

152. The claimant asked on a number of occasions for information on how the flight was planned to come within the maximum FDP. The respondent never provided him with this information and has given no satisfactory explanation as to why they did not do so.

153. It was not clear in the outcome letter that Mr Scadeng had concluded that both allegations were well founded, although he told us in evidence that he did reach the conclusion that both were well founded. There was no explanation as to why part of the allegations, relating to the matters being gross misconduct because they were refusals to carry out management instructions, was omitted from the outcome letter.

154. We consider that Mr Scadeng had no reasonable basis for concluding, if he did, that the claimant knew that the flight plan on the day was legal and that he could lawfully exercise his commander's discretion. This was a crucial element in being able to conclude that the first allegation was well founded. At one time, Mr Scadeng said he concluded that the claimant knew it was legal. However, he also said that he understood the claimant was arguing that it was not legal and he could not exercise his discretion but he was not sure that the claimant was being truthful. We consider that Mr Scadeng had no reasonable basis for concluding that the claimant was not being entirely honest in his reasons for refusing to exercise discretion. Given the Goa incident, of which Mr Scadeng was aware, the claimant's view about the legality of the situation was not surprising. If there was no reasonable basis for concluding that the claimant's view was not genuinely held, there was no reasonable basis for Mr Scadeng concluding that the claimant was guilty of gross misconduct by saying, on 6 May, that he would not exercise discretion in circumstances where he did not consider he could do so lawfully. The claimant had no track record of refusing to exercise discretion. Indeed, in relation to the Goa incident, the claimant had exercised discretion on the basis of the assurance from Mr Thorington that he could lawfully do this, although, after the flight, the CAA gave advice that the claimant's view had been correct. Although Mr Thorington knew this view of the CAA had been given to the claimant, the respondent did not suggest that they had any reason to believe anyone had gone back to the claimant to tell him that the CAA had changed their view. The evidence of Mr Elliott supports us in the view that the position was not so obviously clear that Mr Scadeng could reasonably conclude that the claimant, as an experienced commander, must have known that he could lawfully exercise discretion in the circumstances presented on the morning of 6 May. Mr Elliott, an extremely experienced pilot and trainer, had never come across the situation and said that he would have to take advice if he did.

155. Mr Scadeng failed to explain in the outcome letter how he reached the conclusion, if he did, that, by saying that he would not exercise discretion, the claimant was in breach of a reasonable management instruction. He did not address the claimant's argument that he could not be in breach of such an instruction by refusing to exercise discretion since whether to exercise discretion is a matter for the commander of the aircraft alone. The omission from the letter of the part of the allegations relating to refusals to carry out reasonable management instructions may suggest Mr Scadeng did not address his mind to this. Mr Scadeng's evidence at this hearing did not satisfy the tribunal that he genuinely came to the view that the