

version does not record a direct answer but recalls the claimant saying "it's like saying you are doing a marathon today and tomorrow, marathon today ok but couldn't do tomorrow". In the claimant's version of events, this is preceded by "in my email to you (RS) on 7<sup>th</sup> May and a phone call to crewing morning of 7<sup>th</sup> May". The versions of notes are consistent in recording the claimant saying "I was pretty confident due to previous duties and minimum rest and late finish that I would not be fit to do the duty". The notes are also consistent in the claimant saying "of course I can't say absolutely not fit." Mr Scadeng asserted that there was an inconsistency between an Aircraft Commander who is not too tired to operate beyond maximum FDP and into discretion but at the same time saying he believed he was too fatigued. The claimant replied "no I had a suspicion". Mr Scadeng asked if he told the company he was not available or that he had a suspicion. The claimant said at that point he said he was not available. The claimant said he did not say "I suspect". He said he was not going to be available. The claimant was asked "so you didn't tell the FO that you wouldn't be operating due to fatigue". The claimant replied "no, no reason to".

82. The claimant said in his fourteen years he had never refused a duty that legally goes into discretion or refused due to fatigue.

83. Mr Scadeng asked how the claimant would have known in advance that he would have a poor night's sleep. The claimant said he suspected that, due to the run of earlies. The claimant said he would have expected the company to not have done what they did in rostering the flight on the 6<sup>th</sup>. When asked if he thought there was ever a realistic expectation of completing without going into discretion, he said they might just have made it.

84. In relation to the use of discretion, Mr Scadeng clarified that was the claimant's decision, "the company can't force you but equally it's not solely your decision. There are legal reasons".

85. The claimant referred to the allegation that he was being accused of gross misconduct. The claimant said that it was at his discretion so it could not be a management request or instruction (the notes use different words).

86. Mr White joined the meeting. Mr White expressed the view that you cannot plan to use discretion. Mr Scadeng asked if the flight was not planned to go into discretion but use maximum FDP was it legal or not. Mr White replied that the question was whether it would be a realistic flight plan, would it stand up to scrutiny. He said "a twelve hour thirty minute FDP on max allowance FDP if it stood up on his flight plans it's legal yes but whether it is sensible it is another matter". He suggested with delays etc and this they would almost always use discretion and expressed the view that FDP should be built in with a buffer. Mr Scadeng wrote in his witness statement that "I extracted a concession from Ian White during the disciplinary hearing that the planned duty was legal". We do not consider that this accurately reflects what Mr White said. We also note the choice of words by Mr Scadeng, which we do not consider reflects the approach of an independent disciplinary officer, approaching the matter without preconceptions.