EMPLOYMENT TRIBUNALS

Claimant:	Mr M Benka	
Respondent:	British Airways PLC	
Heard at:	Reading	**On: 9, 10, 11, 12, 13 and 16 October**
Before:	Employment Judge Gumbiti-Zimuto Members: Mrs A Brown and Ms H Edwards	

Appearances
For the Claimant: Mr E Kemp (Counsel)
For the Respondent: Ms E Gordon-Walker (Counsel)

JUDGMENT

The claimant's complaint that he was subjected to detriment by the respondent because he made protected disclosures is not well founded and is dismissed.

REASONS FOR JUDGMENT

1. In a claim form presented on the 25 October 2016 the claimant made a complaint alleging that he was subjected to detriment by his employer done on the ground that the claimant made a protected disclosure. The claimant has withdrawn the complaint of unlawful deduction from wages. The respondent defends the complaints.

2. The claims relating to detriment are limited to acts or deliberate failures to act done before 25 October 2016. The acts or failure to act are set out in further particulars provided by the claimant and contained in the trial bundle at pages 34I to 34Q.

3. The claimant and Ms G Terry gave evidence in support of the claimant's case. The respondent relied on the evidence of Mr P Mooney, Mr J Rowell, Mr I Pringle, Mr A Bridger, Mr S Scholey and Mr S Bond. All the witnesses provided statements which were taken as their evidence in chief. The Tribunal was provided with a Trial Bundle consisting of three volumes of documents running to in excess of 1200

pages of documents. From these sources, we made the following findings of fact.

4. The claimant is a commercial airline pilot employed by the Respondent. He is currently a long-haul Senior First officer on the Boeing 777*.*

5. On 17 February 2016, the claimant and his partner Ms Terry were in Bangkok Thailand. Ms Terry had to attended hospital where she was admitted and required emergency surgery. Ms Terry was cleared to fly home to England on 23 February 2016.

6. The claimant purchased a full commercial business class ticket for Ms Terry to fly to England with the respondent. The claimant purchased a premium staff travel ticket for himself.

7. On the evening of 22 February 2016 Ms Terry tried to check-in online but was unable to do so.

8. On the morning of departure, the claimant had two bookings for Ms Terry, a staff travel booking and the commercial booking.

9. The claimant insists that he had not booked Ms Terry a staff ticket and puts the existence of the staff ticket in her name to an IT error on the part of the respondent. This is not accepted by the respondent whose position is that the claimant must have known that he had two bookings and in fact did this deliberately.

10. Ms Terry arrived at the check-in desk at airport Bangkok at some time between 10.13 and 10.15 am local time. The exact time of her arrival was important and is disputed between the parties. The claimant arrived at the check-in desk shortly after Ms Terry. The check-in process for Ms Terry was in progress when the claimant arrived.

11. The claimant states that the check-in agent confirmed that Ms Terry was being checked-in on her commercial club class ticket. This is disputed by the respondent whose position is that the check-in process for Ms Terry at this stage related to her staff travel booking.

12. The claimant's account is that approximately 3 or 4 minutes later there was shouting behind the check-in desks amongst the ground staff members and the baggage handlers were instructed by the check-in agent to retrieve Ms Terry's luggage which had been checked in, and was about to proceed down the baggage belt. Ms Terry was informed that all the seats in business club class were taken, the flight had been oversold. Ms Terry was offered a jump seat on the flight.

13. The claimant pointed out that Ms Terry was flying on a commercial ticket and was not normally permitted to travel on a jump seat. The claimant explained that Ms Terry had been unwell, was convalescing from a serious operation and would not be able to sit upright on a jump seat for a 13-hour flight to London Heathrow.

14. The claimant and Ms Terry asked if there was space on the flight leaving the next day. They were told that flight was also oversold. The claimant was offered to be put on the waiting list for a flight the next day or to travel that day with Thai Airways on a flight leaving about an hour later than the respondent's flight. The claimant's ticket was not transferable. Flying on Thai Airways Ms Terry would have to travel alone. Ms Terry declined the offer.

15. The claimant and Ms Terry returned to the claimant's apartment in Bangkok. The claimant made enquires and discovered that Ms Nawaporn Sittirath, who is employed by the respondent as Bangkok Airport Manager, was seated in business club on the flight; that there had been 6 involuntary upgrades to business club; 5 upgrades from traveller and world traveller plus; and one staff member in economy.

16. The claimant concluded that Ms Terry had been deliberately off loaded from the flight. He believed that Ms Nawaporn Sittirath would otherwise have had to be downgraded to allow the claimant to fly in business club. The claimant believed that Ms Terry had been treated unfairly and lied to by check-in staff at Bangkok Airport, when they were told that the flight was oversold in business club, so that Ms Nawaporn Sittirath was not downgraded to economy.

17. The claimant telephoned the check-in agent, Ms Rauntip Singthongsuk (referred to and known as Ms Keng). The claimant states that he was very polite to her while he queried her actions and politely disagreed with what she said. The claimant asked Ms Keng why she had lied to Ms Terry by saying "all the club seats were full of club ticket holders". The claimant did not think that what Ms Keng said could be true. Ms Keng referred the claimant to the Customer Service Duty Manager Mr Wasan Apinantasap (referred to and known as Kim). The claimant says that he tried to discuss the situation with Kim, but found him to be very rude and says that Kim hung up the phone when it was apparent that what Ms Keng and Kim had been saying to the claimant was not true.

18. The claimant was subsequently accused of behaving in an aggressive and intimidating manner to both Ms Keng and Kim during these conversations. The claimant was later to state that he had a recording of the conversations but was only ever able to provide a recording of a very small part of the conversations.

19. The claimant contacted various departments in BA, including BA customer service, but he was unable to resolve any of the issues or change Ms Terry's ticket for the following day.

20. The claimant spoke to Ms Kate Thornton (Head of Service Recovery). After hearing the claimant's description of events Ms Thornton asked him to put it in writing to her. A note was made of what the claimant said had occurred at Bangkok Airport that day (p94). This note had

been provided to Kim when he sent his email to Mr Mooney and others at 4.58 pm on 23 February 2016 (p92).

21. On 26 February 2016, the claimant wrote to Ms Thornton. The claimant relies on this letter as his protected disclosure. Although the claimant states that he has made other disclosures which are protected within the meaning of section 43A of the Employment Rights Act 1996. It is the disclosure made in this email that the employment tribunal has been concerned with.

22. The claimant states that his disclosure was made in the public interest because: the respondent has a duty to its passengers, its staff and the public generally to ensure safe travel arrangements which comply with health and safety legislation, European legislation and its own internal procedures; the respondent has a duty to ensure that its customers were treated fairly in accordance with European legislation The Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005 for dealing with passengers denied boarding; the respondent is a large multinational company, and there is an inherent public interest that it should apply equally and fairly company policies and avoid corruption, dishonesty, bribery and other unethical practices and that it should operate transparently.

23. On 23 February 2016 Kim sent an email to Mr Mooney about the claimant's complaint. Mr Mooney did not read Kim's email until he was copied into the claimant's email to Ms Thornton. Mr Mooney contacted the claimant on 26 February 2016 and informed him that he would be investigating. Mr Mooney states that he was investigating the matter as a customer complaint and looking to see whether there had been any misconduct by the respondent's staff at Bangkok Airport.

24. On 7 March 2016 Mr Mooney met with Bangkok Airport staff who had been involved in the incident with the claimant and Ms Terry. From what he was told, Mr Mooney became concerned that the claimant's behaviour towards the staff was not appropriate. He discovered that Ms Terry had two bookings one commercial and one booked on the claimant's staff travel concession. Mr Mooney's investigation showed that Ms Terry arrived at the check-in desk after the flight was closed, Ms Terry had therefore arrived too late to check-in as a commercial passenger. Mr Mooney incorporated the results of his investigation into the body of the letter containing the claimant's complaint. This was not sent to the claimant until 10 June 2016.

25. In his witness statement Mr Mooney explains that: "Had Ms Terry arrived earlier, she would have been able to check-in on her commercial ticket. Ms Sittirath would always have been confirmed J class club seat and one fewer discretionary upgrade from the over booked M class would have been actioned." Mr Mooney's conclusions conflicted with the claimant's belief that Ms Sittirath would otherwise have had to be downgraded to allow the claimant to fly in business club.

26. The claimant mistakenly believes that at a Forum held around 26 February 2016 managers involved in the investigation into matters arising from his complaint were present and discussed his case. This did not occur, there were no such discussions.

27. Mr Mooney sent his draft response to the claimant's complaint to Ms Thornton. Ms Thornton raised a query about Ms Terry holding a staff travel ticket and a commercial fare booking. It was pointed out that this was a potential breach of the respondent's staff travel policy.

28. The BA staff travel policy is that you either travel as staff or as a commercial passenger but not as both. A staff ticket does not guarantee a seat if the flight is fully booked – priority is given to commercial fare paying customers. A member of staff could book both full price refundable commercial ticket in order to protect a staff travel ticket and then use the cheaper staff ticket and obtain a refund for the commercial fare.

29. The claimant's emails and complaints came to the attention of Mr Jon Rowell (Customer Relations Team). He contacted Mr Paul Kemp a team Leader in the Chairman's office. Mr Rowell and Mr Kemp agreed that the Staff Travel Team should deal with the issue of the apparent contravention of the staff travel policy. Mr Rowell gave evidence that he did not know what was meant by a protected disclosure. He said that he assumed that the claimant meant to contact the press. Mr Rowell gave the impression he was not particularly concerned about this. He denied that it affected his view of the matter. The Tribunal accepted the evidence that was given by Mr Rowell.

30. On 16 March 2016 Mr Rowell wrote to the claimant and informed him that he had looked into his complaint and pointed out that there may have been a breach of the staff travel policy which was being referred to the claimant's line manager.

31. The claimant has described how he was shocked with the tone taken by Mr Rowell in this email, and the use of red font on the word "full". Having heard the evidence of Mr Rowell we are satisfied there was no significance intended or to be properly attached to this. Mr Rowell had shared an earlier draft of the email with the Staff Travel Delivery Manager who had made amendments to the draft in red font. The draft that was sent to the claimant incorporated the amendments. It is likely that edits had resulted in the final email retaining a red font. No significance should be attached to the colour font. What Mr Rowell told the claimant in the email was in line with the usual procedure where a staff travel breach is suspected.

32. Mr Rowell contacted the claimant's line manager. In his email, he included the following passage: "Mike has made a number of points, one of them related to potentially making some information public which has cause for concern in addition to the potential breach of policy." (p193) Mr Rowell explained that his concerns were that the

claimant was going to go to the press. Mr Rowell explained that the respondent has policies that cover confidentiality and talking to the press, by talking to the press the claimant could have been in breach of these policies. Mr Rowell states that his decision to initiate the disciplinary process had nothing to do with the claimant making a protected disclosure.

33. On 24 March 2016, the claimant was notified of the intention to conduct a preliminary investigation into the alleged allegations against him. The claimant was in disciplinary proceedings from 24 March 2016 until 17 January 2017 and a second disciplinary investigation from 18 October 2016 until 1 February 2017. The claimant's salary stopped on 26 October 2016 and started again from the 26 February 2017.

34. The respondent's disciplinary procedure provides for the employee to normally be suspended on full pay when subject to gross misconduct proceedings. The claimant was not suspended. Had he been suspended he would have been entitled to receive his basic salary during the disciplinary process.

35. The decision whether to suspend the claimant is for the line manager. Mr Allister Bridger explained that suspension would generally occur in cases where the person involved would be in an environment where their presence would be detrimental to the working environment and that was not the case with the claimant. The decision not to suspend the claimant was in line with other cases where there is an alleged breach of the staff travel policy.

36. On the 29 March 2016, the claimant submitted a grievance alleging that he had suffered harassment and bullying "particularly over the last 24 months". On the 8 April 2016, the claimant wrote to the respondent setting out the detail of the grievances. The detail included reference to events that occurred two years previously in New Zealand and also the events around the 23 February 2016.

37. The respondent's grievance procedure EG903 provides that the respondent will accept grievances from employees and former employees involving alleged incidents that have occurred in the previous 12 months unless there are exceptional circumstances. The procedure provides that an employee cannot bring a grievance that relates to the decision to take disciplinary action.

38. On the 15 April 2016, the claimant was informed by Mr Dave Thomas (Head of Flight and Technical Training) that the grievance in respect of the New Zealand matters was not being accepted because the "incident took place over 12 months ago". In respect of the matters which related to the incident on the 23 February 2016 the claimant was told that the respondent intends to "hear your complaints and accusations about this incident" in the EG901 process.

39. From the 25 April 2016, the claimant had indicated that he was not able to undertake his duties because he was distracted and felt that operational safety would be compromised. The claimant complains that he was marked as 'sick' throughout the period. The claimant says he was not sick. The position was that the disciplinary process was distracting him from his primary task of passenger safety which was a normal reaction and therefore he could not fly.

40. Mr Bridger explained that a where a pilot is not fit to undertake their normal duties they are off sick. Consideration can be given to other temporary alternative ground duties as part of a plan to get them back to their normal flying role.

41. In his evidence Mr Bridger was able to say that a complaint had been made about the claimant by CTC. An investigation found the complaint was unsubstantiated and it was not pursued against the claimant further. There is a dispute between the claimant and his line manager as to whether the claimant was ever informed about the outcome of this investigation. The claimant states that he asked Mr Bridger if the investigation was still ongoing but he never received an answer. Mr Bridger stated that the claimant never asked him about the CTC investigation, and if he had done he would have explained that the investigation was closed.

42. The claimant was invited to a Preliminary Investigation interview to take place on 7 April 2016. The claimant was unable to be accompanied on the suggested date and the interview in fact took place on 15 April 2016.

43. The claimant was informed that the Preliminary Investigation may take longer than the 14 days set out in the disciplinary procedure. The claimant provided the investigator with additional evidence. In an email dated 6 May 2016 the claimant was told that the investigator hoped to hand the matter over to the case to answer manager soon.

44. By 7 June 2016 the claimant had not been informed of an outcome and so wrote to the investigator. On the 15 June 2016, the claimant was informed that the preliminary investigation was complete and the file had been handed to the case to answer manager.

45. On 17 June 2016, the claimant was informed that there was a case to answer and the file would be passed to a hearing manager, Mr Pringle.

46. Mr Pringle invited the claimant to a hearing to be held on 11 July 2016 to answer charges of breach of the staff travel guide and rude, abusive and/or offensive behaviour towards a colleague. The claimant was informed that the allegations were altered. This was to make clear that the allegation of the claimant being rude, abusive or offensive to a colleague related to the claimant's phone call made later in the day on 23 February 2016 and not his behaviour at the check-in desk.

47. The claimant could not find anybody to accompany him to the hearing on the original date and so the disciplinary hearing did not take place until 22 July 2016.

48. The claimant said that he would like to ask questions directly of the "the authors of any reports or written complaints which will be relied on by British Airways in the disciplinary process". In effect to be able to question Ms Keng and Kim at the disciplinary hearing. Mr Pringle refused stating: "I want to use this hearing to hear from you and to give you a chance to respondent to the allegations and make any representations in relation to the EG901 process. I can then consider whether any further evidence is required including whether any additional questions should be asked of any particuar individuals."

49. The claimant raised a grievance on 29 March 2016 (the claimant raised a further grievance on 26 August 2016) in which he complained that he had been subject to detriments for having made protected disclosures. The claimant considers that the respondent failed to conduct any investigation or any proper investigation in respect of his grievances. The claimant was told that he should raise any relevant points and evidence on his grievance at the disciplinary hearing.

50. The disciplinary hearing was held on 22 July 2016. At the disciplinary hearing Mr Pringle was provided with copies of the claimant's grievances.

51. Following the disciplinary hearing the claimant provided further information to Mr Pringle on 29 July and 1 August 2016. Mr Pringle undertook further investigation, including a check whether the index incident was a one off or there were other instances of the claimant holding a commercial booking and a staff travel ticket.

52. The claimant was informed that he would receive the outcome on the 10 August 2016. Nearly 3 weeks after the hearing and contrary to the timetable provided in the respondent's procedure.

53. Mr Pringle concluded that the claimant had made two bookings for his partner, a commercial one and a staff travel booking. Mr Pringle rejected the claimant's explanation that this was due to the respondent's faulty IT systems and concluded that the claimant was aware that he had made a duplicate commercial booking; there was no fraudulent intent, the claimant wanted to ensure that Ms Terry would travel in the club cabin. Mr Pringle found that during the telephone call the claimant had behaved in a way that was rude, abusive and likely to cause offence.

54. Mr Pringle set out several factors which affected his view of the claimant's credibility, including what he accepted in cross-examination was a mistaken view of the chronology of events. The correct chronology would have provided a motive for Ms Keng and Kim to have a potential motive to give a defensive account of events. Mr Pringle did

not say that this would have changed his conclusions stating that such data there was tended to support the account given by Ms Keng and Kim.

55. The claimant had been informed by Mr Thomas that he was to raise his complaints and accusations about the incident on the 23 February 2016 at the disciplinary hearing. Mr Pringle addressed the claimant's grievance in his decision letter as part of the disciplinary process. Mr Pringle concluded that the claimant had not provided any evidence to support the points in his grievance.

56. Mr Pringle decided to give the claimant a written warning and withdraw staff travel concessions for a period of two full staff travel years, which was the minimum sanction provided for in the staff travel guide. The ban did not apply to the claimant's commuting from Bangkok to London Heathrow.

57. The claimant appealed the outcome of the disciplinary.

58. An appeal hearing by Mr Scholey took place on the 19 October 2016. He produced his outcome on the 16 November 2016. A final appeal was heard by Mr Bond on the 16 December 2016. He gave his outcome on the 17 January 2017. The appeals upheld the decision of Mr Pringle.

59. On 5 October 2016, the claimant received a text message from Ms Kennally, a Duty flight crew manager, telling him that Staff travel had alleged that he was in breach of the staff travel regulations. This came about because in the process of applying the sanction imposed by Mr Pringle what appeared to have been another possible breach of the staff travel policy was detected. Investigation eventually established that the matter should not be subject of disciplinary action.

60. The second disciplinary process started on 18 October 2016, and finished on the l February 2017. The claimant was invited to a Preliminary Investigation interview on 7 November 2016. The claimant requested a postponement to a later date but this was refused. On 21 November 2016, Mr Bristow wrote to the claimant stating that the Preliminary Investigation was complete. The claimant wrote to Mr Bristow requesting that he delay concluding his Preliminary Investigation as there was evidence which he wanted to be put before the case to answer manager. On 23 November 2016, the claimant received a letter from the case to answer manager stating that he believed there was a case to answer and the file had been passed to the hearing manager.

61. The claimant spoke to the hearing manager who referred to the file back to Mr Bristow. There followed an exchange of correspondence between the claimant and Mr Bristow concerning further evidence including medical evidence. On the 22 December 2016 Mr Bristow

stated that he had concluded the preliminary investigation and he was passing the file to the case to answer manager.

62. On 1 February 2017, the claimant was informed that the outcome the second disciplinary was that the allegation was not found.

63. On the 6 February 2017, the claimant informed duty flight crew managers that he was able to return to work. The claimant was referred to British Airways Health Services to ascertain his fitness to return to work. On the 26 February 2017, the claimant was passed fit to work. The claimant began receiving his salary again from that date.

64. The parties have produced written submissions which they have amplified in further oral submissions. The issues that have to be decided in this case have reduced to the following:

    a. Did the claimant make protected disclosures?

    b. Was the claimant subjected to detriment?

    c. Did the respondent do an act, or a deliberate failure to act, that subjected to the claimant to that detriment?

    d. Was that act or omission on the ground that the claimant made a protected disclosure?

    e. Was the claimant's claim presented in time?

65. **Did the claimant make protected disclosures?** The Tribunal has to consider whether in the claimant's conversation with Kate Thornton on 23 February 2016 or the email sent to Kate Thornton on the 26 February 2016 the claimant made a protected disclosure within the meaning of section 43B(1)(b) Employment Rights Act 1996. A disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

66. The claimant must convey facts rather than state an allegation or opinion. The claimant states that this is plainly established. In his conversation on the 23 February and the letter of the 26 February 2016 the claimant communicated to Ms Thornton detailed information about events in Bangkok at check-in on 23 February 2016. The respondent states that the information that the claimant disclosed was trivial and personal.

67. The conclusion of the Tribunal is that in outlining the events on the 23 February 2016 in a conversation with Kate Thornton and in the letter of the 26 February 2016 the claimant's account sets out information that could, if established amount to a disclosure of information amounting to a qualifying disclosure.

68. The information must in the reasonable belief of the claimant tend to show a failure to comply with a legal obligation. The claimant contends that he reasonably believed that Ms Terry arrived at check-in in time and that when the check-in agent started processing Ms Terry he had a reasonable belief that the she had checked in on time but had been denied boarding in club class because they had not downgraded Ms Sittirath.

69. The respondent says that the overwhelming evidence is that the claimant was late to check-in. The respondent relies on the evidence of Ms Terry and the CCTV footage still to support this point.

70. The check-in process for Ms Terry was started. The claimant and Ms Terry's evidence is that Ms Terry was being checked in on her commercial and not her staff ticket. The Tribunal accept that this is indeed what they thought was happening at the time and at the point that the letter 26 February 2016 was sent. While the claimant and Ms Terry may in fact have been late for check-in they believed they had arrived on time and that the check-in of Ms Terry as a commercial passenger had started.

71. The claimant states that there was a breach of the legal obligations that arise from the Civil Aviation (Denied Boarding Compensation and Assistance) Regulations 2005.

72. The respondent contends that other than the above stated provisions the claimant has failed to show the source of any alleged legal obligation relied on.

73. The Tribunal is satisfied that if Ms Terry was denied boarding in the way described that the respondent would be in breach of its legal obligation to Ms Terry which arise from the purchase of a flight ticket and presenting herself in time for the flight.

74. The Tribunal are satisfied that the claimant and Ms Terry were genuinely of the view that they arrived on time, just, for the flight and that check-in of Ms Terry had commenced. The issue whether they arrived in time or not is a matter in respect of which scrutiny occurred after the events had occurred. Ms Terry arrived between 10.13am and 10.15am and the claimant shortly after. It was in our view understandable that they thought they arrived on time.

75. Was the disclosure in the public interest? The claimant contends that the disclosure was in the public interest because: Ms Terry was a member of the public; the nature of the disclosure has a wider public interest; BA's status as a large multinational company; the wrong doing disclosed could cause reputational damage to BA.

76. The respondent says that the information was entirely personal in nature. Although the claimant referred to a duty to make the disclosure in the public interest, he admitted in questioning that what it meant was

just that it affected Ms Terry as a member of the public. The respondent states that we have to consider whether the claimant reasonably believed that the disclosure was in the public interest.

77. We are satisfied that the disclosure in this case can be considered in the public interest. The group of people affected by the disclosure are all the respondent's customers. The wrong doing may arise from a private transaction but was not trivial. The respondent is a large corporation and the extent that it meets or fails to meets its obligations in situations such as the Ms Terry is a matter of public interest.

78. The Tribunal is satisfied that the claimant made a protected disclosure.

79. Was the claimant subjected to detriment?

80. Where an employee suffers a disadvantage to qualify as a detriment it must be such that a reasonable worker would take the view that they had been disadvantaged in the circumstances. An unjustified sense of grievance of cannot be a detriment.

81. The respondent takes issue with the claimant's position which is that having regard to the wide meaning of detriment, each of the detriments complained of should be made out on the facts based on the evidence the Tribunal has heard. The respondent concedes the following as potential detriments: initiating the disciplinary investigation; upholding the allegations; issuing the claimant with sanctions and removing the claimant's staff privileges (detriments ii-iv).

82. The respondent however takes issue with the following matters: the failure to investigate the claimant's complaint under BASI 13; placing claimant on sick leave; delays in the first disciplinary process; second disciplinary process; commuting staff privileges; failing to follow internal policies; evidence; loss of pay; grievance (detriments i, vi, vii, viii, ix, x, xi, xii, xiii xiv).

83. In respect of the matters that the respondent denies the Tribunal has found that the following are detriments:

    a. **Delay in the first disciplinary**: There was a delay over the whole period. The five-week period between May and June is not explained. There is an explanation for much of the delay; the amount of time required by the managers to consider the various matters arising; the claimant's request for further time and the agreed extensions of time for the managers to take various steps. However, there remains a significant period of time when there is no explanation for the delay. This is in our view a detriment.

    b. **Initiating and continuing a second disciplinary:** There is no detriment in initiating the second disciplinary process. There

was a detriment in the circumstances here in continuing it beyond the preliminary investigation stage.

c. **Cross examination of witnesses:** The claimant says that he was not allowed to cross examination of Ms Keng and Kim. The respondent states that the procedure adopted by Mr Pringle was a reasonable way to proceed. It is noted that the claimant was offered the opportunity of being able to provide written questions which could be put to Ms Keng and Kim. Even accepting the respondents point that There was no contractual or common law right for the claimant to cross examine witnesses. We are of the view that having considered the wording of the EG901 that a refusal to facilitate the calling of a witness to give evidence is a potential detriment.

84. In so far as the other matters are disputed as detriments the Tribunal accepts the respondent's position that they are not detriments.

85. **Failing to carry out any proper investigation into the subject matter of the claimant's protected disclosure:** The claimant says it was a perfunctory and defensive investigation highlighted by the fact that Mr Mooney never obtained the CCTV footage in his investigation. The respondent says that CCTV was not relevant because the respondent had the stills and it would not have given any more information that was relevant than was obtained from the stills.

86. The respondent accepted that the claimant's complaint was not dealt with under the BASI 13 policy. However, this causes no detriment to the claimant because as the the respondent says, it was proportionate and appropriate for Mr Mooney, as the person with overall responsibility for BA staff at Bangkok to investigate the complaint. Further, the respondent argues that this course of action taken was consistent with the policy in BASI 13 which states that *"in many* cases, *although a potential fraud may have been committed, it may be more appropriate and proportionate* to *deal with it in the line".*

87. Mr Mooney met with the Ms Keng and Kim, the people involved in events on 23 February 2016, for 90 minutes; he considered and viewed objective evidence to resolve the dispute as to Ms Terry's check-in time (the still from CCTV); he reverted to the claimant (albeit after some unexplained delay) with his findings. The delay aside, the respondent's investigation was an entirely appropriate and proportionate investigation.

88. The conclusion of the Tribunal is that the claimant has not suffered a detriment in this regard.

89. **Not suspending the claimant on full pay the respondent annotated the claimant's personnel file as being -sick- when in fact he was not, affecting his employment record and from 26 October 2016**

the claimant was denied his salary: The claimant states that this is plainly a detriment the respondent says that there was no detriment.

90. The claimant was not disadvantaged by the decision to pay him six months' sick pay, in circumstances where he was unwilling to perform his contractual duties. The claimant's stated that he was unfit to perform his contractual duties or operate in a safety critical environment, because he was too distracted.

91. If the claimant was not sick, an alternative suggested under cross examination was to place him on special leave. There is no right to pay in such circumstances.

92. The claimant says that he should have been suspended. The respondent points out that there is no contractual right to this. The decision not to suspend the claimant was in line with other similar cases and Mr Bridger's personal experience of cases of breach of the staff travel policy.

93. The Tribunal accept that there was no detrimental treatment in respect of the issue of ground duties. The claimant was treated in accordance with the policy and standard practice.

94. **Commuting staff privileges:** The Tribunal do not consider that the claimant has been able to show a detriment by the imposition of this restriction.

95. **Evidence**: Mr Mooney did not look at the CCTV. However, there is no detriment. The relevance of the CCTV was to establish the time, this was information that was contained on the stills. We see no disadvantage to the claimant from the fact that Kim provided the CCTV evidence to the investigator during the preliminary investigation stage. The CCTV evidence from the check-in desk was not relevant to the issues on appeal.

96. The claimant states that Mr Mooney did not ask for information from the claimant or Ms Terry after he had obtained the version of Ms Keng and Kim. There was no need to do so in this case the claimant had given a full account of his position. There was no disadvantage to the claimant.

97. **Loss of pay:** The Tribunal do not accept that the claimant has suffered a detriment in respect of pay. The claimant was paid what he was entitled to; it was his availability for work that impacted on his pay.

98. **Grievance:** The claimant raised a grievance. The respondent's grievance procedure EG903 provides that the respondent will accept grievances from employees and former employees involving alleged incidents that have occurred in the previous 12 months unless there are exceptional circumstances. The procedure also provides that an

employee cannot bring a grievance that relates to the decision to take disciplinary action.

99. The claimant's grievances were dealt with in accordance with the operation of the respondent's grievance procedure there was not detriment.

100. Did the respondent do an act, or a deliberate failure to act, that subjected to the claimant to detriment? Was that act or omission on the ground that the claimant made a protected disclosure?

101. **Initiating a disciplinary investigation against the claimant**: The claimant states that Mr Rowell had in mind a concern that he was going to go public with his concerns. The claimant points to the fact that Mr Rowell contacted the chairman's office and to the words he used in his emails which referred to the concerns raised by the claimant.

102. The conclusion of the Tribunal however is that Mr Rowell was acting on the apparent breach of the staff travel guide and not the fact that the claimant was making mention of the possibility of going public or any concern that the claimant was going to go to the press. Mr Rowell we accept was not aware of the significance of the reference to public interest disclosure. He would in our view have been well aware of what a whistleblower was. We accept Mr Rowell's evidence that he assumed that the claimant meant to contact the press, in our view he was not particularly concerned about this. It was not the reason he initiated the disciplinary investigation.

103. **Upholding the allegations against the claimant; issuing the claimant with a written waning; removing the claimant's staff travel privileges**: The claimant contends that the disclosure infected Mr Pringle's reasoning; Mr Pringle disbelieved the claimant's protected disclosures and that tarnished the claimant's credibility; the decision to prefer the accounts of Ms Keng and Kim was partly based on a misapprehension by Mr Pringle of the Chronology; Mr Pringle relied heavily on the perceived misrepresentations by the claimant which were diminished by a number of facts such as exaggeration by Ms Keng and Kim, common IT issues that he did not consider; the allegations were described as gross misconduct when in fact they were minor matters with significant mitigation available to the claimant.

104. The conclusion of the Tribunal is that the claimant had on the face of it committed a breach of the staff travel guide. Once the claimant's account about an IT error is rejected by Mr Pringle, the claimant must inevitably, on the facts in this case, be found to have breached the staff travel guide. There was a valid basis for Mr Pringle to reject the claimant's explanations and the matters which went against the claimant were matters which on the evidence Mr Pringle was entitled to rely upon. There was a firm basis on which Mr Pringle could conclude that the claimant had breached the staff travel guide. The allegation relating to rude, abuse and/or offensive behaviour turned on whether

the claimant's account was preferred to the account given by Ms Keng and Kim. The claimant's failure to provide a recording of the exchange as he suggested until very late on, and then only to provide a small fraction of the exchange, was a matter that Mr Pringle was entitled to have regard to when considering the claimant's account. It was open to Mr Pringle to prefer the account of Ms Keng and Kim over the claimant.

105. Having come to the conclusions that he did which are well within the ambit of the evidence that was before him Mr Pringle then went on to apply sanctions which fit with the sanctions that have been imposed by the respondent in other cases where there has been a breach of the staff travel guide. This was a serious matter as far as the respondent was concerned. The claimant had imposed upon him the minimum sanction which suggested that the claimant's mitigation was to some extent accepted by the respondent as the claimant's case appeared to be a paradigm example of the type of situation that the staff travel guide was aiming to deter.

106. The claimant accepted that if the account of his behaviour was correct then this was a matter that fitted in to the bracket of gross misconduct.

107. The Tribunal has not been able to conclude that there is any evidence that the upholding the allegations against the claimant; issuing the claimant with a written waning; removing the claimant's staff travel privileges was in any sense impacted upon by the claimant making protected disclosures.

108. **Delay in the first disciplinary**: The claimant contends that the three-month delay in the investigation was inordinate and far outside the prescribed periods. The delay was not explained by any of the respondents' witnesses. The claimant says that the respondent has not discharged the burden that is placed on it by section 48(2) Employment Rights Act 1996.

109. The respondent contends that the principal reason for the delay was the vast volume of material submitted by claimant. The respondent continues that it was in the claimant's interests that the respondent properly considered this before reaching a conclusion. On the claimant's own account, he submitted over 100,000 words, 35 letters and several pieces of evidence. This is in the context of a disciplinary process relating to two disciplinary allegations regarding the discrete events of 23 February 2016.

110. The Tribunal accepts the reason for the delay as explained by the respondent. The extent of the material generated by the claimant required the various employees of the respondent dealing with his case to consider the material carefully. The Tribunal considers that while it must have been possible for the claimant's case to have been concluded sooner there is no evidence that there was a deliberate

attempt to cause delay. The Tribunal does not consider that the delay was because the claimant had made a protected disclosure.

111. **Initiating and continuing a second disciplinary:** We have set out above our conclusion that there is no detriment in initiating the second disciplinary process. We formed the view that there was a detriment in the circumstances here in continuing the disciplinary beyond the preliminary investigation stage.

112. The claimant's complaints about detriment are limited to acts or deliberate failures to act done before 25 October 2016. The second disciplinary process started on 18 October 2016, and finished on the 1 February 2017. The claimant was invited to a Preliminary Investigation interview on 7 November 2016. The period after this date is when the detriment occurs in our view. This is outside the scope of this claim.

113. There were matters raised that justified the initiation of the second disciplinary. Once initiated the claimant needed to provide an answer to what appeared to be a breach of the staff travel guide. The claimant did provide the information required however it is not clear why the claimant's explanation was not accepted by the respondent until February 2017. There is however evidence that shows the claimant requesting a postponement, and the claimant seeking out information to provide to the respondent to support his explanation. In our view, there nothing in the events which occurred in the period from the initiation of the second disciplinary to the 1 February 2017 that leads us to conclude that the actions in this regard were affected by the claimant making a protected disclosure.

114. **Cross examination of witnesses:** The claimant contends that the questioning of live witnesses is permitted under the respondent's policy. The allegation was fact sensitive and ripe for witness questioning. Ms Keng and Kim had a possible motive to exaggerate their accounts and had developed over time. The questioning could have been via Skype and Mr Pringle could have controlled the questioning to protect the witnesses.

115. The respondent says that there is no contractual or common law right to the claimant to cross examine witnesses. The policy provides for an individual to "call" witnesses. Giving this its ordinary meaning, the claimant could have called his own witnesses but could not compel the respondent to call witnesses. The respondent's procedure allowed for the questioning of the parties and Ms Keng and Kim were not parties. Given the nature of the allegations it was not appropriate for the claimant to cross examine the check-in staff. The claimant was offered the opportunity to ask the individuals written questions.

116. The Tribunal are not assisted by the respondent's legalistic defence relying on the absence of a contractual or common law right to question witnesses. It is clear that the technicality of calling witnesses and questioning parties were no matters considered by Mr Pringle.

117. It is clear from Mr Pringle's witness statement that he was informed by the nature of the allegations in deciding not to allow the claimant to question the check-in staff. In cross examination, the evidence of Mr Pringle was: *"EG901 allows calling witnesses. I allowed written questions but I did not want him to question the witnesses. I felt anything I needed I could get from question bank from Mike. I appreciate it is not the same as questioning. [Q: Credibility crux therefore could not challenge?] A: No. He could submit questions. I did not think it appropriate to allow Mike t question witnesses. I cannot recall if Skype was suggested. I did not think it needed to go beyond a question bank. Challenge in written questions I felt I could deal with it."*

118. The refusal of Mr Pringle to allow the claimant to question the witnesses was a matter that he considered appropriate because of the nature of the allegations. Mr Pringle offered an option which would have allowed for him to put the claimant's questions himself. The Tribunal consider that his approach was reasonable in the circumstances and there is nothing in the evidence that leads us to conclude that the claimant's protected disclosure influenced the decision not to allow questioning of the witnesses.

119. The claimant's complaints are not well founded and are dismissed.

_____
Employment Judge Gumbiti-Zimuto

Date: …13th November 2017

Sent to the parties on: .....

.....
For the Tribunals Office