# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| **Mr A Mahju** | **v** | **British Airways plc** |

**Heard at**: Watford

**On**: 2 November 2017 (in chambers)
3, 6, 8 to 10 and 13 to 15 November 2017
21 December 2017 (in Chambers)

**Before:** Employment Judge R Lewis
Members: Mr D Bean & Mr I Bone

**Representation**

**For the Claimant:** Ms H Bell, Counsel
**For the Respondent:** Mr A Nawbatt QC

## RESERVED JUDGMENT

1. The claimant's claims of victimisation under Section 27 Equality Act 2010 are dismissed on withdrawal.

2. The claimant was not unfairly constructively dismissed by the respondent and his claim of unfair dismissal is dismissed.

## REASONS

Case management and procedural

1. This was the hearing of a claim presented on 21 December 2015. The claim was the subject of case management before Employment Judge Smail on 1 March 2016; Employment Judge McNeill QC on 12 May 2016; Employment Judge Manley on 25 January 2017; Employment Judge Bedeau on 19 October 2017; and by telephone before the present Judge, shortly after he had been assigned to hear the case, on 31 October 2017. From that history the following matters were material.

2. Employment Judge McNeill QC issued deposit orders, related mainly to claims of harassment (58). The claimant did not pay any of the deposits, and accordingly all such claims were struck out on 27 July 2016 (65).

3. Before the preliminary hearing on 25 January 2017, the claimant withdrew all claims of direct discrimination, which were dismissed in accordance with rule 52 (68 i).

4. Employment Judge Manley, who heard both counsel who appeared before us, issued a detailed order (sent 25 January) setting out a timetable, an allocation of time per witness, and a comprehensive and definitive list of issues (68J). She also listed the case for the present hearing dates.

5. The allocation of time made by Judge Manley was no longer available in full when the present Judge was appointed to hear the case, and he alerted counsel to this on 31 October. In the event, the matter proceeded on the basis that it was too late to reduce the allocation given by Judge Manley, and that in the available time the parties should reach the end of their submissions, with the tribunal meeting separately for deliberations, and provisional dates allocated for a remedy hearing (which has now been vacated). In the event the claimant gave evidence for about two days, Mr Skinner for over a day, and Mr Brady for one full day. Mr Nawbatt's cross-examination of the claimant's witnesses was abridged.

6. On the morning of 3 November, and in the light of reading the previous day, the tribunal sought clarification of the victimisation claim. Ms Bell confirmed that the sole detriment relied upon was the decision of Mr Ahmad in September 2015 to refer the issue of the drawing to a preliminary investigation. The tribunal noted in its reading that Mr Ahmad wrote in his witness statement that he did not know that the claimant had raised grievances of discrimination. It noted that the claimant's evidence did not challenge this, but simply asserted that he had been victimised by "the company". Ms Bell confirmed that that was the position. At the end of Mr Ahmad's evidence (9 November) in which Mr Ahmad had maintained that position, and had not been cross-examined with the suggestion of lying about it, Mr Nawbatt intervened and asked the tribunal to record that the victimisation claim was not sustainable in light of the evidence, and that while he did not consider that he could apply to strike out, a costs application would be made if it were pursued. Ms Bell asked for a short adjournment, after which she withdrew all the victimisation claims.

7. Thereafter, the claim proceeded as a claim of unfair dismissal only. When the victimisation claims were withdrawn, the Judge canvassed briefly with the parties the question of whether the tribunal should proceed with judge alone. It did not appear clear from s 4(1) Employment Tribunals Act 1996 that the tribunal had power to do so in mid hearing, and as the judge had by that stage been engaged with members in considering the case for five days, it did not seem in the interests of justice to do so. With consent of the parties, the matter therefore proceeded with full tribunal.

8. We note for the record that members of the public observed the hearing from time to time, including one representative of the press. Copies of witness statements were provided to the public in accordance with rule 44. The witness statements had been prepared on both sides before the withdrawal of any Equality Act claims, and not amended since. The tribunal pointed out to the public that the references in the witness statements to claims of discrimination referred to matters no longer before the tribunal.

9. There was an agreed bundle in excess of 1200 pages. All copies were in immaculate order. We thank those responsible for affording the tribunal this rare pleasure.

10. Witness statements had been exchanged long before this hearing date. All witnesses adopted their statements and were cross-examined. The claimant's witnesses were interposed, and we thank the counsel for their co-operation in this regard. In addition to the claimant, the following witnesses gave evidence on his behalf (listed in order of giving evidence):

    - Ms Ranu Joshi, employed by BA for 29 years, and a Unite representative;
    - Ms Khisheeba Sarwar, formerly employed by BA for 17 years and a Unite representative;
    - Ms Michelle Braveboy, Regional Officer with Unite;
    - Ms Cecilia White, employed by BA for over 45 years, and a Unite representative; and
    - Ms Kay Curran, employed by BA for over 40 years, and a Unite representative.

11. The respondent called the following witnesses, in order of giving evidence:

    - Mr Michael Brady, Readiness and Planning Manager, who conducted the disciplinary hearing which led to a final written warning. Mr Brady gave evidence for a fraction under a full day;
    - Mr Rehan Ahmad, Team Manager, who conducted the initial assessment meeting in September 2015. Mr Ahmad gave evidence for just under two hours;
    - Mr Trevor Skinner, Operations Control Manager, who had been the claimant's line manager from December 2012 until June 2015 and was central to these proceedings. His evidence lasted just over a full day;
    - Captain Stephen Wright, then Manager of Network Operations Delivery, and therefore head of the department in which the claimant and Mr Skinner worked. Captain Wright's evidence lasted just over one and a half hours;
    - Mr David Briggs, Network Operations Manager who supported Mr Skinner during some of these events. Mr Brigg's evidence lasted about one and a half hours;
    - Mr Jason Ayres, Network Operations Manager, who was involved with events in November 2014 and September 2015. Mr Ayres gave evidence for about one hour;

- Mr Thomas Dollery, Manager of Euro Fleet, who heard and rejected the claimant's appeal against the final written warning. Mr Dollery gave evidence for just under one and a half hours;
- Mr Edward Harford, Manager of Heathrow Customer Operations, who rejected the claimant's further appeal against the final written warning. Mr Harford gave evidence for just under two hours;
- Ms Susan Harmshaw, Business Support Manager at the time, and since retired, who heard the claimant's grievance of March 2015, part of which was rejected and part upheld. Ms Harmshaw gave evidence for just over one hour.

12. The respondent did not call its final timetabled witness, Mrs Hudson, whose statement had been served.

General observations

*Selection*

13. Before we set out our findings of fact, we have a number of general observations about issues and approach in this case. We heard evidence about a wide range of issues, some of it in depth. Where we make no finding about an issue of which we heard; or where we make a finding, but not to the depth to which the parties went, that is not oversight or omission but a reflection of the true extent to which the point or issue was of assistance to the tribunal.

14. While the above observation is commonplace in the work of the tribunal, it was a particular issue in this case because of the volume of paperwork, the extensive use of email, and the collective depth of knowledge of the business which was enjoyed by many witnesses; and because much of the case turned on repeated iterations of similar points or events.

15. The parties, and most witnesses, had prepared for this hearing with care, and reminded themselves of the bundle and evidence in detail. We have not found it helpful or proportionate to refer in detail to many specific documents.

*Iteration*

16. The "iterations" question was an obvious concern, which led this judge to arrange the brief telephone preliminary hearing on 31 October 2017. The point is that the trigger event of this case was an email which the claimant sent on 2 October 2014. It runs to three lines, about 70 words. We discuss it below.

17. The claimant had up to about 15 formal opportunities on which to give his view of the email, and had done so on, at least, the following occasions: initial assessment; preliminary investigation; disciplinary hearing; written appeal; first appeal hearing; second appeal letter; second appeal hearing; grievance letters; grievance meetings; appeal against grievance outcome;

ET1 and grounds of complaint; list of issues; witness statement; oral evidence. With the exception of the last four, each iteration had been made to a manager or managers, each of whom in turn formed his or her response or opinion. There were written records of almost every such occasion.

18. On its face the case presented the opportunity for repeated trawling of the same territory expressed by the claimant; for each person to whom he had expressed a view to be asked his or her view of what the claimant had said, and what he or she had said at the time or subsequently about it; and then each to be asked what they thought of other managers' views of the same. Each documented iteration presented an opportunity for cross examination on any alleged discrepancy between what had been said and what (and how) it had been written down.

19. On paper therefore the case offered every opportunity for disproportionate analysis, and required self discipline on the part of all engaged in it. We record as a matter of general approach that detailed exegesis of office correspondence, including email and retrospective analysis of meeting notes did not assist the tribunal. In this, as in most cases, we are assisted by a reasonable common sense overview.

*The claimant's approach*

20. In that context, in this case we were not assisted by the binarism of the claimant's approach. A binary approach, which argues that everything done by the other side is inherently at fault, rarely reflects workplace reality, and is generally not of assistance to us. The respondent's witnesses were candid and sometimes generous in acknowledging the claimant's professional strengths, and in reflection on how they might, at the time, have dealt with matters better. We saw little recognition on the part of the claimant of the legitimacy of the balancing exercises which management may involve, and he struggled to acknowledge error or shortcoming on his own part.

21. The claimant put forward a conspiracy theory, and named a number of managers who he said had a hidden agenda to ensure his severance from the business. Ms Sarwar gave evidence, not supported in her written statement, that it was well known that there was a metaphorical target list of poor performers and the claimant (who was not a poor performer), whom the management wished to see leave the company.

22. There was no evidence to support the claimant's conspiracy theory, and no evidence that Ms Sarwar's sense of injustice, or commitment to her union members, had ever led her as a manager to raise an issue about an apparent target list. We do not accept either piece of evidence.

23. In cross-examination, Ms Bell adopted a number of broad approaches which we do not accept assisted.

24. On a number of occasions she appeared to us to cross-examine the respondent's witnesses on the basis of an expectation of management standards which was unrealistic. We approach this matter on the basis that the standard is that of the reasonable employer of substantial size and administrative resources, acting upon the information reasonably available to it at the time in question, and in a workplace with a developed system of written procedures and trade union representation. We reject for example the premise that management of the issues in this case should have been dealt with in a separate department from that within which the claimant and most witnesses worked. It was in our view more than sufficient that issues were dealt with by managers without personal knowledge or involvement in them, and without relationships with those involved which might be material, but with sufficient knowledge of the relevant systems to be able to make a fair contribution.

25. Ms Bell repeatedly put to witnesses that when they were faced with making decisions, their choices were inappropriate or unreasonable. Those words imply a range of management considerations or responses. It seems to us in the essence of professional judgment that there may be more than one right answer to any question. The choice of one answer or solution may be open to challenge or discussion, without rendering the actual choice illegitimate, inappropriate, unreasonable or repudiatory.

26. The attacks which were made on managers' exercises of judgment seemed to us opportunistic, if not disingenuous. We mean by this that the claimant (or Ms Bell) attacked a choice or decision which had been made, putting forward their alternative. We do not accept that if made at the time, the alternative choice now put forward by the claimant would have met with his agreement. We were at times sure that if made, that choice would have been the subject of the reverse attack in these proceedings. We mention three specific instances below (whether to allow the trip to proceed; Mr Stebbings; and capability or conduct, respectively paragraphs 60, 77 and 121.10), but these are only examples.

27. We were not assisted by the frequency with which Ms Bell put hypothetical questions to the respondent's witnesses (e.g. if such a step had been taken, then the claimant's job might have been saved). We were also not assisted by points which in the context of constructive dismissal were technical to the point of absurdity. Mr Skinner was asked for example about why Ms Smith (not a witness) might have used inverted commas in an email (299), and why he ended an email to her with x's to show kisses. When no point was taken at the time by Unite that disciplinary papers were received by the claimant 70 or so hours before the disciplinary meeting (rather than the 72 hours required by the appropriate procedure) we could not in the context of constructive dismissal see the purpose of further cross-examination on the point.

28. The witness statements on behalf of the claimant expressed opinion evidence. We were not assisted by pure expressions of feeling, perception, or opinion, unless the opinion arose out of an identified factual matter. Ms

Joshi's assertion "I believe the claimant was targeted because he was too intelligent…. I do not believe there was any justifiable reason for the company to have pursued disciplinary proceedings against him" was unsupported by factual evidence, and it was not in our view necessary to cross-examine it. Ms White's response to being shown the coffin drawing by Mr Ahmad was that BA had obtained it by hacking into the claimant's facebook account; she did not know that Mr Aziz was the source of the item. Having read the statements of opinion given by the claimant's witnesses we note that a number of them appear to have based their opinions on an understanding of the factual background which was neither complete nor accurate.

29. Ms Bell cross examined extensively on peripheral points. Notable examples were Ms Smith's offensive email (279) about the claimant, and the detailed procedure for booking a recency trip. This was frustrating for a number of reasons. A minor one was that the same point, in multiple iterations, was put to many witnesses. The major one was that the peripheral points were incapable of addressing the core issues around the meaning of the email which the claimant sent on 2 October 2014, and around managers' responses to it.

*The claimant's oral evidence*

30. We make two comments about the claimant's evidence. This hearing took place over two years after the claimant had left BA; over three years after he had written the email of 2 October 2014; and at a time when, we saw from his statement, he has secured employment with a major blue chip company, where we wish him every success. Nevertheless, the depth of his emotion was still clear, and he momentarily struggled to conceal his anger when Ms Smith was named. We attached no evidential weight to the claimant's strength of feeling, for him or against him, save that it was an indication of his difficulty in bringing objective analysis to bear on the events in this case.

31. The second matter which was striking was his occasional evasiveness and denial of the plain meaning of words. We refer to paragraphs 54 and 55 below.

<u>Findings of fact: setting the scene</u>

32. We approach the facts through a number of strands.

*The claimant*

33. The first strand is the claimant. He was born in 1979, and had over thirteen years service with the respondent at the material time. He had an unblemished disciplinary record, and his functional performance was of high quality, as noted repeatedly by Mr Skinner in his line management. (Mr Skinner was the claimant's line manager for over two years).

34. The claimant worked in a team which responded to worldwide disruption of BA flights. It required permanent rostering, on a 24 hour basis. It was a small group of specialist staff, required to co-operate closely with each other.

35. We accept as a matter of background that the claimant through force of personality, intellect, and IT skills (he was an IT graduate) took the leading role in rostering. We accept that by 2013 his rostering responsibilities had been transferred to outside the team, and that he resented the loss of status and opportunity. Ms Smith was responsible for maintaining the rostering system. She found the claimant difficult to manage. We find that as early as 2013 the claimant was thought (260) by management to be resentful of the loss of rostering responsibility, and suspected of manipulating the roster for personal motives. Management accepted however (260, 279) that this was suspicion unsupported by evidence, and, correctly, that nothing could be said or done about it without evidence. (The suspicion was not pursued, and not proved to this tribunal).

36. There was other evidence to show that managers found the claimant difficult. We accept the evidence of Mr Skinner and Mr Briggs that when challenged the claimant became confrontational, responded by inappropriate demands for evidence, showing a difficulty in accepting the judgment of managers when it did not accord with his own judgment. Mr Skinner's evidence was that he would find ways to work around open disagreement with the claimant. In memos written in 2014 (which the claimant came to see as a result of a subject access request) Ms Smith wrote that he was one of the most difficult members of staff to deal with, and in another (279) wrote to Mr Griffiths (who replied expressing agreement) that the claimant was a "w----r." (It was common ground that the full word was "wanker").

37. As the claimant's role involved managing disruption, it involved dealing potentially with any airport of the hundreds worldwide served by BA. Some airports were busier or more eventful than others. The claimant asserted that Las Vegas was a particular problem airport; the other examples he gave were Delhi and Mumbai. No one else agreed with this assessment, and there was no evidence of it. We do not agree that in 2014 Las Vegas was seen within BA as a problem airport.

*ICSP*

38. The second strand was the ICSP system. This was a system (previously known less confusingly as VCC, Volunteer Cabin Crew) whereby ground staff were trained and accredited to act as cabin crew in the event of disruption. In this context, disruption meant industrial action by cabin crew, with whom BA had had a number of industrial disputes in the recent past. The company trained and supported the arrangements, and the ground staff in question were required to maintain what the company called "recency" i.e. a minimum number of flights per year, flying on aircraft for which they were specifically trained and accredited. Between 2010 and October 2014 the

claimant undertook 20 recency trips (1010) of which 18 were long haul. Las Vegas was his most frequent destination, followed by Miami (respectively five trips and four). When acting as volunteer cabin crew, the claimant and colleagues were required to work as full members of staff, and were paid a modest enhancement to existing salary.

39. The system for organising recency trips was not clearly stated, and not consistently applied. We accept that by October 2014 there may have been discrepancies between the paper procedures and what was actually done in practice. The inordinate amount of evidence on this point did not assist the tribunal, as we did not find that it was a major issue in the matters before us.

40. We find that recency entitled (and required) the claimant to undertake a trip before his recency expired (which it was due to on 27 October 2014). While he had the right to apply for a particular destination, he had no right to require travel to a particular destination, or on a specific date. At the time with which we were concerned, the only destinations for which 747 recency trips were available were Las Vegas, Vancouver and Moscow. We accept that Moscow was not regarded as a desirable trip, because it involved a four and a half hour flight each way, with a one and a half hour ground turnaround between the two, after which crew had the next day off.

*Presentation*

41. A third strand related to information sharing, and we were told about project work, a company project called Opsmanship, and the claimant's presentation. We find as follows. The claimant's team was involved in a number of initiatives to inform colleagues throughout the company about the nature of their work. One of these was Opsmanship 1. We accept (930) that a more developed stage, Opsmanship 2, was never launched. The claimant and a colleague, Ms Akbar, together compiled a presentation in 2011, describing the work of their team. It was a relatively straightforward general introduction for BA colleagues. The evidence was that by 2014 it had been shown a handful of times to ground staff at Heathrow and Newcastle on Tyne, but nowhere else. There was an inconsistency between Ms Akbar's account and the claimant's view as to when it had last been shown, but the point does not matter. We noted emails written by the claimant (on 6 February 2014, 270) and Ms Akbar (on 30 July 2014, 284), in which both acknowledged that the presentation needed to be revised before it was next used.

42. We find that by October 2014 the presentation (344) was visibly so far out of date as to be unuseable. Its introductory slide was dated March 2011. It included a press quotation from 2009, and statistics for 2010. It contained job titles, names of post holders, and email addresses which were all out of date. It was plainly no longer fit for its purpose.

43. The claimant relied in part on his one-to-one of 6 February 2014, and on his performance review the previous month (261, 271), which together referred to the development objective of building relationships with out stations, and

the benefits of an overseas visit to a potential problem station. The claimant said that he took those comments as an indication that the presentation was approved for delivery at any airport served by BA anywhere in the world. We do not agree that that was a reasonable interpretation.

44. The position therefore as at 1 October 2014 was the following. The claimant was a successful member of staff. His work record and appraisals were excellent. His line managers found him difficult to manage, and suspected, but could not prove, that he on occasion manipulated his team's roster to suit his own preferences. He had travelled as volunteer cabin crew nineteen times over four years. He was co-author of a presentation which had fallen out of date, had not been delivered for some time, and had only ever been delivered at two airports, both in the UK. He had been involved in a wider information project which seemed to have stalled.

The email of 2 October 2014

45. In that setting, at the heart of this matter was the claimant's email of 2 October 2014 (298). It was sent from him to "Schedule ICSP" and it stated in its entirety the following:

> "Hi Guys, I have some project work that requires delivery to Las Vegas and have a duty trip scheduled in the near future to LAS to deliver this. If possible, and to save duty travel costs, could you please arrange a recency trip to LAS on Thursday 30 October – this will save me from organising a further trip to LAS and also save some valuable time within our department. Kind regards, Amar."

46. We have found it helpful to approach the document through four main questions, artificial though that exercise may appear.

47. We ask first what is the ordinary and natural meaning of the English words, taking the document as a whole, and giving it a common sense work place reading: it was not written to be the subject of days of forensic dissection. We note that the ordinary words include two company usages. One is that within BA a "duty trip" occurs when a member of staff, with prior written authority of a senior manager, travels for work as a passenger on a BA flight. We were given the example of the expat Station Manager at Nairobi Airport travelling between London and Nairobi. A "recency trip" is one on which a member of ground staff works as cabin crew, so as to keep his or her ICSP training up to date: the trip must be on an aircraft which the individual is trained to operate, and to a destination approved for recency purposes.

48. The ordinary and natural meaning, in our reading, is that the claimant (1) has, at 2 October 2014, arrangements in place for an authorised "duty trip" (2) to Las Vegas (3) potentially on 30 October. (4) The purpose of the duty trip is to deliver project work. (5) He is, in principle, due to make a recency trip. (6) There will be a saving of resource if the claimant could be allocated a recency trip to Las Vegas on the same, stated date, as that would mean the claimant making one trip rather than two. (7) This would save time for

the claimant's team, hence the request is as much in the respondent's interests as those of the claimant.

49. Ms Bell wrote (CSC16), that the 'primary reason for requesting a trip was maintenance of his flight recency and his secondary purpose was to attempt to combine that trip with the achievement of one of his objectives to visit a problematic outstation in order to provide them with information about the CSE role via his WWA presentation.' Our finding as to meaning is to the opposite effect of the reason proposed by Ms Bell.

50. In light of our finding on meaning, we ask secondly whether the claimant could reasonably have believed that what he wrote was true; and we answer that he could not. Applying an objective test, and having regard to the claimant's thirteen years of service, he must have known that no duty trip had been applied for, approved, or authorised, whether in principle or for a specific date (or potential date) or destination. He was not involved in anything which could objectively be designated as live project work; rather he was co-author of a presentation which was significantly out of date, and which he had not been authorised to deliver abroad. There was no saving of resource to be achieved if he travelled to Las Vegas on 30 October because on 2 October he had only one bird to kill (recency), not two. While he was entitled to a recency trip to an approved recency destination, there was no objective reason for Las Vegas to be the destination, or for travel to take place on 30 October.

51. As our third question, we ask whether it was reasonably open to the claimant's managers, with their knowledge and experience of the company's systems, procedures and vocabulary, and what they knew of the claimant's experience of the company, to have formed the view that the claimant was lying when he sent the email. We find that it was. We say so because Mr Skinner, as line manager, reasonably understood, when he read the email, that there was no pre-arranged duty trip to Las Vegas, no commitment to deliver project work there or anywhere else, no operational need to go to Las Vegas, no reason to travel on a specific date, and no saving of resource to be made, as there was, on 2 October 2014, only one trip to be made by the claimant, which was a recency trip to a destination which might be but was not necessarily Las Vegas. Mr Skinner reasonably believed that the claimant must have known all this himself. That was in essence also the reading of Mr Brady, Mr Dollery and Mr Harford, and the findings in this paragraph apply equally to each of them.

52. A consequence of the above is that we find that one range of attack on Mr Skinner and others, which was that they 'assumed' that the claimant was guilty of lying before hearing from him and without proper inquiry was, in our view, misplaced. Their response was an immediate, knowledge-based reaction to the flaws which they saw in what the claimant had written, and the word 'assumed' was misused. The proper analysis is that stated in the previous paragraphs. Two recurrent points follow. First, it was reasonably open to the respondent's managers to form the view that their suspicions were increased by the claimant's denials of wrong doing; and secondly, that

we find that the answer given by a number of witnesses, to the effect that the claimant could have helped or saved his position by admitting wrong doing, was reasonable and well said.

53. The email has been the subject of exhaustive analysis in the three years since it was written, a process repeated at this hearing. We ask as our fourth and final question whether consideration of events before and / or after the email was written was capable of changing any of the above answers, bearing in mind that the first three questions and answers arose from the wording of the email as and when it was sent. The words of the email were clear, and, once sent, unalterable. We find that while further inquiry might have been capable in principle of shedding light on whether the claimant genuinely believed what he had written, it could not change the answer to the first two questions, and would be highly unlikely to change the third answer. It follows that a swathe of the claimant's evidence and submissions was, in Mr Nawbatt's apt word, peripheral at best.

54. In cross-examination the claimant was asked about the email and the language used. He did in one answer "accept this email is written using the wrong words," but came no closer than that to admitting that anything about it might be at fault, or would warrant a management response. On a number of occasions he described his state of understanding when he wrote the email as that he "envisaged" an event, eg that he 'envisaged' the trip to Las Vegas, or the duty trip as a passenger. In the note of his meeting with Mr Harford (516) a similar exchange was to be found:

> "EH Did you have a duty trip scheduled in the near future to Las Vegas? Yes or no.
> AM I will need to explain this one to you and then you will find your answer.
> EH Why can't you just answer yes or no?
> AH It's not as simple as that."

55. His answers in these instances indicated the claimant's difficulty in finding words which were consistent both with his case and with plain reality.

56. In submission, Ms Bell argued that the email was ambiguous, and that the claimant might be given the benefit of any consequent doubt. She suggested that the ambiguity arose from an apparent tension between the opening which said that a duty trip was scheduled, and the conclusion, which implied uncertainty. We disagree that there is any such ambiguity. At best, the email was unclear as to whether 30 October was the arranged date or a potential date for the duty trip, when the truth was that it was neither. In any event, we repeat that even if there were ambiguity, the respondent's above interpretation was reasonably open to it.

57. The tribunal has not in this, as in any unfair dismissal case based on conduct, decided whether the claimant in fact committed misconduct. It is not necessary for us to do. We find that the contents of the email, and our analysis of it, formed reasonable and proper cause for any disciplinary step about which we heard.

Events between the email and the suspension

58. Ms Smith was responsible for oversight of the roster. She became aware of the claimant's request by 6 October, and emailed line management to ask on whose authority the claimant had made the arrangement, as it appeared to her that his absence would leave shifts uncovered (295). Her immediate concern was coverage of the roster. This issue was not pursued, as a decision was taken to cover the claimant's absence through overtime, and in the expectation that a trainee, Ms Randhawa, would be qualified to join the roster by the time of the claimant's trip (as indeed she was).

59. Mr Skinner and Mr Briggs expressed immediate scepticism (299) about the claimant's trip, and by mid-October they had seen his email of 2 October. Mr Skinner's evidence was that he knew on seeing the email that it was "lies." He maintained that opinion for the following three years, and repeated it in his evidence at this hearing.

60. Much turned at this hearing on whether or not management should have made the decision to prohibit the claimant from travelling. Mr Briggs and Mr Skinner thought that it was best to give him the benefit of the doubt. Mr Rayment's views wavered. Mr Skinner brought the matter to Captain Wright, who thought it appropriate to stick to plan and see what happened. It seems to us that while the benefit of the doubt may have been a factor, both Mr Briggs and Mr Skinner saw the opportunity to catch out the claimant in one lie, and they had some belief that he would compound the untruthful email by not delivering a presentation in Las Vegas. Both saw that possibility as an opportunity to catch out the claimant at fault, and as a result to rein him in, and impose management control. We do not find that either saw the event as an opportunity for dismissal.

61. Much was made, in that context, of an email written by Mr Skinner on 17 October, in response to his first sight of the 2 October email (306), saying, 'I think now is the time to tackle this, .. why is he requesting LAS trips? And why is he lying about this stating he is delivering project work, this is maybe the breakthrough we have been waiting for!' We accept Mr Skinner's evidence, which was that when he wrote that this email and trip might constitute a 'breakthrough', he was referring to a breakthrough in understanding how the claimant was operating the roster, and managing the claimant's performance. We do not accept the claimant's interpretation, which was that the breakthrough was a breakthrough towards achieving his dismissal.

62. They were at the same time puzzled. They read his email as transparently untrue, and they were surprised that the claimant would expose himself to a plain risk. It was notable that every manager who saw the email before the trip responded with disbelief and suspicion. They could not understand the claimant's motivation. They therefore investigated whether there was some personal motive for the claimant's trip, including checking crew lists, to see if he was travelling with a friend. That was a reasonable and legitimate line of inquiry. No ulterior motive for the trip was ever uncovered or discovered,

and at this hearing Mr Nawbatt confirmed that the respondent did not rely on an ulterior motive.

63. The claimant travelled, leaving on 30 October. As a result he was away from his desk for four days. There was a daytime flight on day one, which, with the time difference, reached Las Vegas the same afternoon, with overnight in the crew hotel. The claimant had dinner with colleagues and on the morning of day two went shopping. The flight returned overnight, leaving on the evening of day two and landing in London on the morning of day three. The claimant had the remainder of day three off, and all of day four as rest time before returning to the office. We accept that that was a more desirable recency trip than Moscow.

64. The claimant attached considerable weight to emails from flight crew (316 - 317) confirming that he had worked hard and had been an effective colleague during both flights. Mr Brady commented that he expected nothing less of the claimant. No more turns on that point. We do not accept the claimant's argument that it shows that the email was truthful. We do not find that it changes any of our four questions or answers about the email.

65. The claimant's evidence was that he emailed BA's Las Vegas Airport Manager, Ms Pace, before he set off, but never received a reply. He was later to say that the reason was that the email had got lost due to a migration of the IT system. It was never produced. The claimant made no other attempt to contact Ms Pace other than the single lost email. He had not had a reply from Ms Pace by the time he travelled. He did not know, when he set out, whether Ms Pace was to be in Las Vegas or on duty when he was there. As was pointed out, he made no other attempts to arrange delivery of a presentation, although he did take the slides with him.

66. On arrival in Las Vegas he asked a member of local ground staff, Dana, if Ms Pace was available and was told that she was not. He expressed a wish to speak to her. On the return flight, and shortly before the doors closed, Ms Pace came to the aircraft, seemingly in fancy dress for Halloween (she was described by the claimant (392) as wearing a judge's wig) and spoke briefly to the claimant, who introduced himself and said that he had slides with him, but they were in his luggage. The claimant and Ms Pace exchanged pleasantries, and the claimant returned to London with the flight. He did not email the slides, or otherwise contact Ms Pace, after his return.

67. The claimant returned to duty on 3 November, and was at work for a few days before Mr Skinner returned to duty and they overlapped. By that time, Mr Skinner's further enquiries indicated that there had been no prior contact with Ms Pace before the claimant arrived in Las Vegas, and no attempt to deliver a presentation while he was there. That confirmed Mr Skinner in his view that the email of 2 October had been lies, and that he should proceed to manage on that basis.

68. We heard much evidence about the events of 11 November 2014. This was to be the first formal meeting at which the disciplinary process was to be triggered. The meeting was to be conducted by Mr Skinner. He was

apprehensive, and aware of his own relative inexperience in the disciplinary process. He asked to be supported by Mr Briggs, who had much more experience of these matters, and who over the years had developed a mentoring relationship with the claimant.

69. The first step was that the claimant was, without warning of the meeting, asked to have a meeting with Mr Skinner, attended by Mr Briggs, which was for initial assessment. We accept in particular the evidence of Mr Ahmad, who had considerable experience of initial assessment, that the respondent's practice was that such meetings were, in effect, sprung upon an employee, for the purpose of recording an initial spontaneous response to an allegation. Mr Skinner prepared informal questions and asked the claimant about the trip. We accept the broad note taken by Mr Briggs. The claimant "said the trips are limited to one or two routes and as Las Vegas had a new station manager he wanted to build a relationship and also to keep in check the 90 day recency requirement." (320) He said that he had made an attempt to contact the station manager. The meeting adjourned for about 15 minutes.

70. The meeting then convened as a formal meeting with the same three individuals. There was a dispute of fact as to whether or not the claimant had for the formal meeting been offered trade union representation. Mr Skinner and Mr Briggs were adamant that he was, and that they were aware that an accredited GMB representative was working close by (the claimant was a member of Unite). In evidence, Mr Skinner commented that the claimant had the option of seeking the accompaniment of any colleague, a large number of whom were working close by.

71. After notes of the formal meeting were typed, Mr Skinner added a handwritten amendment (319) indicating that the claimant had been offered and refused trade union accompaniment.

72. We find that the claimant was offered accompaniment and declined it. We accept that the notes were initially typed without reference to the offer, and that faced with a choice between correcting the printed document (which could be criticised as being misleading in appearance) and a handwritten addition (which could be criticised for showing that it was amended) Mr Skinner chose the latter. That was a Hobson's choice caused by the inaccuracy of the original notes, and Mr Skinner (rightly in our view) chose the path of greater transparency. The claimant was told that the matter would proceed to a disciplinary investigation and that he was suspended.

73. We heard a great deal of dispute about the decision to suspend. It was common ground that the disciplinary procedures specifically referred to suspension in cases of an allegation of gross misconduct; but in this case, where the allegation was of misconduct not gross misconduct, suspension was available as an option. We accept that suspension was an option legitimately open to management. We also accept that the reason why the claimant was suspended was that his action was seen as potentially damaging to trust (Mr Skinner being convinced from the moment he saw the

email that the claimant had lied) and that it was undesirable that the claimant continue in his normal workstation.

74. Mr Briggs gave compelling evidence that after the meeting had ended, he was concerned that the claimant would be unable to travel home, and offered to help him with a taxi. He said that they spoke together for up to an hour in the car park, and that the claimant was distraught, repeatedly asking questions about what to do, to which Mr Briggs in general terms reminded him that he should obtain union support.

75. After the meeting, Mr Skinner sent an email to a number of the claimant's managers, stating that the claimant was absent because he had suspended him on a precautionary basis and matters would go to a preliminary investigation (325). We accept, as did Mr Skinner, that the proper course was to tell the claimant's managers that the claimant would be absent for an unknown length of time, without placing the reason on record. We accept that the email was sent to managers who had a legitimate reason to be informed that the claimant would be absent, but not to be told why. We accept that the reason for Mr Skinner referring to suspension was ignorance and inexperience of the process, and no more.

76. We also accept that Mr Skinner made text or telephone contact with three of the claimant's peers and repeated his mistake, telling them that the claimant had been suspended, not just that he would be absent for some time. We accept that Mr Skinner made this further mistake in the same circumstances and for the same reason.

77. Ms Keszei conducted a preliminary investigation, interviewing Mr Skinner, a number of others, and the claimant. Her task was no more than to decide whether there was a case to proceed, which she did. She then had to refer the papers to Mr Stephen Stebbings as case to answer manager. Mr Stebbings' task was to consider the papers and advise whether there was a case which should proceed to a disciplinary hearing. By email of 24 November Mr Stebbings declined to do so, his reason being that it was not clear that Ms Keszei had interviewed Mr Skinner <u>after</u> the claimant had been interviewed, and therefore that Mr Skinner had not commented on what the claimant had had to say. Ms Bell's comment on Mr Stebbings' action was opportunistic: "The tribunal is invited to find that this reflects not genuine and careful consideration of the material obtained as part of the preliminary investigation but in order to head off any potential challenge to the procedure Ms Keszei had followed thus far." We are asked to find a point in the claimant's favour that an independent manager had identified a procedural shortcoming, and refused to permit the matter to proceed unless and until it was rectified. If it had not been rectified, Ms Bell's submission would have been the exact opposite: Mr Stebbings' agreement to the matter proceeding without Mr Skinner having been interviewed would have been taken as evidence of the respondent's bad faith.

78. Ms Keszei interviewed Mr Skinner, reported to Mr Stebbings, who duly authorised the matter to proceed and Mr Brady was identified as the disciplinary manager.

79. Before the disciplinary hearing on 5 December 2014, Ms Joshi and Ms Curran as experienced Unite representatives agreed that no issue would be taken as to Mr Brady's appointment as the hearer. We accept that Mr Brady and the claimant had both worked as check-in staff about 12 years previously. The claimant admitted that they were two out of about 1,000 staff in the same terminal, but asserted that "they all knew each other" and that it was not appropriate that Mr Brady hear the matter. We disagree. We find that Mr Brady had no relationship with the events in question, or with any individual involved, which rendered him unsuitable to hear the disciplinary. It was common ground that the timing of the claimant's meeting with Mr Brady was brought forward for Ms Curran's sake, and that the claimant received the appropriate papers about 70 hours before the start of the meeting, not the 72 required by the respondent's procedure. No point was taken about this at the meeting, and we do not think the point merits any further consideration.

80. The disciplinary meeting took place on 5 December 2014. The claimant and Ms Curran attended. Mr Brady was supported by a note taker. The notes (382-397) record a meeting which lasted from 10.50 to 14.10, with a number of short breaks totalling about an hour.

81. The claimant had been sent all the material to be considered by Mr Brady. His right of accompaniment was respected. He was offered the right to correct any matter in which his view had been recorded. The claimant's responses to the allegations were, broadly, that he had done nothing wrong, and was 'baffled' by the investigation, and to introduce issues which led to a lengthy enquiry into the range of peripheral issues about which this tribunal heard.

82. Ms Bell's submissions set out four closely written pages of criticism of Mr Brady's hearing, including that which he investigated, that which he did not investigate, and the outcome letter. All of those are preceded by the submission that "The outcome of the claimant's disciplinary hearing was a foregone conclusion as is evidenced by the following." The submissions did not address why the foregone conclusion was neither dismissal, nor a final written warning for three years (the maximum available, short of dismissal).

83. Despite their length, the submissions dealt in two sentences with whether the email of 2 October was truthful: "The fact and nature of [the claimant's conversation with the airport manager in Las Vegas] therefore clearly suggests that the claimant's reason for his request on 2 October 2014 was genuine; Mr Brady unreasonably failed to consider any alternative explanation for evidence which on one view could be seen as evidence of the claimant having provided a false reason for the trip." Those two sentences did not address what we have found to be the ordinary and

natural meaning of the email, or the reasonable interpretation to be placed on it.

84. Mr Brady's conclusion letter should be read in full (416-418, 17 December). He set out in detail his findings to the effect that the presentation was in no fit state for delivery, and had not been authorised for delivery abroad. He found that the claimant had not prepared its delivery. Expressing himself with care, he wrote, "Regretfully, it is my belief that you made a significant error of judgement when you decided to request the ICSP trip to La Vegas and from that point in time, you have deliberately misled a number of colleagues and attempt to mislead others including me. This is wholly unacceptable." In recognition of the claimant's passion for his work, commitment and service record, the penalty was a final written warning for two years, and removal from the ICSP scheme. The claimant's suspension was lifted, and he was advised of his right of appeal. We find that the findings were reasonably open to Mr Brady on the evidence, as was the outcome. We accept that Mr Brady had power to dismiss, or to impose a final written warning of up to three years.

85. The first day on which both the claimant and Mr Skinner were next at work together was 29 December 2014. That was a day of exceptional levels of work in their team, because Gatwick airport was closed for part of the day for an emergency. The emergency was already in place when the claimant arrived at work and Mr Skinner had been working on it for some hours. We fully accept that he had scant time that day to welcome the claimant, so as to lay down the groundwork for their future working relationship. We do not criticise him and nothing turns on the point.

86. We agree that the following day he asked the claimant for a word in private so he could discuss rebuilding their working relationship. The claimant declined to meet Mr Skinner in private, and there was a formal exchange of emails. The exchange speaks for itself (993). It should be read in full, but what Mr Skinner wrote was that he wanted to discuss "how we work together from this point and also to reassure you that any of the recent issues… are clearly behind us… If I request a private conversation I would expect this to be honoured." The claimant replied stating that while he welcomed a possible conversation he felt "anxious and vulnerable" and "I am happy to meet with you and anyone from the management team but I am not comfortable meeting you alone at this stage hence I would like you to honour my request for me to attend any meetings with either a colleague/trade union representative."

87. This was icy courtesy on both sides between two colleagues who recognised the need to rebuild a working relationship. We reject Ms Bell's submission that Mr Skinner's email was "heavy handed and far from conciliatory". We find that it was the opposite. Mr Skinner suggested that both put the past behind them and move on; the claimant could not accept this approach.

88. Meanwhile, the claimant exercised his right of appeal against the warning issued by Mr Brady. Mr Dollery was appointed to hear the appeal. He and Ms Bashir of HR as notetaker met the claimant and Ms Curran on 27 January 2015 (469) and Mr Dollery's letter of 6 February (491-494) rejected the appeal.

89. Mr Dollery had the authority, which he did not exercise, to extend the period of final warning to three years, or to dismiss. It was nevertheless submitted that the outcome of the appeal was a foregone conclusion. In four pages of submission, setting out some 19 criticisms of Mr Dollery, Ms Bell made one reference to the email of 2 October 2014. She wrote that, "he failed to appreciate the ambiguity on the face of the claimant's email of 2 October 2014 which on the one hand indicated that he had the duty trip scheduled whilst on the other suggested that this trip was yet to be organised". We do not agree that that was the ordinary and natural meaning of the email. Furthermore, the question is what was the reasonable interpretation of the email given by the respondent's managers, a question which we have answered above. Ms Bell dealt at length with the procedure for arranging ICSP trips, the routes which were available for ICSP, what the claimant actually did in Las Vegas, and peripheral matters.

90. The claimant appealed against Mr Dollery's rejection of his appeal and Mr Harford was appointed to hear that appeal. His first meeting was with the claimant and Ms Curran on 4 March 2015; Mr Harford was supported by Ms Bashir (513).

91. The chronology then became complicated by two matters. On 11 March 2015 the claimant submitted a formal grievance about his treatment and management (540) and asked that Mr Harford's appeal process be stayed pending an outcome. He raised allegations of race and sex discrimination which were no longer before us. The grievance was later extended by a letter with additional issues on 14 April (582).

92. Meanwhile, the claimant had made a subject access request to which he received the response in late March. When he did so, he wrote to Mr Harford in euphoric language: "I have just acquired some new evidence in my defence that will prove my innocence in every way, I should not have been placed on disciplinary." (Emphasis added, 29 March, 576). The new material was set out in the additional grievance of 14 April (582) and focussed on two main points which the claimant had found in the SAR. They were the offensive email from Ms Smith, and the emails of October 2014, which showed that managers had been aware of their concerns about the trip to Las Vegas before the claimant travelled. The language of the claimant's additional grievance was revealing. The claimant wrote (emphasis added) that managers "colluded to create a premeditated plan with a view to forcing me out of BA… The disciplinary sanction came about as a result of a witch hunt against me which clearly shows that it was unjustified… I was set up… "(583-584). The underlined words show the claimant seeking to displace responsibility for his own actions. His language displayed no insight into two inescapable facts. They were (a) that he had

been the author of the 2 October 2014 email; and (b) that the positive decision to travel was his alone.

93. The claimant's approach, with which he continued at this hearing, contained an inherent logical flaw. All that the email material of 2014 could show, at its highest, was that Ms Smith held the claimant in low regard and was uninhibited about saying so to colleagues, one of whom at least (Mr Griffiths) shared her opinion; and that a number of managers had doubts about the claimant's reasons for travel before he travelled. None of that had any impact on anything said or done by the claimant of his own volition, which was what led to disciplinary action. At their highest, they gave rise to potential arguments on mitigation of penalty; but they could not on any reasonable view be relevant to his culpability.

94. At the same time, the claimant was told that his paper personnel file, for which Mr Skinner was responsible, had gone missing. It was never found. The claimant wrote (587) that it was "appalling and unacceptable" that his personnel file had been misplaced and "could not be located… I am suspicious that this file has been withheld from me because I believe it may contain yet more inflammatory and defensive information about me. I do not accept that BA is unable to locate it."

95. Mr Harford met the claimant again with representatives on 27 April and 6 May and heard his further arguments about the matters arising out of the SAR. By letter dated 29 May (693-700) he rejected the claimant's overall appeal, while upholding the ground of appeal that there had been breach of confidentiality by Mr Skinner. He dealt individually with a number of the points raised by the claimant, and at length with the allegations (then still live, but not before us) of race and sex discrimination. It is notable that Mr Harford's letter conclude (emphasis added): "I am satisfied that there are numerous inconsistencies across this investigation and ultimately areas where I believe that you have not been entirely honest. <u>Ultimately these started with you advising that you had the duty trip planned, when in fact you did not.</u> This is poor behaviour and you have knowingly misled a colleague, which does bring into question your integrity." (700). That was the heart of the matter, and Mr Harford's finding was that the claimant had not addressed it.

96. Ms Harmshaw met the claimant to hear his grievances on 21 and 22 May. She then conducted a number of other interviews and inquiries, before writing her outcome letter on 7 August (753-764). She informed the claimant that she had contacted 15 other individuals, whom she named, and we accept that that was evidence of care being taken, as well as explaining the time required. Ms Harmshaw's letter was rigorous. She found that Ms Smith's language had been 'unacceptable' and that management in October 2014 of the then proposed trip to Las Vegas showed 'culpability on both sides.' She accepted that there had been breach of confidentiality by Mr Skinner, and without using the precise phrase, accepted that his actions had been an honest mistake (her words were 'a learning curve'). Overall, she rejected the grievance, subject to the above points. The claimant exercised

his right to appeal to Ms Hudson. In the event, he did not place before us the conduct of the appeal, and for that reason Ms Hudson was not called. Her outcome decision was given after the claimant's resignation.

The coffin drawing issue

97. We now turn to the events surrounding the drawing of the coffin (453b). We have dealt with the exchange of emails on 30 December 2014. Mr Skinner gave evidence, which we accept, that the claimant afterwards maintained an appearance towards him of hostility, which Mr Skinner interpreted as rudeness. We accept that it was identified as in the better interests of all that the claimant be line managed elsewhere, and that at some point in spring 2015 the claimant ceased to be part of Mr Skinner's team. Mr Skinner's evidence, which was not challenged, was that he did not see the claimant after that.

98. In late January 2015 Mr Aziz showed Mr Skinner the coffin drawing. Mr Skinner was concerned about it. He understood that the claimant had created images of, apparently, violence and death, at a time when he appeared hostile to him. However, after discussion, Mr Skinner accepted Captain Wright's guidance that no more could be done about it in the then state of evidence, which was that the drawing could not be shown to relate to Mr Skinner. We find that it is much to the credit of both Captain Wright and Mr Skinner that they gave the matter an objective, evidence based analysis. We repeat that this mirrors the actions of those managers who suspected the claimant of manipulating the rosters, but who likewise accepted that their suspicions had to be founded in evidence before action could follow by management. This approach, by at least five different managers in two different situations, is powerfully at odds with the claimant's view of a management out to get him.

99. Mr Skinner was the subject of the claimant's grievances and was interviewed about them in late spring and early summer 2015. The grievances included allegations of sexual harassment (Mr Skinner is gay). Those allegations were not before us, not pursued by the claimant, not corroborated, and not upheld. Mr Skinner had since October 2014 been of the view that the claimant was a liar; his view of the allegations against him was the same.

100. Mr Skinner gave evidence that on about 15 September and while at home he read an email sent by the respondent's data protection team pursuant to the claimant's SAR, asking him to search for emails concerning the claimant. Pursuit of this further information about an individual who had alleged that he had been sexually harassed by Mr Skinner caused personal distress to both Mr Skinner and his partner.

101. It was in that context that on 17 September Mr Skinner was approached by Mr Aziz, who told him that he had additional information about the coffin drawing.

102. Mr Aziz told Mr Skinner that he had not been fully candid in January, because he felt that there was a potential conflict of interest which no longer applied; Mr Skinner understood this to refer to the fact that Mr Aziz had been but was no longer a trade union representative. He told Mr Skinner that the drawing had been produced at work, and not just on the claimant's facebook page; and that by gesture, the claimant had linked or referred it to Mr Skinner. He confirmed that he was willing to make a statement to that effect. He also told Mr Skinner that he had come forward because he could see that matters were still live, and that they continued to have an impact on Mr Skinner.

103. Mr Skinner was upset. He wanted to speak to the available duty manager, who was Mr Ayres. He spoke to him on 18 September. We accept the outline note made by Mr Ayres on 21 September was an accurate summary as he understood it (840).

104. The language used by the claimant about Mr Skinner in his grievances had pulled no punches: there were allegations of race and sex discrimination, including an allegation of collusion in dishonesty (541). There were allegations of "bullying and harassment", abuse of position (547), collusion to force the claimant out of the company, part of a witch hunt, inappropriate touching, being set up to fail and harassment.

105. Whether or not the full extent of this language was known to Mr Skinner on 17 September, Ms Bell's criticism of Mr Skinner for failure to consider informal resolution and an informal approach to the claimant must be read in light of that language, and when it is, her criticisms are manifestly unfounded. We accept that Mr Skinner gave no thought to informal resolution. We find that that response was reasonable in light of the material before him. In light of the language used by the claimant about Mr Skinner, the claimant cannot, at the time, have had a reasonable expectation of or confidence in informal resolution.

106. On 21 September Mr Ayres spoke to Mr Aziz, who broadly confirmed the outline given to Mr Ayres by Mr Skinner. Mr Ayres' evidence was that he thought the matter should be taken further, but he was unclear as to the precise process which then followed.

107. The HR function plainly was asked to advise, and on 25 September Ms Bashir asked Mr Ahmad to conduct an initial assessment. Mr Ahmad was experienced in managing disciplinary matters. He had not been involved in any of the previous events. He did not know the claimant or Mr Skinner. When he gave evidence, he presented as measured and thoughtful. His task was no more than to conduct the initial assessment, and then, depending on his view of the matter, to refer it either for informal resolution or for preliminary investigation by another independent manager.

108. Mr Ahmad was given the drawing to consider, and Mr Ayres' note (840). Mr Ahmad did not know Mr Ayres.

109. On 28 September Mr Ahmad tried to telephone the claimant to arrange a meeting. As it was to be an initial assessment, the claimant was not to be told in advance what the meeting was about. The claimant's in-house telephone details were not up to date, so Mr Ahmad emailed him to arrange a meeting (843). Not surprisingly, the claimant wanted to know what the meeting was about, which Mr Ahmad declined to answer in advance. He simply said that information had come to light which he wanted to discuss (846).

110. The meeting took place at 3pm on 28 September. The claimant was accompanied by Ms White. We accept the broad accuracy of the note of the meeting (844). Mr Ahmad explained that there was an initial assessment and handed the claimant the drawing.

111. It was common ground that when handed the drawing the claimant said nothing and shook his head. Before shaking his head, the claimant had been asked the question, whether he had seen the drawing before. The claimant and Ms White stressed in evidence that the claimant shook his head in disbelief at the company producing an item which the claimant knew he had prepared on his private facebook page. Not without reluctance, the claimant agreed that it might to Mr Ahmad have appeared that he had shaken his head by way of immediately denying that he had seen the drawing before. The meeting was adjourned for 15 minutes.

112. The meeting reconvened, and Ms White expressed her opinion, confirmed in evidence, that the drawing had been obtained unlawfully by a company representative hacking into the claimant's facebook account. That was an assumption unsupported by evidence, and made in ignorance of what had been said by Mr Aziz. We accept that the respondent's information was that the drawing had been obtained properly on facebook by Mr Aziz. The claimant admitted that it was his drawing, prepared privately, on his facebook account, and nothing to do with work or Mr Skinner. It apparently referred to a wrestler known as 'The Undertaker.'

113. After the meeting Mr Ahmad spoke to Ms Bashir, who in reply to his questions gave information which was also given in evidence; that the source of the drawing was Mr Aziz, and the author of the initial note (840) was Mr Ayres.

114. Mr Ahmad stressed the limits on his remit. He legitimately formed the view that the matter could not be dealt with under informal resolution. He knew that if the matter proceeded in accordance with the disciplinary procedure, it would enter a procedure of several stages: preliminary investigation; case to answer; disciplinary; and potentially two levels of appeal.

115. Mr Ahmad formed the view that the drawing was "horrible and nasty" and that if it were shown to have been about Mr Skinner, it would have had an impact on him. He was concerned that the claimant appeared first to have denied knowledge of it, and secondly to have responded by raising a collateral issue (hacking). He considered that the matter could not be

disposed of informally, but warranted a formal investigation. We find that that was a proper and legitimate exercise of judgment and discretion.

116. He reconvened the meeting on the morning of 30 September and explained that as the allegations were "very serious" they warranted further investigation without suspension. He told the claimant that he would hear from the preliminary investigator. He confirmed the outcome in writing (849-850).

117. The following day, 1 October, the claimant attended a lengthy grievance appeal with Ms Hudson (855). The appeal was not concluded in the three hours available and adjourned to continue on 7 October. The same day the claimant wrote to resign with immediate effect (873). His resignation letter should be read in full. It may have been prepared with legal assistance. The reason given for resignation was breach of "both the express and implied terms of my contract by subjecting me to disproportionate and unfair treatment. I have set out the full details of my complaints in my grievance and grievance appeal." He referred to the SAR disclosure letters and allegations of discrimination. He complained of how the grievance procedure had been conducted.

118. He went on to say that the coffin allegation had been the final straw. After setting out his denials that he had ever said to Mr Aziz that the drawing was about Mr Skinner, he wrote: "This most recent allegation is completely untrue and unfounded. As such, the investigation is being pursued based on a spurious and unfounded allegation. This for me was the last straw and I can no longer continue to tolerate the unfair treatment to which I have been subjected." (873-875)

119. We accept that the letter terminated the claimant's employment, and that it accurately set out the operative considerations in the mind of the claimant which led him to resign.

120. We find that the claimant resigned because of an accumulated perception of injustice, which he thought was to lead to his dismissal. Although he knew that there would be at least five stages at which the coffin allegation would be investigated, at all of which he had the right of representation and the support of some colleagues and his union, he formed the view that there would not be a just outcome, particularly in the knowledge that he was on a final written warning. We do not find that his perception was well founded in fact. We decline to make any finding about how the disciplinary inquiry into the drawing would have concluded.

<u>The claimant's points</u>

121. The claimant relied on a large number of points of procedure and documentation, and while we do not identify or deal with all of them, we here address what seem to us the major ones, in case they are not dealt with elsewhere. In calling these points 'major' we refer to the time taken on them, and make no finding that any of them were not peripheral. We have

tried to set out first what seem to us broad or general points, and then specifics in chronological order. The following are not in order of priority or exhaustive.

*General points*

121.1. That Ms Smith had a grudge against the claimant and wanted to get rid of him. The claimant relied on the 'wanker' email, and on her assessment of the claimant as difficult (276 and 279A). But there was no evidence that she made any relevant decision, influenced any decision-maker, or made any proactive attempt to bring about the claimant's dismissal.

121.2. That ICSP procedures were unclear. We agree, and are not sure that this mattered a great deal in the present case. Whatever the procedures, the overwhelming issue was not whether it was wrong to send the email of 2 October direct to scheduling, or wrong not to refer the proposal first to line management. What was wrong was the content of the email.

121.3. That he had done nothing wrong because there was at the time no need to obtain prior authority before an ICSP booking: we agree that he did not need to obtain such authority. We do not think the point goes any further, and repeat: what was wrong was the content of the email.

121.4. That Ms Bashir of PCS (effectively the HR support) should not have been involved in procedures in which actions taken on her advice were under criticism or appeal. As a counsel of perfection we accept that that may be the case in some instances. We accept that in principle a change of HR advisor with each stage of procedure may be helpful; in some cases, continuity of advisor may be more desirable. There was no evidence that the point was material in this case. It was the management's view and practice that Ms Bashir advised about options, and decisions were made by managers. We agree that her role was advisory only, and can see no point in the claimant's favour which follows from her involvement.

121.5. That the disciplinary and appeal processes should have been taken outside the directorate where the claimant was working. We disagree. We accept Mr Harford's evidence that the directorate employed in excess of 15,000 employees, and that the correct approach was to ensure that those managers who had to make significant decisions did not have working relationships with the facts in issue or any of the parties involved. We find that they did not.

121.6. That failure to adhere to EG901 time limits was detrimental and significant. It is correct that the time limits were not always adhered to strictly. We do not agree that the departures were detrimental or

significant. On the first instance, the claimant received Mr Brady's disciplinary papers about 70 hours before his hearing rather than 72 hours, and Ms Curran made no objection. Both Mr Dollery and Mr Harford by some time exceeded the procedure's timetables for sending out their decisions. In both cases the reason was the volume and complexity of the material placed before them by the claimant, and they would have been open to criticism had they rushed out a hasty piece of work.

121.7. That the respondent failed to discipline Ms Smith. It was common ground that her email (279) used unacceptable language. Ms Smith was in due course instructed to write a formal letter of apology to the claimant which she did. In the letter she volunteered to meet with him personally. The letter was returned unopened by the claimant. She was given informal recorded guidance by Captain Wright in September 2015. We accept that all that was within the legitimate range of reasonable management responses to Ms Smith's misconduct.

121.8. That he had been discriminated against. Although the discrimination claims were withdrawn, and Ms Bell correctly asked no questions about them, Mr Nawbatt opened his cross-examination of the claimant by asking about discrimination, in reply to which the claimant confirmed that he resigned in part due to discrimination on grounds of race and sex. Mr Nawbatt put this line of questioning to lay the ground for a submission that the victimisation claim (which was eventually withdrawn) did not have the good faith protection of Section 27. The questions left the claimant in the logical difficulty (not resolved before us) of seeking to rely on matters which he had withdrawn.

121.9. That five named individuals had not taken independent decisions but had been told what outcomes to reach (Messrs Brady, Dollery, Harford, Ahmad and Ms Harmshaw). The claimant's words in evidence were, "Someone was telling them what to do. I don't know who. I have no evidence". He confirmed that this sense of conspiracy was part of his reason for resigning. Ms Bell dutifully put to each of the named individuals that the decision in question had not in fact been their own independent decision, which all denied. There was no evidence to support the claimant's submission, as he agreed. There was no explanation of why none of the first three had not imposed the maximum length of warning, or expressly dismissed the claimant. We find that the five were not instructed what conclusions to reach. If that was a reason for the claimant's resignation it was an unfounded reason.

121.10. That the whole matter should have been dealt with as one of capability, not conduct, even if the claimant himself did not claim incapability, as the possibility of incapability should have occurred to the disciplinary managers. That argument was predicated on the

basis that if the claimant really thought that his presentation was fit for purpose, his performance should be managed. We note the ingenuity of the submission, but we do not accept that any manager was under an obligation to initiate such action: the quality of the presentation was not the central point. We also do not accept that at the time the claimant would have accepted a capability procedure, or co-operated with it.

121.11. That at various stages the issues of informal resolution or mediation should have been pursued as a means of avoiding formal action. We agree in principle that informal resolution is desirable. We do not fault the respondent for failing to engage with it in these instances. Having heard this case, including two days of the claimant's evidence, the view that the claimant might not be a suitable colleague for informal resolution or mediation was, we find, one that was reasonably open to managers, and to Mr Skinner in particular. We note the extreme, personalised language of the claimant's grievances. We also note that he did not demonstrate, either at the time or in this hearing, the qualities of insight into his own shortcomings, and ability to respect the views of others which are usually essential to achieve informal resolution.

121.12. That it was suspicious that before sending out a decision letter, each decision maker identified an appeal hearer. We disagree; it was, on the contrary, good practice, which ensured that each letter (eg that from Mr Dollery) told the claimant by name who had been appointed to hear an appeal, and had agreed to do so.

121.13. That the Subject Access Request material demonstrated the claimant's 'complete innocence' (576). It did not, and was not capable of doing so. Neither the facts (a) that Ms Smith had written the offensive email, or (b) that a number of line managers had known in advance that he was to travel to Las Vegas in reliance on the 2 October email could change the meaning of the email, or have any significant impact on the four questions about it which we have identified.

121.14. That the respondent, through the various managers who were involved in this case, consistently had the objective of dismissing the claimant. This point was also expressed as an issue that various individuals had grudges against the claimant, which led them to want to dismiss him. This was a compendious allegation upon which the claimant relied as tainting the entire process from about 6 October 2014 until his resignation a year later. We reject the allegation in its entirety. We find that the two major triggers of the material events of which we heard were the email of 2 October and the coffin drawing. These were both produced by the voluntary acts of the claimant, not instigated by anyone else. We note by contrast that we had evidence of at least two occasions on which there was suspicion against the claimant, but managers declined in

both cases to act on the suspicions due to the paucity of the evidence (rostering issues in 2013 and 2014, 277, and the first coffin allegation in January 2015). If, furthermore, the respondent had a corporate goal of dismissing him, the claimant did not explain why it failed to do so, when on three separate occasions three different managers (Messrs Brady, Dollery and Harford) had the power to do so.

121.15. That various steps and decisions were foregone conclusions. We could find no instance where this has been shown to be the case.

*Before the trip*

121.16. That Ms Smith, who was not in any formal line management role of the claimant, had, in effect, no business to intervene when she saw the 2 October email. We disagree: she had overall responsibility for rostering, and was entitled to make a legitimate inquiry about an absence which she saw as creating a possible risk to the roster.

121.17. That management had not intervened to prohibit his trip to Las Vegas. The claimant used strong language. He said that he had been set up, and relied on it as evidence of a conspiracy to manage him out of the company. The question for us is not whether it was the right or wrong decision, but whether it was a decision which met the test of a repudiatory breach of contract. We find that the decision was taken partly to give the claimant the benefit of the doubt, namely to see what he actually did to deliver his presentation; and partly because, as Captain Wright said, operational staff make plans and stick to them. We find that Mr Skinner and Mr Briggs saw an opportunity to confront the claimant with proof of what they had long suspected, namely that he at times made rostering arrangements to suit himself. We find that while the line managers in question had no real belief that the claimant would return from Las Vegas after successful delivery of any presentation, the decision not to intervene before he travelled was a legitimate decision of management, reasonably made and for a proper cause.

121.18. That the email trails of 17 and 18 October 2014 between Mr Skinner and Mr Briggs showed that he was being “set up.” We disagree. The claimant was not induced to do something which he would not otherwise have done. He was being left with the consequences of his own actions.

121.19. That there was something sinister about the inquiries into whether he travelled to Las Vegas for an ulterior motive. We disagree: we accept that Mr Skinner could not understand why the claimant would take the risk, as he saw it, of putting an obvious lie in writing, and wanted to know more.

121.20. That Mr Skinner's use of the word "breakthrough" was evidence of a plan to remove him for the company. We disagree and we accept Mr Skinner's interpretation that he saw a potential breakthrough in achieving control by management over the claimant's rostering arrangements.

*After the trip*

121.21. That the emails with Mr Hills and Mr Vickers (flight crew who confirmed that the claimant had worked during both flights) were deliberately withheld from Mr Brady so as to cast the claimant in a poor light. We disagree. While it was to the claimant's credit that he worked properly on board, the fact is barely relevant, because it does not change the truthfulness of the email of 2 October as at the date it was sent.

121.22. That he was ambushed on 11 November 2014. We agree that he was taken by surprise for the purposes of the IAM, and we accept Mr Ahmad's evidence, to the effect that that is usual practice, so as to test a first, spontaneous response to the question put.

121.23. That he was deprived of the right of Trade Union representation on 11 November 2014. We disagree and accept that Mr Skinner and Mr Briggs made the offer of accompaniment, having previously satisfied themselves that Mr Hoad of the GMB was available.

121.24. That there was something sinister to the handwritten addition made to the note at page 319 by Mr Skinner. We disagree. The transparency of the addition makes clear that it is a manuscript correction of a typed note, added later.

121.25. That he was not offered a support manager at the time of suspension: the point is well made. He was not, and he should have been. Mr Briggs was perhaps momentarily conflicted between his managerial role and his personal relationship with the claimant. We find that the claimant was not without the support of friends, colleagues, and his union, and was not isolated.

121.26. That there was unfairness or confusion as to whether he was suspended for misconduct or gross misconduct. We did not find this as helpful a point as the claimant thought. We accept that his actions were designated as misconduct, and that the respondent had the power to suspend him.

121.27. That he should not have been suspended at all. We accept that as trust was an issue, and having regard to the geography of the offices, it was reasonably open to management on the facts of this case, and in accordance with EG901, to suspend the claimant.

121.28. That there was a breach of confidentiality when Mr Skinner told managerial colleagues and three team members that the claimant had been suspended. The point is well made and accepted by Mr Skinner and the respondent. As was made clear to Mr Skinner in the course of these proceedings, he should have simply told colleagues that the claimant was absent, without revealing that the reason was suspension.

121.29. That Mr Brady should not have been the disciplinary officer. We accept Mr Brady's evidence that until about 2003 he and the claimant had both been check-in staff at the same terminal, and that there had been about 1,000 other check-in staff. We accept that they have had no professional contact since then. The claimant's objection was unfounded.

121.30. That other appeals should have been heard by managers outside Network Operations. We accept that at the material time Network Operations employed at least 15,000 employees, and see no objection in principle to one of its managers dealing with the claimant's case, subject to the hearer having no personal knowledge, involvement or relationship in the matters to be considered, or any relationship with anyone involved which would render him or her unsuitable.

121.31. That there was insufficient clarity in the first suspension and first disciplinary letters to alert the claimant to the nature of the case against him (323, clarified at 378). We agree in part. The original allegation was too broadly framed, and the clarification given by Mr Brady went some way towards solving the problem. That said, we accept that the claimant understood the nature of the allegation against him and the case which he had to answer.

121.32. That the loss of the claimant's paper personnel file was 'unreasonable.' We disagree: it was on its face a banal everyday event of office life, and there was no other evidence about it.

121.33. That Mr Skinner is to be criticised for failing to seek informal resolution of the coffin issue. We disagree: he was, in light of the history of his relationship with the claimant, and of the information given to him by Mr Aziz, reasonably entitled to proceed as he did. We do not accept that informal resolution would have been effective at that time in any event.

121.34. That the coffin allegation was spurious and should not have been investigated. We find that the decision to proceed to investigation was one that was reasonably open to Mr Ahmad. We do not find that the allegation before him was spurious.

Legal framework and conclusions

122. This was a claim of constructive dismissal. It arose under the provisions of s.95(1)(c) Employment Rights Act 1996. That provides that an employee is dismissed if "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct." Ms Bell summarised the breach alleged: "the implied term of trust and confidence imposes an obligation that the respondent shall not without reasonable and proper cause conduct itself in the manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee," and quoted Malik v BCCI [1997] IRLR 462.

123. She referred to the guidance in Lewis v Motorworld Garages Ltd [1996] ICR 157 as authority for the proposition that the last straw (in this case Mr Ahmad's decision to refer the coffin drawing to preliminary hearing) need not of itself be a breach of contract but that the focus of the tribunal should be "the cumulative series of acts taken together." She submitted that the last straw itself need not be unreasonable or blameworthy conduct.

124. The legal framework was not in dispute. Mr Nawbatt placed reliance on London Borough of Waltham Forest v Omilaju [2005] IRLR 35, quoting the headnote (emphases added): "When alleged breach of the implied obligation of trust and confidence consisted of a series of acts on the part of the employer, the last act, or final straw, which led the employee to resign, when viewed in isolation, might not always be unreasonable, still less blameworthy, but its essential quality was that it was an act in a series whose cumulative effect was to amount to a breach of the implied terms; that while it did not have to be of the same character as the earlier acts, it had to contribute something to that breach, even if what it added might be relatively insignificant; that, if the final straw was not capable of contributing to the series of earlier acts, there was no need to examine the earlier history to see whether it did in fact have such effect."

125. The claim fails at each stage of the test of constructive dismissal.

126. We have found that the process which began when the claimant's 2 October 2014 email was first read by managers, and which concluded with the rejection of his second appeal by Mr Harford, was conducted for the reasonable and proper cause summarised, namely the reasonable view of management that the claimant had lied.

127. We have not found the exhaustive approach of the claimant in these proceedings to have taken us to any matter in that procedure where he has shown conduct objectively calculated or likely to destroy the relationship of trust and confidence. What it has shown on the contrary has been a painstaking dedication of management resource applied to a relatively straightforward matter, namely the interpretation of three lines of text. Where decisions have been taken with which the claimant takes issue, they have been evidence based, and have represented the legitimate exercise of judgment and discretion on the material available to managers. We attach some weight to the fact that three independent managers, each of whom

had the authority to dismiss the claimant on the material before him, declined to do so.

128. The same conclusions may be expressed about the grievance procedure, coupled with the observation that the claimant may not have assisted his own case by use of overstated language, sweeping allegations, and unsustainable interpretation.

129. When we come to the coffin incident, we repeat our findings. In light of a history between the claimant and Mr Skinner which had become increasingly embittered over a year, the respondent had reasonable and proper cause to reach the conclusion that the matter merited formal investigation. It could not be said that the allegation was spurious or unfounded. Had the claimant not resigned and stayed to fight his ground, that conclusion might have been reached, but the respondent was entitled to call for an investigation, in which Mr Aziz's allegations would have been tested, and the claimant's response to them heard and considered. We do not agree that the claimant's dismissal was the inevitable outcome of the coffin allegation.

130. We ask ourselves what are the high points of the claimant's case. We find two relatively minor matters. As was recognised by everyone, Ms Smith should not have sent the email (279); when it was revealed, the respondent took proportionate and appropriate action. While we accept that the respondent is vicariously liable for the email, we do not in context accept that it was a repudiatory act of the employer. We attach some weight to Mr Nawbatt's submission that the email was sent behind the claimant's back, and that those who saw it, including Ms Smith, played no decision making part in any of the issues before us.

131. The second matter on which the claimant might have a well founded sense of injustice was the breaches of confidence by Mr Skinner, who told the claimant's managers, and three individual peers, that his absence was attributable to suspension, not just that he was absent. Our finding is that this was an honest mistake, made by Mr Skinner because of his inexperience of suspension. It was (by 29 May at the latest) acknowledged as such by the respondent. We do not accept that either alone, or taken with Ms Smith's offensive email, the breach of confidence constituted repudiatory conduct of the employer. We have asked ourselves the artificial question, did the claimant resign in response to the two 'high point' matters and we find that he did not. We ask if he would have resigned if those had been the only two points of dispute in his employment, and we are very sure that he would have not – in part because the respondent in both instances agreed with his concerns.

132. We do not find that the respondent managed the claimant in this sequence of events without proper or reasonable cause. We do not find that any actions of the respondent were, taken objectively as a whole and in context, calculated or likely to damage or destroy the relationship of trust and

confidence between the parties. We do not find that the claimant resigned in response to any such conduct. We do not find that the final straw was part of a series with previous events. We find that the coffin matter was a fresh, standalone allegation. While that would have left open to us the option of rejecting the claim in its entirety on the basis of the Omilaju submission, that would, in our view, not have been in the interests of justice, and we have preferred to set out our findings in full. We have some sympathy with the claimant's concerns about the two matters referred to in the previous two paragraphs, but we do not find that even taken together they constituted repudiatory conduct of the respondent, and we do not find that they were of significance in the claimant's resignation.

133. The claim fails.

_____
Employment Judge R Lewis
18 January 2018
Date: ……..
18 January 2018
Sent to the parties on: .....

.....
For the Tribunal Office