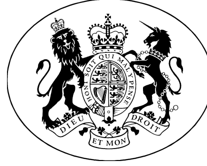

EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr T Oliver	**v**	British Airways plc

Heard at: Reading **On:** 10 & 11 August 2020

Before: Employment Judge Anstis (sitting alone)

Appearances
For the Claimant: Mr A Korn (counsel)
For the Respondent: Mr S Purnell (counsel)

JUDGMENT

The claimant's claim of unfair dismissal is dismissed.

REASONS

INTRODUCTION

1. Judgment in this case was given orally at the hearing. At the end of the hearing the respondent requested these written reasons, which are now produced together with the judgment.

2. This hearing was conducted partly by video using CVP. On the first day of the hearing the advocates and all witnesses and observers were in the tribunal room and I heard evidence from Mr Reeves (dismissing officer), Mr Tempest (first appeal officer) and the claimant. On the second day the hearing was conducted simultaneously in the tribunal room and on CVP. Mr Garcia (the second appeal officer) gave evidence by video as he could not travel to the United Kingdom on account of the quarantine regulations. I was in the tribunal room, along with the advocates, claimant and an observer. The respondents' other witnesses (who had given evidence the previous day) observed remotely via CVP for all or part of the day.

3. It was agreed that this hearing would be confined to matters of liability (including any contributory fault or *Polkey* deduction – without prejudice to the claimant's primary contention that he should be reinstated or re-engaged).

THE ISSUES

4. The claimant's claim is one of unfair dismissal only. He accepts that the reason for his dismissal was misconduct, meaning that what I have to determine was whether his dismissal was fair, applying the terms of section 98(4) of the Employment Rights Act 1996. That is:

> *"the determination of the question whether the dismissal is fair or unfair… 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 shall be determined in accordance with equity and the substantial merits of the case."*

THE FACTS

Introduction

5. The claimant was employed by the respondent as a team leader (cargo) until his dismissal with immediate effect on 18 January 2018. Before that, he had been an operations manager in cargo.

6. At the time of his dismissal the claimant had 23½ years' service. No issues arose with his behaviour until the matters for which he was dismissed.

Investigation

7. The initial investigation into the first relevant incident was carried out by the claimant's immediate manager. In a meeting on 1 September 2017 she interviewed the person who raised the complaint – a work colleague of the claimant's. During that investigation meeting, the complainant said,

> "[the claimant] *walked as if he was leaving* [the room]*, I went to my desk and sat down typing and facing the window/screens.* [He] *came and approached me from behind and started talking and when I turned around he went forward and kissed me on the lips and said "if you weren't married"… He* [then] *walked off quite quickly*".

8. Later that same day, the manager questioned the claimant about the incident, to which he said he "*can't remember that far back,* [it] *was four months ago*" and "*it was over four months ago I cannot remember*". The date of the incident in question was 2 May 2017.

9. On 8 September 2017 another of the claimant's colleagues mentioned to a manager that he (that is, the claimant) "*had specifically grabbed her hair in what she believed frustration the previous week*". This manager referred the matter on for investigation.

10. A further meeting was held concerning the allegation that he had grabbed a colleague's hair. During this investigation meeting the claimant said, "*I didn't pull it out of frustration*". He was notified that this matter was under investigation.

11. On 12 September 2017, the claimant was suspending suspended pending an investigation into:

    "*an allegation of unwanted physical contact made towards a colleague on 2 May 2017*", and

    "*a subsequent allegation of aggressive behaviour towards a colleague which resulted in unwanted physical contact*".

    It was said that "*these allegations are extremely serious and constitute gross misconduct. If the allegations are found the appropriate sanctions may be dismissal.*"

12. A further investigation meeting was held with the original complainant on 27 September 2017. She identified a colleague who was present at the time of the incident in question (although he may not have witnessed it first-hand). An investigation meeting was held with this individual, who agreed that he had not witnessed the incident first-hand, but he said that he had come upon the immediate aftermath of it at which point the original complainant had given him essentially the same version of events that she gave now. He had also remarked at the time on the claimant's unusual demeanour immediately following the incident.

13. A further interview was carried out with the second complainant, who said:

    "[the claimant] *was exasperated about something on his computer and raised his arms in frustration, then he grabbed the back of my hair, it was a bit of a weird situation, I was flabbergasted and confused but I didn't feel threatened in any way it was just an odd situation.*"

14. A further investigation meeting with the claimant was conducted. He denied having leant forward and kissed the complainant, or having said "if you weren't married" but gave no further explanation of the events on that day, saying that he "*can't remember back to the 2 May*". As regards the second incident, he said "*grabbed her hair in frustration, no definitely not, if I recall basically* [she] *was learning from me, I feel the only way to learn is jump in, no in guidance to* [her] *I placed my hand on her head*".

15. The investigation papers were referred to a manager who decided there was a case to answer. Mark Reeves of the respondent was given the task of conducting the disciplinary hearing. The claimant was provided with the

investigation papers and a copy of the disciplinary procedure. He was notified of the allegations against him.

The disciplinary hearing

16. The disciplinary hearing eventually took place on 24 October 2017, the claimant being accompanied by his trade union representative. Two people were identified to be spoken to after that disciplinary hearing. They were spoken to – in one case inconclusively and in the other case with a colleague having identified the claimant's initial behaviour as being "*unpleasant and unprofessional*", but with the claimant having corrected himself on being confronted by her about this.

17. Following this further investigation, by letter on 6 November 2017 the claimant was notified that Mr Reeves had found both allegations proven and had decided that the claimant should be demoted and given a final written warning. The claimant was given a right of appeal against this decision and in the letter was told that, "*the appeals manager has the power to confirm, decrease, rescind or otherwise vary the above penalty*".

The first appeal

18. The claimant appealed, giving his reason as being "*failing to comply with the correct policy procedures*". On being asked to elaborate on this, he later set out 17 different points which was said to be procedural or policy failings.

19. The appeal hearing took place before Warren Tempest of the respondent on 28 November 2017. The claimant was again accompanied by his trade union representative. Mr Tempest approached this meeting by working through the individual points of complaint made by the claimant (which had now increased to 21).

20. There was a delay in notifying the claimant of the outcome of this appeal hearing, for reasons that I need not go into and which are not now complained about by the claimant. In a letter on 18 January 2018 Mr Tempest replied to each of the grounds of appeal from the claimant, and concluded:

> *"In summary I have decided to not uphold your appeal and in line with British Airways EG901 policy* [the disciplinary policy] *I am exercising my right to alter the sanction imposed at the outcome hearing.*
>
> *The sanction of a final written warning and a demotion to team leader will be increased to dismissal with immediate effect … I have found your approach to answering straightforward questions to be inconsistent and lacking in credibility. In comparison to the other witnesses who remained entirely consistent."*

21. It is common ground that the respondent's disciplinary procedure, which is a contractual document, permits a manager hearing the appeal to increase the disciplinary sanction.

The second appeal

22. The fact that the disciplinary procedure is contractual, and permits increases in the sanction, is unusual. What is also unusual is that there is a second right of appeal, which the claimant exercised despite the apparent advice from his trade union that "*it was not worth going to the appeal as BA had done everything correctly and* [Mr Tempest] *was in his rights to dismiss*."

23. The claimant's grounds of appeal were:

> "- [the events that had caused the delay in the outcome]
>
> - *ramification between the hearing manager and the first appeal manager* [later explained by the claimant as being the discrepancy in the two different decisions outcomes]
>
> - *defamation of character*
>
> - *this list is not exhaustive"*

24. The claimant second appeal was heard by Camilo Garcia on 7 March 2018. The claimant was accompanied by his trade union representative. As is evident from the notes the meeting, much of the meeting was taken up with discussion of the question of defamation, and the possible effect of the events giving rise to the delay in the appeal outcome. These are not now said to contribute towards the fairness or unfairness of the dismissal.

25. Mr Garcia upheld the decision to dismiss the claimant.

DISCUSSION AND CONCLUSIONS

Fairness generally

26. Against the background of the claimant being unable to remember the events of 2 May 2017, most of his complaints at the time concerned the procedures used by the respondent in its investigation and decision on his misconduct. This included allegations that the colleagues who had made complaints against him had not done so in the terms required by the dignity at work policy, and the lack of any informal attempts at resolution. Most of these were (correctly) not relied upon by Mr Korn as matters of unfairness in his closing submissions.

27. It is well understood that complaints of this nature may not be raised in a textbook manner, and that those affected by them may find it difficult to raise them immediately. The same goes for any reluctance by a complainant to

raise a matter formally or seek formal action against an individual. It is ultimately for the employer to take a view on what action is necessary in such circumstances, and I do not consider that the complainants' reluctance to raise or press matters formally makes or contributes substantially to this being a fair or unfair dismissal.

28. Questions as to why matters were not raised earlier may be relevant if there is, for instance, a serious dispute as to what occurred or where it is said that the complainants had some ulterior motive for now raising the allegations, but it has never been part of the claimant's case that the complainants were being dishonest. The basis of the claimant's substantive defence has been (eventually) denying the first incident entirely on the basis that he could not remember it or anything else about that day, and on the second incident putting a different nuance on it (but still accepting that there was physical contact) rather than denying outright that it had occurred. In those circumstances the complaints now put by Mr Korn at para 22 of his submissions fall away. They are steps that were unnecessary in these circumstances (i)-(iv), immaterial (the remaining points), or not made out on the facts of the case (part 2 of (vi)).

29. I consider it is plainly within the range of reasonable responses for an employer to consider that these allegations (with the emphasis on the first one which, as Mr Purnell pointed out, is tantamount to (or actually) an allegation of a sexual assault) are sufficient to justify dismissal, and to form a genuine belief (which is not challenged in this case) on reasonable grounds that these events occurred. I also do not see that any further investigation was required in the circumstances of this case.

The increased sanction on appeal

30. The most substantial aspect of the claimant's case, and the only point which I consider comes anywhere near raising substantive questions of fairness, is on the fact that the sanction was increased on appeal.

31. It is common ground that this is permitted by the respondent's contractual disciplinary policy, but this is the start of a discussion of fairness, not the end of it.

32. The first issue that arises is whether McMillan v Airedale NHS Foundation Trust [2014] EWCA Civ 1031 permits an increase in sanctions in circumstances such as these. Mr Korn says that Underhill LJ's comments to the effect that contractual terms can permit an increase in the sanction are obiter. I accept that, but I consider them to be highly persuasive in circumstances where Underhill LJ was clearly consciously giving guidance if the point should arise in future cases, and I will follow what Underhill LJ says. Mr Korn says that Underhill LJ must have had in mind only circumstances in which the appeal is by way of a rehearing – as referred to in para 72 of the judgment. I disagree, for the reasons given by Mr Purnell.

Underhill LJ is referring to a specific example in support of his proposition here, rather than suggesting that these are the only circumstances in which an increase in sanction can be justified. The same goes for any argument suggesting that this can only be done in cases of "new evidence". It is also plain that in coming to its conclusion the Court of Appeal were well aware of (and took into account) the terms of the ACAS Guidance relied upon by Mr Korn.

33. The point I draw from McMillan is that an increase in sanction may be permitted by contractual terms, but this is not of itself determinative of fairness one way or the other. It is clear from para 73 of that judgment that a failure to follow a contractual policy does not necessarily make a dismissal unfair, and equally that following that policy does not necessarily make it fair. As Underhill LJ concludes at para 73:

> *"Neither the court nor the employment tribunal determines legal rights in cases of this character exclusively by reference to formal compliance with procedures."*

34. So while the contractual policy may provide the opportunity to increase the sanction, it does not necessarily make it fair to do so.

35. Mr Korn identifies several points that he says mean that increasing the sanction is not fair. These are that the claimant was not warned that this could be a consequence of the appeal. While the policy is clear that this may include an increase in the sanction, the letters the claimant received referred only to "variation" or a reduction of the sanction. He also said that the claimant was not notified by Mr Tempest that he was considering an increase in the sanction, so did not have the opportunity to make representations on the point, and that having two different managers making different findings offended against principles of consistency in unfair dismissal.

36. I would have preferred it if the respondents had made it clear in their correspondence that an increase (not just a variation or reduction) in the sanction could follow on an appeal, but I am satisfied that this does not make the dismissal unfair. The claimant had access to the procedure and was throughout represented by his trade union, who would have been very familiar with the procedure. There was no unfairness in this.

37. On the question of being given the opportunity to oppose the increased sanction, I accept that he was not given that opportunity, but Mr Korn has not explained what difference that might have made. The claimant was complaining about his sanction in any event (by reference to his length of service) and any question of unfairness through not having been notified of this beforehand could have been (and was) corrected by the right of further appeal to Mr Garcia.

38. On the question of consistency, managers at different appeal levels may disagree about the right approach or right sanction. That is the whole point of appeals. I do not think the cases about broad consistency between employees assist the claimant in arguing about the fact that two different managers took different views in his case. It is plain from, for instance, the concept of the range of reasonable responses, that managers may validly take different views of the same situation.

39. The claimant's dismissal was not unfair.

Employment Judge Anstis

Date: 11 August 2020

Judgment and Reasons

Sent to the parties on: 7/9/2020

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For the Tribunal Office

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