

87. Mr White disagreed with the view that the chances of the claimant sleeping through on the night of 6th/7th May were good. He said that evidence suggested that, if on a pattern, you still wake up early. The patterns would have meant that the claimant would not have been able to sleep properly. He said "MS felt on the 7th that he couldn't operate due to fatigue. I think, looking at the run of duties it's reasonable. The only person who can say if he is tired is MS". Mr White said that, the day before, the claimant would know he would have minimum rest so he would say that the day before, the claimant would have suspected that he would be fatigued.

88. The notes are consistent in recording Mr Scadeng as saying that if it was only the 7th the claimant reported fatigue, he did not think they would be there. The claimant responded that on the 6th he suspected he would be fatigued. He said on 6th he was tired and he suspected he would not be fit to operate on the 7th.

89. Mr Scadeng wrote to the claimant with the outcome of the disciplinary hearing on 23rd October 2014. The letter repeated the allegations that had been set out in the invitation to the disciplinary hearing but with the omission of the statement that these were being considered as potentially gross misconduct offences as refusals to comply with reasonable management instructions.

90. Mr Scadeng wrote that the claimant had called Crewing on 5th May to inform them that he would not utilise discretion during his duty on 6th May, "This was despite the fact that you could not possibly have known at the time you called Crewing whether or not you and your crew would have been fit to exercise discretion during your flight the following day". We note that the claimant had never argued that the decision about whether he could exercise discretion was based on not being fit to do so; rather the claimant argued consistently that he considered he was not legally entitled to exercise discretion where, in his view, the flight had been illegally planned to exceed the maximum FDP. Mr Scadeng wrote:

"You claimed that this decision was based on *"my early SIMS and the fact I suspected the flight was illegal"*. Yet, despite this, you did in fact operate into discretion, claiming that it became legal to do so because the planned duty changed; however, there was no change to your duty. You still operated the same three sectors to the same destinations. The Air Traffic Control Flight Plans were always filed for the three sectors actually flown and your PLOGS likewise never changed from the planned three sectors ending in Manchester.

"Thus I find that it was always possible to exercise discretion, if you and your crew were fit to do so and, on the balance of probabilities, your threat not to do so was an attempt to put pressure on the Company to change a sequence of duties you did not wish to perform. This pressure could have resulted in a change to the plan or diversion at substantial cost and passenger inconvenience".

91. Mr Scadeng wrote that the claimant did eventually exercise discretion and had confirmed that he was not at any point too tired to operate into Commander's discretion. Mr Scadeng wrote: