



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Ms K Forshaw

and

Respondent

Virgin Atlantic Airways Limited

Held at Reading on

Hearing – 6 and 7 February 2020

In Chambers (without parties) – 26 February 2020

Representation

Claimant: Miss G Cheng, counsel

Respondent: Miss S Cowen, counsel

Employment Judge

Vowles

Members: Ms B Osborne

Mr J Cameron

UNANIMOUS RESERVED JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties and determined as follows.

Disability – section 6 Equality Act 2010

2. The Claimant was a disabled person at all material times.

Direct Disability Discrimination – section 13 Equality Act 2010

3. The Claimant was not subject to direct disability discrimination. This complaint fails and is dismissed.

Discrimination Arising from Disability – section 15 Equality Act 2010

4. The Claimant was not subject to discrimination arising from disability. This complaint fails and is dismissed.

Unfair Dismissal - section 98 Employment Rights Act 1996

5. The Claimant was dismissed on 25 May 2017 and that was the effective date of termination. The dismissal was not unfair. This complaint fails and is dismissed.

Wrongful Dismissal – article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994

6. The Claimant was not wrongfully dismissed. This complaint fails and is dismissed.

Reasons

7. This judgment was reserved and written reasons are attached.

Public Access to Employment Tribunal Judgments

8. The parties are informed that all judgments and reasons for judgments are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the Claimant and Respondent.

REASONS

SUBMISSIONS

1. On 18 October 2017, the Claimant presented complaints of disability discrimination and unfair dismissal to the Employment Tribunal.

Respondent

2. On 20 November 2017, the Respondent presented a response. All claims were resisted.

Issues

3. The Claims and issues were clarified in case management orders made at a preliminary hearing held on 3 April 2018. Claims of direct disability discrimination and wrongful dismissal were added.
4. The list of claims pursued by the Claimant and which fall to be determined by this Tribunal were as follows:

- Unfair dismissal – Section 98 Employment Rights Act 1996
 - Direct disability discrimination – Section 13 Equality Act 2010
 - Discrimination arising from disability – Section 15 Equality Act 2010
 - Wrongful Dismissal / Breach of Contract (notice pay) – Article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994
5. During the course of the proceedings, on 29 May 2018, the Respondent conceded that the Claimant was a disabled person by reason of depression. It did not concede however that the Respondent knew, or could reasonably be expected to know, at the material time, that the Claimant was a disabled person.

EVIDENCE

6. The Tribunal heard evidence on oath from the Claimant, Ms Karin Forshaw (Ticket Sales & Support Agent).
7. The Tribunal also heard evidence on oath on behalf of the Respondent from Mr John Mallard (investigating officer) and Mr Andrew Miltiadou (dismissing officer).
8. The Tribunal also read documents in a bundle provided by the parties.
9. From the evidence heard and read, the Tribunal made the following findings.

FINDINGS OF FACT

10. On 22 March 2017 the Claimant was stationed at desk 34 at London Heathrow Airport Terminal 3. This was the Virgin Atlantic Airways Upper Class ticket desk. A customer, WO, presented herself as wanting to upgrade to upper class on her flight to New York. The Claimant's computer system had frozen and she asked her colleague, Mr FT, to confirm the cost while she tried to reboot her system. He confirmed that the cost was £199 and passenger WO handed over £200 and was checked into premium economy on the Claimant's system. Once this was done, the passenger asked the Claimant to check again that there were no upper class seats available. There was one "no show" and the Claimant therefore arranged to have the seat assigned to passenger WO. The cost was £999. The Claimant returned the £200 cash and customer WO gave the Claimant £1,000 in cash in a white envelope.

11. The passenger's bags required manual tags. The Claimant said that she placed the money in the envelope in a slot on her desk because there was no safe or lockable drawer to put the money into. The Claimant said that she then went to desk 1 (Crew Bag Drop desk) to get crew bag tags and then went to room 505 to ask the flight controller to add bags into the system manually since by this time all systems were closed off for the flight.
12. It was not disputed that the Claimant failed to issue a receipt or make any note to record that £1,000 cash had been received by her from passenger WO.
13. The Claimant said that she returned to her desk and found that the money was missing. She said she conducted a search but could not find it. The Claimant did not report that she had received the money or the fact that it had gone missing on that day, although she still had four hours of her shift to complete. She accepted that she attended work the next day, 23 March 2017, and did not report the missing money to anyone on that day either. 24 and 25 March 2017 were days off and she returned to work on 26 March 2017. Again, she did not report the missing money to her superiors.
14. On 27 March 2017 she again attended work and on this occasion, Mr Mallard asked her about the events of 22 March 2017. Passenger WO's assistant had called the Respondent's contact centre on 26 March 2017 to change the date of WO's return and was quoted a change fee which the assistant challenged on the basis that £1,000 had already been paid at Heathrow. That matter was escalated to Mr Mallard to look into and that was why he spoke to the Claimant on 27 March 2017.
15. Mr Mallard gave an account of his discussion with the Claimant in an email dated 27 March 2017 to the HR manager. The relevant parts included the following:

"I have spoken with Karin today after reading this email as an implication of Fraud is an urgent issue for us.

We had a pre-cursor chat to go over the events concerning PNR EKQ3XK and I retrieved the following information from Karin:

- *Karin was at the Upper Class desk*
- *The customer arrived at the airport and had left her wallet at home. She was travelling on the VS25/22MAR*

- *The customer spoke with Karin about the potential upgrading (whilst the customer waited for her passport arrived)*
- *Karin informed me that she had spoken with the customer to discuss the day of departure prices*
- *The customer was unsure of which class she wanted to travel in*
- *Karen held fares for each of the DoD classes for the customer in case she decided to upgrade. Booking was changed each time*
- *At 25 minutes before closure (1925), the customer's booking was changed to Z class. Karin informed me that she spoke to the TO (could not give me his name) and the TO said it was too late*
- *Karin and the TO tried to reopen the flight but couldn't so Karin sent the customer through the gate at -35 mins so that the customer could make the flight. Karin informed me that, due to the mistake, she did not want the customer to miss the flight*
- *Karin grabbed manual baggage tags from crew bag drop.*

- *Karin informed me that no cash exchanged hands*
- *When asked why Karin moved the customer into D class at 1927, she informed me it was because Z class wasn't available. When I informed her that she had previously confirmed the customer in Z class, she denied it, then had no answer for me when I showed her in the history.*
...

- *I also informed Karin that Ticket and Support should not be waiving any fees without Supervisor or Manager consent, but to let a passenger travel in Upper Class for free without any form of consent was not acceptable.*

After speaking with Karin, it became clear that there were inconsistencies with her story, and I did not feel satisfied with her version of events. I am still unsure why the customer's ticket was changed to Z class at -35 and then changed again to D class at -33. I am also unsure as to why Karin was still dealing with the customer at -35 and had not informed any CSS or Duty Manager. I am also confused as to why a Ticket and Support Agent with Karin's length of service would feel justified allowing a customer to travel in a class that was not booked free of charge without any consent."

16. After speaking to the Claimant, Mr Mallard spoke to Mr KK, the Terminal Controller, who the Claimant had said she had spoken to when looking for help when entering late bags into the system. Mr KK confirmed that the

Claimant had asked for assistance with urgently adding a bag for a customer shortly before the flight was due to leave.

17. Later the same day, on 27 March 2017, Mr Mallard spoke to Mr FT, the ticket agent who assigned the upper class seat to the passenger and printed her boarding pass. Mr FT confirmed that the passenger had asked him to upgrade her ticket and she had been upgraded to upper class and that the passenger had paid for the upgrade in cash which was given to the Claimant.
18. Mr Mallard said that he was concerned about the inconsistencies in these statements and he considered whether to review CCTV footage of the events of 22 March 2017 from the camera which sits above the ticket desks. However, he said that the CCTV footage overwrites after 48 hours and he had only been made aware of the incident on 27 March 2017. That was five days after the event, and he concluded that it was too late to review any footage. However, Mr Mallard went on to investigate the matter and he interviewed the following people:
 - Mr FT again on 3 April 2017
 - Ms Bez Grenardo-Simpson (turnaround officer)
 - The Claimant, again on 13 April 2017
 - Mr FT, again on 21 April 2017
 - Ms VS on 28 April 2017
19. At the meeting with the Claimant on 13 April 2017, the Claimant, for the first time, confirmed that she was handed £1,000 in a white envelope by the passenger on 22 March 2017. The Claimant said that both Mr FT and Ms VS had seen the cash being handed over. When she returned to her desk and saw the cash was missing, she had panicked and called a man who had been with the passenger and that she had also called the passenger's assistant to say that she could not issue a receipt. There was the following exchange between Mr Mallard and the Claimant at the meeting:

“JM I have some questions for you. When we met at the podium you clearly advised me that no money exchanged hands?”

KF I didn't feel comfortable speaking about this at the podium. I didn't want to answer.

JM But it was just to go through the PNR at that point, to understand what had happened. It was about information gathering and I showed you the

booking to jog your memory. You saw that there were no notes in the booking.

KF I always put notes in the booking. I don't know what happened, my system crashed.

JM So initially you told me that no cash exchanged hands, now you are saying the customer gave you cash and it was stolen? Why was no-one told about this on the evening it happened?

KF I understand the perception. When you spoke to me I didn't know what to do. I wasn't prepared to discuss at the podium.

JM Why didn't you say can we go elsewhere?

KF I just panicked, it was a shock to me.

JM I asked you why the booking had been changed. You never mentioned any sensitive issues about cash at this time.

KF I was eager to tell you what had happened, I spoke to my Solicitor If only I could say what happened.

JM I had no idea that £1000 had been stolen from VS, you are normally great with feedback and openly after this. Why would you not have told someone?

KF I told no-one I just froze."

20. On 3 May 2017 Mr Miltiadou wrote to the Claimant to invite her to a disciplinary meeting on 9 May 2017. The letter included the following:

"The purpose of the disciplinary meeting is to discuss the following allegations:-

It is alleged that on 22 March 2017 you:-

- 1. Took £1000 cash from a customer for an upgrade without recording any details of the transaction, or providing the customer a receipt of payment.*

2. *Upgraded a customer with no record of payment, and without prior authorisation to waive the fee.*
3. *Stole Virgin Atlantic Property, namely the £1000 received from the customer.*

...

You are advised that if the allegations are found to be proven, it will be considered gross misconduct under the Company's Disciplinary Procedure and your contract of employment maybe be summarily terminated."

21. At the disciplinary meeting on 9 May 2017 the Claimant confirmed that she was aware of her right to be accompanied but she was happy to proceed unaccompanied. She said that she had received Mr Miltiadou's letter of 3 May 2017 and enclosures but that she had not received Mr Mallard's investigation meeting notes. However, she was given the opportunity to review those notes before the meeting and she confirmed that she was happy to proceed with the meeting.
22. The Tribunal were shown the minutes of the meeting which Mr Miltiadou accurately summarised as follows:

"10. I gave Karin the chance to provide her explanation for the incident. In summary, she told me that the customer had given £1,000 in cash in a white envelope. Karin had counted the money and had not processed the receipt as she was pressed for time before the flight. She put the envelope on the top shelf of her desk, printed the customer's boarding passes and went to get the bag tags for the customer's baggage. When she returned, Mr FT was not at his desk. While she was tagging the bags, Mr FT returned. Karin went back to her desk and told the customer to go to the Gate, and that she could request the receipt later.

11. Karin told me that she went to process the receipt after Mr FT took the customer to the wing, but could not see the white envelope. Karin told me that she didn't issue a receipt as she couldn't account for the money. Karin told me that she called the customer's assistant and asked her whether there was anyone else in the area, and she said no. I asked Karin why she had not reported this at the time, and she said that she had panicked and didn't think this through.

12. I asked Karin whether there were any points of mitigation she wished to raise. Karin said that this was an exceptional incident, and she accepted that

leaving the money unattended was a grave error. She said that she had nowhere to keep the cash safe and thought that this would not have happened if there was a safe or a lockable drawer available. She also questioned whether Mr FT may have taken the money.”

23. Following the disciplinary meeting, Mr Miltiadou took time to consider the evidence and wrote an outcome letter to the Claimant on 25 May 2017. He decided that she should be summarily dismissed. The letter included the following:

“Following the formal disciplinary meeting you attended on 9 May 2017, I am writing to confirm what was discussed.

I chaired the meeting, Teja Bains, Employee Relations Consultant attended to take summary notes. You were given the opportunity of being accompanied by a work colleague, staff committee representative or trade union representative, which you declined.

The meeting had been arranged to consider the allegation:

It is alleged that on 22 March 2017 you:-

- 1. Took £1000 cash from a customer for an upgrade without recording any details of the transaction, or providing the customer a receipt of payment.*
- 2. Upgraded a customer with no record of payment, and without prior authorisation to waive the fee.*
- 3. Stole Virgin Atlantic property, namely the £1000 received from the customer.*

You were advised that if proven, these allegations would be considered gross misconduct and could lead to your summarily dismissal. ...

Conclusion

Given your admission to allegation 1, I am satisfied that this allegation is proven.

In terms of allegation 2, whilst you accept this allegation in part but do not accept that you had waived the fee I am satisfied that you had technically waived the fee by accepting full responsibility for allowing the £1000 to go

missing. There would have been an expectation on you to have reported this matter at the time of the incident to the Company and by not doing so you had made a conscious decision to waive the fee.

You do not accept allegation 3. Having considered your response and reviewing John's investigation report and his responses I do believe there is a reasonable belief that you had stolen £1000 in cash from Virgin Atlantic for the following reasons:-

- There was an inconsistency in terms of the information you had provided at the initial investigation meeting on 27 March 2017 and you told John 'no cash exchanged hands' (Appendix 3) and at the further investigation meeting on 13 April 2017 you accepted receiving £1000 cash from the customer (Appendix 5);*
- You had time to count £1000 and it was your choice to keep the white envelope of cash in the top-shelf of your check-in desk rather than keeping it secure or on you at all times;*
- There is no supporting evidence to suggest that the customer or Mr FT could have stolen the money;*
- The money has not appeared following the incident and if you had reported what happened to the Company on 27 March 2017 then an immediate search could have been carried out with the involvement of the Airport Police; and*
- The incident took place on Wednesday 22 March 2017 you had not brought this matter to the Company's attention at any point. The initial conversation with you was on Monday 27 March 2017 and this was due to the customer's representative calling the Contact centre team on Sunday 26 March 2017 raising a query about the customer's booking.*
- I believe on balance that the above factors are not consistent with your account that the money went missing and was taken by someone other than you. It is not credible that you misplaced that sum of money and it had then gone missing, you would not have alerted your colleagues or Management to this fact at a much earlier stage, even if I accept that you "panicked".*

Outcome

I have taken into consideration your mitigation put forward at the disciplinary meeting and other mitigating factors, including that you have been employed

with Virgin Atlantic since 24 March 1997. I have also taken into consideration that you currently have a clean disciplinary record and have no live disciplinary warnings on file.

I have considered whether there should be a lesser sanction than dismissal but I believe this would not be appropriate for the following reason:-

- *I appreciate that you have worked hard to build a good reputation at Virgin Atlantic for over 20 years and you regard yourself to be a good employee however I cannot ignore that this was a serious matter where you have accepted full responsibility for taking £1000 in cash from the customer and that this cash then went missing.*
- *During the investigation process, you had given two different explanations where you initially stated that there was no cash exchanged and then said you had received £1000 in cash.*
- *This was an extremely serious case of where you were in a trusted position to handle cash and as a Ticketing and Support Agent and you had failed to report this matter to the Company immediately.*
- *My findings are that you did take the money and that you have been dishonest in a) doing so initially and b) attempting to avoid dismissal by alleging that the money simply went missing.*
- *This dishonesty goes to the heart of whether you can be trusted to remain in any position within the Company going forward and my view is that therefore summary dismissal is the only viable option given my findings and conclusions.*

I have found there is sufficient evidence to support the allegations against you and given the severity of the allegations, I consider your conduct amounts to gross misconduct under the Company's Disciplinary Procedure and therefore you are summarily dismissed (i.e. without notice) with effect from the date of this letter (i.e. 25 May 2017). As such, you are not entitled to notice pay."

24. The Claimant was given the opportunity to appeal but did not do so.

25. Those are the background facts.

UNFAIR DISMISSAL – section 98 Employment Rights Act 1996

26. *Section 98. General*

- (1) *In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
- (a) *the reason (or if more than one the principal reason) for the dismissal, and*
 - (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) *A reason falls within this subsection if it-*
- ... (b) *relates to the conduct of the employee, ...*
- (3) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
- (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
 - (b) *shall be determined in accordance with equity and the substantial merits of the case.*

27. Under section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by his employer.
28. For cases involving misconduct, the relevant law is set out in section 98 of the Act and in the well-known case law regarding this section, including British Home Stores v Burchell [1978] IRLR 379, Post Office v Foley [2000] IRLR 827, and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. From these authorities, the issues for the Tribunal to determine were as follows.
29. Firstly whether there was a potentially fair reason for the dismissal under section 98(2) and did the employer have a genuine belief in the misconduct alleged. The burden of showing a potentially fair reason rests with the employer.
30. Secondly whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for

dismissing the employee under section 98(4), in particular did the employer have in mind reasonable grounds upon which to sustain a belief in the misconduct and, at the stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Did the investigation and the dismissal fall within the range of reasonable responses.

31. Thirdly the Tribunal must not substitute its own view for that of the employer, but must assess the actions of the employer against the range of reasonable responses test. That test applies to all stages in the procedure followed by the employer, including the investigation, the dismissal and the appeal.
32. In Santamera v Express Cargo Forwarding [2003] IRLR 273 the EAT said that fairness does not require a forensic or quasi-judicial investigation for which the employer is unlikely in any event to be qualified and for which it may lack the means. In each case the question is whether or not the employer fulfils the test laid down in British Home Stores v Burchell and it will be for the Tribunal to decide whether the employer acted reasonably and whether or not the process was fair.
33. The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out the steps which employers must normally follow in such cases. That is, establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action and provide the employee with an opportunity to appeal.
34. The Tribunal found that the reason for dismissal was misconduct. There was no evidence of any other reason or of any ulterior motive on the part of the Respondent. In the Claimant's closing statement, it was suggested that the Respondent used the Claimant's inconsistent accounts as "*an excuse to dismiss the Claimant when the Respondent had no reasonable grounds for doing so*". It was also said that "*It is clear that the Respondent did not consider any alternative explanation for why the money went missing and was keen from the get go to use this as an excuse to dismiss the Claimant as a result of her disability.*"
35. The Tribunal found no evidence that the decision to dismiss was motivated in any way by the Claimant's sickness record or her disability. The disability claim is dealt with below but so far as the unfair dismissal claim was concerned, Mr Miltiadou set out in considerable detail the reason for dismissing the Claimant in his letter of 25 May 2017 which is quoted above.

The matters mentioned in that letter were more than adequate to support his conclusion of gross misconduct.

36. The Tribunal found that that there was a reasonable investigation. All the relevant people who could have been witnesses and who could have provided relevant evidence were interviewed by Mr Mallard and were referred to in his investigation report.
37. The investigation provided reasonable and sufficient grounds upon which to sustain the Respondent's belief in the Claimant's misconduct. In particular, Mr Miltiadou sets out in detail the evidence he relied upon in concluding that the Claimant stole the money. He refers in particular to the Claimant's initial denial of receiving the cash on 27 March 2017 followed by her acceptance that she did receive the cash on 13 April 2017. He also refers to her failure to report the loss of cash until 13 April 2017 despite her having been in work on 23, 26 and 27 March 2017 when she could have reported it to a manager or a supervisor.
38. The Claimant complained that the CCTV footage was not examined. However, the Tribunal found that the Respondent acted reasonably in concluding that nothing relevant would be produced because the CCTV record was overwritten after 48 hours and that was confirmed by both Mr Mallard and Mr Miltiadou. It was the Claimant's failure to report the loss which meant that this source of evidence was no longer available to either the Claimant or the Respondent.
39. The Claimant complained that neither Mr Mallard nor Mr Miltiadou took account of the effects of the Claimant's ill health on her conduct during the period of 22 – 27 March 2017. While both had some knowledge that the Claimant suffered from depression in 2016, the Claimant did not at any time inform them that her conduct had been affected by, or caused by, depression or the effects of depression. It was not raised during the investigation or the disciplinary meeting. In these circumstances, neither Mr Mallard nor Mr Miltiadou could reasonably be expected to know that the effects of the depression played any part in the events they were investigating.
40. The Claimant also claimed that Mr Miltiadou did not treat the Claimant's conduct in a similar way to other cases where cash had gone missing. He said he did not accept the Claimant's assertion that money goes missing all the time and that agents would put money back in from their own pockets. She said that the Respondent's policy was clear and that if money goes

missing, it should be reported at the earliest opportunity to managers and the matter would be investigated.

41. There was no evidence before the Tribunal of the Respondent being aware of any previous similar event having occurred. The Tribunal was taken to one incident on 30 October (the year was not stated) in which £30 was missing from a float. That was not materially similar to the circumstances involving the Claimant and the allegations against her.
42. The Claimant also complained that Mr Miltiadou did not have regard to the Claimant's length of service and her good performance. That was clearly wrong. In his dismissal letter, Mr Miltiadou said that he had taken account of the Claimant's 20 years' service and her good reputation as mentioned in the extract from the dismissal letter above.
43. The Tribunal found that the dismissal was procedurally fair and complied with the basic requirements of the ACAS Code of Practice and the Respondent's own disciplinary policy.
44. The Tribunal found that in the circumstances found proved by Mr Miltiadou in his dismissal letter, dismissal was within the range of reasonable responses. Having made a finding that the Claimant had stolen £1000 cash, the Tribunal found that it was within the range of reasonable responses for the employer to dismiss a ticket sales and support agent whose job required the highest levels of integrity and honesty, and involved the handling of cash.
45. The dismissal was not unfair.

DIRECT DISABILITY DISCRIMINATION – section 13 Equality Act 2010

46. *Section 13*

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

47. *Section 136 – Burden of Proof*

- (1) *This section applies to any proceedings relating to a contravention of this Act.*

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

48. There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination, they are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.
49. If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.
50. The Tribunal took account of the relevant provisions of the Equality and Human Rights Commission Code of Practice on Employment 2011
51. The Claimant claimed that she was dismissed because of her disability. She relied upon a hypothetical comparator, that is, a person who was not disabled but where £1000 in cash was missing in the same circumstances.
52. The Tribunal found no evidence whatsoever to support this allegation. As found above in the claim for unfair dismissal, there was a clear, well documented and fully evidenced non-discriminatory reason for the dismissal. The dismissing officer had concluded, based upon the evidence gathered by the investigating officer, that the Claimant had stolen £1000.

DISCRIMINATION ARISING FROM DISABILITY – section 15 Equality Act 2010

53. Section 15

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

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

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

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

54. In the case management order, this claim was set out as follows:

7.1 *The allegation of unfavourable treatment as “something arising in consequence of the Claimant's disability” is that the Claimant was dismissed on 25 May 2017.*

7.2 *Did the Respondent treat the Claimant as aforesaid because of the “something arising” in consequence of the disability, namely that:*

7.2.1 *On 22 March 2017, the Claimant panicked and did not issue the customer with a receipt for the sum of £1,000; and/or that*

7.2.2 *The Claimant failed to give a proper account of her actions and in particular the handling of the £1,000 when spoken to on 27 March 2017 by John Mallard and this was used against her when she was found guilty of misconduct.*

7.3 *Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent's case is that the legitimate aim was to deal appropriately with employees it reasonably believed were suspected to have stolen from it and it is contended that dismissal was proportionate to the severity of the offence.*

7.4 *Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?*

55. The Tribunal accepted that the Claimant's dismissal was unfavourable treatment.
56. So far as 7.2.1 was concerned, the Tribunal found no evidence to support the contention that the Claimant having panicked and not having issued a receipt was something arising in consequence of her disability. There was no medical evidence to support this contention and the Claimant did not raise it herself during the course of the investigation or the disciplinary procedure.
57. Additionally, the Claimant's evidence was that she did not issue a receipt because her computer had frozen. That was unconnected with anything arising from her disability.
58. As regards 7.2.2, the Tribunal found no evidence to support this contention that the Claimant's failure to give a proper account to John Mallard on 27 March 2017 when first confronted about the events of 22 March 2017 arose in consequence of her disability. Additionally, the Claimant did not herself raise this as a reason for her account during the course of the investigation or the disciplinary procedure.
59. Furthermore, as the Claimant stated at the time, the reason she did not issue a receipt to the passenger on 22 March 2017 was because it was "*too late*" and not because of something arising in consequence of her disability.
60. The reason that she gave an inconsistent account to Mr Mallard on 27 March 2017 was that she "*didn't feel comfortable speaking about this at the podium*", that she "*didn't want to answer*" and that she "*wasn't prepared to discuss at the podium*" and not because of something arising in consequence of her disability.
61. The Tribunal also found that neither Mr Mallard nor Mr Miltiadou were aware that the Claimant had a disability. Although they at least may be expected to have known that she had in the past suffered from depression, they did not know that any effects from her disability affected her conduct during the period 22 – 27 March 2017. She did not raise these matters at any stage in the procedure and they were only raised during the course of the Employment Tribunal proceedings.
62. At no point until the Tribunal proceedings did the Claimant suggest that her conduct on the day or subsequently had been caused by, or arose in

consequence of, any underlying mental health condition of depression, or her disability.

63. The Tribunal found that the Claimant's conduct referred to in paragraphs 7.2.1 and 7.2.2 above was not something arising in consequence of her disability.
64. Even had the Tribunal found that the Claimant's conduct referred to in paragraphs 7.2.1 and 7.2.2 above was something arising in consequence of her disability, it would have found that the dismissal was justified for the reasons given by the Respondent. Namely that the dismissal was a proportionate means of achieving a legitimate aim to deal appropriately with employees it reasonably believed had stolen a large sum of money.
65. Accordingly, the Tribunal found that this claim was not proved.

WRONGFUL DISMISSAL - article 3 Employment Tribunals Extension of Jurisdiction (E&W) Order 1994

66. The test for wrongful dismissal is different to the test for unfair dismissal. In the former the reasonableness or otherwise of the employer's actions is irrelevant. The question is whether the employee was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract.
67. The Tribunal looked objectively at the evidence placed before it and found (as did the Respondent) that there was reliable evidence sufficient to conclude on a balance of probabilities that the Claimant was guilty of gross misconduct, namely taking £1000 cash from a customer for an upgrade without recording any details of the transaction or providing a receipt and then keeping the money.
68. This conclusion was based upon the same reasons given by Mr Miltiadou in his letter of 25 May 2017. In particular, that the Claimant failed to issue a receipt or make any record that £1000 cash had been received. She failed to report on 22 March 2017, or subsequently, until 13 April 2017, that the cash had been given to her. She did not report it to her managers despite having every opportunity to do so. Even if she panicked on the day, that would not explain her failure to report the matter subsequently. The most compelling evidence to support the allegation of having stolen the money was the Claimant's false account given to Mr Mallard on 27 March 2017, that no cash had changed hands. Had the passenger's personal assistant

not telephoned on 26 March 2017 to complain about the lack of a receipt, there would have been no audit trail for the £1000 in cash, and the Claimant would have known that.

69. The Tribunal found that the Claimant was guilty of gross misconduct which justified summary dismissal. She was not wrongfully dismissed. This claim fails.

Employment Judge Vowles

Date: 24 March 2020

Sent to the parties on:

20 April 2020

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For the Tribunal Office