Appeal No. UKEAT/0106/17/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 12 October 2017
Judgment handed down on 2 July 2018

Before

NAOMI ELLENBOGEN QC (DEPUTY JUDGE OF THE HIGH COURT)

(SITTING ALONE)

MR P MURDOCK — APPELLANT

BRITISH AIRWAYS PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHARLES CIUMEI (One of Her Majesty's Counsel) Bar Pro Bono Scheme
For the Respondent	MS MARIANNE TUTIN (of Counsel) Instructed by: Harrison Clark Rickerbys Limited First Floor Suite Thorpe House 29 Broad Street Hereford HR4 9AR

SUMMARY

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

CONTRACT OF EMPLOYMENT - Wrongful dismissal

DISABILITY DISCRIMINATION - Direct disability discrimination

The Tribunal had erred in its findings on the claims of unfair and wrongful dismissal. The Claimant's dismissal had arisen from his alleged intention to act in breach of policies requiring him to notify his line manager of certain disqualifying criminal offences within 14 days. The disciplinary process had commenced at a time when the notification period had not expired and he had then notified his line manager within the 14-day period. The Tribunal ought to have considered the claims of unfair and wrongful dismissal in the context of the proper construction of the Respondent's policies. Both claims would be remitted for that purpose, in accordance with this Judgment. The Tribunal did not err when considering the claim of direct disability discrimination.

NAOMI ELLENBOGEN QC (DEPUTY JUDGE OF THE HIGH COURT)

1. In this Judgment, I refer to the parties as they appeared before Reading Employment Tribunal.

2. By a Reserved Judgment, sent to the parties on 22 November 2016, the Tribunal found that:

2.1. the Claimant had been dismissed by reason of misconduct on 6 November 2015 and that his dismissal had not been unfair;

2.2. the Claimant's complaint of direct disability discrimination, contrary to sections 13 and 39 of the **Equality Act 2010** ("EqA"), failed and was dismissed; and

2.3. the Claimant's summary dismissal had not been wrongful.

The Tribunal's Findings of Fact

3. The Tribunal found that, between 11 June 2001 and his summary dismissal on 6 November 2015, the Claimant had been employed by the Respondent as Air Cabin Crew, on a 75% contract. The Respondent conceded that, at all material times, the Claimant had HIV infection, deemed to be a disability under paragraph 6(1) of Schedule 1 to the **EqA**.

4. The Tribunal noted that the Respondent's contractual policy EG804 included a section headed "*Criminal Convictions*" which related to the holders of permanent restricted zone, or "airside", passes. (The Claimant was the holder of such a pass.) That section provided:

> **"Where an employee who is a holder of an Airside pass(es) is convicted of a disqualifying offence* under the relevant legislation, the issuing authority responsible for the employee's Airside pass is required by law to withdraw any Airside pass issued.**
>
> **If any employee is convicted of a disqualifying criminal offence he/she must notify his/her line manager of that conviction within 14 days. Failure to do so will be a disciplinary offence and dealt with in accordance with EG901: Disciplinary Procedures (Employment Guide).**

> **If an Airside pass(es) is withdrawn due to disclosure of a disqualifying conviction, the employee will be managed under EG904: Unsatisfactory Criminal Record Checks (Employment Guide).**
>
> *** Disqualifying offences are set out in Appendix B of EN815: Criminal Record Checks & Disclosure of Criminal Convictions (Employment Navigator)."**

5. On 2 June 2015, the Claimant pleaded guilty to two counts of obtaining abatement of liability by deception, contrary to section 2(1) of the **Theft Act 1978**. On 25 June 2015, he was sentenced to 6 months' imprisonment, suspended for 18 months. His convictions amounted to disqualifying offences under the relevant Civil Aviation Authority ("CAA") regulations, such that he was required to notify his line manager of them within 14 days, in accordance with contractual policy EG804.

6. On 27 and 29 June 2015, the Claimant worked on outward and return flights between London and Philadelphia. On 7 July 2015, he had been due to report for a flight to Hyderabad but had been stopped from doing so and interviewed by Mr Jon Shirley, Inflight Business Manager. He was asked whether he had been to court recently and said that, on 2 June 2015, he had been convicted of housing benefit fraud, and that, on 25 June 2015, he had been given a 6-month suspended prison sentence. Asked whether he had informed anyone at the Respondent about the outcome, the Claimant said:

> **"I spoke to my manager last Saturday when I was checking in for Philadelphia 4 July. I explained to her it was all over … I explained that I had pleaded guilty to overcharged benefit fraud … It finished on the 25th and I only got a little time to discuss with my manager … With everything that was going on I didn't think. I needed to sit down and talk properly."**

The Claimant was then suspended from duty and his airside pass was taken from him.

7. On 5 October 2015, the Claimant attended a disciplinary hearing under the Respondent's disciplinary policy EG901, chaired by Mr Charles Oliver, Inflight Business Manager. He was accompanied by his trade union representative. At the end of that hearing,

he was summarily dismissed, an outcome confirmed in a letter dated 6 November 2015. The Tribunal cited verbatim and extensively from that letter in its Reasons.

8. The letter noted that the Claimant had faced two allegations:

8.1. Breach of EG815 - criminal records checks and disclosure of criminal convictions; and

8.2. Conduct which affected the Claimant's suitability to remain as British Airways crew.

9. The letter began by setting out Mr Oliver's findings in relation to the first allegation. It recorded the history of the convictions and sentence, as explained by the Claimant at the disciplinary hearing. Mr Oliver noted that the offence was a disqualifying conviction for aviation roles, under the CAA's safety document. He observed that, during the disciplinary hearing, he had asked the Claimant whether he (the Claimant) had informed the Respondent that he had been convicted and sentenced. The Claimant had told him that the Respondent had known all along about the charges and his court case and that his former manager, Ruth Hawkes, had known all about the case in 2011/2012. Mr Oliver noted that, from his investigations, Ms Hawkes had been aware of the Claimant's court case at that time but had not been aware of the matters with which he had been charged. He further noted that at no time had the Claimant told Ms Hawkes what the charges were, or their detail. Mr Oliver concluded that Ms Hawkes had been unaware of the reasons for, or details of, the charges.

10. Mr Oliver went on to record that, at the disciplinary meeting, the Claimant had told him that he had met his current line manager, Angela Young, on 4 July 2015. Mr Oliver found that,

on that date, the Claimant had told Ms Young no more than that "*it was all over*" and had at no time told her that he had been sentenced. His letter continued:

> **"… The only time you notified Angela Young of your sentence was in your email to Angela dated 9th July 2015, after you had been called in by Jon Shirley on 7th July 2015.**
>
> **After your sentence on 25th June 2015, at no point did you voluntarily offer to notify anyone in British Airways about your 6 months suspended prison sentence. You operated a trip to Philadelphia on the 27th June 2015 and returned back to London on 29th June 2015. You operated a trip two days after your sentence. If you had intention of reporting your sentence to BA, I believe you would have reported it on 27th June 2015 - the 1st day you operated after your court [sic].**
>
> **My belief is that you had no intention of notifying British Airways of your conviction on 25th June 2015 until Jon Shirley met with you on 7th July 2015.**
>
> **As per my observations above, you only told Angela after you had been called in by Jon Shirley for the initial assessment. You were again for the 2nd time about to operate a trip on 7th July 2015 without telling anyone in BA that you had a conviction.**
>
> **The BA policy EG815, Criminal Record Checks & Disclosure of Criminal Convictions states that "if any employee is convicted of a disqualifying criminal offence, he/she must notify his/her line manager of the conviction within 14 days, as required by Employment Guide policy EG804: Identity Passes. Failure to do so will be a gross misconduct offence and dealt with in accordance with EG901: Disciplinary Procedure.**
>
> **I do not accept your explanation that you followed what your line manager asked you to do i.e. that you told British Airways that you had been convicted within the 14 days. My belief is that, your true intentions [were] to report for duty as normal and operate as normal hoping British Airways had no information of the detail of the outcome of your court case.**
>
> **… My belief is that, had Jon Shirley not stopped you from flying on 7th July, you would have operated this 2nd trip (i.e. since your court case) and subsequent trips without telling anyone in BA that you had a criminal conviction.**
>
> **Therefore my belief is that you were not truthful at [your] hearing when you told me that you would have told British Airways within the stipulated 14 days. I believe that you had every reasonable opportunity to disclose your charge however you only notified BA when you were asked about this by Jon Shirley on 7th July 2015.**
>
> **Although British Airways became aware of your conviction within 14 days of your conviction, this was because you were directly asked about the conviction and not because you had any intention of informing the business of your conviction. In fact, as stated above, I believe that you intended to continue to fly on 7th July 2015 without informing the business of a disqualifying criminal offence, which is a very serious issue.**
>
> **My decision is that this allegation is found."**

11. Mr Oliver went on to set out his findings in relation to the second disciplinary allegation. Having repeated the nature of the convictions and sentence, he noted that the Claimant had advised him that he had pleaded guilty to the criminal charges, continuing:

> **"My analysis is that, you then consciously and intentionally decided to keep the details of your … sentence from British Airways and go about your flying duties as normal. You had reasonable opportunity to disclose the sentence … You had from 25th June 2015 until 7th July 2015 (i.e. before your next scheduled flying trip) to disclose your sentence to BA but you deliberately chose not to. My expectation would be that you would have notified your line manager immediately after you had been charged on 25th June 2015."**

12. Mr Oliver's letter continued by recording his belief, respectively, that the Claimant had deliberately attempted to hide details of his court case from him and had chosen not to cooperate fully with the initial assessment and preliminary investigation conducted by others. Mr Oliver further concluded that the Claimant had chosen to be economical with the truth during his disciplinary hearing before observing:

> **"During your hearing you gave me copies of documents to support your case. The content of the "certificate of disregard" … does not confirm that your convictions have been disregarded. It states that "This certifies that the following unspent conviction may be disregarded." It further states that "any airside pass issue is subject to your employer and pass issuing authority being satisfied that you are a suitable person to conduct such role".**
>
> **…**
>
> **As the hearing manager to your case [sic], I am not satisfied that you will be a suitable person to work in any role with British Airways. I believe the offence of fraud is a serious offence and something British Airways will never condone let alone support. I also believe your conduct throughout the whole disciplinary process has not been encouraging and I have misgivings as to your integrity [given] the misrepresentations you made throughout the PI and hearings.**
>
> **The crime you committed and consequent suspended 6 months prison sentence in my opinion, demonstrates a clear and serious lack of honesty and integrity on your part.**
>
> **My decision is that this allegation is found."**

13. Mr Oliver went on to note that the Claimant had mentioned that he had a disability under the **EqA** and that he (the Claimant) felt that he had been discriminated against owing to his disability. Mr Oliver stated that he had considered that contention and was satisfied that, throughout the process, the Respondent had treated the Claimant in a fair and equitable manner, in accordance with the disciplinary policy and that he had not been discriminated against. He continued:

> **"You have not provided any specific details to support your allegation that you have been discriminated against on the basis of a disability. … and I confirm that the disciplinary procedure has been followed in accordance with EG901. I can also confirm that the conclusions I have reached … have had nothing to do with any issue of disability or any other protected characteristics that is covered by the Equality Act 2010 [sic].**
>
> **On both counts and irrespective of your disability I have found both the allegations against you."**

14. Having so found, Mr Oliver turned his attention towards the appropriate sanction. He stated that he had reviewed the Claimant's file, noting the compliments for good service received from passengers, and taking into account the Claimant's past record. He concluded:

> **"Your Union Representative stated … that you were remorseful for your actions. At no point do I believe that you have shown any remorse or attempted to apologise. I have taken into account your 14 years' service at British Airways, your operational and personal file. In considering whether I could impose a lesser sanction, such as a final written warning, I have asked myself whether I believe that the Company could have confidence in you as an employee going forward. I am afraid that I do not believe it can.**
>
> **The role of Cabin crew is a safety critical role and it is of crucial importance that members of Cabin Crew demonstrate they can be trusted and operate with honesty and integrity. In this context in particular, I am afraid that I do not believe British Airways can have confidence in you in the performance of your role and responsibilities going forward. I do not believe that we can allow your continued employment, given the seriousness of your misconduct.**
>
> **These factors have [led] me to conclude that dismissal without notice is the most appropriate sanction, your employment therefore ends today."**

15. The Tribunal noted that the Claimant had presented two separate appeals from Mr Oliver's decision, neither of which had been upheld.

The Tribunal's Conclusions

16. Having summarised the legal principles and set out the issues, as identified in a case management Order dated 25 April 2016, the Tribunal recorded its decision on the claim of unfair dismissal. It found that the reason for dismissal was misconduct and that there had been a reasonable investigation. It found that it was clear that Mr Oliver had had sufficient evidence to have concluded as he did in his letter. It went on to find that the test in **British Home Stores Ltd v Burchell** [1978] IRLR 379 EAT had been satisfied on the charges found proven by the Respondent. There had been a reasonable investigation and the Claimant had been informed of all the evidence against him before the disciplinary hearing. He had been given the opportunity at the hearing to give his own account and had been permitted to be accompanied by a trade union representative. The investigation had provided reasonable and sufficient grounds to sustain the Respondent's genuine belief in the Claimant's misconduct.

17. Regarding the claim of direct disability discrimination, the Tribunal again set out the legal principles and the issues as identified in the case management Order. The alleged less favourable treatment, as identified in that Order, was framed in this way:

> **"Has the Respondent subjected the Claimant to treatment falling within section 39 Equality Act, namely by the dismissing manager not being prepared to take into account that the claimed benefit, which led to the Claimant's conviction, itself arose from his illness?"**

18. Having recited the relevant part of the Claimant's witness statement, in which he had stated and explained his view that Mr Oliver had not believed him to be disabled, the Tribunal recorded its conclusion that Mr Oliver had not been prepared to take into account the Claimant's disability because it had not been relevant to the matters with which he (Mr Oliver) had been dealing: Mr Oliver had not been concerned with how the Claimant had come to claim benefits, or the reasons why he had committed benefit fraud. The Claimant had pleaded guilty to those offences and it was not for Mr Oliver to look behind the convictions: he had been concerned with the Claimant's conduct in failing to have disclosed the convictions. There was no link between the Claimant's disability and his failure to disclose. The Claimant's disability had not been a factor in the decision to dismiss him. A hypothetical comparator, that is a person in the same circumstances but without a disability, would have been treated no differently. There was no evidence of any less favourable treatment because of disability.

19. Considering the claim for wrongful dismissal, the Tribunal noted that the case management Order had framed the issue in the following way:

> **"Does the Respondent prove that it was entitled to dismiss the Claimant without notice because the Claimant had committed gross misconduct in that he had breached the Respondent's policy with regard to disclosure of criminal convictions and had acted in a manner which affected his suitability to remain as a crew member? NB This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the gross misconduct."**

20. The Tribunal found that, based upon the evidence heard and read, the Claimant had conducted himself as alleged and as found proven by Mr Oliver. At paragraphs 55 and 56 of its Reasons, it continued:

> **"55. The Tribunal found on a balance of probabilities that the Claimant failed to disclose his conviction on 2 June 2015 and the sentence on 25 June 2015 despite several opportunities to do so. He failed to engage with the investigation into his conduct and with the disciplinary process which followed.**
>
> **56. The Tribunal found that the conduct of the Claimant was sufficiently serious to be categorised as gross misconduct justifying summary dismissal."**

The Respondent's Policies

21. Legislation controlling access to restricted zones at airports (known as "airside access") requires the Respondent to carry out a criminal record check for all permanent restricted zone passholders. The Respondent has a number of policies related to this requirement, some of them expressly contractual and some expressly non-contractual.

Non-contractual Policy EG815

22. Non-contractual policy *EG815: Criminal Record Checks and Disclosure of Criminal Convictions* provided that "*If any employee is convicted of a disqualifying criminal offence, he or she must notify his or her line manager of the conviction within 14 days, as required by policy EG804: Identity Passes (Employment Guide)*". Policy EG804 is a contractual policy.

23. Policy EG815 further provided that failure to notify would be a gross misconduct offence and would be dealt with in accordance with *EG901: Disciplinary Procedures (Employment Guide)*. The latter, too, is a contractual policy. Disqualifying offences are set out in Appendices A and B of EN815. It is common ground that the Claimant's convictions were for disqualifying offences. Section 4 of EN815 provided that colleagues with disqualifying convictions may wish to apply for a Notice of Disregard from the office of the Secretary of

State for Transport, a process independent of the Respondent. It stated that colleagues may still be subject to disciplinary action, if in breach of policy EG804.

Contractual Policy EG804

24. Within contractual policy EG804, in the section headed "*Criminal Convictions*", it is stated that, if an airside pass is withdrawn owing to disclosure of a disqualifying conviction, the employee will be managed under policy *EG904: Unsatisfactory Criminal Record Checks*. EG904 is a non-contractual policy.

Non-contractual Policy EG904

25. EG904 cross refers to EG815, providing that, "*If an affected employee fails to provide a satisfactory criminal record check, the Respondent will review that employee's continued employment in accordance with EG904*". Under the heading "*General*", appears the following paragraph, "*This policy sets out the steps to be taken if an employee's criminal record check (CRC) identifies disqualifying information, or if an employee refuses to undertake a CRC where required to do so. This Policy should be read in conjunction with EG815 …, which sets out requirements for certain work groups to undergo CRCs*". Thus, on its face, EG904 does not relate to disclosure of a criminal conviction, but the approach that it adopts is applied by virtue of policy EG804 (to which I have referred above).

26. So far as material and in summary, paragraphs 2.4 to 2.6 of policy EG904 provide that, on receipt of confirmation of a disqualifying conviction, the employee should immediately be suspended from work on basic pay as he may no longer undertake a job that requires airside access. A review meeting should then be held at which any responses from the employee will be considered. Subject to those responses, the manager will explain that the usual consequence

of the disqualifying conviction, in the case of cabin crew, will be the revocation of the airside pass. The manager will then confirm that the employee is unable to continue in his current job and, unless there are suitable authorised vacancies available immediately, will be dismissed on the grounds that he or she is incapable of continuing to carry out contracted duties as it will be illegal for the Respondent to require them to work airside. The employee will be informed at the meeting of the dismissal decision, which will be effective immediately, as the employee will be unable to fulfil his contract during any notice period. A letter confirming the dismissal will then be sent.

Contractual Policy EG901

27. Under the heading "*Criminal Offences*", paragraph 6.5 of contractual policy EG901 provides that, "*If an employee has been found guilty of a criminal offence, the question of continued employment will be decided, having regard to the nature of the offence, in relation to British Airways regulations, the responsibilities and characteristics of the employee's job and whether they remain able to fulfil their contract of employment*".

Certificate of Disregard

28. The CAA may grant a certificate of disregard under which disqualifying offences may be disregarded. The final decision on issuing an airside pass rests with the British Airports Authority. The Respondent has a discretion as to whether to continue the employee's employment.

The Claimant's Appeal

29. Following a Rule 3(10) Hearing, four amended grounds of appeal are advanced, which may be summarised as follows:

29.1. When considering the claim of unfair dismissal, the Tribunal had erred in law in concluding that the Respondent's investigation had provided reasonable and sufficient grounds to sustain its genuine belief in the Claimant's misconduct, because (1) its finding as to the first of the two disciplinary allegations faced by the Claimant was perverse and (2) it had impermissibly elided the two disciplinary allegations;

29.2. The Tribunal had erred in law in its consideration of the claim of direct disability discrimination, which itself further undermined its earlier finding that the **Burchell** test had been satisfied for the purposes of the unfair dismissal claim and/or that dismissal had been within the band of reasonable responses. The Tribunal's finding that there was no link between the Claimant's disability and his failure to have disclosed his disqualifying offences, could only be relevant to the first disciplinary allegation. Had it properly and separately considered the second allegation against the Claimant, the Tribunal would have found a connection. When reaching its remaining conclusions as to the claim of direct disability discrimination, the Tribunal had ignored its finding that Mr Oliver had not been prepared to take the disability into account when considering the allegation of misconduct;

29.3. When considering the claim of direct disability discrimination, the Tribunal's approach to the burden of proof had been erroneous and, in any event, it had erred by failing to have considered whether the burden of proof had shifted to the Respondent; and

29.4. When addressing the claim of wrongful dismissal, the Tribunal had erred in finding that the Claimant had in fact committed the misconduct alleged, because its finding as to the first disciplinary allegation was perverse, and it had misapplied the law as to breach of contract.

The Parties' Submissions

30. Before me, as below, the Respondent was represented by Ms Tutin. The Claimant had represented himself before the Employment Tribunal. Before me he was represented by Mr Ciumei QC, instructed by the Bar Pro Bono Unit. I am grateful to both counsel for their written and oral submissions.

The Claimant's Submissions

31. On behalf of the Claimant, Mr Ciumei made the following submissions:

Ground 1

31.1. In accordance with the principles in **Strouthos v London Underground Ltd** [2004] IRLR 636 CA, charges against an employee facing dismissal should be precisely framed and evidence should be confined to the particulars given in the charge. An employee should only be found guilty of the offence with which he is charged. The Respondent and the Tribunal had been wrong to construct an allegation of dishonesty in the context of a contractual period within which notification was due. The charges as explained by the Respondent include matters not contained in the outcome letter. The charges as put to the Claimant were not clearly explained and/or had been recast by the Respondent.

31.2. It appeared to be the case, consistent with the understanding of Mr Oliver, that the sentence imposed in consequence of any conviction is part of what constitutes a disqualifying offence. That was consistent with the reference to disposal in the relevant CAA regulations and with the date of conviction as stated in the certificate of disregard (25 June 2015). On that basis, the date from which the 14-day notification period had started to run was 25 June 2015; the date on which the Claimant had been sentenced. In any event, the date which, in practice, the Respondent typically considered to be the date of conviction would be relevant to the question of fairness, even if it did not apply as a matter of strict construction.

31.3. That being the case, an obligation to notify within 14 days, at least on one view, meant that the last day for notification had been 9 July 2015. The Claimant had complied with that obligation but the Tribunal had made no findings to that effect because it had erroneously focused on the events of 7 July, when the Claimant had been called to a fact-finding meeting to discuss information that the Respondent had received concerning his convictions. The Crew History Report made clear that details of a conviction had been discussed with his line manager, Angela Young, on 8 July 2015 and the Claimant's e-mail, sent at 00:07 on 9 July 2015, had been expressly written formally to notify her, under policy EG815, that he had received a suspended custodial sentence. That was before time for notification had expired.

31.4. Thus, the dismissing manager could not have had a reasonable belief that the first allegation had been made out and, in fact, appeared to have had a belief that

a different allegation had been made out: "*My belief is that you had no intention of notifying BA of your conviction on 25th June 2015 until Jon Shirley met with you on 7th July 2015*". However, the first disciplinary charge had not related to the Claimant's intention; it had alleged a breach of the notification requirement. To shift its basis in that way had been unfair and impermissible.

31.5. The Tribunal had not made its own findings about that matter. Instead, it had simply endorsed the findings set out in the Respondent's letter of dismissal. To have done so was perverse. Furthermore, the conclusion that the requirements of section 98 of the **Employment Rights Act 1996** ("ERA") and/or the **Burchell** test had been satisfied was wrong in law because:

31.5.1. the dismissing manager's findings of fact did not establish the first allegation made, as put to the Claimant;

31.5.2. it failed to take account of the "moving of the goalposts" in relation to the nature of the first allegation;

31.5.3. it failed to establish what it was that the Claimant's manager had known and as of what date;

31.5.4. to the extent that the second allegation had been considered by the Tribunal, its conclusion that the Respondent's decision that the certificate of disregard was irrelevant had been legitimate was itself an error of law. That was because paragraph 6.5 of contractual disciplinary policy EG901 provided that, if an employee has been found guilty of a criminal offence, the question of continued employment will be decided having regard to (amongst other matters) whether that employee remains able to fulfil his contract of

employment. There was no indication that the Respondent had referred to paragraph 6.5 of the policy;

31.5.5. the second disciplinary allegation had been broad and general in its terms and it made no sense to rely on dishonesty based upon non-disclosure before the contractual notification period had expired. Whilst it was not being suggested that dishonesty regarding non-disclosure cannot legitimise dismissal, dishonesty could not be constructed from non-disclosure within the contractual notification period. Nor could Mr Oliver properly infer dishonesty from the Claimant's notification within the 14-day period; a conclusion that Mr Ciumei termed Kafkaesque. Whilst the Claimant could have been more forthcoming with information, he had not lied. Disclosure to Mr Shirley constituted evidence of honesty, not dishonesty, as did his candour regarding the limited information previously given to Ms Young.

Ground 2

31.6. Mr Ciumei contended that the Tribunal's conclusions in relation to disability discrimination had impermissibly focused on the first disciplinary charge alone. He submitted that "the background" to the criminal offence was relevant to the second disciplinary charge, having regard, once again, to paragraph 6.5 of policy EG901. In concluding that the Claimant's disability had not been relevant to the matters with which the dismissing officer had had to deal, the Tribunal had not properly addressed the allegation of disability discrimination that had been before it.

31.7. Mr Ciumei further contended that the Claimant's disability had also formed the background to his criminal offences. He had received assistance from a social worker and had not understood the impact of what had been happening. The Department of Work and Pensions had now accepted that the Claimant did not owe money to it. The fact of disability was relevant because the consequences of dismissal were much more severe.

Ground 3

31.8. Relying upon **Efobi v Royal Mail Group** [2017] IRLR 956 EAT, at paragraphs 77 to 86, Mr Ciumei argued that the Tribunal had erred in placing the burden of proving facts from which it could conclude that any difference in treatment had been because of the protected characteristic on the Claimant. In any event, Mr Ciumei submitted, there were clearly facts that fell within the scope of section 136(2) of the **EqA**, such that the burden ought to have shifted to the Respondent. Those facts were:

31.8.1. the moving of the goalposts in relation to the first disciplinary allegation;

31.8.2. the Tribunal's apparent acceptance of the Claimant's evidence that the dismissing manager had not believed that the Claimant was disabled and had exhibited body language indicating that he did not take the matter seriously;

31.8.3. the language used by the dismissing manager in his decision letter (that he "*will never condone let alone support*" the Claimant's conviction); a consideration irrelevant to the second disciplinary allegation and the continuation of the Claimant's employment; and

31.8.4. the dismissing manager's failure to have taken proper account of the certificate of disregard.

31.9. If the burden ought to have shifted, the Tribunal had not asked itself the relevant question.

Ground 4

31.10. There had been no breach of the obligation to disclose the disqualifying offence. As this had been the focus of the Tribunal's conclusion that there had been no breach of contract by the Respondent, the Tribunal's conclusion was wrong in law. The Tribunal's implicit conclusion regarding the date from which time for notification had started to run was unclear and apparently contrary to the position adopted by the Respondent and/or by the CAA, when the latter issued the certificate of disregard. The Tribunal's findings in the second sentence of paragraph 55 of its Reasons had not been analysed as a matter of repudiatory breach.

The Respondent's Submissions

32. On behalf of the Respondent, Ms Tutin contended, in summary:

Ground 1

32.1. Both allegations of misconduct against the Claimant had been considered by the Tribunal and found proven.

32.2. "*The Respondent has never disputed the fact that the Claimant notified his line manager, Angela Young, of his disqualifying conviction on 9 July 2015, 14 days after he was sentenced. Rather, it was the Respondent's case that it had reasonable grounds to believe that the Claimant had not disclosed the disqualifying conviction when given ample opportunity to do so and had no intention of disclosing it*"[1]. Ms Tutin observed that the Claimant had accepted in evidence that he had not notified his line manager about his disqualifying conviction before 7 July 2015, even though he had seen her on at least one occasion prior to that.

32.3. The dismissing manager had taken into account the following matters, accepted by the Tribunal and not disputed by the Claimant:

32.3.1. the Claimant had told the dismissing manager that he had notified the Respondent of his prosecution and/or conviction but, upon investigation, it had transpired that he had provided no, or no adequate, detail;

32.3.2. the Claimant had not voluntarily disclosed his disqualifying conviction until challenged on 7 July 2015;

32.3.3. the Claimant had operated a trip to Philadelphia two days after sentence, in breach of policy EG904, and had intended to operate a trip to Hyderabad until suspended on 7 July 2015; and

32.3.4. the Claimant had seen his line manager on (at least) 4 July 2015 but had failed to notify her of his disqualifying convictions.

[1] The Respondent's skeleton argument, paragraph 17.

32.4. In the circumstances, it had been open to the Tribunal to conclude that the Respondent had had reasonable grounds to believe that the Claimant had not disclosed his disqualifying convictions when given the opportunity to do so and had had no intention of notifying the Respondent about those convictions, in breach of policy EG815.

32.5. The Tribunal had not elided the two allegations of misconduct. Its conclusion that the dismissing manager had had sufficient evidence to have concluded as he had done in his outcome letter applied equally to both disciplinary charges, each of which had been considered in the letter. In any event, the two allegations had had the same, or similar, factual basis. The dismissing officer had concluded that, in respect of the second allegation, the Claimant had acted dishonestly and without integrity, relying on the fact that the Claimant had intended to keep the details of his sentence from the Respondent and to go about his flying duties as usual and had misled his line manager about his disqualifying convictions. The dismissing manager had also found that the Claimant had failed to co-operate with the disciplinary process and been convicted of an offence of dishonesty, consistent with his intention to mislead the Respondent. The Claimant's certificate of disregard had not been relevant to the Respondent's consideration of whether he had intended to conceal his convictions. Ultimately, both allegations had concerned the Claimant's intention to conceal his disqualifying convictions, reflected in the summary in the dismissal letter. The first allegation considered the Claimant's conduct in the context of policy EG815; the second in the context of the wider employment relationship. It had been proper for the Tribunal to have considered them together and the Tribunal had not reached a

perverse decision, or erred in law, in concluding that the Respondent's investigation had provided reasonable and sufficient grounds to sustain its genuine belief in the Claimant's misconduct.

32.6. It was particularly important to appreciate the significance of the Respondent's various policies regarding the issue of airside passes. Those policies exist so that people can move freely around airports. Contractual policy EG804 states that, where an employee is the holder of an airside pass and is convicted of a disqualifying offence, the issuing authority responsible for that pass is required by law to withdraw it. That is underlined by non-contractual policy EG815, which has contractual effect if read with EG804. Therefore, the Respondent is dependent on disclosure by its employees in order that it will not be in breach of its own obligations to the British Airports Authority. Ms Tutin contended that the 14-day grace period was in place because employees and their line managers fly all over the world and do not see each other all the time. The withdrawal of the pass upon conviction for a disqualifying offence indicates that such a person should not be flying at all. Thus, the clear implication within the policies as a whole is the need to inform one's employer before operating any flight, in order that the Respondent will not be placed in breach of its own obligations. The Respondent's actions fell within the spirit of policy EG815, if not its express wording.

32.7. The minutes of the investigative meeting on 7 July 2015 had made clear that the nature of the allegation had been communicated to the Claimant:

> **"JS: I want to reiterate that EG815 states that employee has 14 days to disclose information and you had an opportunity on the 4th to do so and didn't disclose. This makes me allege that you weren't going to disclose the information …"**

That had been the focus of the disciplinary hearing and the Claimant had never previously suggested that he did not understand the charges that he was facing, nor had that been the focus of his claim form, or of the issues identified in the case management Order. The Tribunal could not be criticised for not having addressed that point in those circumstances. The facts before the dismissing officer had demonstrated an intention to conceal notwithstanding the fact that the specified notification period had not expired. An intention to conceal operated as a breach in its own right, but required the implication of words into the policy: this had been an unusual situation.

32.8. The additional matters supporting Mr Oliver's findings regarding the second disciplinary allegation, did not constitute separate charges, but did inform the question of trust in providing further evidence of dishonesty. The Claimant's failure to have engaged with the disciplinary process had been noted by the Tribunal at paragraph 55 of its Reasons.

32.9. Disability as a mitigating factor (namely that it would make it more difficult for the Claimant to find alternative employment) had not been raised by the Claimant, whether in his disciplinary hearing or before the Tribunal.

Ground 2

32.10. Ms Tutin stated that the Respondent had struggled to understand the disability discrimination claim from the outset. The Tribunal had not erred in law in its consideration of that claim and the claim as now advanced had been recast. The Tribunal was not to be criticised for not having considered a claim that had not

been before it. The first and second disciplinary allegations had concerned the same misconduct, namely the Claimant's intention to conceal his disqualifying conviction. The Tribunal had been correct to find that the purported link between the Claimant's disability and his disqualifying conviction was irrelevant. In any event, it was not for the dismissing officer to look behind the Claimant's convictions.

Ground 3

32.11. No error had been made in relation to the burden of proof for the disability discrimination claim: the Claimant had failed to prove any, or sufficient, primary facts, as required by **Madarassy v Nomura International plc** [2007] IRLR 246 CA. The Tribunal had correctly identified the relevant part of the Claimant's witness statement and its citation of that paragraph was not to be taken as its endorsement of the relevant evidence. Even if such evidence had been accepted, it was irrelevant to the detriment as advanced before the Tribunal (as well as to the allegation as now put by Mr Ciumei). Ms Tutin stated that, as she had submitted below, the Claimant had failed to identify the hypothetical comparator, any difference in treatment or any reason for any such treatment. There were no facts to indicate that the burden of proof should have shifted to the Respondent and **Efobi** had not been as seismic in its effect as some might suggest. In any event, the Respondent's explanation for the alleged treatment had been considered by the Tribunal, as was clear from paragraph 50 of its Reasons. The Tribunal had concluded that the reason why the dismissing manager had not taken the Claimant's disability into account when considering

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the allegations of misconduct was because it had been irrelevant. Having properly directed itself, the Tribunal had been entitled so to conclude.

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Ground 4

32.12. The Tribunal had been entitled to conclude that the Claimant had committed acts of gross misconduct, in particular given its findings at paragraph 29 of its Reasons:

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> **"29. … Notwithstanding the contents of the crew history report, the Claimant confirmed that he did not speak to Angela Young on 7 July 2015 and that he did not inform her of the outcome of the court case until after that date."**

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32.13. The Tribunal had concluded that the Claimant had not disclosed his disqualifying conviction on 2 June 2015, or sentence on 25 June 2015. The Claimant had not disputed that he had not voluntarily disclosed his conviction prior to 7 July 2015. Whilst, for the purposes of the claim of unfair dismissal, the date of sentence had been used as the trigger date, for the purposes of the wrongful dismissal claim it should be noted that the Claimant had not disclosed his conviction until five weeks after it had occurred. A more literal approach should be adopted for the purposes of the latter claim, subject to which it was accepted that the claim would fail. Disclosure had only been made after the Claimant had been challenged about the matter and suspended. The Tribunal had supported the basis upon which the dismissing officer had concluded that the Claimant had had no intention of disclosing his conviction to the Respondent. In so doing it had found that the Claimant "*had conducted himself as alleged and as found proved by Mr Oliver*". That indicated that it had considered all allegations of misconduct to which the dismissal letter had referred. There had been no need

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for it to have considered each allegation separately. There was no error of law or perversity.

The Claimant's Submissions in Reply

33. Mr Ciumei submitted that it was not possible to imply wording into the express terms of a contract which ran contrary to those terms. He did not believe that the Claimant had understood the allegation faced to be one of concealment, as opposed to non-disclosure, and the minutes of the 7 July meeting did not establish the contrary. The Crew History Report for the relevant date indicated that the allegations had not been clear. The burden was on the Respondent to show that the requirements of section 98(1) of the **ERA** had been satisfied.

34. If Ms Tutin were correct in her submission that the Tribunal's citation of the Claimant's evidence regarding his claim of direct disability discrimination had been mere recital, the Tribunal had made no findings for the purposes of section 136(2) of the **EqA**.

35. It was "extremely odd" to advance a trigger date for the wrongful dismissal claim which differed from that applicable for the purposes of the unfair dismissal claim and the Tribunal had made no clear findings in that connection. The Tribunal had not investigated the Respondent's custom and practice. If that practice is to adopt the date of conviction, why had the dismissing manager made a decision related to the date of sentence?

Discussion

36. The Respondent's contractual policy EG804 expressly requires a relevant employee to notify his or her line manager of a disqualifying criminal offence within 14 days of conviction.

A failure to notify constitutes a disciplinary offence, to be dealt with in accordance with contractual disciplinary policy EG901. Paragraph 6.5 of the latter provides:

> **"If an employee has been found guilty of a criminal offence, the question of continued employment will be decided, having regard to the nature of the offence in relation to British Airways regulations, the responsibilities and characteristics of the employee's job and whether they remain able to fulfil their contract of employment."**

37. Non-contractual policy EG815 refers to and repeats the obligation upon an employee convicted of a disqualifying offence to notify his or her line manager within 14 days, as required by policy EG804. Failure to do so is said to constitute a gross misconduct offence, to be dealt with in accordance with EG901. Section 2 provides:

> **"Employees who have unspent [disqualifying convictions] will immediately be prohibited from working Airside unless they can produce a Notice of Disregard in advance of the pass expiry."**

38. Policy EN815 states that colleagues having disqualifying convictions might wish to apply for a Notice of Disregard from the Office of the Secretary of State for Transport. It is noted that colleagues might still be subject to disciplinary action, if in breach of policy EG804.

39. The date of conviction in this case was 2 June 2015. Sentencing was deferred until 25 June 2015. However, as is clear from, respectively, the dismissal letter and the certificate of disregard, the date of a disqualifying conviction was taken by the Respondent and by the Department of Transport to be that on which sentence was imposed. Similarly, under the CAA's regulations, applicants will fail the criminal records check if (so far as material) it reveals a conviction for a disqualifying offence which has been received within the last 7 years where the disposal was a prison term of 6 months or less (emphasis added). All of this evidence indicates that the definition of disqualifying offence is deemed to include disposal, such that, in the Claimant's case, time for notification under policy EG804 ran from 25 June

2015. Thus, his contractual obligation was to have notified the Respondent of his disqualifying offences within 14 days of that date, that is by 9 July 2015.

40. I do not accept Ms Tutin's submission that the proper construction of the Claimant's obligation was that he should notify the Respondent before operating any flight within the 14-day notification period. That is contrary to the express wording of the obligation set out in policy EG804 (and EG815) and would have been a straightforward requirement to express, had it been the Respondent's intention. It is not in dispute that the Claimant in fact notified his line manager of the disqualifying conviction on 9 July 2015 and he therefore complied with the obligation imposed by EG804 on that date, at the latest.

Ground 1

41. The Respondent's position is that the focus of the first disciplinary allegation had been the Claimant's intention to conceal his disqualifying convictions, as evidenced by his alleged failure to have made adequate disclosure until he was suspended on 7 July 2015. It is said that, prior to Mr Ciumei's instruction, the Claimant had never suggested otherwise and that the point had not been identified as an issue at the case management hearing. Ms Tutin is right to point to the statement made by Mr Shirley, in the course of the fact-finding meeting of 7 July 2015, identifying the first disciplinary allegation as being that the Claimant had not been intending to disclose the information. Accordingly, in connection with that allegation, the principles set out in **Strouthos** are not engaged and the Tribunal is not to be criticised for not having addressed a matter which had not been identified as being in issue.

42. However, the difficulty with the first disciplinary allegation as identified is that it did not in fact constitute a breach of policy EG804 or EG815. Those policies, as noted above,

imposed an absolute obligation to give notification, within 14 days, of a disqualifying offence (to be defined to include disposal). As a matter of fact, that is what the Claimant had done and the question therefore arises as to whether his dismissal was fair or unfair within the meaning of section 98 of the **ERA**.

43. The Tribunal found that the **Burchell** test had been satisfied on the charges found proven by the Respondent. It did not address the fairness of the dismissal and, in particular, whether, in the circumstances, the Respondent had acted reasonably in treating the first disciplinary allegation as a sufficient reason for dismissal, in light of the obligation under policies EG804 and EG815, instead concentrating its analysis of the first disciplinary allegation on the reasonableness of the Respondent's conclusion that there had been an intention to conceal the disqualifying conviction.

44. I do not accept Mr Ciumei's submission that the Tribunal failed to establish what it was that the Claimant's manager had known and as of what date. It made findings on that matter at paragraph 29 of its Reasons, by reference to the Claimant's own evidence. Irrespective of what Ms Hawkes and/or Ms Young had been told or understood at any earlier date, neither had been told of the disqualifying convictions, including the sentence imposed. In any event, Ms Hawkes had not been the Claimant's line manager at that time.

45. The Tribunal was correct to find that, notwithstanding the certificate of disregard, the Respondent retained a discretion to withdraw the Claimant's airside pass. It did not, however, expressly refer to paragraph 6.5 of policy EG901 to which, as Mr Ciumei submitted, that certificate was material, in affecting the Claimant's ability to fulfil his contract of employment. That was of relevance to the fairness or otherwise of his dismissal.

46. The Tribunal did separately address each disciplinary allegation, as had the Respondent in the course of the disciplinary process. The Respondent is right to contend that the second allegation flowed from the facts giving rise to the first, albeit free-standing. Two points arise from that:

46.1. The Respondent's, and the Tribunal's, conclusions regarding the second disciplinary allegation were affected by its analysis of the first allegation, including the error identified above; related to which

46.2. There was no analysis by the Tribunal of whether, had the first allegation been correctly analysed against the background of the contractual requirement imposed by policy EG804, the second allegation would have been established and considered to justify summary dismissal in all the circumstances. The Claimant's failure suitably to have engaged with the disciplinary process was found to have lent support to the Respondent's primary findings but, as Ms Tutin accepted, did not (and, logically, could not) have formed the basis of the original allegation.

47. The Respondent's failure to have taken the Claimant's disability into account in connection with the claim of unfair dismissal was not in issue before the Tribunal, as is clear from the case management Order and the Tribunal's recital of the complaints raised by the Claimant in this connection, at paragraphs 33 to 39 of its Reasons. Once again, the Tribunal is not to be criticised for not having addressed its mind to that issue in that context. In any event, its findings in relation to the claim of direct disability discrimination (considered below) were findings which were open to it to make.

48. In summary, the Tribunal erred in its approach to the claim of unfair dismissal in the following respects:

48.1. It did not address the fairness of the dismissal and, in particular, whether, in the circumstances, the Respondent had acted reasonably in treating the first disciplinary allegation as a sufficient reason for dismissal, in light of the requirement imposed by policies EG804 and EG815, properly construed;

48.2. It wrongly concluded that the certificate of disregard was irrelevant to the disciplinary process and ought to have considered its relevance in the context of paragraph 6.5 of policy EG901; and

48.3. Having failed to analyse the Respondent's approach to the first disciplinary allegation against the background of the contractual requirement imposed by policy EG804, it failed to consider whether the second disciplinary allegation would have been established and considered to justify summary dismissal in all the circumstances.

49. In those respects, the first ground of appeal succeeds.

Grounds 2 and 3

50. There is no dispute that the claim advanced was one of direct disability discrimination, contrary to sections 13 and 39 of the **EqA**. Thus, the allegation was that the Respondent had treated the Claimant less favourably than it treated, or would treat, others because of his disability. The alleged less favourable treatment, as set out in the case management Order and repeated in the Tribunal's Reasons, was "*the dismissing manager not being prepared to take into account that the claimed benefit, which led to the Claimant's conviction, itself arose from his illness*".

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51. As I put to both parties in the course of their submissions, it is difficult to see how, as a matter of principle, such an allegation was advanced as a claim of direct discrimination:

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51.1. If the complaint related to the Respondent's unfavourable treatment of the Claimant because of something arising in consequence of his disability, that was a complaint contrary to section 15 of the **EqA**. No such complaint was advanced.

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51.2. If the complaint was that the dismissing manager had not been prepared to take account of the specified matters because the Claimant was disabled, such a contention could be advanced as a direct discrimination claim under section 13 of the **EqA**, but the Tribunal's findings must be viewed within that framework.

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52. At paragraph 50 of its Reasons, the Tribunal found that the reason why Mr Oliver had not been prepared to take the Claimant's disability into account when considering the allegation of misconduct was because it had not been relevant to the allegations with which he had been dealing. Mr Oliver had not been concerned with how the Claimant had come to claim benefits, or with the reason why he had committed benefit fraud. The Claimant had pleaded guilty to those convictions and it was not for Mr Oliver to look behind them. He was concerned with the Claimant's conduct in failing to have disclosed them. There was no link between the Claimant's disability and his failure to disclose. The Claimant's disability had not been a factor in the Respondent's decision to dismiss him. A hypothetical comparator, namely a person in the same circumstances but without a disability, would have been treated no differently.

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53. As I have noted above, the underlying primary facts giving rise to both disciplinary allegations were the same, namely the Claimant's alleged intention to conceal his disqualifying convictions. Mr Ciumei's criticism that the findings made by the Tribunal related only to the

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first allegation is, therefore, unwarranted. The Tribunal accepted the Respondent's case that Mr Oliver had been concerned with the failure to disclose, rather than with the reasons underlying the criminal offences or the Claimant's convictions therefor. The fact, if it be the case, that the claimed benefit had itself arisen from the Claimant's illness was rightly considered to be of no relevance to the non-disclosure of his disqualifying convictions. Mr Ciumei's further submission that the fact of disability was also relevant because the consequences of dismissal were much more severe had not been advanced as an issue, or submission, before the Tribunal, nor did it form part of the Claimant's amended grounds of appeal. Once again, the Tribunal is not to be criticised for failing to have taken it into account.

54. As to the shifting burden of proof, the Tribunal correctly directed itself in accordance with the principles in **Madarassy** and in **Igen Ltd v Wong** [2005] IRLR 258 CA. Subsequent to the hearing of this appeal, the EAT's judgment in **Efobi** was disapproved by the Court of Appeal in **Ayodele v Citylink Ltd and Another** [2018] ICR 748, per Lord Justice Singh:

> **"105. In any event, it seems to me that the difference of wording between section 136 and its predecessor provisions should be regarded, in context, as no more than a legislative "tidying up" exercise. It was not intended to change the law in substance and certainly not in the fundamental way held by Elisabeth Laing J in *Efobi* …, of no longer imposing a burden on a claimant at the first stage of the inquiry.**
>
> **106. Accordingly I have come to the conclusion that previous decisions of this Court such as *Igen* …, as approved by the Supreme Court in *Hewage* [2012] ICR 1054, remain good law and should continue to be followed by courts and tribunals. The interpretation placed on section 136 by the appeal tribunal in *Efobi* is wrong and should not be followed."**

55. Thus, it was necessary for the Claimant to prove facts from which the Tribunal could have concluded, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against him. If he did so, it fell to the Respondent to establish that it had not committed such an act.

56. In my judgment, none of the matters relied upon by Mr Ciumei as operating to shift the burden of proof to the Respondent in fact did so (whether individually, or in combination with any other):

56.1. As is apparent from my conclusion in connection with the first ground of appeal, the true nature of the first disciplinary allegation was clear to the Claimant from the outset. Furthermore, the contention that the goalposts had been moved had not been advanced before the Tribunal. On both bases, the issue did not arise for its consideration.

56.2. It is not clear from the Tribunal's Reasons whether it had accepted the Claimant's evidence to the effect that Mr Oliver had indicated, by his body language, that he did not believe the Claimant to be disabled. Nonetheless, the Tribunal found as a fact that the reason why Mr Oliver had not been prepared to take into account that the claimed benefit which had led to the Claimant's convictions had itself arisen from his illness was because that matter had not been relevant to the issues with which Mr Oliver had had to deal.

56.3. The statement in the letter of dismissal on which Mr Ciumei relies was clearly intended to explain Mr Oliver's view (set out in the immediately prior sentence) that the Claimant was not suitable to work in any role for the Respondent. That was of direct relevance to the second disciplinary allegation and the continuation of the Claimant's employment.

56.4. Mr Oliver had correctly noted that the certificate of disregard was not determinative of the Claimant's continued employment with the Respondent.

57. The focus of the Tribunal's analysis had to be whether it could properly and fairly infer discrimination. At paragraphs 50 and 51 of its Reasons, the Tribunal concluded that there was no evidence of any less favourable treatment because of disability and that a hypothetical comparator would have been treated no differently. There was no basis upon which the burden of proof ought to have shifted to the Respondent. In any event, had it done so, it is clear that the Tribunal had considered and accepted the Respondent's evidence that the treatment of which complaint was made had nothing to do with the Claimant's disability.

58. No error of law is demonstrated in the Tribunal's approach to the claim of direct disability discrimination, from which it follows that none of its findings in relation to that claim vitiated its findings in relation to the claim of unfair dismissal.

Ground 4

59. I agree with Mr Ciumei that the proper construction of the contractual requirement imposed by policy EG804 cannot change according to whether the claim under consideration is one of unfair or wrongful dismissal. As a result, the first breach of contract on which it was necessary for the Claimant to rely was of the contractual requirement in EG804, as interpreted at paragraph 39 above.

60. Given the way in which the issue for determination had been framed at the case management hearing, the Tribunal could not properly find that there had been a breach of contractual policy EG804 or, hence, of EG815. Its finding that, on the balance of probabilities, the Claimant had failed to disclose his convictions and sentence, despite having had several opportunities to do so, did not, without more, equate with a finding of breach of contract, repudiatory or otherwise.

61. In any event, given the way in which the issue before it had been framed, the breach of policy EG804 had been only one of the two questions that the Tribunal had been asked to determine. The Tribunal did not indicate whether, in the absence of an actual breach of policy EG804, the Claimant's conduct had been such as to affect his suitability to remain as a crew member, and, in any event, to justify dismissal without notice.

62. It follows that the Tribunal's approach to the claim of wrongful dismissal was wrong in law and the fourth ground of appeal succeeds.

Disposal

63. The parties agree that, if and to the extent that the Claimant's appeal succeeds, the matter will need to be remitted to the Employment Tribunal. The Claimant contended that it should be remitted to a different Tribunal, asserting that the original decision is totally flawed and that such an approach would be proportionate given his dire employment prospects. Even a declaration of unfair dismissal would be important to him. Mr Ciumei stated that the Claimant has no confidence in the original Tribunal and it is particularly important that he has "the clearest shot". The Respondent contended that it would be disproportionate and unnecessary to start again. The Tribunal's decision is not totally flawed, there will be no need for a full rehearing and there is no indication that the Tribunal was biased.

64. Having regard to the criteria in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 EAT, I consider that the case should be remitted to the same Employment Tribunal to reconsider the claims of unfair and wrongful dismissal in accordance with this Judgment. The Tribunal will be able to make use of its knowledge of the case and notes of evidence. Its original decision was not totally flawed and there is no suggestion that there is a real risk that it

A will have forgotten about the case, or question of bias or partiality. There is no indicator that, on remission, the Tribunal will deal otherwise than professionally with the matter.

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