EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Elwertowska**

Respondent: **LHR Airports Limited**

Heard at: **Reading Employment Tribunal (in public, by video)**

On: **19 and 20 July 2021**

Before: Employment Judge Moor

Representation
Claimant: Miss R Thomas, counsel
Respondent: Mr D Patel, counsel

JUDGMENT

It is the judgment of the Tribunal that:

1. **The complaint of unfair dismissal is well-founded.**

   1.1. **No compensatory award is made.**

   1.2. **The basic award should be reduced by 60% by reason of the Claimant's conduct prior to dismissal.**

   1.3. **The basic award should be uplifted by 12.5% because of the Respondent's unreasonable failure to follow the ACAS Code of Practice on Discipline.**

   1.4. **The Respondent is ordered to pay to the Claimant £3,425.63.**

   Recoupment does not apply, no compensatory award having been made.

2. **The complaint of wrongful dismissal (breach of contract) does not succeed.**

REASONS

1. The Claimant was dismissed on 24 June 2019. She brings claims of unfair dismissal and wrongful dismissal (breach of contract for notice pay).

Preliminary Matters

2. This claim was originally listed in August 2020 but was postponed at the parties' request. It was then heard on the earliest date it could be re-listed. The original listing would have been 14 months after dismissal, unfortunately now we are three years after dismissal. (The reasons for this further delay are well set out in the latest National User Group minutes.) Fortunately, much of the material before me was contemporaneous emails and minutes of meetings.

3. The use of the cloud video platform has enabled this hearing to be effective and I thank all participants for adjusting to the remote hearing.

4. I thank both Counsel for the intelligent, efficient, and courteous way in which they pursued their respective cases. They assisted me by producing an agreed chronology and cast list.

5. After hearing submissions, I allowed the Claimant's application to amend the claim to include a claim for wrongful dismissal i.e. a breach of contract by the failure to give notice of dismissal. I gave reasons orally which I do not repeat here.

6. It was agreed that reference to members of staff against whom disciplinary proceedings arose but who had not given evidence would be referred to in this decision by initials.

Issues

7. The parties agreed the issues in the claim were:

    7.1. Whether the Respondent had a genuine belief in misconduct;

    7.2. Whether that belief was based on reasonable grounds after a reasonable investigation;

    7.3. Whether there was otherwise a fair procedure including whether the ACAS Code was followed. Mr Patel identified these procedural points:

        7.3.1. a failure properly to inform the Claimant of the charges;

        7.3.2. no reasonable opportunity to call witnesses;

        7.3.3. no reasonable opportunity to present evidence and

answer allegations;

7.3.4. no reasonable opportunity to raise points about information provided by witnesses;

7.3.5. allegations of dishonesty made against AJ were not communicated to decision makers in the case;

7.3.6. the appeal decision maker, Mr Coen, had informal discussions with the dismissal decision maker, Mr Jhuti and Miss Hill.

7.4. Whether the dismissal was a response that a reasonable employer could have reached.

7.5. If necessary, the remedy issues in principle of:

7.5.1. Polkey (the chance a fair dismissal would have occurred in any event);

7.5.2. contribution; and

7.5.3. any ACAS uplift.

Findings of Fact

8. n deciding the facts I have applied the balance of probabilities test i.e. I have decided what was more likely to have occurred. Having heard the evidence of Miss N Tibbles, Mr K Jhuti, Mr J Coen and the Claimant, and having read the documents referred to me I make the following findings of fact.

9. The Respondent runs Heathrow Airport. In its security function alone it employs about 4,500 staff, and employs about 6,000 people in all.

10. The Claimant had worked for the Respondent since 5 July 2006. By 2013, after promotions, she was employed as the Terminal Security Manager ('TSM') at Terminal 5, the busiest of the Heathrow terminals. Until the incidents leading to dismissal, she had a clean disciplinary record.

11. The TSM role is a senior manager. In each terminal there is only one person holding that position.

12. The TSM manages Security Managers who in turn manage Security Officers. Security Officers read the X-ray screens at cabin baggage check. Airline passengers pass through this check before moving into the area where they board the plane. This area is known as the Critical Part Security Restricted Area ('CPSRA'), also referred to as 'airside'.

13. In the Respondent's disciplinary policy, '*misconduct'* includes a *'failure to follow security procedures'* and *'gross misconduct'* includes a *'serious and/or deliberate breach of security procedures'.* The policy also states investigations are confidential.

Hand Baggage Check and Prohibited Items

14. Hand baggage check is obviously a very important part of security control at Heathrow. Its aim is to stop potentially dangerous items from being brought onto aircraft. Baggage is sent through a reinforced tunnel where it is X-rayed. The X-ray screen reader looks for items that may present a risk.

15. Passengers are told of a list of items that are not allowed on the aircraft. This prohibited items list includes *'(f) explosives … and devices capable, or appearing capable, of being used to cause serious injury or to pose a threat to the safety of aircraft including … replica or imitation explosive devices; … grenades'.* It also includes firearms that appear capable of being used to discharge a projectile including *'toy guns, replicas and imitation firearms capable of being mistaken for real weapons.'*

16. A brand of perfume comes in a grenade-shaped container. Prior to the incident in question duty free (airside) had been told not to stock it.

17. When a Security Officer looks at the X-ray screen, they can pause the image and enhance it in a number of ways to help them better identify suspicious objects. The image I have seen (and that the Claimant saw at the time) is not an enhanced image. It shows the shape of objects and shows inorganic items as blue and organic items (including plastics) as orange.

18. If, after enhancements, an object still appears as a risk (or threat item) then the Security Officer is supposed to do one of two things:

    18.1. rejects it for search, which means the bag is pulled off onto a different line for a physical search. If there is a prohibited item, it will be removed; or

    18.2. holds it in the tunnel. This happens if there is real concern that it might explode. A Security Manager is asked to assess the image. The options then are to ask the passenger to remove the item and questioning ('profiling') to assess the threat;

    18.3. if there is still doubt then the matter is escalated to the TSM.

Code 97 Procedure

19. If there is a '*breach of security'*, then the Code 97 procedure must be followed. The purpose of it is to alert everyone at the terminal via an open radio announcement (83). Anyone can declare a Code 97 when they realise a breach of security has occurred.

20. The approach to be taken once a Code 97 is called depends upon the security breach. If the incident severity is unknown then staff investigate reviewing CCTV, SEMS (the system that stores the X-ray images); witnesses are questioned and the TSM reviews and liaises with the Airport Operations Manager ('AOM'). Ultimately in such a case it is the AOM who assesses the threat and decides whether to involve police or the airline.

21. If a threat item has been missed in a piece of hand baggage at the X-ray stage, then that is a plainly security breach. If this is discovered then Code 97 is the process whereby all are alerted to attempt to find the passenger, the flight they were on, and in some cases the potential threat discussed with police and/or the airline. The Claimant had designed process to help quickly identify the passenger name and flight in such cases.

Structure of Findings of Fact

22. I shall look at the facts as they became known to the employer rather than as they were presented to me in totality. This is important in the unfair dismissal claim so that I make appropriate findings about the investigation, the grounds and what the employer knew and when.

23. I shall set out my own findings, based on the evidence before me, about the Claimant's conduct in respect of her wrongful dismissal claim.

18 December 2018

24. At around 19.00 on 18 December 2018, a Security Manager, AJ, saw that a Security Officer, LV, was talking while X-ray reading cabin baggage. This was not allowed, and AJ spoke to LV.

25. On the same shift, AJ reviewed the X-ray images read by LV and identified a grenade-shaped object that had not been rejected for search. The time stamp on the image showed it was screened at 19.14. AJ did not call a Code 97 herself but referred it on to the Claimant verbally.

26. Later 21.38, AJ sent an email to the Claimant '*just to go over events from today'*. AJ stated at '*roughly 19.00'* she noticed LV talking while checking and that when she had approached LV about it she not accept her feedback and was rude to her. She thought this should be dealt with formally.

27. In the last paragraph of this email AJ stated, '*I have checked SEMS and along with some busy bags this is one of the bags I have come across which wasn't marked as clear'*. She sent the image attached to that email, which then gave the Claimant the opportunity to see its time stamp.

28. It was later established that LV had looked at the image for 15 seconds with enhancements before moving it on. Neither AJ nor the Claimant knew this at the point they were making decisions.

29. At 21.43 the Claimant forwarded AJ's email on to Mr Chohan, Security Assurance Manager, and Ms Kaur, of HR, asking '*Shall we do a fact find before deciding what next. I asked AJ to take the officer LV off the screen reading* ***as*** *the item in the right hand corner was identified as a* ***plastic grenade I believe and the bag was not rejected for search****.*' (my emphasis). Mr Chohan worked days so would not have received that email on the night in question.

30. The Claimant did not call a Code 97. Nor did she refer the issue to the

AOM to be threat-assessed.

31. She heard no more about this matter until she attended a fact-find concerning LV nearly 2 months later on 12 February 2019, and another concerning AJ on 27 February 2019, and was then suspended on 11 March 2019. Miss Tibbles, Assurance Manager, then investigated the issue.

12 February 2019 Fact-Find with Ms Hardie in relation to LV

32. On 12 February 2019 (about 2 months after the incident) the Claimant attended an investigation meeting with Ms Hardie concerning LV.

33. The Claimant said that, around 16.00, AJ had told her about the problem of LV talking while screen reading.

34. She said that, around 20.30, AJ had told her that AJ and a Security Manager (Compliance) had viewed CCTV and SEMS and '*showed me something* ***that looked like a toy grenade. I then said this was serious*** *and we looked at the image again and I said that* ***do you believe there is anything of concern? We agreed no*** *and then I said she needed to be taken off screen reading*…'. (my emphasis)

35. The Claimant supported AJ's approach stating she had gone '*over and above'* in looking at the images after the talking incident.

27 February 2019 Fact-find with Mr Garrett about AJ

36. At 15.00 the Claimant attended a fact-find with Mr Garrett about AJ, ending at 15.24.

37. So far as is relevant, she told Mr Garrett that AJ had had help from a colleague 'Sanj' when viewing the CCTV and SEMS and that there was a '***grenade type of item. It was quite some time since the item had gone through and I didn't call a code 97*** *and the officer had gone home. I was a bit concerned when I had the meeting with [Ms Hardie] that it was to do with AJ's behaviour.'* (my emphasis)

38. When asked about what the process was regarding the 'plastic grenade' she said '**she would have followed the normal process but we never found about it even 6/7 hours late**r, by secondary checks or anything like that. If we had looked at it straight away we could have dealt with it. It was 6/7 hours later and even when I saw the image I didn't see it….I did see the image but what I am saying is that without the enhancements it was difficult to see. But **it was 6/7 hours later, and the bag had gone the passenger had gone…** ***If we had looked at it straight away we would have followed process and called a code 97.***' (my emphasis)

SA Disciplinary and 'Chohan email' and call to AJ

39. Earlier, on 29 January 2019, the Claimant held a disciplinary hearing with a Security Officer SA about how they had dealt with a passenger carrying a lock knife. SA had allowed that person to '*mail and fly'*: the knife had been removed from them and posted back to them by the Respondent.

AJ attended that hearing as SA's companion. The Claimant made brief notes of the meeting in bullet points.

40. While it has not been made clear in the written evidence, it appears the issue was that SA ought to have done more than allowing the passenger to mail and fly: including looking at the knife and deciding whether to involve the police. The Claimant decided that SA had learned from the incident, understood the procedure, and decided there should be no disciplinary action but the incident would be recorded on their 'green card' (their personnel file).

41. The Claimant was then shortly away on leave and then, after a skiing accident, at home on sick leave because of a knee injury. Ms Kaur chased the Claimant for a written outcome letter for SA.

42. On 27 February 2019, while at home on sick leave, the Claimant drafted an outcome letter in which she stated: '*You cited the email from Deepesh Chohan that confirmed that Police should only be called for lock knives only in case of any concerns, regardless of the size of the blade'* (the 'Chohan email'). All agree the Chohan email gave guidance on the knife procedure. At 16.05 she sent the draft to Ms Kaur and a copy of the Chohan email to attach to the outcome letter for SA. (This was about half an hour after she had attended the fact-find with Mr Garrett about AJ.)

43. In reply, at 16.13 Ms Kaur queried the use of the Chohan email because it was not referred to expressly in the Claimant's bullet-point notes. In the emails that followed, the Claimant told Ms Kaur that SA had referred to it and she had had to look it up. She explained the notes were just bullet points and referred Ms Kaur to the bullet-point where it was discussed: '*We discussed the process for knife handling*'. The Claimant's final email to Ms Kaur was at 16.18.

44. On the time, also at 16.18, the Claimant called AJ and talked to her for 36 minutes.

AJ's Letter to Ms Kaur of 5 March 2019

45. The Claimant's call to AJ became the subject of disciplinary investigation after AJ's letter to Ms Kaur of 5 March 2019. AJ knew she was the subject of a disciplinary investigation, including dishonesty allegations. In her letter AJ stated:

    45.1. she was under a lot of stress and felt paranoid;

    45.2. she wanted to tell Ms Kaur about the call 'to protect my integrity';

    45.3. during the call the Claimant referred to the SA disciplinary and asked her if she remembered events. AJ said not well. The Claimant said someone had questioned the outcome of the meeting. She reminded AJ of the Chohan email about lock knives and AJ had told her '*I can't be sure but yes it may well have been mentioned'*. She asked why did it matter anyway. On reflection AJ felt uncomfortable as she was being asked about

the SA disciplinary, which she did not remember clearly.

45.4. during the call AJ stated the Claimant had told her she (AJ) was being investigated (which AJ knew). The Claimant told her about the fact-find with Mr Garrett and that she had supported her, telling him she thought AJ had gone '*above and beyond'* what would have been expected.

45.5. Initially AJ felt the call was about her well-being but on reflection she wanted to tell Ms Kaur about it. She did not remember the events of 18 December well but was getting confused with the Claimant's input.

11 March 2019 with Mr Parker Suspension and Fact-Find

46. On 11 March 2019, Mr Parker, Security Assurance Manager, held a fact-finding meeting with the Claimant over the telephone.

47. His questions concerned the Claimant's contact with AJ and the incident on 18 December.

48. The Claimant said she had not escalated matters on 18 December because it had happened 5 hours before and it was a plastic toy in her opinion and not a danger. She said she only saw the SEMs image but not with enhancements (On this part the handwritten notes are missing. But I prefer the Claimant's evidence of what she said here because she gave evidence about it and her correction to the note at 132.**)**

49. The Claimant confirmed she had contact with AJ. The Claimant recalled AJ telling her she was under investigation and the Claimant saying words to the effect not to worry.

50. The Claimant mentioned the Chohan email because SA had referred to it in the meeting and she had found it.

51. The Claimant sent corrections to the handwritten notes for the fact find and was told (141) that these would be collated. This was not done.

52. After a 10-minute adjournment, Mr Parker suspended the Claimant saying '*Looking at the facts in front of me, … I am currently suspending you from work for breach of confidentiality, false and dishonest conduct, failing to follow security procedures and policies, constituting gross misconduct.*' This was followed up in a formal suspension letter, which set out the same allegations but without the phrase 'constituting gross misconduct' and replacing it with the statement that it could potentially amount to gross misconduct. The '*false and dishonest conduct'* was not specified.

53. Mr Parker ticked off and initialled the suspension checklist (133), which suggests it was followed at the meeting. It appears likely therefore that he told the Claimant not to contact '*witnesses' (*as the checklist records).

54. The suspension checklist includes a section where Mr Parker had to consider re-deployment. It is ticked. I have not heard why he considered

suspension more appropriate than redeployment. After the investigation, the Claimant's TU representative asked for the suspension to be lifted or that she be moved to a non-security role. Miss Tibbles reviewed this and decided not to do so because the allegations were serious. She also took into account Ms Kaur's rumours email (see below). The Respondent refused the request but did not give these reasons to the Claimant at the time. On suspension the Claimant was given a 'wellbeing contact' whom she did not know.

55. After the meeting the Claimant sent a text to the note-taker thanking her. The note-taker reminded her not to contact employees. The Claimant apologised and said she thought he had only said witnesses (240). (At the time she sent the text I find that is what she had been likely told.) The letter sent afterwards to the Claimant confirming her suspension told her not to contact 'colleagues' without prior permission. Ms Tibbles did not explain in her evidence why she considered the Claimant's text of thanks to the note-taker sufficiently serious to be regarded as a further disciplinary allegation. She describes it as a breach of the suspension conditions, though had she investigated this matter she would have seen that the suspension checklist stated 'witnesses', so even that was not clear. Nor has anyone given evidence as to why a person suspended is not able to contact *any* employee in the business (there being 6000 of them) rather than potential witnesses. As the Claimant pointed out, her long service meant that many of her friends were also colleagues, and she was deprived of support from friends at a time she needed it.

11 March 2019 contact with AJ

56. During the breaks in this meeting the Claimant sent two texts to AJ telling her it looked like they want to launch an investigation against the Claimant as well and that she had asked for a representative. She later deleted those texts.

Investigation

57. Miss Tibbles interviewed the Claimant, AJ, SA and made enquiries by email of Mr Parker, Ms Kaur and the Claimant's line manager.

58. Ms Kaur wrote to her of rumours that she had heard about the Claimant's contact with others during her suspension and that they were shocked Ms Kaur could have questioned the Claimant's decision making and they were not prepared to give their name for 'fear of repercussions'. This email was added to the bundle. Miss Tibbles took it into account in the decision to continue suspension. The allegations within it could not be investigated because it was about rumours. During the disciplinary hearing it was objected to, but Mr Jhuti stated he thought it pertinent and relevant. Although he did not take in into account in reaching his final decision.

59. Miss Tibbles prepared an investigation report, which is dense, complicated and not easy to follow. (I have some sympathy with Miss Tibbles: it has been hard for me to extract the key strands from the evidence before me and this judgment is not a model of brevity.) Doing

the best that I can, I summarise it below.

60. In relation to 18 December, Miss Tibbles concluded that:

60.1. a potential threat item - a plastic grenade – entered airside at 19.14;

60.2. the Claimant was made aware of it at approximately 20.30;

60.3. no attempt was made to locate the passenger;

60.4. LV finished her shift at 21.00 and no attempt was made to locate her;

60.5. no code 97 was called when that was the correct process nor was the matter escalated to the AOM (236);

60.6. at 21.38 AJ sent an email to the Claimant summarising events and attaching the SEMS image;

60.7. documents showed enhancements had been used on the bag;

60.8. she appended the Code 97 process to her report.

61. In the investigation the Claimant had referred to the Compliance officer being present when reviewing the image and CCTV with AJ (100, 132, 230). She did not interview that officer.

62. Miss Tibbles set out in her report in detail the ways in which she concluded that the Claimant had given inconsistent accounts about 18 December. Most importantly:

62.1. the Claimant had originally stated to the LV fact-find that AG approached her around 16.00. Then to Mr Parker that this was about 15.00. (Compared to AJ's email that it was around 19.00);

62.2. the Claimant told Mr Garrett that she did not call a Code 97 because the officer had gone home and she had not found out about it for 6/7 hours (she said about 5 hours to Mr Parker);

62.3. AJ had stated that no Code 97 had been called because the Claimant did not think it was high risk. But the Claimant had said they agreed the image was not a concern. And she also said it was 'serious' and they had removed LV from screen reading.

62.4. At their meeting the Claimant did not think the image matched a plastic grenade but that she had described it as such in her earlier email.

63. Miss Tibbles asked Mr Parker questions about the Code 97 procedure in particular '*Would you expect the TSM to call a code 97 even if the item went through the machine approx. 90 minutes before they were notified?*'

In response Mr Parker attached a copy of the process and said the '*TSM would then escalate to the AOM who is the risk assessor for the airport who may work in conjunction with [the police] to take any necessary action.*'

64. In relation to the SA disciplinary and Chohan email, Miss Tibbles' report includes the following:

64.1. on 27 March 2019 (2 months after the SA disciplinary), SA said she had not brought up the Chohan email and she did not recall whether anyone else had mentioned it;

64.2. on 11 March 2019, unaware of the allegation against her, at the fact-finding meeting with Mr Parker the Claimant said she could not remember but they may have spoken about the Chohan emails. Later she said she could remember referring to the Chohan email in her conversation with AJ on 27 February;

64.3. on 3 April 2019, in Miss Tibbles' first investigation meeting with the Claimant, the allegation of making false statements in relation to disciplinary cases was described as *'namely messaging a colleague regarding ongoing disciplinary investigations on 27 February and 11 March'*. Miss Tibbles did not ask about the Chohan email;

64.4. on 12 April 2019 (2.5 months afterwards), asked whether she could confirm whether SA had mentioned the Chohan email at SA's disciplinary hearing, AJ said '*not to best of my knowledge'*;

64.5. on 25 April 2019, in Ms Tibbles' reconvened the investigation meeting with the Claimant, she asked about the SA disciplinary meeting and why the email was not mentioned in the notes. The Claimant again referred to the discussion of the knife process in those notes (which was what the email was about). She was asked why she had discussed the SA case with AJ on 27 February. The Claimant said she was off sick and on that day was doing admin work including the outcome letter for SA. She told AJ '*by the way I just found email from [Chohan] reference the knife process'*. Miss Tibbles summarised this issue in her report: '*No email was recorded in SA's meeting notes despite GE saying SA mentioned it in her hearing, SA confirms she did not mention it.*'

64.6. SA was not a Security Manager at the time the Chohan email was sent to SMs;

64.7. Ms Kaur was not questioning the outcome of the SA disciplinary.

65. In relation to the phone call with AJ on 27 February 2019, Miss Tibbles cited the relevant parts of AJ's letter of 5 March, and the following problems with the Claimant's account that:

65.1. AJ had told the Claimant she was under investigation, whereas

AJ said the opposite;

65.2. that AJ had said in her meeting that the Claimant was trying to remind her of things in SA's meeting that did not happen. The Claimant had mentioned to her the Chohan email and she did not recall the Chohan email being mentioned at the disciplinary.

66. Miss Tibbles concluded in her report, however, that she could not establish why the Claimant had called AJ; or why she had mentioned the Chohan email. Thus at this stage there was no allegation as to the Claimant's motive for referring to the Chohan email in the outcome letter. Mr Jhuti (the decision maker) accepted the investigation report did not allege that the Claimant had falsified her reasons for not sanctioning SA.

67. Miss Tibbles sets out the wording of the texts sent to AJ on 11 March 2019 during the fact-find with Mr Parker. Miss Tibbles set out the wording of the texts sent between the Claimant and the note-taker. She also referred to Ms Kaur's 'rumours' email.

68. Her summary referred the 18 December threat incident; the SA hearing and the 'incidents' on 27 February and 11 March 2019. She recommended '*progress to a disciplinary hearing for gross misconduct based on the facts established and [the Claimant's] inconsistent explanations for her actions*'.

69. Miss Tibbles provided notes to the Claimant but did not allow her to correct the notes on a word-processed document using track changes. The Claimant sent her some significant changes by hand, colour-coded.

70. On 14 March the Claimant's TU rep asked for her email access to be reinstated so that she could look for evidence. The following day Miss Tibbles effectively agreed this asking for how long and when and requiring that the Claimant did not contact colleagues. Neither the Claimant nor her representative responded.

Invitation to Disciplinary Hearing

71. On 20 May 2019 the Claimant was invited to a disciplinary hearing to be chaired by Mr Jhuti, Head of Landside and VIP Operations. It was to deal with the following allegations, that could amount to gross misconduct:

- '*Deliberately making a false statement or dishonest conduct in relation to the Company, its customers and employees*
- *Failure to follow a security process/procedure namely, escalating a potential threat item which entered the CPRSA*
- *Breaching suspension conditions'*

72. The Claimant was informed: '*If there is any evidence you wish to be considered at the hearing, please provide copies at least 48 hours prior to the hearing. If you do not have those documents, please provide details so that efforts can be made to obtain them.'*

73. On 11 June 2019, the Claimant's TU representative asked for the pack to

be numbered, for ease of reference at the hearing. Mr Jhuti invited the TU to do so. The representative also objected to the 'rumours email' and asked for Ms Kaur to provide evidence and attend as a witness. This request was denied, although Mr Jhuti indicated it could be discussed at the hearing. Mr Jhuti stated he saw her email statements as pertinent and relevant.

Disciplinary Hearing

74. The disciplinary hearing took place on 17 June 2019. Mr McGrath was the Claimant's TU representative.

75. The Claimant asked what the false statements in the allegation referred to. Mr Jhuti stated, '*it is to do with the email attachment*'. Mr McGrath noted that the email from Mr Chohan, '*was a group email sent to many so how it is a breach of confidentiality*', which suggested he did not understand the allegation, but Mr Jhuti did not correct him and explain his understanding. Later in this meeting, Mr Jhuti said "*I want to talk about false statements. SA was investigated. Talk me through'*. The Claimant explained she did not remember it all. Towards the end the Claimant again asked what the false statements were, and Mr Jhuti said, '*What we have discussed regarding the email and texts etc*'.

76. The Claimant again raised her concern about Ms Kaur but Mr Jhuti did not consider the question whether she should be called as a witness.

77. Mr Jhuti did not put the allegation to the Claimant that she had falsified her reasons for not sanctioning SA or even the gist of it (one of his reasons for the dismissal). He did not explore her reasons for not sanctioning SA. Nor did Mr Jhuti make it clear at the hearing to the Claimant that the allegation was that she had made a false statement in suggesting that SA had mentioned the Chohan email at the hearing. In his evidence to me Mr Jhuti agreed with these propositions.

78. On the issue of the Chohan email, the Claimant explained why it was relevant to the SA disciplinary, that it describes a change of procedure. Mr Jhuti stated in the disciplinary that he understood she attached it in good faith. She also said she thought the email had been sent many times. In his evidence to me he understood that an email showing they had not breached procedure would be relevant to whether or not a person was disciplined.

79. The Claimant provided Mr Jhuti with a document showing which parts of the AJ letter she agreed with and not. While Mr Jhuti likely stopped her from going through it in detail, the notes record that she provided it to him and explained it. She disputed that she had told AJ she was being investigated and she denied that she had said anything about the matter.

80. The Claimant told Mr Jhuti that she had asked AJ what the concern was and that it was a toy plastic grenade. She asked AJ whether they normally act on that and AJ told her it would normally be rejected for search although it was plastic and not a reason for concern. The

Claimant told Mr Jhuti that she had helped design a process where a passenger could be pin-pointed. She said if she had thought it was a concern they could have used that process quickly. She said she and AJ did not have concerns about the image. If they had had concerns they would have called the AOM. He asked her why they had concluded there was no malicious intent and the Claimant said 'we checked CCTV, they didn't appear to have'. Her representative pointed out that there was a Security Manager Compliance involved and they did not think to call a Code 97.

81. The Claimant stated that, looking back, she would have looked at the item more carefully, checked the screen and maybe called the AOM. At the end of the first meeting, the Claimant said '*In relation to Code 97 I'm very sorry [for] what I didn't do'*.

82. The meeting was adjourned.

Ms Hill

83. Mr Jhuti then obtained evidence from Ms Hill, Head of Security Compliance & Training. Her job was to convert security regulations into operating protocols.

84. She explained that the SM captures as much information as possible and escalates to the TSM. The overarching objective of the TSM is to stop the threat. Mr Jhuti asked what the remit of the TSM was in the scenario where there was a delay in escalation and a potential threat item has passed unsearched. Ms Hill explained the SM had to gather all information, the description of the passenger, the item and how it was carried and any supporting information. The TSM is responsible for stopping the threat going into the restricted area. '*Where there has been a delay I would expect that to play a part in the decision making and the TSM to take all the information and make a decision*.' In answer to a further question she agreed in such a scenario that the AOM should be informed.

85. Mr Jhuti did not feel the need to consult an expert on the image because all had agreed it was shaped like a grenade.

Reconvened hearing

86. At the reconvened disciplinary hearing on 24 June 2019, Mr Jhuti provided notes of his interview with Ms Hill to the Claimant at the start. She agreed with Ms Hill's evidence. She explained because she had not assessed the image as a threat, she had not followed the process. She said she was not justifying that but was explaining why she had acted. She emphasised that others had agreed, that she had thought the item was a toy: the concern was the shape but it did not look dangerous.

87. The Claimant said now she would probably have looked at the CCTV and found the passenger. She stated '*looking at everything I am aware I that I have made an error*'. She pointed to it being the first time in 13 years. She was '*devasted'* that she was not able to explain her decision in a way that was acceptable to herself and was sorry. Her TU representative

emphasised that this was a mistake rather than a breakdown in trust.

88. After 16 minutes break Mr Jhuti announced the dismissal reading from 'outcome letter notes'.

Reasons for Dismissal

89. In my judgment the Mr Jhuti dismissed for three reasons:

89.1. Falsifying the reasons for not sanctioning SA

89.2. Breach of confidence in discussion her disciplinary with AG;

89.3. Breach of security in failing to call a Code 97.

90. These reasons were set out in sometimes around about fashion in his letter of dismissal dated 8 July 2019 but that is what I draw from it and his oral evidence in totality.

90.1. In his letter of dismissal he stated that no one questioned her decision-making in the SA case but, after setting out the competing evidence about the Chohan email, he found '*no reason why SA would fabricate her version of events. I believe you were dishonest in relation to the case and falsified reasons for not sanctioning SA'*.

90.2. In his letter of dismissal he stated there was a reasonable belief that the Claimant had discussed AJ's case with her in the call on 27 February, which was unprofessional and a breach of trust and confidence.

90.3. In his letter of dismissal he stated that once informed of a potential threat item going into the CPRSA, it was her responsibility to '*inform and escalate as appropriate to the correct level'*. Since the investigation was initiated into the matter her version of events was inconsistent. She should have contacted the AOM. This was to describe the Code 97 procedure.

91. Unsurprisingly, Mr Jhuti decided not to discipline for the text to the suspension meeting note-taker, because it was not trying to sway her. But he went on to state '*your explanation that you were not aware you could not [contact] anyone is not one I believe as you have conducted suspensions yourself in your role as a TSM for several years.*'

92. In his letter of dismissal he said he had no confidence that 'this type of conduct' will not be repeated' and it wasn't the behaviour to be expected of someone in her position.

93. He did not refer to having taking into account her clean disciplinary record or length of service or apology. Nor did he consider an alternative non-security role.

94. In his evidence to me Mr Jhuti explained that it was open to a TSM to

take no further action on a security breach if there had been a delay but only after they had obtained all the information: the CCTV, and the data that helped find the passenger. Here there had been no determination about whether passenger was still in the airport and that was part of the TSM role. There is a difference between overall threat assessment which is for the AOM and calling the Code 97 that a security breach had occurred which was for anyone, including the TSM.

95. Mr Jhuti stated that he regarded this breach of security to be serious because it was up to the TSM to make the call, once it was escalated to her and she did not do so. A threat item had entered the CPRSA and no attempt had been made to retrieve the item and passenger. He considered the Claimant was well aware of the procedure. Just because there had been no damage in his view did not mean it was not serious: this could have been a dummy run and, after profiling the passenger, the police may have been called. The Code 97 made all of that retrieval of information possible by alerting all to the issue.

96. He did not agree that a lesser sanction was appropriate because the TSM role was an individual one. *'You can't have a TSM dismissing a threat item a breach of security and not declaring it*.' In the light of this I am satisfied that he considered lesser sanctions at the time.

97. I am not satisfied however that Mr Jhuti expressly took the Claimant's clean disciplinary record and length of service into account in assessing the level of sanction. This is because it would have been referred to somewhere in his notes or decision letter if he had done so.

98. I accept Mr Jhuti's statement that he would have reached the same decision if it had only been the breach of security issue that was before him. This was because his view that the Respondent needed to retain confidence in the person holding the TSM role. It did not matter whether the item was plastic or not: it needed to be followed through and the other thing that was missed was an opportunity to apprehend the passenger.

99. In his evidence to me Mr Jhuti accepted that if an item was viewed by X-ray with enhancements it could be allowed through. This however was not known at the time the Claimant was making her decision.

Appeal

100. The Claimant appealed with detailed grounds. Mr Coen, Director of Security, addressed them in a meeting on 4 September 2019. By letter of 24 September, he upheld the decision to dismiss.

101. After the appeal meeting but before his decision, Mr Coen spoke informally to Mr Jhuti. He did not inform the Claimant about this or share with her what had been said for her comment or provide her with any notes.

102. Mr Coen states that his discussion with Mr Jhuti was regarding the "diligence" Mr Jhuti undertook within his disciplinary considerations relating to Code 97 and the allegation that Mr Jhuti had only relied on

evidence that proved that she had done something wrong. But I agree with the Claimant those matters could have been assessed from the documents without the need to speak to Mr Jhuti and Mr Coen did not explain what it was he sought from Mr Jhuti verbally about this.

103. Similarly, Mr Coen spoke to Ms Hill without informing the Claimant.

104. The first ground of appeal concerned the fairness of the investigation. Part of the objection was that the Chohan email was not included in the pack. Mr Coen rejected this ground on the basis that the Claimant accepted SA would not have received it. But this disregarded that Claimant had asserted in the investigation the email had been sent many times. Nor did it deal with the question why the Claimant falsified her reasons for not sanctioned SA, as decided by Mr Jhuti, when her contention was the email was relevant to the knife procedure.

105. Mr Coen did not accept the Claimant's points about the minutes or organisation of the evidence pack.

106. At the hearing, Mr Coen did not accept that the Ms Kaur 'rumours' email was inappropriate.

107. A further ground was that the sanction was excessive, and alternatives had not been considered. In his evidence to me he considered the matter was gross misconduct because it was serious, given the position the Claimant held. In his evidence (but not his outcome letter) he relied on the Claimant's admission that she made an error. In his oral evidence he first contended she had made a 'conscious decision not to follow' the procedure but then rephrased and called it an 'error of judgment'. I am satisfied that at the time he viewed this as a serious failure to follow procedure not a deliberate decision not to do so. He said he did not believe it would not happen again because it was only late in the process that the Claimant had acknowledged it as a failure. He did not take into account the dishonesty allegation in this regard, but treated that separately. He would have upheld a decision to dismiss on the Code 97 matter alone.

108. I do not accept that Mr Coen considered the mitigation evidence before him that the Claimant had obtained Heathrow stars (a commendation). This was not mentioned in his outcome letter as undoubtedly it would have done if he had considered and rejected it.

109. Mr Coen stated he believed Mr Jhuti had considered length of service. But this is not clear from his decision letter. Nor is it one of the matters Mr Coen states in his evidence he asked Mr Jhuti about. He took this as read. Mr Coen did however take her length of service took into account.

110. On balance I find that neither Mr Jhuti nor Mr Coen considered the Claimant's clean disciplinary record in considering sanction. Neither record this in their outcome letters as they are likely to have done if considering the matter at the time.

111. Mr Coen upheld the appeal on dishonesty because (in his oral evidence) he thought three others had a '*different view or slightly different*

perspective'. He assessed why the others would have a motive for saying something different. He said the crux was that the SA outcome was more lenient, and '*in order to avoid the outcome being challenged, the Claimant had enhanced the evidence brought forward as part of her consideration'*. But there was no evidence that there was any risk the Claimant would be challenged about the outcome. Ms Kaur had made it clear in the investigation, and it was stated in Miss Tibbles investigation, that she did not question the outcome. And, of course, had the Claimant been doing her job properly as a manager she would have searched for any mitigation evidence which would have brought the Chohan email out in any event. He did not appear to take this into account when considering the likelihood that the Claimant had lied about the email or what purpose that would have served. Nor did he appear to consider the possibility that all three simply had different recollections. In my judgement therefore Mr Coen looked only superficially at the appeal on dishonesty.

Disciplinary Allegations against AJ

112. AJ was alleged to have behaved dishonestly. She resigned before these allegations could be decided. Mr Jhuti and Mr Coen were not told about these allegations and therefore could not take into account that there was also a question-mark about her reliability.

Findings of Fact on Wrongful Dismissal Allegations

113. On the evidence I have heard I find on a balance of probabilities that the Claimant made an error of judgment in not calling a Code 97 when she was told that LV had missed a grenade-shaped object or toy in a piece of hand luggage.

114. A grenade shaped object, even if a toy, was a prohibited item because, depending on its actual appearance, it could be used to threaten harm for example by hijacking. It could also have been used for a 'dry run' to see if such an object would pass a search.

115. If such an object was found on X-ray reading, it would have required a rejection for a physical search or to be held in the tunnel while the passenger was questioned.

116. By about 20.30 and before 21.00, AJ, a security manager escalated the matter to the Claimant verbally. As a result of LV missing the grenade-shaped object she was withdrawn from the line. The Claimant said so in an email. She also took the view that this was serious.

117. AJ reported what had happened in writing to the Claimant who read the email soon after it was sent at 21.38. AJ reported the timings (that she had spoken to LV about talking around 19.00 and looked at the images around that time) and provided the relevant X-ray image which was time stamped 19.14. By then I find the Claimant knew the details.

118. I find also by this time that the Claimant should have been aware that what she had been told amounted to a breach of security because a prohibited item had passed through X-ray without an actual search or

profiling.

119. At the time she made her decision the Claimant did not know that LV had used enhancements to look at the object before passing it through.

120. Thus, by the latest 21.38 the Claimant knew that the bag had been let through to airside about 2 hours and 20 minutes previously. This still meant there was a chance the passenger was in the airport and a strong chance that they were in the air. There was therefore still a risk given that the bag had not been searched or the passenger profiled.

121. At this point the Claimant should have called a Code 97 by alerting all on the radio that a breach of security had occurred. The Code 97 alert meant that efforts could be made to identify the passenger. Code 97 is specifically for a breach of security in order to obtain information that enables the threat posed by that breach to be assessed. The Claimant had been involved in setting up the system to quickly pinpoint the passenger. The matter could then be escalated to the AOM for their final decision on the threat: whether the police and airline should be contacted.

122. I do not accept that the Code 97 procedure was in doubt when there had been a delay: there was still a chance here that the passenger was in the airport or in the air. The Code 97 procedure was designed for when security had been breached in just that situation. I find the Claimant knew about the procedure. Here the breach of security was in not searching the bag or profiling the passenger. The item was a threat item and that threat needed to be assessed on the information the Code 97 would likely bring.

123. In not calling a Code 97, I find the Claimant relied upon the view of the Security Managers, subordinate to her, that the object was a toy and of no concern. But she knew they had reached their view only by looking at the image without enhancements and the CCTV, which was not the procedure to take for such an object: there had been no bag search or profiling of the passenger as the procedure required.

124. I recognise that Security Managers have more day-to-day experience of X-ray reading than did the Claimant. And that, at the time, she genuinely relied on their view in reaching her decision. But, she was the senior security manager for the terminal. Her training meant she too could assess images. The matter had been escalated to her. The procedure required her to call a Code 97 in order that as much information could be obtained about the passenger before the AOM ultimately assessed the threat. This is why, doubtless, the Claimant admitted at the end of the first disciplinary hearing that she had made a mistake and apologised and, in the reconvened hearing, stated she was unable to explain this error to her own satisfaction. It would have been far better for her to accept this earlier.

125. I do not take into account her different recollections of the timings in the fact finds for LV or AJ. These were some weeks after the event and she is unlikely to have had the timings at her fingertips. Nor was she offered

the documents to refresh her memory.

126. In my judgement the Claimant did not falsify her reasons for the outcome in SA's case. The Claimant had decided on the day of the disciplinary that what SA had failed to do was not serious enough to warrant a disciplinary sanction. This has never been questioned. The Claimant therefore had no reason to falsify her reasons.

127. The Claimant's notes of the SA disciplinary show she had discussed the knife procedure with SA. The content of the Chohan email was about the knife procedure. I accept the Claimant's recollection that it was discussed in the meeting: this is entirely consistent with her note that knife procedure was discussed. I conclude the Claimant's recollection that SA raised the email was a genuine one. All of those involved may well have had genuine, but different recollections in this regard some months later. Either way the Chohan email was relevant and the Claimant acted properly by attaching it to her outcome email. I do not accept Miss Thomas' submissions that it was important to know *who* had raised the email: it did not make a difference to the Claimant's view that SA had not done enough in breach of the procedure to warrant disciplinary action, it merely supported it. The email described that procedure.

128. I find that after the AJ fact-find the Claimant telephoned AJ and they spoke for 36 minutes. They had been close at work with AJ relying on the Claimant for support. It was not unusual for them to speak.

129. The Claimant denies talking about the fact-find.

130. On the other hand I have seen AJ's letter of 5 May, written about a week after the call. In which she stated the Claimant had told her she had been involved in a fact-find about the investigation into AJ. AJ recalled that the Claimant had said '*she told this person she felt I was doing my job and that I went above and beyond what they expect of SM's and that she didn't feel I had done anything wrong'*. Of course AJ was under investigation and may have had the motive to push the spotlight onto the Claimant. But this statement is uncannily similar to what the Claimant did in fact say in the fact-find about AJ, namely that AJ had gone 'over and above' what was expected of her.

131. On the strength of the strong similarity between what AJ recalls the Claimant told her and what the Claimant is recorded as having said in the fact-find, and that AJ would not have known about those words from any other source, and because the letter was written close to the time of the conversation, and because the Claimant was wont to offer AJ support, I find it likely that the Claimant did tell her that she (AJ) was being investigated and did tell her some of what she had said in the fact-find. I find that this was unprofessional conduct and in breach of the Claimant's obligations under the disciplinary policy to keep disciplinary matters confidential

Submissions

132. Counsel gave me much to consider in their excellent questions during he evidence and their persuasive, intelligently thought-through submissions

made in writing and supplemented orally. I refer to their written submissions.

Legal Principles

133. The employer must show a potentially fair reason for dismissal within section 98 of the ERA. All agree this was a dismissal for the potentially fair reason of conduct, section 98(2)(b).

134. Section 98(4) of the ERA then requires the Tribunal to determine whether in the circumstances (including the size and administrative resources of the undertaking) the employer acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. 'Equity' includes a consideration of whether or not a fair procedure has been followed.

135. Whether the Respondent acted reasonably or unreasonably in treating any misconduct as sufficient reason for dismissal, is considered objectively, by reference to the standards of a reasonable employer, not the Tribunal's subjective view. This need to apply the objective standard of a reasonable employer is often referred to as the range of reasonable responses test: Iceland Frozen Foods v Jones [1982] IRLR 439. Depending upon the misconduct alleged, there may be a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own view for that of the employer. The range of reasonable responses is not infinitely wide. It is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking.

136. Inconsistency or disparity may be relevant to the overall assessment of reasonableness under s.98(4). Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 is still the leading case on inconsistency. The third leg of its rational is relevant here: evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances. But this latter argument should be scrutinised with care.

137. BHS Ltd v Burchell [1980] ICR 303 seta out well-established questions as to a fair procedure in conduct cases:

137.1. did the employer genuinely believe that the employee had committed the act of misconduct;

137.2. was such a belief held on reasonable grounds; and

137.3. at the stage at which it formed the belief on those grounds, had the employer carried out as much investigation as was reasonable in all the circumstances of the case?

138. In deciding whether the dismissal was fair or unfair, the Tribunal must consider the whole of the disciplinary process. Early defects may be cured by later procedural steps. The Tribunal also tests the fairness of procedure, including the conduct of investigations, according to the objective standard of the reasonable employer, Sainsbury's Supermarket v Hitt [2002] EWCA Civ 1588.

139. The Tribunal must have regard to the ACAS Code of Practice on Discipline ('the ACAS Code'). An employer that fails to follow its own procedure or the principles set out in the Code will rarely be found to have acted reasonably.

    139.1. Paragraph 9 states that if it is decided there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct … to enable the employee to prepare to answer the case at a disciplinary meeting.

    139.2. Paragraph 12 states, at the disciplinary meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should be given an opportunity to raise points about any information provided by witnesses.

140. A reasonable investigation and procedure usually requires an employer to be even-handed in its approach—looking as much at exculpatory evidence as that which shows guilt. Where there are serious charges with particularly serious consequences, reasonableness may require a more scrupulous investigation.

141. In P v Nottinghamshire CC [1992] ICR 706 the issue was whether a failure to consider alternative employment prior to dismissal rendered it unfair. In an appropriate case, where the size and administrative resources of the employer permit, it may be unfair to dismissal an employee without first considering whether they can be offered some other job notwithstanding that it may be clear that they cannot be allowed in the original job.

142. In Strouthos v London Underground Ltd [2004] EWCA Civ 402 the case concerned whether the employee had been dismissed for the disciplinary charge. Pill LJ observed '*It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed …'*.

143. In assessing compensation, the Tribunal must consider the question what were the chances of a fair dismissal taking place**,** Polkey v A E Dayton Services Ltd [1987] IRLR 503, HL. The task is to identify and consider any evidence, which it can with some confidence deploy to predict what would have happened had there been no unfair dismissal. This is necessarily a speculative exercise. It does not call for complete

certainty or require the Tribunal to predict all that would have occurred. The question is whether the Tribunal can make any assessment on the evidence with sufficient confidence about what is likely to have happened, see Software 2000 Ltd v Andrews and others [2007] ICR 825 EAT. It can do so by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event.

144. A basic award may be reduced pursuant to s.122(2) ERA, if the Tribunal considers any conduct before to dismissal was such that it would be just and equitable to do so.

145. Where any action by the Claimant caused or contributed to the dismissal, the Tribunal shall reduce the compensatory award by such proportion as it considers just and equitable, section 123(6) ERA.

146. The Tribunal will address: (i) the relevant conduct; (ii) whether it was culpable or blameworthy; (iii) whether it caused or contributed to the dismissal (for the compensatory award) and (iv) to what extent should any award be reduced.

147. As to what blameworthy conduct comprises, Brandon LJ in Nelson v BBC (No 2) [1980] ICR 110 observed:

> *'The concept … includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved.'*

148. As for the size of the reduction, and whilst the Tribunal retains a discretion to do whatever is just and equitable, in Hollier v Plysu Ltd 1983 IRLR 260, the EAT suggested that the contribution should be assessed broadly and should generally fall within the following categories: wholly to blame (100 per cent); largely to blame (75 per cent); employer and employee equally to blame (50 per cent); slightly to blame (25 per cent).

149. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 allows me to consider whether to increase any relevant award where I find there has been a relevant, unreasonable failure to follow the ACAS Code, if it is just and equitable to do so.

150. In Lawless v Print Plus 0333/09 Underhill P acknowledged that the relevant circumstances to be taken into account by tribunals when considering ACAS uplifts would vary from case to case but should always include the following: whether the procedures were applied to some extent or were ignored altogether; whether the failure to comply with the procedures was deliberate or inadvertent; and whether there were circumstances that mitigated the blameworthiness of the failure to comply.

Breach of Contract

151. The Claimant's claim for breach of contract (wrongful dismissal) is brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, article 3.

152. At common law it is well established that gross negligence can amount to repudiatory conduct. I referred counsel to Adesoken v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22, [2017] IRLR 346, which approved, the observations of Lord Jauncey in Neary. Elias LJ held, at para 23-24:

> *'The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence.*
>
> *The question for the judge was, therefore, whether the negligent dereliction of duty in this case was 'so grave and weighty' as to amount to a justification for summary dismissal.'*

153. Relevant to this determination will be the nature of the employer, the role of the employee and the degree of trust required.

154. Mr Patel referred me to the test for dishonest in Ivey v Genting Casinos (UK) Ltd (t/a Crockfords Club) 2018 AC 391, SC at [74]: '*where a question arises as to whether conduct is in fact dishonest, the fact-finding tribunal must first ascertain the actual state of the individual's knowledge or belief as to the facts. The question whether the conduct was honest or dishonest should then be determined by applying the objective standards of ordinary decent people.'*

Application of Facts and Legal Principles to Issues

Unfair Dismissal

155. I must consider the reasons I have found for the decision, in summary

155.1. the failure to follow Code 97 and escalate to the AOM;

155.2. discussing AJ's case with her;

155.3. falsifying reasons for not sanctioning SA.

156. I have not doubted the genuineness of Mr Jhuti's reasons. I will go onto consider whether they were reached after a reasonable investigation on reasonable grounds.

Reasonableness of Investigation

Code 97

157. In my judgment, considering the matter overall, the Respondent made a reasonable investigation into the Code 97 matter. It obtained the flow chart and sought information from Mr Parker and Ms Hill. It also asked

questions of the Claimant about it.

158. I do not agree that a reasonable employer would have obtained an expert view on the image, because all agreed it showed a grenade-shaped object or toy. That was enough to put it in the prohibited objects list.

159. I do not agree that it was unreasonable not speak to 'Sanj' the Security Compliance officer who reviewed the images and CCTV with AJ. One of the Claimant's explanations was that other experienced officers had not considered the matter a threat. But the breach of security was that the object had passed without search or being held. The whole point of the Code 97 was to use it to obtain as much information as possible including from the passenger in order then to assess the threat, rather than to rely on only part of the picture.

Discussion of AJ's case

160. In my judgment there was probably a reasonable investigation into the discussion of AJ's case on 27 February and the texts sent to her on 11 March. The Respondent had AJ's letter about the call and asked the Claimant questions about it. The Claimant gave her side of the story including in the colour-coded document to Mr Jhuti.

Falsifying Reasons for not sanctioning SA

161. I do not consider there was a reasonable investigation into whether the Claimant had falsified her reasons for not sanctioning SA. This is because the matter was not reasonably investigated with the Claimant herself. This allegation was not put to her so that she could understand it and then answer it. She could not reasonably know from the suspension letter; the investigation report; the invitation to the disciplinary hearing or Mr Jhuti's responses to her questions about this charge at the hearing, what it was she was alleged to have said or done falsely or dishonestly. Any investigation into the matter with her, therefore, was unreasonable because it did not give her the opportunity to comment knowing the allegation against her.

    161.1. In the suspension letter the statement was 'false and dishonest conduct' which gave the Claimant no clue as to what she was supposed to have done.

    161.2. Miss Tibbles did not put the allegation to her in the first meeting. The false conduct was about messaging a colleague at that stage.

    161.3. Miss Tibbles report did not state the allegation. Indeed the report states she could not establish why the Claimant had mentioned the Chohan email. There was no sense in the report that the allegation was falsifying reasons for not sanctioning SA.

    161.4. At the disciplinary hearing the Claimant asked what the false statements were and was not provided with any kind of reasonable answer by Mr Jhuti when he said 'it is to do with the email attachment'. Her trade union rep's question about breach

of confidence clearly showed he misunderstood this allegation. And the Claimant's question at the end was again not answered so that she could understand what dishonest behaviour was alleged.

161.5. Mr Jhuti stated at the disciplinary hearing his view that the Claimant had attached the Chohan email to the outcome letter in good faith. This did not suggest to the Claimant that she was going to be disciplined for falsifying her reasons for the SA outcome.

161.6. The Chohan email was not available to Mr Jhuti for him to assess whether or not it was relevant to the decision on sanction.

161.7. While it could be said that over the course of many interviews the employer garnered the facts about the email, that is not enough to amount to a reasonable investigation if the central allegation is not put to the Claimant so that she can answer it: her motive for the conduct she was ultimately accused of was not investigated at all. No reasonable employer would have reached the conclusion Mr Jhuti reached without enquiring about her motive for falsifying her reasons.

162. I have considered whether the appeal process righted this part of the investigation. But, by Mr Coen informally discussing the case with Mr Jhuti and not informing the Claimant what was said, he created an appearance of bias. The whole point of an appeal manager is that he remains impartial and remains independent from the decision-maker. (Mr Coen's conduct is all the more surprising when the Respondent created a disciplinary allegation out of the Claimant contacting a mere note-taker in the suspension meeting.) The Respondent understood the need for parties in a disciplinary process not to talk to each other informally about it: any reasonable employer would have appreciated that what goes for witnesses also goes for decision-makers. It was concerning that Mr Coen could not see any difficulty in his speaking to Mr Jhuti in this way. I do not consider therefore that the appeal was independent of Mr Jhuti's decision and did not therefore solve any unfairness in Mr Jhuti's reasoning.

163. It was probably reasonable not to allow the Claimant to call Ms Kaur because she had stated in one of her emails that she did not question the outcome. This was why the Claimant wished to call her but was clear from the investigation report that Ms Kaur had not questioned the outcome. And while her 'rumours' email was inappropriate to be included in the investigation pack without investigation, it does not appear to have been taken into account by either decision maker.

164. The notes were not collated to include the Claimant's corrections. This is poor practice. All recollections of the interviews should be included on the same document, shown differently if they are disputed. However in this case the Claimant's comments were included elsewhere in the documents for the decision-maker and I cannot say this was outside what a reasonable employer would do.

165. Contrary to her submissions, the Claimant was given an opportunity to seek evidence from documents by the letter in which she was invited to inform the Respondent of the evidence she wished to produce and by Miss Tibbles positive reply on 15 March to her representatives request for access to her emails. She did not take this up.

Reasonable Grounds for decision

Code 97

166. I consider the Respondent had reasonable grounds for its decision that the Claimant failed to follow the Code 97 procedure.

167. First, I do not agree that the Code 97 flow chart was unclear. It states what to do when there has been a breach of security.

167.1. There is a breach of security when a potential threat item has been allowed into the CPRSA without assessment.

167.2. The image the Claimant saw on 18 December showed a potential threat item: namely a grenade-shaped object or toy. Clearly one of the items on the prohibited list and which would normally be held or rejected for search.

167.3. This object had not been held or rejected for search and there was therefore a breach of security triggering the Code 97 process.

167.4. While Mr Parker did not explicitly answer the 90-minute question put to him by Miss Tibbles, in his answer he referred to the escalation process to the AOM which is part of the Code 97 and what the Claimant did not do. This was also described by Ms Hill.

167.5. The Claimant had told Mr Jhuti she had helped design the process whereby a passenger could be pinpointed.

168. Second, from Miss Tibbles' investigation, there was good information for the Respondent to decide that the Claimant had been alerted that the prohibited object had been let through to the CPRSA around 1hr 15 mins to 2 hours and 20 mins later. It followed that there was still a reasonable chance that the passenger was in the airport and very good chance they was still in the air. The matter was therefore not so delayed as there to be no point in calling a Code 97. (In an earlier fact-find the Claimant originally thought she had been informed between 6/7 hours later, but once she saw from the documents that at the latest was 2 hours and 20 minutes.)

169. Third, while the Claimant stated that her reason for not calling the Code 97 was because the Security Managers had no concern after having looked at the CCTV and images, there were reasonable grounds for rejecting this as a reason. It first ignored the fact that, before an object like this was allowed through, more information would normally have been obtained either by way of an actual bag search or by asking the

passenger questions. Neither of these things had been done. The whole point of a Code 97 was to obtain that information before assessing the threat. This is why the Claimant first said she would have called one, but for her memory that there had been a much longer delay. Second, it disregarded that the SM, AJ, had referred the matter to the Claimant as TSM as the procedure allowed. Before the decision the Claimant admitted making a mistake that she could, in the end, not explain acceptably to herself.

170. Finally, there were reasonable grounds for deciding that the Claimant was aware of the procedure. The Claimant initially stated to Mr Garrett that the reason she did not call a Code 97 was that she thought 6/7 hours had gone by and the passenger was gone. The logic of that comment is that, had she known at the time there was some likelihood the passenger was still present, she knew to call a Code 97. By the end of the first disciplinary hearing the Claimant acknowledged her mistake. She repeated this more so at the reconvened hearing and through her representative. Her case was not that the Code 97 was unclear.

Talking to AJ about her case

171. I consider that that the Respondent had reasonable grounds for its decision that the Claimant had discussed the investigation into AJ with AJ.

172. It had good evidence from AJ's letter of 5 March. It stated, in particular, that the Claimant had told her she was being investigated and had told her she supported what she had done. It was reasonable for Mr Jhuti to rely on that letter: it was voluntarily written near the time of the call. It was therefore reasonable for him to decide that the Claimant had told AJ at least some of what she had said in a fact-find into AJ. It was reasonable for him to conclude that this was unprofessional and in breach of trust and confidence: this employer had impressed upon its employees that disciplinary investigations were confidential and not to be discussed with potential witnesses.

173. What Mr Jhuti did not know was that dishonesty allegations were made against AJ as well. It seems to me that this would not have altered his assessment given that both the Claimant and AJ faced such allegations.

Falsifying Reasons for SA Outcome

174. I do not consider there were reasonable grounds for concluding that the Claimant had falsified her reasons for not sanctioning SA. This inevitably follows from there being a lack of a reasonable investigation but I add the further points.

175. But in addition to this there were no reasonable grounds for this decision:

    175.1. First, this was not the allegation initially being looked into. The investigation report does not suggest it as an allegation.

    175.2. Second, there was no investigation into and no evidence that the Claimant had any motive to falsify her reasons for not

sanctioning SA. Indeed HR had not questioned the outcome. This is particularly unreasonable when SA's motive was considered.

175.3. Third, it was stated the email was not referred to in the notes of the meeting when the Claimant had consistently identified that it was under the bullet point on procedure. (The Chohan email was *about* the knife procedure.) The notes could not reasonably be said to be therefore inconsistent with her account.

175.4. Fourth, it was decided SA could not have received the Chohan email but the Claimant's evidence on it having been sent a number of times was not taken into account nor was that investigated further.

175.5. Fifth, at the disciplinary hearing Mr Jhuti appears to have accepted that the Claimant attached the email in good faith to her outcome letter.

175.6. Sixth, all of the individuals at the SA meeting were only asked about this some time later and Mr Jhuti agreed that it is hard to remember exactly what was said in a meeting a while afterwards. AJ's recollection was uncertain. SA could not remember whether the email was referred to by others. There was not the clear cut evidence that it had not been mentioned that the Respondent contends for.

175.7. Seventh, I agree with the Claimant that whoever had raised the Chohan email it was a relevant piece of evidence about the problem before the Claimant and she was right to attach it to the letter.

175.8. In the absence of any motive to falsify; in the absence of any contradiction with the notes of the meeting; in the light of the fact that it was proper to refer to the Chohan email; it is astonishing to me that this was identified as an issue of dishonesty and I do not consider there were reasonable grounds to do so.

176. The dismissal was for all three reasons. I find it to be unfair because the Respondent did not undertake a reasonable investigation or have reasonable grounds for the third of those reasons (falsifying the reasons for the outcome in the SA disciplinary).

177. As a footnote, I should state that Mr Jhuti reached the only possible reasonable conclusion in one respect on the 'breach of suspension conditions' allegation. The Claimant's text could not have been more benign: she thanked the note-taker. The Respondent should be careful in future not to raise technical points as disciplinary allegations when they have no substance. It is officious to do so. The fact that this allegation was added could have raised the question whether those putting together the disciplinary allegations adopted an even-handed approach. Furthermore, Mr Jhuti's suggestion that it was dishonest of the Claimant to suggest she was confused about whether to contact

witnesses/colleagues was plainly an unreasonable one to reach had he reasonably investigated the matter, given that at the suspension hearing she was told not to contact 'colleagues' (see the checklist) and only in the letter after the text was she told witnesses. The Respondent might wish to consider in future whether it is reasonable to limit employees facing disciplinary allegations to no contact with any colleagues rather than with potential witnesses.

Polkey

178. Having found an unfair dismissal, I must next ask whether there was a chance of dismissal if a fair procedure had been followed.

179. I do not consider the Chohan email issue, reasonably investigated, on any day would have led this employer to conclude the Claimant had falsified her reasons for the SA outcome. The Claimant attached a relevant email to a disciplinary outcome letter. There is no evidence, even now, that she had any motive for lying about the disciplinary outcome: one she had already reached long before writing the letter and which was not in question. Her notes show the procedure was discussed. The Chohan email gives guidance about that procedure. It would have been wrong for the manager not to attach it to the outcome letter. It was not reasonable to conclude dishonesty in those circumstances even where the recollections of attendees differed as to what was said. In my clear judgment, this employer, adopting a reasonable approach to the issue, standing back, would not have seen this as a dishonesty allegation.

180. Nevertheless, I then consider what the chances of dismissal were if the Respondent had considered its decision on the two reasons for which it had done a reasonable investigation and had reasonable grounds. I conclude there was 100% chance of dismissal. I base this conclusion on the breach of the security procedure alone. This is because I agree that it had reasonable grounds to decide it was a serious failure to follow security procedure and that, under its own procedure, amounted to gross misconduct justifying dismissal under its own procedures.

180.1. It was plain, by the end of the first disciplinary hearing that the Claimant accepted she was in error. She acknowledged this again at the reconvened hearing. She had attempted to explain it initially by relying on her junior managers' views that the object was not a threat. But even that explanation by the end, she did not find acceptable to herself.

180.2. There was enough information available to the Respondent (for the reasons I have already given) to decide that the Claimant was aware of the procedure.

180.3. The Claimant herself accepted that grenade-shaped objects and toys might be used, depending upon their appearance, as threat items for example in hijacking an aircraft. That this was not actually a grenade is nothing to the point.

180.4. The issue was one of risk not damage. No one knows whether

the object was a trial run and this was a chance missed to identify and profile the passenger.

180.5. The Claimant was a senior manager, the only one in her position in the terminal. Security was the main concern of the Respondent and it had to be able to trust the Claimant in her job.

181. I do not consider there is any inconsistency argument here that would have prevented this employer from fairly dismissing. This is because the others identified by the Claimant are not in truly comparable situations: LV was a much more junior employee; AJ was facing disciplinary allegations but resigned; Mr Chohan did not see the email on the night in question; and in any event both AJ and the other security manager were more junior to the Claimant had had escalated the matter to her. The training scenario identified by Mr Patel was just that: training, it did not present a real risk as this incident may well have done.

182. There are two issues that I have spent a great deal of time considering about the chances of dismissal. First mitigation and second alternative employment.

183. First, in the absence of a clear dishonesty issue, what are the chances Mr Jhuti and Mr Coen would have taken the Claimant's mitigation into account so as not to dismiss. (I have found that at least in some respects in the original decision they did not consider this mitigation.) The mitigating features of her case were significant. She had nearly 13-year, clean record of service and her performance had previously been commended with Heathrow stars. She had also admitted her error prior to dismissal albeit explaining why she had made that error by relying too much on the security officers. This was a one-off error of judgment. The Claimant's involvement in the prior procedure to help pin-point employees showed that she understood the importance of security. Many employers would have counted all of this in her favour and continued her in employment. But the question for me is what *this* employer would have done if it had followed a fair procedure. What is the chance here that this employer would have weighed that mitigation in the Claimant's favour so as not to have dismissed? Security is vitally important to the Respondent's business. It is vitally important that risks are taken seriously. This was therefore a serious error – a well-understood security procedure was not followed and allowed a potential threat item airside. The Claimant was the senior security manager for the terminal. She was the only employee in that position. And finally she had also breached confidence by discussion a disciplinary case with another employee. This Respondent had to have absolute confidence in her. In my judgment, therefore, even though this was a one-off error of judgement, there is 100% chance the Respondent would have dismissed because it the serious failure to follow security procedures that led to heightened risk. Such a dismissal, despite the significant mitigation, would have been within the range of responses of a reasonable employer to have done so.

184. Second, I have not heard evidence of any alternative role that existed the Claimant could have been transferred to. It would have been reasonable

that this role was not in security. On the other hand the Respondent employs a huge number of people. I have concluded, however, there is not the evidence for me to decide that there was any chance of redeployment, especially where there had been such an undermining of trust and confidence in the Claimant through her serious failure to follow security procedures and the loss of confidence that her discussion of the disciplinary investigation with another colleague created.

185. In my judgment, therefore, this is a case in which I can be confident that this employer, having followed a fair procedure, would still have dismissed the Claimant.

Contribution

186. In relation to the basic award I find that there should be a reduction to reflect blameworthy conduct before the dismissal namely the Claimant's serious error of judgment in not calling a Code 97 that day and her breach of confidence in discussing the disciplinary case. (This conduct is reflected in the full Polkey reduction I have made to the compensatory award.) In considering what is just and equitable here I also take into account my own view that the Claimant had significant mitigating factors here: long service, a clean disciplinary record and Heathrow stars reflecting good performance and her admission at the disciplinary hearing that she had made an error. I do not find her guilty of dishonesty (see my wrongful dismissal findings). Taking all of those factors into account, particularly her weighty mitigation, I consider the reduction in the basic award should be 60%.

187. Given that this Polkey decision reduces the compensatory award to zero, I do not need to make a finding on contribution in relation to it.

ACAS Uplift

188. It follows from my decision, that the Respondent breached paragraph 9 of the ACAS Code by failing to notify the Claimant of the false statement/dishonesty allegation so as to enable her to prepare to answer the case at a disciplinary meeting. This allegation was never specified and it left her without a fair opportunity to prepare. If the Claimant had known that in advance she would have been able to prepare her case: that she had not motive; and point to why the content of the Chohan email was relevant to her decision.

189. I find this breach to be unreasonable: there were plenty of opportunities inform the Claimant of the charge and none were taken. The Claimant had queried what the allegation was about and not even then was it set out for her. It is set out simply in the dismissal letter and should have been earlier: *you falsified your reasons for not sanctioning SA*. The consequences of not doing so were real. It is much much harder to defend oneself when one does not know the allegation clearly. A dishonesty allegation is a significant one to make. It is much harder to find a job if you have been dismissed for dishonesty. It is therefore really important that such allegations are set out clearly.

190. I have considered the factors in Lawless.

190.1. I cannot see how this failure is inadvertent, given that the Claimant asked specifically what it was and was not given an answer. For the same reasons there was no mitigating factor for not setting out the dishonest allegation clearly.

190.2. This is only one failure when in other respects the ACAS code was complied with.

191. I consider it would be just and equitable to make an uplift of 12.5% on the award as in my view fairness in relation to dishonesty allegations is really very important and any failure in that regard significant. My uplift would have been the maximum except that procedure was followed substantially in relation to the other allegations.

Breach of Contract Claim

192. The breach of confidence in relation to the AG investigation in my view was not gross misconduct. It was unprofessional and in breach of the confidential nature of the disciplinaries but it did little harm. It was not therefore in my view a fundamental breach of the employment contract. In telling her she was being investigated the Claimant told AJ something she knew already. That the Claimant told her she had given her support at the fact find, AJ would discover if the matter had gone to a disciplinary by seeing the notes of her interview.

193. As to the failure to call a Code 97. At common law, an employer can rid itself of a careless employee at any time if it gives her notice of dismissal. But an employer cannot dismiss a careless employee immediately unless the carelessness amounts to gross negligence: a carelessness so grave and weighty that it shows the employee has disregarded the essential conditions of his contract with the employer. Is this such a case?

194. The factors that go to the Claimant's mistake being grave and weighty are:

194.1. the Claimant was a senior security employee. The only one at her level in the terminal. Security breaches were escalated to her. The Respondent needed to be able to trust her to follow the security procedures: I take into account both Mr Jhuti and Mr Coen's clear evidence about that.

194.2. The Claimant knew the procedure and the procedure was clear.

194.3. The Respondent's own policy stated that a serious breach of security procedure justified instant dismissal.

194.4. The whole purpose of the procedure was to prevent unnecessary security risks. If the Claimant had called a Code 97, more information could have been found out about the passenger, their whereabouts and a better-informed decision made about the risks the object presented.

194.5. As it was, a prohibited threat item had gone airside and there was some chance they were still in the airport and a good

chance the passenger was in the air with it. (It was the risk this presented that was important. It matters not that there was no damage. Risk prevention was part of the Claimant's job.) The consequences could have been very serious. I accept that even grenade-shaped objects could be used to threaten harm and only an actual search or profiling would establish that they could not for sure.

195. The factors that go against this being the type of error that shows the employee has disregarded the essential terms of her contract with the employer are as follows:

195.1. This was a single error.

195.2. It was plainly not a deliberate flouting of the procedure. The Claimant's explanation that she relied on the views of two security managers is, in my view, a genuine one. She does not excuse her error but seeks to explain it in this way.

195.3. The evidence does not point to the Claimant being a worker with a wrong or reckless attitude to security. (Her decision not to sanction SA itself was not questioned.) She had a long and flawless record in security with the Respondent. She had been proactive in helping design the system to pinpoint passengers. She had a clean disciplinary record.

195.4. The Claimant admitted the error before the decision to dismiss and apologised.

196. I carefully weighed those factors before reaching my decision. This has taken me some time. I have given full weight to the obvious success that the Claimant had had in her security career with the Respondent and that this was a one-off failure. Nevertheless I find it did amount to gross negligence and entitled the Respondent to dismiss without notice. The factors that point towards this conclusion weigh more heavily than those against. This was, in my judgment, a grave and weighty error. I weigh in particular the seriousness of the risk that the Claimant's failure to call a Code 97 presented: that a security breach had been identified, a threat item left to go airside unsearched and a lost opportunity to obtain the kind of information to properly assess the threat. Not to call a Code 97 on this occasion was therefore in my judgment a serious breach of security. The Respondent's own procedure referred to serious breaches of security policy justifying instant dismissal. I also weigh heavily the Claimant's senior and unique position in security in Terminal 5. The matter had been escalated to her. I agree with the Claimant that it is an unusual and hard thing indeed to lose a job for a single mistake, but the contract and the law allows for such an outcome and I find here there was no breach of contract in dismissing summarily.

Remedy

197. Given that my findings mean the remedy is of the basic award only and that is a matter of calculation, I set it out in the appendix attached. There is no need for a further remedy hearing.

_____

Employment Judge **Moor**

_____

Date : 05 August 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....17 August 2021.....

..... THY.....
FOR THE TRIBUNAL OFFICE

APPENDIX ONE

REMEDY CALCULATION

BASIC AWARD

The Claimant worked 12 complete years to the effective date of termination.

She was 46 at the effective date of termination.

Weekly pay is capped at £525.

Basic Award =

5 full years (worked when 41 or older) x 1.5 7 years x 1 14.5 years x 525	**7,612.50**
Contribution Reduction 60% (4567.50) =	3,045.00
ACAS Uplift 12.5% x 3045 = 380.63	**£3,425.63**