

States of Guernsey

**EMPLOYMENT & DISCRIMINATION TRIBUNAL**

APPLICANT: **Captain Yvonne Burford**
 Represented by: Advocate Clare Tee, Ashton Barnes Tee

RESPONDENT: **FlyBe Limited**
 Represented by: Jason French-Williams, Eversheds

Decision of the Tribunal Hearing held on 13th and 14th November 2008.

Tribunal Members: Ms Carol Harvey (Chair)
 Mr Peter Woodward
 Ms Caroline Latham

UNANIMOUS DECISION

1. In relation to the claim of Unfair Dismissal, having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal found that the Applicant was dismissed under Section 5(2)(a) of the provisions of The Employment Protection (Guernsey) Law, 1998 as amended, Captain Yvonne Burford was unfairly dismissed by the Respondent, due to a technical breach by the Respondent of a fair process of such standing that their behaviour cannot be judged as fair and reasonable within a reasonable range of responses.
2. In relation to the claim of Sex Discrimination, having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal found that, under the provision of the Sex Discrimination (Employment) (Guernsey), Ordinance 2005, and The Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was not directly; or indirectly discriminated against.

Amount of Award (if applicable):

When calculating the award under Section 22 of the Employment Protection (Guernsey) Law, 1998, as amended, whilst the Tribunal recognised that the Applicant did not receive pay during the six months prior to the termination of her employment, it considered it just and equitable to use its discretion under Section 22(2)(b) of the Law to determine that the sum equal to six month's pay for the Applicant was £27,508.50.

However, the Tribunal further concluded it would be just and equitable to also use its discretion under Section 23(2) of the Law, to reduce this amount by 80%. This reduction is made in consideration of the repeated efforts made by the Respondent in accommodating the Applicant's requests for additional unpaid leave and in light of the Applicant's significant contribution to the ending of the contract.

Therefore, in relation to the complaint of Unfair Dismissal, the Tribunal makes an award in the amount of £5, 501.70

In relation to the complaint of Sex Discrimination, the Tribunal makes no award.

Ms Carol Harvey

16 December 2008

.....
 Signature of the Chairman

.....
 Date

NOTE: Any award made by a Tribunal may be liable to Income Tax
 Any costs relating to the recovery of this award are to be borne by the Employer

Any Notice of an Appeal should be sent to the Secretary to the Tribunal within a period of one month beginning on the date of this written decision.

The detailed reasons for the Tribunal's Decision are available on application to the Secretary to the Tribunal, Commerce and Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF

The Laws referred to in this document are The Employment Protection (Guernsey) Law, 1998, as amended and the Sex Discrimination (Employment) (Guernsey) Ordinance 2005.

Extended Reasons

1.0 Introduction

- 1.1 The Applicant, who was represented by Advocate Clare Tee, gave witness testimony, which was supported by documentary evidence (combined bundle P206 – P225 refers).
- 1.2 Documentary evidence in support of the Applicant was read to the Tribunal on behalf of Mr Gary Elson (combined bundle P226 – 228 refers).
- 1.3 The Respondent was represented by Mr Jason French-Williams.
- 1.4 Mr French-Williams called the following witnesses to give testimony: -

Mr Paul Turner, HR Business Partner, Flight Operations
Captain Nick Brown
Captain Ian Baston
Captain John Alsford (witness statement only)

These witnesses were supported by documentary evidence (combined bundle 184 - 205 refers).

Documentary evidence in support of the Respondent was read to the Tribunal on behalf of Captain John Alsford.

- 1.5 At the beginning of the proceedings the Chair clarified with the parties which elements of the Sex Discrimination Ordinance were in question, namely: -

Direct Discrimination (Section 1(a))
Indirect Discrimination (Section 1(b))
Victimisation within the meaning of the Ordinance (section 5(d))
Dismissal due to sexual discrimination (Section 6 (2)(b))

- 1.6 The representatives of the parties confirmed that they would be asking the Tribunal to consider the claim made by the Applicant under the following elements of the Sex Discrimination Ordinance:

Direct Discrimination (Section 1(a))
Indirect Discrimination (Section 1(b))
Dismissal due to sexual discrimination (Section 6(2)(b))

- 1.7 It was further clarified that the issue of alleged Constructive Dismissal was grounded in both Sex Discrimination allegations and non- discrimination issues.
- 1.8 In respect of the discrepancy in the stated termination dates both parties confirmed that there was no immediate resolution to this issue, but that they were of the opinion it would become apparent through the giving of evidence.

- 1.9 It was noted by the Chair that there was no agreement on the amount of gross salary. The Chair therefore advised the parties' representatives that should the Tribunal find that it is appropriate for an award to be made, in relation to either claim, then this would need to be addressed. The parties were further advised to give some consideration to their cases, in respect of this matter, prior to the closure of the Tribunal.

2.0 Facts Found by the Tribunal

- 2.1 The Applicant, Captain Yvonne Burford, was employed by Flybe Limited from 30th January 1998, at the time of which the name of the Respondent was Jersey European Airways (UK) Limited. (P18 of the bundle refers).
- 2.2 Captain Burford was employed as a pilot, initially as a First Officer on the BAe 146 aircraft. She was promoted to the rank of Captain on that aircraft after approximately eighteen months.
- 2.3 In 2002 the Captain Burford transferred to the Dash 8 aircraft as Captain.
- 2.4 That Captain Burford's working schedule typically started and ended in Guernsey and that as such she was eligible to bring a complaint under Part II Section 4 of the Law despite clause 26 of the Contract of Employment stating that it should be interpreted in accordance with the laws of England.
- 2.5 Captain Burford commenced her maternity leave in May 2005 the length of which was as defined under UK statutory entitlement.
- 2.6 The options open to Captain Burford regarding her period of Maternity Leave are outlined in an email to her, dated 21st June 2005 from Mr Howard Mascall (P67 of the bundle refers).
- 2.7 The original agreed return to work date was 18th June 2006.
- 2.8 In November 2005 Captain Burford requested an unpaid extension to the Maternity Leave (P68 of the bundle refers).
- 2.9 Captain Ian Cheese on behalf of the Respondent acceded to the Applicants request in January 2006 and a revised return to work date of 18th October 2006 was agreed (P71 of the bundle refers).
- 2.10 A further extension was requested by Captain Burford in March 2006 in order that she could complete her Open University course which was due to finish in the second half of October 2006 (P72 of the bundle refers).
- 2.11 The Respondent acceded to Captain Burford's request to extend the Maternity Leave to the end of October 2006.
- 2.12 Captain Burford wrote to Captain Nick Brown in July 2006 requesting a further year of unpaid maternity leave (P76 of the bundle refers).
- 2.13 Following discussions and further negotiations during the period July 2006 to 12th October 2006 the Respondent agreed to granting Captain Burford a 13 month Maternity Career Break from 1st November 2006 to 31st November 2007, with a return to work date of 1st December 2007. (Ps 83, 86-89 & 93

of the bundle refer).

- 2.14 Captain Burford's level of seniority would be frozen for the period of the Maternity Career Break and "all bidding rights" commensurate with the seniority number would be granted. (P93 of the bundle refers).
- 2.15 Captain Burford accepted the terms of the Maternity Career Break via an email dated 29th October 2006 (P105 of the bundle refers).
- 2.16 During September 2007, Captain Burford discussed her return to work with the Respondent. Due to the scheduling of the next available and required Dash 8 Q400 course being January 2008, it was agreed in a letter from Captain Ian Baston that Captain Burford would defer her return to work until 7th January 2008. (P113 of the bundle refers).
- 2.17 Captain Burford put in place childcare arrangements in order that she could attend the course which was to be held in Exeter & Farnborough and arranged for her husband to take annual leave in order to assist her with looking after their child.
- 2.18 Following illness over the New Year period, at the beginning of January 2008 Captain Burford requested (via a telephone conversation) that her Maternity Career Break be extended by a further year.
- 2.19 On 4th January 2008 Captain Brown informed Captain Burford that she had been removed from the training course. In a subsequent discussion she was offered the options of either joining the January course during the second week or joining the February course.
- 2.20 Captain Burford declined this offer due to childcare commitments and requested that the Maternity Career Break be extended to the end of 2008, with a return to work date of January 2009.
- 2.21 Captain Ian Cheese wrote to Captain Burford on the 30th of January 2008 advising her that her Maternity Career Break had ended on 1st December 2007 but had been extended until 7th January 2008 and that she could apply for another career break in accordance with the normal Flybe Career Break policy. (P151 of the bundle refers).
- 2.22 Captain Burford responded to Captain Ian Cheese via email setting out her concerns on 31st January 2008 (P152 of the bundle refers).
- 2.23 Captain Burford notified Mr Howard Darby, a BALPA (British Airlines Pilots Association) representative, of the situation, in an email dated 31st January 2008 (P153 of the bundle refers).
- 2.24 Captain Ian Cheese replied to Captain Burford via letter on 4th February 2008, confirming that, following discussions with Mr Paul Turner, HR Advisor Flight Operations, the extended Maternity Career Break was not available. He also requested confirmation by the 14th February, if Captain Burford intended to take up the offer of a Standard Career Break.
- 2.25 Captain Burford responded to Captain Ian Cheese via email on 6th February 2008, stating that she felt it was unreasonable that she was being asked to resign.

- 2.26 That Captain Burford flew for Aurigny during February, whilst on her maternity career break and that this was permitted by Flybe.
- 2.27 On the 4th March 2008, Captain Burford received a letter from Mr Paul Turner offering a meeting with her nominated representative present, as she had referred the matter to BALPA.
- 2.28 In an email dated 4th March 2008, Mr Turner confirmed that the company assumed that the Captain Burford would not be returning to work at the end of the maternity career break as she had not applied for a career break and that the leaver process would now start.
- 2.29 Captain Burford forwarded a letter of resignation on 26th April 2008.
- 2.30 The letter of resignation was not accepted by the Respondent who stated that Captain Burford's employment had terminated on 14th February.
- 2.31 A post-termination grievance meeting was scheduled for 29th May 2008 by the Respondent and communicated to the Applicant.
- 2.32 Captain Burford, through her Advocate, advised the Respondent that she would not be attending the meeting in a letter dated 13th May 2008.

3.0 The Applicant's Case

- 3.1 The Applicant read from a prepared witness statement (P206 – P225 of the bundle refers). In her statement the Applicant confirmed her role, rank and length of service with the Respondent.
- 3.2 In her statement Captain Burford stated that in November 2005 she decided the 18th June 2006 would be too early to return to work, as she was still breast-feeding her son. At this time the Applicant wrote to Captain Ian Cheese (General Manager- Turboprops) requesting a four-month extension to her maternity leave. (P68 of the bundle refers).
- 3.3 She confirmed agreement was given to this request via a letter from Captain Cheese dated 17th January 2006, giving an extended return to work date of 18th October 2006 (P71 of the bundle refers).
- 3.4 Captain Burford's statement confirms that she wrote to Captain Nick Brown via email dated 1st March 2006 enquiring whether the four-month extension to her maternity leave could be extended further.
- 3.5 This request had been made as the Applicant stated that she was attending an Open University course and that it looked likely to finish in the second half of October 2006 and that she would be still breastfeeding her son, so it would be a challenging coordinating this with a training course on her return to work.
- 3.6 Captain Burford confirmed that the Respondent agreed to extend her maternity leave to the end of October 2006. As she was still breastfeeding her son and was concerned about the logistics of returning to work and attending a training course as her son was unhappy being looked after by anyone other than herself or her husband, she entered into further discussion about her return to work with Captain Brown. (P76 of the bundle refers).

- 3.7 A letter was received from Mr Don Darby, Personnel Manager for the Respondent at the time, in August 2006 confirming that the maternity leave would end at the October 2006 and that the best option after that would be for the Applicant to take a standard career break. (P83 of the bundle refers). Under the career break policy she would have to resign from her job and then reapply for it at the end of the career break with no guarantee that the job would still be available and no guarantee that any would still be offered to her. She also stated that should a job be offered to her then it would be as the most junior co-pilot on half the salary she was then currently entitled to.
- 3.8 In a letter to Mr Darby dated 21st August Captain Burford stated that because of the consequences for her of the standard career break she could not consider it as an option and that if no further unpaid maternity leave were available she would return to work on 1st November 2006. (P84 of the bundle refers). Further discussion followed between the Applicant, Captain John Alsford (Director Flight Operations) and the Director of Personnel, Mr Keith Hodgson. The Applicant confirmed that this resulted in the Respondent proposing that a career break, under the Company's current policy be granted but that the Applicants seniority within the pilot workforce would be unaffected. (P86 of the bundle refers).
- 3.9 Captain Burford responded, via letter, asking for further clarification regarding her situation should she not "pass" the interview or should there not be any vacancies in Guernsey. Following further email correspondence, the Applicant confirmed that she accepted that the Respondent could not guarantee a Guernsey base and stated that she would like to return to work as soon as possible commensurate with her son's development. She received a letter from Captain Alsford confirming that Keith Hodgson had recognised the special circumstances surrounding maternity care and had offered her an unpaid 13 month Maternity Career Break with a frozen seniority number. This was to be effective from 1st November 2006 to 31st November 2007.
- 3.10 In a letter to Captain Alsford dated 12th October 2006, further clarification was sought so as to ensure that she understood everything correctly. Following receipt of clarification of the points raised by Captain Alsford in a letter dated 23rd October 2006 (P103 of the bundle refers) Captain Burford stated she accepted and took the Maternity Career Break. At the end of her Maternity Career Break, around September 2007, Captain Burford discussed her return to work with Captain Brown and requested that it be deferred until 7th January 2008 as offered by Captain Brown, as this was when the next available course would be held. This was confirmed by the Respondent via a letter from Captain Ian Baston (P113 of the bundle refers).
- 3.11 Captain Burford explained that although she could have returned to work without attending a full training course, she believed it was reasonable for the Respondent to expect her to attend the training course, as she had only amassed 40 hours flying experience on the Dash 8-400 before going on maternity leave. Due to childcare needs, the Applicant stated that she arranged for her husband to take his annual leave to assist with childcare whilst she was on the course in the UK and booked accommodation. After being ill over the New Year period of 2008, Captain Burford stated that she was unable to complete some pre-course preparation and that this had put her under a lot of stress. On the 2nd January 2008, the Applicant confirmed that she telephoned Captain Brown and asked if the Maternity Career Break could be extended by one year, although she was aware that arrangements had been put in place for her to attend the course. Captain Brown agreed to make enquires.

- 3.12 Captain Burford stated that she was advised on 4th January 2008 that she had been taken off the course but that she was not provided with a reason for this. Following a number of telephone conversations with Captain Brown and Mr Paul Turner, she was advised that she had been put back onto the payroll and that she was surprised at this, as she thought she was still on her Maternity Career Break.
- 3.13 In response to being offered the training course in February, Captain Burford stated that due to her childcare commitments and the need to have the assistance of her husband, who was unable to rearrange his annual leave she would not be able to attend another course until January 2009 and requested that her maternity career break be extended to the end of 2008. She was surprised at the content of a letter dated 30th January 2008, from Captain Ian Cheese (P151 of the bundle refers), stating that she had declined the courses in January and February. She also confirmed that she was reluctant to take the Standard Career Break. Captain Burford confirmed she responded to this letter via email dated 31st January 2008 outlining her concerns (P152 of the bundle refers). She also emailed Mr Howard Darby a BALPA representative on 31st January 2008 advising that she may need to avail herself of the services of BALPA.
- 3.14 Captain Burford stated that she felt that the Respondent was “piling on the pressure” for her to take the standard career break which would in effect mean should would have to resign. Following the response from Captain Cheese stating that the position remains unchanged and that he would advise HR to commence the process Captain Burford stated she was unclear what this meant and requested clarification. (P158 of the bundle refers).
- 3.15 As the matter had been handed over to Mr Paul Turner, HR Business Partner the Applicant confirmed that she received a response from him outlining the position from the Respondents point of view. Namely that the maternity career break could not be extended and that as she had not applied for the standard career break it would be assumed by the Company that she would not be returning to work at the end of her maternity career break on 14th February and that the leaver process would now start (P162 of the bundle refers). Captain Burford replied to Mr Turner via email on 7th February confirming she would be happy to speak with him the following week and stated the reason she had not returned to work was due to them taking her off the course.
- 3.16 The next correspondence she had with the Respondent was via an email exchange on 4th March 2008 where it was suggested by the Respondent that it would be more appropriate to discuss the matter with her representative present as she had referred the matter to BALPA. Clarification was sought as to what was meant by the process and that the Respondent confirmed this related to Company procedures.
- 3.17 Captain Burford went on to state that she received no further communication from the Respondent over the next few weeks and that this made her very unsettled. She was of the opinion that the Respondent was deliberately avoiding communicating with her and keeping her in a state of limbo and ignorance. At this point she sought legal advice and wrote to the Respondent via her Advocate (P170 of the bundle refers).
- 3.18 As she did not receive a response to this letter Captain Burford confirmed that she resigned in writing via a letter dated 26th April 2008. She did not understand the response received from the Respondent stating that they did not accept her resignation and that her employment had been terminated on 14th February 2008 or why she should attend a grievance meeting as she had not raised a grievance.

- 3.19 Via a letter from her Advocate, dated 13th May 2008, making her position clear in relation to her resignation, the termination of employment and the fact that as she had not raised a grievance Captain Burford stated she advised the Respondent she would not be attending a grievance meeting.
- 3.20 In response to questions put by Mr French-Williams Captain Burford confirmed that she had requested several extensions to her maternity leave. It was also agreed that the Respondent had made considerable efforts to accommodate her needs and had taken the unprecedented step of providing a maternity career break which would maintain her seniority. During this period she was also permitted to fly for a local competitor.
- 3.21 In response to further questions Captain Burford reiterated that she wanted to return to work and to fly but also agreed that she was apprehensive about her return and taking the course, as she had concerns regarding her son and childcare provisions.
- 3.22 Captain Burford maintained that she did not know what was meant by “process” and that she did not take herself off the course or that she was given any reasons as to why she was taken off the course in January.

4.0 Testimony from Mr Gary Elson

- 4.1 Advocate Clare Tee read a prepared Witness Statement on behalf of Mr Gary Elson (P226 – P229 of the bundle refers).
- 4.2 Within the statement Mr Elson confirmed that he was the husband of Captain Burford and that he worked as an Air Traffic Controller at the Guernsey Airport. He also confirmed that Captain Burford had primary responsibility for the care of their son but that he assisted and continues to assist in between his shifts, which are on a four on two off basis.
- 4.3 Mr Elson confirmed the dates of Captain Burford’s maternity leave and those of the extensions that were subsequently granted, giving a return to work date of October 2006.
- 4.4 Mr Elson also confirmed that he made special arrangements to take the majority of his annual leave in one block during January and February 2008 so that he could accompany Captain Burford to England for the course to assist with childcare. As he had an entitlement of 40 days this meant he could accompany Captain Burford for the whole of the course.
- 4.5 Further confirmation was given regarding the timing and nature of Captain Burford’s illness over the New Year period of 2008 and that she made enquires around that time to see whether her maternity career break could be extended.
- 4.6 In his statement Mr Elson said Captain Burford had told him about a telephone conversation she had with Captain Nick Brown during which she was informed that she had been taken off the training course in January 2008.
- 4.7 Mr Elson further states that he still had to take most of the annual leave that had been booked in January and February 2008 although he was able to cover a few days for a colleague.

- 4.8 Mr Elson states that he is aware that Captain Burford was subsequently asked to attend another training course in February 2008 but that she had to inform the Respondent that she was unable to attend because of her childcare commitments and because he could not accompany her to assist with their son until January 2009.

The Respondent's Case

5.0 Testimony from Mr Paul Turner

- 5.1 The witness read a prepared witness statement (P 199 – 202 of the combined bundle refers). Paul Turner joined the Flybe on 20th August 2007 and was the HR Business Partner – Pilots, with HR responsibility in respect of 700 pilots and 25 office staff covering all bases.
- 5.2 Mr Turner confirmed that when he joined the Company Captain Burford was already on her maternity career break. In response to a question put by Mr French Williams he confirmed that it was not normal policy for a maternity career break to be granted and that this was something that had been specifically arranged for Captain Burford.
- 5.3 In September 2007 Mr Turner was copied in on an email from Captain Nick Brown regarding arrangements for Captain Burford's return to work. He confirmed that it was normal policy, due to the length of time the Applicant had been away from work, for the Company to require that she undertook a full conversion course in relation to the aircraft she would be flying on her return. This had been arranged for 7th January 2008.
- 5.4 Mr Turner became aware that the Applicant had been removed from the course via an email from Captain John Alsford on 4th January 2008 (P125 of the bundle refers). Having reviewed the issues in relation to Applicants current position Mr Turner confirmed that he believed that the Company had been extremely generous in granting a one-year extension to her maternity leave with preserved seniority, all of which was outside of normal Flybe Policy.
- 5.5 Mr Turner discussed the situation on 9th January with Captain Nick Brown following which he approached Captain Ian Cheese and established that it would be possible for Captain Burford to rejoin the course. The option to rejoin the January course or join the course in February was given to Captain Burford as her request to take an additional one-year extension to her maternity career break was not an option. Mr Turner then stated that Captain Burford informed him that due to childcare reasons she would not be able to attend the course until January 2009.
- 5.6 Mr Turner believed that he had made it clear to Captain Burford that the maternity career break was no longer applicable and that the Company was not in a position to extend it. Also that she was aware of what her options were, either to return to work and rejoin the January course or join the February course or apply for the standard career break, which would in effect mean that she would have to resign. Mr Turner was aware that this was something that the Applicant was not happy with. The deadline of 14th February for a response was given to her.
- 5.7 Mr Turner confirmed that as no application for the standard career break had been received by 14th February it had been assumed that Captain Burford would not be returning to work and the leaver process had therefore come into effect on that date. In response to questions put Mr Turner confirmed that the normal leaver process would

include the return of manuals, uniforms, tax, insurance documents etc. Whilst there is a termination checklist in use by HR this was not used in this instance. Mr Turner confirmed that no formal notification had been given to Captain Burford stating that her employment had been terminated despite there being email correspondence regarding her questions relating to the meaning of “process”. It was also confirmed that the standard notice period was 3 months but this had not been given and that it would not normally be HR that would acknowledge letters of resignation.

- 5.8 Mr Turner stated that he was surprised to receive a letter from Captain Burford's Advocate two months later and that it was agreed to treat the complaint within the letter as a formal grievance and arranged a grievance hearing. It was later confirmed by Captain Burford's Advocate that she would not be attending the grievance hearing. Again in response to questions Mr Turner confirmed that there were no written remedies in relation to post termination grievances.
- 5.9 In response to several questions put to him by Advocate Tee the witness confirmed that it would not be unusual for there to be a “gap” in correspondence when a matter had been referred to BALPA. He also reiterated that the final decision for removal from the course had not been HR's. It was also confirmed that no medical examinations or medical certificates had been requested in relation to the Applicant's illness, but that this was not unusual.

6.0 Testimony from Captain Ian Cheese

- 6.1 The witness read a prepared witness statement (P193 – P198 of the bundle refers). Captain Ian Cheese joined Flybe in June 2005 and throughout his employment has been employed as General Manager – Turbo Props. He has overall responsibility for safety, operational and personnel matters for pilots, covering 12 bases and 44 aeroplanes.
- 6.2 Captain Cheese stated that he did not meet Captain Burford prior to her maternity leave and that his first real contact was when he received a letter in November 2005 requesting a four-month extension to her unpaid leave. (P68 – P70 of the bundle refers). Having discussed the matter with the then HR Manager, Mr Don Darby, although unusual it was agreed to grant the extension to the maternity leave, with a return to work date of 18th October 2006. At this time it was confirmed that Captain Burford would need to attend a conversion course on her return to work and to complete six months full-time operational service before she would be able to go part time in accordance with policy. Agreement was then given for the date to be extended to the end of October 2006.
- 6.3 Captain Cheese confirmed that it was agreed after some lengthy discussion to agree to Captain Burford's request for a further year of unpaid leave and that the unprecedented step was taken to grant this as Maternity Career Break, not the standard career break in order to protect her seniority. This was confirmed via a letter in September 2006 (P86 of the bundle refers).
- 6.4 Captain Cheese stated that the conversion course that Captain Burford was required to attend had always been run in the UK and assistance was given to her in putting in place arrangements to attend.

- 6.5 On returning from sick leave Captain Cheese stated that he became aware that Captain Burford had been taken off the course due to sickness. A number of further discussions took place and he stated that he advised Captain Burford that as she would not be rejoining another course the leaver process would commence. Captain Cheese believed that the Company had already been very generous but that a cut off point had now been reached. As such she needed to either return to work or take a career break in the normal way. A number of options were discussed but Captain Burford stated she could not take the course until 2009.
- 6.6 Captain Cheese stated he was of the opinion that Company had been more than generous in considering all Captain Burford's personal circumstances and gone outside of Company's normal policies.

7.0 Testimony from Captain Nick Brown

- 7.1 The witness read a prepared witness statement (P187– P192 of the bundle refers). Captain Nick Brown joined the Company in March 1999 when it was called Jersey European Airways Limited as a First Officer. After becoming a Captain on the Dash 8 Q400 he was then promoted to Fleet Base Manager in 2005. Since the beginning of 2008 he has been Pilot Base Manager for Guernsey.
- 7.2 Captain Brown stated that he has known the Applicant for over 20 years and at the time he became Pilot Base Manager she was already on maternity leave. At the end of 2005, Captain Brown stated that he became aware that the Applicant was concerned about returning to work in June 2006. He believes he was sympathetic to and supportive of her request for an extension of four months to her maternity leave.
- 7.3 In July 2006, Captain Brown stated that the Captain Burford emailed him at his private email address requesting an additional year of unpaid leave up to December 2007 and regarding her worries about returning to work (P76 – P77 of the bundle refers). At the same time she was also concerned about jeopardising her seniority. This was forwarded to John Alsford, Director of Flight Operations, as Captain Brown stated the decision regarding the leave was not his to make. He was though, supportive of the request.
- 7.4 Captain Brown recalled that after several months the matter was resolved and the Company made a special concession agreed to protect her seniority for one year through what was termed a maternity career break. This would enable Captain Burford to return to work at the same base and at the same level of seniority. Captain Brown also noted that Captain Burford was flying for Aurigny whilst on her maternity career break and that Aurigny rotas appeared to give her the necessary flexibility, which enabled her to work when her husband was not working.
- 7.5 Captain Brown went on to state that Captain Burford made contact with him during September 2007 regarding the proposed start date of the conversion course. Having chosen to start the course in January 2008 she remained on unpaid leave until that date. Captain Brown stated that he was aware that Captain Burford's husband had arranged to take annual leave and that they had made arrangements for the family to join her in the UK whilst she was on the course as she was still breastfeeding. Captain Burford would receive duty pay in addition to her salary for the duration of the course and the Company had also agreed to pay for a hire car. In addition her staff travel benefits were re-instated.

- 7.6 Captain Brown stated that, approximately six weeks before the start of the course, a full breakdown of timings for the course was given to Captain Burford. He was aware despite the efforts being made by the Company that Captain Burford continued to worry about her return. In December, Captain Burford advised him that she had a brain scan booked, at the hospital in Guernsey, on 17th January 2008. Discussions took place regarding arrangements for her to leave the course for the appointment and then rejoining the course the next day.
- 7.7 On the Thursday prior to the start of course Captain Brown stated that he received a tearful telephone call from Captain Burford stating that she had been in bed with a migraine for the past four days and that she was really unwell. Captain Brown expressed that he was extremely concerned about her health, especially given what he had previously been told about the brain scan. As Captain Burford asked what the position would be regarding an extension to her maternity career break Captain Brown contacted John Alsford.
- 7.8 Captain Brown then states he was advised that Captain Burford had been taken off the course because of her being unwell and that he agreed with this decision, as the course is tough and her health would have been a serious concern. The following week Captain Burford contacted him sounding much better and told Captain Brown that she had spoken with Aurigny and made arrangements to start flying with them once more. Captain Brown expressed surprise that she was working back at Aurigny when the Company still needed to agree the options for her return.
- 7.9 Captain Brown was of the belief that Mr Paul Turner discussed the options available to Captain Burford and that she had said that she would not be available to return until January 2009. He is further of the belief that Captain Burford was made aware that her maternity career break would not be extended further and that she would either have to join the January or February course or apply for a standard career break. After this point Captain Brown stated that he had no further involvement in the matter as it was left for HR to resolve.

8.0 Testimony from Captain Ian Baston

- 8.1 The witness read a prepared witness statement (P203– P205 of the bundle refers). Captain Ian Baston has worked for the Company since March 2007 when his employment was transferred across after Flybe acquired BA Connect Limited whom he had worked for since 1999. He is General Manager – Flight Crew.
- 8.2 Captain Baston stated that the first time he became aware of Captain Burford's unique period of leave was via an email from Captain Brown in September 2007 (P110 of the bundle refers).
- 8.3 Following discussions and as it was part of his role to allocate course places Captain Baston wrote to Captain Burford to confirm the arrangement surrounding her return on 5th October 2007 (P113 of the bundle refers). These were subsequently accepted by Captain Burford.
- 8.4 Captain Baston stated that he became aware of the issues regarding Captain Burford attending the course at the beginning of January 2008. He was aware that she had been withdrawn from the course, as he understood, on health grounds, but he was not involved in the decision.

- 8.5 Captain Baston gave his opinion on the maternity career break and concluded that the only option available for Captain Burford if she wished to continue her unpaid leave was to apply for a standard career break under the normal Flybe policy. Following this Captain Baston's involvement in the matters reduced considerably.
- 8.6 Captain Baston confirmed that he emailed all those involved at Flybe on 28th January 2008 and highlighted the fact that Captain Burford was no longer covered by the maternity career break which had preserved her seniority and that it would not be possible to keep her place in Guernsey open and unfilled. From this point Captain Baston stated that he had no further involvement.

9.0 Testimony from Mr John Alsford

- 9.1 Mr French-Williams read a witness statement on behalf of Mr John Alsford (P184 – P186 of the bundle refers).
- 9.2 Mr Alsford was employed by Flybe from May 2005 September 2008. At the time of leaving he held the position of Director, Flight Operations. In this role he had oversight, responsibility and accountability for the flight operation process and oversight of the pilot management process. This was then properly delegated to pilots' Fleet General Managers and the HR Business Partner, Flight Operations.
- 9.3 In the statement Mr Alsford stated that around July 2006 he became aware that Captain Burford had requested an additional year's unpaid leave. Although agreed prior to his incumbency he was aware that she had been off on maternity leave, which had been extended by a few months. He also stated that Captain Burford had made it clear that she did not want her seniority with the company to be affected and that this was an unusual request.
- 9.4 Following discussions Captain Burford was offered a career break in accordance with Flybe's Career Break policy. After further discussion a unique maternity career break, whereby she would be able to return to work on 1st December 2007 with her seniority number protected was offered.
- 9.5 Once accepted and the maternity career break put in place Mr Alsford did not have any further involvement.
- 9.6 In December 2007, Mr Alsford stated that Captain Nick Brown highlighted to him that Captain Burford was becoming agitated around her return to work and was concerned that this was a significant source of stress to her. He also stated that due to his concerns he did not want to force her to come back to do the course if this was going to be detrimental to her health at that time. For these reasons the decision made that it was appropriate to take her off the course.
- 9.7 The intention was that Captain Burford would rejoin the course as soon as possible. On 4th January Mr Alsford stated that he advised Captain Nick Brown and emailed Mr Paul Turner, HR Business Partner and asked him to follow this matter up urgently. Mr Alsford stated that he was not directly involved thereafter.

10.0 The Law

- 10.1 The Applicant alleged that she was constructively unfairly dismissed within the meaning of Section 5(2)(c) of the Employment Protection (Guernsey), Law, 1998, as amended.
- 10.2 The Applicant further alleged sexual discrimination as defined in the Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 and that this allegedly less favourable treatment culminated in an unfair dismissal and that in accordance with Section 70 of the Ordinance these allegations might result in a finding of unfair dismissal as defined in the Employment Protection (Guernsey) Law, 1998, as amended.

Direct and indirect discrimination against women:-

- 1(1) *In any circumstances relevant for the purposes of any provision of Part 11 of this Ordinance, a person discriminates against a woman if:-*
- (a) On the grounds of her sex he treats her less favourably than he treats a man, or*
 - (b) He applies to her a provision, criterion or practice which he applies or would apply equally to a man but*
 - (i) which is such that it would be to the detriment of a considerably larger proportion of women than of men*
 - (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it applied, and*
 - (iii) which is to her detriment*

Discrimination against Applicants and employees

- 6(2) *Subject to the provisions of subsection (3) a person shall not, in the case of a woman employed by him at an establishment on Guernsey, discriminate against her*
- (a) in the way he affords her access to opportunities for promotion, transfer or training or to any other benefits (including without limitation, benefits consisting of the payment of money), facilities or services, or by refusing or deliberately omitting to afford access to them or*
 - (b) by dismissing her, or subjecting her to any other detriment*

Burden of Proof before Tribunal

- 44 (1) *This section applies to any complaint made to the Tribunal under section 38*
- (2) *Where, on the hearing of the complaint the complainant proves facts from which the Tribunal could, apart from this section conclude in the absence of any adequate explanation that the Respondent –*
- (a) has committed an act of discrimination against the complainant which is prohibited by any provision of part 11*

The Tribunal shall uphold the complaint unless the Respondent proves that he did not commit or, as the case may be, is not to be treated as having committed that act.

11.0 Closing Statements

Advocate Clare Tee

- 11.1 Advocate Tee raised the following points during her closing statement. That there appeared to be mess and confusion surrounding the treatment of Captain Burford. That

not one person from the Company had taken control of the situation, however, to the contrary she believed that Captain Burford had been clear and detailed.

- 11.2 It had been stated by HR that they had a leaver process checklist but this had not been used, although it would be normal to do so.
- 11.3 Captain Cheese had confirmed that no disciplinary action had been taken in relation to Captain Burford and that the process for the termination had not been explained. Captain Nick Brown had not given any reasons to Captain Burford for her removal from the course in January.
- 11.4 It had been confirmed on several occasions that should she have taken the option the normal career break would require Captain Burford to resign from her position and not maintain her seniority.
- 11.5 Advocate Tee stated that the general demeanour and behaviour of the Respondent since the beginning of January 2008 demonstrated unfairness and was clearly unreasonable.
- 11.6 In relation to the unfair dismissal there is no dispute relating to the Applicant ordinarily working in Guernsey, the Respondent would claim that there had been a repudiatory breach of the contract by not returning to work by 14th February 2008, thereby the termination was fair under Section 5 (4) (b) of the Law, which was contested.
- 11.7 The Applicant claims that under Section 5 (2) (c) of the Law she was constructively dismissed and that it had been shown that there had been a breach of contract resulting in Captain Burford resigning and she did not delay in placing the claim.
- 11.8 The implied term of trust of confidence had been breached by the Respondent through:
 - 11.8.1 The removal from the course in January 2008 without reasons being given.
 - 11.8.2 Requesting that she attend the course in February.
 - 11.8.3 Being sexually discriminated against contrary to statute.
 - 11.8.4 By giving what amounted to an ultimatum that either the Applicant undertook the course or a career break or the leaver process would commence.
 - 11.8.5 Putting the standard career break forward when it essentially amounted to a resignation without any guarantee of return or maintenance of seniority.
 - 11.8.6 Failing to explain about the leaver process and how or why this was justified.
 - 11.8.7 Failing to pay the Applicant her salary from 14th February 2008 at the end of her maternity career break.
 - 11.8.8 Failing to offer the Applicant work at the end of her maternity career break from 14th February 2008.
 - 11.8.9 Leaving the Applicant in a state of uncertainty and limbo.
 - 11.8.10 Failing to communicate with the Applicant after the 4th March 2008.
 - 11.8.11 Acting generally as to force the Applicant to leave her employment.
- 11.9 In the Applicant's letter dated 26th April 2008 the reasons for the resignation were made clear. The last communication from the Respondent had been 4th March 2008 and during this seven week period the Applicant took legal advice. Advocate Tee referred to a skeleton argument contained in "*Tottel – Termination of Employment*" (EE2 P233 of the bundle refers).

- 11.10 In relation to the claim of sex discrimination Advocate Tee re-stated the seven steps that must be met in order to prove that this had occurred and in summary maintained that:-
- 11.10.1 There was no dispute regarding the place of employment.
 - 11.10.2 Section 6 (2) (B) was demonstrated by virtue of following steps 3 – 6.
 - 11.10.3 Section 11 (B) was demonstrated by virtue of the Respondent requiring the Applicant to attend the course in February 2008 and having taken her off the course in January 2008. It was claimed that the provision, criterion or practice applied would be to the detriment of significantly greater proportion of female pilots than male in circumstances where leave had been given back (EE2 P247 of the bundle refers).
 - 11.10.4 The provision, criterion or practice applied was to the Applicant's detriment by leaving her no option but to resign.
 - 11.10.5 The actions of the Respondent were not justifiable as they had removed Applicant from the January course at their own instigation.
 - 11.10.6 The Applicant could have been permitted to return to work and put on ground duties or, in light of her inability to attend the course, until January 2009, could have extended the Maternity Career Break
 - 11.10.7 The claim had been brought within three months.
- 11.11 In conclusion Advocate Tee stated that Captain Burford had been indirectly discriminated against and unfairly dismissed. In relation to the Unfair Dismissal the Tribunal was asked to make an award commensurate to Section 22 (2) (b) of the Law and in relation to the Sex Discrimination commensurate to Section 46 (1) of the Ordinance.
- 11.12 Prior to Mr French-Williams closing statement, while stressing that the Tribunal had not yet reached a conclusion, clarification was sought from the parties regarding the seniority level and pay scale level applicable at the time of termination. This was accepted and agreed by both parties as Q400 Captain, Level 7 £55,017.

Mr Jason French-Williams

- 11.13 Mr French-Williams opened by re-capping the two claims put forward by the Applicant. The Tribunal was asked to consider three specific points in relation to the Sex Discrimination:-
- 11.13.1 Was it unreasonable to ask the Applicant to attend the course in February, having taken her off the one scheduled for January on Health & Safety grounds. That the Applicant had unreasonably refused and that there was little evidence of her trying to find or make alternative childcare arrangements.
 - 11.13.2 That it was unreasonable of the Applicant to state that she could not attend a course for a further twelve month period.
 - 11.13.3 That by the 30th January 2008, the Applicant had had thirty months of leave, when the maximum normal amount given was twelve months. The Respondent had been extremely generous by putting in these provisions as could have insisted on a return to work in June 2006 or that a career break under the normal policy was taken up.

11.14 The Respondent maintained that the actions taken were justified by reasons of:-

- 11.14.1 It was accepted by the Applicant that the course had to be undertaken.
- 11.14.2 Putting an experienced, qualified pilot on ground duties for a further nine to ten month period was unrealistic given the salary level.
- 11.14.3 The Applicant had already had 18 months longer than required under UK Law and the business is required to run effectively.
- 11.14.4 The Applicant had been given the option of taking the normal company career break, as would be offered to all other employees, male and female, with or without childcare responsibilities. It was acknowledged that it was a technical resignation, but reiterated that priority treatment would be given should she want to return.

11.15 It is the Respondent's submission that they had been far from unsympathetic at any stage, but rather had "bent over backwards" to provide assistance. They did though have a duty to be fair to all pilots, male, female, parents or non-parents.

11.16 In relation to the Unfair Dismissal, it was the Respondent's submission that the dismissal was fair.

11.17 It was agreed that in an ideal world the Applicant should have been given more detail regarding the removal from the course, but this was not an ideal world. However, from the testimony given by Captain Nick Brown it was reasonable to surmise that the Applicant was aware what the situation was.

11.18. Seeking and obtaining medical advice would have taken a number of days and it is the Respondent's position that even if this had been obtained it would not have changed the decision to take her off the course. Neither would it have changed the Applicant's position that she would not prepared to undertake another course until January 2009.

11.19 It was agreed that the termination process was not perfect and that a final letter should have been sent, but there was a unique set of circumstances. The fact that a letter was not sent does not mean that the Applicant did not know that her employment was terminated. This was made clear in an email (P162 of the bundle refers).

11.20 It is the Respondent's submission that there was no alternative but to terminate the employment on 14th February 2008 and that the Applicant was aware of this as she was commercially flying for another airline.

11.21 If the Applicant thought she was still employed by the Respondent she would not be flying for another airline as her Maternity Career Break had finished and such action would not be permitted.

11.22 Mr French-Williams made reference to "*Sainsbury Supermarkets Ltd v Hitt*" (ER3 of the bundle refers). The Tribunal was asked to consider that even if it was believed the procedure was wrong if the dismissal would have taken place in any case. It was the Respondent's position that it would, as it would be unreasonable to wait a further year.

11.23 Mr French-Williams submitted that should the Tribunal find the dismissal to be fair then the date of termination will be 14th February 2008. If however, if the date of termination is found to be 26th April 2008 what did the Respondent do on or around that date to constitute constructive dismissal.

- 11.24 It was further submitted that the Applicant refused the offer of a grievance meeting and therefore the termination cannot be treated as a breach.
- 11.25 Mr French-Williams submitted that if the Tribunal should find for the Applicant in relation to the claim of Unfair Dismissal any award should be nil as the Applicant was not in receipt of any wages for the previous six months.
- 11.26 Similarly, if the Tribunal should find for the Applicant in relation to the claim of Sex Discrimination then any award should be minimal taking into account the efforts made to assist the Applicant, over and above the normal, by the Respondent.

12.0 Conclusions

- 12.1 The Tribunal was persuaded that none of the normal attributes of a resignation or termination process were undertaken. For example, there was no letter confirming the termination of employment, no right of appeal, no exit interview and no evidence of any element of the standard HR termination checklist being covered by Mr Turner. Such was the confusion over process that the Tribunal was of the opinion that whether the “Effective Date of Termination” was in February, or the end of April, that the Applicant acted in a timely manner.
- 12.2 The Tribunal had to determine the actual date of termination of the employment as this was in dispute. The Tribunal concluded that this date was 14 February 2008, due to the inaction of the employer in either formally clarifying the employee’s intentions regarding return to work or formal notification of the termination of employment before instigating the ‘Leaver Process’.
- 12.3 The Tribunal found that no one Senior Manager involved in the termination of the Applicant had “forced” the resignation process.
- 12.4 Further the Tribunal found there was lack of clarity in communicating the reasons for taking Captain Burford off the course on 7th January.
- 12.5 The Tribunal went on to consider each element of the allegations in relation to Sex Discrimination and commenced with Direct or Indirect Discrimination.

In relation to direct discrimination the main tests are:

- (a) Was Captain Burford treated less favorably than a man, and
- (b) The treatment of her was to her detriment.

In relation to indirect discrimination the main tests are:

- (a) Can the Applicant demonstrate that the application of any provision, criterion or practice was such that it would be to the detriment of a considerably larger proportion of women than men?
 - (b) Which cannot be shown to be justifiable irrespective of the sex of the person to whom it was applied.
 - (c) Which is to her detriment.
- 12.6 Having listened to and considered the testimony of both parties the Tribunal could find no evidence of either direct or indirect discrimination.

- 12.7 Although there is not a requirement within Guernsey employee protection legislation, the Respondent had applied the UK statutory provisions of Maternity Leave to the Applicant.
- 12.8 The Respondent had considered and then accommodated the Applicant's requests for extensions to the period of unpaid leave.
- 12.9 Further the Respondent had taken the unprecedented step of affording the Applicant a Maternity Career Break' in order that she could spend more time with her child but without the loss of seniority, which would have been the case, had the normal Career Break been taken.
- 12.10 It was noted by the Tribunal that the Maternity leave provision observed by all other eligible Flybe staff had been limited to 12 months. The Applicant had been afforded c30 month's leave resulting from the combination of standard maternity leave and special leave granted to her as an exception.
- 12.11 Given the age of her child by early 2008, the Tribunal considered that none of the Law pertaining to pregnancy and the potential for automatically unfair dismissals pertained to the Applicant's claims
- 12.12 Although the Applicant was due to return to work in December 2007, given the need for her to attend the next available refresher training course in the UK, it was reasonable that the return to work be delayed as the course was not due to start until early January. A course of action that was agreed by both parties.
- 12.13 Following a telephone conversation and given the apparent distraught state of the Applicant and the impending brain scan, as communicated on 2nd of January to Captain Nick Brown by the Applicant the Respondent had good and genuine reasons to ask the Applicant not attend on 7th January.
- 12.14 The Tribunal was not of the opinion that it was then contradictory to offer a later start date for the January course as the Applicant was clearly less distraught and communicated her intention to fly for Aurigny.
- 12.15 From the Applicant's own testimony it was stated that her husband could not reschedule the majority of his annual leave, which had been booked to assist with the childcare for the duration of the course. Therefore he was still available for the majority of the training course to provide parental care.
- 12.16 The Applicant made only very limited attempts to seek alternative child care and made no apparent attempt to seek UK solutions even though other members of the family were based in the proximity of the course and may have been aware of possible solutions for consideration.
- 12.17 As an experienced pilot the Applicant would have known that such courses ran throughout the year.
- 12.18 The blanket refusal of the Applicant to consider the February course or indeed any other alternative date until January 2009, given the age of the child, was considered by the Tribunal to be unreasonable.

- 12.19 The Tribunal was also of the opinion that it was reasonable for the Respondent not to employ a highly paid and qualified pilot on ground duties for c11 months until January 2009, regardless of the gender of the pilot.
- 12.20 The Tribunal accepts that it is reasonable to believe that a greater proportion of women will have proportionately more problems with childcare provisions than male colleagues; however, the Tribunal was also of the opinion that there is a limit of reasonableness as to how an employer should act to counterbalance this.
- 12.21 It is arguable that the Respondent exceeded their duty and was in fact in danger of positive discrimination in respect of the Applicant.
- 12.22 In summary the Tribunal could find no substantive grounds to support a claim of either direct or indirect discrimination.

13.0 Decision

- 13.1 In relation to the claim of Unfair Dismissal, having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal determined that the Applicant was unfairly dismissed under Section 5(2)(a) of The Employment Protection (Guernsey) Law, 1998, as amended. Captain Yvonne Burford was unfairly dismissed by the Respondent, due to a technical breach by the Respondent of a fair process of such standing that their behaviour cannot be judged as fair and reasonable within a reasonable range of responses.
- 13.2 Given the resources and size of the Respondent this matter should have been handled with a great deal more expertise than was demonstrated, particularly by the HR Management. However, the obduracy of the Applicant in rejecting reasonable alternatives amounted to a most significant contribution to the ending of the employment.
- 13.3 In relation to the claim of Sex Discrimination, having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal found that, under the provision of the Sex Discrimination (Employment) (Guernsey), Ordinance 2005, and The Employment Protection (Guernsey) Law, 1998, as amended, the Applicant was not directly; or indirectly discriminated against.

14.0 Award

- 14.1 When calculating the award under Section 22 of the Employment Protection (Guernsey) Law, 1998, as amended, whilst the Tribunal recognised that the Applicant did not receive pay during the six month's prior to the termination of her employment, it considered it just and equitable to use its discretion under Section 22(2)(b) of the Law to determine that the sum equal to six month's pay for the Applicant was £27,508.50.
- 14.2 However, the Tribunal further concluded it would be just and equitable to also use its discretion under Section 23(2) of the Law, to reduce this amount by 80%. This reduction is made in consideration of the repeated efforts made by the Respondent in accommodating the Applicant's requests for additional unpaid leave and in light of the Applicant's significant contribution to the ending of the contract.

- 14.3 Therefore, in relation to the complaint of Unfair Dismissal, the Tribunal makes an award in the amount of £5, 501.70
- 14.4 In relation to the claim of Sex Discrimination, the Tribunal makes no award.

Signature of the Chairman: Ms Carol Harvey

Date: 16 December 2008