EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105597/2020 (V)

Held via Cloud Video Platform (CVP) on 30 November & 1-3 December 2021

Employment Judge Sangster
Tribunal Member Watt
Tribunal Member Burnett

Mr A Jeffrey	**Claimant** **In Person**
Secretary of State for Home Department	**Respondent** **Represented by** **Ms J Forrest** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's complaints of unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments do not succeed and are dismissed.

REASONS

Introduction

1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face-to-face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.

2. The claimant presented complaints of unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments.

3. The respondent admitted the claimant was dismissed, but stated that the reason for dismissal was conduct, which is a potentially fair reason. The respondent maintained that they acted fairly and reasonably in treating

misconduct as sufficient reason for dismissal. They denied that the claimant had been subjected to disability discrimination.

4. At an open preliminary hearing, held on 26 May 2021, Employment Judge Porter determined that the claimant was a disabled person for the purposes of the Equality Act 2010 (**EqA**), by reason of anxiety and depression, in the period from August 2016 to 20 August 2020.

5. The respondent denied that they were aware that the claimant was a disabled person at the relevant times.

6. The respondent led evidence from five witnesses, as follows:

    a. Ben Wallace (**BW**), Assistant Director Border Force West with the respondent;

    b. Simon Myszker (**SM**) Border Force Higher Officer with the respondent;

    c. Keith Stadler (**KS**), Higher Executive Officer with the Professional Standards Unit for the respondent;

    d. Lisa Fraser (**LF**), Senior Executive Officer with the respondent; and

    e. Patricia Hamill-Morgan (**PHM**), formerly Assistant Director at Border Force, currently Senior Project Manager with the respondent.

7. The claimant gave evidence on his own behalf and called two witnesses:

    a. Neil Oldland (**NO**), now retired, formerly Border Force Officer with the respondent; and

    b. Peter Heslop (**PH**), Border Force Officer with the respondent and trade union representative, Immigration Service Union.

8. A joint set of productions was lodged, extending to 736 pages. Parties also agreed a statement of facts, which was included in the joint set of productions.

Issues to be determined

9. At a case management preliminary hearing held on 17 September 2021, the issues to be determined were discussed and agreed as follows:

10. *Unfair dismissal*

a. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (**ERA**)? The respondent asserts that it was a reason relating to the claimant's conduct.

b. If so, was the dismissal fair or unfair in accordance with s 98(4) ERA?

Discrimination Arising from Disability – s15 EqA

c. Did the respondent know, or could the respondent reasonably have been expected to know, that the claimant had a disability?

d. Did the following thing(s) arise in consequence of the claimant's disability:

i. The claimant's failure to accurately input his annual leave dates into the respondent's system; and

ii. The claimant's quick temper, irritability and mood swings.

e. Was the claimant treated unfavourably by the respondent when they dismissed him?

f. If so, was this due to something arising in consequence his disability?

g. If so, was the treatment a proportionate means of achieving a legitimate aim? The respondent relies upon the following:

i. Removing an individual from the organisation when they can no longer be trusted in relation to their conduct or to behave appropriately towards passengers; and

ii. Discouraging such behaviour by ensuring that employees do not believe that such conduct will be tolerated, thereby ensuring appropriate use of public funds and ensuring employees adhere to the Civil Service Code of Conduct and professional standards to prevent fraudulent activity.

Reasonable Adjustments – s20 & 21 EqA

h. The provision, criteria or practice "PCP" relied on by the claimant is managing attendance with trigger points.

i. Did the respondent have such a PCP(s)?

j. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that he had mental health issues which caused him to be absent from work more frequently, therefore breaching the trigger points?

k. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

l. If so, would the steps identified by the claimant, namely extending the trigger points have alleviated the identified disadvantage?

m. If so, would it have been reasonable for the respondent to have taken those steps at any relevant time and did they fail to do so?

Time limits

n. Were all of the claimant's claims of discrimination presented within the time limits set out in s123(1)(a) & (b) EqA?

o. If not, should time be extended on a 'just and equitable' basis?

11. Parties agreed at the outset of the hearing that this remained their understanding of the issues to be determined by the Tribunal. The claimant also indicated at the outset of the hearing that the last day on which he asserts he was subjected to a substantial disadvantage as a result of the application of the PCP, for the purposes of his reasonable adjustments claim, was 26 March 2019.

Findings in Fact

12. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

13. The respondent is the Border Forces agency responsible for carrying out immigration and customs controls for people and goods entering the UK. The Border Force is responsible for checking the immigration status of people arriving in and departing from the UK, searching baggage, vehicles and cargo for illicit goods or illegal immigrants, patrolling the UK coastline and searching vessels, gathering intelligence and alerting the police and security services to people of interest. Border Force Officers are warranted law enforcement officers.

14. The respondent operates/adheres to a number of Codes/Procedures relevant to the conduct of employees as follows:

    a. The Civil Service Code, which states that all civil servants are expected to carry out their roles with dedication and a commitment to the Civil Service and its core values of integrity (putting the obligations of public service above personal interests), honesty (being truthful and open), objectivity (basing advice and decisions on rigorous analysis of evidence) and impartiality (acting solely according to the merits of the case and serving equally well governments of different political persuasion);
    b. A Personal Conduct Policy which states that staff require to be mindful of their personal conduct, both within and beyond their official role, as it may affect the employment relationship, either because of the nature of the work, or because of the potential for reputational damage to the Home Office;
    c. A Discipline Policy and Procedure, detailing the procedure to be adopted if staff fail to meet the standards of conduct expected; and
    d. A Complaints Management procedure, for addressing external/customer complaints. That procedure directs that the Professional Standards Unit (**PSU**) requires to investigate serious complaints. If these relate to a member of staff, the PSU investigation will then be used as the basis for any appropriate disciplinary process.

15. The respondent operates an Attendance Management Policy for managing attendance, which sets out the following:

    a. At section 51, attendance should be formally reviewed if an employee's sickness absence level reaches certain Consideration Trigger Points. These trigger points can be reasonably adjusted for disabled staff but should be reviewed regularly.
    b. Under section 54, if the sickness absence level reaches or exceeds the Consideration Trigger Point, the manager should arrange a formal meeting to discuss attendance when the employee returns to work. An employee can bring a work colleague, staff network representative or trade union representative/official to all formal meetings.
    c. Formal action for unsatisfactory attendance consists of the following decision points:
        i. First written attendance warning; considered when the employee reaches or exceeds their Consideration Trigger Point;
        ii. Final written attendance warning; considered when the employee reaches or exceeds their Consideration Trigger Point following a First Written Attendance Warning;
        iii. Consideration of dismissal; when the employee reaches or exceeds their Consideration Trigger Point following a Final Written Attendance Warning or when a continuous sickness absence can no longer be supported.
    d. The employee has the right of appeal against each decision point.

16. The claimant was employed as Border Force Officer at Edinburgh Airport from 6 November 2006. He worked 37 hours per week.

17. The respondent also operates an Annual Leave Policy. Under that policy, the claimant was entitled to 30 days' (222 hours') annual leave per annum, plus 8 public holidays and 1 privilege day. He could carry over up to 9 days' (66.6 hours') unused annual leave from one leave year to the next. The respondent's holiday year runs from 1 March to 28 February.

18. The Annual Leave Policy states that annual leave requests should normally be made in advance to an individual's line manager, giving the manager at least twice the notice as the length of leave to be taken. It also states that all annual leave should be requested and approved on the respondent's HR systems *'in a timely manner, so that leave is recorded on the system prior to it being taken. This is to ensure that leave balances are accurate. This applies even where there are additional local systems in place for recording leave.'*

19. The claimant was referred to occupational health in December 2015, following a 4 week absence for work related stress. The subsequent report noted that he had had episodes of work-related stress/depression in the past. The report noted that he was at increased vulnerability of recurrent episodes. It concluded that on balance, in view of his previous recurrent episodes of psychological ill health, it was likely he would fall within the scope of the Equality Act. A further report, dated 13 April 2016, reiterated these opinions and referenced that he had previously suffered from depression. A further report, dated 2 December 2016, confirmed that the claimant was absent from work due to a particular workplace issue. It highlighted that the claimant had had several periods of absence from work on account of *'perceived work related issues'* which caused him anxiety and stress. The report stated that '*anxiety and stress can affect concentration which can impact performance.'* It confirmed that, in view of the recurrent nature of his psychological symptoms, the Equality Act was likely to apply.

20. The claimant was prescribed fluoxetine from October 2015 to 2018. From 2018 to July 2020, he was prescribed propranolol instead. He did not however take these medications continuously throughout those periods.

21. From 31 July 2017, the claimant moved to a fixed shift, rather than a shift pattern (Monday-Thursday 10am-6.30pm and Friday 10am-6pm, with an unpaid lunch hour each day). This fixed shift pattern was implemented as a reasonable adjustment for the claimant.

22. From August 2018 onwards, the claimant's line manager was SM. SM worked a rotating shift pattern, including early, late and night shifts.

23. In the period 22 December 2017 to 22 December 2018, the claimant had 4 separate periods of absence, totalling 35 days.

24. On 17 January 2019 and 1 February 2019, the claimant attended attendance management meetings with Higher Officer, Colin Smith, as SM was unavailable. The meeting on 1 February 2019 was adjourned for Occupational Health advice to be obtained. It was reconvened on 26 March 2019, after receipt of a report from Occupational Health.

25. Occupational Health produced a report, dated 27 February 2019, following a consultation with the claimant on 25 February 2019. The report referred to the claimant having anxiety and depression and made reference to previous occupational health reports. In response to the question *'would this case be covered under the Equality Act'* the report stated *'As advised previously, I believe Mr Jeffrey's health circumstances are such that it is likely he will fall within the scope of the disability provision of the Equality Act 2010.'*

26. SM chaired the meeting on 26 March 2019. The outcome of the meeting was that the claimant was issued with a first written attendance warning under the Attendance Management Policy. The warning took effect from 1 February 2019 and remained in place for a three-month improvement period (the **Improvement Period**). The claimant was advised that if he had two days of absence in the three-month improvement period then his attendance would be considered at a further meeting and a final written attendance warning may be issued. He was also advised that, whilst the warning would no longer be live, his attendance would continue to be monitored for a further 9 months after the Improvement Period (the **Sustained Improvement Period**). This was confirmed to the claimant by letter dated 31 March 2019, which was sent to the claimant by email on 2 April 2019. The letter confirmed the claimant's right to appeal against this decision. The claimant confirmed, by email of 4 April 2019, that he would not be appealing.

27. The claimant had two further days of absence in the Improvement Period, on 19 & 20 March 2019.

28. A further meeting between the claimant and SM took place on 8 August 2019, to discuss the claimant's attendance during the Improvement Period. Despite the fact that the claimant had had two further days of absence in the Improvement Period, SM decided to take no further formal action regarding attendance management at that time, given the reason for the claimant's absence, his overall attendance since his return to work and the information supplied by Occupational Health. The claimant was informed that his attendance would continue to be monitored during the Sustained Improvement Period, but the warning was no longer live. The outcome of this meeting was confirmed to the claimant in a letter dated 9 August 2019.

29. The claimant had no additional sickness absences in the Sustained Improvement Period. The claimant was accordingly advised, on 15 April 2020, that the attendance management process had come to a close.

30. The respondent operated an HR system called Adelphi from around 2004 onwards. At the start of 2020 the respondent changed their HR system from Adelphi to Metis. The respondent also operates a system called Kronos/TAMS, which records the time each individual works.

31. The claimant was based at Edinburgh Airport. In that location, the Edinburgh Operational Planning & Support Team (the **EOPS Team**) manages attendance/holiday rosters, to ensure there are sufficient officers on shift to meet demand. When an officer wishes to take annual leave, they apply to the EOPS Team, who consider current staffing levels and whether there is capacity to grant leave. Where there is capacity to grant leave, the EOPS Team update the rosters (which are password protected so only key staff have access to make changes) and inform the member of staff of this. The member of staff then formally applies for the leave on Adelphi, in accordance with the respondent's Annual Leave Policy. The individual's line manager would then

consider the request and approve/refuse this, checking the individual's remaining balance on Adelphi when doing so. If the individual's line manager is absent from work for any reason, and not able to respond to the request, the request would automatically be sent to the next level of management for consideration.

32. On 4 May 2019, an email was sent to all Border Force staff at Edinburgh Airport regarding annual leave. This stated *'please send any AL requests to the EOPS or AL inbox for approval prior to putting on Adelphi.'*

33. On 27 July 2019, SM sent an email to the claimant stating *'Please make sure in future you send your leave requests prior to taking your leave. The ideal time would be once Ops have agreed to your request.'*

34. On 9 August 2019, SM sent an email to his direct reports, including the claimant stating *'When you're booking annual leave, please ensure that the request is lodged on Adelphi in good time and approved prior to your time off. I appreciate that there will be exceptions when emergency leave is taken and so long as this applied for promptly on return, will be acceptable.'*

35. On 23 September 2019, SM sent an email to his direct reports, including the claimant, forwarding an email from BW in relation to the change in HR systems from Adelphi to Metis. Within the email, he asked all his direct reports to *'please review your leave/absence records across both Kronos and Adelphi and sent me an email by noon on 1st October to confirm the records are correct. If we need to discuss issues I am happy to do so before 1st October.'*

36. The claimant confirmed to SM on 10 October 2019 that Kronos and Adelphi were up to date.

37. Towards the end of 2019, a request for annual leave, submitted by the claimant on the Adelphi system, was forwarded to BW for approval, as the claimant's line manager was on holiday. BW noticed that, when taking a full week's leave the claimant was requesting 36.6 hours holiday, rather than 37 hours, which BW expected to see. This caused him to look closer at the claimant's annual

leave record and to compare this with the roster. When doing so, he noticed that there were a significant number of annual leave dates recorded for the claimant on the roster, which were not showing on Adelphi. The claimant was asked to explain the discrepancies. The claimant was unable to provide any satisfactory explanation.

38. On 10 February 2020 BW contacted the Central Referrals Team about his concerns regarding the claimant's annual leave, stating that it appeared to him that the claimant had taken at least 50 days of annual leave he was not entitled to, over a four-year period.

39. On 19 February 2020 the PSU were asked to investigate whether the claimant had abused the annual leave approval process to obtain more annual leave than he was entitled to from 2016-2017 to date and whether, by doing so, he:

    a. Failed to follow department policy/procedure;
    b. Took unauthorised absence;
    c. Committed theft, corruption or fraud, dishonest or fraudulent conduct in the course of employment with a view to gain for himself;
    d. Breached the Civil Service Code; and/or
    e. Breached the Home Office Personal Conduct Policy.

40. The claimant was notified on 19 February 2020 of the commencement of an investigation in relation to the allegations and the process which would be followed. The letter indicated that BW would be the 'Decision Manager' under the respondent's Discipline Policy and Procedure.

41. BW provided the PSU with the rosters and Kronos/TAMS records for each year in question, as well as the corresponding Adelphi records in relation to the claimant's annual leave requests. He also provided the correspondence with the claimant asking him to explain the discrepancies and the claimant's responses. BW explained that the stamping on books had been reviewed (each BFO requires to place their unique stamp in a book on each day they are present and working) and that these corresponded with the rosters.

42. Following representations from the claimant's trade union representative, it was agreed that it was not appropriate for BW to continue as Decision Manager. He was replaced on 30 March 2020.

43. On 3 April 2020, the PSU were also formally asked to investigate additional allegations that the claimant acted unprofessionally in two interactions with passengers and one interaction with Border Force North Regional Command Centre. There was a delay in asking them to do so as, prior to that point, there had been informal discussions in relation to whether the allegations should be investigated as part of the existing investigation, or whether this should be done separately. The conclusion reached was that they should be addressed in the context of the existing investigation. The additional allegations were that:

    a. The claimant acted unprofessionally in his interactions with arriving passenger BB on 20 December 2019;
    b. The claimant acted unprofessionally in his interactions with arriving passenger ARM on 13 January 2020; and
    c. The claimant acted unprofessionally in his interactions with Border Force North Regional Command Centre in relation to an email the claimant sent on 3 January 2020.

44. The claimant was notified by letter dated 9 April 2020 of the extension of the investigation to include these allegations.

45. KS carried out the investigation into the allegations. He took the following steps in investigating matters:

    a. He met with the claimant on 5 May 2020. The claimant was accompanied by PH. The interview took place via video call;
    b. He reviewed the information subsequently provided to him by the claimant;
    c. He obtained and reviewed information from SM, namely emails sent in the period from 2 May to 10 October 2019 to staff in relation to the

process for requesting holidays and ensuring that Adelphi records were correct;

d. He reviewed information provided by BW, in particular the shift rosters and Kronos/TAMS records for the claimant in respect of 2016-17, 2017-18, 2018-19 and 2019-20;

e. He took into account information from SM that he had reviewed the stamping on books and that these demonstrated that, on the days the claimant was not rostered to work due to annual leave, he did not stamp on;

f. He reviewed the records on Adelphi, showing the annual leave requests submitted through that system by the claimant;

g. He prepared a spreadsheet to compare the annual leave which was requested by the claimant according to the roster, with annual leave that was formally submitted by the claimant through Adelphi for authorisation;

h. He reviewed the written complaints submitted by BB and ARM, associated correspondence with those individuals and the Complaint Proforma in relation to each complaint, detailing the findings of the initial internal investigation conducted; and

i. He reviewed the email sent by the claimant to Border Force North Regional Command Centre on 3 January 2020 and related emails reacting to this.

46. KS produced an investigation report on 19 June 2020, detailing the process he followed in his investigation, the evidence obtained and the conclusions reached. His report extended to 32 pages, plus 23 appendices, extending to a further 84 pages. The appendices comprised all the supporting evidence. He found there was a case to answer in relation to each of the allegations and set out in detail in the investigation report why he believed that to be the case. In summary, his findings were as follows:

a. There was evidence to suggest that the claimant was aware of the procedure for booking annual leave through the EOPS Team and then on Adelphi. He had taken 53 days in excess of his entitlement over a 4 year period (11 additional days in 2016-17, 8 additional days in 2017-18,

17 additional days in 2018-19 and 17 additional days in 2019-20). The evidence suggested this was intentional, rather than due to issues with the claimant's mental health. There was no evidence to support the claimant's suggestion that this may have been due to IT errors, or particular issues with the Adelphi system.

b. There was evidence to substantiate that it was the claimant who interacted with passenger BB. She was able to describe the claimant and the claimant was on the control she passed through at the time her passport was scanned. The claimant denied the content of the interaction and it was uncorroborated, but it was similar to the entirely independent complaint made by ARM, which added credibility to the passenger BB's account.

c. There was evidence to substantiate that it was the claimant who interacted with passenger ARM. She provided the stamp number of the officer she interacted with and it had been confirmed that that stamp was allocated to the claimant. CCTV footage had been reviewed which also established this. The claimant accepted that he had a discussion with ARM, but denied the content of the interaction. The content of the discussion was uncorroborated, but it was similar to the entirely independent complaint made by BB, which added credibility to the passenger ARM's account.

d. There was evidence to support the allegation that the claimant acted unprofessionally in his interactions with Border Force North Regional Command Centre, given the terms of the email.

47. LF was appointed as Decision Manager on 3 July 2020. Having reviewed KS's investigation report, LF made the decision to proceed to a disciplinary hearing.

48. By letter dated 6 July 2020, the claimant was invited to a disciplinary hearing on 15 July 2020 in relation to the allegations, which were re-stated in the letter. The letter confirmed that a possible outcome was dismissal and, if gross misconduct was established, dismissal would be without notice or payment in lieu of notice. A copy of the investigation report prepared by KS was enclosed with the letter.

49. The disciplinary hearing took place on 16 July 2020 by video call. LF chaired the meeting. The claimant attended with PH. At the disciplinary hearing the claimant accepted that he had overtaken at least 51 days annual leave over a 4 year period. He put forward the following explanations for his failure to formally request the leave he took via Adelphi:

    a. He was in the habit of formally requesting leave on his return from holiday, rather than before, to save problems if the dates for the leave were changed. When he returned to work, he then forgot to request his annual leave due to:
        i. Being busy on his return and not having time to complete admin duties; and
        ii. With hindsight, he felt his prescribed medication (initially fluoxetine & then propranolol), caused him to be forgetful.
    b. Being badly managed. He stated that due to his mental health issues he should have had 1-2-1 on his return to work from annual leave and shown how to put annual leave on Adelphi.
    c. There were technical problems with Adelphi.

50. At the disciplinary hearing, the claimant offered to 'pay back' the 51 days' annual leave which he agreed he had taken in excess of his entitlement.

51. At the disciplinary hearing, LF decided not to take any further action in relation to the final allegation and informed the claimant of this.

52. The disciplinary hearing was adjourned to allow LF to consider matters and to review the OH reports, dated 2 December 2016 and 27 February 2019, in relation to the claimant, which he mentioned during the course of the disciplinary hearing. Neither report mentioned that the claimant was taking any medication, or was suffering from any adverse side effects as a result of doing so.

53. LF then carefully considered all of the evidence presented and reached the following conclusions:

a. The claimant was aware of the procedure for booking leave, namely checking with the EOPS Team to ascertain if it would be possible to take leave on the desired dates and then formally requesting this via Adelphi. He had followed that procedure in relation to numerous periods of leave which were recorded on Adelphi each year. He was aware that a request should be made on Adelphi before the leave was taken. He had been reminded of this on several occasions in 2019, but continued to take a number of periods of leave, without requesting that on Adelphi (in advance or at all), following those reminders.

b. There was no evidence supplied to support the claimant's statement that had been prescribed certain medication, that the medication he was taking caused forgetfulness or memory loss, or that he suffered from that side effect. The claimant simply asserted that he now felt, in hindsight, that this may be the case. It was accordingly not accepted that he forgot to input his annual leave due to any medication he was taking.

c. There was no guidance in place that managers conduct 1-2-1s on return from annual leave and no suggestion this was a reasonable adjustment which was required for the claimant.

d. There was no evidence of any technical issues with Adelphi or other IT issues which prevented the claimant requesting annual leave in accordance with the procedure.

e. The fact that the claimant did not request annual leave in accordance with the Annual Leave Policy prevented the claimant's line manager from seeing an accurate count of his leave balance.

f. The claimant's annual leave entitlement was 30 days per year. Over the period 2016-2020 he intentionally took 51 days' annual leave in excess of that entitlement, that were not recorded on Adelphi. It was not credible that he was not aware that he was taking more leave than he was entitled to. He behaved in a way that was dishonest and benefited himself over the Home Office. In doing so he:

    i. Failed to follow departmental policy/procedure;

ii. Took unauthorised absence;

iii. Committed theft, corruption or fraud, dishonest or fraudulent conduct in the course of employment with a view to gain for the employee;

iv. Breached the Civil Service Code, which required him to act with integrity;

v. Breached the Home Office Personal Conduct Policy

g. In relation to the passenger complaints, the accounts from the passengers were preferred to that of the claimant. They were able to identify that it was him that they interacted with and their accounts were, in effect, corroborated by each other. The established conduct amounted to inappropriate behaviour for a Border Force Officer.

h. Each allegation established constituted gross misconduct.

i. The appropriate sanction was summary dismissal. The first allegation, by itself, entirely undermined the claimant's continued employment, such that his continued employment, in any capacity, was untenable. Had the disciplinary hearing simply related to the second and third allegations, it is unlikely the sanction would have been dismissal.

54. The claimant was informed of the outcome of the hearing, and that he would be summarily dismissed, by letter dated 24 July 2020. The letter confirmed the claimant's right to appeal.

55. The claimant's employment terminated on 24 July 2020. The claimant was not paid in lieu of his notice period.

56. On 25 July 2020, the claimant submitted an appeal against the decision to terminate his employment. His grounds of appeal, in summary were that:

a. He had new evidence that fluoxetine did indeed cause memory loss. He provided a link to the list of potential side effects stated on the NHS website. He also provided a copy of the pamphlet which accompanies propranolol and lists its potential side effects;

b. The process was not applied correctly. He had been poorly managed. His offer to 'pay back' the annual leave taken had not been properly considered; and

c. The decision was unreasonable. The allegation in relation to annual leave and the allegations regarding the passengers should have been considered separately. The allegations in relation to the passengers amounted to minor misconduct only, The allegation in relation to annual leave should have been dealt with simply by advice from line management.

57. PHM was appointed to chair the appeal hearing. The appeal hearing took place on 17 August 2020. She was accompanied by a note taker and a member of the respondent's HR team. The claimant attended with his trade union representative, Gordon Dick. The hearing took place by video call.

58. Following the hearing, PHM considered all the evidence presented. Having done so, she decided not to uphold the claimant's appeal. She formed the following conclusions in relation to each element of the claimant's appeal:

a. **New Evidence.** The generic data provided by the claimant demonstrated that trouble focusing, memory problems and not thinking clearly were rare side-effects (impacting up to 1 in every 1,000 people). The generic data on the medication urged users to contact their doctor 'immediately' if they experienced any of those particular side-effects. The claimant confirmed at the appeal hearing that he had not contacted his doctor in relation to any symptoms and indeed he had spoken to his doctor recently and had not raised this. The claimant had not raised the issue of medication causing memory loss during the investigation. It was raised for the first time at the disciplinary hearing. She did not believe that the claimant had established that he had the side effects he now stated. She did not accept that memory loss caused the claimant to fail to input at least 51 days of annual leave on Adelphi over a 4 year period. There was no evidence to substantiate this.

b. **Process not applied correctly.** There was no evidence that the claimant was poorly managed. Rather, the evidence demonstrated that, as confirmed by the claimant during the appeal hearing, the claimant took active steps to avoid his line manager. The offer to 'pay back' leave had been considered but was not viable given the severity of the claimant's actions and the fact that, under his proposal, it would take approximately 8 years to pay back the leave he had taken in excess of his entitlement.

c. **Unreasonable decision.** The passenger complaints ought to have been dealt with separately. Leaving those aside however did not change the outcome. The abuse of the annual leave process alone was clearly fraudulent conduct and amounted to gross misconduct. The claimant's honesty and integrity had been brought into question and had fallen far below the standard expected of a Border Force Officer (a warranted law enforcement officer) and as outlined in the Civil Service Code, Home Office and Border Force values. The claimant's conduct caused irreparable damage to the working relationship between him and his employer such that he could not continue to be employed by the respondent

59. The claimant was informed of this by letter dated 20 August 2020

60. Early conciliation took place from 5-20 August 2020. The claim form was presented on 17 October 2020.

Submissions

Respondent's submissions

61. Ms Forrest, for the respondent, provided a written submission, extending to 27 pages, which she read to the Tribunal. In summary she submitted that:

a. The respondent's witnesses were more credible than the claimant and his witnesses.

b. She referred to s98 ERA and the Burchell tests, which she stated were satisfied. The claimant admitted that he had taken at least 51 days in

excess of his annual leave entitlement, over a 4 year period. His conduct amounted to gross misconduct. The mitigation he put forward was considered, but discounted. It was within the range of reasonable responses for the respondent to dismiss the claimant in the circumstances. Arguments of consistency are not validly made in the circumstances.

c. A fair procedure was followed, which accorded with the Acas Code.

d. The claimant was not treated unfavourably because of something arising in consequence of his disability. The claimant has not established that the things he asserts arose in consequence of his disability. If he was treated less favourably as a result of something arising from his disability, this was objectively justified.

e. The Tribunal have no jurisdiction to consider the claim for failure make reasonable adjustments, as it is submitted outside the requisite timescale. It is not just and equitable to extend time. In any event, the claimant was not placed at a substantial disadvantage, so the duty did not arise. If it did, the adjustment proposed was not reasonable.

Claimant's submissions

62. The claimant also lodged a written submission, extending to 11 pages, which he requested that the Tribunal read themselves. His submission addressed the factual issues in dispute and, in summary, stated that:

a. The claimant was the only member of staff whose annual leave was checked, which was unfair.

b. He was not suspended during the investigation.

c. The respondent had failed to carry out a reasonable investigation. The investigation was protracted which led to unfairness. In addition, BW should not have initially been Decision Manager.

d. The health issues which he raised in the investigation and disciplinary process were not properly considered or investigated.

e. His offer to 'repay' the annual leave taken in excess of his entitlement was not properly considered.

f. The sanction of dismissal was too harsh.

g. Dismissal was unfavourable treatment because of something arising in consequence of his disability. The respondent was aware the claimant was a disabled person.

h. The respondent failed to make reasonable adjustments.

i. It is just and equitable to extend any time limits.

Relevant Law

Unfair Dismissal

63. S94 ERA provides that an employee has the right not to be unfairly dismissed.

64. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that it is a potentially fair reason falling within s98(1) or (2) ERA.

65. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) ERA. The determination of that question (having regard to the reason shown by the employer):

"(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

66. Where an employee has been dismissed for misconduct, ***British Home Stores v Burchell*** [1978] IRLR 379, sets out the questions to be addressed by the Tribunal when considering reasonableness as follows:

    i. whether the respondent genuinely believed the individual to be guilty of misconduct;

    ii. whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct; and

    iii. whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

67. The Tribunal then requires to consider whether the decision to dismiss fell within the range of reasonable responses available to a reasonable employer in the circumstances. In determining this, it is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law as the Tribunal would have 'substituted its own view' for that of the employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any given situation available to a reasonable employer. It is only if, applying that objective standard, the decision to dismiss (and the procedure adopted) is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (***Iceland Frozen Foods Limited v Jones*** [1982] IRLR 439).

68. Equity means that similar cases should be dealt with in a similar manner. Valid arguments in relation to inconsistency of treatment however only arise in limited circumstances, such as where employers have previously treated similar matters less seriously, leading employees to believe that such behaviour is condoned or to an inference that the asserted reason for dismissal is not the real reason, or where employees, in truly parallel circumstances arising from the same incident, are treated differently (***Hadjioannou v Coral Casinos Limited*** [1981] IRLR 32, approved by the Court of Appeal in ***Paul v East District Health Authority*** [1995] IRLR 305).

Discrimination arising from disability

69. Section 15 EqA states:

> *"(1) A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

Guidance on how this section should be applied was given by the EAT in ***Pnaiser v NHS England*** [2016] IRLR 170, EAT, paragraph 31. In that case it was highlighted that 'arising in consequence of' could describe a range of causal links and there may be more than one link. It is a question of fact whether something can properly be said to arise in consequence of disability. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

70. There is no need for the alleged discriminator to know that the 'something' that causes the treatment arises in consequence of disability. The requirement for knowledge is of the disability only ***(City of York Council v Grosset*** [2018] ICR 1492, CA).

71. The EAT held in ***Sheikholeslami v University of Edinburgh*** [2018] IRLR 1090 that:

> *'the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial*

part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.'

72. The burden is on the respondent to prove objective justification. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (***Homer v Chief Constable of West Yorkshire Police*** [2012] IRLR 601).

Failure to make reasonable adjustments

73. Section 20 EqA states:

"Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A."

74. The duty comprises three requirements (of which the first is relevant to this case). The first requirement is a *"requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

75. Section 21 provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments and that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

76. Further provisions in Schedule 8 Part 3 provide that the duty is not triggered if the employer did not know, or could not reasonably be expected to know that the claimant had a disability and that the provision, criteria or practice ("PCP") is likely to place the claimant at the identified substantial disadvantage.

77. The guidance given in ***Environment Agency v Rowan*** [2008] IRLR 20 remains valid, being that in order to make a finding of failure to make reasonable adjustments there must be identification of:

(a) the provision, criteria or practice applied by or on behalf of an employer or the physical feature of premises occupied by the employer;

(b) the identity of non-disabled comparators (where appropriate); and

(c) the nature and extent of the substantial disadvantage suffered by the claimant.

Burden of Proof

78. Section 136 EqA provides:

'If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.'

79. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of ***Igen v Wong*** [2005] IRLR 258, and ***Madarassy v Nomura International Plc*** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish prima facie case of discrimination by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

80. In ***Madarassy***, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the Tribunal "could conclude" that on a balance of probabilities the respondent had committed an unlawful act of discrimination. The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the

evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council*** [2006] IRLR 748***,*** an EAT authority approved by the Court of Appeal in ***Madarassy***.

Time Limits

81. Section 123(1) EqA confirms that complaints should be brought within either:

(a) the period of 3 months starting with the date of the act to which the complaint relates; or
(b) such other period as the Tribunal thinks just and equitable.

82. Section 123(3) EqA states that conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it.

83. What is just and equitable depends on all the circumstances. The burden of proof is on the claimant, as explained in ***Robertson v Bexley Community Centre*** [2003] IRLR 434, in which the Court of Appeal also said, at para 25:

"When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

84. In ***British Coal Corporation v Keeble*** [1997] IRLR 336 the EAT indicated that task of the Tribunal, when considering whether it is just and equitable to extend time, may be illuminated by considering section 33 Limitation Act 1980. This sets out a check list of potentially relevant factors, which may provide a prompt as to the crucial findings of fact upon which the discretion is exercised, such as:

(a) the length of and reasons for the delay;
(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any requests for information;

(d) the promptness with which the claimant acted once they knew of the facts giving rise to the cause of action; and

(e) the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

85. In ***London Borough of Southwark v Afolabi*** [2003] IRLR 220 the Court of Appeal confirmed that, whilst that checklist provides a useful guide for Tribunals, it does not require to be followed slavishly. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] EWCA Civ 640, the Court of Appeal confirmed this, stating that it was plain from the language used in s123 EqA ('such other period as the Employment Tribunal thinks just and equitable') that Parliament chose to give Employment Tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list.

86. In ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23, the Court of Appeal approved the approach set out in Afolabi and Morgan and, at paragraph 37, Underhill LJ confirmed, that

'rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language. The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.'

Discussion & Decision

Discrimination Arising from Disability

87. In relation to the claims of discrimination arising from disability the Tribunal started by referring to section 15 EqA.

88. Section 15(2) states that section 15(1) will not apply if it the respondent shows that they did not know, and could not reasonably have been expected to know, the claimant had the disability.

89. As set out in paragraph 19 and 25 above, the respondent was aware, from occupational health reports provided to them, that the claimant suffered from anxiety and depression, that he had had previous recurrent episodes of this and this was likely to continue. All of the occupational health reports confirmed, in response to a specific question from the respondent, that it was likely the Equality Act applied. In these circumstances the Tribunal concluded that the respondent knew, or could reasonably have been expected to know, that the claimant was a disabled person as a result of anxiety and depression. In light of the fact that the respondent has not demonstrated that they did not know, and could not reasonably have been expected to know, that the claimant had a disability, the Tribunal proceeded on the basis that the provisions of 15(1) applied.

90. To shift the burden of proof to the respondent in relation claim under s15 EqA, a claimant requires to show:

a. That he or she has been subjected to unfavourable treatment;
b. A link between the disability and the 'something' that is said to be the ground for the unfavourable treatment; and
c. Some evidence from which it could be inferred that the 'something' was the reason for the treatment.

91. In relation to the first question, the Tribunal noted that no question of comparison arises. The EHRC Code indicates that unfavourable treatment is treated synonymously with disadvantage. It is something about which a reasonable person would complain. Taking this into account the Tribunal accepted that the claimant established that he was dismissed and that this amounted to unfavourable treatment.

92. The Tribunal then considered the second question, addressing each 'something' asserted by the claimant to have arisen in consequence of his

disability, to determine whether a link between the 'something' asserted and the disability, had been established in the evidence presented. The Tribunal reached the following conclusions in relation to these:

a. The claimant's failure to accurately input his annual leave dates into the respondent's system. Various reasons were advanced for the claimant not accurately inputting his annual leave dates into the respondent's system, as confirmed in paragraph 49 above. This included, at the investigation meeting, his mental health and, at the disciplinary and appeal hearings, the medication he was taking. The claimant restated this position in his evidence. No evidence was led to substantiate the claimant's assertions that there was a link between his failure to accurately input his annual leave dates and the medication he was taking as a result of his disability, or the disability itself. The Tribunal were not referred to any medical evidence to this effect. While there was generic information available in relation to the side effects of the medication, memory loss was a rare side effect and there was no evidence to substantiate the claimant's assertion that he believed he suffered from those rare side effects. In any event, the claimant's evidence that he did not take fluoxetine/propranolol continuously throughout the period from 2016 onwards undermined the assertion that his medication caused him to forget to request leave via Adelphi. Further, it was clear from his evidence that the claimant made a conscious decision not to request annual leave via Adelphi prior to taking his leave, contrary to express and repeated instructions to do so. It was clear from all the evidence that, for every period of leave taken, the claimant contacted the EOPS Team to ascertain if it would be possible to take leave on the desired dates and ensure that the rosters were updated to reflect this. The fact that he was able to do so on every occasion undermined his assertion that he was, notwithstanding that, unable to then accurately input his annual leave dates into the respondent's system due to the medication he was taking or his disability. The Tribunal accordingly concluded that the claimant had not established any link between his disability, or the medication he was taking as a result, and his failure to accurately input

his annual leave dates into the respondent's system. Given that this was not established, the claim under s15 EqA in relation to this does not succeed.

b. The claimant's quick temper, irritability and mood swings. No evidence was led in relation to the claimant having a quick temper, irritability and mood swings, whether due to disability or otherwise. This was not mentioned in the claimant's evidence and the Tribunal were not referred to any documents suggesting this may be the case. Given that the asserted 'something' arising in consequence of disability was not established, the claim under s15 EqA in relation to this does not succeed.

Reasonable Adjustments

93. At the start of the hearing the claimant indicated that the last date on which he was subjected to a substantial disadvantage as a result of the application of the PCP, for the purposes of his reasonable adjustments claim, was 26 March 2019. That was the date he was issued with a first written attendance warning, under the Attendance Management Policy.

94. The Tribunal initially considered whether it had jurisdiction to consider this element of the claimant's claim or whether, as asserted by the respondent, it was submitted outside the requisite timescales and it was not just and equitable to extend time. Given the date of the act complained of, namely 26 March 2019, and the date the ET1 was lodged, namely 17 October 2020, it was clear that the claim was submitted nearly 19 months after the act complained of, significantly outside the three month limit.

95. It was submitted by the claimant that it was just and equitable to extend time. Beyond that assertion however no detail was provided in submissions as to why it would be just and equitable to extend time in the particular circumstances of this case. The claimant's evidence in relation to this, when asked by the Employment Judge at the end of his evidence in chief why he did not raise a claim prior to October 2020, was simply that he felt it would be a waste of time to do so. No further evidence was led in respect of this.

96. The Tribunal was mindful of the fact that what is just and equitable depends on all the circumstances, and the burden of proof is on a claimant to establish this (as explained by the Court of Appeal in ***Robertson v Bexley Community Centre*** [2003] IRLR 434). The Tribunal concluded that no satisfactory explanation had been advanced as to why this complaint was brought nearly 16 months after the time limit had expired. The claimant had accordingly not established that it was just and equitable to extend time and the Tribunal have no jurisdiction to consider the complaint of failure to make reasonable adjustments.

Unfair Dismissal

97. The Tribunal referred to s98(1) ERA. It provides that the respondent must show the reason for the dismissal or, if more than one reason, the principal reason and that it was for one of the potentially fair reasons set out in s98(2). At this stage the Tribunal was not considering the question of reasonableness. The Tribunal had to consider whether the respondent had established a potentially fair reason for dismissal. The Tribunal accepted that the reason for dismissal was the claimant's conduct – a potentially fair reason under s98(2)(b).

98. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason as shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources the employer is undertaking), the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited v Jones*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

99. The Tribunal referred to the case of ***British Home Stores v Burchell***. The Tribunal was mindful that it should not consider whether the claimant had in fact committed the conduct in question, as alleged, but rather whether the respondent genuinely believed he had and whether the respondent had reasonable grounds for that belief, having carried out a reasonable investigation.

Did LF have a genuine belief that the claimant was guilty of misconduct?

100. The Tribunal concluded that LF did have a genuine belief that the claimant had committed the misconduct detailed in the dismissal letter.

Did LF have reasonable grounds for her belief?

101. The Tribunal noted that the claimant admitted that he had taken at least 51 days' annual leave in excess of his entitlement, over a 4 year period. LF accordingly had reasonable grounds for her belief that the misconduct identified in allegation 1 was established.

102. In relation to the passenger complaints, the passengers were able to identify that it was the claimant that they interacted with. In the case of passenger ARM, CCTV also corroborated this and the claimant accepted this. There were accordingly reasonable grounds for LF to believe that the passengers interacted with the claimant. LF preferred the passengers' accounts to that of the claimant as to what was discussed. There were reasonable grounds for her to do so, given that their accounts were, in effect, corroborated by each other given their similar content and that they occurred in close proximity in terms of time, but were entirely independent from each other.

Was there a reasonable investigation?

103. The respondent conducted a balanced investigation. KS interviewed the claimant and gathered all the relevant evidence in relation to the allegations themselves and the mitigation/explanations advanced by the claimant. He prepared a detailed investigation report, extending to 32 pages, which set out the findings of his investigation. He appended notes of the interview conducted and the documentary evidence gathered to his report. There were no further

steps which should, reasonably, have been undertaken during the investigation. The Tribunal did not accept that the health issues raised by the claimant were not investigated. When raised as mitigation in the investigation, disciplinary and appeal processes, the information was duly considered, but it was not felt, given the information provided by the claimant, that any further steps were required to investigate this. That conclusion did not fall outside the range of reasonable responses open to the respondent in the circumstances, particularly given various explanations put forward in mitigation by the claimant.

104. Whilst the investigation was protracted, this was largely due to an initial delay while consideration was given to whether the additional allegations should be included in the existing investigation, or investigated separately. The Tribunal concluded that this did not however undermine the fairness of the investigation as a whole.

Procedure

105. The respondent investigated the allegations against the claimant. They informed him of the allegations and the potential consequences and provided copies of the evidence compiled. The claimant was given the opportunity to respond to the allegations at the disciplinary hearing and was provided with the opportunity to appeal. He was accompanied by a trade union representative at all stages. The respondent followed their internal procedures.

106. The claimant sought to challenge the procedure adopted by the respondent in a number of respects. The Tribunal's conclusions in relation to each are set out below:

    a. The fact that only the claimant's leave records were checked prior to the commencement of the investigation. The Tribunal did not accept that the fact that other Border Force Officer's leave records were not checked introduced any inherent unfairness. BW gave credible evidence, which was accepted by the Tribunal, in relation to what prompted him to look at the claimant's annual leave records in more detail. No evidence was led to suggest that the respondent had treated similar matters less seriously in the past, or that any other employees had also taken

significantly in excess of their annual leave entitlement, but were treated differently. The Tribunal did not accept therefore that it had been established that the circumstances of any other Border Force Officers were truly parallel with those of the claimant. The argument in relation to consistency was accordingly not relevant.

b. BW acting as Decision Manager initially. The respondent accepted that BW should not have been appointed Decision Manager. They accepted this when it was raised by the claimant's trade union. BW was replaced as Decision Manager on 30 March 2020. He had no involvement in making either the decision to move to a disciplinary hearing, or in relation to the disciplinary proceedings themselves. Given that he was not involved in any substantive decisions, the fact that he was initially, and erroneously, appointed Decision Manager did not undermine the fairness of the process adopted by the respondent when looked at in the round.

c. The claimant not being suspended. There is no requirement that a claimant be suspended in circumstances where gross misconduct is alleged. This is clear from the Acas Code. It did not undermine the fairness of the process adopted by the respondent, or the conclusions reached, that the claimant was not suspended during the course of the investigation.

107. Given the above, the Tribunal found that the procedure adopted by the respondent was fair and reasonable in the circumstances.

Did the decision to dismiss fall within the band of reasonable responses?

108. The Tribunal then moved on to consider whether the decision to dismiss the claimant, as a result of the identified misconduct, fell within the range of reasonable responses available to a reasonable employer in the circumstances.

109. The Tribunal noted, and accepted, LF's position that the principal reason for deciding that summary dismissal was appropriate was allegation 1. Indeed, LF indicated that had she simply been considering allegations 2 & 3, in relation to

the passengers, it was unlikely she would have concluded that summary dismissal was the appropriate sanction.

110. Given that the claimant was a civil servant bound by the Civil Service Code and a warranted law enforcement officer it is clear that his position required high standards of integrity and honesty. He was, reasonably, found to have fraudulently obtained a significant number of additional holidays, for his own personal gain, over a 4 year period. This was contrary to the respondent's policies, the Civil Service Code and the Home Office Personal Conduct Policy. It entirely undermined his continued employment in any capacity. In these circumstances it was reasonable for the respondent not to accept the claimant's offer to 'repay' the 51 days of annual leave that he admitted taking in excess of his entitlement. It cannot be said that no reasonable employer would have dismissed the claimant in these circumstances.

111. The Tribunal accordingly found that LF's conclusion to dismiss the claimant fell within the band of reasonable responses open to the respondent in the circumstances.

Conclusions re s98(4)

112. For the reasons stated above the Tribunal concluded that the respondent acted reasonably in treating the claimant's conduct as a sufficient reason for dismissal. The claimant's dismissal was accordingly fair.

Employment Judge: Mel Sangster
Date of Judgment: 13 January 2022
Entered in register: 14 January 2022
and copied to parties