

claimant was in breach of a reasonable management instruction by saying that he would not exercise discretion.

156. Mr Scadeng appears to have been strongly influenced by the view of Mr Thorington in reaching his conclusions. He said he formed an impression from Mr Thorington that the claimant was making a protest.

157. We consider that Mr Scadeng had no reasonable basis for concluding that the claimant was lying about being fatigued. The claimant had no track record of calling in with fatigue. Only the claimant could actually know whether he was fatigued. The run of duties was such that fatigue was entirely possible. The conclusion that the claimant was lying could only be based on findings that the claimant was not honest in his dealings on 6 May and was making a protest; the impression Mr Scadeng said he formed from Mr Thorington. Indeed, Mr Scadeng said to the claimant in the disciplinary hearing that, if the claimant had just called in to say he was fatigued on 7 May (i.e. without the events of the previous day), they would not be at a disciplinary hearing. As detailed above, we do not consider that Mr Scadeng had reasonable grounds for reaching the conclusions which he did about the events of 6 May. His foundations for his conclusions about the claimant lying about being fatigued on 7 May are not, therefore, built on solid ground. Mr Scadeng placed great weight, in his outcome letter, on what he said he considered to be an inconsistency between the claimant exercising discretion on 6 May and then saying he was fatigued. Mr Scadeng appears to place weight on the claimant allegedly saying during the disciplinary hearing that, during the flight on 6 May he was experiencing the onset of fatigue; at the same time as assessing himself not too tired and able to continue safely to Manchester. The claimant denies that he said that he was experiencing fatigue on 6 May. The notes of the disciplinary hearing are disputed in relation to this point. Even if the respondent's version of the notes is correct, it is very clear from elsewhere in the notes and from the material produced in advance by the claimant that he was not saying that he was experiencing fatigue on 6 May but he suspected, due to the run of duties, that he would be fatigued the next day. We do not see any inconsistency between the claimant saying he was not too tired to complete his flight on 6 May but suspected he would be fatigued the next day; the analogy about marathons which the claimant gave is a good one. It is unclear why Mr Scadeng rejected this argument. Mr Scadeng inaccurately reports that the claimant first raised fatigue "on being asked to call the company after landing." The claimant's evidence to the disciplinary hearing was clear that he had said on the radio that he would talk to crewing when he landed. The evidence was that the claimant called crewing on landing and was immediately put through to Mr Thorington.

158. All these matters cause us to doubt whether Mr Scadeng had an honest belief, formed without being consciously or unconsciously influenced to a material degree by the protected disclosures, that the claimant was guilty of gross misconduct. The respondent has not, therefore, satisfied us that the claimant was not subjected to detriment, in the form of disciplinary proceedings culminating in a final written warning, on the ground that the claimant made protected disclosures. The complaint of detriment on the ground of making protected disclosures is, therefore, well founded.