



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Vorajee

**Respondent:** Royal Mail Group Limited

**HELD AT:** Manchester

**ON:**

8 & 9 May 2017  
08 June 2017 (In Chambers)

**BEFORE:** Employment Judge Hill  
Ms B Hillon – Member  
Mr J Flynn - Member

## REPRESENTATION:

**Claimant:** Mr B Henry - Counsel

**Respondent:** Mr I Hartley - Solicitor

## RESERVED JUDGMENT

1. The judgment of the Tribunal is that the Claimant's claim for Unfair Dismissal is well founded and succeeds.
2. The Claimant's claim for Disability Discrimination fails and is dismissed.

## REASONS

### The Evidence

1. The Tribunal was provided with the following:
  - (1) An agreed bundle of documents page numbered 1 - 647
  - (2) Witness statement for the Claimant, Mr A Vorajee

- (3) Two witness statements for the Respondent: Mr Chris Forster, Dismissing Officer and Ms Erica Wilkinson; Appeals Officer.

### **Issues for the Tribunal to determine**

2. By a Claim presented on 09 December 2016 the Claimant complained of unfair dismissal in relation to his dismissal by the Respondent and ticked the discrimination box. The Claimant alleged Disability discrimination. The claim for disability discrimination was clarified at a Case Management Hearing on 20 January 2017 where the Claimant stated that he was claiming direct discrimination and discrimination arising from his disability in relation to his dismissal. The Claimant also indicated that he may wish to pursue a claim of harassment and failure to make reasonable adjustments. The Claimant confirmed at the outset of this hearing that the latter two claims were not being pursued.

3. The Respondent resisted the claims on the basis that the reason for the dismissal was misconduct and that it was a fair dismissal. The Respondent accepted that the Claimant was disabled for the purposes of the Equality Act 2010 but denied that the reason or the principal reason for the Claimant's dismissal was due to the Claimant's depression or that he was referred to Cognitive Behaviour Therapy by Occupational Health.

4. At the beginning of the hearing the Tribunal in discussion with the parties agreed that the following issues would need to be determined:

### **Unfair Dismissal**

5. What was the principal reason for the dismissal?
- a. The Claimant contends that he was dismissed in order that the Respondent could avoid making a reference to CBT Treatment as recommended by OH.
  - b. The Respondent contends that it was on the grounds of misconduct.

If the Claimant was dismissed on the grounds of misconduct pursuant to section 98(4)(ii) of the Employment Rights Act 1996. In respect of that dismissal:

- (1) Did the Respondent hold a genuine belief following a reasonable investigation that the Claimant was guilty of the alleged misconduct?
- (2) Was it reasonable for the Respondent to hold that genuine belief?
- (3) Did the Respondent follow a fair procedure in dismissing the Claimant?
- (4) Did the Respondent act reasonably in treating the Claimant's conduct as sufficient reason for dismissing the Claimant?
- (5) Was the dismissal fair in all the circumstances of the case and within the band of reasonable responses available to the Respondent?

- (6) If the dismissal was unfair on procedural grounds, had a fair procedure been followed would the Claimant have nonetheless been dismissed?
- (7) If the dismissal was substantially unfair did the Claimant contribute to his dismissal and to what extent?

#### Disability Discrimination

6. Has the Claimant established facts from which a Tribunal could reasonably and properly conclude, in the absence of any other explanation, that he had been subjected to unlawful discrimination?
7. Did the Respondent, by dismissing the Claimant treat the Claimant less favourably than it treated or would have treated others in the same material circumstances.
8. If so, was that less favourably treatment because of the protected characteristic.
9. Was the Claimant treated unfavourably by being dismissed because of something arising in consequence of his disability?
10. If so can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim.

#### **Findings of Fact**

11. The Claimant was employed as an Operational Postal Grade (OPG) based at the Respondent's Preston Mail Centre. The Claimant's employment commenced on 21 August 2000 and he was summarily dismissed for misconduct on 29 September 2016. The Claimant was part time and worked 26 hours per week.
12. There was a history of issues between the Claimant and the Respondent. The Claimant had had an accident in 2012; had a second accident in February 2013 that resulted in a dismissal and reinstatement. These issues were not relevant to the issues before the Tribunal but were given as background information by the Claimant.
13. Around June 2015 the Claimant had a period of sickness and there was a dispute between the parties over whether the Claimant should be referred to Occupational Health or whether the parties should engage in a process of mediation. This resulted in the Claimant raising a grievance regarding Mr C Forster's behaviour specifically that the Claimant considered that he was being bullied and harassed. The main area of concern for the Claimant was that he considered Mr Forster would dismissed him if he did not agree to mediation and that Mr Forster would not refer him to Occupational Health.
14. The events leading up to the Claimant's dismissal began around March 2016. The Claimant made a flight booking to Mumbai on 7 March 2016. On 8 March 2016 the Claimant's wife fell off a stepladder and hurt her back. As a result the Claimant cancelled the flight booking on 8 March 2016.

15. On 9 March 2016 the Claimant made a request for special leave in order to look after his wife and children because of his wife's incapacity. The Claimant was asked to provide medical evidence and produced a letter from his wife's GP. Special leave was granted from 10 March 2016 until 24 March 2016.

16. The Claimant had already booked annual leave from 25 March 2016 and was due to return to work on 3 April 2016. During his period of leave the Claimant flew to Abu Dhabi on 29 March 2016 and was due to return on 1 April 2016. However, when the Claimant was about to board his return flight he was denied access to the flight. The Claimant discovered that UAE government had placed a travel ban on him. After engaging lawyers to act for him the Claimant was informed that a civil law suit had been filed against him in respect of a property dispute. Until this issue was resolved the Claimant was unable to leave the country.

17. The Claimant informed the Respondent of the circumstances and provided them with information in respect of the court proceedings. The Claimant had hoped the issue would be resolved quickly however, his travel ban was not finally lifted until 24 July 2016 when the Claimant returned to the UK.

18. During his period of absence the Claimant was contacted by the Respondent and asked to attend a meeting on 23 June 2016, the Claimant could not attend and kept his employers informed of the reason why and supplied information confirming his situation.

19. The Claimant was dismissed because it was believed that he was unlikely to be able to return to work in the foreseeable future. The Claimant appealed the decision and attended an appeal meeting upon his return to the UK. His appeal was successful and he was reinstated.

20. In preparation for the appeal hearing the Claimant had been asked to provide evidence including copies of his flight bookings regarding his trip to UAE and return to the UK. The Claimant returned to work although he took another period of leave in August 2016.

21. On 2 September 2016 Chris Forster received an email from HR Services that included a number of documents that had been prepared for the aforementioned appeal hearing. Simon Walker who had conducted the appeal found documents that appeared to show evidence of possible dishonesty on the part of the Claimant when making his request for special leave in March 2016.

22. During the appeal process the Claimant had provided a copy of flight bookings through copies of 'checkmytrip' and also a document in Arabic showing flights to UAE since July 2015. The tribunal was provided with two copies of the Arabic version of flight information one at page 294 and one at page 604 of the bundle. The Tribunal was not provided with an English translated version of either. The document at page 294 showed five flights with the last flight being a flight into UAE from Agatti Island on 29 March 2016. The document at page 604 showed six flights exactly the same but with the last additional flight being a flight into UEA from Manchester on 29 March 2016. All flights references into the UAE had flight numbers except the flight from Agatti Island. The document at page 604 also had an

official court stamp. The Tribunal finds that the version set out at page 294 is the version that was provided to the Respondent at the first appeal for the reasons set out below.

23. The significance of the Agatti flight was that, Agatti is an Island off India and appeared to show that the Claimant had travelled into UAE from Agatti on 29 March 2016. It would appear that the Respondent suspected that the Claimant had flown to Mumbai on 10 March 2016 and then onto Agatti Island and then onto UAE.

24. The evidence on the face of it indicated that the Claimant may have travelled to UAE during the period that he had requested special leave to look after his wife. As a result Mr Forster asked Scott Sumner, the Claimant's line manager to investigate.

25. Mr Sumner conducted a fact finding interview with the Claimant on 6 September 2016 and referred it back up to Mr Forster because he considered it might require consideration of a penalty beyond his level of authority.

26. The Claimant was invited to a conduct meeting on 20 September 2016 with Mr Forster. Mr Forster found that the Claimant had been dishonest and that he had abused the Royal Mail's Special Leave Policy and summarily dismissed the Claimant on 29 September 2016.

27. The Claimant had provided Mr Forster with a number of documents including: the information from 'checkmytrip' that showed flights booked and cancelled; an email from 'homeandaway' holidays; a letter from Etihad Guest Relations dated 9 September 2016 confirming the flight to Mumbai for 10 March 2016 had been cancelled; an email from Ms Haselhorst a business associate of the Claimant's confirming that she had met him twice in the UK during the period the Respondent alleged he was out of the country. Mr Forster considered that the Claimant had provided evidence that was contradictory and that the 'CheckMyTrip' document clearly showed that he had a confirmed flight that had been booked on 7 March 2016 from Manchester to Abu Dhabi on 10 March 2016 arriving in UAE at 19.30 and leaving for Mumbai, India at 21.45 on the same day. The Claimant did not provide a copy of his passport and this strengthened Mr Forster belief in the Claimant's guilt. Mr Forster set out his reasoning in a Decision Report found at pages 104 – 108 of the bundle.

28. The Claimant did not want to provide a copy of his original passport because of the belief he had that Mr Walker had without his authority obtained information from 'checkmytrip' and he did not trust the Respondent with his passport.

29. Mr Forster formed the belief based mainly on the 'CheckMyTrip' documentation that the Claimant had been dishonest and had requested special leave when in fact he had travelled to Mumbai.

30. The Claimant appealed the decision and Ms Erica Wilkinson an Independent Casework Manager heard the appeal, on 19 October 2016. Ms Wilkinson confirmed at the beginning of the meeting that the Appeal was a 'rehearing' of the case and that the Claimant could introduce new evidence including all previous evidence.

31. The Claimant was represented by his union representative, Barry Bowes, who set out at the beginning of the meeting the Claimant's position that he had not travelled to Mumbai on 10 March 2016 and had been in the UK until 29 March 2016 when he flew to Abu Dhabi from Manchester. The document at page 604 was now available to the Respondent.

32. Mr Bowes pointed out to Ms Wilkinson that the 'checkmytrip' document had been misread by Mr Forster and that the document should be read bottom up which would clearly show that the flight on 10<sup>th</sup> had been cancelled. He disputed Mr Foster's conclusions in respect of the Claimant travelling from Agatti Island and in particular that if the document was to be accepted as factual then he could not be in two places at the same time, that is, flying from Agatti and Manchester. It was explained the Agatti entry was an error and that this was evidenced by there being no flight number.

33. The Claimant provided a copy of his passport at the appeal hearing. Although this was not the actual document it was a certified copy that had been signed by a notary public. This document clearly showed that the Claimant had not travelled anywhere between 10<sup>th</sup> March 2016 and 25<sup>th</sup> March 2016 (during the period of special leave). A letter dated 24 October 2016 from the notary, Mr Peter Lawson was also produced confirming details of the Claimant's bank accounts and confirmed spending from his account in the UK during the period of special leave. The Respondent did not dispute that the evidence from the Notary Public as being accurate.

#### Main Issues in Dispute

##### Court Document

34. There was a great deal of dispute over whether the Claimant provided the document at page 604 which included the additional flight from Manchester on 29 March 2016 and the official court stamp or the document at page 294 which did not include either the Manchester flight or the court stamp. The Tribunal finds that there was no reason for the Respondent to tamper with the document. The Tribunal finds that the document presented at the first appeal hearing was the document at page 294. However, even if we are wrong we do not consider that it effects the decision of this Tribunal or would have made any difference to the outcome.

35. It is clear that a document was presented to the first appeal hearing that had a flight from Agatti into UAE on 29 March 2016. This entry is on both documents and therefore it appears to the Tribunal that the initial investigation was a reasonable thing for the Respondent to undertake.

##### CheckMyTrip document

36. The Tribunal was presented with the CheckMyTrip documentation that shows that the Claimant booked a flight for 10 March 2016 and then subsequently cancelled that flight. The Tribunal accepts that at first glance and if read top – down the document is confusing as appears to show the flight was booked and confirmed. However, when read from bottom up it clearly shows the flight on 10 March 2016

was cancelled. The Claimant explained this clearly at the Appeal hearing and also provided a copy of a letter from Etihad Guest Relations confirming the flight had been cancelled at both the disciplinary hearing and the appeal hearing. Ms Wilkinson said in her witness statement that she tried to get confirmation by telephoning Home and Away Holiday's and tried to contact CheckMyTrip to get confirmation of how the document should be read. She was not successful. She goes on to say at para 22 *'In any event I satisfied that Aboobaker Vorajee had, on 7 March 2016, booked flights for 10 March 2016, without having first requested leave.'* She goes on to say that she considers it too much of a coincidence that the Claimant booked the flights with the intention of not taking them. The Tribunal finds that the evidence does not support this statement. The Claimant's case is that it was his intention was to book leave the following day and the only reason he did not book the leave was because of an intervening event, that being his wife had had an accident. The Respondent's had evidence from the Claimant's wife GP supporting that she had indeed been involved in an accident but Ms Wilkinson does not refer to this.

37. The Tribunal finds that when you read this document in conjunction with the other evidence provided by the Claimant it is clear that the flight on 10 March 2016 was cancelled.

38. The Claimant gave evidence that it was not unusual for staff to book leave at short notice and the Respondent confirmed that this was the case.

39. The Tribunal had before it several documents that were also available to the Respondent either at the date of the dismissal or at appeal stage.

40. There was:

a) An email from Etihad Guest Relations confirming the flight of 10<sup>th</sup> March was cancelled and the flight of 29<sup>th</sup> March was used.

b) A letter from a Notary Public, Mr Peter Lawson dated 24 October 2016 confirming 26 transactions from the Claimant's bank statement during the period the Claimant was alleged to be out of the country.

c) Certified copies (by the above Notary) of the Claimant's passport and confirmation that there was no immigration stamp contained therein between 10 March and 25 March but that there was an immigration stamp relating to entry into UAE on 29 March 2016 and exit on 25 July 2016.

d) An email from home And Away Holidays confirming that the flight on 10<sup>th</sup> March was cancelled.

e) A court stamped Arabic document showing a flight into UAE from Manchester on 29<sup>th</sup> March 2016 – this document also showed a number of flights with flight numbers into UAE from July 2015 and specifically included a flight into UAE on 29<sup>th</sup> March 2016 from Agatti Island (the Agatti Island entry showed no flight number)

f) Emails from Ms Haselhorst confirming two meetings with the Claimant; one on 14<sup>th</sup> March 2016 in Preston and one on 26<sup>th</sup> March in London.

g) Reservation bookings from Home & Away holidays showing numerous bookings and cancellations for trips to Mumbai and UAE but specifically showing the flight to Mumbai dated 10<sup>th</sup> March was cancelled.

h) An email dated 6 October 2016 from Airport controller at Agatti confirming his passport would have been stamped on arrival and exit from Agatti if he had visited the Island.

41. Ms Wilkinson considered all the evidence and considered that the timings of the flights (the Mumbai flight on 10<sup>th</sup> March) was too much of a coincidence and that the amount of evidence and documentation including emails provided by the Claimant was an attempt to 'drown' her with paperwork and to try and lead her to attach more weight that was reasonable to his version of events.

42. Mrs Wilkinson therefore upheld the decision to dismiss and confirmed the penalty, that of dismissal, was appropriate in the circumstances.

43. The Tribunal found that the evidence provided by the Claimant that he did not travel to Mumbai or Agatti during the period of special leave was overwhelming and that although both Mr Forster and Ms Wilkinson may have held a belief that the Claimant had travelled to Mumbai the evidence provided to them showed that it was not reasonable for them to sustain that belief.

## **The Law**

### **Unfair Dismissal**

44. Section 98 of the Employment Rights Act 1996,

- (a) did the Respondent have a potentially fair reason to dismiss?
- (b) did the employer act reasonably or unreasonably in dismissing the Claimant for the reason given?

45. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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.

46. When determining cases of misconduct the Tribunal has settled case law to assist it in drawing conclusions. In particular in cases of misconduct guidelines have

been set out by Arnold J in *British Home Stores Ltd v Burchell* [1978] IRLR 379. Essentially the Tribunal must determine the following:

1. Did the Respondent reasonably believe that the Claimant was guilty of misconduct at the time of the dismissal?
2. Did the Respondent have in mind reasonable grounds to sustain that belief? and
3. At the stage the Respondent formed that belief had it carried out as much investigation into the matter as was reasonable in the circumstances?
4. Whether the dismissal falls within the 'range of reasonable responses' of a reasonable employer.

47. In conduct cases the 'range of reasonable responses' test applies in conduct cases not only to the decision to dismiss but also to the procedure by which that decision was reached. ***J Sainsbury Plc v Hitt [2003] ICR 111 CA.***

48. Disability discrimination

1. Section 136(2) *Equality Act 2010* provides If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

2. Section 13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

3. Section 15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

## **Submissions**

### Respondent

49. The Respondent submitted that the Tribunal would firstly need to decide what the main or principal reason for the dismissal. The Tribunal has two options: Conduct, a potentially fair reason; that the Claimant was dismissed because of his disability or a reason related to it, specifically because he wanted to be referred to CBT.

50. The Respondent asserts that the evidence available to the Respondent raised a question mark over what the Claimant was doing in March 2016 and as a result of the evidence available that is what led to his dismissal.

51. The Respondent asserts that the tribunal has little evidence from the Claimant regarding the disability point and asked the Tribunal to focus on the evidence of Mr Forster and that he was quite clear that he believed the Claimant was guilty of misconduct. The Respondent pointed out that when cross examined Mr Forster was very clear that the referral to CBT would not have caused any problems for the Respondent and that it happens a lot in an organisation of such a size. The only reason the Claimant was taken through the dismissal process and dismissed was because of conduct related issues.

52. The Respondent referred the tribunal to the Burchell principles and asked us to look at the decision as a whole. There was evidence on either side but the test was not that someone had to be certain it was a balancing act. The Respondent asserted that the last two legs of the test were the important issues for the tribunal to consider. Was there a genuine belief and was it based on reasonable grounds after a reasonable investigation.

53. The tribunal was referred to Ms Wilkinson summary of her thinking, in particular para 71 of her witness statement and page 294 of the bundle. It is clear from page 294 that there was a possibility he flew into Abu Dhabi from Agatti Island India. The Respondent also argued that he intended to be absent for 22 days and that very few people would book a flight in the hope that they would get the time off.

54. The Respondent stated that the reason for special leave was not complied with and that he was not looking after his wife but in India and therefore he was dishonest.

55. The Tribunal was referred to the decisions of both Mr Forster and Ms Wilkinson and the special leave policy. The Royal Mail relies upon the honesty of its employees and that it is absolutely crucial.

56. Although there was evidence both ways Ms Wilkinson gave weight to other factors including 'checkmytrip' and Mr Forster read it the other way. There was evidence that the Claimant had flown in from India. Although there was a statement from the notary he did not provide original copy of his passport and would have been easy for him to have done so. The evidence of Ms Haselhorst not determinative as showed business relationship and tribunal should not draw its own conclusion. Although Claimant says the information from 'checkmytrip' was obtained without his permission Mr Walker felt he had permission to do so.

57. The Respondent asserted that Ms Wilkinson looked at all the evidence and made efforts to verify and the conclusions she drew were reasonable. That the investigation was reasonable in the circumstances and remains in the band of reasonable responses. It was argued that the decision falls within the band of reasonable responses and honesty was crucial to Royal Mail and goes to the heart of the employment relationship.

Polkey

58. The Respondent submitted that there was no evidence that procedure was flawed but if found that it was then should be 50% reduction.

Contributory fault

59. The Respondent submitted that there was evidence that he was guilty of the misconduct and that it should be reduced by 70%

Disability Discrimination

60. The test for direct discrimination was the Claimant dismissed because of his disability? The answer submitted was no and that there was cogent evidence that he was dismissed for misconduct. A hypothetical comparator would have been treated in the same way. Was he dismissed for a reason related to his disability because he needed to be referred for CBT, the Respondent submitted this was not the case and there was no evidence to support this and there was no sign that this was the motivation for this. This kind of referral happens all the time at the Royal Mail.

Claimant's Submission

61. The Claimant submitted that the Claimant claims unfair dismissal and disability discrimination with the dismissal being the 'act' of discrimination. The Claimant submitted that the Tribunal needed to determine what was the reason for the dismissal.

62. The Employment Rights Act places the burden of proof on the employer to show what the reason for dismissal was and that it was potentially fair.

Reason for dismissal

63. The reason provided by the Respondent was conduct. The Claimant says there are a catalogue of errors and a total failure to have regard to the evidence submitted and the real reason was his disability and he was causing problems. The Claimant had already submitted a grievance and after OH had said he needed further treatment and therefore time off work that this is what prompted Mr Foster into the mindset that he no longer wanted the Claimant as an employee. The Claimant suggested that the real reason for the dismissal was that the Respondent did not want to manage a disabled employee.

Unfair Dismissal

64. If the Tribunal finds that the reason for dismissal was conduct it is accepted that this is a potentially fair reason and referred the Tribunal to the Burchell test.

65. The claimant submitted that the events leading to the dismissal arose out of the Claimant's first trip where he was delayed in UAE. Someone access information in relation to his flights after his appeal was successful. The Claimant said this was unauthorised access.

66. On the basis of the documents generated he was investigated and provided evidence supporting that he was in the UK and while in the process of getting copies of his passport decision to dismiss was taken. The only piece of evidence relied upon was the 'checkmytrip' which had been read incorrectly. The Claimant argued that this was outside the range of reasonable responses to conclude that the flight had been confirmed and that the Claimant had travelled to Mumbai.

66. The Claimant argued there were no reasonable grounds to sustain the belief and that Mr Forster should have waited for the documents from the notary at page 198 of the bundle.

67. The Claimant submitted that the evidence from Ms Haselhorst was from a 'live person' who could have been contacted and that preferring the documentary evidence was not reasonable. There was evidence for and against but reliance was put on coincidence preferring that over the actual evidence presented.

68. The Claimant had been employed for 16 years. It was a serious allegation of dishonesty. The Respondent should have ensured they had good reliable evidence and not rely upon supposition.

69. Special leave was always granted and Respondent agreed this was the case. However, if he had been refused the leave, he would have cancelled. Decision to dismiss was not based on reasonable grounds. The Agatti evidence is misleading and has no bearing. He was on leave on 29 March. Fails the Burchell test.

70. It was procedurally unfair and cursory. Did not try to speak to Ms Haselhorst and did not wait for the copy of the passport. The appeal was a complete rehearing and further investigations were carried out. At the appeal stage the 'checkmytrip' document seemed to lose its significance as it had been read the wrong way around and relying upon the 'peculiar' document in Arabic which showed a flight from Agatti Island. At the appeal more evidence supporting Claimant and yet weight given to the peculiar document rather than all the other evidence. Although at appeal the Appeal officer started investigating the bank account evidence no reference in appeal outcome as to why evidence discounted and no reason why evidence was dismissed.

#### Polkey

71. There are procedural errors and if documents had been interrogated properly all point in one direction and he would have been found not guilty. Should not have been dismissed.

#### Contributory Fault

72. He explained why he did not show his passport and that was reasonable. The lack of trust arose from obtaining information without authorization and reasonable for the Claimant to feel the way he did.

#### Conclusions

73. The Tribunal finds that the reason for the dismissal was conduct. It is clear from the evidence before the Respondent and this tribunal that the initial reason for the investigation was as a result of the first appeal. The tribunal accepts that Mr Walker accessed information that gave rise to a suspicion of misconduct and appeared to indicate that the Claimant was out of the country at the time he had said that he was at home looking at his wife and children.

74. The motivation for the investigation was initiated by Mr Walker and not Mr Forster and further the initial fact finding interview was carried out by Mr Sumner and referred to Mr Forster. The Tribunal finds that although there had been problems between the Claimant and Mr Forster that there was no evidence to support the view that he would not have been referred for CBT and the tribunal accepted the evidence of the Respondent and Mr Forster in particular that as a large organisation it was not unusual for employees to be referred for this type of treatment. In addition the appeal hearing was a complete rehearing of the case.

75. The Tribunal noted that whilst the Claimant raised issues regarding his problems with Mr Forster during his appeal Ms Wilkinson explained to him that she was an independent investigation manager and that she had no connection with the managers involved and would make her own decision. The Tribunal accepts this to be the case and that the final decision to dismiss was taken by Ms Wilkinson who had not had any prior involvement in this matter.

76. Having considered the facts the Tribunal finds that the main or principal reason for the dismissal was conduct.

#### Unfair Dismissal

77. The Tribunal finds that the initial investigation into the circumstances that led to the Claimant's dismissal was a reasonable action for the Respondent to take. The information that led to the investigation being instigated appears to be information that Mr Walker discovered. Although there appears to be some concerns about how the information was accessed, the fact was that after this information came to light the Tribunal is of the view that it was reasonable to investigate.

78. In order for an employer to determine whether an employee is guilty of gross misconduct applying the Burchell test the employer must show that they have more than mere suspicion and that they hold a genuine belief in the employee's guilt, based on reasonable grounds after carrying out a reasonable investigation into the matter as was reasonable in the circumstances. The employer should ensure that they gather all the available evidence and ensure that they are in possession of all the relevant facts so that they are in a position to make a decision about what action it takes against the employee.

79. In Burchell, Mr Justice Arnold identified three considerations; firstly did the employer have a genuine belief that the employee was guilty of the misconduct in question? Secondly, was that belief based on reasonable grounds? Thirdly, had that

belief been formed following such investigation into the matter as was reasonable in all the circumstances.

80. Further the employer should not act on the basis of mere suspicion; it must have a genuine belief that the employee is guilty, based on reasonable grounds after carrying out as much investigation as was reasonable in the circumstances. The employer is required to look at all the available evidence and once in possession of all the facts make a reasonable decision.

81. The Tribunal finds in this case that the employer did not have sufficient grounds to sustain its belief in the Claimant's guilt. The respondent submitted that it was a balancing act and there was evidence for and against. Having looked at the evidence that was available to the Respondent it cannot be said that the Respondent had sufficient evidence to conclude that the Claimant taken a trip to Mumbai on 10 March 2016 or indeed that he flew anywhere in March other than on 29 March 2016 when he was already on pre agreed leave.

82. Significantly the Tribunal finds that although the Respondent made attempts to verify the veracity of the documentation it had before it that pointed to the fact that the Claimant was being truthful, it chose to rely on coincidence as a reason for discounting the evidence and did not take the simple step of speaking or contacting Ms Haselhorst.

83. The Respondent did not dispute the truthfulness of the evidence from the Notary Public nor did it suggest that the document at page 604 was not authentic. This evidence confirmed that the Claimant had not travelled during the dates in question and his bank account had been regularly used during this period. This evidence along with the evidence from his witness and letters and emails confirming the flight of 10 March 2016 was cancelled when balanced with the coincidental evidence of booking a flight prior to his wife's fall and the 'checkmytrip' document that had been read the wrong way, supported the Claimant's version of events.

84. Consequently it was not in the reasonable band of responses to conclude that the claimant had been guilty of abusing the special leave policy and being dishonest.

### **Contributory Fault**

85. In order for a deduction to be made for contributory fault the Tribunal must be satisfied that the Claimant's conduct was culpable or blameworthy. ***Nelson v BBC (no 2) [1980] ICR 110***. In this case the tribunal finds that the Claimant did not contribute to his dismissal.

86. In determining whether the Claimant's conduct was blameworthy or culpable in some way the Tribunal was directed to the fact that the Claimant did not a copy of his passport, which the Respondent stated would have resolved any issues. However, the Claimant provided a notarised copy of his passport that the Respondent did not suggest was not authentic and therefore the Tribunal finds that the claimant did not contribute to his dismissal.

Polkey

87. The Tribunal finds that it is not appropriate to make a reduction as it follows that this judgment finds that it was outside the band of reasonable responses to have dismissed the Claimant and the Tribunal has found no evidence to support the view that the Claimant could have been fairly dismissed had the Respondent acted fairly.

Remedy Hearing

88. The Tribunal has provided case management orders in a separate order for the preparation of a remedy.

Employment Judge Elayne Hill

18 August 2017

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 August 2017

FOR THE TRIBUNAL OFFICE

[AF]