

143. According to Mr Scadeng, he passed Mr Thorington's e-mail of 8 or 9 May 2014 to Jo Smith and left it in her capable hands to decide what to do about it. As previously noted, unfortunately, due to serious illness, we were unable to hear from Jo Smith. The respondent has not, therefore, been able to provide evidence as to why the respondent took the decision to go down the disciplinary route. From the sequence of events and Mr Scadeng's evidence that the e-mail of Mr Thorington put "a different flavour" on things, however, it appears that Mr Thorington's e-mail was a significant factor in changing the course of events. Prior to his e-mail, Mr Scadeng passed the claimant's e-mail to Jo Smith simply so the issue of fatigue could be considered. After the e-mail, the respondent began looking, in particular at that stage (the second allegation not having been formulated until after the investigation), into whether the claimant had been dishonest when he said he was fatigued. We heard no evidence from the respondent as to who formulated the allegations to be considered at the disciplinary hearing (adding a second one which had not been put to the claimant as a matter for investigation). We heard evidence from Mr Scadeng and Mr Hutchings as to the reasons for their respective decisions and considered all the relevant documents.

144. We consider that, if Mr Scadeng's decision to find the claimant guilty of gross misconduct and issue a final written warning was motivated to any material degree, consciously or unconsciously, by the making of protected disclosures, the complaint of detriment on the ground of making protected disclosures is well founded. From the transcript of the appeal hearing, the outcome letter and the evidence of Mr Hutchings, we are not satisfied that Mr Hutchings formed a view independent of that taken by Mr Scadeng. The appeal hearing was not conducted as a rehearing. The outcome of the appeal is expressed in terms that Mr Hutchings found insufficient evidence for him to overturn or amend the decision of the disciplinary manager. If the decision of Mr Scadeng was tainted by the protected disclosures to any material degree, the decision of Mr Hutchings was similarly tainted. We, therefore, concentrate on whether the respondent has satisfied us that the decision of Mr Scadeng was not motivated, consciously or unconsciously, to any material degree by the fact that the claimant had made protected disclosures about the legality of the flight planning and/or the fatigue.

145. There are a number of matters from which we draw inferences, casting doubt on the evidence of Mr Scadeng that his decision making was not influenced to any material degree by the protected disclosures.

146. There are strange aspects of the disciplinary process which have not been satisfactorily explained by the respondent. Given the allegation which was to be investigated (at that stage being simply about whether the claimant was honest in reporting that he was too fatigued to fly), the tribunal would have expected first steps to be for the investigating officer to obtain the fatigue report completed by the claimant and to interview the claimant before interviewing anyone else. Only the claimant could give direct evidence as to how he felt at the relevant time and what he thought were the reasons for this. If the investigating officer had been satisfied by the claimant's explanation, the matter would have gone no further. Instead, Ms Burke invited anyone who had conversations with the claimant over the course of 6 and 7 May to come to investigation meetings before she spoke to the claimant. She did not