

Judgment 29/2009

**Burford v Flybe Ltd – Royal Court (Civil Action File
1320) – 23 June 2009**

Employment Protection (Guernsey) Law, 1998 – Sex Discrimination (Employment) (Guernsey) Ordinance, 2005 – proper approach to assessing a judgment by an employment tribunal – employee’s appeal from findings by employment tribunal – findings as to date of dismissal – limited purpose of s 6(1) of the 1998 Law – whether 80% reduction of the award was Wednesbury unreasonable – finding as respects allegation of indirect sexual discrimination – proper approach to the test of justification – appeals dismissed

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1320

The 23rd day of June before Richard John Collas Esquire, alone

YVONNE BURFORD

Appellant

and

FLYBE LIMITED

Respondent

Whereas on the 12th May 2009 the Deputy Bailiff considered an appeal against the findings of the Employment and Discrimination Tribunal in its judgment dated 16th December 2008 concerning applications by the Appellant in relation to a claim of unfair dismissal under the provisions of the Employment Protection (Guernsey) Law, 1998 as amended and in relation to a claim of Sex Discrimination under the provisions of the Sex Discrimination (Employment) (Guernsey) Ordinance 2005 and the 1998 Law and heard thereon Advocates C A Tee and G K Bell on behalf of the Appellant and Respondent respectively the Deputy Bailiff this day handed down judgment in the terms attached hereto and;

1. DISMISSED the appeals both in respect of the Tribunal’s findings concerning the Appellant’s unfair dismissal and also in respect of the complaint of sexual discrimination and;
2. Directed that the terms of any costs orders arising from this judgement be submitted in writing for consideration and/or directions at an early sitting of the Interlocutory Court.

S M D ROSS
Her Majesty’s Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

On Appeal from the Employment and Discrimination
Tribunal

Between

YVONNE BURFORD

Appellant

- and -

FLYBE LIMITED

Respondent

Judgment handed down: 23 June 2009

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for the Appellant: CA Tee
Advocate for the Respondent: G K Bell

Legislation, texts and cases referred to:

- 1) The Employment Protection (Guernsey) Law, 1998, as amended.
- 2) The Sex Discrimination (Employment) (Guernsey) Ordinance 2005.
- 3) *Piglowska v Piglowski* [1999] 3 All ER 632.
- 4) *Allonby v Accrington & Rossendale College* [2001] IRLR 364 and [201] EWCA Civ 529
- 5) *Garenne v Falla*
- 6) 'Termination of Employment' published by Tottel, Issue 25, paragraph B1.3.
- 7) Harvey on Industrial Relations and Employment Law, paragraph D207.
- 8) *Loxley v BAE Systems Land Systems (Munitions and Ordnance) Ltd* UKEAT/0156/08/RN

Introduction

1. This is an appeal against the findings of the Employment and Discrimination Tribunal in its judgment dated 16th December 2008 concerning applications by the Appellant in relation to a claim of unfair dismissal under the provisions of the Employment Protection (Guernsey) Law, 1998 as amended, and in relation to a claim of Sex Discrimination under the provisions of the Sex Discrimination (Employment) (Guernsey) Ordinance 2005 ("The 2005 Ordinance") and the 1998 Law.
2. In respect of both enactments, an appeal lies on a question of law only (Section 25(1) of the 1998 Law as amended by the Employment Protection (Guernsey) (Amendment) Law 2005, and Section 48(1) of the 2005 Ordinance).
3. The facts found by the Tribunal are set out at some length in paragraph 2 of its written decision and I was also given a copy of the bundle of correspondence produced to the Tribunal at the hearing. The facts relevant to this appeal are:
 - (a) The Appellant commenced employment with Flybe on 30th January 1998 as a Guernsey based pilot who transferred to Dash 8 aircraft as captain in 2002.

- (b) Her contract of employment was governed by English Law, but nothing in the appeal turns on that choice of law.
- (c) In May 2005 the Appellant commenced maternity leave with, originally, an agreed return to work date set as 18th June 2006.
- (d) In November 2005 the Appellant requested, and was granted, an unpaid extension with a revised return to work date of 18th October 2006.
- (e) A further extension was requested by the Appellant in March 2006 to enable her to complete an Open University course; that request was also granted and her maternity leave extended to the end of October 2006.
- (f) Following further negotiations, the Respondent agreed to grant the Appellant a thirteen month maternity career break from 1st November 2006 to 31st November 2007 with a return to work date of 1st December 2007. The Respondent allows employees to take a career break, but it was unprecedented to allow a maternity career break. One of the benefits to the Appellant was that it preserved her level of seniority.
- (g) During September 2007, the Appellant and Respondent agreed that she would return to work on 7th January 2008 when she would attend a Dash 8 Q400 course. The Appellant accepted that it was reasonable for the Respondent to require her to attend that training course as she had amassed only 40 hours flying experience on the type of aircraft before commencing maternity leave.
- (h) The Appellant was ill over the New Year period and, at the beginning of January 2008, she requested a further extension of her maternity career break.
- (i) On 4th January 2008, Captain Brown of the Respondent informed the Appellant that she had been removed from the training course and offered her the option of either joining the January course during the second week, or joining the February course.
- (j) The Appellant declined that offer due to child care commitments and requested that the maternity career break be extended to the end of 2008, returning to work in January 2009. Her reason was that the child care arrangements she had made to attend the course involved her husband taking annual leave in order to look after their child while she was on the course. Having taken all his annual leave for 2008, he would have to wait until 2009 to be able to take sufficient time to look after the child.
- (k) On 30th January 2008, Captain Cheese, of the Respondent, wrote to the Appellant saying her maternity career break had ended on 1st December 2007, but had been extended until 7th January 2008 and she could apply for another career break in accordance with the normal Flybe career break policy.
- (l) On 31st January 2008, the Appellant replied. She expressed her alarm at the course of action proposed, which she said would involve her resigning, having to reapply for her job which, if she was successful in re-obtaining, would put her back at the start with regard to rank, salary and seniority. She again requested an extension to her maternity career break on the same terms and conditions as previously.

- (m) On 4th February 2008, Captain Cheese wrote to inform her that her request had been turned down. He asked her to advise by the 14th February 2008 whether she intended to take up the offer of a standard career break.
- (n) On 6th February by e-mail, the Appellant replied stating it was unreasonable that she should be asked to resign *“as a result of your decision to remove me from my course”*.
- (o) On 7th February, Paul Turner, the HR Business Partner of the Respondent, advised her that as she had not applied for a career break: *“it would be assumed by the company that you are not returning to work after the end of your maternity career break on the 14th February. The leaver process will now start”*.
- (p) In February 2008, the Appellant flew for Aurigny, which she had been permitted by Flybe to do whilst on her maternity career break.
- (q) On 29th February, the Appellant e-mailed Paul Turner:

“Paul, I replied to this email on the day you sent it to say I would be happy for you to phone me, but have not heard from you. Please could you advise me what is happening. I would still appreciate an explanation of Ian Cheese’s reference to the ‘process’ as I do not understand what is meant by this word. Yvonne”.

- (r) On 4th March, Mr Turner replied saying that as she had referred the matter to her trade union, BALPA, he did not wish to meet with the Appellant until a representative of the union was also present.
- (s) In reply, the Appellant asked again what was meant by *“process”*. The reply of the same day stated that:

“When ‘process’ was referred to it relates to the company procedures that we have worked to, namely: As it stands, you have not applied for a career break and as previously communicated a further extension to the maternity career break is not possible so it would be assumed by the company that you are not returning to work after the end of your maternity career break on the 14th February. The leaver process will now start.”

The last two sentences were a repeat of what he had said in his email of 7th February.

- (t) There was no further communication until 17th April when the Appellant’s Advocate wrote to the Respondent alleging that its failure to pay her constituted a repudiatory breach of her contract of employment.
- (u) On 26th April 2008 the Appellant wrote to the Respondent giving notice of her immediate resignation on the grounds that she considered herself to have been constructively dismissed by reason of the Respondent’s conduct towards her.
- (v) In reply, the Appellant was advised that her resignation was not accepted and that her employment had been terminated on 14th February 2008.

Reviewing the Tribunal’s Decision

- 4. In approaching a review of the Tribunal’s written decision, Advocate Bell urged that I should not be over-critical or over-analytical; the Tribunal is a lay body, not a court of law and

cannot be expected to draft its decisions in the same manner as an experienced, legally-qualified judge. He said the exigencies of daily life in the Court room or the Tribunal are such that judgments could always be better expressed and so they should be read on the assumption that the Tribunal knew how to perform its functions and what matters to take into account, unless the contrary can be demonstrated and he cited Piglowska v Piglowski [1999] 3 All ER 632.

5. In Allonby v Accrington & Rossendale College [2001] IRLR 364 and [201] EWCA Civ 529, Sedley L.J. considered the nature and purpose of a tribunal's reasons, at paragraph 22:

“Before looking again at the employment tribunal’s reasoning, it is necessary to remember, as this court has more than once said, that it is not appropriate to expect an analysis of every fact and argument with reasons for accepting or rejecting them (Kearney & Trecker Marwin Ltd v Varndell [1983] RLR 335, 339-340); that a tribunal’s reasons are not to be construed like a statute or a deed; and that ‘what matters is whether the decision under appeal was a permissible option’ (Piggott Bros Ltd v Jackson [1991] 1RLR 309, 313, 312). This said, there is no point in giving reasons unless they make it possible, at the very least, for parties, advisers and appellate courts to see whether the tribunal has correctly understood the law, has addressed the right questions and has reached its conclusions by permissible means (see Piggott Bros [1991] 1RLR 309, ante, 313). Beyond this point the nature of the issues and the evidence will call for more or less in the way of explicit findings. To dilute this minimum would not only deplete the duty to give reasons and devalue the election under the Industrial Tribunals (Rules of Procedure) Regulations 1985, Sch 1, para. 9(3), to give full (or ‘extended’) rather than summary reasons; it would risk contravening s.6 of the Human Rights Act 1998 by permitting tribunals’ written reasons to fall below the standard, corresponding broadly to our domestic standard, required by Article 6 of the European Convention on Human Rights (see Van de Hurk v The Netherlands [1994] 18 EHRR 481, paragraph 61; Hiro Balani v Spain [1995] 19 EHRR 566, paragraph 27).

6. I have borne those principles in mind in reviewing the decision.

Unfair Dismissal Appeal

7. The Tribunal found in favour of the Appellant that she had been unfairly dismissed but reduced the award of damages by 80%, against which she appeals and she also appeals the finding as to her date of dismissal.

Date of Termination of Employment

8. Ground 1 of the Appellant’s grounds of appeal is:

The Tribunal wrongly found that the effective date of termination of my employment under section 5(4) of the Law was 14 February 2008.”

9. The Tribunal’s finding as to the date of dismissal, at paragraph 12.2 of its decision, was:

“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’.”

10. Both parties agree that the decision as to when the employment terminated is a question of fact which would not ordinarily be subject to appeal. However, I agree with Advocate Tee’s

submission that the finding may be reviewed on appeal if it resulted from misdirection on a question of law.

11. Advocate Tee also submitted that for an express dismissal to take effect, it must be communicated and brought to the attention of the employee so that he knows he is being dismissed. In support thereof, Advocate Tee relied upon paragraph B1.3 of 'Termination of Employment' published by Tottel, Issue 25 and paragraph DI [207] of 'Harvey on Industrial Relations and Employment Law', Issue 197. There is, apparently, no Guernsey authority on the point but I agree it makes sense that if an employee is being expressly dismissed, he needs to be told and if there is any delay in telling him that he is no longer employed, then the employment must continue until the employee is told he has been dismissed.
12. In the present case, Advocate Tee argues that the express dismissal could not have taken effect until the Appellant received the Respondent's letter dated 7th May. By then, the employment had been terminated by the Appellant's letter of 26th April in which she gave written notice of her resignation and said that she had been constructively dismissed by reason of the Respondent's conduct towards her.
13. In her letter to the Respondent dated 17th April, Advocate Tee also suggested there had been a repudiatory breach by the Respondent. In paragraph (1) on the third page of the letter at page 172 of the bundle, she said:

"The Company's withdrawal of Captain Burford from the January 2008 course on short notice, its refusal to extend her Maternity Career Break, its actions in leaving her in a state of limbo without pay and effectively giving her no option but to resign under the Standard Career Break if she did not attend the training course in February 2008, and it (sic) lack of communication and consultation with Captain Burford constitute a breach of the implied duty of trust and confidence, which comprises a repudiatory breach of Captain Burford's contract of employment."
14. At the hearing before the Tribunal, Advocate Tee also said that the Respondent would claim that the Appellant had committed a repudiatory breach of contract by not returning to work by 14th February (see paragraph 11.6 of the Tribunal's decision).
15. I am not sure that I fully understand the Tribunal's reasons for deciding that the employment ended on 14th February but I do not believe that the Tribunal were basing their finding on an express dismissal. That is not what their reasoning in paragraph 12.2 of their decision (quoted above) suggests.
16. There were a number of ways in which the contract might have been terminated, and several dates on which it could have come to an end, including:
 - (a) an express dismissal by the Respondent on, or with effect from, 14th February;
 - (b) a repudiatory breach of contract by the Respondent in failing to pay the Appellant after 14th February and/or to offer her any work after that day;
 - (c) a repudiatory breach of contract by the Appellant on 14th February as a result of the Appellant failing to return to work on that day;
 - (d) on 26th April when the Appellant resigned, claiming constructive dismissal; and
 - (e) on 7th May when the Respondent wrote to say her employment had been expressly terminated on 14th February.

17. The question of how and when the contract of employment ended would have required detailed legal arguments to be presented by the two parties in order to assist the Tribunal to analyse the legal principles and reach a decision. However, it is clear that it was never intended that the purpose of the adjudication procedure introduced by the 1998 Law would be to resolve detailed legal arguments.
18. The intention of the States of Deliberation when establishing the statutory right not to be unfairly dismissed and setting up the Employment Tribunal to adjudicate on complaints was to create a remedy that is, as far as possible non-legalistic, can be pursued by parties without legal representation and can be decided by a lay tribunal. As Southwell JA said, sitting as single judge in *Garenne v Falla*, 18 February 2002:

“It is apparent from the terms of the 1998 Law that the adjudication procedure is not intended to mirror that of the Royal Court, and is intended to be less formal, less legalistic and speedier. The complainant’s rights are to be determined with the reasonable speed and efficiency which is consistent with giving each party a reasonable opportunity to be heard by the adjudicator.”

19. In my view, the circumstances of this case were unusual; the legal analysis as to when the contract was terminated was complex. The concept of a repudiatory breach of contract may not be easily understood by non-lawyers. The question also required an analysis of the express and implied terms of the contract of employment, including the express and implied terms of the agreement to allow the Appellant to take a maternity career break. What was to happen at the conclusion of the Appellant’s maternity career break; was she to return to work immediately on full pay before attending any retraining or refresher course? After a period of unpaid leave of more than 30 months, was it intended that she should attend some further training before flying a passenger aircraft and if no suitable course was then available, what was to happen? Was it a term of the contract that she would be re-employed on ground duties until she could attend a course, as Advocate Tee suggested (paragraph 11.10.6)? If, as appears to be the case, nothing had been expressly agreed should any terms be implied into the agreement as to what was to happen and, if so, what terms? In the event, was either party guilty of a repudiatory breach? What was required to terminate the contract if the employment did not resume: the arrangement agreed for the Appellant of a maternity career break was said to be unique so it is impossible to draw analogies with the Respondent’s Standard Career Break Policy but, under that policy, this situation could not arise because the employee resigns at the start of the career break and has to be reinstated before the employment resumes.
20. Examination of all the facts relevant to the legal principles and their analysis is not easy for a lay tribunal; it is more suitable for a court of law.
21. In my opinion, the right of appeal on a point of law conferred by the 1998 Law must be read in the spirit of the legislation. I do not think it would be right to allow a party who has succeeded before the Tribunal to pursue an appeal on a point of law simply because he or she alleges that the Tribunal reached the right decision but for the wrong legal reasons. The Appellant would have to be able to show some further reason for overturning the decision.
22. In the present case, the other substantive findings of the Tribunal were the date of dismissal and the reduction in the amount of the compensation award. Analysis of the decision shows that nothing turned on the date of termination to the prejudice of the Appellant. (The situation would of course be different if the Respondent was appealing the decision on the ground that the finding of unfair dismissal is wrong in law.)
23. The date of termination of the employment might have been relevant to ascertaining whether the complaint had been brought in time but it was not, because the Tribunal said at paragraph 12.1 of its decision:

“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.”

24. The date might also have been relevant to determining her earnings in the period prior to dismissal but, in relation to that, the Tribunal recognised that she had been unpaid and assumed a figure which had apparently been agreed by the parties (paragraphs 11.12 and 14.1).
25. The date could also potentially have been relevant to the assessment of the compensation award. The Tribunal reduced the award by 80% *“in light of the Applicant’s significant contribution to the ending of the contract”* (paragraph 14.2). The unreasonable conduct on the part of the Appellant that the Respondent relied upon concerned her refusal to attend the second part of the January course, her refusal to attend the February course, her refusal to make alternative childcare arrangements and her statement that she could not attend a course for a further twelve months. All these had occurred before 14th February and there is nothing else in the Tribunal’s findings to suggest that there was anything in the Appellant’s conduct after 14th February that would have influenced the Tribunal’s assessment of the compensation award. In other words, she would have been awarded the same amount of compensation even if the date of termination was later.
26. I therefore conclude that none of the other findings reached by the Tribunal were affected by its decision that the effective date of termination was 14th February rather than a later date. The Appellant has not been prejudiced by any misdirection on a question of law by the Tribunal in determining how and when the employment was terminated and therefore there is no reason to overturn the decision and remit the case to the Tribunal for reconsideration.
27. I note that Advocate Tee claimed in her letter of 17th April that the Respondent had failed to pay the Appellant after the 14th February. She has not said whether the Appellant wishes to pursue a claim for non-payment of salary but, if she did, the claim would have to be brought in the Court, not the Tribunal (such claims are expressly preserved by section 30 of the 1998 Law, as amended). One of the issues the Court would then have to determine might include the actual date of termination of the employment. If so, I believe it would be free to determine the date without being bound by the Tribunal’s finding because the Tribunal did not hear full legal argument on that issue.

Ground of Appeal 2

28. The second ground of appeal is:

“The Tribunal wrongly did not ascertain the reason for my dismissal under section 6(1) of the Law before finding that it was an unfair dismissal.”

29. Section 6(1) provides that: *“...it shall be for the employer to show:- ... (a) what was the reason for the dismissal; and (b) that it was a reason falling within subsection (2)”*.
30. I believe the Appellant has misunderstood section 6(1). Its first, and possibly only, purpose is to put the burden of proving the reason for the dismissal onto the employer. It does not require the Tribunal to establish that there was a reason falling within subsection (2) (which deals with matters such as the capability, qualifications and conduct of the employee, redundancy etc.). The Tribunal would not be able to ascertain a reason for the dismissal if an employer had summarily dismissed an employee without any reason whatsoever, and without following any disciplinary or dismissal procedure, which would be a clear example of unfair dismissal.

31. So, in my view, a failure by the Respondent to establish a reason for the dismissal falling within subsection (2) is not fatal to the Tribunal's decision and, in fact, supports a finding of unfair dismissal. On the other hand, I do not believe that the Tribunal could find there has been a fair dismissal unless the reason for dismissal falls within sub-section 6(2).
32. So, I conclude there can be no merit in this ground of appeal. I therefore do not need to consider the ground any further although I do believe that the Tribunal's reasoning is sufficient to explain its findings in this regard.

Ground of Appeal 3

33. The third ground of appeal alleges that the Tribunal's decision to reduce the compensation award by 80% was *ultra vires* or *Wednesbury* unreasonable, and as such is subject to appeal on a point of law. The Tribunal's explanation of its reasons for making the reduction is in paragraph 14.2 of the decision:

"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."

34. By virtue of section 23 of the 1998 Law as amended in 2006, the Tribunal has the power to reduce the compensation award if it considers "*it would be just and equitable to reduce the amount of the award for compensation for unfair dismissal to any extent*".
35. In ground 3(a), the Appellant alleges that her requests for unpaid leave amounted to previous conduct not pertaining to her dismissal and should not have been taken into account.
36. The legislation does not specify what is to be taken into account so, in my view, the Tribunal has a wide discretion to take account of matters that may be relevant to the dismissal; one of the factors to be considered will be whether the employee has contributed to the dismissal. Thus, previous conduct or earlier events may be relevant if they contributed to the dismissal.
37. In the present case, I believe the Tribunal's reasons for reducing the award are based upon the Respondent's arguments and, hence, I believe they did not take account of her earlier requests for unpaid leave. The Tribunal may have taken into account the total period of more than 30 months of unpaid leave and, if they did, that would not be unreasonable when looking at her conduct at the end of such a long period of leave.
38. In grounds 3(b), (c) and (d), the Appellant submits that the Respondent's failure to follow a fair process before dismissing her means that it was wrong for the Tribunal to conclude that she contributed to her failure; she was denied the opportunity to address any failings before she was dismissed.
39. In my view, the failure to follow a fair process does not of itself lead to the conclusion that the compensation award cannot be reduced. Many cases of unfair dismissal will involve a failure to follow a fair process and if it was said that in all such cases the compensation award could not be reduced, that would substantially defeat the object of the legislation in conferring such a power on the Tribunal.
40. I reject the Appellant's contention that the Tribunal took into account matters it should not have taken into account and ignored matters it should have taken into account. The Tribunal had a wide discretion; it was entitled to take account of all matters that have a bearing on the dismissal and there is no evidence from the decision that it failed to exercise its discretion properly.

41. The Appellant also argued that the Tribunal reached a decision that no reasonable Tribunal could have reached and she relied upon a number of other decisions of the Tribunal to show that a reduction of 80% is unprecedented and substantially greater than has been determined in any other case. Great care must be exercised when looking at other cases as it is not always possible to identify the particular facts of each case that may have influenced each decision. The Court of Appeal has said on many occasions, for example in criminal appeals against sentence, that appellants should only rely upon earlier cases if they lay down guidelines. There are no guideline cases on the subject of reducing compensation awards. The Appellant has failed to persuade me that in the exercise of its discretion to make a reduction of 80% the Tribunal reached a conclusion that is not only unreasonable but so unreasonable that it must be set aside on Wednesbury grounds.
42. In ground of appeal 3(e), the Appellant complains that the reduction effectively circumvented the unfair dismissal protection afforded by section 6(3) of the Law and the purpose of the Law as a whole. In my view, the Tribunal's decision shows that it was well aware of the Respondent's failures to follow a proper process and there is nothing in the decision to indicate that it failed to take that into account, together with all other relevant facts, in reaching its decision.

Sex Discrimination Appeal

43. The next part of the Appellant's appeal concerns a complaint of sex discrimination brought by her under the Sex Discrimination (Employment) (Guernsey) Ordinance 2005 ("the 2005 Ordinance"). The complaint was:

"The Applicant has been sexually discriminated against by the Respondent on the basis that the Respondent's requirement that the Applicant attend the February 2008 training course, which she was unable to attend until January 2009 due to childcare commitments and which requirement has subsequently been to her detriment, constituted a continuing act of indirect sex discrimination under the Ordinance by the Respondent against the Applicant."

Grounds of Appeal

44. The grounds of appeal all relate to the Tribunal's interpretation of section 1(1)(b) of the 2005 Ordinance. Section 1(1) provides:

"Direct and indirect discrimination against women."

- I. (1)** *In any circumstances relevant for the purposes of any provision of Part II of this Ordinance, a person discriminates against a woman if -*
- (a) on the ground of her sex he treats her less favourably than he treats or would treat 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 is applied, and*
 - (iii) which is to her detriment."*

45. The Appellant's grounds of appeal are:

"The Tribunal wrongly decided that I had not been indirectly sexually discriminated against by the Respondent under section 1(1)(b) of the ordinance on the basis that:

- (a) The Tribunal wrongly added and applied a test of reasonableness to the requirement under section 1(1)(b)(i) of the Ordinance that the provision, criterion or practice applied to me was such that it would be to the detriment of a considerably larger proportion of women than men, namely by finding that there was a limit of reasonableness as to how an employer should act to counterbalance the disproportionate impact afford by the provision, criterion or practice;*
- (b) The Tribunal wrongly failed to consider the requirement under section 1(1)(b) of the ordinance that the provision, criterion or practice applied to me be to my detriment; and*
- (c) The Tribunal wrongly failed to consider the requirement under section 1(1)(b) of the ordinance that the provision, criterion or practice could not be shown to be justifiable irrespective of the sex of the person to whom it was applied; alternatively*
- (d) If the Tribunal did consider the requirement under section 1(1)(b) of the ordinance that the provision, criterion or practice could not be shown to be justifiable irrespective of the sex of the person to whom it was applied, and concluded that it was justifiable, the Tribunal wrongly concluded that it was justifiable because it failed to take into account that I could reasonably have been permitted by the Respondent to take further unpaid leave until January 2009."*

46. The Appellant's arguments as to why the Respondent's actions were not justifiable for the purpose of section 1 (1)(b)(ii) are summarised at sub-paragraphs 11.10.5 and 11.10.6 of the Tribunal's decision:

- "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."*

47. The Respondent's reply is at paragraphs 11.13 and 11.14:

- "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."*

48. At paragraph 12.7 onwards, the Tribunal gave its reasons for concluding that it could find no evidence of either direct or indirect discrimination. It found that the Respondent had applied UK statutory maternity leave provisions, even though that is not required under Guernsey, and had complied with requests for extensions of the period of unpaid leave, including an unprecedented maternity career break, so that the Appellant had been afforded about 30 months' unpaid leave.

49. At paragraph 12.12 they observed that she needed to attend a refresher course in the UK which, they said, was agreed by both parties. In paragraph 12.13, they said that the Respondent had good and genuine reasons for asking her not to attend the January course because of her distraught state and impending brain scan as communicated by her on 2nd January; those reasons had nothing to do with her gender.

50. The Tribunal looked at the Respondent's offer to accommodate the Appellant on the January course with a later start date, when she was less distraught, or on the February course. Her husband could have helped with the child care or, if not, she had not explained why other family members in the UK could not have assisted.

51. In paragraph 12.18, the Tribunal said:

"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."

52. In paragraph 12.19 the Tribunal concluded 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."

53. The Tribunal then reached the conclusion which forms the basis of the complaint in ground of appeal 1(a):

"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.”

54. The Appellant’s first ground of appeal assumes that the Tribunal has introduced a test of reasonableness into the consideration of detriment required under section 1(1)(b)(i). The Respondent argues that the Appellant has misinterpreted the decision. I agree with the Respondent although I have had some difficulty in following the Tribunal’s line of reasoning. I have approached the task in accordance with the remarks of Lord Hoffmann in Piglowska that I quoted above. That is to say, I have read the decision on the assumption that the Tribunal knew how to perform its functions and what matters to take into account, unless the contrary can be demonstrated. What matters is whether the Tribunal has correctly understood the law, addressed the right questions and reached its decision by permissible means (as Sedley LJ said in Allonby).
55. In paragraph 12.5 the Tribunal correctly set out the main tests that had to be established in relation to indirect discrimination. It then sought to apply those tests to the facts of the complaint.
56. In the first part of paragraph 12.20, I believe that the Tribunal was addressing the sub-section 1(1)(b)(i) requirement and that it accepted that attendance on the February course would be to the detriment of a considerably larger proportion of women than of men. In other words, the Tribunal agreed with the Appellant in relation to that sub-section. In the second part of the sub-paragraph, I believe the Tribunal was looking at the question of justification.
57. Advocate Tee referred me to a number of authorities as to the way the Tribunal should approach the test of justification. In my view, they are helpfully summarised by Elias J, President of the Employment Appeal Tribunal, in Loxley v BAE Systems Land Systems (Munitions and Ordnance) Ltd UKEAT/0156/08/RN, at paragraph 22:

“[22] On the assumption that the traditional test of justification applies, the following principles are, we understand, not in dispute:

- (1) The **burden of proof** is on the Respondent to establish justification once a prima facie case of discrimination is established. This is in accordance with general principles and is reflected in reg 37.*
- (2) The classic test was set out in Bilka-kaufhaus GmbH v Weber Von Hartz (Case 170/84) [1986] ECR 1607, [1986] IRLR 317, [1987] ICR 110 in the context of **indirect sex discrimination**. The ECJ said that the court or tribunal must be satisfied that the measures must “correspond to a real need are appropriate with a view to achieving the objectives pursued and are necessary to that end” (para 36). This involves the application of the proportionality principle, which is the language used in reg 3 itself. It has subsequently been emphasised that the reference to “necessary” means “reasonably necessary”: see Rainey v Greater Glasgow Health Board (HL) [1987] AC 224, [1987] 1 All ER 65, [1987] ICR 129 per Lord Keith of Kinkell at pp 142-143.*
- (3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] EWCA Civ 846, [2005] IRLR 726 per Pill LJ at paras 19 – 34, Thomas LJ at 54-55 and Gage LJ at 60.*

(4) *It is for the Employment Tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: Hardys & Hansons plc v Lax per Pill LJ para 31.*

(5) *In analysing the issue of justification, the tribunal must carry out a critical examination and reflect that analysis in its reasoning: Hardys and Hansons per Pill LJ at para 33.*"

58. Advocate Tee submitted that the Tribunal failed to consider whether the Respondent had shown on objective grounds that its requirement that the Appellant attend the training course corresponded with a real need on its part and was appropriate and necessary for achieving the objective and, instead, considered it on a subjective basis only and took into account irrelevant considerations as to past conduct in relation to past maternity leave.
59. In its decision, the Tribunal looked at the reasonable needs of the Respondent's undertaking; it noted that there was no dispute that the Appellant had to attend a retraining course before she resumed flying and that courses were held regularly throughout the year. The Tribunal also found that, regardless of the Appellant's gender, the Respondent could not be expected to pay her to carry out ground duties for 11 months.
60. The discriminatory effect was the requirement that the Appellant had to make special child care arrangements in order to attend a course in England. The Tribunal found that:
- a. the reason for removing the Appellant from the January course was due to her physical and/or mental state and unrelated to her gender;
 - b. she was asked to join the course later and refused even though her husband was available for child care for the majority of the time;
 - c. she was also asked to attend a course in February but again refused, without making any real attempt to seek other solutions for her child care problems;
 - d. the Appellant refused to apply for a standard career break; and
 - e. she gave a 'blanket refusal' to attend any other course until January 2009.
61. I believe that, when looking at the discriminatory effect of the requirement, the Tribunal took into account that the Respondent was prepared to be flexible by offering the Appellant a number of options as to when she could attend the course. In my view, that is permissible as part of an objective assessment of the effect of the requirement on a mother with child care commitments, especially where, as in this case, the Respondent was unable to employ the Appellant's services until she had attended the course. So, I believe that the second part of the passage in paragraph 12.20 of the decision is concerned with the test of justification under section 1(1)(b)(ii), and is not part of the Tribunal's thinking under section 1(1)(b)(i).
62. The observation about reasonableness in paragraph 12.20 of the decision means that there was a limit of reasonableness as to how far the Respondent was required to go in mitigating, or counterbalancing, the discriminatory effect. That is further explained in the next sentence "*It is arguable that that Respondent exceeded their duty and was in fact in danger of positive discrimination in favour of the Applicant*". In other words, the Respondent had done more than enough to counterbalance the discriminatory effect of the requirement to attend the course.

63. So, I conclude that the Tribunal did address the question of justification; that it reached its decision on that question by permissible means; and, consequently, that its decision on that question should be allowed to stand. In other words, I uphold the Tribunal's decision that the Respondent's requirement (that she attend the training course no later than February 2008) was detrimental under sub-section 1(1)(b)(i) but it was justified under sub-section (b)(ii).
64. In ground of appeal 1(b), the Appellant alleged that the Tribunal failed to consider that the provision, criterion or practice applied to her be to her detriment, which it had to do under sub-section (b)(iii).
65. It follows from the way that I have analysed the reasoning of the Tribunal that, in my view, the Tribunal considered the detriment to the Appellant in requiring her to attend the course. But, having decided that her attendance was justified, I do not believe that the Tribunal was required to state expressly whether it was or was not to her detriment.
66. Grounds of Appeal 1 (c) and (d) are both concerned with the issue of justification. I have dealt with that in my consideration of the first ground of appeal and so I do not need to address these grounds any further.

Conclusion

67. For the reasons I have given, I dismiss the appeals both in respect of the Tribunal's findings concerning the Appellant's unfair dismissal and also in respect of the complaint of sexual discrimination. I would suggest that costs normally follow the event and hope that the parties can agree the terms of any costs orders arising from this judgement but if there are any applications, I direct that they be submitted to me in writing for consideration and/or directions at an early sitting of the Interlocutory Court.