EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr P Murdock	and	British Airways plc

Held at Reading on 25 and 26 November 2019

Representation
Claimant: Mr S Liberadski, counsel
Respondent: Miss M Tutin, counsel

Employment Judge Vowles
Members: Mrs A Brown, Mr D Gregory

JUDGMENT having been sent to the parties on 29 November 2017 and reasons having been requested by the Respondent in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. A full merits hearing was heard before this same Tribunal on 26 – 28 September 2016. In a Reserved Unanimous Judgment with reasons given on 22 November 2016, the claims of unfair dismissal, wrongful dismissal and disability discrimination were dismissed.

2. The Claimant then presented an appeal to the Employment Appeal Tribunal (EAT) and a hearing was held on 12 October 2017. The EAT's judgment with their reasons was produced on 2 July 2018. The disability discrimination appeal was dismissed but the appeals in respect of unfair dismissal and wrongful dismissal were upheld and those claims were remitted to this same Tribunal for reconsideration in accordance with the EAT judgment. Yesterday, the Tribunal re-read its judgment and reasons and read the EAT judgment and reasons and heard oral and read written submissions from the parties' representatives.

3. The EAT's decision on the claim for unfair dismissal is set out in paragraph 48 of the EAT's decision and it has three parts. The first one reads as follows:

   "The Tribunal 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."

4. The question for this Tribunal was - did the Respondent act reasonably in treating the first disciplinary allegation as a sufficient reason for dismissal?

5. The first allegation was set out in the invitation to the disciplinary meeting as follows: *"Breach of EG815 Criminal Records Checks and Disclosure of Criminal Convictions"*.

6. Both the non-contractual policy EG815 and the contractual policy EG804 provide that an employee convicted of a disqualifying offence must notify his line manager of that conviction within 14 days. There is no dispute between the parties, and it was agreed by the EAT, that conviction in this policy includes sentencing and that the 14 day period runs from the date of sentencing.

7. In this case, the Claimant was convicted of benefit fraud on 2 June 2015. He was sentenced to six months' imprisonment (suspended) on 25 June 2015. The 14 day period therefore expired on 9 July 2015.

8. In the light of the EAT decision and as the Claimant has submitted, despite the terms of that first allegation, what the Respondent actually investigated and dismissed the Claimant for was an intention not to notify the Respondent of his conviction and sentencing within 14 days.

9. At paragraph 43, the EAT said:

"However, the difficulty with the first disciplinary allegation has 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 Employment Rights Act. The parties accept that the Claimant did in fact disclose his conviction and sentence to the Respondent on 7 July 2015 and that was of course within the 14 day period which expired on 9 July 2015."

10. The EAT continued at paragraph 44:

"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."

11. As submitted by the Claimant, the matters which this Tribunal must now assess are as follows.

12. Firstly, whether the Respondent could reasonably treat an intention to breach a policy as misconduct in circumstances where the Claimant had in fact complied with the policy and, even if such an intention could reasonably be viewed as misconduct whether, applying section 98(4) of the Employment Rights Act it could also be treated as sufficiently serious to justify dismissal.

13. On reconsideration in the light of the EAT's decision, this Tribunal finds that an intention which in fact was not actioned by the Claimant could not amount to conduct or misconduct. It was neither. The relevant conduct was in fact the Claimant's compliance with the 14 day policy. The Respondent's finding that an unfulfilled intention to breach a policy followed by actual compliance with the policy cannot form the basis for a fair dismissal for misconduct. The dismissal, so far as it was based upon the first allegation, was unfair. No reasonable employer could or would treat an intention to breach a policy as misconduct in circumstances where the Claimant had in fact complied with that policy. The dismissal therefore on the first allegation was outside the range of reasonable responses and, so far as it is based upon the first allegation, was unfair.

14. Secondly, in the second part of paragraph 48, the EAT referred to a certificate of disregard issued by the Civil Aviation Authority. That certificate is in the bundle at page 162 and the certificate says that the unspent convictions which the Claimant was sentenced for on 25 June may be disregarded for the purposes of reissue of an airside pass. It goes on to say *"Any airside pass issued is subject to your prospective employer and the pass issuing authority being satisfied that you are a suitable person to conduct such a role"*. Yesterday, neither party urged the Tribunal to reconsider the relevance of that certificate of disregard in any depth. The EAT said that the Tribunal had 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, but it is clear that the certificate relates to the nature and seriousness of the particular offence of which the Claimant was convicted and sentenced. In any event, the final decision on the continuation of employment and the suitability to be reissued with an airside pass rests with the Respondent as both parties agreed and as the Respondent stated at paragraph 41 of its written submissions. The Tribunal did not therefore go on to reconsider the relevance of the certificate of disregard.

15. Thirdly, the third part of paragraph 48 of the EAT decision reads

"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."

16. The question for the Tribunal is whether the second allegation would have been established and considered to justify dismissal. In the Claimant's submission, it was said:

"The second allegation was conduct which affects your suitability to remain as British Airways crew. In the absence of an actual breach of the policy … this is simply a different way of expressing the real subject matter of the first allegation that is an intention not to disclose the conviction."

17. The Claimant said that counsel for the Respondent accepted before the EAT that the factual basis of both allegations was the same or very similar and that is evident from the first three paragraphs of the section of the dismissal letter dealing with the second allegation. The dismissal letter was quoted at some length in the Tribunal's reasons in its first instance decision. The first three paragraphs of the dismissal letter included:

"My findings in relation to this allegation are:
On 25 June 2015, you were sentenced for obtaining abatement of liability by deception under section 2(1) of the Theft Act 1978. You were given a six month prison sentence that has been suspended for 18 months. You advised me that in court you pleaded guilty to the charges and were sentenced. My analysis is that you then consciously and intentionally decided to keep the details of your six month suspended prison sentence from British Airways and go about your flying duties as normal. You had reasonable opportunity to disclose the sentence to British Airways. You had from 25 June 2015 until 7 July 2015, that is 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 25 June 2015."

18. The EAT said:

"There was no analysis by the Tribunal of whether, had the first allegation been correctly analysed against a background of the contractual requirement imposed by policy EG804 and the second allegation would have been established and considered to justify summary dismissal in all the circumstances."

19. It is clear from the dismissal letter that the Respondent therefore relied upon the finding that the Claimant intended not to disclose the conviction to support not only the first allegation but also the second allegation. In submissions, the Respondent accepted that was the case, but said that the Claimant's intention not to disclose was contrary to the spirit and

purpose of the policies. The Respondent does accept, as it must, that the Claimant did in fact comply with the 14 day policy and it is clear from the dismissing officer's findings that he relied on the finding of an intention to conceal as the principal basis for both the first and second allegations. That finding was integral to his consideration of both allegations.

20. In the same letter, the dismissing officer referred to the Claimant's uncooperative and evasive conduct during the disciplinary process. The EAT dealt with that at paragraph 46.2 and said:

"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."

21. This Tribunal accepts that proposition.

22. The Tribunal therefore, in these circumstances, also accepts the Claimant's submission at paragraph 18 of the written submissions that it was unreasonable for the Respondent to treat the Claimant's conduct in relation to disclosure of the conviction as misconduct, let alone misconduct sufficiently serious to justify dismissal.

23. This Tribunal's finding is that the second allegation could not, either alone or in conjunction with the Respondent's findings on the first allegation, justify dismissal. No reasonable employer would have dismissed in these circumstances and such a dismissal was outside the range of reasonable responses. The dismissal therefore, based upon both the first and the second allegation, or either of them, was unfair.

24. Having made that finding of unfair dismissal, the Tribunal went on to consider contributory conduct.

25. Section 123(6) of the Employment Rights Act states that

"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

26. In the case of Nelson v BBC [1980] ICR 110, the Court of Appeal said that three factors must be satisfied if the Tribunal is to find contributory conduct. First, the relevant action must be culpable or blameworthy. Second, it must have actually caused or contributed to dismissal. Third, it must be just and equitable to reduce the award by the proportion specified.

27. This Tribunal, by a majority, found that the Claimant was guilty of blameworthy conduct and referred to paragraph 55 of the reasons given in

the first instance decision. That finding was a finding of fact under the heading of wrongful dismissal. Though it was not misconduct to justify dismissal in itself, it did contribute in the majority's view to the dismissal. Paragraph 55 reads:

"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."

28. The Claimant accepted that the Tribunal made no error in holding that the Respondent's finding of fact that the Claimant had intended to conceal the conviction was reasonable in itself. The majority of this Tribunal find that the Claimant waited until 2 days before the 14 day limit expired after having met his line manager, having completed a flight to Philadelphia and being about to board a flight to Hyderabad. He waited until 7 July 2015 to disclose the conviction, giving rise to the not unreasonable suspicion and finding by the Respondent that he intended to conceal the conviction. He was then evasive and unco-operative during the course of the disciplinary process. That was the blameworthy conduct found by the Tribunal. It is separate, of course, to the question of fairness of dismissal which entails the Tribunal's view of the Respondent's decision set against the range of reasonable responses. The Tribunal found that although it did not amount to something that would justify dismissal, it did contribute to the dismissal.

29. The Tribunal also then went on to consider whether it would be just and equitable to reduce the compensatory award and the majority found that it would be just and equitable to do so. It took account of the decision in Hollier v Plysu Ltd [1983] IRLR 260 where the EAT suggested that the contribution should be assessed broadly and should generally fall within the following categories:

Employee wholly to blame:	100%
Employee largely to blame:	75%
Employer and employee equally to blame:	50%
Employee slightly to blame:	25%

30. The majority of the Tribunal found that it would be just and equitable to reduce the compensatory award by 30%.

31. The majority in this case were the Employment Judge and Mrs Brown and the minority was Mr Gregory. Mr Gregory's finding was that no contributory conduct reduction should be made because the Claimant was within his rights to disclose at any convenient time to him during the 14 day period, that is between 25 June 2015 and 9 July 2015 and so he found that there was no contributory conduct.

32. The Tribunal then went on to consider whether there should be a reduction

in compensation under the principle in Polkey and yesterday heard submissions on both contributory conduct and Polkey. We decided that in view of the fact that the dismissal was found to be substantively unfair rather than procedurally unfair that there were no grounds for a reduction under the principle in Polkey.

33. Finally, the issue of wrongful dismissal.

34. In the light of our findings above, and the EAT decision, the Tribunal finds that the dismissal was wrongful. The EAT said this at paragraphs 59-61:

"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 one of unfair or wrongful dismissal. As a result, the first breach of contract on which it was necessary for the Respondent to rely was of the contractual requirements 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."

35. Finally, I should quote from the case management order which was referred to by the EAT. It said this:

"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 the 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."

36. In view of our findings above in this reconsideration, we do not find that the Claimant actually committed the gross misconduct alleged, namely that he breached the Respondent's policy or that he acted in a manner

which affected his suitability to remain as a crew member. The Tribunal therefore finds no fundamental breach of conduct such as would entitle the Respondent to dismiss the Claimant without notice. The claim for wrongful dismissal therefore succeeds.

37. There are then two outstanding matters. The matters of remedy and the application for a costs order by the Respondent.

38. Towards the end of the hearing, the Respondent made an application for a costs order in respect of the ineffective hearing on 21 and 22 March 2019 before this Tribunal. The application had originally been made in writing on 7 May 2019. Today we have considered that written application and we have also considered the case management order which this Tribunal made following that hearing on 21 March 2019, the Claimant's GP's letters of 25 and 29 April 2019, and the ambulance report of the events of 21 March 2019. We have also heard submissions from both representatives and heard some evidence on oath from the Claimant regarding his means and his ability to pay a costs order.

39. The case management order made on 21 March 2019 read:

> 1. *This 2 day hearing was listed to be heard on 21 and 22 March 2019 to consider a case which was remitted to the same Tribunal by the Employment Appeal Tribunal to reconsider the claims of unfair dismissal and wrongful dismissal.*
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> 2. *On 15 March 2019 the Claimant made an application to postpone the hearing because he was unwell and was unable to get legal representation for the hearing.*
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> 3. *On 15 March 2019 the Respondent objected to the application. On 20 March 2019 the Claimant verbally withdrew the application and said he would attend the hearing.*
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> 4. *The parties attended the Tribunal premises for the hearing on 21 March 2019. The Claimant provided a letter from his GP dated 7 March 2019 stating that he was suffering from various physical and mental impairments and a Statement of Fitness for Work stating that he was unfit for work for 6 months from 11 March 2019. He informed the Tribunal clerk that he wanted a postponement of the hearing because of his ill-health.*
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> 5. *Shortly before the Tribunal was due to open at 10:00am the Tribunal was informed that the Claimant had become unwell in his waiting room. An ambulance was called and Paramedics attended to the Claimant in his waiting room. The Claimant told the clerk that he was unfit to attend the hearing and again requested a postponement. He did not enter the*

Tribunal room and was escorted out of the Tribunal premises by the Paramedics at 11:30am to be handed over into the care of a friend.

6. *The Tribunal thereupon decided to postpone the 2 day hearing. The Claimant will be informed not to attend on 22 March 2019 and that a case management order will follow.*
   …

10. *No later than 2 May 2019 the Claimant shall provide to the Tribunal, with a copy to the Respondent, written medical evidence of his condition on 21 March 2019 which resulted in his inability to attend the hearing and caused him to leave the Tribunal premises.*

40. The Claimant complied with that order and provided those letters from his GP dated 25 and 29 April 2019. Today, for the first time, we have seen the ambulance report of the events of that day.

41. The relevant law for the consideration of an application for a costs order is contained in rule 76 of the Employment Tribunals Rules of Procedure 2013. The Respondent submits that as the Claimant had requested a postponement on 15 March 2019, and then again on the morning of the hearing of 21 March 2019, that his conduct on 21 March 2019 was simply an opportune tactic to avoid a hearing. It said that the medical evidence provided by him did not comply with the Presidential Guidance on Postponements due to Ill Health, and that even if the Claimant was unfit at the start of the hearing on 21 March 2019, he appeared to be fit enough to be discharged to the care of a friend after treatment by the paramedics and therefore would have been fit to continue with the hearing.

42. After considering all those matters, the Tribunal is not satisfied that the Claimant's behaviour on 21 March 2019 was a tactic to avoid the hearing. The medical evidence shows that the Claimant has a history of anxiety with frequent hyperventilation episodes and it was recorded by the paramedics that he had high blood pressure and a rapid breathing rate on the morning of 21 March 2019. They contacted his GP whilst they were treating him and the GP confirmed his medical history. Then, on 25 April 2019, as ordered by the Tribunal, the GP sent a letter confirming that he was unfit to continue the hearing on 21 March 2019, and the letter included the following:

"It was felt that he would be safe to be discharged into the custody of a friend at this point and to go home and rest rather than continue with the hearing."

43. It is clear to this Tribunal that that sentence was the conclusion reached by the GP and the paramedics jointly and not just the Claimant's view. The Presidential Guidance may not have been complied with to the letter, but there is today before the Tribunal ample written medical evidence to support the Claimant's contention that he suffered a medical emergency

on 21 March 2019 on the Tribunal premises and was unfit on that day to start or take part in the Tribunal hearing. There is no evidence of unreasonable behaviour by the Claimant. On the contrary, there is ample evidence that he was medically unfit and unable to start and take part in the hearing.

44. There are no grounds under rule 76 upon which the Tribunal could make a costs order against the Claimant in respect of his conduct and absence on 21 March 2019. The application for a costs order is therefore refused.

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Employment Judge Vowles

Date: 5 March 2020

Sent to the parties on

10 March 20

For the Tribunal office