EMPLOYMENT TRIBUNALS

Claimant: Mr D D Hodgson

Respondent: Menzies Aviation (UK) Limited

HELD AT: Manchester **ON:** 5 and 6 October 2017
10 October 2017
(in Chambers)

BEFORE: Employment Judge Sharkett
(sitting alone)

REPRESENTATION:

Claimant: Ms J McCarthy, Solicitor
Respondent: Ms R Levene of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal is not well founded and is dismissed

2. The claimant's claim for breach of contract (notice pay) is not well founded and is dismissed.

REASONS

1. The claimant claims unfair dismissal.

2. The claimant was represented by Ms McCarthy, who called the claimant to give evidence in support of his claim together with Mr David Brown, a colleague of the claimant and local trade union representative.

3. The respondent was represented by Ms Levene who called the following witnesses:

(a) Mr Matthew Platt, the assistant ramp manager and investigating officer;

(b) Mr David Harrison, the Airside Operations Manager and dismissing officer.

4. A written witness statement was also received from the appeal officer, Mr Craig Burrows, who was unable to attend the Tribunal due to sickness.

5. All witnesses gave evidence in chief by way of written witness statements which had been exchanged and were taken as read.

6. The Tribunal was provided with a bundle of documents consisting of 173 pages which had been agreed between the parties as being relevant to these proceedings. All references to page numbers in this judgment are references to pages in the bundle provided unless otherwise stated.

The Issues

7. The issues to be determined by the Tribunal were agreed at the beginning of the hearing as:

(1) Can the respondent show a potentially fair reason for the dismissal of the claimant? The respondent relies on the potentially fair reason of conduct.

(2) Did the respondent have a genuine belief in the claimant's alleged misconduct ? and,

(3) Was the genuine belief held on reasonable grounds? i.e. was a reasonable investigation carried out to establish the facts pertaining to the misconduct

(4) Did the respondent follow a fair procedure, and, if a fair procedure was not followed, thus rendering the dismissal unfair, what would the outcome have been had a fair procedure been followed? (applying the Polkey principle)

(5) Was the decision to dismiss the claimant, in all the circumstances, including the size and administrative resources of the respondent for the reason given, within the band of reasonable responses open to a reasonable employer?

(6) Did the claimant contribute to his own dismissal by culpable or blameworthy conduct?

(7) Should the Tribunal make an adjustment to any award made by reason of any party's failure to follow a relevant code?

(8) Was the respondent entitled to dismiss the claimant without notice or payment in lieu of notice by reason of the claimant's misconduct?

Findings of Fact

8. Having considered all the evidence both oral and documentary the Tribunal makes the following findings of fact. These findings of fact are not intended to include findings of fact on all the evidence heard, but are the salient findings of fact on which the Tribunal makes its decision.

9. The claimant was employed by the respondent as a ground service operative at Manchester Airport, until his dismissal on 9 February 2017. The claimant first commenced working as a ground service operative on 16 February 2004 and transferred to the employ of the respondent in July 2012 under the TUPE Regulations 2006. At the date of his dismissal the claimant had just short of 13 years continuous service at the effective date of termination.

10. The claimant was employed to carry out such duties as loading and unloading passenger bags onto and off aircraft. Part of his duties also involved meeting incoming aircraft at their allocated stands and ensuring that the requisite services were in place for the arrival of the plane. There was an unwritten but known rule that staff should be on the stand to meet with aircraft no less than five minutes before the plane was due to arrive. The arrival and departure times of all aircrafts whilst initially scheduled for a particular time, was subject to change depending on whether the plane was actually going to arrive early or depart late. Staff were aware of the scheduled times when flights were allocated to them and notifications of any changes were displayed by the Chroma system on the monitors which were in the crew and rest rooms. A p.a. system was also in operation within the terminal building.

11. On Saturday 21 January 2017, the claimant commenced his shift at 12:30 and was allocated to team L6. The first flight allocated to him was a flight from Amsterdam, which arrived at 13:00hrs and departed again at 14,00hrs. Although the claimant was not called to attend another flight until 15:50hrs, when he was allocated to meet a flight from Dusseldorf, the Tribunal accept that the claimant may have been required to undertake other work in the period between which the flights arrived. The Tribunal also accepts that this particular day was a quiet day for the airport, unlike other times when staff were exceptionally busy and staff were unable to take breaks.

12. At 16.00hrs on 21 January 2017, the claimant was allocated a flight which was scheduled to depart at 16.40 hrs. In the event the flight departed earlier at 16.29 hrs. It is the respondent's case that after the flight departed the claimant would have returned to the crew room and commenced a break at approximately 16.40. The

claimant disputes this and claims that it was more likely 16.50 before he commenced his break because after the flight had departed he accompanied his colleague in completing tasks before returning to the crew room The claimant says that the actual time he was sent on his break was vague and not defined but in the investigatory meeting that followed he accepted that he had sufficient time to take a 30 minute break following the departure of flight at 16.29 and being allocated his next flight from the Isle of Man (p62)

13. The claimant was allocated the Isle of man flight at some time between 17.00 and 17.15. When the allocation was made the claimant was taking his break in the crew room together with the other members of the team he was working with that day. Tom Collins was the team leader and Peter Buckley a junior ramp agent who was a relatively new member of staff. Mr Buckley did not yet have full access to all areas of the airport and he therefore needed to stay with one of his colleagues who did.

14. The respondent had been contracted to the Flybe Isle of Man flight for approximately ten months by January 2017. At 16.48, the flight was shown on the monitor, that could be viewed by the claimant and the other members of his team, as being scheduled to arrive at 17.40. By 16.51, the monitor had been updated to show that the flight now had an estimated landing time of 17.28. At 17.08, the monitor was further updated to show the flight with an estimated landing time of 17.35, and again at 17.14 to show that it would be arriving at a different gate/stand (p53). A final update was made at 17.28 to show that the flight was expected in the blocks by 17.31.

15. It is the claimant's case that did not personally check the details of the flight on the monitor and instead relied on what Mr Buckley had told him about both the type of plane arriving and when it was due to land. What is clear though is that the claimant must have still been in the crew room at 17.14 when the change of stand was notified because when the left the crew room he knew which stand it was that he was going to meet Mr Collins. Mr Collins had left the crew room to collect the tug and take it to the stand and the claimant had set off with Mr Buckley to pick up the electronic baggage trolley (EBT). It is the claimant's case that he told Mr Collins that he was going for a cigarette before the plane arrived but this is not supported by the statement of Mr Collins or Mr Buckley who was with the claimant at the time. In addition, when questioned in oral evidence, the claimant said that if he asked f he could go for a cigarette at that time, he would not have been given permission because the arrival of a flight was imminent. Given, that neither of the other two team members agree that the claimant had said he was going for a cigarette before going to the stand to meet the plane, and given that he knew that he would not have been given permission to go for a cigarette at that time had he asked, the Tribunal find, on the balance of probabilities that the claimant did not tell Mr Collins that he was going for a cigarette before he came to meet him at the stand.

16. The claimant and Mr Buckley did go to collect the EBT but did not immediately take it to stand 18 to meet the plane. Instead, and in breach of the rules, the claimant travelled in the EBT to the cowshed where he left the vehicle before going to the smoking hall for a cigarette. Mr Buckley went with the claimant to the smoking hall although he did not smoke himself. Once the claimant had finished his cigarette, he

collected the EBT and drove it through the baggage hall, in breach of the rules, arriving at the gate after the aircraft had landed and Mr Collins had locked off the front wheel.

17. During the disciplinary process that followed Mr Collins told the respondent that he had arrived on stand 18 with the tug ten minutes before the plane was due to arrive. At 17.18 the monitor had further updated to show that the plane had 'gone to finals' at 17.18. This phrase is used to indicate that the captain of the plane has notified the crew on board, and the airport, that the aircraft is approaching and that landing is imminent within minutes.

18. Rebecca Molloy, a member of the ground staff who worked as a dispatcher, was in the office when the plane went to finals. She was responsible for ensuring the safe disembarkation of the passengers on that flight. When she saw the notification on the monitor she immediately made her way to stand 18 to meet the plane.

19. When Ms Molloy arrived at stand 18, Mr Collins asked if she had seen the claimant who he understood to be getting power for the plane. It was explained to the Tribunal that some planes need to be plugged into power on the ground when it lands as it is essential to keep the on board equipment such as computers powered. Without the ground power, the plane has to keep an engine running in 'hotel mode' and thus uses more jet fuel. Ms Molloy did not know where the claimant was and when the plane arrived on stand at 17.31, having landed at 17.28 (p53) neither he nor Mr Buckley were there.

20. The claimant arrived very soon after Mr Collins had chocked the front wheels of the plane but he did not have a power connector with him. It is the claimant's case that Mr Buckley had told him a different type of plane was expected, one that would not require power. Consequently, he was unaware that a power connector was needed until Mr Collins told him. Once told the claimant immediately turned around and went to stand 11 to pick up the necessary equipment. On his return to stand 18 he attended to attaching the power to the plane which was still running in 'hotel mode' and the connection is recorded as being made by Tom Collins at 17.41(p53A). The claimant and other members of the team then attended to unloading the luggage and delivering it to the baggage hall by 17.42 (p53).

21. The fact that the claimant and Mr Buckley were late arriving to meet the plane was reported to Mr Clayton, the claimant's line manager. Later that evening at around 20.00 hrs Mr Clayton interviewed the relevant members of staff to find out what had happened. Ms Molloy the dispatcher, explained that after the aircraft had gone to finals she went to the stand and found that Mr Collins was already there. When interviewed Mr Collins confirmed that he had been allocated the flight at 17:00hrs and checked the screen to see that the aircraft was due to arrive at 17:35. He explained that the aircraft had in fact arrived earlier than had been indicated on screen when he had looked at it but as he had got there ten minutes before it was due he was able to receive the aircraft immediately upon arrival. Mr Buckley confirmed when interviewed that evening that the aircraft was already on stand when he and the claimant arrived. He further confirmed that he was aware that the expected aircraft was due in at 17.35 and was an ATR. He confirmed that he was aware that a converter would be needed in order to connect the ATR to ground

power. Mr Buckley confirmed to Mr Clayton that he had gone with the claimant to pick up the EBT from stand 21 and from there they had gone to the smoking shelter, arriving back through the baggage hall to find that the aircraft was already on stand when they arrived

22. In contrast, when the claimant was interviewed by Mr Clayton that evening, he said that the flight had been allocated to them at 17:15 and he was told that the ETA was 17:50. He advised Mr Clayton that Mr Buckley had told him that that the aircraft was a prop flight and from this the claimant assumed that it was a Dash and would not need power. He accepted that he had gone for a cigarette before going to the aircraft but confirmed that he thought that he had time to do this and still be in time to meet the plane. In interview he told Mr Clayton that he was there as the plane taxied onto the stand at 17:30hrs and says that he did the first and last drops of the bags.

23. A full disciplinary investigation was commenced and the claimant was suspended pending the outcome of the investigation. Mr Plant, who had been assigned to conduct the investigation wrote to the claimant (p56) advising him of the terms of his suspension and setting out the allegations to be investigated as:

(a) Failure to carry out a reasonable request in relation to the arrival of the BAT818 on Saturday 21 January 2017; and

(b) Bringing the company into disrepute.

24. The letter of suspension advised the claimant that if the allegations were founded they could be viewed as gross misconduct and could potentially lead to his dismissal.

25. As part of the investigation Mr Plant re-interviewed Mr Buckley and the claimant on 27 January 2017 (pages 57-68). Mr Buckley confirmed that his understanding was that the aircraft, due to arrive at 17.35, was an ATR. He confirmed his previous statement that the claimant had told him that he was going for a smoke and that the aircraft was already on the stand when he and the claimant arrived. Mr Buckley accepted and agreed that going with the claimant to the smoking shelter was an error of judgment on his part.

26. When interviewed by Mr Plant the claimant agreed that Saturday afternoon was generally one of the lightest flight time schedules (p61), and agreed that during his shift on 21 January 2017 there had been sufficient time for him to take a break. The claimant told Mr Plant that when he was given the Isle of Man flight there was an estimated arrival of 17:35 but that he had then been told by Mr Buckley that the flight was not due to arrive until 17.50. He also told Mr Plant that Mr Buckley had told him the aircraft was a Dash. The claimant went on to say that he arrived at the stand just as the aircraft pulled onto it. He says he parked the EBT in stand 21 and walked to the smoking shelter, which was inconsistent with the evidence of Mr Buckley who says that they picked the EBT up from stand 21 and then drove to the baggage hall. Later on in the interview the claimant did change his statement to say that he took the EBT to the baggage hall, albeit this was in breach of the rules. It was the claimant's evidence at this interview that he went for a cigarette in his break time.

27. It is pertinent at this stage to introduce some background to the seriousness with which this matter was considered by the respondent. The respondent obtains its work through contracts with individual airlines who operate out of Manchester Airport, which is owned by Manchester Airport Group (MAG). Competition for the contracts is fierce and those who win them are under pressure from both the airlines and MAG to provide a high quality service or risk losing the contract. The respondent is measured by the airport on four key priorities, (1) getting the aircraft safely on stand, (2) off-loading passengers and baggage, (3) loading the passengers and baggage, (4) safely pushing the aircraft off stand.

28. Within the 48 hours prior to the incident with the claimant of 21 January 2017, the Chief Executive of Flybe had been on board an aircraft arriving at Manchester airport, where employees of the respondent had not met the plane on time (the Flybe incident) The Chief Executive had immediately complained to the station manager in the strongest of terms and the respondent was anxious that further repetition of the same type of failure would place the respondent at risk of losing the contract with Flybe.

29. Mr Plant placed great emphasis on this incident which was raised with the claimant in the investigatory meetingwhen it was suggested that in the circumstances he should have been more astute to the risk of being late at that time. However, the claimant explained that he was unaware of the incident because he had not been on duty when the incident occurred and had been on days off since it had happened. He had not heard about it from anyone else and no one had brought it to his attention. In oral evidence, Mr Plant accepted that the claimant may well have been telling the truth about this.

30. It is not disputed that the respondent did not take any steps to notify staff about the Flybe incident and the seriousness with which being late to meet a flight now raised. There was no general statement made to staff by management nor was there any written communication issued to bringg this to the attention of staff. It is not disputed that the claimant was not at work when the incident happened and in the absence of any evidence to the contrary, whether oral or documentary, it is entirely possible that the claimant may not have been aware of what had happened.

31. In interview with Mr Plant the claimant said that he had been ‘caught with his pants down’ when the plane arrived early. However he maintained that he had not been allocated the flight until 17.15 and Mr Buckley had told that the estimated time of arrival of the flight was 17:50. The claimant changed his account in this interview and agreed that, contrary to what he had said before, the aircraft was on stand when he arrived there (p66). He continued to maintain he had not been told by Mr Buckley that the aircraft was an ATR and that had he known he would have made sure that he had a GPU (connector) there ready for the aircraft when it arrived. He sought to minimise his failure to have a GPU ready when the plane arrived by explaining that once the plane had arrived and he realised one was needed, he got one almost immediately (p67) and that the outgoing flight left on time with the pilot thanking the claimant.

32. As already stated above, it is clear that the claimant was still in the crew room at 17.14 when the change of stand was notified on the monitor because when the

claimant left the crew room he knew which stand he was taking the EBT to. If, as is his account, his team had not been allocated the flight until 17.15 it is not credible that Mr Buckley would have given him a false time of 17.50 because the monitor had been showing the flight as estimated to arrive at 17.35 since it had been updated at 17.03 (p53). The account of both the claimant's colleagues was that they knew that flight was due in at 17.35 and it is more likely than not for this reason and the reasons given above that the claimant also knew this when he left the crew room to collect the EBT

33. From the outset and throughout this hearing, the claimant has sought to blame Mr Buckley for giving him incorrect information about the flight and the type of aircraft arriving. It continues to be his evidence that Mr Buckley told him the plane was a propeller plane and for this reason the claimant believed it would not need ground power. The respondent did not accept the claimant's explanation because Mr Buckley was a new and inexperienced member of staff, in contrast to the claimant who would have known what type of aircraft to expect from the Isle of Man because the respondent had been working on the contract with Flybe operating out of Manchester for the previous ten months. In addition when questioned during the investigation, Mr Buckley clearly indicated that he knew that the plane due to arrive was an ATR. The respondent did not accept that the claimant would have relied on the information of a junior member of staff such as Mr Buckley and did not accept that he would not have known what type of aircraft was due to arrive given his considerable experience of dealing with Flybe and the flight from the Isle of Man.

34. The Tribunal accepts the respondent's reasoning for not accepting the claimant's explanation and for the reasons as stated above, find on the balance of probabilities that it is more likely than not that Mr Buckley did not tell the claimant that the flight was not due in until 17.50 hrs or that it was a prop plane.

35. For the reasons given above, including the fact that the claimant was still in the crew room at 17.14 when the flight was still showing estimated arrival at 17.35, and the fact that both the claimant's colleagues were expecting the flight to arrive at this time, the Tribunal finds, on the balance of probabilities, that the claimant was also aware the flight was due at this time.

36. The Tribunal accepts that the claimant was not aware that the flight had gone to finals at 17.18, because neither Mr Collins nor did Mr Buckley knew this. It is likely that the reason they did not know was because they had already left the crew room and no longer had sight of a monitor to update them. Ms Molloy had said when she was interviewed that she had left the office immediately the flight had gone to finals and that when she arrived at the stand Mr Collins was already at stand there. Mr Collins had explained that he did not know the flight was arriving earlier than expected but as he had gone ten minutes earlier he was there to meet it.

37. For the reasons above it is reasonable to find that the claimant was not aware that the flight had gone to finals and was arriving at 17.25 and estimated to be in blocks at 17.30. Consequently, the aircraft was in blocks 5 minutes earlier than the claimant had expected when he left the crew room to collect the EBT and go for a cigarette.

38. During the course of the disciplinary process the claimant continued to dispute the time of his arrival and of the aircraft and questioned why CCTV had not been obtained. Mr Plant advised the claimant that he did not feel it necessary to obtain CCTV footage to obtain exact timings because, the claimant, had already accepted that he was not at the plane when it arrived, and his colleagues had also given statements confirming that he was not there. The aircraft was already on the stand when the claimant arrived and whilst there was an unwritten rule that staff should be there, where possible, five minutes early, this is a minimum amount of time they should be ready to receive the aircraft and if they can get there earlier then that should be the case.

39. Having concluded his investigation Mr Plant prepared a report and recommended that a disciplinary hearing should be convened (p69). The claimant was subsequently invited to attend a disciplinary hearing on Monday 30 January 2017 where the allegations against him would be considered. The letter set out the allegations as follows.

> "You failed to meet an aircraft on arrival despite being given ample time and instruction to do so. It is believed that your conduct amounts to a breach of company discipline in the following areas –
>
> - Bringing the company into disrepute;
> - Failure to follow a reasonable request;
> - Failure to carry out your normal duties."

40. The claimant was advised that the allegations were serious, could potentially amount to gross misconduct and if well founded may result in his dismissal. He was provided with copies of the documents in relation to the investigation along with the company disciplinary policy for his reference. He was advised of his right to be accompanied and of the potential for his dismissal if the allegations against him were found proved.

41. Mr David Harrison carried out the disciplinary hearing and the claimant was accompanied by Mr David Brown, the workplace Unite representative.

42. During the course of the disciplinary meeting the claimant indicated that at first he had not understood what he had done wrong but the suspension time had given him time to think. He indicated that he did not agree with the timescales put forward and that he was unaware that the aircraft was an ATR and would therefore require ground power. When Mr Harrison put to him that if he had not gone for a cigarette he would have been there with the equipment in time to receive the aircraft the claimant responded that the plane had left on time and the bags were delivered within the required timescale. The claimant contended that he was good at his job and was always safe. In response Mr Harrison expressed a concern that the claimant did not think he had done anything wrong and he referred him to the statements of Mr Collins and Mr Buckley. The claimant said that he realised that he should have been there and he knew he had done wrong. The claimant went on to apologise and say that he knew he should not have gone for a cigarette, had

genuinely learned that he had to be there and be prepared and that it would not happen again. He stated that he was good at his job and apologised again. Mr Harrison did not find that the claimant was genuine in his apology and told the tribunal that he believed he was just paying lip service to an apology and there was no sincerity behind it. Mr Brown in oral evidence confirmed that the claimant had apologised but agreed that the manner in which it was delivered may have led Mr Harrison to reasonably consider it was not meant.

43. Mr Harrison adjourned the meeting on the basis that he wanted 24 hours to consider and to 'look into other incident' (p76). The hearing was not reconvened until 9 February 2017 when Mr Harrison did not provide the claimant with any further information but simply asked whether there was anything that the claimant wanted to add. The claimant was told that he was being dismissed for gross misconduct because Mr Harrison had found that the claimant had made a conscious decision to go for a cigarette instead of going to the ramp and his doing so amounted to gross misconduct.

44. Mr Harrison told the Tribunal in oral evidence that he had considered the claimant's length of service and experience of working on the airfield. He considered whether there was any other sanction that could be imposed as an alternative to dismissal, such as moving the claimant to another department. Mr Harrison concluded that there was not because whereas some people make mistakes that can be remedied by training, he did not feel that this could be achieved with the claimant. Mr Harrison believed that the claimant knew well what was required of him in his duties but had taken a deliberate decision to go for a cigarette instead of doing his job. He believed that the claimant had tried to make a nonsense of the allegations against him and did not think he had done anything wrong because the aircraft had left in time. Mr Harrison took into account the fact that the claimant had changed his story a number of times and remained adamant throughout that he had done nothing wrong, referring back all the time to the fact that he had been given incorrect information by Mr Buckley.

45. The claimant was notified of his dismissal by a letter of the same date (p82). The allegation that the claimant had failed to meet an aircraft on arrival despite being given ample time and instruction to do so was repeated. Mr Harrison found that the fact that the claimant had thought that the aircraft was a Dash and not an ATR had no bearing whatsoever on his being late to meet the aircraft. He did not accept that the claimant arriving three minutes late had no impact on 'the turn' as it still departed on time, because his lateness and unpreparedness had led to the aircraft waiting ten minutes for ground power after arrival. The letter went on to say that his failure to attend the aircraft on time had resulted in a significant financial cost to the airline and the captain becoming extremely irate *"which has brought our company into disrepute with the airline".*

46. The letter acknowledged the claimant's admission that he was late to the aircraft due to going for a smoke break. However Mr Harrison found his behaviour to be inexcusable because he had just finished a break during which time he had ample time to go for a cigarette. Mr Harrison found that the claimant had been given plenty of advance information about the flight arrival but had instead made a conscious decision to go for a smoke break. He confirmed that the claimant was to

be summarily dismissed because in his view Mr Harrison found that the allegations were found proven under each area of the disciplinary procedure considered, which was:

(a) bringing the company into disrepute;

(b) failure to follow a reasonable request; and

(c) failure to carry out his normal duties.

47. The claimant was notified of his right to appeal the decision to dismiss him, which he exercised on 16 February 2017. By email of 21 February 2017 the claimant asked for the following information prior to his appeal:

(1) Details of the financial loss to the respondent regarding the Flybe flight BE118 IOM 21/1/2017;

(2) Video evidence in relation to the aircraft turnaround which would show that following a reasonable request all actions were made on this occasion in question;

(3) Provide a statement from the Flybe pilot in question.

48. The claimant also claimed that he thought his dismissal was unfair because he was not aware of the Flybe incident which had been referred to by both Mr Harrison and Mr Plant during the disciplinary process. He further complained that questions asked of him during the disciplinary meeting had deviated from questions relating to the allegations against him; in particular there was mention made of a previous disciplinary relating to the claimant. The claimant also complained that he had been a long-serving employee with more than 12 years' service and that his long service had not been taken into account before reaching a decision to dismiss him.

49. The appeal meeting did not ultimately take place until Thursday 20 April 2017. The initial delay was due to a misunderstanding on the part of the claimant who thought that the original date of 28 February 2017 was just an informal meeting at which he was accompanied by Mr Brown. This meeting did not go ahead because the claimant wanted the regional union representative to attend which was the usual practice in appeal hearings. Difficulties then occurred rescheduling the meeting because of holidays previously booked by the claimant and the unavailability of the regional union representative. During the course of this hearing Ms Levene sought to bring to the attention of the Tribunal the fact that there is reference to the regional representative ultimately withdrawing his support for the claimant (p117). However there follows on from that email further reference to the regional representative being able to attend on a different date and therefore it is clear that support had not been withdrawn by the union. Ultimately, the regional representative did not attend the meeting on 20 April 2017 and the claimant was accompanied by Mr Brown in his stead.

50. At the appeal meeting the claimant was invited to state why he thought his dismissal was unfair and was assured that Mr Burrows would review the decision in

light of the claimant's comments (p126). At the meeting Mr Burrows explained that it had not been possible to obtain CCTV footage covering stand 18 because not all stands at Manchester Airport are covered, and in any event the CCTV was only available for 30 days afterwards. He did however point out to the claimant that what was in issue was the claimant's arrival time at the stand and the fact that the aircraft had to wait for ground power. At this meeting the claimant once again stated that he was there when the plane arrived.

51. At the appeal meeting the claimant raised a new point. He said that it was not possible that the plane had been waiting ten minutes for power, because, once he had attended to the converter being attached to the aircraft he personally took the bags from the aircraft into the bag hall with the first bag being deposited 12 minutes after arrival. The claimant maintained that it would have been impossible for him to do that within two minutes i.e. get the bags off, into the hall, and the first bag button pressed by 17:42.

52. Prior to the appeal hearing Mr Burrows considered the requests made by the claimant. He found that it was not necessary to show proof from the airline that they had suffered financial loss as a result of the claimant's actions because it was obvious that they would have incurred additional expense in running the aircraft on 'hotel mode' when ground power was not available. In respect of the CCTV Mr Burrows made enquiries of MAG and was told that CCTV footage was only retained for 30 days but that in any event there was not a CCTV camera pointing on stand 18. In respect of a statement from the pilot Mr Burrows did make attempts to locate him but as he was not based at Manchester had been unable to do so. Mr Burrows concluded that as the issue was not about turnaround time but instead related to the aircraft not being met on arrival, a statement from the pilot was not necessary.

53. At the appeal hearing the claimant continued to state that he had relied on information given to him and that everything had been punctual for the aircraft. He maintained that he had gone for a cigarette sometime between 17.05 and 17.10 which would have been on his break time and despite having previously admitted to taking the EBT to the smoke area denied it once again in this meeting (p127).In

54. Mr Burrows adjourned the hearing to allow him a further opportunity to raise questions with Mr Harrison (p130) and arrange a further interview with Mr Collins (p 133-135). Mr Collins confirmed that he had discussed the flight with the claimant; and that it was due in at 17:35 on stand 18; that he had told the claimant that he would go to get a tug and bar and meet the claimant on the stand, and that the claimant was to get the EBT and trailer and meet him at the stand. Mr Collins evidence had remained consistent throughout. He confirmed that he left the crew room between 17:10 and 17:15 and that the claimant had not told him he was going for a cigarette. He confirmed that all three of them took part in taking the bags off the aircraft. He confirmed that this did not take very long as there were only a few bags and they were right next to the carousel in the baggage hall. He had powered the aircraft while the claimant and Mr Buckley offloaded the bags.

55. Having received responses to the questions he asked of Mr Harrison, which included a question about the sanction of dismissal, Mr Burrows decided to uphold the decision to dismiss the claimant. Mr Burrows was aware that employees should

not be dismissed lightly and wanted to make sure that the decision of Mr Harrison was made on sound grounds before making his own decision on the appeal. He communicated this by letter of 5 May 2017 in which he confirmed his finding that the claimant had gone for a cigarette after his break had finished. He advised the claimant that he had considered the harshness of the sanction of dismissal but had decided that because the claimant had made a conscious decision to break the rules for his own benefit, and at no point accepted any wrongdoing and instead sought to create false justification, he decided that dismissal was appropriate. He advised the claimant that if he had admitted an error in judgment and given assurance that there would have been no repetition to his actions that Mr Burrows may have had some scope to substitute the sanction of dismissal with a formal written warning. However this had not been the case and therefore he found himself in full agreement with Mr Harrison that dismissal was appropriate in the circumstances. In his written statement Mr Burrows explained that throughout the appeal hearing the claimant showed no regret or remorse for his actions and did not take ownership of what he had done. Mr Burrows explained that he had also heard the appeals of the employees involved in the case involving the complaint made by the Chief Executive of Flybe. Those two employees were not dismissed but did have disciplinary sanctions imposed. Mr Burrows explained in his statement that the reason the most serious sanction was imposed on the claimant was because he had shown no remorse and was unable to grasp what he had done wrong. He explained that this approach had continued even up to the appeal hearing where he referred to the matter as 'getting caught with his pants down'.

56. Since being dismissed the claimant has obtained some work as a delivery driver for a supermarket but he did not successfully complete the probation period and his employment was terminated. He has also obtained work for a short time through an agency but since has been unable to find alternative employment.

The Law

57. Where an employee brings a claim of unfair dismissal before the Employment Tribunal it is for the employer to demonstrate that his reason for dismissing the employee was one of the potentially fair reasons set out in section 98(1) and (2) of the Employment Rights Act 1996. If the employer was able to establish such a reason the Tribunal must then determine the fairness or otherwise of the dismissal by deciding in accordance with section 98(4) of the Employment Rights Act 1996, being whether the employer acted reasonably in dismissing the employee. Conduct is a potentially fair reason under section 98(2) of the Employment Rights Act 1996. Section 98(4) provides:

> "Where the employer has fulfilled the requirements of subsection (1) the determination of whether the dismissal is fair or unfair, having regard to the reason shown by the employer –
>
> (a) depends on whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer has 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."

58. In determining the reasonableness of the dismissal with regard to section 908(4) the Tribunal must have regard for the three part test established by the Employment Appeal Tribunal in **British Home Stores Limited v Burchell [1978] IRLR 379**. The test requires that an employer before dismissing an employee by reason of misconduct must have a genuine belief that the employee carried out the alleged misconduct and that the belief of that fact is held on reasonable grounds having followed a reasonable investigation. It is not for the Tribunal to substitute the decision of the employer with the decision of what it would have done in the same circumstances. Rather the Tribunal must follow the guidance from the Employment Appeal Tribunal in **Iceland Foods Limited v Jones [1982] IRLR 439** and ask whether the dismissal was within the band of reasonable responses available to a reasonable employer.

59. The Court of Appeal in **Sainsbury's Supermarket Limited v Hitt [2003] IRLR 23** confirmed that the band of reasonable responses approach applies to the conduct of the investigations as much as to other procedural substantive decisions to dismiss. Providing an employer carried out an appropriate investigation giving the employee a fair opportunity to explain his conduct, it would be wrong for a Tribunal to suggest that further investigation should have been carried out. By doing this the Tribunal would be substituting its own standard as to what was an adequate procedure for the standards that could be objectively expected from a reasonable employer.

60. In the case of **Weddell v Tepper [1980] ICR 286** Stephenson LJ stated:

> "Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds and they must act reasonably in all the circumstances of the case. They do not have regard to equity in particular if they do not given them a fair opportunity of explaining before dismissing him. They do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, as per **Burchell**, carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

61. This means that they must act reasonably in all the circumstances and must make reasonable enquiries appropriate to the circumstances. If they form the belief hastily or act hastily upon it without making the appropriate enquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably.

62. The reasonable investigation stage has been subjected to refinement in the judgment of **A v B [2003] IRLR 405**, a judgment of Elias J as he was then and members, which indicates that there is to be a standard of investigation which befits the gravity of the matter charged. If what is sought to be sanctioned is a warning the standard of investigation will be lower than where a dismissal is concerned.

63. Considering the overall fairness of the procedure adopted the Court of Appeal in **Taylor v OCS Group Limited [2006] ICR 1602** stressed that the task of the Tribunal is to look at the fairness of the disciplinary process as a whole. Where procedural deficiencies have occurred at an early stage the Tribunal must examine the subsequent appeal hearing, particularly procedural fairness, thoroughness and open-mindedness of the decision maker.

64. In **UCATT v Brian [1981] IRLR 225** Sir John Donaldson stated:

> "Indeed this approach of Tribunals putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question 'would a reasonable employer in those circumstances dismiss?' seems to me a very sensible approach – subject to one qualification alone but they must not fall into the error of asking themselves the question 'would we dismiss?' because you sometimes have a situation in which one reasonable employer would and one would not. In those circumstances the employer is entitled to say to the Tribunal 'well you should be satisfied that a reasonable employer would regard those circumstances as a sufficient reason for dismissing' because the statute does not require the employer to satisfy the Tribunal of the rather more difficult consideration that all reasonable employers would dismiss in those circumstances."

65. When considering the reasonableness of a decision to dismiss it is for the tribunal to determine whether the employer was justified in dismissing for the reason it did. In doing so potential consequences can be taken into account when deciding whether the dismissal was fair **Wincanton plc –v- Atkinson and anor EAT 0040/11.** The fact that actual loss of reputation has not occurred does not preclude consideration of the risk an employer may be exposed to.

66. The law in relation to the claimant's claim for failure of the respondent to give the requisite notice to terminate its contract with him is based on common law. An employer may only terminate in breach of the contractual right to either reasonable notice or express notice (or payment in lieu of such notice if the contract so provides), if he is entitled to do so by reason of the employee's conduct. If the employee has breached the contract by reason of his conduct to the extent that the breach amounts to gross misconduct then the employer is entitled to consider the contract at an end and is entitled to dismiss without notice.

Submissions

67. Ms McCarthy submits that the respondent did not have a genuine belief in the claimant's alleged misconduct, nor was any belief held on reasonable grounds because the investigation was insufficient. She maintains that there were three problems in relation to the reasons for dismissal:

(1) the actual reason in the letter is not made out by the respondent;

(2) the dismissal was for a different reason than that in the letter; and

(3) the dismissal for the first offence was not gross misconduct.

68. Ms McCarthy refers to the dismissal letter (p82) which sets out the three allegations: disrepute, failure to follow a reasonable request and failure to carry out normal duties. She then refers the Tribunal back to page 71 and the fact that the claimant failed to meet the aircraft on arrival. She maintains that it is not explained in either letter and that it was only ultimately explained at paragraph 4 of Mr Harrison's witness statement. It was only then that it was stated that the claimant had been told by the lead agent to go and get power for the aircraft and go to the stand; and that he had failed to get there five minutes early. Ms McCarthy submits that allegation 1 is not made out at all, and Mr Harrison has accepted this. She submits that the claimant accepts that allegations 2 and 3 as explained in the witness statement are made out because he was not at the aircraft before it arrived and he was not five minutes early either. Mr Harrison accepted in cross examination that 2 and 3 in their own right do not amount to gross misconduct in these circumstances, and that there is no reasonably held belief in allegation 1. Ms McCarthy submits that the dismissal in reality is for different reasons than those stated by the respondent during the disciplinary process, though only now he has put them in the witness statement.

69. Ms McCarth submits that throughout the whole disciplinary process the claimant understood that the allegation was that he was late arriving at the aircraft. It was never put to him that he should have been there five minutes before. It seems in reality that the real allegation is that the claimant went for a cigarette after his break and therefore took an extended break, the result of which was that he was not there five minutes before the flight arrived. If that is the allegation the claimant accepts that he did take a longer break and he was not there, and that allegation is made out. However, this is a dismissal for a first offence.

70. Ms McCarthy submits that the respondent accepts that there is no disrepute to the respondent as a result of the claimant's conduct, and in terms of reasons for dismissal the respondent suggests that the minus 5 rule is key unless there is a good excuse not to comply with this rule. It is the evidence of the claimant and Mr Brown that they were not aware that this rule was so important or that that it could be a disciplinary matter. They certainly were not aware that it was a gross misconduct matter. In particular Ms McCarthy asks the Tribunal me to consider that there are many reasons why an employee may not be able to arrive at the aircraft on time, and according to Mr Harrison's evidence it would have been ok if the reason for his tardiness was the fact that he had gone to the toilet. She refers the Tribunal to a document at p139 where the claimant had previously been late arriving at an aircraft but that he had not been disciplined for it on that occasion.

71. It is, she says, crucial that the claimant has not denied that he went for a cigarette break but he always thought that he would be at the aircraft before it arrived. Mr Harrison has said that he did not take that into account as relevant because he did not believe the claimant. Ms McCarthy submits that whilst the list of examples of gross misconduct contained in the disciplinary procedure is not exhaustive, it is wholly unreasonable for an employer not to communicate examples of gross misconduct unless it is completely obvious. Ms McCarthy submits that there was no proper attempt to get the CCTV footage and look at it for themselves, and that if one of the allegations was that the claimant had brought the respondent into

disrepute it would have been reasonable for the respondent to obtain a statement from the captain of the aircraft to see if he was irate as suggested.

72. Ms McCarthy admits that there has been a lot of criticism of the claimant in defending his position but as he was being accused of bringing the company into disrepute it was reasonable for him to try to defend his position in this respect. She asks that the Tribunal has regard to the absence of a smoking policy and the fact that smoking breaks are tolerated and are fairly relaxed. Smoking breaks happen on an ad hoc basis. In respect of the aircraft going to finals, Ms McCarthy asks that the Tribunal consider the claimant's evidence that it does not mean that an aircraft always land in ten minutes, it can be some time before the aircraft gets to a stand. She submits that the claimant should have got moving at the time when finals were displayed on the screen, but that the claimant genuinely thought that he had time to get there in time; this therefore does not show a deliberate intent to not fulfil his duties.

73. Ms McCarthy submits that the respondent does not appear to have properly taken into account the length of service and good service record of the claimant, and that it was unreasonable of Mr Harrison to decide that the claimant's apology was not genuine. She asks the Tribunalto note that Mr Harrison did not mention that he did not think the apology was genuine at the time it was made, nor did he challenge the fact that he was not remorseful. Ms McCarthy submits that the respondent has not properly considered alternatives to dismissal and refers me to pages 39 and 45 of the disciplinary policy which details the other sanctions available to the employer in addition to those already listed. Mr Harrison did consider transferring the claimant into the baggage hall and Ms McCarthy submits that the reason for him deciding not to do this was wholly unreasonable, in making a finding that it was too close to the smoking shed and that he felt it was unfair to other employees working there. The offence for which the claimant has been dismissed has never been outlined as gross misconduct and she says it falls well outside the band of reasonable responses.

74. In respect of inconsistency Ms McCarthy asks the Tribunal to consider the other two employees who had done also been late meeting an aircraft but had not been dismissed. Whilst the circumstances in each case should be comparable she submits that the situation of the other two employees was worse than that of the claimant because these two employees had brought the company into disrepute. These employees were not dismissed by Mr Harrison who also held their disciplinary meetings, because he decided that their apologies were genuine whereas he did not accept the claimant’s apology. Ms McCarthy submits that the other two employees did have something to be apologetic about and they knew immediately what it was that they had done wrong. Ms McCarthy also complains about Mr Harrison’s input into the appeal process as much of the appeal letter appears to quote verbatim the answers to Mr Harrison’s questions to Mr Burrows.

75. Ms McCarthy submits that the claimant did not know that what he had done was potentially gross misconduct until he got the suspension letter of 27 January 2017 (page 56). The fact that the aircraft had gone to finals was never put to the claimant during the disciplinary or appeal process, but this is not something that is different to what he said throughout that process. In addition, the question of whether

the aircraft was a Dash or ATR again was never put to the claimant at the time, and whether he should have known or not.

76. Ms McCarthy suggests that there are procedural flaws in the process that was followed and the respondent cannot argue that if a fair procedure had been followed the claimant would have been dismissed in any event. Ms McCarthy submits that if a fair procedure had been followed there would have been no dismissal as this was not a type of conduct that entitled them to dismiss. Ms McCarthy submits that even if the Tribunal found that the respondent was entitled to dismiss for the new reasons put forward today, this is not a gross misconduct matter and the dismissal should be with notice.

77. In respect of culpable and blameworthy conduct Ms McCarthy accepts that in going for a cigarette the claimant did not help himself and there is some culpable conduct on his part. Ms McCarthy submits that in his mind the claimant had no idea it was as serious as is now being put to him.

78. For the respondent Ms Levene submits that this is clearly a case of gross misconduct. The claimant knew what was being asked of him and what the charges were (page 71). She submits that what the claimant is being disciplined for is his job, the number one priority, and as an experienced employee he knew he had to be there in a timely fashion with suitable equipment. Ms Levene submits that the allegation against the claimant is the fact that he failed to meet the aircraft, and the other three matters simply highlight the company's disciplinary policy. The charge, she says, has clearly been put from the outset. The claimant has been made aware from the outset that this is potential gross misconduct and at no point has either the claimant or his union representative ever said that this was not the case. The claimant conceded in cross examination that he knew the allegations against him were serious and that they were sackable offences. Ms Levene submits that the respondent had reasonable grounds to dismiss because the claimant has lied at many stages and has sought to muddy the waters and again lied today, which is reflective of his behaviour in the disciplinary process. By way of example of these Ms Levene refers the tribunal to:

(a) The fact that the claimant has tried to suggest he did not know the type of aircraft and therefore did not know that there was a need for power. Ms Levene suggests that the Isle of Man aircraft was always an ATR and both the claimant and Mr Brown accepted this in cross examination.

(b) On 21 January the claimant says that he was told that the flight was due in 17:50. This, she says, is a nonsense because the screen never showed 17:50 at any stage. During cross examination the claimant said that he did not know that it was an Isle of Man flight yet at pages 62, 65 and 127 he confirms that he did. This, she says, shows the propensity of the claimant to lie and that what he says cannot be believed. The claimant knew, in accordance with the minus 5 rule, that he should have been on stand but instead he went in the opposite direction to have a cigarette.

79. In response to Ms McCarthy's submissions Ms Levene says that a reasonable investigation was carried out; the respondent took statements straightaway so was able to rely on fresh evidence and thereafter a few days later a further investigation took place which confirmed the original statements. During the appeal hearing Mr Burrows went back to organise further investigations, for example to understand more about the bag situation. This is not a respondent who did not apply its mind to the investigation. She maintains that CCTV would not have made any difference and that it was Mr Harrison's evidence that it is grainy in any event and would not be of much use given that it was dark and raining when the incident took place.

80. Ms Levene maintains that the decision to dismiss was clearly within the band of reasonable responses because the claimant accepted that it was a sackable offence; it was priority 1 of the employee's job and there were no mitigating factors in this case to require the respondent to consider an alternative sanction. She contrasts the two employees who were also late with the claimant, and submits that those two employees did not choose to go for a cigarette knowing that the aircraft was arriving and make a conscious decision to avoid the essential function of their job. These two employees had been misinformed and one had lost track of time. They could therefore remedy their conduct whereas the claimant lied about the time he arrived on stand and his knowledge of the type of aircraft. The respondent found that this demonstrated that training would be of no use as the respondent no longer had trsut in him. This, she says, is a decision that was within the band of reasonable responses.

81. In respect of culpable or blameworthy conduct Ms Levene says this is clearly a case of a reduction of 100% to both the basic and compensatory awards because his decision to go for a cigarette instead of carrying out the key function of his job meant that there was no mitigation to the decision to dismiss.

82. Ms Levene submits that there was no failure in the procedure followed and that any such failure would have made no difference whatsoever in respect of the CCTV and the statement of the captain. Ms Levene submits that obtaining a statement from the captain would have been commercially inadvisable. It would she submits only serve to remind Flybe of the incident and complaints made by Flybe and anything the pilot would have been able to say would not have made any difference to the fact that the claimant had failed to carry out his job in accordance with the requirements placed upon him.

Application and secondary findings of fact

83. The respondent relies on the conduct of the claimant as the potentially fair reason for dismissal. The respondent's disciplinary policy is silent on the type of conduct the claimant has been dismissed for and the respondent does not have a written policy on smoking. However, the claimant knew that he was required to be in attendance when the flight arrived and in oral evidence also admitted that he knew if he had asked for permission to go for a cigarette break when he did, it would have been refused. The Tribunal does not accept Ms McCarthy's submission that the claimant was unaware of what it was that he had done wrong because he was interviewed the same evening by his line manager and asked to explain his actions in relation to the flight from the Isle of Man. The letter of suspension sent to him also

set out the allegations to be investigated (p56). When he was subsequently interviewed by Mr Plant as part of the investigation he was reminded again of the allegation i.e. that he had failed to carry out his duties as instructed resulting in the BE818 aircraft arriving on stand without a full ramp team present. The claimant was also told that Chroma had been checked for the times that had been displayed in relation to the flight and that the times corresponded with what the other members of the team had said when they had been interviewed.

84. During the course of his interview with Mr Plant it was made clear to the claimant that the allegation related to his failure to attend the stand on time to meet the aircraft. The claimant confirmed during this meeting that he was aware of the potential seriousness of his action and the potential damage that is caused to the reputation of the respondent when aircrafts are not met on time (p62). The letter inviting the claimant to a disciplinary meeting once again advised him that the allegation was that he had failed to meet an aircraft on arrival despite being given ample time and instruction to do so. He was advised that if the allegation was found proven he could be dismissed. For these reasons the Tribunal finds that there is no doubt that the claimant was aware of what he was being accused of and why. He was also aware of the potential consequences of his actions before he attended the disciplinary hearing.

85. Although the respondent did not obtain a witness statement from the pilot of the aircraft in question or CCTV footage of the aircraft arriving on stand as part of the investigation, the Tribunal find that neither would have assisted either the claimant or the respondent in respect of the allegation raised against the claimant. Whilst the claimant's evidence about the time he arrived on stand has been inconsistent, he did ultimately admit that he was not there on time and there was an abundance of witness evidence to confirm this. Given that the allegation stemmed from his late arrival on stand, it is not clear how a statement from the pilot would have added to the investigation. Similarly, the Tribunal accept that the respondent was not obliged to obtain video footage. Mr Harrison has explained that he did not do so because his experience of the footage he has seen in the past is that it is grainy and difficult to make out. Given that it was dark and wet on the night in question the quality of the footage would have been of poor quality and there was other evidence that the Appellant was not present on stand when the aircraft arrived. In the circumstances the Tribunal finds that the investigation carried out by the respondent was one that was reasonable.

86. In respect of the disciplinary hearing, the Tribunal finds that it was not best practice for Mr Harrison to raise matters that did not form part of the disciplinary allegations against the claimant. However, the Tribunal accepts that Mr Harrison referred to the claimant's name having come up three or four times in the past few weeks only in response to the claimant telling him that he was good at his job and always safe (p76). Mr Harrison confirmed that the issues he was referring to did not form part of his reason for dismissing the claimant and the Tribunal finds that his mentioning them in the circumstances described, did not render the hearing unfair. The Tribunal finds that leaving the claimant waiting for nine days before advising him of the outcome of the disciplinary hearing was again poor practice but it did not

prejudice the claimant in any way and he continued to receive full pay during that period.

87. The claimant was given and exercised his right of appeal. The Tribunal notes that a considerable period of time passed before the appeal was heard but that this was mostly caused by the claimant. Before the appeal hearing took place the claimant asked that he be provided with proof of the financial loss incurred because of his action, video footage of the flight arrival, and a statement from the pilot of the airline. As part of the appeal process Mr Burrows considered the claimant's request and decided that it was obvious that a financial loss would have been incurred as additional jet fuel had been used as a result in the delay in getting power to the aircraft. He made enquiries about video footage but was informed that a camera does not cover stand 18 and in any event any video footage is only kept for 3 months, which time had already elapsed. In respect of a statement from the pilot, Mr Burrows discovered that the pilot was not based out of Manchester and concluded that a statement from him would not be needed because the issue was that the claimant had failed to attend the stand on time to meet the aircraft. The fact that the plane had left on time was not relevant. The Tribunal agrees with Ms Levene's submission that given that the pilot would not be able to add anything to the investigation, it would not have been commercially prudent to chase the pilot for a statement because it would only serve to remind him of the failing of the respondent on that occasion. In addition the Tribunal agrees that it would not have assisted the claimant for the above reasons.

88. At the appeal hearing the claimant was given a full opportunity to engage with the meeting and in light of matters raised Mr Burrows decided to carry out further enquiries of both Mr Harrison and Mr Collins.

89. Overall, the Tribunal finds that the procedure carried out by the respondent, was fair and reasonable. It finds, that Mr Burrows, who clearly carried out a thorough examination of the disciplinary process, remedied any flaws that may have arisen out of the poor practice of Mr Harrison. Mr Burrows also made further enquiries to understand Mr Harrison's rationale for dismissing the claimant instead of imposing a lesser sanction. Unfortunately, the Tribunal has not had the benefit of hearing from Mr Burrows who has been unable to attend this hearing because of health reasons. The Tribunal finds that whilst Mr Burrows does use the wording given by Mr Harrison in response to questions raised by him, there is no suggestion that Mr Burrows was pressured to agree with what Mr Harrison had found. The Tribunal was careful to ascertain that Mr Burrows held a position senior to that of Mr Harrison and that he had the authority to overrule the decision of Mr Harrison if he found it appropriate to do so. Unlike the Tribunal, Mr Burrows did have the power to substitute the decision to dismiss with an alternative sanction of his own, but following enquiry he chose not to.

90. In respect of the alleged misconduct, the Tribunal find that Mr Harrison, as the dismissing officer, did have a genuine belief that the claimant had failed to fulfil his obligation to be on the stand ready to meet the aircraft on time. He held this belief on reasonable grounds because the findings of the investigation was that the claimant was late getting to the stand because he had gone for a cigarette.

91. The Tribunal finds, it has been clear to the claimant from the outset that he was disciplined, and ultimately dismissed, because instead of finishing his break and going to stand 18 to meet the aircraft allocated to him, he went for another break to have a cigarette. By doing this, he arrived late to meet the aircraft in breach of the respondent's obligations to the airline. Although the respondent has sought to pin labels on his actions to 'fit them into' the respondent's disciplinary policy the actual act of misconduct which resulted in his dismissal is set out above. The Tribunal is satisfied that it is this conduct which has formed the basis of the disciplinary process and his unfair dismissal claim. The question then is whether the respondent's decision to dismiss the claimant for this conduct was within the band of reasonable responses open to a reasonable employer.

92. It is not disputed that the respondent does not cite either going for a cigarette during working hours or a failure to meet an aircraft on time as potential acts of gross misconduct. The Tribunal finds that a simple act of going for a cigarette without permission would not in the absence of previous warnings, be conduct that would potentially give rise to a fair dismissal. The same can be said for being late on stand to meet an aircraft on one occasion. However, during the course of hearing from the claimant, it is clear that he has worked in the industry for a considerable length of time and knows the importance of the contracts secured by the respondent. He knows that contracts can be lost if the respondent does not meet the standard expected by the airline under the contract awarded to it.

93. The Tribunal is satisfied that the claimant was aware that there was an expectation for him to be at the stand in time for the aircraft arriving unless there were circumstances which made this not possible. The Tribunal find that the claimant was aware of this expectation on him even though he was not aware of the Flybe incident that had only recently occurred.

94. The claimant was aware that he had been allocated the Isle of Man flight before he left the crew room at the end of his break. He also knew that Mr Collins had already set off to go to the stand with a tug. The claimant knew that his decision to go for a cigarette before going to the stand himself was one that would not have been approved by any of his seniors. In oral evidence he said he would not have been given permission to go for a cigarette if he had asked. On that basis it is clear that the claimant must have known that he was not following the instruction he had been given which was to go and meet the aircraft. His decision to take a further break for a cigarette and delay doing his job, led to his late arrival on the stand and the aircraft having to run on hotel mode because the claimant had not got a connector unit for the power. Had the claimant followed the instruction he was given he would have been in attendance before the aircraft arrived and could have complied with his duty to secure all necessary equipment in preparation for the aircraft's arrival.

95. In considering whether the decision of Mr Harrison to dismiss the claimant fell within the band of reasonable responses, the Tribunal has also considered the manner in which he has dealt with the two employees who were disciplined because of the Flybe incident. The Tribunal notes that Mr Harrison conducted the disciplinary hearings on these two employees and issued sanctions short of dismissal. He

explained that he did this because there were different reasons why they had been late and they were both extremely remorseful for what had happened.

96. It is true that the claimant also apologised at his disciplinary hearing but Mr Harrison did not believe the apology was sincere. Although Mr Harrison did not say this to the claimant, Mr Brown who was at the disciplinary meeting has explained that it would have been possible for Mr Harrison to have reached a conclusion that the claimant was not sincere in his apology because of the way in which it was delivered.

97. Ms McCathy submits that it is obvious that these two employees would have been remorseful because they knew what it was that they had done wrong and they were aware that their actions had in fact brought the respondent into disrepute. The claimant, she submits, did not know what he had done wrong. The Tribunal does not accept this argument, because the claimant was at all times aware of the reason why he was being disciplined. It is true that he may not have been formally asked about the five minute rule before he attended the disciplinary hearing, but he did know that he was expected to be ready and waiting for the aircraft when it arrived unless there was some good reason why he could not. Going for a cigarette would not by any standard be deemed to be a good reason not to be there.

98. Throughout the course of the disciplinary proceedings the claimant changed his account of what happened and did not accept that he had done anything wrong. He continued to rely on the fact that he would have been at the stand in time if the aircraft had not come in early. He has maintained that stance throughout and does not appear even now to appreciate that had he been following the instructions he was given to go and meet the aircraft he would have been there on time.

99. Whilst no formal complaint was received from the airline or MAG it is quite obvious to this Tribunal that the airline would not have welcomed the delay that followed, however short, or the cost incurred burning jet fuel that would not otherwise have been needed. The potential for damage to the reputation of the respondent was real and whilst there are occasions when it is not possible to attend an aircraft on time, this was a situation that could have been avoided had the claimant done his job as instructed.

100. The Tribunal finds, that given the circumstances of this case as set out above, the claimant's failure to fully recognise his wrongdoing and the potential consequences his actions could have had on the respondent; the decision of Mr Harrison to dismiss the claimant for failing to meet an aircraft in time, in the circumstances described, does fall within the band of reasonable responses open to a reasonable employer. The claimant's dismissal was not unfair. His claim of unfair dismissal is not well founded and is dismissed.

101. In acting in the manner in which he did, the claimant's actions did not just amount to misconduct because he went for a cigarette without permission, or arrived late to meet an aircraft. In taking the actions that he did, the claimant had disregard for the consequences of his actions on the respondent and failed to take responsibility for them when they were raised with him. In doing this, the claimant breached his fundamental duty of trust and confidence with the respondent. Thus the respondent was entitled to accept the breach and dismiss the claimant without notice

or payment in lieu of notice. The claimant's breach of contract claim is not well founded and is dismissed.

Employment Judge Sharkett

Date: 22 November 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

28 November 2017

FOR THE TRIBUNAL OFFICE