EMPLOYMENT TRIBUNALS

Claimant Mr. L. Neroni v **Respondent** British Airways Plc

Heard at: Watford **On**: 29 March 2017

Before: Employment Judge Heal

Appearances

For the Claimant: Mr. N. Shah, solicitor
For the Respondent: Mr. S. Purnell, counsel

JUDGMENT

1. The complaint of unfair dismissal is not well founded and is dismissed.
2. The claimant shall pay to the respondent the sum of £7040 costs.

REASONS

1. By a claim form presented on 28 July 2016 the claimant made a complaint of unfair dismissal.

2. I have had before me an agreed bundle running to 492 pages to which no further documents have been added during the course of the hearing.

3. I have heard oral evidence from the following witnesses in this order:

Mr Anthony Coombes, Inflight Business Manager,
Mr Ian Brunton, Resource Planning Manager (interim),
Mr Geoffrey Ayres, Inflight Customer Experience Employees Relations Manager,
Mr Lucas Neroni, the claimant.

4. Each of those witnesses gave evidence by means of a prepared typed witness statement which I read before the witness was called to give evidence and then the witness was cross examined and re-examined in the usual way.

Issues

5. At the outset of the hearing and with the assistance of the parties I identified the following issues:

6. There is no dispute that the claimant qualifies to claim unfair dismissal, that his claim is in time or that he was dismissed.

7. What was the reason for the dismissal? The respondent says that it was one related to conduct which is a potentially fair reason for the purposes of section 98(2) of the Employment Rights Act 1996.

8. Being more specific, the respondent dismissed the claimant for 3 reasons:

   8.1 a breach of the absence management policy in that there was a continuous pattern of absence during the ‘festive period’ from about 19 December to 2 January over 3/5 years;
   8.2 a failure to declare an outside interest under the relevant policy EG 812
   8.3 neglect of duty in that the claimant misused dependency leave days. He would apply for dependency leave on a Sunday in circumstances where he had already booked the following day off. The evidence was that he performed duties at a gym on Sunday and Monday.

9. The respondent’s case is that no one of those 3 matters led to the decision to dismiss, but a decision was taken to dismiss on the basis of all 3 allegations cumulatively. However, the respondent says that the first allegation alone (the pattern of absence in the last 5 years) would fall within the reasonable range of responses to dismiss.

10. Was that the genuine reason for the dismissal?

11. Did the respondent hold the belief it had in the claimant’s misconduct on reasonable grounds?

12. Had the respondent carried out as much investigation into the alleged misconduct as was reasonable in all the circumstances?

13. Was the dismissal procedurally unfair? The claimant says that the respondent did not inform the claimant of all the allegations against him in that the dismissal letter mentioned deception and dishonesty although these matters were not put to the claimant during the investigatory or the disciplinary hearings.

14. The claimant also says that there was a finding in the disciplinary outcome that sickness was not genuine but this had not been put to the claimant prior to the decision being taken.

15. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

16. If the dismissal was unfair, did the claimant by his conduct contribute to the dismissal?

17. What was the percentage chance that the claimant would have been fairly dismissed in any event?

Concise Statement of the Law

18. My starting point is always the wording of section 98 of the Employment Rights Act 1996 which says, so far as is relevant:

"*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -*
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a)…
(b) relates to the conduct of the employee,
(ba)…
(c) …
(d) …

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case."

19. Where an employer has a suspicion or belief of an employee's misconduct and dismisses for that reason I have to apply the three-stage test set out in British Home Stores v Burchell [1980] ICR 303. I find it helpful to remind myself of the relevant passage in the judgment of Arnold J:

"First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those

grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances."

20. It is with that test in mind that the I have formulated the issues in this case. The burden lies upon the employer to prove the reason for the dismissal: that it had a genuine belief in the misconduct. Thereafter the burden is neutral. On that neutral burden, I ask whether the employer had in its mind reasonable grounds upon which to sustain that belief, and also, on a neutral burden of proof, I ask whether the employer had carried out as much investigation as was reasonable in all the circumstances.

21. I remind myself that it is not for me to substitute my own view for that of the employer. The question at this stage is not whether the claimant was actually guilty of misconduct, or whether I would have dismissed in the circumstances or even whether I would have investigated as this employer did. The question is whether this employer took an approach which was open to a reasonable employer: was it within the reasonable range of responses? I find those principles set out in the judgment of Browne- Wilkinson P in Iceland Frozen Foods v Jones [1983] ICR 17 paragraph 24.

22. I have to apply that test as much to the question of whether the employer carried out a fair procedure as to the question of whether dismissal was a fair sanction. I must focus therefore on the evidence that was actually before the employer, not on evidence that I have heard but that the employer did not hear.

23. In asking whether or not an employer has carried out a fair procedure, I bear in mind the ACAS Code of Practice and Guide to disciplinary and grievance procedures (2015).
24. A tribunal should not consider procedural fairness separately from the other issues. (*Taylor v OCS Group Ltd [2006] IRLR 613)* I must consider the procedural issues together with the reason for the dismissal, as I find it to be. The two impact upon each other and my task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has proved as a sufficient reason to dismiss. I must look at the question in the round and without regard to lawyers' technicalities.

Facts

25. I have made the following findings of fact on the balance of probability. That means that I do not possess a fool proof method of discovering absolute truth, but I read and listen to the evidence given to me by the parties and on the basis of that evidence I decide what is more likely to have happened than not.
26. The claimant began his employment with the respondent on 13 May 2003. He was employed as a member of the cabin crew.
27. There was an express term of the claimant's contract of employment that:

‘*You shall not accept any other whole or part-time office of employment or otherwise undertake work as a self-employed person during the term of your employment with the Company without prior written approval of the Company.*’

28. The respondent’s disciplinary procedure, EG 901 contains a non-exhaustive list of offences which amount to gross misconduct. These include, ‘neglect of duty’ but they do not specifically include breaches of the absence procedures.
29. The respondent has a separate contractual policy called EG 300 which is its absence management policy.

30. EG 300 section 5 is headed ‘misconduct’ and says that employees who behave in such a way that it appears to the company that their absence is not legitimate will be dealt with under the EG901 disciplinary procedures. It gives as an example that unacceptable pattern of absence is not necessarily a concern but the actual days taken as absence may indicate possible misconduct, for example taking absence on regular days of the week, or linked to public yearly calendar events, or before or after annual leave.

31. EG 812 deals with declaring outside interests. The policy states that employees who wish to engage in any outside profession, trade or business must first obtain written permission of British Airways.

Credibility

32. I regret that I have not found the claimant a reliable witness. His account of events has changed and has on occasions been implausible. Out of many possible examples, when first interviewed about why he went to Rome, he said that he went to see a solicitor with his brother about some business in which they were involved. Later, this was a visit to a solicitor about a matter to do with his child following a divorce. In one account, he said that back pain developed on the flight on the way to Rome and in another account he said that it came on after a visit to the solicitor. He said that his back pain was so bad that he could not telephone his manager and could not fly home as booked, however he could travel lying on the back seat of a vehicle to the east coast of Italy where his brother lived. By contrast, I have found the respondent’s witnesses careful, and consistent and that they gave evidence which made sense.

Chronology

33. In July 2015, the claimant made a bid for annual leave from 22 December 2015 to 2 January 2016 but was unsuccessful. He could have requested those days again at the end of November 2015 but he did not do so.

34. On 21 December 2015, the claimant flew to Rome using staff travel and was booked to fly back to the UK, also on 21 December.

35. On 22 December 2015, the claimant was rostered to fly to Amsterdam. He was rostered to fly to Munich on 23 December 2015. However, on 22 December 2015 at 6:14 am the claimant telephoned the respondent’s

operational support team from Italy to call in sick. He was told that his line manager would be in contact with him over the next couple of days.

36. On 24 December 2015, the claimant's line manager Michelle Weller left a message for him on his answerphone asking him to call her.

37. The claimant returned that call on 27 December, leaving a message for Ms Weller that he had a bad back.

38. On 28th December, while still 'off sick' and still in Italy, the claimant made a booking for 2 January 2016 to fly back to the UK using staff travel. This was in breach of respondent's policy.

39. The claimant's line manager left a message on 29 December asking the claimant to call her that day. The claimant did not do so.

40. The claimant did fly back to the UK on 2 January 2016. He was rostered to fly at 5:30 am on 3 January. However, at 3:37 am on 3 January he telephoned the operational support team to make a special leave request for a family emergency. He said that his son was unwell and no one else was available to care for him.

41. [For the purposes only of any finding that might be necessary for contributory fault I do not accept the claimant's account of either of these absences. On the balance of probability, I do not accept that he had a bad back when he was in Italy on and after 21 December 2015. His account of these events seems to me to be so changeable as to be unreliable. I do not understand how on 28 December he could have known that he would be unfit to fly until 1 January but then become fit to fly on 2 January.

42. [It seems to me implausible that, knowing that he was going to fly again on 3 January, the claimant would permit his son to stay the night as he suggested to me. The claimant's account, that his son - who lives with his mother for 50% of his time 15 minutes away from the claimant's house - would visit for the evening, be permitted to stay the night although the claimant was going to fly early the following day, that the claimant's girlfriend would be content to be called to come and take over childcare for 4.30 in the morning when the claimant was due to leave, and the claimant would not on 2 January have taken the sensible option of returning his son to the mother's house, all seems to me implausible. Further, the claimant's account changed: on one version his son asked to be permitted to stay and later became ill during the night, and on another version the son became ill and therefore was permitted to stay.]

43. The claimant's absence triggered an investigation not only into this particular absence, but into his patterns of absence.

44. Accordingly, together with his trade union representative, he attended an investigation meeting on 7 January 2016 with Michelle Weller, his line manager.

45. The Claimant said that he had been attending a solicitor's appointment with his brother regarding some business in which they were involved. He was vague about the appointment time and said that he felt fine on the outbound flight but after the meeting his back became painful. He said he was not well enough to travel back to London as planned. He stayed in a hotel which he owned with his brother 'quite a way' outside Rome. He said that it had not occurred to him to contact Ms Weller.

46. Ms Weller asked him about the dependency day on 3 January and the claimant said that his son lived with his ex-partner. He was due to have his son overnight on the evening of 2 January, his son stayed that night but became ill during the night. His girlfriend was there as well but because the claimant's son was unwell he felt that he needed to care for him and therefore requested a dependency day.

47. By letter dated 7 January 2016 Ms Weller confirmed to the claimant that a preliminary investigation would be opened in accordance with EG 901. This investigation would be opened because the claimant travelled to Rome using staff travel on 21 December 2015 prior to his next rostered duty on 22 December for which he phoned in sick. This gave rise to allegations of breach of e.g. 300 (section 5) and neglect of duty. The letter told the claimant that the above allegations might need to be amended if further issues arose and also that the allegations were extremely serious and constituted gross misconduct. Ms Weller warned the claimant if the allegations were proved, the appropriate sanction might be dismissal.

48. By letter dated 8 January 2016, Miss Shirley a preliminary investigation official, wrote to tell the claimant that he was required to attend an interview with her. She repeated the allegations and reiterated their seriousness. She told claimant of his right to be accompanied.

49. That interview took place on 11 February 2016. The claimant attended together with his chosen companion Robert Woodward. Notes were taken which recorded detailed questions and answers and those notes have not been in dispute before me. The claimant told Miss Shirley that he had a bidding preference for Sundays and Mondays off. He said that he always requested Christmas and New Year off but was not always successful. The claimant said that he felt 'absolutely fine' on 21 December before his trip to Rome. He said that the business he owned with his brother was a hotel on the east coast of Italy. His brother had arranged the business meeting and the appointment was for around 2 o'clock. He said he started to feel unwell on 21 December after the meeting, going back to the car he dropped something, went to pick it up and felt something. He travelled to the east coast in his brother's car which is a pickup. He said he did not return Michelle Weller's voicemail because he was dealing with pain and it was Christmas.

50. The claimant said that he reported fit for work on 2 January 2016 at 8:27 am: at that time he was in Italy. He agreed that he had not been in contact with his manager the way he was meant to be.

51. The claimant confirmed that on 3 January he was rostered to report at 5:30 am. He had his son staying with him on 2 January 2016. He confirmed that on 3 January a dependency day had been granted. He said that he had arranged for his girlfriend to care for his son on 3 January while he was flying. He agreed that he probably put in a bid request for 3 January 2016 because he normally bid for Sundays and Mondays off.

52. He said that his son lived in Uxbridge and had always lived with his ex-partner.

53. The claimant was then asked about other matters. He agreed that he was an 'Hour of Power' instructor at 'Active for Less' in Uxbridge. He had been working as an instructor for 9 to 10 years approximately. He did this work on Sundays and Mondays.

54. The claimant agreed that he had not filled in a EG 812 declaration of outside interest for advising the respondent of his involvement with Active for Less in Uxbridge. He said that he had made his manager aware that he did this work.

55. The claimant was then asked about 26 October 2014 when he was rostered to fly to Greece. He was asked to confirm whether he 'no-showed' for rostered duty on that day. He could not remember this incident and could not explain his reasons for the no-show.

56. The claimant agreed that on 6 November 2014 he had told Miss Weller that he had been suffering with a lack of sleep. He agreed with Miss Weller that he could use an annual leave day to cover the no-show on 26 October. The claimant agreed that 26 October 2014 fell on a Sunday. He also agreed that he had probably requested a bid day off on Monday 27 October.

57. The claimant could not remember whether he 'no showed' for rostered duty on 19 July 2015. He remembered being told that a day's pay would be deducted from his salary. He confirmed that he probably put in a bid request from 19 July 2015. He agreed that 19 July 2015 fell on a Sunday and that he had requested a bid day off on 20 July 2015.

58. The claimant agreed that on 9 May 2015 the claimant called OST to confirm that he could not work as rostered due to the ill-health of his wife and child. He agreed that he had put in a bid request for 10 May 2015 and that it was a Sunday. He also agreed that he had a bid day off on Monday, 11 May 2015.

59. The claimant thought that he probably put in a bid request for 11 October 2015 which he agreed was a Sunday. He agreed that he had a requested bid day off on Monday 12 October, probably. He could not remember but thought that on 11 October 2015 he had requested a dependency day because his son was unwell.

60. The claimant was also told that he had not attended work for the past 5 Christmas and/or New Year peak holiday periods during which he had been rostered to work 3 of those periods.

61. He was told that he had an unacceptable pattern of absence. Miss Shirley took the claimant through the precise dates of his absences over those periods and he confirmed that the dates were probably correct.

62. He thought that the reason for his absence at Christmas and New Year 2012/13 was probably his back.

63. He thought that at Christmas/New Year 2013/14 the reason for his absence was food poisoning.

64. By letter dated 16 February 2016 Miss Shirley told the claimant that an investigation had been opened additionally into the pattern of non-attendance over the last 5 Christmas and/or New Year holidays over which the claimant was rostered to work on 3 of those years. Miss Shirley said that this was a breach of EG 300 (section 5). Additionally, Miss Shirley said that the claimant had been working elsewhere without prior permission from British Airways, having requested dependency leave days and 'no showed' for his rostered duties on 3 January 2016, 11 October 2015, 19 July 2015, 10 May 2015 and 26 October 2014. This gave rise to allegations of failure to declare an outside interest as declared in EG812 and neglect of duty. She told the claimant that these allegations were extremely serious, constituted gross misconduct and, if found, the appropriate sanction might be dismissal.

65. On 19 February 2016, the claimant completed a declaration of outside interest form notifying the respondent of his freelance paid employment with Active for Less in Uxbridge. Permission was granted for the claimant to undertake this work on 19 February 2016.

66. By letter dated 23 February 2016 Ms Natalie West, in - flight business manager, told the claimant that the investigation was complete and Ms West believed that there was a case to answer.

67. By letter dated 8 March 2016 Mr Anthony Coombs required the claimant's attendance at a disciplinary hearing on 24 March. This letter set out allegations that the claimant had:

1. Travelled to Rome using staff travel on 21 December 2015, prior to the claimant's next rostered duty on 22 December 2015 for which he phoned in sick. The claimant had also not attended work for the last 5 Christmas and/or New Year holiday periods out of which he had been rostered to work 3. This gave rise to a breach of EG 300 (section 5).

2. Been working elsewhere, without prior permission from British Airways, having requested dependency leave days and/or 'no-showed' for his rostered duties on 3 January 2016, 11 October 2015, 19 July 2015, 10 May 2015 and

26 October 2014. This gave rise to allegations of a failure to declare an outside interest as detailed in EG 812 and neglect of duty.

68. The letter told the claimant that the allegations if found were considered to amount to gross misconduct for which dismissal might be an appropriate sanction. The claimant was sent a copy of the detailed preliminary investigation report and of EG901.

69. The disciplinary hearing took place on 24 March 2016 and was chaired by Mr Coombes. The claimant attended with his trade union representative Mr Woodward and detailed notes were taken which have not been in dispute before me. The hearing lasted for 2 hours 37 minutes.

70. On this occasion the claimant said that he had travelled to Rome for a solicitor's meeting to discuss his son's childcare. He said that he had not returned home on 21 December because he had a problem with a pre-existing back condition. He said he did not call in sick because he was in pain. He said that he could not move and needed medication. He acknowledged that he should have called his manager. He knew that going sick over Christmas and New Year was not acceptable to British Airways. He knew that the respondent would not perceive this '*in a good way'* but he said that he was genuinely sick. He said that he requested every Christmas and New Year off but was not always successful. He said that he was not aware of the policy about not using staff travel when sick.

71. The claimant said that over the Christmas period from December 2012 to January 2013 he probably had a sinus problem. He knew that this would be perceived by the respondent '*in a bad way'* and that the respondent would think he did not want to work. He knew that phoning in sick over the Christmas period 3 times in 5 years would be viewed '*in a bad way'*. He understood the impact that his absences over Christmas and New Year would have on the business and on other staff.

72. The claimant again confirmed that he took exercise classes on Sunday and Monday and he always bid for Sunday and Monday off. He said that there was someone to cover classes if he was not available to do it. He reiterated that although he had not filled in the form to ask permission, his manager knew about this work. He said that it would look suspicious to the respondent that he had only no-shows and/or asked for the dependency leave on Sundays. He did not say, as has been said on his behalf in this hearing, that he had his son to stay at weekends. When he was taken through the individual days he repeatedly confirmed that it would look suspicious to the respondent that he made requests for dependency leave for Sundays when he worked on a Sunday as a fitness instructor and he also had the following Monday off.

73. When asked whether there was anything else that he would like to add, he apologised for not being in touch with his manager and said that he was always loyal to British Airways.

74. Mr Coombes then considered his decision.

75. Looking at the alleged pattern of absence, Mr Coombes considered that the absences on 26 December 2012 to 4 January 2013, 27 to 29 December 2013 and 22 December 2015 to 2 January 2015 were all absences occurring in the same period, that is the Christmas and New Year holiday period. He thought that they were all therefore linked to yearly calendar events. He took into account that absences during that period will happen from time to time for genuine reasons. However, he thought that the relevant absences amounted to an unacceptable pattern.

76. Mr Coombes was aware of the pressure on the respondent over the Christmas/New Year period. The respondent was interested in minimising absence levels during that time and the staff were aware that absences were monitored and scrutinised closely over that period.

77. Mr Coombes looked at the different absences individually to determine whether they were genuine.

78. Over 2012/13 Mr Coombes noted that the claimant had pre-booked annual leave and rostered days off before and after the period of sick leave so that the absence was sandwiched between 2 periods of booked days off. He noted that the claimant had pre-booked a flight to Rome on 19 December 2012 and he booked his return flight to Heathrow while he was off sick some 7 days before he declared himself fit to fly. He therefore concluded that the claimant had plans to be in Rome during the period that he was rostered to work and he noted that the claimant's flight back brought him home in time to work on Sunday and Monday.

79. Mr Coombes also noted that the claimant's explanation for this absence had changed from a sinus problem to a back problem. Despite the provision of a doctor's certificate, Mr Coombes did not find the claimant's explanation credible.

80. Taking into account also the claimant's lack of awareness of the attempts he might have made to contact his manager in a context where staff are normally very anxious to demonstrate that their absences are genuine, Mr Coombes concluded that this particular absence was not genuine.

81. Turning to December 2013, Mr Coombes noted that the claimant had been rostered to work from 24 to 28 December. He reported for duty from 24 to 26 December and was then off sick between 27 to 29 December. He had bid unsuccessfully for annual leave between 24 December and 4 January. Mr Coombes thought that 27 to 29 December did count as the Christmas period because the respondent's point of view that period is depicted in the cabin crew rosters as running from 15 December to 6/7 January each year. He thought that the period extended beyond Christmas Day.

82. Mr Coombes thought that the claimant had not given him any convincing evidence or information to prove that he was genuinely unwell during this period. He concluded that the claimant did not have food poisoning.

83. When he considered the period 22 December 15 through to January 2016, Mr Coombes noted that the claimant had bid unsuccessfully for annual leave over the same days that he reported sick. He was surprised that the claimant had not called his manager back straightaway on receipt of her voicemail. He did not find the claimant's explanation for not doing so plausible. He did not understand why the claimant had not been proactive in trying to contact his manager. He thought this demonstrated an attempt to stay 'under the radar' because the claimant knew that he had a bad record for attendance at Christmas. He did not accept that the claimant did not know about the policy that he should not book to travel using staff travel when sick. He did not see how the claimant could have known at the time he made a booking that he would be able to fly back with certainty on 2 January. He concluded therefore that this period of sick absence was not genuine.

84. Drawing these conclusions, Mr Coombes was supported by the clear pattern of absence linked to the Christmas and New Year holiday period. He saw that the claimant had pre-booked tickets to Rome shortly before 2 of the 3 periods of absence. He saw that over 2 of the 3 periods the claimant had bid unsuccessfully for annual leave during the period he later took off sick. He noted that on 2 occasions the claimant had booked return flights to Heathrow while he said he was sick and a number of days before he declared himself fit to fly. He took into account the claimant's conflicting explanations and that on the final occasion the claimant did not report his absence until one day after he had missed his pre-booked flight back to London. He took into account the claimant's lack of contact with his manager and that the claimant had used a staff travel concession while he was allegedly sick.

85. Turning to the failure to declare an outside interest, the facts before Mr Coombes were not in dispute. He was more concerned with how this additional work might impact on the claimant's work for the respondent than with the claimant's inability to fill in the correct form. He was concerned about the need to comply with the Working Time Regulations and the fact that the claimant worked in a safety critical role. He was also concerned that the work as a gym instructor brought the claimant into direct conflict with the his role as cabin crew because he might be required to work for the respondent on Sundays and Mondays.

86. As to neglect of duty, Mr Coombes noted that all the occasions relevant occurred on Sundays, a day when the claimant taught exercise classes. Mr Coombes was troubled that the claimant had difficulty explaining the reasons for his various requests. He noted that the claimant agreed that the pattern of behaviour looked suspicious. Although the claimant recognised the likelihood of suspicion, he was unable to provide any evidence to explain matters.

87. The claimant had produced an email from Amanda Spence who said that she had covered classes for him on 11 October 2015 and 3 January 2016. Mr

Coombes did consider this. Just because it did not influence his decision in favour of the claimant, does not mean that he disregarded it. When weighing it up however, he noted that Ms Spence is a friend of the claimant's and that the email came from a personal email address and not from the gym's email address. Therefore, he did not find the evidence very compelling.

88. Taking all the evidence before him into account, Mr Coombes concluded that the claimant had used dependency leave requests and no-shows to be able to work as a gym instructor. He concluded that the claimant had deliberately deceived the respondent and that this amounted to a serious breach of trust and confidence.

89. Mr Coombes concluded that the appropriate sanction was dismissal. He took into account the claimant's employment history, personal file and mitigating factors. The claimant's low level of absenteeism otherwise made the pattern of absence over Christmas and New Year more striking. Mr Coombes thought that the allegations as a whole linked together and compounded one another. The evidence demonstrated to him that the claimant had been dishonest towards the respondent. He thought that there had been an intention to deceive. He concluded that he could not trust the claimant to carry out his role properly in the future. He was aware of the claimant's demonstration of remorse but thought that did not outweigh his belief that the claimant could not be trusted in the future.

90. Mr Coombes confirmed this decision to the claimant in a letter dated 20 April 2016. Amongst other things he told the claimant that he thought that there had been deception by the claimant and that amounted to a breach of trust. The letter included this passage:

'*For me, the circumstances surrounding your most recent absence as outlined above, coupled with your request for dependency leave on a day when you may well have been working elsewhere demonstrate your arrogance and a degree of contempt towards your employment at British Airways*.'

91. The claimant told about his right of appeal.

92. The claimant did appeal by letter dated 26 April 2016. He said that he felt that the sanction was too severe and disproportionate to the allegations. He thought the language used to describe his motive was unfairly personal and called into account Mr Coombes' objectivity. He said that he was on duty from 24 to 26 December 2013 and that he had not been charged with breach of the staff travel policy. He said that inadequate consideration had been given to his operational and personal files which were clear.

93. A stage 1 appeal hearing took place on 17 May 2016 before Mr Brunton. The claimant attended together with Mr Woodward his trade union representative. Notes were taken which have not been disputed before me. Mr Woodward supplied details of 2 Cabin crew employees who he said had been given lesser sanctions in the claimant for similar offences. Mr Brunton set in train an investigation into those cases. One involved a member of cabin crew who had

run a beauty salon at home without declaring it and who was given a written warning for failure to declare an outside interest, albeit she had been open about the interest itself. The other case concerned an employee working as a yoga instructor, however because of the passage of time and the employee's departure from the respondent's employment, no written records were available. There was some suggestion that the employee had been given a written warning that it was not possible to be clear about the facts.

94. Mr Brunton was also given details of other cases which were more similar to the claimant's case and in which the individual had been dismissed. Therefore, he did not think that there had been any inconsistency in the sanction awarded.

95. Mr Brunton also did not consider that the claimant had been genuinely sick over the Christmas/New Year periods. He thought the claimant had used no-shows and dependency leave days in order to work as a gym instructor. He disagreed with Mr Coombes about the failure to declare an outside interest for which he did not think dismissal was a fair sanction. He accepted that the claimant had always been open with his colleagues about his work as a gym instructor. However the other 2 allegations did, to Mr Brunton, justify summary dismissal.

96. Mr Brunton thought that Mr Coombes had properly considered the claimant's mitigation documents: letters from doctors, from his solicitor and from Amanda Spence. He could see that these matters have been discussed at the hearing.

97. Mr Brunton considered the evidence for himself and drew his own conclusions on the evidence. He did not believe that the claimant intended to return to the UK for 22 December. He was influenced by the fact that the claimant booked a flight home on 28 December while he was off sick and 6 days before the actual flight, by the fact that the claimant had already bid for these dates as annual leave and he noted the convenience by which the claimant always fell ill over Christmas/New Year when he was rostered to work. He thought it just not plausible that the absences were genuine. He thought that Amanda Spence's email was not compelling for the same reasons as Mr Coombes.

98. Mr Brunton thought that the passage quoted did not mean that the claimant had been arrogant or shown contempt for the process but was referring to the claimant's actions. Mr Brunton thought that those actions could be interpreted as showing arrogance and contempt towards the respondent and therefore he did not consider that Mr Coombes language was inappropriate.

99. Mr Brunton thought that the absence from 27 to 29 December did count as absence over the Christmas period even though the claimant had actually worked at Christmas and on New Year's Day itself. He thought, as did Mr Coombes, that it was appropriate to look at the Christmas period as a whole.

100. Mr Brunton thought that the relevance of the reference to the staff travel policy of not booking travel while on sick leave was that it showed part of the pattern of the absences which showed that the absence had been

premeditated. This was because the managers found it hard to believe that the claimant would have known while sick when he would be well enough to fly.

101. Mr Brunton was satisfied that Mr Coombes had given careful consideration to the claimant's personal operational file.

102. Mr Brunton took the view that the claimant's conduct had been extremely serious and that dismissal without notice was the appropriate sanction. He would have reached the same decision on only the first and third allegations because he took the view that those allegations revealed dishonesty.

103. This decision was confirmed to the claimant in a letter dated 14 June 2006. That letter told the claimant of his rights to a final stage of appeal. The claimant did appeal and the hearing was conducted on 11 July 2016 by Mr Ayres. Mr Ayres too conducted a detailed hearing in which notes were taken which have not been disputed before me.

104. Mr Ayres upheld the decision summarily to dismiss the claimant for gross misconduct. This was confirmed in a letter dated 28 July 2016. Mr Ayres approached the appeal by discussing with the claimant each one of his appeal points and then he considered them.

105. Mr Ayres thought that the claimant had not presented any new evidence or information which had not been seen at earlier stages. He did not accept that the claimant should have been given an opportunity to improve. He thought that the claimant had worked for the respondent for 16 years and should know that nongenuine sickness absence would be considered seriously. He thought the matter was not one of improvement but of the claimant being dishonest. He thought that these similar cases presented by the claimant's union representative were different from the claimant's case in that they concerned employees who had not declared their outside interests to the respondent. Those cases lacked the feature of patterned absences and neglect of duty.

106. Mr Ayres considered that where employees took patterned absences, that usually resulted in dismissal. He thought that the sanction was appropriate.

107. Looking at the language used in the dismissal letter, Mr Ayres thought that Mr Coombes had conducted a very thorough and fair investigation and having examined it, Mr Ayres did not think Mr Coombes lacked objectivity or independence. He agreed that the claimant had showed a degree of contempt towards his employment with the respondent and that he intended to deceive the respondent to further his own outside interests.

108. About the December 2013 absence, Mr Ayres thought the claimant was fully aware of the importance of reporting for duty over the Christmas holiday period in its entirety. He did not accept that the claimant thought that

the Christmas period was limited to the days 24 to 26 December. He did not think that this absence should be discounted.

109. Mr Ayres thought that the point about booking staff travel when off sick was relevant because it shed light on whether the claimant's absence was genuine. He thought that the rules around staff travel were common knowledge amongst BA staff and the claimant was aware that staff travel was not permitted during periods of sick absence. He thought that the claimant had had a reasonable opportunity to state his case on this matter.

110. In relation to the claimant's point that his operational and personal files should have been looked at more thoroughly, Mr Ayres thought that this did not necessarily help the claimant because his otherwise good absence record shed light on the patterns of absence at Christmas/New Year. The claimant was unable to make Mr Ayres doubt the findings about the dependency leave requests.

111. Mr Ayres thought that each of the allegations against the claimant could amount to gross misconduct and therefore summary dismissal was appropriate for any one of them. He himself would have dismissed the claimant for each of the allegations except that a failure to declare an outside interest for which he would have given a final written warning. However, he considered that the allegations were interdependent and not easily separated. Therefore, he thought it appropriate to consider them cumulatively and he was satisfied that summary dismissal was the appropriate sanction.

Analysis

112. It is not in dispute that the respondent dismissed the claimant for a reason related to conduct. That is a potentially fair reason for the purposes of section 98(2) of the Employment Rights Act 1996.

113. I consider that the respondent has carried out a detailed and meticulous investigation which falls within the range of reasonable investigations. Indeed, during the disciplinary process, the claimant admitted that he had breached the respondent's procedures. The respondent has been criticised before me for not carrying out further investigation by contacting Ms Spence, the claimant's medical advisers, or the gym. It seems to me that the respondent has conducted an investigation within the range of reasonable responses. It is within that range for the respondent to take the view that if the claimant wished to provide further evidence to support that of Ms Spence or his medical evidence or from the gym, then it lay in his hands to do so. He knew, as is plain from his responses at the disciplinary hearing, that his honesty was in question. He knew that there was a question as to whether he was genuinely sick and he knew that the circumstances looked suspicious to the respondent. He had ample opportunity to provide evidence to the respondent to allay its suspicions.

114. I consider that the respondent held the belief it had in the claimant's misconduct on reasonable grounds. It was reasonable for it to take the view

that the claimant was in breach of its various policies because the claimant had agreed that he was. Moreover, the pattern of absences over Christmas/New Year, in circumstances where the claimant had already tried unsuccessfully to book leave over these periods, together with the times when he booked to fly home knowing in advance when he would be better and his lack of communication with management, all add up to circumstances so suspicious that the respondent was entitled to feel sure that the claimant's absences were not genuine.

115. The same applies to the claimant's absences on Sundays when he had been rostered to work. Once again the pattern is one that the respondent acting within the reasonable range of responses was entitled to regard seriously and with suspicion. The claimant worked at the gym on Sunday and Monday. On each occasion, he had the Monday booked off from the respondent's work. On each occasion, he contacted the respondent to ask for a dependency day or made a no-show on the Sunday. The pattern is so striking that it is within the reasonable range of responses for the respondent to conclude as it did that the claimant's reasons given for absence on each Sunday were not genuine.

116. Although Mr Coombes did think that it was appropriate also to dismiss for the failure to declare an outside interest and although two later decision-makers disagreed with him, this seems to me to make no practical difference. Whether one regards the allegations as 2 or 3 allegations against the claimant, in either case it was within the reasonable range of responses for the respondent to take the view that the matters proved added up to gross misconduct and therefore that summary dismissal was appropriate.

117. I do not accept that because the respondent's absence policy uses the heading 'misconduct' that prevents the respondent from regarding as gross misconduct matters which it is entitled to regard as amounting to dishonesty. The absence policy makes it plain that breaches may be dealt with under the disciplinary policy and that disciplinary policy includes matters of gross misconduct. It was within the reasonable range of responses for the respondent to take the view that these matters were so serious on the facts that they amounted to gross misconduct.

118. The claimant says that the dismissal was unfair because it was not put to him at the various hearings that he had been dishonest or intended to deceive. I accept Mr Purnell's submission that an employer's managers are not to be judged by the standard of cross examination in a court or tribunal. They have to do what is fair within the reasonable range of responses. That is what they did in this case. The claimant knew clearly what were the allegations made against him. His answers given repeatedly in the disciplinary hearing show that he knew that his bona fides were in question and at the respondent would regard the circumstances as suspicious. He knew therefore that his honesty was in question and it was not outside the reasonable range of responses for the respondent not to say expressly, 'we think that you have been dishonest'.

119. If I were wrong about that, then once the claimant received the dismissal letter from Mr Coombes, he knew clearly that the respondent believed that he had been dishonest. Thereafter he had a full opportunity at separate appeals to convince Mr Brunton and Mr Ayres that he had in fact been honest. Therefore, in any event what the respondent did overall was fair.

120. I consider that dismissal was a fair sanction: that it was a sanction within the reasonable band open to this employer. The respondent was entitled to conclude that the claimant's actions showed that he could no longer be trusted. His conduct had damaged the relationship of trust and confidence. The respondent was entitled to take into account its need for crew members who would turn up to work reliably and who would give a genuine account of their absences so that it could run its business.

121. For all those reasons I consider that this complaint of unfair dismissal is not well-founded and I dismiss it.

Costs

122. After I had delivered the judgment set out above orally to the parties, the respondent made an application for costs. Mr Purnell based his application on rule 76(1)(a): that the claimant had acted unreasonably in the way the proceedings had been conducted and/or on rule 76(1)(b) that the claim had no reasonable prospect of success.

123. Enlarging on that, Mr Purnell handed me copies of some of the correspondence between the parties. By a very detailed letter dated 8 September 2016, Messrs Addleshaw Goddard, solicitors, who then acted for the respondent, wrote to the claimant inviting him carefully to consider the detail contained in the letter explaining to him the weaknesses in his case and inviting him to consider whether to pursue or withdraw it. If the claimant withdrew his claim before 14 September 2016 then the respondent would not pursue costs against him in the event that he was unsuccessful at the tribunal. The letter was headed, 'without prejudice save as to costs'.

124. Mr Purnell said that on the exchange of witness statements the merits of his case should have been obvious to the claimant. He said that the case as presented to the tribunal was one constructed after the event by the claimant's lawyer and that much that was put to the respondent's witnesses had not been raised by the claimant as the time of his disciplinary procedure. The claimant had admitted breaches of all 3 relevant policies. He said that the claimant's claim had been extremely unlikely to succeed.

125. Mr Purnell added that there had been unreasonable behaviour because of my findings about the claimant's credit and because he had failed to engage with the respondent's offers.

126. Mr Purnell said that the claimant had not been a reliable witness, had at times been implausible and had changed his story several times. He reminded me of certain examples and that I had made adverse findings about

the claimant's credit. He said that the claimant's behaviour would have been unreasonable on that ground alone.

127. However, the respondent submitted that the claimant had also been unreasonable because he has failed to engage with respondent's offer of September 2016. The offer had been extended after Mr Shah was instructed but it had been rejected and a counter offer made of £24,000. The respondent replaced its solicitors partway through the proceedings and the new solicitors also repeated the offer. The offer was repeated on 23 March 2017. On 28 March, that not having been accepted, the respondent put the claimant on notice that it would apply for costs in the event that it was successful at this hearing. A costs bundle was enclosed and the claimant was invited to prepare evidence about his ability to pay for the conclusion of the hearing.

128. Mr Purnell repeated the offer to Mr Shah on the first day of this hearing but it was rejected.

129. Mr Purnell reminded me of *Kopel v Safeway Stores Plc* [2003] IRLR 753, that although the Calderbank procedure does not apply in the employment tribunal, nonetheless an offer of a Calderbank type is one which a tribunal may take into account when deciding whether to make an order for costs.

130. The respondent did not claim its costs for before the change in solicitors. It asks for the sum of £3,190 net of VAT being the cost of Mr Purnell's attendance on the respondent before the hearing and also of his instructing solicitor's attendance. Mr Purnell also applied for his brief fee of £2500 plus his refresher of £1350 net. In total therefore the respondent applied for costs in the sum of £7040 net of VAT.

131. Mr Shah expressed uncertainty as to what was meant by unreasonable conduct. He wondered if it included a case when a claimant brought a tribunal claim on advice that he had reasonable prospects of success and a desire to clear his name.

132. I reminded him therefore of the grounds on which Mr Purnell made his application.

133. Mr Shah submitted that the claimant could not have known of my findings about his credit until he gave evidence. In relation to the rejection of respondent's offers, he said that the offer was a 'drop hands and walk away' offer and the claimant has never said that he was not open to offers.

134. Mr Shaw added that if the respondent genuinely believed that there were no reasonable prospects of success, it could have applied to strike the claim out. That would have meant that these issues were dealt with at a much earlier stage. The claimant could not have second-guessed how the tribunal would decide the case and the best he could do was to put the evidence before the tribunal and let the tribunal determine it.

135. I consider that there was no reasonable prospect of this claim succeeding. I have looked at the matter objectively. It appears to me that a reasonable lawyer looking at the evidence in this case would have seen that it did not have reasonable prospects of success. The claimant admitted the breaches themselves. The procedure was unimpeachable. During that procedure, the claimant knew the case that he had to meet, there was a full investigation and he had a full opportunity to present his defence and any mitigation before unbiased decision-makers. He was given two appeals. The entirety of the conduct alleged was so serious that it was plainly within the reasonable range of responses to dismiss.

136. The claimant did have legal advice. It was unreasonable for him to reject the offers made to him albeit they were offers that if he withdrew the respondent would not apply for costs.

137. It is no answer to suggest that the respondent might have made an application to strike out on the same ground. The tribunal rules provide opportunities to apply to strike out and to apply for costs if there are no reasonable prospects of success. Very often the evidence is so detailed that an application to strike out is not proportionate and could only be decided properly after the hearing of, or close examination of detailed evidence. In those circumstances an application to strike out is unlikely to be appropriate. There are occasions when it is only after all the detailed evidence has been carefully examined at a full hearing that it can be demonstrated to a tribunal that there were no reasonable prospects of success. I consider this to be such a case.

138. Given the findings I have made about the claimant's credit, it might be open to me to find that this was a dishonest claim. However, I do not need to go so far as that. I have already decided that there were no reasonable prospects of success and the claimant's conduct, in the light of that, was unreasonable when he refused the respondent's offers to withdraw with no order for costs.

139. Having made those findings, I asked the claimant's representative if there was any reason why I should not exercise my discretion to make an order for costs.

140. Having taken instructions, Mr Shah said that an order would place the claimant in severe financial hardship. He produced a bank statement which the respondent had not previously been shown. That bank statement showed payments to the claimant from amongst other sources, 'Uber', 'Simon Straker' and the Revive Health Club. It appears that the claimant received Job Seekers' Allowance for 6 to 7 months. There were also payments into this account by another bank account apparently also belonging to the claimant.

141. The claimant did not have documents to show me relating to that bank account.

142. There was a payment into the claimant's bank account of £40,000. Mr Shah told me that that was the proceeds from the sale of a flat which were now being held in a trust for the claimant's son. He said that that was done before the claimant could have known about this application, at the beginning of February 2017. Other payments into the claimant's account related to his work as a minicab driver, from occasional shifts as a security guard and from his gym work. The claimant had not been able to work as a minicab driver during February and March because of issues with his vehicle and licensing with Transport for London. His income from Uber averaged at £225.54 per week; his occasional work as a security guard averaged £77.89 per week and his gym work averaged £85.95 per week. He had no other sources of income.

143. The balance in the bank account was £3,252.81 as at 22 March 2017. Mr Shah told me that the other bank account was an HSBC account with a balance between £1000 and £2000. He said that the claimant had no other bank accounts.

144. Mr Shah told me that the claimant owned a 50% share in property in Italy with a value of €160,000. He says that the claimant owned no part in his brother's hotel and received no income from it. The claimant pays rent in the UK of £680 a month and pays £400 per month towards his son. He pays council tax, usual bills (water is part of his rent), £100 per week on food, car insurance of £3000 per year and £400 a year to an accountant. He pays for his car by a loan from a friend to the value of £250 a month. He pays mortgage on the property in Italy of €250 a month but in August this will rise to €500 a month.

145. When I measured the claimant's outgoings against his income it appeared to me that he was living considerably beyond his means. Mr Shah agreed and said that the claimant was 'running about £6000 short' and had been using his savings to subsidise his living expenses.

146. I asked about the claimant's prospects of finding alternative employment. Mr Shah told me that the claimant has applied for several jobs, including in the security industry and the prison service, unsuccessfully.

147. I asked about equity on the property in Italy and Mr Shah told me that the claimant thought he had bought that property in 2009, 'so there is not much equity in the property at the moment and prices have lost value'. The claimant says that he is in negative equity in relation to that property and in any event his ex-wife goes to Italy and stays in the property. He said that there was no rental market in the area although he agreed that it was in a tourist area. It would be difficult, he said to use the property for holiday lets because this would not be the claimant's sole decision and would involve his ex-wife.

148. Mr Purnell observed that the evidence about the claimant's ability to pay was unsatisfactory. The claimant had been given clear warning of the need to bring evidence of his ability to pay but he had not done so. The claimant's savings account had not been included in his list of assets. He

pointed to evidence of substantial transfers of funds. He also said that there were continual vacancies for cabin crew with different airlines. He said that the calculations of the claimant's income and outgoings simply did not work, but that that was as far as he could go with the information the claimant had provided.

149. I considered whether it was appropriate to postpone the costs hearing to give the claimant an opportunity to produce more detailed evidence of his ability to pay. Mr Shah did not strongly urge me to do so and Mr Purnell objected.

150. I decided that it was not proportionate to postpone the costs hearing. I do not wish to create expensive satellite costs litigation and I am satisfied that the claimant was given sufficient warning of the likelihood of an application for costs to understand the need to bring evidence about his ability to pay.

151. I have decided to exercise my discretion to order the claimant to pay costs in the sum claimed. I am far from convinced that the claimant has told me all there is to tell about the state of his finances. There is at least one other bank account which he has not disclosed. He does have a substantial asset in Italy. The claimant's figures for his incomings and outgoings do not add up. This suggests that he does have more income than he claims. The claimant must also have a better chance of improving his financial position than he now says. The evidence in this case has shown that he is active and energetic in finding sources of income. So, I have taken into account his ability to pay, albeit I am not convinced that he has given me the full picture. In all these circumstances, I consider it appropriate to order the relatively modest sum requested by the respondent for this hearing only.

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Employment Judge Heal

Date: 19 June 2017………………………

Sent to the parties on: ......

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For the Tribunal Office