Case No: 1305877/19

O

EMPLOYMENT TRIBUNALS

Claimant: Sophia Carvalho

Respondent: Swissport GB Limited

Heard at: Birmingham (via video conferencing)

On: 29,30 November 1,2,3 & 6 December 2021

Before: Employment Judge J Jones
Mr D Faulconbridge
Mr D Spencer

Representation
Claimant: Mr O Prys Lewis (counsel)
Respondent: Mr S Peacock (solicitor)

JUDGMENT having been sent to the parties on 29 December 2021 and written reasons having been requested by the Claimant on 15 December 2021 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. This was a claim of constructive unfair dismissal, direct and indirect race discrimination and victimisation arising from the claimant's employment with the respondent as a Flight Dispatcher at Birmingham airport. In summary, Birmingham Airport Ltd (BAL) decided to suspend the claimant's security pass in February 2019 and this led to her inability to perform her contractual duties for the respondent. The pass was never reinstated by BAL and the claimant resigned claiming constructive dismissal on 10 December 2019.

2. The claim was derived from two claim forms submitted by the claimant on 7 July 2019 and 16 March 2020 respectively. Early conciliation took place in the first claim between 21 May and 10 June 2019 and in the second claim between 18 and 19 February 2020.

3. The claims were the subject of 2 case management discussions resulting in a summary of the issues in the case by Employment Judge Butler in an Order dated 22 November 2019 and Employment Judge Gaskell in an Order dated

21 December 2020. At the outset of the hearing, the claimant confirmed that the claim for holiday pay had been satisfied by a payment from the respondent and agreed that this claim could be dismissed upon withdrawal by her. The tribunal discussed the remaining claims and issues in detail with the representatives and worked with them during the hearing prior to closing submissions to devise a composite agreed list of issues for the tribunal to determine.

4. The tribunal was provided with a joint bundle of documents running to 442 pages. On the third day of the hearing, by agreement with the respondent, the claimant submitted two further documents which were inserted in the bundle at pages 443 - 444. References to page numbers in these reasons are references to the pages of that bundle unless otherwise stated.

5. The claimant gave evidence herself having provided a lengthy 46 page witness statement, which was accompanied by a bundle of exhibits. She called as witnesses her former colleagues, Miss Saima Mohammed and Mr Olukayode Fadahunsi.

6. The respondent called Mr Terry Coombes, former Airside Duty Manager, Mr David Astle, interim General Manager at Dublin airport, Mr Jason Lear, Head of Operational Control Centre at Birmingham airport and Miss Claire Hepworth, HR Business Partner, to give oral evidence.

7. Counsel for the claimant made oral submissions at the end of the evidence and Mr. Peacock, solicitor for the respondent, submitted written representations. Neither representative cited any specific legal principles or case law and both submitted that the well-known tests applicable to claims of discrimination and victimisation, together with constructive unfair dismissal, were applicable.

The issues

8. The agreed list of issues (as referred to above in paragraph 3) is set out at the end of these reasons.

The evidence

9. Based on the oral and documentary evidence, the tribunal made the following findings of fact.

    9.1 The claimant commenced employment for the respondent on 14 March 2016. She worked as a Flight Dispatcher. The respondent is a large UK employer, employing 8,800 staff across 25 UK airports. The respondent provides a wide range of staff to carry out different services covering ground, cargo and passenger support to the airports for whom they work.

    9.2 The role of Flight Dispatcher involves receiving incoming aircraft, carrying out a series of checks on them, ensuring that they are safe, stocked and ready to depart and overseeing their departure.

9.3 The claimant worked at Birmingham airport which was owned and managed by BAL.

9.4 New members of staff who joined the respondent were the subject of a series of ID checks, DBS checks and referencing. During this process, staff would be issued with a temporary (white) security pass by BAL to permit them to access secure areas at the airport during training and induction, provided they were accompanied by an escort. A white security pass was valid for only 60 days after which it would expire.

9.5 Whilst holding a temporary or white security pass, an employee would apply to BAL for a permanent security pass (a blue pass). This would entail the completion of a BAL "Application Form for Permanent Critical Part (CP) Security ID pass", such as the form completed by the claimant (page 197). These forms had to be signed by the respondent and also the applying member of staff (page 202). A Security ID Pass holder Declaration was included in the application form and the staff member, by signing, confirmed a number of matters including that the individual had completed general security awareness training.

9.6 If, on receipt of an application for a blue pass, and having carried out its own security checks, BAL was satisfied of an employee's suitability, a pass would be issued to that employee. This would entitle the employee to transit into security restricted areas (SRAs) at the airport unaccompanied. The blue pass remained the property of BAL at all times. When collecting a blue pass, an employee was required by BAL to sign for that pass and in doing so confirmed that he or she agreed to abide by the conditions of a Security Declaration (page 239). The tribunal found that the Security Declaration that was in force at the time of the claimant's employment was a different iteration of the document at page 239, but was in broadly similar terms. It commenced with the words "*in signing for your identity pass you agree to abide by the conditions contained in the Security Declaration*". The Declaration itself did not have a space for the individual to sign separately. The signature by the employee was to confirm the collection of the pass, to be held on the terms set out.

9.7 The tribunal found that the respondent did not employ any staff at Birmingham airport who did not require a blue pass in order to carry out their duties. This included staff who work primarily in the terminal building but who were still required to transit through SRAs for meetings, training and other related work duties. Passenger service staff required a blue pass to accompany passengers to the aircraft.

9.8 The claimant was employed under the terms of a contract of employment signed by her on 17 March 2016 (page 184). She held a blue pass. Clause 7 of the contract of employment stated as follows:

7. Security ID Pass

7.1 You must hold a valid Airport Security Pass to enable you to fulfil your contractual duties.

7.2 The Company reserves the right to delay the commencement of your employment (and therefore withhold your salary and benefits) if for any reason (including but not limited to delay on the part of your referees, the Company or relevant Airport Authority) you have not been able to complete the process and be issued with any necessary unescorted Security Pass.

7.3 The Company also reserves the right to cease or withhold salary payments for any time after the commencement of your employment when you are unable to fulfil your contractual duties as a result of you not holding a valid security pass. Consideration will be given to continuing or reinstating salary payments, in circumstances where the removal of and, or failure to renew the necessary security pass, arises from any delay, act or omission of a third party which was outside the control of the employee.

7.4 If you do not hold a security pass during any particular period, then the Company reserves the right to redeploy you to other reasonable duties, subject to the necessary training being provided in order to enable you to continue to receive your salary and benefits during that particular period and until the security pass is received.

7.5 If you are unable to comply with the conditions of application/issue for a security pass and are therefore unable to obtain any such security pass then the Company may withdraw this offer and /or your employment may be terminated.

9.9 The claimant had a good work record and the respondent produced no evidence to suggest that she was anything other than a valued employee prior to the events which occurred in February 2019. The claimant enjoyed her job but told the tribunal that between 2016 and 2017 she had been the subject of remarks in the workplace which were discriminatory on the grounds of race and gender. These included highly inappropriate comments from Steve Griffiths, a Senior Flight Dispatcher. The claimant's evidence in this regard was corroborated by her two witnesses, both of whom ceased working alongside her in early 2017. They too told the tribunal they had heard and witnessed examples of racially and sexually inappropriate behaviour in the workplace and that the ramp office where the dispatch staff operated from was the source of such comments and conduct on a regular basis. The claimant and her witnesses advised that no formal complaints or grievances were raised in relation to this issue but that David Astle was told about the conduct of Steve Griffiths and raised the matter with his direct line manager, Paul Harris, who put the respondent's Equality Policy up on the wall in the office. The tribunal accepted the evidence of the claimant and her witnesses in this respect.

9.10 On 8 February 2019 Mr Lear received a telephone call from Birmingham airport police requesting him to come to the airport. He was met on arrival at

the airport by two police officers and the airport manager, Jeanette White. He was requested to view some CCTV footage taken at the airport. The footage showed a member of the respondent's staff appearing to video an aircraft taking off on a mobile telephone and then typing on the phone. Mr Lear identified the claimant as the person shown on the CCTV footage. The police confirmed that this was consistent with the other evidence they had gathered which indicated that the claimant had used her swipe card to access the lounge area where some of the footage was taken. The tribunal did not make a finding of fact as to whether or not it was the claimant on the CCTV footage. The tribunal has not seen it nor was it material to the issues in the case for the tribunal to deliberate on that point. The tribunal accepted that Mr Lear was confident of his identification of the claimant, however, and believed the footage he saw to be clear. Mr Lear viewed the footage in its original form in the security suite at the airport.

9.11 Mr Lear was advised by the police and airport manager that the flight that was being videoed was carrying passengers who were being deported to Jamaica and that this was a sensitive political matter that staff at the airport had been deliberately not made aware of. The police advised Mr Lear that mobile phone video footage of that flight taking off had been posted on social media and later reported on local news channels.

9.12 Jeanette White told Mr Lear that a security stop had been placed on the claimant's blue pass as a consequence of the matter and that West Midlands Police had been advised and were commencing a criminal investigation.

9.13 At approximately 3PM that afternoon Mr Lear telephoned the claimant and advised her that she should not attend the airport for her shift the following day because a stop had been placed on her security pass by BAL. He advised her that this was due to concerns arising out of her allegedly filming a flight air side.

9.14 On 9 February 2019 the claimant sent an email to her line manager Mr Stuart Lawrie (page 207). This read as follows:

Dear Stuart,

Yesterday (09 02 2019) I received a telephone call from Jason Lear at approximately 3pm. During the phone call Jason informed me that Birmingham Airport Authorities had contacted Swissport to inform them that "they had put a stop on my security pass due to an allegation of filming whilst air-side and that I should not return to work until they had finished their investigation into the allegation that they were making". Unfortunately Jason could not furnish me with any further details about the allegation.

Could you please confirm the following:

Just to help me understand what is going on can I have written confirmation of the allegation that has been made and what is the reason for my pass being suspended?
Have you been given a date as to when the investigation will end?
Have you been given a date as to when I can return to work?
What is my employment status whilst I cannot return to work?

Can you also please confirm if I will be paid during this period of absence from work?
Can you please provide me with the policy or procedure that relates to the investigation against me.

At this point I presume that this is simply a mis-understanding and I look forward to it being resolved quickly and me returning to work asap.

Kindest Regards
Sophia Carvalho

9.15 Mr Lawrie replied on 11 February 2019 stating that he was unable to pass on any further details of the investigation as the matter was currently with the airport authorities. He explained that the respondent would be back in touch when more information was forthcoming (page 208).

9.16 On the evening of 11 February 2019, without prior notice, the claimant was visited at home by two police officers who instructed her to surrender her work and personal mobile telephones for inspection. She did so. The police advised the claimant that it had been alleged that she had broken an airport byelaw relating to filming airside.

9.17 The respondent was asked to delay its own internal investigation pending the police investigation, which it did. Mr Terry Coombes was appointed by the respondent to investigate. On a date unknown prior to the investigation meeting on 18 March 2019, Mr Coombes viewed the CCTV footage. He too concluded that it was the claimant who was shown on the screen videoing a flight taking off. He was firm in his conclusion to this effect and also described the footage as clear.

9.18 On 19 February 2019 the claimant was invited by letter and email to attend an investigation meeting with the respondent on 22 February 2019 (page 209-10). The claimant replied by email the same day (p211) declining to attend the investigation meeting and explaining that, on the advice of her solicitor, she had been told not to discuss the matter because it was sub judice as the matter was still being investigated by the police/airport authorities.

9.19 Miss Donna Goodwin, HR adviser of the respondent, replied to the claimant on 20 February 2019 (page 212) agreeing to postpone the investigation meeting but advising the claimant that she had not been suspended and was therefore not being paid. She added that “until we start our own internal investigation we will not be in a position to make any decisions regarding your pay and role going forward”.

9.20 On 28 February 2019 the claimant attended an interview with the police in the company of her solicitor. She was shown the CCTV footage and told the tribunal that she later received a copy as part of a response to a DSAR (data subject access request). This contained two separate pieces of footage. She said the first had a date and time stamp but was very unclear and could not be said to be her as it was so grainy it could have been anyone. She did not say whether the second piece of CCTV footage showed her but said that it had no date or time stamp on it. The police continued their enquiries after the

interview although at the time the claimant believed that the matter would go no further following that interview. She wrote to Donna Goodwin the next day explaining that she had been to an interview with the police and was now available to meet with Terry Coombes (p215).

9.21 At some point between 9 February and 28 February 2019 Stuart Lawrie, the claimant's line manager, confirmed to payroll that she should not be paid for the month of February after 9 February 2019. In doing so, he applied paragraph 7.3 of the claimant's contract of employment on the basis that the claimant was not able to fulfil her contractual duties because she did not hold a valid security pass. This decision was implemented and the claimant only received pay for 1 - 9 February 2019 at the end of that month.

9.22 An investigatory meeting was arranged by Ms Goodwin for 11 March 2019 but was later postponed to 18 March 2019 after the claimant raised a number of queries about the procedure and purpose of the meeting (page 218).

9.23 Before the meeting could take place, however, the claimant wrote again to Ms Goodwin (page 219) to advise that she had been informed by her solicitor that in fact the police investigation was ongoing. As the matter was still "sub judice" she would not be able to answer questions in connection with it. Notwithstanding this, the claimant attended a meeting with Mr Coombes on 18 March 2019. Mr Coombes had prepared a series of questions for the claimant (page 221) but he was not able to ask these in view of the claimant's stance and the meeting was adjourned after a short time. The claimant did read a prepared statement at this meeting (page 228) and explained that she denied the allegation that she had broken Byelaw 3(26). It was the police who identified this provision to the claimant as forming the basis of the criminal investigation when she met with them on 28 February 2019.

9.24 On 18 March 2019 the claimant also submitted a grievance in writing ("the wages grievance", page 229) about the stoppage of her pay from the second week of February 2019 onwards.

9.25 Following the second investigation meeting, Mr Coombes took advice from the respondent's then HR business partner, Sue Marsden, about how to proceed in relation to the claimant's "no comment" interview. He was advised that the investigation should go ahead even though the claimant had not responded to his questions. He wrote to Donna Goodwin on 20 March 2019 (page 232)" in the following terms:

"Hi Donna,

SC made a clear statement at the start of the meeting in which she explained that she has been advised not to offer any further information at this point. This then prevented the Investigation meeting from taking place and none of the prepared questions were answered, therefore it is difficult to conclude the investigation without obtaining explanations for the activity as witnessed within the CCTV footage shown to us.SC did state that she denies all allegations made and I believe the investigation being carried out by the Airport Authority / Police may still be ongoing, this may account for the reasons that SC has been advised to relay to us at this meeting?

Whilst the footage we have been shown appears to be very clear, I would like to record the explanation for this activity from the agent directly.

Rgds,

Terry"

9.26 On 3 April 2019 Mr Coombes followed up his email to Donna Goodwin with the following recommendation:

"*Donna,*

As the planned Investigation Meeting was prevented from taking place due to the statement given by SC, I can only conclude my investigation from the evidence witnessed on CCTV footage which clearly shows SC using a device at the bottom of the International Pier to either take pictures or video record activity on the runway at that specific time. This is in breach of the Birmingham Airport Security Declaration section 7.4 as shown in the attached document.

I would recommend that the matter be dealt with by way of disciplinary proceedings,

Rgds
Terry"

9.27 Mr Coombes told the tribunal that, in hindsight, he realized he could have postponed the investigatory meeting and waited until the claimant felt able to comment. He added, however, that everyone wanted it concluded and that, because the claimant wouldn't answer questions, he felt there was nothing more he could do so recommended that the matter move to the next stage, which was a disciplinary hearing.

9.28 On 4 April 2019 a letter was sent to the claimant requiring her to attend a disciplinary hearing on 11 April 2019 to answer an allegation that she had committed a "serious breach of airport authority regulations" (page 237). A copy of the BAL Security Declaration was enclosed with the letter.

9.29 A dispute arose between the claimant and Donna Goodwin about the arrangements for the disciplinary hearing and in particular the claimant's representative's availability. This led to the claimant submitting a second grievance against Ms Goodwin on 11 April 2019 ("the Goodwin grievance", page 271). The claimant expanded on her grievance in an email to Ms Marston on 15 April 2019 (page 275).

9.30 The disciplinary hearing eventually went ahead on 18 April 2019. The claimant was represented and the hearing was conducted by Mr Jason Lear. Mr Lear had been the disciplinary manager for a previous disciplinary case in 2016/17 in relation to an employee, Sam Jennings, who is white. Mr Jennings was found to have posted photographs of aircrafts online. Mr Jennings did not have his blue pass suspended or stopped by BAL, who had apparently

not witnessed this employee's conduct. Mr Lear issued Mr Jennings with a final written warning.

9.31 Mr Lear told the tribunal that, had BAL not put a stop on the claimant's pass, she would have been permitted by the respondent to continue working whilst the allegations against her were investigated. He commented in the disciplinary hearing that he saw no reason why the claimant shouldn't be at work at that time (page 286). The claimant still felt unable to answer any substantive allegations at the disciplinary hearing due to the ongoing police investigation and the advice she had received, but submitted a written statement (p290-296). Mr Lear was not comfortable in proceeding with the disciplinary hearing without permitting the claimant to view the CCTV footage and examine the Security Declaration apparently signed by her, which was said to exist as part of BAL's records. He therefore postponed the disciplinary hearing agreeing to follow the matter up with BAL to obtain the evidence.

9.32 The claimant's wages grievance was also heard by Mr Lear on 18 April 2019.

9.33 On 23 April 2019 the claimant wrote directly to BAL requesting information about the suspension of her pass (p297). The ID Centre Manager responded by email the same day stating that she was unable to offer information regarding the security of the pass system at Birmingham airport but attaching a "briefing sheet" that she said was given to the claimant at the appointment for her security pass. This was a copy of the Security Pass Declaration.

9.34 Also on 23 April 2019 the claimant made enquiries of Sue Marston of the respondent about whether or not she could carry out temporary work whilst she was not being paid by the respondent (page 302). The response she received was that the respondent would not prevent her from seeking temporary work but expected her to make herself available for further meetings with the respondent as deemed necessary (page 303).

9.35 On 26 April 2019 Mr Lear wrote to the claimant with the outcome of her wages grievance (page 304). He rejected the grievance and stated that it was both appropriate and justifiable in accordance with the terms of the claimant's employment in paragraph 7.3 and 7.4 of her contract of employment, to cease paying her whilst her BAL security pass was suspended. He added that all the respondent's employees at Birmingham airport required a valid ID pass and *"therefore in the circumstances redeployment was not an option on this occasion"*. On 30 April 2019 the claimant appealed the outcome of the wages grievance (page 306).

9.36 On 17 May 2019 David Astle wrote to the claimant advising that he had been appointed to hear her appeal against the outcome of the wages grievance. Mr Astle told the tribunal that, although he was working at Dublin airport at that time for the respondent, he was asked to consider this appeal because the managers at Birmingham airport had been involved in the original decision to stop the claimant's pay when her pass was suspended. A grievance appeal hearing took place on 23 May 2019. The claimant argued that the situation fell within the terms of the last sentence of paragraph 7.3 of her contract, namely that she was unable to work due to the acts of a third party which were outside of her control. Mr Astle took the view that the situation was not "*outside of the employee's control*" in circumstances where

her conduct was in issue and there was CCTV evidence which, as far as he was aware from his colleagues' observations, implicated the claimant. Mr Astle told the tribunal that there had been occasions when individuals who were unable to work were still paid by the respondent under the terms of paragraph 7.3. He drew the distinction, however, that those were cases in which there was a delay, for example, to the obtaining of a CRB check caused by postal disruption.

9.37 On 30 May 2019 Sue Marston wrote to the claimant with a written response to the Goodwin grievance. The claimant did not appeal that outcome (p325).

9.38 On 12 June 2019 the claimant was advised by Sue Marston that Mr Lear wished to arrange the reconvened disciplinary hearing for 27 or 28 June 2019 depending on the availability of the claimant and her companion (page 329). The claimant confirmed she would attend a meeting on 27 June 2019. A formal letter of invitation to the reconvened disciplinary hearing was then sent to the claimant on 17 June 2019 (page 337). The following day the claimant advised Mr Lear and Ms Marston that she had a meeting with Birmingham airport police on 4 July 2019 and as such her solicitor had advised her to request that the reconvened disciplinary hearing took place later on. This request was granted and the reconvened disciplinary hearing re-scheduled for 9 July 2019 (p345).

9.39 On 13 June 2019 Mr Astle wrote to the claimant asking for an update as to the claimant's enquiries of BAL and the police in relation to their ongoing investigations.

9.40 On 20 June 2019 the claimant lodged a third grievance ("the race discrimination grievance"((p339). In this grievance the claimant raised essentially two points. The first related to the treatment by the respondent of an alleged comparator. Of this person the claimant wrote as follows:

"It has been brought to my attention (I have been sent a letter by the person involved detailing the events), that on December 14th 2015, a Swissport employee was seen by Birmingham Airport Security on cctv taking images of a security flight operation carrying refugees from Syria. The airport authorities alerted Swissport. The aircraft was a 'Jordanian Air Wing' Airbus A320 registration JY-AYI seen arriving onto stand 59. The arrival of the refugees was also reported in the media (Birmingham Mail - Syrian refugees face a brighter Christmas after arriving in Birmingham - Birmingham Live): https://www.birminghammail.co.uk/news/midlands-news/syrian-refugees-face-brighter-christmas-10515305 (article date: on 17/12/2015)

The employee in question (who was on a final warning at the time) was called into a meeting with manager Paul Harris. The employee informed the manager that he had taken the photographs for his own purpose and did not intend to post them onto social media. He also showed the manager the images that he had taken on his phone (see images below, image 1). The employee was permitted to keep the photographs on his phone, never had his phone confiscated, continued to take pictures airside up until his date of leaving the company in 2018, did not have his wages stopped, was not suspended, did not have his security id pass parked/blocked, was not sacked

for gross misconduct and was not accused of "serious breach of airport authority regulations".

9.42 The claimant did not say in terms in the grievance that this was an allegation of race discrimination nor did she make reference to the race of this alleged comparator.

9.43 The second point raised by the claimant in the race discrimination grievance was that Mr Terry Coombes, the person appointed to investigate by the respondent, had posted a comment on Facebook in relation to what the claimant described as “an anti-immigration political party, UKIP” and further that he had been involved in a similar situation himself where he published photographs/video taken airside on his Facebook account. The claimant said that he had not been disciplined or investigated but was told by airport security simply to take the pictures down. The claimant included with her grievance screenshots of Mr Coombes’ Facebook pages including evidence that he had replied to a friend’s message saying that he had voted UKIP with the words “*fair play to you son*”.

9.44 The claimant did not receive an acknowledgement of the race discrimination grievance and therefore re-sent it to Jason Lear and Sue Marston on 3 July 2019 (page 347). Again, the claimant received no acknowledgement.

9.45 On 9 July 2019 the claimant attended the reconvened disciplinary hearing with Jason Lear and Sue Marston. She was accompanied by her work colleague Mr Ahmed. The claimant raised the issue of her race discrimination grievance at the hearing. She was told by Ms Marston that those points “deemed relevant” would be addressed as per the grievance procedure. This was later reiterated in a letter from Ms Marston to the claimant dated 16 July 2021 (page 358) when she wrote, “as advised during your reconvened hearing your letter of 20th June will be addressed via the grievance procedure and an appropriate manager will be appointed and you will be notified in due course of any further arrangements”. Mr Lear advised the claimant that the social media points she had raised were “irrelevant” - he was not prepared to check social media.

9.46 The respondent’s Grievance Procedure (page 172) provided at paragraph 2.1 that individuals lodging grievances would normally be invited to attend a meeting to discuss their grievance within 7 days and receive a written outcome within a further 7 days, or as soon as reasonably practicable, taking account of the need to carry out any investigations.

9.47 Mr Lear had by this time made a number of verbal enquiries of BAL in an attempt to obtain a copy of the CCTV footage and the alleged signed copy of the security declaration in order for him to show these to the claimant and obtain her comments in accordance with the respondent’s disciplinary procedure. He had been frustrated in his attempts by BAL and came to the conclusion that in the circumstances it was not possible for a fair disciplinary hearing to take place. Mr Lear therefore decided that there would be no further action against the claimant. He asked her to sign a document acknowledging that photography or filming anywhere on the airport site was only permitted for corporate use i.e. as a necessary part of the job (page 358

– 359). The claimant felt in this respect she was being treated differently to others who had not been asked to sign such a declaration by the respondent and declined to sign. Mr Lear did not insist.

9.48 On 10 July 2019 a representative of the respondent (most likely to have been Ms Marston or Mr Lear) wrote to BAL stating "*please be advised Swissport have concluded its investigation for Sophia Carvalho could you please advise when Sophia security ID pass will be reinstated by BAL in order for Sophia to return to duty*." (p354) This was one of a series of emails in the bundle that were redacted having been provided to the claimant as part of the response to a DSAR to BAL. The respondent was requested to provide unredacted copies to the tribunal as these were their documents, but was not able to do so.

9.49 The Airport policing unit of the West Midlands Police wrote to the Airport Authority on 11 July 2019 in these terms

"Following the disappointing decision regarding Carvalho's disciplinary hearing my understanding is that BAL are still to withhold the return of her pass pending the police investigation. As such we are currently waiting the CPS decision as to whether to prosecute or not. As soon as we get a decision I will update you further"(p355)

9.50 In an email from BAL which appears to be a response to the respondent's email of 10 July 2019 (p356), BAL advised that they continued to be led by any possible outcome from the police investigation adding that "*if there is no police case, or follow-up, we would immediately approve ID pass reinstatement. It is appreciated that this process takes time, but we do share Swissport's concerns that it has taken a considerable period of time to get feedback from the CPS. On the basis there are no police actions, we would accept that Swissport have conducted their internal process. We would not take severe action around permanent ID pass removal just for the infringement of filming airside*."

9.51 In stark contrast, however, in an email that appears to have passed between the Police and BAL on 14 July 2019, BAL wrote that "*from the security perspective we have a view, in line with information shared and would not be looking to reinstate the ID and as the issuing authority will follow this process*" (p357).

9.52 The Tribunal concluded that there was discussion at or about this time between the Police and BAL that is not fully documented in the Tribunal bundle and which refers to the perceived security risk posed by the claimant. The nature of this discussion was not known to the Tribunal, or indeed the parties. What seems clear is that the Police passed some information or expressed certain opinions to BAL, the result of which was that it changed its mind and decided not to reinstate the claimant's security pass.

9.53 On 2 August 2019 Julie-Ann Kelly, acting Head of Airport Security at BAL wrote to Mr Lear advising him of the change of heart on the part of BAL in connection with the withholding of the claimant's security pass. She stated that BAL would not be reinstating the claimant's ID "*due to the filming of a politically sensitive flight and by using the security pass for reasons*

unconnected with her employment". She added that she believed there had been a breach of byelaws and breakdown in trust for this individual to continue to operate in a security restricted area.

9.54 Mr Lear replied the same day as follows (p363):

"Good Afternoon Julie-Anne

Thank you for your response to rny email. I am naturally disappointed to learn of your decision for the reasons stated, with regard to your reference to 'Sophia using the security pass for reasons unconnected with her employment' I would like to clarify that Sophia was on shift on the day in question and would have been undertaking duties within the location identified on the CCTV footage and would ask that you give consideration to this point.

Further, I would like to make you aware that in the absence of Sophia holding a Security ID Pass she is unable to undertake her duties of her job role and therefore unable to fulfil her contractual obligation in this regard and as an outcome may result In a decision by Swissport to having no alternative other than to terminate Sophia's employment due to third party pressure. Therefore I would respectfully request that you re -consider your decision and re-instate Sophia's ID Pass.

Julie-Ann I am on leave from today so I have copied in my HR manager Sue Marston could you please copy Sue in on your response.

I thank you for your time and look forward to hearing from you.
Kind regards

Jason Lear"

9.55 On 9 September 2019 the claimant wrote to Ms Marston copying in Mr Lear, Mr Laurie and Mr Astle, to advise that the CPS had told her that no charge would be brought and that the investigation had now ceased with no further action. She enquired as to the steps that were needed to bring about her reinstatement and the reinstatement of her pass (p365).

9.56 Mr Lear wrote again on 12 September 2019 to BAL (Julie-Ann Kelly) requesting the reinstatement of the claimant's ID pass in light of the CPS decision (p 366). From the email at the bottom of page 366 it appears that this may have been the third email from Mr Lear to BAL requesting the return of the claimant's pass, there being an apparent interim email exchange on 28 August 2019.

9.57 The respondent wrote to the claimant on 3 October 2019 to invite her to a meeting to discuss her continued employment (page 367). It included the statement that "*Swissport has been attempting to get your security ID pass reinstated by Birmingham Airport Ltd since it was determined that no internal disciplinary case against you was to be progressed*." The correspondence between Swissport and BAL on this issue was enclosed with the letter and the claimant was advised that BAL had declined to do as requested. The claimant was advised that one outcome of the meeting might be the

termination of her employment. Included in this letter was the single sentence as follows: "*this meeting will also provide the opportunity for us to discuss the complaint of race discrimination you have raised*."

9.58 The meeting eventually went ahead on 29 October 2019 after the claimant requested a new date. She was again accompanied by her work colleague Mr Ahmed. The meeting was chaired by Mr Astle with Ms Goodwin as HR representative.

9.59 The tribunal found that that Sue Marston, HR business partner, ceased working as part of the HR function at Birmingham Airport at some point after her letter of 3 October 2019. Ms Marston was on sickness absence and Clare Hepworth took over as HR business partner serving that part of the respondent's business in November 2019 on a temporary basis.

9.60 Mr Astle was asked to investigate the claimant's race discrimination grievance shortly before the meeting scheduled with the claimant on 29 October 2019 and was not provided with a copy of it until that point. The tribunal found that there was no appointed investigator for this grievance from 20 June 2019 when it was submitted until approximately 3 October 2019.

9.61 At the meeting on 29 October 2019 the claimant did not wish to discuss her race discrimination grievance as she understood the meeting to be primarily about her future employment. She saw these issues as distinct and expected a separate grievance investigation process to be put in place, albeit belatedly.

9.62 The subject of redeployment was raised by the respondent at the meeting and the claimant was given copies of job opportunities for other airports around the UK working for the respondent. This was the first time the idea of the claimant being redeployed outside of Birmingham airport was raised for discussion. It was common ground that none of these particular vacancies were suitable for the claimant and she noted that the deadlines for application had in some cases already passed. The claimant explained that she would need to take advice and consider her personal circumstances before discussing further employment opportunities outside Birmingham.

9.63 On 30 October 2019 BAL wrote a formal letter to Mr P Sutcliffe, the respondent's then General Manager at Birmingham airport, setting out their decision formally in relation to the claimant's ID pass (p389). They included the statement that BAL were not preventing the claimant from working in other areas of the airport or indeed for working for the respondent and explained that it was purely SRA access that had been withdrawn. The tribunal found, however, that in fact this was of no assistance to the claimant - or the respondent - because there were no posts at Birmingham airport working for the respondent which the claimant could carry out without a blue pass.

9.64 Also on 30 October 2019 the claimant wrote to Mr Astle (p392) following up her race discrimination grievance. She said

"I would like to reiterate that further to yesterday's meeting I am requesting that the matters raised in my letter of June 20th in relation to racial

discrimination be dealt with procedurally. Swissport confirmed in writing on July 16th 2019 that the matter would be dealt with via its grievance process. As of this date no such meeting has been convened. Furthermore I find that Swissport attempting to address the matter informally at yesterday's meeting as simply 'a racial complaint' is in violation of established company protocol and procedure.
It has been four months since the matter was raised and to-date nothing has been done about the grievance raised. This I find wholly unacceptable."

9.65 On 7 November 2019 the claimant made data subject access requests of both BAL and the respondent.

9.66 On 18 November 2019 Clare Hepworth wrote to the claimant inviting her to a reconvened meeting to continue the discussion started on 29 October 2019 about her future employment. Despite the claimant's email to Mr Astle of 30 October 2019 Ms Hepworth again merely included the words "*this meeting will also provide the opportunity for us to discuss the complaint of race discrimination you have raised*". The claimant's reply to Clare Hepworth of 20 November 2019 again raised her unhappiness that her race discrimination grievance was not being dealt with in a timely way nor in accordance with the respondents grievance procedure (p406-7).

9.67 The claimant advised the respondent on 29 November 2019 that she was not able to attend the reconvened meeting with Mr Astle because "*I have decided that I need further advice*". The meeting did, however, go ahead on 10 December 2019. At the outset of this meeting the claimant handed in a letter of resignation dated 9 December 2019 (p414-415). The Claimant's letter said that she felt she had no choice but to resign in view of her recent experiences over the past 10 months. The claimant referred to the very significant impact that the withdrawal of her salary had had on her financial and mental health and described suffering race discrimination and being "*emotionally spent, bullied and battered by the hand of ineptitude, corruption, poor leadership and the abuse of policy and procedure*" on the part of the respondent.

9.68 The claimant's resignation was acknowledged by the respondent by letter of 17 December 2019 (page 430). The claimant's last day of work was 10 December 2019 and she was paid her accrued but untaken holiday as at her effective date of termination.

9.69 In relation to the claimant's outstanding race discrimination grievance the respondent wrote that they would "continue to look into it" and that an outcome would be provided based on the information the claimant had given to the respondent to date. That outcome was sent to the claimant on 22 January 2020 (page 232). The grievance was dismissed by Mr Astle in a letter written by Clare Hepworth on the basis that the "unnamed colleague" cited as a comparator had not been identified by name so that issue could not be investigated. In relation to Terry Coombes it was found that he had treated the claimant no differently because of her race and that he was "a long-standing employee of Swissport who was fully aware of Swissport's position in relation to equality and diversity".

The law

10. The law applicable to the race discrimination and victimisation claims was to be found in the Equality Act 2010 ("EqA) and in particular the following sections:

13 Direct discrimination

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

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

123 Time limits

(1) **….** proceedings on a complaint within section 120 may not be brought after the end of—

(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 employment tribunal thinks just and equitable.

(2) …

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

136 Burden of proof

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

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

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

11. When considering whether Sam Jennings was capable of being an actual comparator for the claimant's direct race discrimination claim, the Tribunal reminded itself of the decision of the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] IRLR 285, ICR 337. As Lord Scott explained in that case 'the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the

same position in all material respects of the victim save that he, or she, is not a member of the protected class.'

12. In relation to the constructive unfair dismissal claim, the Tribunal considered the framework provisions in sections 95 and 98 Employment Rights Act 1996 ("ERA") which provide as follows:

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if …

(a)…

(b)…

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

13. In considering whether the claimant had been dismissed, the Tribunal applied the well-known test in *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 asking itself whether there had been a fundamental (repudiatory) breach of the claimant's contract of employment by the respondent and if so, whether the claimant had resigned in response to that breach within a reasonable time.

14. If dismissal was proven, then the Tribunal noted that it would be for the respondent to show the reason for dismissal and that it was for one of the reasons set out in section 98(1) ERA. In this case the respondent said that dismissal, if proven, was because of some other substantial reason being BAL's decision not to reinstate the claimant's blue pass meaning that she could not do her job at Birmingham airport.

15. The Tribunal would in those circumstances go on to look at whether the dismissal was fair or unfair, applying the wording of section 98(4) ERA and asking itself whether dismissal was within a range of reasonable responses, taking care not to substitute its own decision for that of the respondent employer.

16. Finally, the Tribunal considered the test to be applied in determining the claim to unlawful deduction from wages by the withholding of the claimant's salary following the suspension of her blue security pass. This was a contractual matter – in other words, was the claimant paid in accordance with the terms of her contract of employment or not? This reflected the statutory provision under which the claim to unlawful deductions was made which is in section 13 ERA.

Section 13(3) states:

"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Conclusions

17. The tribunal reached its conclusions unanimously by applying the law to the facts it had found. In doing so the tribunal took each claim in turn as set out in the final version of the list of issues.

Race discrimination – time

18. The claimant's claims of direct and indirect race discrimination were the subject of some discussion with the representatives relating to the applicable

time limits. The parties were asked to clarify their positions, which they did by completing a table in which they stated their respective positions in relation to when and whether each claim of discrimination was out of time (see "the out of time annex"). It was admitted by the respondent that the claim of victimisation was in time.

19. The first claim (in which the claims of direct and indirect race discrimination were made) was lodged on 7 July 2019. This followed a period of ACAS conciliation between 21 May 2019 and 10 June 2019. Alleged discrimination that occurred prior to 21 February 2019 was therefore on its face out of time, unless it was "conduct extending over a period" – also referred to as a "continuing act" - within the meaning of section 123(3) EqA. Where reference to "continuing acts" is made in these reasons it is purely by way of short form and does not signify a departure from the statutory test.

20. For the avoidance of doubt, it appeared to the Tribunal that the respondent had erroneously used the dates of submission and early conciliation associated with the second claim when completing the out of time annex, when the claim for discrimination was in fact included in the first claim. The points made therein about whether or not a claim was "continuing" held good, however.

21. The respondent accepted, rightly in the Tribunal's view, that the alleged discriminatory acts outlined at 2.1 (prevent continuing employment) and 2.3 (failure to pay wages) were in time because the matters complained about were ongoing when the first claim form was submitted.

22. In relation to the remaining allegations of alleged discrimination, the respondent conceded that they were also in time if the Tribunal came to the same view – namely, that these were still "live" issues or a continuing state of affairs when the claimant lodged her claim with the Tribunal. The Tribunal considered each act of alleged discrimination, as set out in the list of issues, and determined that, as with 2.1 and 2.3, they were in fact all complaints about ongoing matters at the time the claim form was submitted on 7 July 2019 and were therefore in time applying the test set out in section 123(3) EqA.

23. Issue 2.2 states that the respondent unlawfully discriminated against the claimant by "failing to treat [her] as suspended from 8 February 2019". The use of the word "from" here is significant as it is suggestive of an ongoing state of affairs. The respondent decided when the issue of the claimant's security pass first arose not to suspend her pending disciplinary investigation but rather to invoke clause 7 of her contract and instruct her to stay at home because she did not have the requisite security pass to access her workplace. This was a decision that could have been changed at any time up until her employment ended. In addition, if the linked complaint of failure to pay the claimant (issue 2.3) was a continuing act then the Tribunal concluded that, by extension, so was the linked decision not to suspend her on full pay.

24. Issue 2.4 related to the alleged failure to deal with the claimant's wages and race discrimination grievances. These were both lodged after 21 February 2019 and so were complaints of acts of discrimination that were in time when the first claim was lodged.

25. Issue 2.5 (alleged failure to investigate the allegations raised against the claimant by Birmingham airport) commenced on or about 8 February 2019 and was ongoing until at least the decision by the respondent not to issue the claimant with a disciplinary sanction (disciplinary outcome letter, 16 July 2019, p360). This is why the Tribunal considered that this allegation was in time.

26. Issue 2.6 concerned the bringing of disciplinary proceedings against the claimant which was notified to her by the letter of 4 April 2019 (p237), therefore also making this an allegation which was in time.

27. Finally, in relation to the allegations of direct race discrimination, the claimant alleged that the respondent had failed to provide her with accurate information from BAL as to their reasons for withholding her security pass. Again, this was very much said to be a continuing state of affairs when she lodged her first claim in July 2019 at the Tribunal.

28. The indirect discrimination claim relating to the alleged inconsistent application of the respondent's disciplinary procedure was clearly continuing when the tribunal claim was lodged as the claimant's reconvened disciplinary hearing was not due to take place until 9 July 2019. This claim was therefore also in time.

Race discrimination – merits

29. Turning to the merits of the direct discrimination claim, the tribunal concluded that, in answer to the questions in paragraph 2 of the agreed list of issues, the respondent did not "prevent the claimant from continuing employment with the respondent from 8 February 2019". On the contrary, the respondent took no steps to end the claimant's employment prior to her resignation. The fact that the claimant was not able to go into work was the consequence of an act on the part of BAL in removing her pass, no the result of an act on the part of the respondent in "preventing" her from doing so, as alleged.

30. The respondent did not suspend the claimant on 8 February 2019. The tribunal was not satisfied, however, that this amounted to less favourable treatment, despite the financial impact of the decision in these particular circumstances. Suspension is often cited as an act of less favourable treatment in itself, despite its neutral status. It was the failure to pay the claimant from 10 February 2019 that was the act of unfavourable treatment (issue 2.3).

31. The tribunal was not satisfied that the respondent failed to deal with the wages grievance and, whilst there was an inordinate delay in dealing with the race discrimination grievance of 20 June 2019 (see below re victimisation), it could not be said to represent unfavourable treatment at the time when the first claim was lodged on 9 July 2020, the point in time when the Tribunal was required to adjudicate on this question (issue 2.4).

32. The tribunal did not agree that the respondent had failed to properly investigate the allegations raised against the claimant by BAL (issue 2.5) or provided the claimant with accurate information received from them by BAL (issue 2.7). The evidence showed that the respondent had asked a number of times for BAL to provide evidence which had been declined and there was no evidence that the respondent had withheld information from the claimant received from BAL about why her pass had been withdrawn.

33. Finally in relation to the direct race discrimination allegations, the respondent did bring disciplinary proceedings against the claimant and, although they were later dropped, the Tribunal accepted that this was treatment that the claimant could reasonably conclude was unfavourable.

34. In relation to the failure to pay the claimant and the disciplinary proceedings, the tribunal went on to consider who would be an appropriate comparator. The tribunal concluded that Sam Jennings, whom the claimant relied upon, was not an appropriate comparator because in his case there was no involvement from BAL nor suspension of his blue security pass. Indeed, the claimant was asked by the respondent's solicitor during cross-examination the following question "none of the other comparators had their passes stopped by BAL did they?" The claimant answered "true". The tribunal concluded that, applying the EqA and relevant case law such as the *Shamoon* decision, the correct comparator would be a person of a different race to the claimant who had also been observed by BAL to have been allegedly breaching security rules and had his or her BAL security pass withdrawn/suspended and was unable to carry out their contractual duties as a consequence.

35. The tribunal heard no evidence from either party about the treatment of any other employee of any race whose BAL security pass been withdrawn/suspended. For the purpose of the direct race discrimination complaint, therefore, the tribunal was left with looking at how an hypothetical comparator would have been treated.

36. This led the Tribunal to the conclusion that there had been no less favourable treatment of the claimant. The tribunal was not satisfied that a person in the same position as the claimant would not have been treated the same as she was. The respondent followed the contractual term that was in the contracts of all its staff setting out what would happen in the situation where security clearance was not available, in relation to the payment of salary. At the time that the disciplinary process was commenced, there was a serious allegation that had been made against the claimant by BAL, and there was evidence by way of CCTV footage, that the respondent's managers had viewed and considered potentially incriminating of the claimant. After an investigatory meeting with the respondent, the concerns remained and the claimant, albeit acting on advice, had not provided any explanation to alleviate the respondent's concern. The disciplinary process was invoked against this backdrop and to enable the respondent to progress its investigations and pursue the claimant's explanation (page 249).

37. In relation to the indirect discrimination claim, the Tribunal asked itself whether the respondent had a practice, criterion or policy (PCP) of an inconsistent application of the disciplinary policy, and concluded that this was not established on the evidence. There was no clear comparator on the evidence before the Tribunal, as explained above. The individual referred to in the claimant's race discrimination grievance was not identified by her nor was any documentary evidence put forward from that person, although it was alluded to in the grievance. Sam Jennings, whose circumstances were not the same as the claimant, was treated consistently with her in that he too was subjected to the disciplinary process. The application of this process by the respondent in his case resulted in a harsher outcome – he received a final warning and the

claimant's discipline was discontinued when Mr Lear could not obtain copies of the evidence from BAL.

Victimisation

38. There were 3 complaints of victimisation which the Tribunal considered in turn. The Tribunal was not satisfied that the decision to continue to withhold the claimant's wages or the failure to redeploy her were influenced in any way by the fact that she had lodged a grievance of race discrimination on 20 June 2019 (the protected act). This is because there was no evidence from which the Tribunal could conclude that this link was there when the wages had been withheld pursuant to the contract since February 2019 and the redeployment issue was still under discussion at the time of her resignation. There was no evidence before the Tribunal of a suitable role at a suitable alternative location to which the claimant could have been redeployed.

39. In the case of the third allegation of victimisation – the failure to properly consider the claimant's grievance of 20 June 2019, the Tribunal came to a different conclusion. Applying section 136 EqA, the Tribunal found that there were facts from which it could conclude, absent a satisfactory explanation from the respondent, that the respondent's considerable delay in considering the claimant's race discrimination grievance was related to its status as a protected act i.e. a complaint of discrimination. These facts included the fact that the respondent's grievance procedure set out its expectation that grievances would be considered within 7 days, that the employee raising them would be invited to a meeting to discuss them and that an outcome would be delivered in 7 further days, or as soon as reasonably practicable. Whilst a failure to adhere to those strict time limits was not in itself a reason to draw any particular inference, there were no steps taken by the respondent at all to investigate the claimant's race discrimination complaint from 20 June 2019 until 3 October 2019, despite the respondent being chased by the claimant on 3 and 9 July 2019 and indicating on 16 July 2019 in writing that it would be investigated in accordance with the procedure.

40. On 3 October 2019, over 3 months after the grievance was lodged, it was suggested that the grievance was going to be considered at a meeting convened for a different purpose – namely to discuss the claimant's future employment. These facts contrasted markedly with the way in which the claimant's 2 prior grievances were handled, neither of which raised allegations of race discrimination. In relation to the wages grievance (dated 18 March 2019) – this was heard by Mr Lear on 18 April 2019 and a written outcome delivered on 26 April 2019 and in relation to the Goodwin grievance (dated 11 May 2019), there was also a meeting and a written outcome dated 30 May 2019. When the race discrimination grievance was finally considered (after the claimant's employment had ended), the claimant was not invited to supply information about the identity of the comparator referred to, nor copies of the documents referred to in the body of the grievance itself.

41. Having considered these matters, the Tribunal concluded that, as a matter of law, the burden of proof did indeed shift to the respondent under section 136 EqA and it therefore must look to the respondent for an explanation. Unfortunately, none was forthcoming. The most that was said was that there had been some re-organisation of the HR function of the respondent that was supporting Birmingham airport and that Ms Marston was absent on sick leave

after 3 October 2019. The Tribunal concluded that these were not full or adequate explanations from which it could conclude that the delay in dealing with the claimant's race discrimination grievance was not related to the fact that it was a protected act. Indeed, Mr Lear's summary rejection at the reconvened disciplinary meeting on 9 July 2020 of the matters the claimant had raised in relation to Mr Coombes as "irrelevant" suggests that there was no appetite to take the claimant's concerns of bias on grounds of race seriously at all.

42. The operation of section 136 EqA means that, in the circumstances described above, the Tribunal found that the complaint of victimisation that the respondent failed to properly consider the claimant's grievance of 20 June 2019 was well founded.

Unlawful deduction from wages

43. The test here, as explained above, was a contractual one. The Tribunal found that the claimant's contract was clear that, in circumstances, as here, where she could not fulfil her contractual duties as a result of not holding a valid security pass, the respondent had the contractual right to withhold her salary. The Tribunal did not agree with the claimant's analysis of the contract that the situation fell within the second sentence of paragraph 7.3 of the contract dealing with situations outside the employee's control. In any event, that sentence requires the respondent contractually to merely "consider" the reinstatement of the claimant's salary. Here, such a consideration occurred when the claimant raised her wages grievance which was heard and determined in April 2019.

44. There was no breach of the claimant's contract and therefore she was not paid less than she should have been according to its terms in any pay period. The claim to an unlawful deduction of wages therefore failed.

Unfair dismissal

45. The Tribunal did not find that the claimant had demonstrated a breach of her contract of employment by the respondent or that it was a fundamental breach of her contract that led her to resign her employment.

46. The claimant explained her reason for resignation in her witness statement at paragraph 268. To summarise, she explained that she had no alternative but to resign because, despite the conclusions of the respondent and the CPS, BAL refused to reinstate her security pass. She added that she felt let down by the respondent because it had not been actively seeking information to exonerate her and did not provide her with any information about how she might appeal against BAL's reinstatement of her pass. The Tribunal did not find evidence of the withholding of information by the respondent and concluded that it was the actions of BAL, not the respondent, that was the primary driver that led the claimant to conclude that her ongoing employment with the respondent was untenable. The Tribunal concluded that the claimant resigned when she did as she anticipated, for the same reason, that the respondent, having failed to find her an alternative position, was about to terminate her employment.

47. In these circumstances, the claimant was not able to show that she had been "dismissed" within the meaning of section 95 ERA and therefore her claim to unfair dismissal was bound to fail.

Employment Judge J Jones
25 January 2022

Case No: 1305877/19

Miss S Carvalho

Claimant

-and-

Swissport GB Limited

Respondent

LIST OF ISSUES (Merits)[1]

Unlawful deductions from wages

1 Did the respondent make unauthorised deductions from the claimant's wages in accordance with Employment Rights Act 1996 (ERA) section 13, from 10 February 2019 (when her security pass was suspended) until

(a) 7 July 2019 – the date of submission of the first claim (R's case); or

(b) 10 December 2019 – the effective date of termination (C's case) ?

R's position is that the second ET1 submitted to the ET on 16 March 2020 does not include an unlawful deduction from wages claim. C's position is that ET1 form 16.3.20 does claim compensation and the loss of wages section is filled in. It would be artificial to say the victimisation etc. does not include the obvious deduction from wages.

Direct race discrimination (section 13, Equality Act 2010 (EqA))

2 Did the respondent do the following:

2.1 Prevent the claimant from continuing employment with the respondent from 8 February 2019;
2.2 Fail to treat the claimant as suspended from 8 February 2019;
2.3 Fail to pay the claimant from 10 February 2019;
2.4 Fail to deal with grievances raised by the claimant on 18 March 2019 (in relation to non-payment of wages) and/or 20 June 2019 (in relation to a complaint of race discrimination);
2.5 Fail to properly investigate allegations raised against the Claimant by Birmingham Airport Limited (BAL);
2.6 Bring disciplinary proceedings against the claimant;
2.7 Fail to provide the claimant with accurate information received by them from BAL as to the reasons why the claimant was not being permitted back on to the Birmingham Airport site ?

3 If so, was that treatment "less favourable treatment', i.e. did the respondent treat the claimant as alleged less favourably than it

[1] Prepared by the Tribunal and shared with the parties on 1 December 2021; amended by the parties' representatives and returned to the Tribunal on 2 December 2021)

treated Sam Jennings or would have treated another (hypothetical comparator) in not materially different circumstances?

4 If so, was the less favourable treatment because of the claimant's race?

Indirect discrimination (section 19, EqA)

5 Did the respondent have a practice, criterion or policy (PCP) of an inconsistent application of the disciplinary policy?

6 If yes, did the respondent apply the PCP(s) to the claimant at any relevant time?

7 If yes, did the respondent apply (or would the respondent have applied) the PCP(s) to persons with whom the claimant does not s hare the characteristic of being African-Caribbean, Jamaican and/or Black-British?

8. Did the PCP put persons with whom the claimant shares the characteristic, e.g. somebody who is African-Caribbean, Jamaican and/or Black-British at one or more particular disadvantages when compared with persons with whom the claimant does not share the characteristic, in that: inconsistent application of the policy meant that disciplinary allegations were brought against the claimant?

9. Did the PCP put the claimant at that/those disadvantage(s) at any relevant time?

10. The respondent no longer asserts a defence of objective justification.

Time limits

11. Were the claimant's complaints of direct and indirect race discrimination presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")?

In relation to each of the alleged acts of discrimination, the parties' positions as to when time began to run is as follows:

See the enclosed "out of time annex".

Victimisation (section 27 EqA)

12. The parties agree that the claimant did a protected act on 20 June 2019 by submitting a grievance complaining of race discrimination to the respondent.

13. Did the respondent subject the claimant to all or any of the following detriments because she did the protected act :

13.1 continue to withhold her wages;
13.2 fail to redeploy her;
13.3 fail to properly consider her grievance of 20 June 2019?

14. The parties agree that these claims are in time as they were all acts continuing at the effective date of termination or beyond (10 December 2019).

Unfair Dismissal

15. Did the respondent do the following things:

15.1 deducted the claimant's wages for 10 months on the basis of an allegation only which was never fully investigated;
15.2 failed to consider suspension for an unproven Allegation;
15.3 failed to give consideration to the full terms of clause 7.3 of her employment contract in particular the act of a third party;
15.4 failed to adjourn the investigation hearing on the 18th of March 2019 until the independent police investigation had been completed;
15.5 failed to properly consider the claimants grievance regarding deduction of pay even when the police investigation had been discontinued;
15.6 failed to even consider evidence of other employees undertaking filming inside;
15.7 failed to adhere to their disciplinary procedure when dealing with the Claimant's racial discrimination claim of the 20th of June 2019. This claim was dealt with over a period of months rather than within 7 days with completion within probably a month;
15.8 Failed to have regard to the claimant's repeated complaints about the lack of progress on her racial discrimination claim.[2]

16. Did that breach the implied term of trust and confidence?

The Tribunal will need to decide:

16.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

16.2 whether it had reasonable and proper cause for doing so.

17. Did that breach clause 7.4 of the contract?

[2] Section 15 is included verbatim - as provided by claimant's counsel on 2.12.21

18. Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

19. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

20. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

21. If the claimant was dismissed, what was the reason or principal reason for the breach of contract?

22. Was it a potentially fair reason? The respondent alleges that it was "some other substantial reason".

23. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

2 December 2021

MISS S CARVALHO v SWISSPORT: ANNEX TO LIST OF ISSUES - JURISDICTION

First ET1 submitted: 07.07.19	ACAS Date A: 21.05.19 ACAS Date B: 10.06.19	Extended Limitation Date for 'Date of Act': 08.02.19 is: **10.07.19**
Second ET1 submitted: 16.30.20	ACAS Date A: 18.02.20 ACAS Date B: 19.02.20	Extended Limitation Date for 'Date of Act': 10.12.19 is: **19.03.20**
Less favourable treatment	**C**	**R**
2.1		Prevent continuing employment R accepts continuing act to 10.12.19 Extended Limitation Date ²ET1: 19.03.20 Therefore: **In Time**
2.2	Continuing act: **In Time**	Decision not to suspend If date of Act 08.02.19 3 month date: 07.05.19 ACAS Date A: 21.05.19 Therefore: **Out of time** If date of Act: Continuing: Extended Limitation Date: ¹ET1 10.07.19 Therefore: **In Time**
2.3		Failure to pay R accepts continuing act to 10.12.19 Extended Limitation Date ²ET1: 19.03.20 Therefore: **In Time**
2.4	**In Time**	Failure to deal with grievances Depends on ET findings If found to be continuing act to 10.12.19 then **In time**: Extended Limitation Date ²ET1: 19.03.20 If ET find an earlier date than 10.12.19, may need to do another ACAS EC Limitation calculation to consider whether or not in time. Therefore: **TBC**
2.5	Continuing act: **In Time**	Failure to properly investigate BAL allegations Depends on ET findings

		If found to be continuing act to 10.12.19 then **In time**. If ET find an earlier date than 10.12.19, may need to do another ACAS EC Limitation calculation to consider whether or not in time. Therefore: **TBC**
2.6	**In Time**	Disciplinary proceedings Date of Act: 09.07.19 (Meeting where C told no disciplinary action) 3 month date: 08.10.19 ACAS Date A: 18.02.20 Therefore: **Out of time**
2.7		Failure to provide accurate information Depends on ET findings If found to be continuing act to 10.12.19, then **In time**. If ET find an earlier date than 10.12.19, may need to do another ACAS EC Limitation calculation to consider whether or not in time. Therefore: **TBC**
Indirect discrimination	**In Time**	Application of Disciplinary Policy Date of Act: 09.07.19 (Meeting where Mr Lear told C no disciplinary action) 3 month date: 08.10.19 ACAS Date A: 18.02.20 Therefore: **Out of time**