EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr Peter Lort	**v**	British Airways PLC

Heard at Cambridge by CVP **On:** 13 January 2021

Before: Employment Judge Finlay

Appearances
For the Claimant: Mr Jonathan West (Counsel)
For the Respondent: Ms Chloe Bell (Counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face-to-face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

The claimant's complaints of unfair dismissal and breach of contract (wrongful dismissal) are not well founded and the claim is dismissed.

REASONS

The Claim

1. The claimant was employed by the respondent from 1 March 1993 until his (summary) dismissal which took effect on 10 May 2019. By a claim from presented on 11 July 2019 which followed early conciliation on 7 June 2019, the claimant brought a complaint of unfair dismissal. At a preliminary hearing on 18 May 2020, permission was granted to add a complaint of wrongful dismissal. Both complaints were defended in full by the respondent, which said that the claimant was dismissed fairly due to his misconduct and that it was entitled to terminate the claimant's employment summarily due to the severity of that misconduct.

The Hearing

2. The hearing of the claim took place by CVP on 13 January 2021. The claimant, represented by Mr West, gave evidence on his own behalf. The respondent, represented by Ms Bell, gave evidence through the dismissing manager, Ms Sharon Walsh and the two appeal managers, Mr David Rose and Mr David Anderson. An agreed bundle had been prepared to which two documents were added. Ms Bell presented written submissions which she amplified orally and Mr West made an oral submission. I also had the opportunity to view the video which provided the evidence against the claimant of the conduct for which he was dismissed.

3. The issues to be determined by the tribunal had been identified initially at the preliminary hearing. The claimant conceded that he had been dismissed for a reason related to his conduct, a potentially fair reason, that the respondent genuinely believed that he was guilty of that conduct and that the respondent had reasonable grounds for that belief. However, the claimant contended that his conduct did not amount to gross misconduct or such serious misconduct to enable the respondent to dismiss him fairly or without notice, nor was it fair or reasonable for the respondent to treat his conduct as such. In a revised statement of case, the claimant set out nine reasons for these contentions, to which I will return in my conclusions below.

4. In addition, the claimant alleged that his dismissal was unfair because of unfairness in the way in which the respondent had managed the disciplinary process. He said that his disciplinary hearing had been unduly and unfairly rushed and not in accordance with the respondent's own disciplinary procedure and that it was unfair that Ms Walsh had been the person to conduct his disciplinary hearing.

5. The claimant confirmed at the hearing that the remedy he was seeking was compensation. The respondent argued that even if the dismissal were unfair, the claimant's compensation should be reduced considerably by virtue of his conduct and in accordance with the principles set out in the *Polkey* case.

The facts

6. Having heard the evidence of the four witnesses and considered the documents to which I was referred I have found the following facts.

7. The respondent needs no introduction. It is, by any measure, a large employer. It is also a service business which relies for its success on its brand reputation. As Ms Walsh passionately and eloquently explained, its customers are buying an experience not a tangible product. That experience is paramount for the success of the respondent and any competitive advantage against its competitors in the sector. The passengers take home memories and not a physical object.

8. The claimant began work with the respondent in March 1993 as a cargo delivery driver at London Heathrow Airport. He subsequently became an aircraft loader, but in 2017 he suffered a serious seizure and the DVLA revoked his driving licence. As a result, he transferred to working as a baggage handler in the

baggage hall in Terminal 5, where he remained until his dismissal. His job involved unloading baggage from containers which had been unloaded from incoming planes, and then loading that baggage onto one of the carousel belts which took the bags into the baggage reclaim hall to be collected by the passengers from the relevant plane.

9. The claimant undertook his role 'airside' such that his interaction with passengers was minimal. His role was inherently stressful as he and his colleagues were under pressure to get the sometimes heavy bags onto the carousel belts as quickly as possible. As those who use the services of the respondent will know, the baggage handlers tend to handle luggage bags in a robust manner.

10. In the Autumn of 2018, the claimant suffered a serious and traumatic physical assault outside his home, suffering injuries which required hospital treatment. He had subsequently been subjected to threats against his family and suffered from lingering psychological effects of the assault, including occasional 'night terrors'.

11. The claimant had sought help from a qualified counsellor after both the 2017 and 2018 incidents, his last counselling session being in November 2018. He had advised his manager of his personal issues, but he was fit for work when the incident related below occurred and did not speak to his manager about any psychological issue on the day. Indeed, he told the tribunal that he did not want to use any psychological or personal issues as an excuse for his conduct.

12. On 13 April 2019, the claimant was working as normal when he noticed that two of his colleagues were having trouble loading passengers' luggage onto the carousel belt. The claimant identified that some luggage had been loaded mistakenly onto this carousel, with the result that the belt was not being emptied by the passengers in the baggage reclaim hall who were waiting for their own luggage. The claimant's colleagues were then not able to load those passengers' luggage onto the belt because it was already full of the incorrect luggage.

13. The claimant then investigated inside the baggage reclaim hall to learn that passengers were still waiting for their luggage 30 minutes after it should have arrived and that passengers were becoming increasingly cross and, as the claimant put it, 'shouty' with the colleague who was manning the helpdesk. The claimant decided to resolve the problem by removing from the carousel the bags which should not have been on it and which were causing the delay. In doing so, he was taking action to assist the passengers in the baggage reclaim area.

14. What happened next was captured on video by a passenger in the area. The claimant did not know that he was being recorded. The recording is very clear visually and reasonably clear audibly. It shows the claimant walking briskly to the carousel and then start to remove from the belt the bags he has identified as incorrectly placed there. In his haste to remove these bags as quickly as possible he is seen to be throwing them with some force onto the floor from the belt. As he removes the third one, a passenger is heard asking him not to 'throw them down'. The claimant then stops to engage with the passenger and can be heard explaining why he is 'chucking' the bags off. Not all of this section is audible, but

it is likely that the claimant says that he is doing so in order that the passengers in the area can recover their luggage.

15. The claimant then throws the bag he was holding in what I think can best be described as a defiant manner and throws the next bag more vigorously than he had thrown the others. There then follows a further exchange between the claimant and passenger in which the passenger asks for the claimant's name and he refuses to give it. The claimant says "mate – do me a favour…otherwise I'll just walk away and leave it". The claimant continues to remove bags from the belt, perhaps less vigorously now, and mutters under his breath "for fucks sake". I should say here that I could not hear this on the recording I had, but it was common ground that the claimant said this, "under his breath" but audibly such that it was picked up on the recording and apparently by a female passenger who turned to look at the claimant at that point. The entire recording lasts for only one minute and three seconds.

16. The impression given by the recording is not good. The claimant is seen handling the bags in a way which appears to be unnecessarily vigorous and when it is suggested to him by a passenger that he should be taking more care, he responds in a confrontational manner. What is more, he then throws the next two bags even more robustly, with the effect of inflaming the situation. The claimant is then heard to swear in earshot of passengers in the vicinity.

17. The passenger who took the video recording lodged a complaint on the respondent's website portal on the following day, 14 April. His complaint is couched in somewhat hyperbolic terms, referring to the respondent's "crazy" baggage handler "hurling" bags off the carousel, "deliberately trying to damage them" and verbally abusing the passenger who asked him to stop. He asks to whom at the respondent he can send the video.

18. The respondent's customer relations team responded to the complaint and request on 3 May, nearly three weeks later, whereupon the passenger sent the recording to the respondent sometime between 3 and 6 May. The matter was referred to Jason Francois, people policy manager, who viewed the video and then suspended the claimant by telephone on 8 May, advising him that he was required to attend a meeting at 9:00 am on 10 May. Mr Francois sent the video recording to the claimant that same afternoon with a letter confirming the suspension. The letter records the allegation thus: "Your suspension follows an incident on 13th April 2019, where you were captured on video offloading luggage from a baggage belt in an unacceptable manner. When challenged by a customer, you responded inappropriately and continued to offload the luggage in the same way. Your conduct is damaging to our reputation and contrary to standard procedures and acceptable standards." It goes on to say that the allegations may constitute gross misconduct and that the appropriate sanction may be dismissal.

19. The respondent has a written disciplinary procedure. Amongst other things, it provides:

19.1. for the "appropriate line manager" to determine whether there is a case to answer based on a preliminary investigation conducted, where possible, by somebody else;
19.2. that, where possible, the appropriate line manager who believes that there is a case to answer and the "appropriate authority" hearing the case should not be the same person; and
19.3. that evidence should be given to the accused employee at least 72 hours before the disciplinary hearing.

20. The policy sets out a non-exhaustive list of offences which constitute gross misconduct, including "abusive, rude or offensive behaviour towards, or in the presence of, a customer" and "conduct prejudicial to the good name of British Airways".

21. Sharon Walsh, an Area Performance Manager not in the same management line as the claimant, was appointed to conduct the disciplinary hearing with the claimant on 10 May 2019. She had received the video footage on 8 May. She was advised by the respondent's in-house legal department that the matter should be dealt with immediately. By this point, the video was circulating on You Tube and other social media platforms, such that Mr Rose and no doubt others within the respondent had seen it in on personal social media feeds.

22. The claimant attended the disciplinary hearing on 10 May with his union representative, who made a comment that "this is very abrupt". When asked whether he thought it appropriate to "chuck" bags, the claimant replied that he was doing it as quickly as possible and was under pressure to avoid delays to passengers. He referred to the personal issues referred to in paragraphs 8 and 10 above. He apologised, saying he had not intended to be rude. After less than half an hour, Ms Walsh adjourned to consider her decision, reconvening about 70 minutes later to tell the claimant that he had been dismissed, reading from the disciplinary outcome letter which she had prepared in the intervening period.

23. That letter was also dated 10 May. In it, Ms Walsh referred to the mitigation offered by the claimant, but stated that the difficulties in his personal life did not negate or justify his actions. She also referred to his past history. The claimant had a clean disciplinary record.

24. The claimant appealed against his dismissal on 13 May, apologising again and expressing remorse and regret. He highlighted the personal issues but stated that they were not an excuse for what happened. He stated that he believed the decision to be unfair and unjust. He subsequently added that he felt his dismissal was out of process and the policy was not followed.

25. Mr David Rose was appointed to hear the appeal. Mr Rose is employed by the respondent as global operations punctuality manager. He heard the appeal on 20 May and he looked at the case afresh. The claimant was again accompanied by his union representative. By this point, the claimant and his union had collated a significant amount of mitigation documentation, including a letter from his counsellor confirming the treatment given by her, pictures of the claimant following his assault, character references from within and without the

respondent, a nomination of the claimant for a 'Heathrow Hero' award in 2018 and a letter seeking clemency for the claimant signed by 235 of his colleagues.

26. During the appeal hearing, there was discussion regarding the claimant's personal issues. In relation to the procedural element, the claimant's union representative referred to the same manager having conducted the investigation and decided that there was a case to answer. He said a third manager should have conducted the disciplinary hearing. He also asserted that the claimant had not had opportunity to provide the evidence in mitigation until now. The claimant stated that he was not 'customer trained' and the union representative suggested that there had been inconsistency of treatment, albeit without mentioning any comparable incident by name.

27. Mr Rose wrote to the claimant with his decision on 29 May. He rejected the appeal. In the letter, he acknowledges the personal and mental health issues, but notes that the claimant had not requested support from the respondent and believed he was fit for work on the day. Despite stating at the appeal that he had been stressed and anxious, the claimant had not brought it to the attention of management.

28. In relation to the procedural aspects, Mr Rose accepted that the respondent had departed from the normal process and said that it was unfortunate that there had not been different managers conducting the preliminary investigation, case to answer and hearing stages. However, he was satisfied that the video footage constituted sufficient evidence for a preliminary investigation and said that he understood why the case to answer stage had been truncated. He was not surprised that the case was not then passed onto an independent manager and believed that the same outcome would have been reached even if it had been.

29. The respondent's policy allows the dismissed employee a second appeal and the claimant exercised his right by a letter from his union representative of 31 May, citing as the grounds of his appeal:

    29.1. The decision was harsh and unfair and his personal circumstances leading up to the day were not fully considered;
    29.2. The SOP was wrong (a matter not pursued before the tribunal);
    29.3. That the claimant had no formal training to interact with customers;
    29.4. That the disciplinary process had not been followed; and
    29.5. That the claimant had been a loyal and hard working employee for many years, the situation he found himself in was alien to him and he regretted any actions that may have caused offence and put the company in a bad light.

    A written statement amplifying these grounds was also produced by the union representative.

30. David Anderson, Head of Ground Safety and a manager since 1995, was appointed to conduct the second appeal. He met with the claimant and his union representative on 19 June. The appeal points were discussed and the claimant

offered to write a letter of apology to the passenger who had complained. Mr Anderson stated that he found it difficult to rationalise the claimant appearing to deliberately throw down the next suitcase after being asked to stop doing so and the language used by the claimant. He also told the tribunal that whilst the respondent does provide training in dealing with customers, it was self-evident that a member of staff should not act in the way in which the claimant had acted. The claimant would not have needed training to know that.

31. Like Mr Rose, Mr Anderson considered that the outcome would have been the same had the disciplinary process not been condensed. He also investigated the 'inconsistency of treatment' argument with the respondent's people department. He too rejected the claimant's appeal, setting out his reasons in a detailed letter on 26 June and confirming that he believed that dismissal was an appropriate sanction for the conduct displayed by the claimant.

The Law

Unfair Dismissal

32. Section 94(1) of the Employment Rights Act 1996 provides that "an employee has the right not to be unfairly dismissed by his employer". Dismissal is defined by Section 95(1). Once a dismissal has been established it is for the employer to show the reason or principal reason for the dismissal and that it is either a reason falling within subsection (2), or some other substantial reason of a kind such as to justify the dismissal of the employee holding the position which the employee held.

33. Section 98(2) sets out five potentially fair reasons, one of which is conduct (section 98(2)(b).

34. Once the reason for the dismissal has been shown by the employer the tribunal applies Section 98(4) to the facts it has found in order to determine the fairness or unfairness of the dismissal. The burden of proof is neutral. Section 98(4) provides "where the dismissal has fulfilled the requirement of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reasons shown by the employer):

    34.1. depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
    34.2. shall be determined in accordance with equity and the substantial merits of the case.

35. In considering Section 98(4), the tribunal asks itself whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own view for that of the decision makers in the case.

36. The case of *Iceland Frozen Foods Ltd -v- Jones [1982] IRLR 439 EAT*, established that the correct approach for a Tribunal to adopt in answering the questions posed by Section 98(4) is as follows:

    36.1. The starting point should always be the words of section 98(4);
    36.2. In applying the section, a tribunal must consider the reasonableness of the employer's conduct, not whether the tribunal considers the dismissal to be fair;
    36.3. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what the right course to adopt should have been;
    36.4. In many (although not all) cases, there is a band of reasonable responses in which one employer might reasonably take one view, whilst another might reasonably take another; and
    36.5. The function of the tribunal is to determine whether in the particular circumstances of the case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band of reasonable responses, the dismissal is fair. If it falls outside the band it is unfair.

37. In the case of *Sainsbury's Supermarket Ltd -v- Hitt [2003] IRLR 23 CA*, the court of appeal held that the objective standards of a reasonable employer must be applied to all aspects of the question whether an employer was fairly and reasonably dismissed, including the investigation.

38. In *Polkey v AE Dayton Services Ltd [1988] ICR 142* the House of Lords made it clear that procedural fairness is an integral part of the reasonableness test. The House of Lords decided that the failure to follow the correct procedures was likely to make a dismissal unfair, unless, in exceptional circumstances, the employer could reasonably have concluded that doing so would have been futile. The question: "would it have made any difference to the outcome if the appropriate procedural steps had been taken?" is relevant only to the assessment of the compensatory award and not to the question of reasonableness under section 98(4).

39. If I am satisfied that the Respondent conducted matters in accordance with the *Burchell* guidance I have to decide whether the dismissal was a reasonable response to the misconduct and I must not adopt a "substitution mindset".

Wrongful dismissal

40. A dismissed employee has the right to notice of termination of employment or payment in lieu of that notice unless the employee has committed a repudiatory or fundamental breach of contract.

41. A repudiatory breach is one which goes to the root of the contract. The conduct must be incompatible with the employee's duties under his contract of employment. In the 1959 case of *Laws v London Chronicle (Indicator Newspapers Ltd) [1959] 2 All ER 285* the question to be answered was

expressed using the language of the time as follows: "whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service" and it was also stated in that case that "the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions".

Conclusions

42. Applying the relevant law to the facts of this case, my conclusions are set out below.

43. I will deal with the procedural aspects first. It is not in dispute that the claimant was not given 72 hours to consider the evidence against him. The respondent's witnesses have acknowledged that the initial procedure was 'condensed' or 'truncated'.

44. In addition, the respondent's own procedure provides for three people to be involved before an employee is dismissed, being the investigator, the person determining whether there is a case to answer and the person determining whether the case is made out and deciding on the sanction. In this case, only Mr Francois and Ms Walsh were involved.

45. There was also a lot of discussion during the hearing as to whether Ms Walsh should have conducted the disciplinary hearing, because she was not the claimant's line manager. The policy states that it is 'the appropriate line manager' who determines whether there is a case to answer and 'the appropriate authority' who hears the case.

46. Mr West put to all the respondent's witnesses that the appropriate line manager must mean the claimant's line manager and there is some force in this argument. I also take into account that there was evidence given that whilst the disciplinary manager is usually the line manager, it is not always the case. I would add that Ms Walsh did not know why she had been chosen for this task and it was suggested that it was just because she happened to be available, the respondent being anxious to hear it quickly.

47. My conclusion is that 'the appropriate line manager' does not necessarily have to be the employee's direct line manager. There are many reasons relating to the nature of the alleged misconduct which might make another manager more appropriate. I do not believe that the choice of Ms Walsh was a departure from the respondent's policy.

48. That still leaves the fact that the process was condensed and rushed. However, this was not a case in which there was a dispute as to what actually happened, such that a preliminary investigation would identify witnesses on either side. The video recording was clear and an employer could decide reasonably that no further preliminary investigation was required.

49. That does not explain, however, why the respondent saw the need to deal with the process with what might be considered unseemly haste. The claimant had been suspended. The video was already circulating on social media to the extent that the cat was already out of the bag. In addition, the respondent had taken nearly three weeks to respond to the initial complaint (although to be fair to Ms Walsh, she did not know that at the time). None of the respondent's witnesses were able to give a logical explanation why the claimant could not have been given at least 72 hours to prepare for his disciplinary hearing.

50. In looking at this issue, I am conscious that I should not look at the initial part of the process in isolation and that I should consider the process as a whole. The claimant was given the opportunity in three meetings to put his case. He was accompanied at all times by his union representative and was aware of the allegations and was given the evidence against him in advance. The process after the disciplinary hearing was certainly not rushed and Mr Rose looked at the matter afresh, rather than simply reviewing Ms Walsh's decision.

51. Whilst keeping in mind the effect of *Polkey* (paragraph 38 above), I have also looked at the consequences of the initial shortening of the process in the context of the procedure as a whole. The claimant was able to bring his union representative to the disciplinary meeting (and that representative did make the point about the process being 'abrupt'). The claimant's primary complaint is that he did not have the opportunity to put to Ms Walsh the mitigation documents he presented to Mr Rose at the first appeal (see paragraph 25 above), but it must be questionable whether he could have produced most of those documents in time even had he been given 72 hours' notice and one of the stages not been left out.

52. Not every procedural defect will render a dismissal unfair. Taking all of the circumstances into account and looking at the process as whole, I consider that viewed from an objective perspective from the standpoint of a reasonable employer that the process adopted by the respondent was not unfair.

53. I would add that if I am wrong about this, and the truncated and hasty initial process did render the subsequent dismissal unfair, then at that point I would in considering compensation conclude that even without the procedural flaws, the outcome would have been the same. Ms Walsh was adamant that the additional mitigation documentation would not have swayed her decision and I accept her evidence in this respect. Both Mr Rose and Mr Anderson had all the available mitigation and came to the same conclusion, Mr Rose having looked at that matter afresh.

54. Before turning to the matters set out in the claimant's revised case summary, I will deal with one other argument of Mr West even though it does not appear in that document. Mr West referred to the case of *Strouthos v London Underground Ltd [2004] EWCA Civ 402* as authority for the proposition that the framing of the disciplinary charge of misconduct should be done with particularity. He noted that the specific allegations put to the claimant (paragraph 18 above) did not refer to the examples of gross misconduct in the respondent's disciplinary procedure on

which it relied (paragraph 20) and argued that the charge was therefore defective.

55. I do not accept this argument. There is nothing in the *Strouthos* case to make it a requirement that the charge uses the wording in the policy and I consider that the framing of the charge by Mr Francois was detailed and such that the claimant knew precisely what he had been alleged to have done.

56. Turning to the revised statement of case, the claimant contends that it was not (nor was it fair or reasonable for the respondent to treat it as) gross misconduct or such serious misconduct to dismiss him fairly. In addition (or in the alternative), the decision to dismiss was outside the range of reasonable responses of a reasonable employer. He lists nine reasons for this contention which I will deal with in the same order. I start by saying that all the assertions are factually accurate, but do not individually or collectively lead to the conclusion that no reasonable employer could have dismissed:

    56.1. *It was not the claimant's normal job to clear baggage in the presence of customers. His duties took place behind the scenes and he was not used to working in a 'customer facing environment'. In other words, he was a 'fish out of water' when filmed.*

    Whilst this is true, it was not the case that the claimant never interacted with passengers. A reasonable employer was entitled to conclude that the complaint's unfamiliar environment excused behaviour which any employee (including the claimant) would know to be wrong.

    56.2. *The claimant was trying to be helpful and was going beyond his normal duties to assist to resolve the issue with the bags.*

    A reasonable employer was entitled to conclude that the manner in which the claimant went about giving his assistance and his interaction with the passenger was gross misconduct despite the claimant's motivation for going into the area in the first place.

    56.3. *The claimant accepted that he could have handled the baggage more carefully, but the respondent was fully aware that luggage can be handled robustly on its journey, especially at busy times.*

    The video shows the claimant handling the baggage considerably more robustly than he needed to and then handling it with even more force when asked to be more careful by a passenger.

    56.4. *The actions of the claimant and his offending words were not planned, deliberate or malicious, but on the spur of the moment in a moment of frustration.*

    This was appreciated by the respondent, but it was entitled to focus on the impression portrayed by the video, at least as much as the motivation of the claimant.

56.5. *The claimant apologised fully and sincerely at every stage of the disciplinary process.*

The remorse shown by the claimant was a factor which any reasonable employer would take into account, as did the respondent. However, it does not necessarily render the decision to dismiss outside of the range of reasonable responses.

56.6. *The claimant's actions were entirely out of character and he had been suffering from personal problems and poor mental health, such that there was no prospect of a repeat.*

The claimant's personal problems were a factor to be taken into account by any reasonable employer. All of the respondent's witnesses confirmed that they did so. However, they were equally entitled to note that the claimant considered himself fit for work on the day, had not referred any problem to his line manager, was not under any medication or treatment and was keen not to use his personal problems as an excuse.

56.7. *The claimant had not been given any training on how to interact with passengers, particularly in a stressful environment for both.*

I am far from convinced that this is a factor which would sway a reasonable employer. Whilst training may have helped, it should have been obvious to the claimant (and indeed it was clear to him when he saw the video) that his behaviour was inappropriate regardless of training.

56.8. *The claimant had a truly exceptional employment history.*

The respondent took into account the claimant's clean record but was entitled to conclude that the gravity of his conduct was such that dismissal was appropriate regardless of his prior disciplinary record. As it states in its disciplinary policy: "in cases of gross misconduct an employee may be dismissed without notice or prior warnings".

As for the claimant's length of service, Ms Walsh and Mr Rose in particular suggested that this was not so much a matter to the claimant's credit, but something which worked against him, on the basis that after 26 years, he should have known the sort of behaviour which was unacceptable. I did have concerns about this, and it chimes with what I saw as Ms Walsh's somewhat unsympathetic approach towards the claimant. Nevertheless, a reasonable employer is entitled to conclude that the severity of the charge outweighs length of service.

56.9. *The claimant should have received a written warning.*

> Many employers might have given the claimant a warning, perhaps with some additional training. However, the issue for me to determine is not what other employers might have done, but whether the decision of this employer was outside the range of reasonable responses open to a reasonable employer in these circumstances.

57. The claimant was guilty of conduct which was recorded. A passenger made a complaint and the recording circulated on social media. Whatever the claimant's frustrations at the time and whatever his mitigation, the video is, in modern parlance, a very bad look for the respondent. Mr West has made the point that we do not know how many people have viewed the video and whilst I accept his point that this was not a public relations calamity to compare with the opening of terminal 5, for example, there can be no doubt that it did damage the respondent's reputation with some customers and may well have damaged it with many more.

58. Added to this, the respondent is an organisation which relies heavily on its reputation. As Ms Walsh explained, it is a seller of a service and of an experience rather than of a physical or tangible product. In my judgment, it cannot be said that no reasonable employer would have considered the claimant's actions to constitute gross misconduct or dismissed in the circumstances in which this employer found itself. The dismissal was therefore not unfair.

59. Turning to the complaint of wrongful dismissal, I conclude, primarily for the reasons set out in paragraph 57 above, that the claimant's actions constituted gross misconduct and/or a fundamental breach of his contract of employment. Whilst he did not set out to commit gross misconduct, and indeed his motivation for venturing into the baggage reclaim area was laudable, his actions were deliberate in that he knew exactly what he was doing, particularly after having been challenged by a passenger. The complaint of wrongful dismissal must therefore also fail.

60. In coming to these conclusions, it is hard not to have sympathy for the claimant. He had given over 25 years of his life to the respondent and by all accounts had been a loyal and popular member of the company and his community in general. It was unfortunate that on the day, his actions and words were recorded and that the recording was then circulated. He had a bad day and as Mr West pointed out consistently during the hearing, everyone can have a bad day.

61. Furthermore, the claimant apologised and showed remorse and it is remarkable that as many as 235 of his colleagues signed a letter on his behalf asking for clemency. The impression he gave to the tribunal was that he is an honest and straightforward person. One can well understand his sense of grievance that over 25 years were cast away in just over one minute.

62. However, the tribunal cannot make its decision based on its sympathy for the claimant. I cannot be influenced by what I might have done as the employer or indeed by the fact that other employers may well not have dismissed the claimant. I note that the claimant has been able to secure alternative employment

and hope that he has found some comfort in that and the many character references and messages of support that he was able to present at his appeal.

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Employment Judge Finlay

Date: 25 January 2021

Sent to the parties on:

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For the Tribunal Office

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