



EMPLOYMENT TRIBUNALS

Claimant

Alexandra Howe

Respondent

British Airways plc

v

Heard at: Watford Employment Tribunal

On: 24 - 27 April 2023

Before: Employment Judge Coll

Appearances

for claimant: Mr S Crawford, counsel

for respondent: Mr G Baker, counsel

RESERVED JUDGMENT

1. The claim for unfair dismissal does not succeed.
2. The claim for wrongful dismissal does not succeed.

REASONS

The hearing

3. The following attended in person on behalf of Miss Howe: Mr. Crawford as counsel, Mr. Eckett as instructing solicitor and Miss Howe as claimant and witness. The following attended in person on behalf of the respondent: Mr Baker as counsel and witnesses: Mrs. Clark, Miss Ferguson-Prout, Mr Shirley and Mrs. Allport. All witnesses took the oath or affirmed.
4. The joint bundle of documents totalled 1013 pages. This together with the witness statements was made available by Miss Howe and the respondent respectively to each other in advance of the hearing (in hard copy format). The bundle and the witness statements were provided to the Tribunal for the first time at the hearing (also in hard copy format). Page numbers in these reasons refer to pages in the bundle.
5. I adjourned for 45 minutes to read the witness statements and bundle, having asked Mr Crawford and Mr Baker for suggestions of essential reading in the bundle.
6. There was a list of issues as set out in the case management order from the preliminary hearing for case management on 16 May 2022 (see below) [pages 56-63, with particular reference to pages 61-63].

7. It was agreed that contributory fault was relevant (as per the list of issues). With regard to contributory fault, it was recognised that this meant I would need to make a finding as to whether Miss Howe had committed any of the gross misconduct set out in the allegations, if I were to find the dismissal unfair. This was also relevant to the breach of contract claim (wrongful dismissal).
8. Given that the final hearing had been listed for five days and only four days were available, I discussed with Mr Crawford and Mr Baker how the timetable could be adjusted to ensure completion within four days. It was anticipated that all of the afternoon sessions would be used, which was not the case, and the application made by Mr Baker on 26 April 2023 was not anticipated.
9. On day one (24 April 2023) Mrs. Clark and Miss Ferguson-Prout adopted their witness statement and were respectively cross examined in the morning and the afternoon. I asked a few questions of Mrs. Clark and there was some re-examination. Mr Baker requested that no further respondent's witnesses be cross examined after Miss Ferguson-Prout since there was not time at 3:15 p.m. to start and complete a witness. On day two (25 April 2023), Mr Shirley adopted his witness statement and was cross-examined. I asked some questions and there was some re-examination. At this point, it was 3:15 PM and Mr Baker stated that he needed to take lengthy instructions and would prefer that the day ended without hearing from Mrs. Allport.
10. At the start of day three (26 April 2023), Mr Baker said that he needed to make an application but before doing so he had been instructed to ask some questions to determine the need for the application. He asked me a number of questions about my career history, having ascertained that I had once worked for the respondent, the dates of my employment, role and whether I had ever undertaken occupational health assessments of cabin crew overseas. I had not mentioned this because I had ceased working for the respondent some 35 years previously in the capacity of Occupational Psychologist in Human Resources allocated to Passenger Services, Ramp, Reservations and Revenue Accounts. Mr Baker then said that he would need to take further instructions in light of this information and he requested an initial period and then a further period. I returned to the hearing room to hear Mr Baker's application at 11:30 a.m. Mr Baker indicated that he would no longer be pursuing the application.
11. After this, Mrs. Allport adopted her witness statement and was cross examined. Miss Howe then adopted her witness statement, cross examination followed and re-examination. On day four (27 April 2023), both representatives provided written submissions. Closing oral submissions followed. By this stage, it was about 3:00 p.m. and I explained that it would not be possible for me to make my decision and deliver judgement by the end of the afternoon session. I therefore reserved my decision.

The issues

12. *Unfair Dismissal Section 94 Employment Rights Act 1996 ("ERA 1996")*

- 12.1 Was there a potentially fair reason for dismissal?
- 12.1.1 The respondent relies on the potentially fair reason of conduct (s98(2) ERA 1996). Miss Howe agreed.
- 12.2 If Miss Howe was dismissed for the potentially fair reason of conduct, did the respondent have a reasonable belief in Miss Howe's guilt?
- 12.3 If so, did the dismissal fall within a band of reasonable responses?
- 12.4 Was the dismissal fair in all the circumstances? (s98(4) ERA 1996)
- 12.5 If Miss Howe was dismissed for a potentially fair reason, but the dismissal was procedurally flawed rendering the dismissal unfair, would Miss Howe have been dismissed in any event? (See *Polkey v A E Dayton Services Ltd.* [1987] IRLR 503).
- 12.6 Did Miss Howe contribute to her dismissal? Would it be just and equitable to reduce any award because of the conduct of Miss Howe before the dismissal and if so, to what extent?
- 12.7 Did the respondent fail to follow the ACAS guidelines in dismissing Miss Howe and, if so, should any award of compensation awarded by the Tribunal be increased and if so, by how much?
- 12.8 The issues relating to the remedy for unfair dismissal were set out at paragraphs 2.1 to 2.6 of the issues list finalised at the preliminary hearing.

13. *Wrongful dismissal/notice pay*

- 13.1 What was Miss Howe's notice period?
- 13.2 Was Miss Howe paid that notice period?
- 13.3 If not, was Miss Howe guilty of gross misconduct and/or did Miss Howe do something so serious that the respondent was entitled to dismiss without notice?

Law applicable to the issues in dispute in the Unfair Dismissal Claim

14. S.98 Employment Rights Act 1996 ("ERA 1996") states:

- (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 there is more than one the principal reason for the dismissal and

- b. that it is either a reason falling within (2) or some other substantial reason of a kind such justify the dismissal of the holding position which the employee held.
- (2) a reason falls within this subsection if it –....(b) relates to the conduct of the employee,
- (3) ...
- (4) where the employer has fulfilled the requirements of subsection 1, the determination of the question whether dismissal is fair or unfair (having regard to the reason shown by the employer) –
- a. depends on whether in the circumstances (including the size administrative resources of the employer’s undertaking) the employer acted reasonably and unreasonably in treating it as a sufficient reason for dismissing the employee and
 - b. shall be determined in accordance with equity and substantial merits of the case”.

Misconduct

15. The classic three stage test for a misconduct dismissal is set out in *British Home stores Ltd v Burchell* [1980] ICR 303 EAT:

- (a) the respondent genuinely believed that Miss Howe was guilty of misconduct
- (b) the respondent had in mind reasonable grounds upon which to sustain that belief
- (c) the respondent carried out as much investigation as was reasonable.

16. The burden of proof is on the respondent to show that it believed Miss Howe was guilty of misconduct. The burden of proof for the remainder of the test is neutral (section 6 of the Employment Act 1980 and *Boys and Girls Welfare Society v MacDonald* [1996] IRLR 129 EAT).

17. Where there are multiple allegations of misconduct, the question for the Tribunal is not whether the acts individually amount to (gross) misconduct, or might be said to cumulatively amount to (gross) misconduct. Rather (per *Governing Body of the Beardwood Humanities College v Ham* UKEAT/0379/13/MC):

12.... *The focus for the Tribunal to the nature and quality claimant’s conduct in totality and impact of such conduct and the sustainability of the employment relationship so the reason for dismissal purposes of section 98 employment rights act is a set of facts known to be put maybe of beliefs held by him, which goes into dismiss the as Cairns*

LJ famously observed in Abernethy v Mott Hay and Anderson [1974] ICR 662...

16... The question is not whether the individual acts misconduct found by the appeal panel individually or indeed cumulatively amount to gross misconduct. Rather it is whether the conduct in its totality amount to a sufficient reason for dismissal under section 98 (4)".

18. Generally, misconduct need not be culpable or blameworthy, it may include gross negligence, and there is no need for Miss Howe to have been subjectively aware of the misconduct (*JP Morgan Securities plc v Ktorza* UKEAT/0311/16/JOJ).

19. As the question of whether Miss Howe's behaviour was gross misconduct:

19.1 gross misconduct, describes an act that fundamentally undermines the contract (*Wilson v Racher* [1974] ICR 428 CA) or is either deliberate wrongdoing or gross negligence (*Sandwell & West Birmingham hospitals NHS trust v Westwood* UKEAT/0032/09)

19.2 more recent authorities, however, have moved away from a purely contractual analysis - that is, was Miss Howe's conduct repudiatory focussing on the question of "grossness". The question is: was the conduct such that it was reasonable to dismiss; not did it amount to gross misconduct (*Hope v British Medical Association* [2022] IRLR 206 EAT)?

19.3 a series of acts demonstrating a pattern of conduct of sufficient seriousness could undermine the relationship of trust and confidence such that dismissal would be justified even if the employer is unable to point to any particular act and identify that as gross misconduct. The dismissal would be justified by the conduct which undermined the relationship of trust and confidence – not because the series of acts had added up to gross misconduct as such: *Mbubaegbu v Homerton University Hospital NHS Foundation Trust* UKEAT/0218/17.

20. Even if a Tribunal finds that Miss Howe's misconduct did not amount to gross misconduct, that does not necessarily render the dismissal unfair (per Langstaff J in *West v Percy Community Centre* UKEAT/0101/15/RN at paragraphs 23-24).

21. In terms of what constitutes gross misconduct, I am aware of the following referred to me by Mr. Crawford.

22. HHJ Eady QC (as she was then) in *Burdett v Aviva Employment Services Ltd* UKEAT/0439/13/JOJ held:

"29. What is meant by "gross misconduct" – a concept in some ways more important in the context of a wrongful dismissal claim – has been considered in a number of cases. Most recently, the Supreme Court in Chhabra v West London Mental Health NHS Trust [2014]

ICR 194 reiterated that it should be conduct which would involve a repudiatory breach of contract (that is, conduct undermining the trust and confidence which is inherent in the particular contract of employment such that the employer should no longer be required to retain the employee in his employment, see *Wilson v Racher* [1974] ICR 428, CA and *Neary v Dean of Westminster* [1999] IRLR 288 , approved by the Court of Appeal in *Dunn v AAH Ltd* [2010] IRLR 709, CA). In *Chhabra* , it was found that the conduct would need to be so serious as to potentially make any further relationship and trust between the employer and employee impossible. It is common ground before me that the conduct in issue would need to amount to either deliberate wrongdoing or gross negligence (see *Sandwell & West Birmingham Hospitals NHS Trust v Westwood* UKEAT/0032/09/LA)”.

23. The characterisation of an act as “gross misconduct” is thus not simply a matter of choice for the employer. Without falling into the substitution mindset warned against by Mummery LJ in *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, it will be for the Employment Tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct (see *Eastland Homes Partnership Ltd v Cunningham* UKEAT/0272/13/MC per HHJ Hand QC at paragraph 37). Failure to do so can give rise to an error of law: the Employment Tribunal will have failed to determine whether it was within the range of reasonable responses to treat the conduct as sufficient reason for dismissing the employee summarily.
24. The reason for a dismissal will be determined subjectively: what was in the mind of the employer at the time the decision was taken. Whether the dismissal for that reason was fair, however, imports a degree of objectivity, albeit to be tested against the standard of the reasonable employer and allowing that there is a margin of appreciation – a range of reasonable responses – rather than any absolute standard. So if an employer dismisses for a reason characterised as gross misconduct, the Employment Tribunal will need to determine whether there were reasonable grounds for the belief that the employee was indeed guilty of the conduct in question and that such conduct was capable of amounting to gross misconduct (implying an element of culpability on the part of the employee). Assuming reasonable grounds for the belief that the employee committed the act in issue, the Tribunal will thus still need to consider whether there were reasonable grounds for concluding that she had done so wilfully or in a grossly negligent way.
25. Even if the Tribunal has concluded that the employer was entitled to regard an employee as having committed an act of gross misconduct (i.e. a reasonable

investigation having been carried out, there were reasonable grounds for that belief), that will not be determinative of the question of fairness. The Tribunal will still need to consider whether it was within the range of reasonable responses to dismiss that employee for that conduct. The answer in most cases might be that it was, but that cannot simply be assumed. The Tribunal's task in this regard was considered by a different division of the EAT (Langstaff P presiding) in *Brito-Bapabulle v Ealing NHS Trust* UKEAT 0358/12/1406, as follows:

“38. The logical jump from gross misconduct to the proposition that dismissal must then inevitably fall within the range of reasonable responses gives no room for considering whether, though the misconduct is gross and dismissal almost inevitable, mitigating factors may be such that dismissal is not reasonable. [...]

39. [...] What is set out at paragraph 13 [“Once gross misconduct is found, dismissal must always fall within the range of reasonable responses ...”] is set out as a stark proposition of law. It is an argument of cause and consequence which admits of no exception. It rather suggests that gross misconduct, often a contractual test, is determinative of the question whether a dismissal is unfair, which is not a contractual test but is dependent upon the separate consideration which is called for under s.98 of the Employment Rights Act 1996 .

40. It is not sufficient to point to the fact that the employer considered the mitigation and rejected it [...], because a tribunal cannot abdicate its function to that of the employer. It is the Tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case. But this general assessment necessarily includes a consideration of those matters that might mitigate. [...]”

26. In terms of fairness a Tribunal must consider whether (i) the procedure and investigation and (ii) the decision to dismiss fell within the range of reasonable responses. In *J Sainsburys v Hitt* [2003] I.C.R., the Court of Appeal clarified that the scope of the reasonable responses test permeates every aspect of the dismissal. The objective standard of the reasonable employer should be applied as to what was a reasonable investigation. The Tribunal should ask itself whether the investigation into the suspected misconduct was reasonable in all the circumstances.

27. The EAT set out the “correct approach” considering the reasonableness of a dismissal in *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 EAT at 24-25, specifically:
- 27.1 The starting point is the words of section 98(4) ERA 1996.
- 27.2 The tribunal must consider the reasonableness of the respondent’s conduct, not whether the Tribunal considered a dismissal fair.
- 27.3 When judging reasonableness, the Tribunal must not substitute his own views as to what was the right course to adopt.
- 27.4 There is a range of reasonable responses within which decisions fall: that one employer might have made a different decision does not render the respondent’s decision unfair.
- 27.5 The task before the Tribunal is to determine whether the respondent’s decision to dismiss fell within that band. If it did, the dismissal was fair.
28. As to the investigation, the Tribunal must assess the reasonableness of what the respondent did do, not what it did not do. Assessment of the scope and nature of the investigation, like all other matters is a question of reasonableness.

Findings of fact on credibility and liability

29. I make my findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral which was admitted at the hearing. I do not set out in this judgment all of the evidence which I heard but only my principal findings of fact, those necessary to enable me to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts, I have done so by making a judgment about the credibility or otherwise of the witnesses I have heard based on their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

Background

30. The respondent is a global airline in the sector of air transportation services, offering scheduled air services for passengers and freights, as well as aircraft financing, maintenance, holiday packages and insurance.
31. Miss Howe commenced employment with the respondent on 22 June 1986 as what was then known as “Stewardess” but more recently as “Cabin Crew and Purser” in Long Haul with Inflight Customer Experience. Her position of purser was a supervisory position, in charge of a cabin. She was dismissed on 27 May 2021 for gross misconduct.

Chronology of key events

32. On 25 January 2021, Miss Howe was taken ill on the flight to New York [page 846]. She was taken off the flight by an ambulance to the terminal at John F. Kennedy (“JFK”) Airport and examined by a U.S. doctor. She was then taken by ambulance to the nearest hospital, the Jamaica Medical Centre. Initially, it was suspected that Miss Howe had had a stroke but subsequently it was considered that she had COVID-19. The Jamaica Medical Centre (“the hospital”) was largely dedicated to the care of COVID-19 patients. 5 of its 6 floors were COVID-19 wards. At the time of admission, it was still not clear whether Miss Howe had had a stroke or experienced some other very serious medical incident and for this reason she underwent a number of tests, including a MRI scan of her brain.
33. Miss Howe was first put in a room with an elderly woman who died during the night of the 25 January 2021/early morning 26 January 2021. Miss Howe was moved to a private room where she was told that another patient had very recently died.
34. Miss Howe observed as she entered the hospital that one individual had been stabbed with the knife still embedded whilst another had suffered a drug overdose. The temperature in the hospital was variable and was very hot in Miss Howe’s first room, her bed being next to the radiator. In her view, the food was very limited and rather inedible.
35. Miss Howe had a meeting with a doctor wearing personal protective equipment (“PPE”) who explained her MRI brain scan to her.
36. On 25 and 26 January 2021, Miss Howe had many phone conversations with various Cabin Crew Duty Managers who called her repeatedly to find out what was happening.
37. On 26 January 2021, Miss Howe’s discharge took place. I do not refer here to my findings of fact about whether she discharged herself or was discharged. She left the hospital and went to Walgreens, where she brought water and some basic food. She was transferred to the T.W.A. Crew Hotel by taxi.
38. Miss Howe stayed in the hotel until she was cleared for a flight home on 3 February 2021. During her hotel stay, she was visited by a doctor on behalf of Global Lifeline (a service provider to the respondent).
39. On 23 February 2021, Miss Howe met with Miss Ferguson-Prout in a pre-investigation hearing to enable Miss Ferguson-Prout to decide whether to recommend an investigation.
40. On 4 March 2021 [page 267], Miss Howe was invited to attend an investigatory meeting with Mr. Cannon on 11 March 2021 [page 271]. In the interim, Mr. Cannon emailed the appellant and a number Cabin Crew Duty Managers and Airport Managers at JFK Airport, with questions, requesting answers by email.
41. On 14 April 2021 following the investigation interview, Mr. Cannon informed Miss Howe that she had a case to answer [page 350].

42. On 16 April 2021, Miss Howe was invited to a disciplinary hearing [page 352]. On 28 April 2021 the disciplinary hearing took place with Mr. Shirley [page 360]. On 27 May 2021, Mr. Shirley informed Miss Howe that she would be summarily dismissed [page 401].
43. On 1 June 2021 Miss Howe appealed the dismissal [page 417]. On 16 June 2021, the appeal hearing took place with Mrs. Allport [page 454]. On 25 June 2021, Mrs. Allport dismissed the appeal [page 479].
44. On 27 July 2021, a second appeal hearing took place with Mr. Rickwood [page 215].
45. On 2 August 2021, Miss Howe commenced the A.C.A.S. Early Conciliation Process [page 1].
46. On 3 August 2021 Mr. Rickwood dismissed the second appeal [page 561].
47. On 3 September 2021, Miss Howe presented her claim [page 2 - 23].

The allegations

48. The disciplinary hearing was concerned with 6 allegations as investigated by Mr. Cannon [pages 267 – 268]. Although there were 6 allegations, there was some duplication and certain allegations gave rise to more than one charge of misconduct:
49. Alleged racist comments which related to both EG101 and E102, policies concerned with Dignity at work – Diversity and Inclusion and Dignity at work – Harassment and Bullying [pages 86 – 92 and 93 – 97]. The alleged racist comments also related to the offence ‘conduct prejudicial to British Airways’. The two alleged racist comments were as follows:
- 49.1 Making the comment “I do not want to be in a hospital where the doctors speak with a West Indian accent”.
- 49.2 Making the comment: “I have been put in a room with an Afro-Caribbean lady and the room is too hot”.
50. Leaving the hospital and going to Walgreens which related to two offences – breach of British Airways COVID Procedures (OMB2.3.5) [pages 131 - 144] and a failure to comply with Overseas COVID Procedures (down route health precautions) (OMB 6.0.3) [pages 145-150].
51. Comments to Cabin Crew Duty Managers and to Global Lifeline relating to the offence of making abusive, rude or offensive behaviour towards a colleague and/or service partner.

Witnesses

52. My impression of the witnesses was as follows.

Mrs. Clark, Duty Cabin Crew Management

53. I find that the majority of Mrs. Clark's recollection was based on the notes which she had made in the log used by Duty Cabin Crew Management and which she had transferred to the Crew History Report (which was also referred to as the Crew Service History during the hearing). In other words, her memories were based on the Crew History Report. Her first-hand experience of the allegations concerned:

53.1 The comment about the doctor and a West Indian accent

53.2 The comment about the elderly Afro-Caribbean patient and the temperature in their hospital room.

53.3 Abusive, rude or offensive comments made to her.

54. Mrs. Clark's entries in the Crew History Report about Miss Howe started at [page 844] with her initial at the end. It began *"to paraphrase a little, she stated "what use was tea and sympathy conversation with an IBM she wanted someone who could make decisions. She expected 6 star treatment when down-route and sick, she is going through hell as she's been placed in an NHS style hospital, she only deals in private when it comes to healthcare. She has asked for bottled water, rice cakes, fresh fruit, cheese, lip balm, toothpaste and UK size 10 pyjamas...."*

55. Below that was another entry starting with *"Alexandra called again. To cut a long story short after x 4 very long calls where AH made several demands, wouldn't let me speak and continually repeated these demands inc. 6 star treatment – and the fact it is BA's fault she has covid- she is proving very difficult to speak to. She has made comments "I want to be in a hospital where the Drs don't speak with a West Indian accent" and "I've been put in a room with an Afro-Caribbean woman the room is too hot". I have had to pass this to Fm on call Daniel Godbold. GLL have stated that medically she has been provided with everything she requires, medically she has been given everything she needs. GLL say her perceptions of what she needs differ from what she actually needs to recover. She has asked for 7 star quarantine facility and private room in private hospital etc. HC"*.

56. "To paraphrase a little" and "to cut a long story short" indicate several things:

56.1 That Miss Howe said a lot which was not noted by Mrs. Clark;

56.2 A sense of antipathy towards Miss Howe.

57. The initial indicated that Mrs. Clark had transposed her own entries from the Duty Cabin Crew Management Log. The entries on subsequent pages [page 847 - 849] had underneath them "note taken by Helen Clark", but the typed entry was initialled by someone else. The Tribunal was not shown the Duty Cabin Crew Management Log for the period since it contained entries about other staff during the shift and it would have been very long.

58. Mrs. Clark was consistent in maintaining throughout that Miss Howe had said nothing about being unable to understand the doctor's medical explanation to her. Mrs. Clark was not able to explain why she had not answered the questions of the investigating officer, Mr. Cannon, in full as to whether Miss Howe had referred to the doctor wearing PPE – two masks and a visor. Mrs.

Clark was also not able to confirm whether Miss Howe's comment referred to one or several doctors when Mr. Cannon had written doctor with an s at the end ("doctor's").

Miss Ferguson-Prout, Initial Investigating Officer

59. First, Miss Ferguson-Prout hesitated sometimes when asked about statements made in her witness statement. Secondly, Miss Ferguson-Prout made judgmental references in her witness statement to Miss Howe:

- 59.1 "...as if a celebrity.." [paragraph 14]
- 59.2 *Felt like Miss Howe was having a rant*" [paragraph 15]
- 59.3 "little understanding or empathy..." [paragraph 16].

60. Miss Ferguson-Prout admitted that there was no (evidential) support for these judgmental comments made in her witness statement; they were not borne out by her interview with Miss Howe. Miss Ferguson-Prout stated that she had not shared her view with Mr. Cannon nor recorded it. She denied that this had affected her view of Miss Howe.

61. I find it more likely than not that her negative view of Miss Howe as expressed in the witness statement was likely to have had some effect even if subconsciously, on her assessment of Miss Howe. For example, she did not consider the questions raised by Miss Howe about the lack of consistency of the evidence of Duty Cabin Crew Management (e.g. Mrs. Clark and Ms. Slark).

Mr. Shirley, Dismissing Officer

62. Mr. Shirley's oral evidence was relatively straightforward.

63. He admitted that Miss Howe had explained to him the context in which she had made a comment about the West Indian accent of the doctor. He accepted that Miss Howe had a hearing impairment due to COVID-19 which made it difficult for her to hear the doctor's medical explanation of her diagnosis. In addition, he accepted that the PPE worn by the doctor made it difficult to understand the doctor's medical explanation and he accepted that Miss Howe was frightened, another factor put forward by Miss Howe making it difficult to understand the doctor's medical explanation.

64. At some point in Mr. Shirley's evidence, Mr. Baker interrupted and said that Mr. Shirley had not said that he accepted that these explanations applied. Instead, Mr. Baker said that all that Mr. Shirley was doing was accepting that Miss Howe had stated these things to him and put them forward as explanations of why she had difficulty in understanding the doctor's medical explanation.

65. I discussed the oral evidence with Mr. Baker and read back a number of answers from my contemporaneous notes given by Mr. Shirley in which he had said 'I accept that'. I find that the plain meaning of his answers was that he accepted that these were true.

66. Mr. Shirley continued under cross examination and towards the end of his oral evidence, there was another interruption by Mr. Baker. Mr. Baker said that the question put to Mr. Shirley in cross examination repeatedly had been whether he had accepted that Miss Howe had given that account but not whether he accepted it as true. I explained to Mr. Baker that the meaning of 'accept' in this context of cross examination is usually "I accept this as true". Later, I asked Mr. Shirley to clarify what he accepted as true or correct. I went over what he had said (but not everything - only a selection) and asked him whether he had meant "I accept that it was said by Miss Howe or I believed or I accepted as true that ..." Mr. Shirley confirmed that he had accepted (as true) that the following factors had made it difficult to understand the doctor's medical explanation of the MRI brain scan and therefore diagnosis – hearing impairment, PPE, the noise of the machines in the hospital, being frightened and being unwell from COVID-19.

Mrs. Allport, Appeal Officer

67. Mrs. Allport answered a number of questions with approximately the same answer; that this was a review not a rehearing. She quite often repeated sentences or phrases from her witness statement. This had the effect of Mrs. Allport's not answering a significant number of questions.

Miss Howe

68. Miss Howe was consistent throughout her oral evidence with her witness statement and her answers in the interview with Miss Ferguson-Prout, in the email correspondence with Mr. Cannon (the investigating officer) and in the hearings with Mr. Shirley and Mrs. Allport. Although Mr. Baker told Miss Howe that she had changed her account from doctors to doctor in the comment concerned with a West Indian accent, I find that Mrs. Clark accepted in answering questions about the email from and to Mr. Cannon that she could not be sure whether the comment was "doctor" or "doctors".

69. Miss Howe explained the full context of what was said concerning her comment about the West Indian accent and about the Afro-Caribbean lady in the hospital. The full contexts given were plausible and matched what Mr. Shirley understood her to have said.

70. She explained why talking to the doctor via zoom allowed her to understand his medical explanation – because he was able to remove his PPE which had been a barrier. Mr. Shirley had accepted in the disciplinary hearing that Miss Howe had used zoom to resolve the problem. It makes sense that Miss Howe had been referring to one doctor all along because only one doctor gave her the analysis of her MRI brain scan and her resulting diagnosis.

71. Miss Howe gave clear explanations why she could not be overheard when speaking about the elderly Afro-Caribbean patient – she was in a corridor with background noise in a chaotic hospital and had taken care not to be overheard. I recall that Mr. Baker accused Miss Howe of not telling the truth because she had told the hearing that she was in a corridor when speaking to

Mrs. Clark whilst her written account stated that she was under the blanket on her bed. I find that Duty Cabin Crew Management (and in this context, Mrs. Clark) made many calls to the appellant, and I do not find it significant that Miss Howe was in different locations when speaking to Mrs. Clark over several conversations.

72. The context given for explaining the comment about the Afro-Caribbean lady was also plausible. She explained that it was relevant to include the ethnic origin of the patient to explain why she needed more warmth in the room in the context of her making arrangements to give this patient a better temperature and to make her comfortable. Miss Howe also said that she would not have referred to the patient as “an Afro-Caribbean lady”. She would have used the word “woman”.
73. Miss Howe was extremely honest. She admitted (to Mr. Shirley and the Tribunal) that:
- 73.1 she had made comments to the Cabin Crew Duty Management Team and to Global Lifeline which were abusive, rude or offensive.
- 73.2 she did not consider the alleged racist comments in the context in which she had made them to be racist (see paragraphs 110.3 and 115.5 below).
74. Towards the end of cross-examination, she said very frankly: *“My comments would most certainly have across as being racist but you need to look at the full sentence and context”... “If somebody ... is making racist comments they should not be working as an international cabin crew member”*.
75. Miss Howe gave a graphic description of what she felt when unwell which was consistent with the accounts given to Mr. Shirley. Her account that the Crew History Report did not record everything she said was consistent with the problems identified with the Crew History Report under cross examination (see below).
76. Having made these general observations, I find the evidence of Miss Howe to be more credible than that of the respondent’s witnesses for all the reasons set out above. Where there is a dispute on the facts, I have therefore relied on the evidence of Miss Howe in preference to that of the respondent’s witnesses.

Cabin Crew History Report

77. There were two Duty Cabin Crew Managers on each shift. They received many telephone calls and emails during their shift. They made a rapid note in the Duty Cabin Crew Management Log identifying the range of problems encountered and any solutions. Generally, the identity of the note taker was recorded. At the same time or at any subsequent time, the same or a different Duty Cabin Crew Manager would copy an entry from the Duty Cabin Crew Management Log and paste it into the Crew History Report. The Crew History Report is the individual equivalent of the personal file recording anything considered to be relevant about the employee. Generally, the

person copying the notes will put their initial or name down to show who copied it across. The identity of the copier of the note need not be the same as the author of the note in the Cabin Crew Duty Management Log.

78. As a result of answers to cross examination about the Crew History Report by the respondent's witnesses, and in particular by Mrs. Clark, I find that the Crew History Report was a little disorganised because it was not chronological, although some of it was copied across contemporaneously. Mrs. Clark said she had copied the (alleged racist) comments across from the Duty Cabin Crew Management log into the Crew History Report immediately. Given that Mrs. Clark admitted under cross examination that she could not remember who was on duty with her that shift, it is somewhat surprising that she can be so sure about this. Timings also could be confusing because the Crew History Report gives times in different time zones (U.K. and U.S.) without specifying which is which. An example of the confusing chronology was an entry that Miss Howe had left the hospital and was in the hotel, having called paramedics to look at her room. Following that are entries concerned with Miss Howe in the hospital [page 847].
79. I note that entries copied across by Ms. Slack into the Crew History Report were confusing about the chronology of events; whether Miss Howe had been told not to organise transport herself or told to do so via the Social Worker, whether the Social Worker in hospital had been approached to ask them to organise transport and when, and whether Miss Howe had discharged herself or was discharged and the timing of that discharge.
80. This is supported by the email from Steven Manswell, JFK Airport Operations Manager to Mr. Cannon [pages 340 - 342]. Mr. Cannon considered that Mr. Manswell might have been involved in all of those points, but he denied involvement. This is important because the Crew History Report sets out an account of instructions, as if these were clearly given to Miss Howe. Miss Ferguson-Prout admitted that she could not say when Miss Howe would have gone to Walgreens or for how long she had waited outside the hospital before going to Walgreens. It is a critical part of Miss Howe's evidence that it was only after she had waited some 2 hours outside in very cold temperatures that she had to go to the supermarket to buy herself some water to enable her to take her medicine and some food.
81. Miss Ferguson-Prout in cross examination admitted that it was possible that Miss Howe had approached the Social Worker who had told Miss Howe that the Social Worker would not arrange transport. Miss Ferguson-Prout accepted that it was possible that Miss Howe had been told by the Social Worker to leave the hospital. She agreed that it was possible that Miss Howe was not welcome in the lobby of the hospital because she had COVID-19 and so had been made to go outside. She further accepted that it was possible that Miss Howe had been waiting for 4 hours outside in the cold. Mrs Ferguson-Prout repeatedly said that the hospital must have had water to offer Miss Howe, but she could point to no evidence that Miss Howe would have been admitted back into the hospital to get this water.

82. Taking all these flaws together, I find that the Crew History Report was at times unreliable (concerning the incidents around leaving the hospital) and a truncated version of what had been said at the time by Miss Howe (concerning the alleged racist comments). In other words, I accept Miss Howe's evidence that she gave a full account with her reasons for her comments and behaviour and the Crew History Report gives only a brief extract. It is also plausible that only some of what an individual said would have been recorded because Duty Cabin Crew Managers were extremely busy, especially during COVID-19 with additional compliance procedures, and it is likely that the most contentious or controversial words would have stuck in the memory and be noted down devoid of their full explanatory context.

83. I return to discussion about the Crew History Report in the section on the investigation.

Was there a dismissal?

84. It is not disputed that there was a dismissal.

Was it for a potentially fair reason?

85. It is not in dispute that the reason for the dismissal was conduct.

Fairness of the Procedures

86. Miss Howe did not raise any point about unfairness of procedure. This was confirmed in Mr. Crawford's closing submissions. For the sake of completeness, I find that there was no procedural unfairness because:

86.1 The investigation, disciplinary hearing and appeal complied with the ACAS code of practice.

86.2 Miss Howe was sent letters informing her of what was happening and why at each stage. This included the letter setting out the rationale for an investigation, the possible grounds of misconduct to be investigated, an invitation to the investigation meeting and an invitation to the disciplinary hearing again setting out the grounds of misconduct being considered. Both invitations referred to the right to be accompanied. In sum, the letters contained what would be expected to enable Miss Howe to prepare and generally to achieve fairness.

86.3 Miss Howe was accompanied by her union representative to each meeting, as requested.

Did the respondent undertake a reasonable investigation?

87. I accept that Mr. Cannon put detailed written questions to all the people who could be thought to have been involved and carried out an extensive hearing with Miss Howe.

88. The investigation relied on the memories of managers which in turn relied on the Crew History Report as an aide memoire.

89. As stated above, these were some flaws with the Crew History Report with regard to the incidents around leaving the hospital and the alleged racist comments. Given the Crew History Report's unreliability in these respects, this meant that questions asked of key players (Mrs. Clark and Ms. Slark) to explain what they meant by various entries were unlikely to give a full and accurate picture of what had happened.
90. In addition, there was little challenge by Mr. Cannon to anything said by a Duty Cabin Crew Manager or Management but instead, any records in the Crew History Report were treated as an accurate reflection of events at the time and formed the foundation from which any further questions were asked.
91. I find however that it was open to a reasonable employer to find the Crew History Report reliable because:
- 91.1 It was essentially a contemporaneous record, made during the same shift, although occasionally transferred during the following shift.
 - 91.2 The records in the Duty Cabin Crew Management Log of the two alleged racist comments were written by the manager who copied them across into the Crew History Report (Mrs. Clark).
 - 91.3 It was unrealistic to expect a perfect record of events in the fast-moving and extremely busy environment in which Duty Cabin Crew Management had to operate.
92. I find that it was open to a reasonable employer to conduct the investigation process in the way that it did because:
- 92.1 It was legitimate to use the Crew History Report as a starting point.
 - 92.2 it was thorough seeking answers from all relevant personnel about the Crew History Report entries and cross-referring these to any contemporaneous emails.
 - 92.3 Conclusions were logical.
93. For these reasons, I find that the investigation was within the range of reasonable responses.

Did the respondent have a genuine belief in Miss Howe's guilt?

94. The respondent had a genuine belief in Miss Howe's guilt because this was based on a reasonable investigation.

Was the decision to dismiss within the range of reasonable responses?

Breach of BA and overseas COVID procedures

95. Miss Howe admitted to Mr. Shirley that she had gone outside the hospital and to Walgreens. Given that Miss Howe was still within the period during which

she was required to self-isolate, it was within the range of reasonable responses for the respondent to conclude that she had breached these procedures by these actions and this misconduct was proved.

96. Having regard to the law stated above, I asked myself the following questions with regard to each allegation:

96.1 whether the conduct was such as to be capable of amounting to gross misconduct?

96.2 Was this one of a series of acts demonstrating a pattern of conduct of sufficient seriousness which could undermine the relationship of trust and confidence such that dismissal would be justified even if the respondent were unable to point to any particular act and identify that as gross misconduct?

97. In this section, it is relevant to answer the question at 96.1 and leave 96.2 once I have made findings on all the allegations.

98. I find that it was within the range of reasonable responses for the respondent to conclude that these breaches were gross misconduct because:

98.1 It was critical to the safe operation of the respondent's business that COVID-19 procedures were followed strictly.

98.2 Miss Howe had volunteered to work during the pandemic rather than be furloughed and by doing so, had agreed to adhere to COVID-19 procedures.

99. It was however not within the range of reasonable responses to dismiss summarily/dismiss for these breaches because:

99.1 given the conflicting accounts and uncertainties of what happened in the hospital concerning discharge, the Social Worker and transport arrangements, no reasonable employer could have accurately identified whether and to what extent Miss Howe had deliberately breached these procedures.

99.2 Her mitigation was not taken account of: that she might have been on the pavement for hours in the cold and desperate for water (to take her medication) and food through no fault of her own.

Abusive, rude or offensive behaviour towards a colleague and/or a service partner

100. Miss Howe admitted this to Mr. Shirley (towards colleagues and Global Lifeline, a service partner) and she repeated this admission in her oral evidence.

101. It was therefore open to a reasonable employer to find that this allegation was proved.

102. It was open to a reasonable employer to find that these comments were conduct capable of amounting to gross misconduct because:

102.1 The respondent is in a business in which a reputation for very good customer service is essential

102.2 Any abusive, rude or offensive behaviour by an employee, particularly one in front line work such as Cabin Crew could damage this reputation.

103. As mitigation, Miss Howe offered her long service record and the circumstances in which she found herself in New York.

104. Miss Howe had no previous involvement in disciplinary proceedings and had a long and good employment record. I accept that at the appeal hearing, Mrs. Allport had examined the Crew History Report and found three entries which she considered undermined this. Mrs. Allport accepted in cross examination that there was no evidence that any of these three allegations had ever been put to Miss Howe or taken further in any sense. Miss Howe had never had the opportunity to put her side of the story. Mr. Shirley did not make any reference to these and acted on the basis that Miss Howe had an unblemished record.

105. With regard to the circumstances, Mr. Shirley accepted that Miss Howe was feeling very unwell in an environment (the hospital and subsequently, the hotel) that she was not used to in physical conditions that were unsettling and had behaved out of character, not intending to cause upset. Miss Howe told Mr. Shirley that the hospital and hotel were very far below the standard to which Miss Howe as British Airways Cabin Crew was used to.

106. It was however not within the range of reasonable responses to dismiss summarily/dismiss for this breach:

106.1 taking account of Miss Howe's long and unblemished record and

106.2 the challenging circumstances in which she found herself – isolated abroad during the pandemic and feeling very unwell.

Alleged racist comment involving "Afro-Caribbean" patient

107. Miss Howe admitted to Mr. Shirley that she had made this comment. Although her case was that much more had been said, she admitted that the comment referred both to the temperature of the room and the ethnic origin of the patient with whom she shared that room. It was therefore open to a reasonable employer to find that this allegation was proved.

108. It was open to a reasonable employer to find that this comment was conduct capable of amounting to gross misconduct because it characterised an individual in terms of her ethnic origin and the juxtaposition of the reference to temperature with ethnic origin gave the impression of stereotyping.

109. Mr. Shirley heard that Miss Howe had concerns about the welfare of this patient and had attempted to alleviate how cold she felt by swapping her own bed next to the radiator and by giving this patient her own blanket. Her case to Mr. Shirley was that the reference to the temperature of the room and the patient's ethnic origin were connected but only through an empathy for this patient and an understanding of how her body fared particularly badly in cold temperatures and would have benefited from experiencing the heat around Miss Howe's bed.
110. Despite this mitigation, it was within the range of reasonable responses to dismiss summarily for this comment because:
- 110.1 Even though Miss Howe had explained well why she had referenced the patient's ethnic origins in the context of trying to care for her;
- 110.2 The words "Afro-Caribbean" had been used. Miss Howe could have expressed her concerns about the temperature and for the patient without needing to use these words.
- 110.3 Miss Howe admitted to Mr. Shirley that she did not understand why it had been wrong to make this comment, although she understood that the respondent found it wrong and she would not do it again because of the consequences to her. Such words, though extremely frank, would not set an employer's mind at rest that during stressful circumstances, there might not be a repetition.

Alleged racist comment about doctor(s) and a West Indian accent

111. Miss Howe admitted to Mr. Shirley that she had made the comment (with reference to one doctor): *"I do not want to be in a hospital where the doctor(s) speak with a West Indian accent"*.
112. It was therefore open to a reasonable employer to find that this allegation was proved.
113. It was open to a reasonable employer to find that this comment was conduct capable of amounting to gross misconduct because:
- 113.1 it characterised an individual in terms of his ethnic origin.
- 113.2 it gave the impression of stereotyping.
- 113.3 the connotations in the sentence were negative.
114. Mr. Shirley admitted that Miss Howe had explained to him why she had made the comment and offered mitigation. This was in the context of being very alarmed about her possible diagnosis, having had the scare of a suspected stroke and her failure to understand the doctor's explanation of what her MRI brain scan meant, being worried that the yellow dot on the scan might mean a tumour or some other extremely serious medical condition. She had therefore set out the factors making it difficult to hear and understand the

doctor: his accent, coupled with his wearing of PPE (two masks and a visor), the noise of the machines and her feeling very unwell. Mr. Shirley confirmed to the Tribunal that he had accepted that these factors applied.

115. Despite this mitigation, it was within the range of reasonable responses to dismiss summarily for this comment because:

115.1 Even though Miss Howe had explained well why she had referenced the doctor's ethnic origins in the context of not understanding his medical explanation;

115.2 The words "West Indian (accent)" had been used.

115.3 Miss Howe could have expressed her concerns in other ways, which would have avoided any reference to ethnic origin. For example, "*I did not understand the doctor because of his accent*" or "*I would like to be in a hospital where I can understand the doctors*" [see paragraph 14 of respondent's closing note].

115.4 In the context of a very large international airline dealing with many different ethnic minorities as customers, staff and contractors and with a need to establish and maintain a good reputation in customer service, use of any racist language could be highly damaging.

115.5 Miss Howe admitted to Mr. Shirley that she did not understand why it had been wrong to make this comment, although she understood that the respondent found it wrong and she would not do it again because of the consequences to her. Such words, though extremely frank, would not set an employer's mind at rest that during stressful circumstances, there might not be a repetition.

Pattern of conduct and mitigation

116. The respondent's case is that the allegations related to a series of acts demonstrating a pattern of conduct of sufficient seriousness which undermined the relationship of trust and confidence such that summary dismissal was justified.

117. When asked, Mr. Shirley told the Tribunal what was in his mind when he decided to dismiss summarily.

118. First, he considered that summary dismissal would have been justified by the racist comments alone. In any event, he considered the allegations as a whole.

119. Secondly, he rejected the mitigation based on the side effects of melatonin.

120. Thirdly, he took account of all the other explanations for Miss Howe's conduct, whether labelled as mitigation or not.

121. With regards to the behaviour to a service partner, in over 20 years as a hearing manager, he had never come across Global Lifeline refuse to treat someone because of the way in which an employee had spoken to them.

122. Miss Howe had volunteered to work during the pandemic instead of being furloughed and should have understood the need for compliance with COVID-19 procedures, especially as she was a vaccinator.

The side effects of melatonin

123. Miss Howe had suggested that some of her behaviour was due to the side effects of melatonin, hallucinations and psychotic symptoms. Mr. Shirley quite properly asked for the views of the respondent's Occupational Health Physician (Dr. Stephen Houston) to understand the potential side-effects of melatonin. Dr. Houston told Mr. Shirley that these were not accepted side-effects. It was within the range of reasonable responses therefore for Mr. Shirley to reject this as mitigation, relying on a professional opinion.

Apologies

124. When asked what might have persuaded him in considering mitigation to opt for a lesser sanction, he said that a genuine apology showing remorse. He clarified that Miss Howe would have had to write to all those whom she had offended and apologise for the offences of which she had been accused and before she was informed of the pre-investigation. In his view, she had failed to make any apologies in writing and definitely not before the start of the pre-investigation.

125. I find that with regards to all of the alleged offences, it was not within the range of reasonable responses *if Miss Howe had offered apologies*:

125.1 to consider that no genuine apology had been made because it had not made in the form that Mr. Shirley considered valid.

126. Miss Howe admitted to Mr. Shirley and to the Tribunal that she had made no apology to anyone.

Pattern of conduct

127. I find that it was within the range of reasonable responses to conclude that there had been a series of acts demonstrating a pattern of conduct of sufficient seriousness which had undermined the relationship of trust and confidence such that summary dismissal was justified because:

127.1 Each conduct in each allegation had been proved [paragraphs 95, 100 – 101, 107 and 111 – 112].

127.2 Cumulatively, they were sufficiently serious in terms of the ramifications to the respondent of each.

127.3 Timely apologies to all involved would have been accepted as mitigation reducing the sanction from summary dismissal but no apology to anyone had been made. Apologies would have carried such weight because they would have reassured the respondent that there would not be any repetition of any of this conduct in future very stressful circumstances.

128. The respondent acted reasonably in treating the two racist comments [paragraphs 107 – 110, 111 - 115 and 118], or alternatively this pattern of conduct, as sufficient reason for summarily dismissing her.

Summary of Conclusions on Unfair Dismissal Claim

129. The dismissal was fair in all the circumstances. In making this decision, I have taken all of the above into account, the important role of Cabin Crew in projecting the respondent's image and the degree to which the respondent's reputation and therefore business could have been affected by either the racist comments or this pattern of conduct by a member of Cabin Crew.

Wrongful Dismissal

130. Miss Howe through her comments about the accent of the doctor and the ethnic origin of her fellow patient, was guilty of gross misconduct.

131. This amounted to a repudiatory breach of her contract such that it entitled the respondent to dismiss her without paying notice.

I confirm that this is my Reserved Judgment with reasons in Howe v British Airways Plc No: 3315889/2021 and that I have approved the Judgment for promulgation.

Employment Judge Coll

Date: 22 June 2023

Sent to the parties on: 22 June 2023

For the Tribunal Office: GDJ