terms and Conditions of their employment to maintain an acceptable level of attendance. If an employee fails to maintain an acceptable level of attendance it may become necessary to take action.
>
> British Airways will regularly monitor absence levels of all employees in order to address issues as they arise and aim to act reasonably at all times and taking account of all the circumstances including compliance with any relevant legislation in place."

16. The policy went on to explain that it was divided into five sections. It is common ground that Section 4 headed "Managing absence which exceeds 21 consecutive days or absence which affects an employee's ability to work for medical reasons", was applicable in this instance.

17. Before turning to Section 4, we note the terms of paragraph 2.3, headed "Appeals procedure":

> "Employees shall have the right to appeal against ... the decision to terminate employment in Section 4 of the policy. The appeal must be submitted in writing within 7 calendar days after the decision has been notified in writing to the individual, stating the reason for the appeal.
> British Airways will notify the employee of the date of the appeal hearing...
> The appeal will be heard within7 calendar days, of the receipt by British Airways of the employee's written appeal notification.
> ...
> The employee will be informed in writing of the result of the appeal within 7 calendar days after the conclusion of the appeal hearing. The appeal authority may confirm or rescind the decision."

18. The AMP provided that where an employee was "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 procedure in Section 4 of this policy".

19. Section 4 said that where the manager believed on reasonable grounds that the employee's absence or their inability to do their job to the standard reasonably required was due to medical incapacity that was likely to be long term, the manager would seek occupational health advice from BAHS (paragraph 4.1). If an employee chose not to attend BAHS within a reasonable period (usually 28 calendar days from the date the report is sent to the employee), the line manager "will make a decision about the employee's ongoing employment and management under this policy based on the information which is available to him or her".

20. Paragraph 4.3 provided that where BAHS advised that the employee was incapacitated and was unable to do their job to the standard reasonably required by the respondent in the foreseeable future, the following procedure was to be followed:

> "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 with British Airways; or
> - termination of employment on the grounds of medical incapacity (see paragraph 4.7)
>
> It may be appropriate for one or more of the actions to be taken in any particular case."

21. Paragraph 4.4 of Section 4 addressed reasonable adjustments in the work environment, paragraph 4.5 concerned rehabilitation plans and paragraph 4.6 focused on suitable alternative employment. Paragraph 4.7 was headed "Termination of employment on the grounds of mental incapacity". It stated:

> "An employee's employment will be terminated on the grounds of mental incapacity if:
>
> (i) reasonable adjustments cannot be made to the working environment of the employee's current job; and
> (ii) within a reasonable period of time, the employee is incapable of undertaking a suitable alternative job or no suitable alternative [is] available.
>
> Line managers when considering terminating an employee's employment on the grounds of Medical Incapacity must:
>
> - Write to the employee summarising the employee's situation and explain the reason(s) why the line manager is considering terminating the employee's contract of employment on the grounds of medical incapacity and invite the employee to a meeting to discuss the situation;
> - Seek advice from Policy and Casework Support; and
> - Ensure that guidance has already been sought from BAHS with reference to reasonable adjustments to the work environment, appropriate rehabilitation plan and suitable alternative jobs."

The ET's decision

22. We will now set out the material findings made by the ET. All references to paragraph numbers in this section of the judgment are references to the ET's Reasons, save where the contrary is stated.

23. The ET noted that the claim had proceeded on the basis of the respondent's agreement that the claimant was a disabled person by reason of: (i) a physical impairment (diabetes), of which it had knowledge by 7 December 2017; and (ii) a mental impairment (stress, depression and post-traumatic stress disorder) of which it had knowledge by 13 July 2018 (paragraph 4).

Findings of fact

24. On 15 October 2012, the claimant began a period of sickness absence. A meeting under Section 4 of the AMP took place on 9 November 2012. The claimant required surgery on his uvula, sinuses and oesophagus. The absence lasted 188 days and the claimant returned to work in April 2013, undertaking ground duties by way of a rehabilitation plan. He was declared fit to fly in July 2013 (paragraphs 20 – 22).

25. The claimant advised his employers that he required time off for an operation in August 2014. On 20 January 2015 the respondent wrote advising him that following two periods of absence in August and November 2014, he had reached a trigger point and was required to attend a Stage 1 absence review process. Subsequently, by letter dated 25 May 2016, the claimant was advised that he had now exited the attendance management process (paragraphs 23 – 26).

Events in August 2016 – August 2017

26. The claimant began a further period of absence on 29 August 2016, necessitated by physical health problems. Further to a BAHS referral, a review meeting with the claimant took place on 3 November 2016. In her letter of 4 November 2016, his line manager, Ms Sandhu, noted that BAHS had advised that he was currently unfit for all duties. BAHS had indicated that the claimant had a review with his specialist in November 2016 and the expectation was that he would be fit for flying duties around then. Ms Sandhu advised that his ongoing absence would now be managed under Section 4 of the AMP and she explained the possible outcomes (paragraphs 31 – 32).

27. A further review meeting took place on 28 November 2016. The latest BAHS report was discussed, which provided that the claimant was unfit for work in any capacity (paragraph 33). There were further referrals to BAHS in January and in May 2017. On the latter occasion BAHS advised that the claimant was unfit for any duties (paragraphs 34 – 35). With effect from 21 June 2017, the claimant reduced his part-time hours from 75% to 50% (paragraph 36).

28. A further review meeting was held on 26 July 2017. Ms Sandhu summarised the meeting

and the recent history in her letter to the claimant of 28 July 2017. She noted that the claimant had referred to being very stressed as a result of work-related stress and that he had not reached a level of fitness to return to his contractual role. She said that a further review meeting would take place on 23 August 2017, with a BAHS referral beforehand and that if there was no positive progress, the next step would be to register the claimant with the Career Transition Service ("CTS") to enable him to explore alternative employment with the respondent. Ms Sandhu indicated that under Section 4 of the AMP a termination date would be set for two months' time (paragraph 37). The ET rejected the proposition that the claimant was given notice of termination at this meeting; finding that this was a warning (paragraph 38).

Claimant given notice of termination

29. The next review meeting was held on 31 August 2017. On this occasion the claimant was given notice of termination of his employment. The notes of the meeting indicate that the BAHS review of 23 August 2017 was discussed. Ms Sandhu indicated that a termination date would be set for 5 January 2018. She said that it was "not set in stone", that the claimant would be supported in the interim and that she preferred to view this as a date by which he should aim to return to work. She informed the claimant that he would be registered for CTS and she explained their role and the Section 4 process. It was envisaged that the claimant would commence a ground role for three days starting on 4 September 2017 if he was then fit for ground duties. A further BAHS review would take place on 28 September 2017 and a Section 4 review meeting would be held in November 2017 (paragraphs 39 – 40).

30. BAHS recommended that the claimant undertake some ground duties in September 2017 as part of a phased return to work. By 10 October 2017 he was declared fit for flying duties. The claimant undertook a return to work course and then took accumulated annual leave, that he would otherwise lose. As a result, he did not return to flying at this stage (paragraphs 42 – 43).

The first, second and third extensions of the termination date

31. On 7 December 2017, the claimant met with Mrs Gupta, who had taken over from Ms Sandhu, following the latter's departure. This was the first time that the claimant's termination date was extended ("the first extension"). Mrs Gupta summarised the position in her letter to the claimant dated 13 December 2017. She noted that he had worked on the ground from 1 September to 2 October 2017 and completed the majority of a return to work course. She also noted his indication that he had been diagnosed with diabetes; that his recent BAHS referral had concluded that he was fit for full flying duties with immediate effect; and that he had not participated with CTS. She said that in view of the recent developments in terms of his fitness and his participation in the return to work course, she would postpone his termination date to 31 March 2018 "to allow you time to demonstrate an ability to sustain your commitments on your flying roster". The ET accepted that this extension was intended to allow the claimant to demonstrate that he could fly again. The letter advised the claimant that he had a right to appeal her decision (paragraphs 44 – 45). There was no appeal at this stage.

32. Pausing our summary of the ET's Reasons for a moment, we note that counsel agreed at the hearing before us that the letter to the claimant in respect of the 31 August 2017 decision to terminate his employment and in respect of each of the subsequent postponements of the termination date up to and including the letter of 30 July 2018 (but not thereafter) referred to him having a right of appeal against the decision.

33. On 18 January 2018 the claimant attended for work in the expectation that he would be called upon to fly. However, at this point it was discovered that his ID and CRB clearance had expired (paragraphs 46 – 48). By letter to the claimant dated 13 March 2018, Mrs Gupta indicated that in light of these events she would extend the termination date by three months to 30 June 2018 ("the second extension"). The letter said that this was to enable the claimant to "demonstrate to me your ability to sustain a full flying roster". He was advised that a further review meeting would take place in May 2018 (paragraph 52).

34. On 25 April 2018 the claimant attended for work but did not fly, saying he was stressed and wished to take unpaid leave (paragraph 53). The claimant also attended on 11 May 2018 but said he was stressed and unable to do his duty (paragraph 54). On 15 May 2018 the claimant wrote to Amy James of the respondent's legal department making allegations of racism (paragraphs 55 – 57). From 17 May to 8 August 2018, the claimant was signed off sick as a result of anxiety and depression and work related stress disorder (paragraph 58).

35. A further review meeting took place in June 2018. As set out in Mrs Gupta's letter of 13 June 2018, the claimant's termination date was extended to 31 July 2018 ("the third extension"). She indicated that Ms James had advised her that she had agreed this extension with the claimant, to give her time to consider his allegations. A BAHS report of 13 July 2018 opined that the claimant's ongoing work related issues with the respondent appeared to be the barrier to his return to work at present and that it was likely that his underlying medical condition satisfied the statutory definition of disability. The author of the report was unable to give a timescale for his return to work. The ET noted that by this stage there appeared to be two impediments to him doing so: the ongoing sickness absence that was being managed by Mrs Gupta and the complaints made to Ms James, which the claimant had chosen to pursue as a separate strand (paragraphs 59 – 62).

The claimant's appeal

36. By letter dated 19 July 2018 the claimant raised what he described as a "formal grievance" in respect of Mrs Gupta's 13 June 2018 letter (paragraph 63). The respondent subsequently decided to treat the letter as an appeal; an approach which the ET concluded was "not an unreasonable course as despite the title of the grievance, given its purpose was to challenge Mrs Gupta's termination decision, it appears more in the nature of an appeal" (paragraphs 75 – 77).

37. In summary, the issues raised in the claimant's letter were as follows. He said that he did not believe that British Airways were acting reasonably in treating the adverse effects of his conditions as sufficient reason for terminating his employment "either on 31 July or within the immediate

future having regard to my circumstances". He said that the circumstances, which had yet to be fully investigated by the respondent, included discrimination on grounds of his race and his disability. He said that his absence was directly linked to a "fume event" in 2016. He claimed that his doctor had been put under pressure by BAHS to sign him as fit for work earlier than she otherwise would have done. He alleged that the respondent had caused his ill-health by failing to deal with his ethical concerns and with racism, that there had been a failure to explore reasonable adjustments, a failure to propose a rehabilitation plan, no consideration had been given to a phased return to work and insufficient account had been taken of his disabilities. He suggested that any decision to dismiss him was a breach of the procedural expectations under the AMP and an act of direct race discrimination. He asked that the decision to dismiss him on 31 July 2018 be revoked (paragraph 63).

The fourth and fifth extensions of the termination date

38. By letter to the claimant dated 30 July 2018, the respondent postponed the termination date to 17 August 2018 ("the fourth extension"). This was at the claimant's request in order to allow medical information to be obtained (paragraph 67).

39. The BAHS report of 7 August 2018 concluded that the claimant remained unfit for flying duties and that it was not possible to give a timescale for his return to flying duties. Although noting that the claimant's health had improved, the author said their view "would remain guarded until I review his health again on 6th September 2018". It was accepted that the claimant was fit for ground duties "with the support of some adjustments" (paragraph 68).

40. At a meeting on 9 August 2018, in light of information indicating an improvement in his health and a request from the claimant to complete a short course of treatment, Mrs Gupta agreed to further extend the termination date, this time to 13 September 2018 ("the fifth extension"). Her confirmatory letter of 24 August 2018 said that she granted the extension "to allow you further support to continue with your treatment and to enable you to return to work". The letter also

reminded the claimant of his CTS registration and advised him to contact them, noting that he had told Mrs Gupta at their recent meeting that he had "still not participated with this service" (paragraphs 69 – 72).

41. The claimant undertook further ground duties in August 2018 (paragraph 73). Having previously expressed his thanks to her, on 30 August 2018 the claimant wrote to Mrs Gupta saying that it was wholly inappropriate and damaging to his mental health for her to threaten him with a potential termination date (paragraph 80).

42. A further BAHS report dated 5 September 2018, referred to the claimant having a medical condition of an endocrinological nature (diabetes) in relation to which he was likely to be regarded as a disabled person. The report said that he was fit to continue with ground duties and from 29 September 2018 would be fit to resume his flying role (paragraph 81).

The appeal hearing

43. Ms Houghton was the decision maker in relation to the claimant's appeal, which was heard on 5 September 2018. The claimant attended with a trade union representative. Prior to this date, Ms Houghton had made enquiries into matters raised by the claimant and had interviewed various witnesses. Amongst other points that he made at the appeal hearing, the claimant said that moving the termination dates had caused him extra anxiety and stress. When asked why he had not engaged with CTS, the claimant said that he just wanted to fly. After the hearing Ms Houghton conducted some additional enquiries (paragraphs 75 and 82 – 84).

The sixth extension of the termination date

44. The claimant met with Mrs Gupta for a further review meeting on 12 September 2018. Mrs Gupta described the indication from BAHS that he would be fit to return to flying from 29 September 2018 as "very good news" and agreed to extend his termination date to 13 December 2018 in light of this development ("the sixth extension"). It was agreed that the claimant would be

removed from CTS. These matters were confirmed in a letter to the claimant dated 28 September 2018, which described the extension as "to allow you time to return to your role as Cabin Crew". The claimant was informed that there would be a further review meeting in November 2018 to see how he was progressing (paragraphs 85 – 86).

45. In October 2018 there was a repeat of the ID issue. Mrs Gupta wrote to the claimant expressing her disappointment in light of the fact that she had reminded him to keep this up to date (paragraph 87). The claimant did not fly and had a further sickness absence. On 22 October 2018 he was admitted to hospital with a suspected stroke and was subsequently signed off work by his GP from 30 October to 26 November 2018 with anxiety and depression, work related stress, hypertension and diabetes.

Outcome of the claimant's appeal

46. On 24 October 2018 Ms Houghton wrote to the claimant indicating that she did not uphold his appeal. She said that she had been unable to identify any supporting evidence in relation to the alleged fume incident. She noted that the claimant had said that the extensions to his termination date had occasioned him stress but she "believed the extensions have been made in an attempt to accommodate management of your ongoing issues and medical conditions and to support you back into the workplace", as per the AMP. She considered the respondent was working hard to get the claimant back to work in his contractual role and that given "the length of your absence and previous medical assessments and prognosis I don't believe that the previous notices of termination date have been given unreasonably, even more so given that management have obviously kept an open mind and reviewed developments in your condition". Having made enquiries into the matter, she did not accept that any pressure had been put on the claimant's GP. She observed that as the claimant had consciously chosen not to engage with CTS, this had prevented him from being supported by the respondent in terms of finding suitable alternative roles. The opportunity he had been given to undertake ground duties prior to a return to flying was an appropriate rehabilitation

plan in the circumstances. Having reviewed the recent BAHS assessments (with the claimant's consent), she considered that the respondent had made reasonable efforts to properly assess his medical condition (paragraphs 89 – 91). The ET concluded that Ms Houghton had made proportionate enquiries into the various grounds on which the claimant sought to challenge his dismissal and rejected the claimant's contention that this was a whitewash (paragraph 92).

47. On 24 October 2018 the claimant wrote to Ms James again, setting out various complaints, primarily concerning allegations of racism (paragraph 93).

Events in November – December 2018

48. A BAHS report of 6 November 2018 recapped the recent history and concluded that the claimant was unfit for all duties at the present time. It was noted that he was awaiting an appointment with a specialist doctor (paragraph 94). A further review meeting took place on 7 November 2018, which the claimant attended with his union representative. Recent events and the appeal outcome were discussed. Mrs Gupta indicated that the termination date would remain as 13 December 2018, as the current prognosis was that the claimant was unfit for all duties. She suggested re-registering the claimant with CTS, which he agreed to. Mrs Gupta summarised the meeting in her letter to the claimant dated 15 November 2018. She noted: "I advised you that if anything changed in your health situation between now and the 13th December 2018, I would review the situation, which included the termination date set".

49. The ET observed that in the period prior to 13 December 2018 the claimant did not provide any further information about his health or "any other information which might have caused her to revisit the decision made" (paragraph 97). However, there were without prejudice discussions taking place with the respondent's legal department. On 11 December 2018, Ms James contacted Mrs Gupta to advise her to postpone the termination date for a short period until 21 December 2018. Mrs Gupta wrote to the claimant on 12 December 2018 giving this indication ("the seventh extension") (paragraphs 97 – 98).

50. On 18 December 2018 the claimant rang the respondent's operational control department to say that he was fit for flying duties. The ET's view was:

> "99. ...The Tribunal notes this appears to be inconsistent with the previous occasions when the Claimant returned to work after a long period of sickness absence, where that had been part of [a] planned return to work and began with a period of ground duties. No new medical information was offered. The Claimant must have known the Respondent could not simply roster him to fly and a BAHS assessment would be necessary. Furthermore, given the Claimant's poor health at this time and the numerous unresolved workplace issues he said were operating as a barrier to his return, his self-declaration of fitness to fly is very surprising."

51. As Mrs Gupta was on leave at this time, Ms Caruso Lorenzo, Area Manager, stepped in. She referred the claimant to BAHS to assess his fitness for flying. The ET described this as "unsurprising" given that the claimant had not resumed flying duties in more than two years (paragraph 100).

52. Ms Caruso Lorenzo asked Ms Langman, the Occupational Health Business Partner, to arrange a consultation with the claimant on 20 or 21 December 2018. Ms Langman spoke with the claimant five times, but he was unwilling to participate in an assessment (paragraphs 101 – 102).

53. The ET found:

> "103. ...The Claimant's rationale for refusing this assessment is difficult to understand. The fact of him being engaged in without prejudice negotiations would not act as a bar to him taking part in an occupational health process ... The Claimant's approach, declaring himself fit in circumstances where he knew the Respondent would need to verify that through BAHS and then refusing the assessment, appears to be a holding measure, intended to avert dismissal but not result in an immediate return to flying. Furthermore, in light of the medical evidence we will discuss below, we do not accept the Claimant's fitness to fly at this time."

54. Ms Caruso Lorenzo decided not to extend the claimant's termination date. The ET accepted her explanation for this, namely that the termination date had already been extended on a number of occasions, the claimant had not engaged with CTS or BAHS and had not given any basis for confidence that he would be able to return to and sustain his full contractual duties, in circumstances where engaging in the telephone assessment with BAHS was not overly onerous (paragraph 105).

55. On 21 December 2018 Ms Caruso Lorenzo wrote to the claimant referring to the recent events and advising him that given it was not possible to assess his fitness for a return to flying duties, the termination date would remain in place, so that this was his last day of employment

(paragraph 106).

56. In paragraphs 107 – 108 the ET explained that it found that the claimant was not in fact fit to fly when he reported as fit on 18 December 2018.

Unfair dismissal – the ET's conclusions

57. The ET found that the claimant was dismissed for incapability, a potentially fair reason~~s~~ for dismissal (paragraph 142).

58. The ET noted that the claimant had not flown after he began a period of sickness absence in August 2016, which was more than 2 years before his dismissal in December 2018 (paragraph 143). The ET concluded that there was "very little, as at 21 December 2018, to suggest that the Claimant was then able and willing to fly, or that such a position was about to be achieved". Reporting that he was fit to fly on 18 December 2018 was "immediately undercut by his refusal to participate in a BAHS referral" (paragraph 144). The ET noted that there had been various health obstacles that had prevented the claimant from returning to work over the period since August 2016, both physical illnesses and, from July 2018, stress-related issues (paragraph 145). The ET concluded that it was "satisfied the Respondent had reasonable grounds for its belief in the Claimant's incapability" (paragraph 146). There is no appeal against any of these findings.

59. The key parts of the ET's reasoning for present purposes were set out under the heading "Procedure". The contents of paragraphs 147 – 151 are directly relevant to Ground 1; and paragraphs 152 – 155 are central to Ground 3. In the circumstances it is necessary to quote these passages almost in full (with certain passages now underlined for emphasis):

> "147. Mr Duggan argued that the Respondent failed to apply its own absence management procedure or acted in breach of the same because this does not provide for a termination date to be set and then varied. It is certainly correct that there is no reference in the policy to dismissal dates being postponed. We note, however, that the Respondent's policy does not expressly exclude the variation of such dates and it is apparent, not least because it was done in several other cases, that this is part of how the procedure is applied in practice. Mr Duggan said that such an approach was fundamentally unfair because it placed an improper burden on a sick employee to prove that they were well in order to avoid dismissal. Whilst that may appear harsh, in substance it is in the nature of any employee's absence management scheme, that, once an employee has accumulated sufficient sickness absence to enter the process, then unless their health improves and they are able to return to work, they will likely face dismissal at some point.

148. In one respect the Respondent's approach is different to that followed by many employers, who make enquiries, set review dates, warn that dismissal may follow and then in the event there is no improvement after several such meetings, set a dismissal date which is not changed (save unless there is a successful appeal). In this case, when the Respondent did set a dismissal date, it then scheduled further review meetings before the dismissal took effect, at which it considered whether to vary the termination. It is important to note, however, the Respondent did not move immediately to give the Claimant notice of dismissal as soon as he entered Section 4. The Claimant began a period of sickness absence on 29 August 2016. There were then repeated BAHS referrals and review meetings. Only on 31 August 2017 (12 months later) when despite an improvement in his health the Claimant still had not flown, was a termination date set. At that point the Claimant was given notice to expire on 5 January 2018, which would be more than 1 year and 4 months after he became sick and ceased flying.

149. Having set a termination date, the Respondent's intention was to review the position before the Claimant's employment expired. This is, in the Tribunal's experience, a somewhat unusual approach. Novelty does not, of course, mean there was unfairness. The Respondent's approach did have the benefit that if there were a change, an improvement in health and prognosis for a return to flying, then this could be taken into account without the need for the Claimant to appeal.

150. The Claimant said he found this approach caused him a great deal of worry and stress. He likened it to be be[ing] put on 'death row'. Mr Duggan was vigorous in arguing that the employee should not have the burden of proving his fitness to avoid dismissal. Our view is that this is a matter of form rather than substance. Long term sickness absence and not performing contractual duties will inevitably put an employee at risk of dismissal and the employer will not proceed fairly unless it clearly advises the employee of that prospect. This will almost inevitably be a cause of stress to the employee because the position will be that if their health does not allow a return to work then dismissal is likely to follow. The Claimant in this case was told that the termination date set might be postponed or revoked if it appeared likely or he were in fact able to return to his duties.

151. We cannot say the approach followed here, of setting a termination date and then putting that back to allow the Claimant a further opportunity to return to work was a procedure that no reasonable employer would adopt.

152. The Claimant was afforded a right of appeal against the decision to dismiss and exercised this. Notwithstanding the debate over whether this was a grievance or appeal, for the reasons set out above we found it was in substance an appeal ... The Claimant's grounds of appeal were set out in his letter of 19 July 2018 and developed at the hearing on 5 September 2018 ... We were satisfied that the Claimant was given a full and fair opportunity to challenge Mrs Gupta's decision, albeit much of what he set out did not directly address the decision she had made and her reasons for that. We were not persuaded the appeal was a whitewash, on the contrary and given a widely-drawn challenge to his termination, Ms Houghton made reasonable enquiries and came to a decision which was reasonably open to her.

153. Subsequent to the appeal and following a late extension of termination, whilst the parties had without prejudice discussions, the Claimant declared himself fit to return to flying ... Mr Duggan said the dismissal was unfair because the Claimant did not have a right of appeal against Ms Caruso Lorenzo's decision, the grounds of which appeal would have been that she should have contacted the Claimant and told him that his employment would be terminated if he refused to speak with BAHS and / or that she should have postponed his BAHS referral and termination until after Christmas and / or pending the outcome of the without prejudice negotiations.

154. We were not persuaded the dismissal was unfair because there was no subsequent right of appeal, with respect to Ms Caruso Lorenzo's decision. This latter decision was merely not to interfere with the decision to dismiss previously made by Mrs Gupta, against which the Claimant had appealed, unsuccessfully. The possible new grounds identified by Mr Duggan added very little to what had gone before, as they did not address the Respondent's reason for terminating the Claimant's employment, namely incapability due to sickness absence and because he had not returned to flying. The Claimant already knew his employment was about

> to terminate and did not need to be told this again. Whilst the Respondent might choose to extend employment to allow for without prejudice negotiations (this was the reason the Claimant gave for declining the BAHS assessment) it was under no obligation to do so. The Claimant had already exercised his right of appeal against the substantive decision to dismiss.
>
> 155. We are satisfied the Respondent followed a fair procedure."

60. The ET went on to indicate that if they had found that the dismissal was unfair because the claimant was not afforded a subsequent right of appeal, it would have found that there was no prospect of such an appeal being upheld (paragraph 156).

61. The ET declined to find that the claimant's illness was caused by any culpable behaviour by the respondent. It observed that in so far as the respondent had been expected to go the "extra mile", it "did so by waiting for more than 2 years of absence from flying duties before dismissal" (paragraph 159). The ET commented that this was "a very lengthy absence and certainly not a case where the Respondent could be said to have rushed to dismissal" (paragraph 160).

62. The ET then set out further conclusions relating to the fairness of the dismissal in paragraphs 157 – 166 under the heading "Fairness Generally". There is no free-standing appeal against any of these findings. The ET's reasoning included the following (with underlining now added for emphasis):

> "161. The Respondent delayed before first setting a termination date and then postponed this several times. We are satisfied that the reason for the delay and the extensions in this case was in order to give the Claimant a further opportunity to demonstrate that he was able to fly. The Respondent was not rigid in its approach. When the Claimant reported he was undergoing treatment or a new investigation was to take place, his dismissal was postponed to await the outcome of this...
>
> 162. The Respondent made appropriate enquiries with respect to the Claimant's health. He was assessed by the Respondent's occupational health advisors on a regular basis. The information he provided was taken into account. When the Claimant advised of medical treatment he was undergoing, his employment was extended to allow for this and for any new information bearing upon his health and prognosis to be obtained. We are satisfied that reasonable enquiries were made.
>
> 163. The reason the Claimant wanted a further extension after 21 December 2018 was not due to his health, rather it was because of the ongoing without prejudice negotiations. Whilst the Respondent might agree to extend for that purpose, it was under no obligation to do so. It was not unreasonable for the Respondent to treat without prejudice discussions as a separate track and not one that need hold up the proper application of its attendance management process.
>
> ...
>
> 165. In terms of whether the Respondent waited long enough before dismissing the Claimant, we remind ourselves that on this question as on all aspects of the decision to dismiss for incapability, the band of reasonable responses applies. Only if we conclude that no

> reasonable employer would have considered this period sufficient is the dismissal unfair for that reason. We cannot say the period waited in this case was too short or that a good reason for a further extension emerged prior to termination."

63. The ET also found that the claimant's absence affected the respondent's staffing resource and that after two years the impact would have been significant (paragraph 164). As regards suitable alternative employment, the ET referred to the fact that the claimant was given the benefit of CTS, but did not engage with it and there was "not, however, much that can be done in a case where the employee has no interest in pursuing alternatives" (paragraph 166).

64. Overall, the ET was satisfied that the decision to dismiss was within the band of reasonable responses (paragraph 167).

The legal framework

65. We have already noted that the ET found that the claimant's dismissal was for a potentially fair reason, namely incapability.

66. As the ET reminded itself at paragraph 115 of the Reasons, section 98(4) of the **Employment Rights Act 1996** ("ERA") provides:

> "In any case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair having regard to the reason shown by the employer –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

67. It is agreed that the principles applicable to a medical incapability case were correctly summarised in the ET's Reasons at paragraphs 116 – 119 and 121, as follows:

> "116. In a case where the employee is incapable of doing their job by reason of ill health, the basic question to be answered when looking at the fairness of the dismissal is, in all the circumstances, whether the employer can be expected to wait any longer before dismissing and, if so, how long.
>
> 117. The employer will be expected to consult the employee about their ill health, the effect this has on their ability to do their job, how this might change in the future and any alternative role the individual might undertake instead: see **East Lindsey District Council v Daubney** [1977] IRLR 181 EAT.
>
> 118. Factors which may be relevant to incapability cases may include:

> 118.1 whether steps were taken to clarify the nature of the employee's ill health, the prognosis and prospects for a return to work;
>
> 118.2 whether support could be provided which would assist with a return to work;
>
> 118.3 the effect the employee's absence has on other employees in the business, the needs and resources of the employer;
>
> 118.4 whether there was any suitable alternative employment.
>
> 119. Where an employer's conduct is alleged to have caused the employee's ill-health that might require the employer to 'go the extra mile' in finding alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable, but it does not follow that a dismissal will be unfair; an employee in such circumstances will have their right to pursue a personal injury claim in the civil courts, which may include loss of earnings, the employment tribunal is trying a different issue, see **McAdie v Royal Bank of Scotland** [2007] IRLR 895 CA.
>
> 121. The function of the employment tribunal is to review the reasonableness of the employer's decision and not to substitute its own view. The question for the employment tribunal is whether the decision to dismiss fell within the band of reasonable responses, which is to say that a reasonable employer may have considered it sufficient to justify dismissal."

Failings at the appeal stage

68. Counsel agreed that the following passage in the judgment of Linden J in **Knightley v Chelsea & Westminster Hospital NHS Foundation Trust** [2022] EAT 63; [2022] IRLR 567 ("**Knightley**") accurately summarised of the effect of a failure to allow an opportunity to appeal a dismissal:

> "35. It will be noted that, at the fairness stage under s 98(4), the question is whether the employer acted reasonably or unreasonably in treating its reason for dismissal as a sufficient reason for dismissal. The statutory focus is on why the employer dismissed the claimant and the ET is called upon to decide whether, having regard to that reason, to the procedure which the employer followed and to the other relevant circumstances, dismissal was within the range of reasonable actions open to an employer ...
>
> 36. As far as the effect of failure to allow an opportunity to appeal against dismissal on the fairness of that dismissal is concerned, the availability of an appeal and, if so, what that appeal entailed in terms of its scope is part and parcel of the procedure relating to the dismissal and therefore relevant to an assessment of the overall fairness of the procedure which led to that dismissal, see *Taylor v OCS Group Ltd* [2006] EWCA Civ 702, [2006] IRLR 613, [2006] ICR 1602 (CA). By the same token, the lack of an opportunity to appeal does not necessarily or automatically render a dismissal unfair. Whether it does will depend on the circumstances of the particular case. An unreasonable failure to provide a right of appeal may mean that the dismissal is unfair but it may not: see, for example, *Moore v Phoenix Product Development Ltd* (2021) UKEAT/0070/20 at [43] and [45] and *Gwynedd Council v Barratt* [2021] EWCA Civ 1322, [2021] IRLR 1028, [2021] ELR 747 at [36] – [40] and [38] in particular. For example, it might not in a case where the case for dismissal is particular compelling and the preceding procedural steps were thorough and left no room for sensible challenge. It would be for the ET to judge this question, applying the range of reasonable responses approach."

69. **Knightley** was a long term sickness absence case where it was clear that the claimant had

not had an effective appeal, because her employer had not permitted her to appeal outside of the stated timescale for doing so. Mr Justice Linden held that the tribunal in that case had correctly looked at the procedure as a whole and had legitimately concluded that the procedure that was adopted was within the range of reasonable courses open to a fair employer (paragraphs 51 – 52).

70. The significance of a failure to adhere to a contractual right of appeal was considered by the Court of Appeal in **Westminster City Council v Cabaj** [1996] 399 ("**Cabaj**"). In that case the claimant's contract provided for an appeal against dismissal to be determined by a panel comprising three members of the council. The claimant's unsuccessful appeal against his dismissal for poor attendance was heard by a panel of two members of the council (rather than three). The EAT found that the provision of a two-member panel was a breach of the claimant's contract and that this was so fundamental a defect in the appeals process that an industrial tribunal could only decide that the dismissal was unfair. The Court of Appeal allowed the council's appeal and remitted the case. Lord Justice Morritt (with whom Hutchinson and Neill LJJ agreed) rejected the proposition that a failure to observe the contractual procedure *inevitably* meant that the dismissal was unfair. In setting out the approach that the tribunal should take on remission, Morritt LJ referred to the statutory questions that the tribunal was required to answer in an unfair dismissal case (then pursuant to section 57 of the **Employment Protection (Consolidation) Act 1978 1978**). He noted that if a potentially fair reason was established, the question to be asked pursuant to section 57(3) was "Did the employer act reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee?" (paragraph 28). Referring to **West Midlands Co-operative Society Ltd v Tipton** [1986] IRLR 112 HL he indicated that:

> "29. ... the relevance of the failure to entertain an appeal to which the employee is contractually entitled is whether the employee is 'thereby' denied the opportunity of demonstrating that the real reason for his dismissal was not sufficient. It is irrelevant to that question to consider whether the employer would have acted differently if he had followed the agreed procedure, for that is hypothetical. On the other hand ... it is relevant to consider whether the employer acted reasonably if he actually considered or a reasonable employer would have considered at the time of dismissal that to follow the agreed procedure would in the circumstances of the case be futile ...
>
> 30. Accordingly, on any remission the industrial tribunal would be bound to consider ... at least whether the failure of the chief executive to convene a meeting of an appeals tribunal consisting of three members of the city council impeded Mr Cabaj in demonstrating that the

> real reason for his dismissal was not sufficient and the reasons (if any) why the city council determined to dismiss Mr Cabaj without having observed the requirements of the disciplinary code. The industrial tribunal would then have to decide the three questions posed by section 57(3). For my part I do not think that it can be predicated that the industrial tribunal must inevitably answer all those questions in the sense which would justify the conclusion that the dismissal was unfair. They may but I do not think that they must." (Emphasis added.)

71. In the present case, the ET set out the passage from paragraphs 36 – 38 of the judgment of Bean LJ in **Gwynedd Council v Barratt** [2021] EWCA Civ 1322; [2021] IRLR 1028 ("**Gwynedd Council**"), at paragraph 120 of the Reasons. **Gwynedd Council** was a dismissal for redundancy case where the claimants had not been given an appeal as the governing body determined that it would make no difference as the school at which they taught was to be closed and no appeal panel would be able to reverse that position. The tribunal found that the dismissals were unfair and the EAT and the Court of Appeal dismissed the council's appeal. In light of the claimant's contention that the ET misdirected itself in applying the **Gwynedd Council** approach, it is necessary to set out what was said by Bean LJ:

> "36. There is no general rule that any dismissal on the ground of redundancy without an appeal must be unfair where no internal appeal mechanism is provided for in the contract of employment, as the Northern Ireland Court of Appeal held in *Robinson v Ulster Carpet Mills* [1991] IRLR 348, [1991] 7 NIJB 21. The court in that case attached importance to the fact that the employees' handbook, complied by the management in consultation with their trade union, expressly made provision for an internal appeal against dismissals for misconduct but not against dismissals for redundancy. *Robinson* is not of assistance in a case where an integral appeal mechanism is provided for in the contract of employment, or is incorporated into the contract of employment by statute, and the employee is nevertheless denied the opportunity to appeal.
>
> 37. Mr James relied on some dicta of Lady Smith, giving the judgment of the EAT sitting in Scotland in *Love v Taskforce (Finishing and Handling) Ltd* (2005) EATS/001/2005, [2005] All ER (D) 269 (Jun), unreported. She said
>
> > '31. We are satisfied that there is no rule, in a redundancy case, that the employee has a right to be accompanied at any consultation meeting. Nor is there any rule that a dismissal for redundancy will automatically be regarded as unfair on account of the absence of an appeal procedure provided in the event that there is one. The matter was specifically tested in the case of *Robinson* where three employees dismissed on grounds of redundancy claimed that they had been unfairly dismissed in circumstances which did not give them a right of appeal against the redundancy situation although employees dismissed for misconduct were afforded such a right. The Court of Appeal in Northern Ireland, taking account of the decisions in two Scottish cases, clearly determined that, in the absence of special facts, an appeal procedure was not required before a dismissal for redundancy could be found to be fair. Further, even in redundancy cases, the absence of an appeal or review procedure does not of itself make a dismissal unfair; it is just one of the many factors to be considered in determining fairness, as was determined in the case of *Shannon*. *Accordingly, it would be wrong to find that a dismissal on grounds of redundancy was unfair because of the failure to provide an employee with an appeal hearing*. Similarly it would be wrong to find that a dismissal on grounds of redundancy was unfair because of the failure to have an appeal hearing conducted by someone other

than the person who took the original redundancy decision.' [emphasis added]

> 38. The decision of the EAT remains unreported 16 years after it was given and is not even referred to in the six volumes which currently comprise *Harvey on Industrial Relations and Employment Law*. That suggests that it does not lay down a general principle. I do not agree with the proposition that in redundancy cases the absence of any appeal or review procedure does not of itself make the dismissal unfair – that is to say, if the original selection for redundancy was in accordance with a fair procedure the absence of an appeal is not fatal to an employer's defence. But the sentence I have italicised goes too far unless it is qualified by saying that it would be wrong to find a dismissal unfair *only* because of the failure to provide the employee with an appeal hearing. As Lady Smith had said in the previous sentence, the absence of an appeal is one of the many factors to be considered in determining fairness."

72. We return to the claimant's submission when we address Ground 3 below.

The appeal tribunal's approach

73. Pursuant to section 21 of the **Employment Tribunals Act 1996**, an appeal to the EAT lies only on a question of law.

74. It is very well established that decisions of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation: **DPP Law Ltd v Greenberg** [2021] IRLR 1016 ("**Greenberg**"), at paragraph 57(1). A tribunal is not required to identify all the evidence that it has relied on in reaching its conclusions of fact; and it is not legitimate for an appellate tribunal to reason that a failure by an employment tribunal to refer to a particular piece of evidence means that it was not taken into account: **Greenberg**, paragraphs 57(2) and 57(3). Where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal should be slow to conclude that it has not applied those principles and should generally do so only where it is clear from the language used that a different principle has been applied: **Greenberg**, paragraph 58.

Ground 1: discussion and conclusions

The claimant's submissions

75. The central thrust of Ms D'Souza's argument was that the ET had failed to recognise that the process operated by the respondent was a deviation from the AMP and, as such, a breach of the claimant's contract of employment. The terms of the AMP made clear that the policy could only be

varied by the specified process and not by a change in local practice. The ET should have asked itself whether a reasonable employer could have pursued a course of setting and varying the termination date on several occasions, where the collectively agreed contractually binding procedure made no provision for such a practice. In turn, the inevitable answer to this question, was that the employer's actions were outside the band of reasonable responses and the ET erred in failing to so conclude.

76. In support of this central point, Ms D'Souza emphasised that the contractual nature of the AMP and the limitations it prescribed on the implementation of any changes to the policy was not the subject of any express finding by the ET. In the circumstances, the ET had failed to give due weight to the breach of contract. She submitted that the AMP envisaged, in sequence and occurring on a single occasion: (i) a proposal to dismiss; (ii) a meeting to discuss that proposal; (iii) a decision to dismiss; and (iv) a right of appeal against that decision.

77. We clarified with Ms D'Souza at the outset of her submissions on Ground 1 that she alleged that there had been two breaches of the AMP, namely the point we have summarised in the previous two paragraphs and the absence of an appeal from the 21 December 2018 decision. She confirmed that she did not contend that the AMP had been breached in other respects. We consider the appeal point when we come on to Ground 3.

Alleged breach of contract

78. For the reasons that we will identify, we do not accept that the process adopted by the respondent involved a breach of the claimant's contract.

79. It is correct that the AMP became part of the claimant's terms and conditions (paragraph 12 above). It is also correct that the terms of the AMP could only be amended via the processes identified in the "Policy" section of the document (paragraph 14 above). However, as Ms Newton submitted, the AMP set out the framework for addressing circumstances where the employee was "unable to do their job to the standard reasonably required by British Airways due to the

employee's medical incapacity". In such circumstances the respondent was to follow the procedure set out in Section 4 of the policy (paragraph 18 above). Section 4 of the policy identified the steps that were to take place up to and including a decision to terminate an employee's employment, but the AMP did not purport to cover every eventuality, identify every step that a reasonable manager might take or deal with how a manager should react to circumstances arising after the termination decision had been made. Section 4.7 is in relatively brief terms. The proposition that a manager could *only* do that which was expressly spelt out in Section 4 without committing a breach of contract, as to do anything more than that must amount to an impermissible attempt to change the terms of the AMP, is unsustainable.

80. Whilst the position would be different (in contractual terms) if the respondent was to act in a way that was positively inconsistent with or contrary to the AMP, we do not consider that this was the case here. The policy envisaged a decision, in the singular, being made to terminate an employee's employment, but did not prohibit or preclude a manager, in the reasonable exercise of their discretion, from deciding to postpone the date on which that termination took effect or otherwise reacting to developments, in particular to accommodate the reasonable requests and changing circumstances of the employee. As the ET correctly recognised in paragraph 147 of the Reasons (paragraph 59 above), the respondent's policy is silent on this point and does not exclude the extension of the termination date. If the claimant were correct on this point, a manager would have to rigidly apply a policy that did not permit the termination date to be reconsidered in any circumstances other than by an appeal. We do not consider that this is what the policy states or envisages. In the absence of the AMP specifically dealing with the eventuality of changed or changing circumstances after the decision was made to terminate the employment, the duty on the employer, in terms of unfair dismissal law, was to act reasonably. This was also reflected in the passage in the "Principles" section of the document that we have quoted at paragraph 15 above.

81. Importantly, in this instance Ms D'Souza did not suggest that there was any breach of Section 4 of the AMP in relation to the steps that had been taken up to and including the decision

being made on 31 August 2017 to terminate the claimant's employment (paragraph 77 above).

82. Accordingly, there was no error of law on the part of the ET in not finding that the respondent was in breach of contract in extending the claimant's termination date on a number of occasions after the notice of termination had been given.

83. There is also a second answer to the claimant's contention. Even if postponing the termination date after the notice of termination had been given was a deviation from the AMP (contrary to our primary conclusion set out above), the ET found that in this instance the parties had agreed to extend the termination date, reasoning as follows:

> "171. We are satisfied that on 13 December 2017 and subsequently, when the Respondent told the Claimant that his termination was varied to a later date, this is something he agreed to. Later in the chronology, two of the extensions were proposed by the Claimant himself.
>
> 172. On all occasions, up to 21 December 2018, both parties continued to perform the contract and conducted themselves as though bound by the same, which evidences several agreements having been reached to vary the termination, by postponing it to take effect on a later date.
>
> 173. Having been given a longer period of notice in the first instance than was required under his contract of employment and the termination date later having been varied by consent, there was no breach of contract."

84. These findings were made in relation to the ET's rejection of the wrongful dismissal claim, but the conclusion that there was no breach of contract in respect of the extensions to the termination date is also pertinent to the Ground 1 argument. There is no live appeal against the ET's finding in paragraph 173 that there was no breach of contract; an attempt to appeal the rejection of the wrongful dismissal claim did not survive the sift and there was no renewal application made thereafter. We also note that after Ms Newton raised this point in her oral submissions, Ms D'Souza offered no rejoinder to it in her Reply.

85. Accordingly, we reject the premise of Ground 1, namely that the extensions to the claimant's termination date constituted a breach of his contract.

The grant of the extensions and the band of reasonable responses

86. Even if the extensions to the termination date amounted to a breach of the claimant's contract of employment (contrary to the ET's finding and to our primary conclusion above) the

error of law would not be a material one. We are quite clear that the ET had full regard to the substantive position in terms of the repeated extensions to the termination date and the disadvantage in terms of stress that the claimant said this caused him, in lawfully concluding that the procedure adopted by the respondent was within the band of reasonable responses. We set out our reasons in the paragraphs that follow.

87. Ms D'Souza rightly accepted that if the procedure adopted by the employer in respect of a dismissal involves a breach of contract, it does not necessarily render the procedure outside of the range of reasonable responses or the dismissal unfair; this will depend upon the tribunal's evaluation of all of the relevant circumstances.

88. Save in relation to Ground 3 (which we address separately below), no complaint is made of the ET's self-directions on the law in respect of the unfair dismissal claim. The ET correctly asked whether the procedure adopted by the respondent of setting a termination date and then putting it back to allow the claimant a further opportunity to return to work was a procedure that no reasonable employer would adopt: paragraph 151, ET's Reasons (paragraph 59 above).

89. Even if there had been a breach of contract, there would have been no warrant for the ET to pose the range of reasonable responses question in the narrow way formulated by Ms D'Souza ("whether a reasonable employer might [have] pursued such a practice in circumstances where its collectively agreed contractually binding procedure made no provision for such a practice (and where deviation from the prescribed provisions of the policy was only possible in defined circumstances, which were not fulfilled in this case"). The tribunal would need to examine whether the procedure adopted was within the band of reasonable responses in light of all the relevant facts and circumstances, rather than pose the question that it asked itself in a way that focused upon one particular aspect.

90. Furthermore, it is clear that in this instance the ET had full regard to the claimant's contention that the procedure adopted had occasioned him a great deal of worry and stress: paragraph 150 of the ET's Reasons (paragraph 59 above).

91. In assessing this aspect and the fairness of the respondent's approach, the ET rightly focused on how the policy operated in "substance": paragraphs 147 and 150 of the ET's Reasons (paragraph 59 above). In these passages the ET explained why it concluded that the claimant's position was not materially different to other circumstances where an employee is on long term sickness absence, not able to perform their contractual duties and aware of the prospect of dismissal unless their health improves.

92. The following features are also significant:

i) The decision to terminate the claimant's employment was made on 31 August 2017. The claimant did not allege that any breach of policy or contract was involved at that stage. It was accepted, or at least not disputed, that the Stage 4 steps were followed. Furthermore, the ET found that the respondent only moved to give the claimant notice of dismissal after he had been on sickness absence and had not flown for over a year; after there had been repeated BAHS referrals and a number of review meetings between the claimant and his line manager; and that the date of termination then given (5 January 2018) was more than 16 months after he became sick and ceased flying: paragraph 148 of the ET's Reasons (paragraph 59 above);

ii) The ET found as a fact that the reason for the delay and the extensions in his case was in order to give the Claimant a further opportunity to demonstrate that he was able to fly: paragraph 161 of the ET's Reasons (paragraph 62 above). This finding is amply borne out by the circumstances in which each extension was granted. The position is detailed in our earlier account of the ET's findings of fact. However, in summary: the first extension was to give him a chance to show that he could fly again in circumstances where his health had improved and he had recently undergone a return to work course (paragraph 31 above); the second extension was to give him a further opportunity to show this, as he had not been able to fly because his ID and CRB had expired (paragraph 33 above); the third extension was to enable Ms James to consider the claimant's concerns (paragraph 35 above); the

fourth extension was at the claimant's request to enable him to obtain certain medical information (paragraph 38 above); the fifth extension followed a request from the claimant to be permitted to complete a course of treatment (paragraph 40 above); the sixth extension was to give the claimant a chance to return to his contractual role after an improvement in his health (paragraph 44 above); and the seventh extension was to allow for the without prejudice discussions to take place with the legal department (paragraph 49 above);

iii) In the circumstances it is clear that each of these extensions was for the claimant's benefit and to his advantage; and

iv) It was in any event fair and appropriate for the respondent to satisfy itself of the up to date position in respect of the claimant.

93. In December 2018, the claimant's central concern was not that his termination date had been repeatedly extended, but rather that the respondent was not going to further extend it beyond 21 December 2018. As to this, the ET legitimately concluded that they could not say that no reasonable employer would have considered the period sufficient in the circumstances: paragraph 165 of the ET's Reasons (paragraph 62 above). This conclusion was undoubtedly open to the ET; indeed it was amply supported by the evidence. In particular:

i) The decision to terminate his employment had been made in the circumstances we have just referred to at paragraph 92(i) above;

ii) The claimant had already had the benefit of seven extensions to the termination date, spanning nearly a year in total (paragraph 92(ii) and (iii) above);

iii) The respondent had made appropriate enquires with respect to the claimant's health: paragraph 162 of the ET's Reasons (paragraph 62 above) and had reasonable grounds for its belief in the claimant's incapability: paragraph 146 of the ET's Reasons (paragraph 58 above);

iv) The claimant had not provided any further information about his health or any other information that would have caused his manager to revisit the termination date set for

December: paragraph 97 of the ET's Reasons (paragraph 49 above);

v) The reason the claimant wanted a further extension was not due to his health, but was because of the without prejudice negotiations; it was a holding measure intended to avert dismissal, but not to result in an immediate return to flying: paragraphs 103 and 163 of the ET's Reasons (paragraphs 53 and 55 above);

vi) The claimant's rationale for declining to engage with BAHS in respect of an assessment on 20 or 21 December 2018 was "difficult to understand": paragraph 103 of the ET's Reasons (paragraph 53 above). He had not engaged with BAHS and had not given any confidence that he would be able to return to and sustain his contractual duties: paragraph 105 of the ET's Reasons (paragraph 54 above);

vii) As at 21 December 2018 there was "very little ... to suggest that the Claimant was then able and willing to fly, or that such a position was about to be achieved": paragraph 144 of the ET's Reasons (paragraph 58 above); and

viii) There had been no failure to make reasonable adjustments, as the ET found at paragraph 194 of the Reasons.

94. As regards the specific contention at paragraph 6.2.7 of the Amended Grounds of Appeal (which was given much less emphasis than paragraph 6.2.6 in Ms D'Souza's oral submissions), the statement that the respondent operated a policy of dismissing first and then consulting is an inaccurate characterisation of the ET's findings, as we have identified at paragraph 92(i) above.

95. Accordingly, we do not uphold the claimant's Ground 1.

Ground 3: discussion and conclusions

The claimant's submissions

96. Ms D'Souza submitted that the failure to afford the claimant a right of appeal from the 21 December 2018 decision was a breach of contract, as paragraph 2.3 of the AMP required there to be an appeal from the decision to terminate the employee's employment. In this regard she noted that

the ET had referred to Section 4 of the AMP but not to paragraph 2.3 in the Reasons. She submitted that the ET had erred in law in failing to recognise this breach of contract and, in turn, had erred in failing to apply the test identified in **Cabaj** of inquiring whether the absence of the appeal denied the claimant the opportunity of demonstrating that the real reason for his dismissal was not sufficient. She said that if this question had been asked, it could only have been answered in the claimant's favour.

97. She also submitted that no reasonable tribunal could have concluded that the dismissal was fair in circumstances where there was a "gross disparity of time" between the appeal that the claimant had been permitted and the subsequent termination of his employment on 21 December 2018. She said that there had been relevant developments and material changes of circumstances in the interim, so that fairness required the claimant to be afforded a second appeal as the grounds of appeal would have been "completely different". In support, Ms D'Souza listed the following: that the claimant had successfully returned to ground duties in August 2018; that the BAHS report of 5 September 2018 had identified for the first time that he was likely disabled on account of his diabetes and had recommended a supported return to flying programme; he had been declared fit to fly as at 28 September 2018; he had returned to work for flying duties on 22 October 2018, but his ID pass did not work; he had suffered a suspected stroke on 22 October 2018; and there was material suggestive of the respondent having failed to take account of the supported return to flying programme. Ms D'Souza also said that the failure to give the claimant a further appeal compounded the failure of Ms Caruso Lorenzo to meet with him before making her 21 December 2018 decision.

Alleged breach of contract

98. We reject the proposition that the failure to afford the claimant an appeal from the 21 December 2018 decision was contrary to the AMP and a breach of contract. The right of appeal in paragraph 2.3 of the AMP is in respect of "the decision to terminate employment in Section 4 of the policy". The decision to terminate the claimant's employment was made on 31 August 2017

(paragraph 29 above). He was offered an appeal against that decision, albeit he did not exercise the right of appeal until after receiving the 13 June 2018 letter granting the third extension. However, it is plain both from the terms of the claimant's appeal document and from the decision conveyed in the outcome letter, that what was considered at that stage was an appeal against the decision to dismiss the claimant, as opposed to an appeal focused on the decision to extend the termination date by a month (paragraphs 37, 43 and 46 above). Allowing the claimant to appeal the decision to dismiss him by way of his 19 July 2018 letter was a sensible and flexible approach on the part of the respondent (in circumstances where paragraph 2.2 of the AMP indicated that variations to the timescales stated in the policy could be agreed between the parties).

99. Furthermore, the ET found that this afforded the claimant an appeal against the decision to dismiss him and that he was given a full and fair opportunity to challenge the decision to dismiss him: paragraph 152 of the ET's Reasons (paragraph 59 above). The fairness of this appeal is not challenged and we have already noted its wide-ranging scope (paragraph 98 above). In the circumstances, the ET was perfectly entitled to find, as it did at paragraph 154 of the Reasons that the claimant "had already exercised his right of appeal against the substantive decision to dismiss him" (paragraph 59 above). We consider that there was no error of law in this conclusion.

100. On 21 December 2018 Ms Caruso Lorenzo simply decided that the claimant's termination date should not be further postponed. This was not the decision to terminate his employment, within the meaning of paragraph 2.3 of the AMP; that decision had already been made.

101. In the circumstances, the contention that the ET erred in law in not applying the approach identified in **Cabaj** to the failure to provide an appeal to which the claimant was contractually entitled, simply does not arise. However, for completeness we also indicate that it is clear from the ET's findings that it took the view that the claimant was not denied the opportunity of demonstrating that the real reason for his dismissal was not sufficient. It found that the claimant was given a full and fair opportunity to challenge the decision to dismiss him (paragraph 59 above). This conclusion was entirely consistent with the breadth of the appeal and the issues addressed by Ms

Houghton, as we have already described (paragraphs 37, 43 and 46 above). Furthermore, as we refer to at paragraph 104 below, the ET found that the possible new grounds that Mr Duggan indicated the claimant would have raised at that stage "added very little to what had gone before": paragraph 154, ET's Reasons (paragraph 59 above).

102. In any event, as is apparent from paragraph 30 of Lord Morritt's judgment in **Cabaj** (paragraph 70 above), in a case where an appeal has been denied in breach of a contractual term, it is still necessary to place this in the context of and ask the statutory question posed by section 98(4) **ERA 1996**. We have underlined the relevant passage. Ms D'Souza acknowledged as much and also accepted that, as identified in **Knightley**, the tribunal has to consider the fairness of the procedure that was adopted as a whole, applying the band of reasonable responses approach (paragraph 68 above). This is what the ET did; and, as we come on to address below, the ET's conclusion that the procedure adopted by the respondent was within the range of reasonable responses was amply supported by its findings.

Reasonableness of the respondent's procedure

103. We are not persuaded that in these circumstances fairness required that the claimant be given a second appeal. Still less is there any basis for the contention that no reasonable tribunal could have found, as this ET did, that the procedure adopted by the respondent was within the range of reasonable responses.

104. We have already observed that the appeal which the claimant did pursue was an appeal against the decision to terminate his employment, not simply an appeal against the particular extension granted at that stage (paragraph 98 above). We have noted that the ET found that the claimant did have a full and fair appeal against the decision to dismiss him (paragraph 99 above). Furthermore, in arriving at her decision, Ms Houghton did not confine her consideration to events before 19 July 2018 (the date of the letter instituting the appeal); at the claimant's request, she took into account the BAHS reviews of 5 September and 9 October 2018, as is apparent from the ET's

citation from her outcome letter at paragraph 91 of the Reasons. We have already indicated that there was no error law in the ET's conclusion at paragraph 154 of the Reasons that the claimant "had already exercised his right of appeal against the substantive decision to dismiss him" (paragraph 104 above).

105. Ms D'Souza argued that the grounds of appeal that the claimant would have wished to raise in December 2018 were "completely different" to those raised in the appeal that he was afforded. However, to support that proposition she sought to advance a new case which was not argued before the ET. It was not open to her to do so. Paragraph 153 of the ET's Reasons (paragraph 59 above) identified the contentions that Mr Duggan said the claimant wished to raise at a further appeal. The ET proceeded to evaluate those matters, arriving at an unimpeachable and reasoned conclusion in paragraph 154 that these points added "very little to what had gone before" and did not address the Respondent's reason for terminating the claimant's employment.

106. The ET cannot be faulted for failing to address a case that was not advanced before it. There is no suggestion in the Reasons that any of the additional matters that Ms D'Souza said constituted a material change of circumstances were put to the ET. Furthermore, we have been shown no evidential basis to support counsel's suggestion that the claimant would have raised the matters she listed, had he been granted a further appeal.

107. In light of the ET's findings that the claimant already knew his employment was about to be terminated and did not need to be told this again (paragraph 154 of the ET's Reasons; paragraph 59 above); and the reason why he sought a further extension in December 2018 was not because of his health, but with a view to furthering the without prejudice negotiations (paragraph 163 of the ET's Reasons; paragraph 62 above), there is nothing in the supporting point that Ms Caruso Lorenzo had not met with the claimant.

108. Lastly, there is also nothing in the contention that the claimant would have been able to demonstrate that he was fit for work if he had been granted an appeal in December 2021; the ET found as a fact that he was not fit for work at this time: paragraphs 103 and 107-108 of the ET's

Reasons (paragraphs 53 and 56 above).

109. Accordingly, we do not uphold the claimant's Ground 3.

Outcome

110. For the reasons that we have set out above, we reject both Ground 1 and Ground 3. In the circumstances we will dismiss the appeal.