Neutral Citation Number: [2022] EAT 123

Case No: EA-2020-000427-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 April 2022

Before :

THE HONOURABLE MR JUSTICE GRIFFITHS
MS V BRANNEY
MX C E LORD, OBE

- -

Between :

MS K FORSHAW	**Appellant**
- and -	
VIRGIN ATLANTIC AIRWAYS LIMITED	**Respondent**

- -
- -

Nikolas Clarke (instructed by BN Chris Solicitors) for the **Appellant**
Claire McCann (instructed by Gowling WLG (UK) LLP) for the **Respondent**

Hearing date: 5 April 2022

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JUDGMENT

SUMMARY

CONTRACT EMPLOYMENT AND DISABILITY DISCRIMINATION

There was no error of law in the ET's findings of fact when dismissing claims of wrongful dismissal and disability discrimination. There was no failure to take account of relevant matters. Although the burden of proof was misstated at one point, this was not part of the operative reasoning of the ET.

THE HONOURABLE MR JUSTICE GRIFFITHS:

Introduction

1. This is an appeal against the failure of the claimant/appellant's wrongful dismissal claim and also against the failure of her disability discrimination claim under section 15 of the **Equality Act 2010**. She also lost claims for unfair dismissal and for direct disability discrimination under section 13 of the **Equality Act** (the Act), but there is no appeal in that respect.

2. The appeal was originally rejected by HHJ Tayler under Rule 3(7) of the **EAT Rules**, at which point there were six grounds of appeal. The appellant exercised her right to have that reconsidered at a Rule 3(10) oral hearing, at which the respondent was not represented. HHJ Tucker was persuaded that some (although not all) of the original grounds of appeal were arguable, and those are the matters which we have heard argued before us today.

3. The two grounds of appeal are (1) the ET failed to take account of relevant matters and made errors in respect of the wrongful dismissal claim; (2) the ET misstated the burden of proof applicable to the claim under section 15 of the **Act** and, repeating the points made under ground (1) and applying them to the **Equality Act** appeal, failed to take account of relevant matters and made errors.

The ET Judgment

4. The claimant/appellant's claims were heard by the ET consisting of Employment Judge Vowles and two lay members sitting at Reading on 6 and 7 February 2020. The ET deliberated in chambers on 26 February and its unanimous reserved judgment (the ET judgment) was dated 24 March and sent to the parties on 20 April 2020. The findings of the ET were (1) the claimant was a disabled person at the material times (it was not disputed that the claimant was a disabled person by reason of depression), but she was not subject to direct disability discrimination under section 13 of

the **Act**, and she was not subject to discrimination arising from disability under section 15 of the **Act**. (2) The claimant was dismissed on 25 May 2017. She was not unfairly dismissed. She was also not wrongfully dismissed.

5. The ET found that the reason for dismissal was misconduct by the claimant/appellant when she was working for the respondent at the Virgin Atlantic Airways Upper Class ticket desk on 22 March 2017. The claimant/appellant had, as the employer found and as the ET also found when dismissing the wrongful dismissal claim, on that occasion taken £1,000 in cash from a customer for an upgrade without recording any details of the transaction or providing a receipt, and she had then kept the money.

6. The ET found that the claimant/appellant's dismissal was not motivated in any way by her sickness record or her disability.

7. The ET found no evidence whatsoever to support the claimant/appellant's allegation under section 13 of the **Act** that she was dismissed because of her disability (ET judgment, paragraph 52). There was a clear, well-documented and fully evidenced non-discriminatory reason for dismissal. The dismissing officer, Mr Miltiadou, had concluded based upon the evidence gathered by the investigating officer, Mr Mallard, that the claimant/appellant had stolen £1,000.

8. The claimant/appellant's case under section 15 of the **Act** was that she was dismissed because of something arising in consequence of her disability within the meaning of section 15(1)(a) of the **Act**, namely that (1) on 22 March 2017 she panicked and did not issue the customer with a receipt for the sum of £1,000 and/or that (2) she failed to give a proper account of her actions and in particular the handling of the £1,000 when spoken to on 27 March 2017 by John Mallard, the investigating officer.

9. This was rejected by the ET. It found as a fact that the claimant/appellant's conduct in these two respects was not something arising in consequence of her disability (ET judgment, paragraph 63), having identified other reasons given by the claimant/appellant herself for this conduct:

> **"The reason that she gave an inconsistent account to Mr Mallard on 27 March 2017 was that she *"didn't feel comfortable speaking about this at the podium",* that she *"didn't want to answer"* and that she *"wasn't prepared to discuss at the podium"* and not because of something arising in consequence of her disability."**

10. She had not attributed panic to her disability in the course of the investigation or the disciplinary procedure, and the medical evidence did not support this contention (ET judgment, paragraph 56). She had also given evidence that she did not issue a receipt because her computer was frozen, which was unconnected with anything arising from her disability.

11. The ET found that neither Mr Mallard nor Mr Miltiadou were aware that the claimant had a disability or that any effects from her disability affected her conduct during the period 22 to 27 March 2017 (ET judgment, paragraph 61). This was a time-specific finding, as the ET accepted that "they may at least be expected to have known that she had in the past suffered from depression" (ET judgment, paragraph 61).

12. The ET found that the investigating officer, Mr Mallard, and the dismissing officer, Mr Miltiadou, had some knowledge that the claimant suffered from depression in 2016, i.e. the year before the alleged theft, but that she did not claim and they could not be reasonably expected to know that her conduct had been affected by or caused by depression or the effects of depression (ET judgment, paragraph 39).

13. The reason for dismissal was misconduct. There was no evidence of any other reason or of any ulterior motive. There was a reasonable investigation. The investigation provided reasonable and sufficient grounds upon which to sustain the respondent's belief in the claimant/appellant's

misconduct. These were set out in the dismissal letter from Mr Miltiadou dated 25 May 2017. The dismissal was procedurally fair, and dismissal was within the range of reasonable responses.

14. The ET made its own finding on the balance of probabilities that the claimant/appellant had stolen the £1,000. She had not therefore been wrongly dismissed. The respondent was entitled to dismiss her. It explained the finding as follows (paras 67-68 of the ET Judgment):

> **''67. The Tribunal looked objectively at the evidence placed before it and found (as did the Respondent) that there was reliable evidence sufficient to conclude on a balance of probabilities that the Claimant was guilty of gross misconduct, namely taking £1000 cash from a customer for an upgrade without recording any details of the transaction or providing a receipt and then keeping the money.**
>
> **68. This conclusion was based upon the same reasons given by Mr Miltiadou in his letter of 25 May 2017. In particular, that the Claimant failed to issue a receipt of make any record that £1000 cash had been received. She failed to report on 22 March 2017, or subsequently, until 13 April 2017, that the cash had been given to her. She did not report it to her managers despite having every opportunity to do so. Even if she panicked on the day, that would not explain her failure to report the matter subsequently. The most compelling evidence to support the allegation of having stolen the money was the Claimant's false account given to Mr Mallard on 27 March 2017, that no cash had changed hands. Had the passenger's personal assistant not telephoned on 26 March 2017 to complain about the lack of a receipt, there would have been no audit trail for the £1000 in cash, and the Claimant would have known that."**

The Facts of The Alleged Theft

15. The ET's findings about what actually happened in relation to the £1,000 were as follows (see the "Findings of Fact" section of the ET judgment, paragraphs 10 to 25). Since the appeal is against the findings of fact, it is necessary to set them out at some length.

16. On 22 March 2017 the claimant was stationed at desk 34 at London Heathrow Airport Terminal 3. This was the Virgin Atlantic Airways Upper Class ticket desk. A customer ("WO"), presented herself as wanting to upgrade to upper class on her flight to New York. The claimant's computer system had frozen and she asked a colleague ("FT") to confirm the cost while she tried to

reboot her system. FT confirmed that the cost was £199 and passenger WO handed over £200 and was checked into premium economy on the claimant's system.

17. Once this was done, the passenger asked the claimant to check again that there were no upper class seats available. There was one "no show" and the claimant therefore arranged to have the seat assigned to passenger WO. The cost was £999. The claimant returned the £200 cash and customer WO gave the claimant £1,000 in cash in a white envelope.

18. The passenger's bags required manual tags. The claimant said that she placed the money in the envelope in a slot on her desk because there was no safe or lockable drawer to put the money into. The claimant said that she then went to desk 1 (Crew Bag Drop desk) to get crew bag tags and then went to room 505 to ask the flight controller to add bags into the system manually since by this time all systems were closed off for the flight.

19. It was not disputed that the claimant failed to issue a receipt or make any note to record that £1,000 cash had been received by her from passenger WO.

20. The claimant said that she returned to her desk and found that the money was missing. She said she conducted a search but could not find it. The claimant did not report that she had received the money or the fact that it had gone missing on that day, although she still had four hours of her shift to complete. She accepted that she attended work the next day, 23 March 2017, and did not report the missing money to anyone on that day either. 24 and 25 March 2017 were days off and she returned to work on 26 March 2017. Again, she did not report the missing money to her superiors.

21. On 27 March 2017 she again attended work and on this occasion, Mr Mallard asked her about the events of 22 March 2017. Passenger WO's assistant had called the respondent's contact centre on 26 March 2017 to change the date of WO's return and was quoted a change fee which the assistant challenged on the basis that £1,000 had already been paid at Heathrow. That matter was

escalated to Mr Mallard to look into. That was why he spoke to the claimant on 27 March 2017.

22. Mr Mallard gave an account of his discussion with the claimant in an email dated 27 March 2017 to the HR manager which is quoted extensively in para 15 of the ET Judgment. The claimant said the customer spoke to her about the potential upgrading. The customer was unsure which class she wanted to travel in. The claimant held fares for various classes for the customer in case she decided to upgrade. Booking was changed each time. At 25 minutes before closure (1925), the customer's booking was changed to Z class. The claimant said that she spoke to the ticketing officer (whose name she could not recall) and he said it was too late. She and the ticketing officer tried to reopen the flight but could not. The claimant therefore sent the customer through the gate at minus 35 mins so that the customer could make the flight. The claimant grabbed manual baggage tags from crew bag drop. She told Mr Mallard that no cash exchanged hands. When the claimant was asked why she had moved the customer into D class at 1927, she said it was because Z class was not available. When Mr Mallard told her that she had previously confirmed the customer in Z class, she denied it. He showed this to her in the history, and she had no answer.

23. Mr Mallard told the claimant that Ticket and Support should not be waiving any fees without Supervisor or Manager consent, but to let a passenger travel in Upper Class for free without any form of consent was not acceptable.

24. After speaking to the claimant, Mr Mallard thought it was clear that there were inconsistencies with her story, and he did not feel satisfied with her version of events. He was still unsure why the customer's ticket was changed to Z class at minus 35 minutes and then changed again to D class at minus 33 minutes. He was also unsure as to why the claimant was still dealing with the customer at minus 35 minutes and had not informed any CSS or Duty Manager. He was also confused as to why a Ticket and Support Agent with the claimant's length of service would feel justified allowing a customer to travel in a class that was not booked free of charge without any consent.

25. After speaking to the claimant, Mr Mallard spoke to Mr KK, the Terminal Controller, who the claimant had said she had spoken to when looking for help when entering late bags into the system. Mr KK confirmed that the claimant had asked for assistance with urgently adding a bag for a customer shortly before the flight was due to leave.

26. Later the same day, on 27 March 2017, Mr Mallard spoke to FT, the ticket agent who assigned the upper class seat to the passenger and printed her boarding pass. FT confirmed that the passenger had asked him to upgrade her ticket and that she had been upgraded to upper class and that the passenger had paid for the upgrade in cash which was given to the claimant.

27. Mr Mallard said that he was concerned about the inconsistencies in these statements and he considered whether to review CCTV footage of the events of 22 March 2017 from the camera which sits above the ticket desks. However, the CCTV footage overwrites after 48 hours and he had only been made aware of the incident on 27 March 2017, which was five days after the event.

28. Mr Mallard concluded that it was too late to review any footage. However, Mr Mallard went on to investigate the matter and interviewed the following people:

(1) FT (again) on 3 April 2017

(2) Ms Bez Grenardo-Simpson (turnaround officer)

(3) The claimant (again) on 13 April 2017

(4) FT (again) on 21 April 2017

(5) Ms VS on 28 April 2017

29. At Mr Mallard's meeting with the claimant on 13 April 2017, the claimant, for the first time, confirmed that she was handed £1,000 in a white envelope by the passenger on 22 March 2017. The claimant said that both FT and Ms VS had seen the cash being handed over. She said that, when she returned to her desk and saw the cash was missing, she had panicked and called a man who had been

with the passenger and that she had also called the passenger's assistant to say that she could not issue a receipt. Both the respondent and, in due course, the ET when making its own findings of fact, thought it significant that the claimant had not said this before.

30. Mr Mallard put it to the claimant that "When we met at the podium [on 27 March] you clearly advised me that no money exchanged hands?". She replied that she "didn't feel comfortable speaking about this at the podium" and "didn't want to answer". He pressed the claimant and reminded her that he had showed her the booking to jog her memory and "there were no notes in the booking". The claimant said: "I always put notes in the booking. I don't know what happened, my system crashed." Mr Mallard said to her: "So initially you told me that no cash exchanged hands, now you are saying the customer gave you cash and it was stolen? Why was no-one told about this on the evening it happened?" The claimant said "I understand the perception. When you spoke to me I didn't know what to do. I wasn't prepared to discuss at the podium." Mr Mallard asked her why she had not asked to go elsewhere, in that case. She replied: "I just panicked, it was a shock to me." Mr Mallard said: "I asked you why the booking had been changed. You never mentioned any sensitive issues about cash at this time." The claimant said "I was eager to tell you what had happened. I spoke to my Solicitor. If only I could say what happened." Mr Mallard said he had no idea that £1,000 had been stolen from Ms VS, and the claimant was "normally great with feedback and openly after this. Why would you not have told someone?" The claimant said "I told no-one. I just froze."

31. On 3 May 2017, Mr Miltiadou wrote to the claimant inviting her to a disciplinary meeting on 9 May 2017. The letter stated that the allegations were that the claimant on 22 March 2017: (1) Took £1000 cash from a customer for an upgrade without recording any details of the transaction, or providing the customer a receipt of payment; (2) Upgraded a customer with no record of payment, and without prior authorisation to waive the fee; and (3) Stole Virgin Atlantic Property, namely the £1000 received from the customer.

32. The disciplinary meeting duly took place on 9 May 2017 between the claimant and Mr Miltiadou. The claimant was asked to provide her explanation for the incident on 22 March 2017. She said that the customer had given the claimant £1,000 in cash in a white envelope. The claimant had counted the money and had not processed the receipt as she was pressed for time before the flight. She put the envelope on the top shelf of her desk, printed the customer's boarding passes and went to get the bag tags for the customer's baggage. When she returned, FT was not at his desk. While she was tagging the bags, FT returned. The claimant went back to her desk and told the customer to go to the Gate, and that she could request the receipt later.

33. The claimant told Mr Miltiadou that she went to process the receipt after FT took the customer to the wing, but could not see the white envelope. She said that she did not issue a receipt because she could not account for the money. She said that she called the customer's assistant and asked her whether there was anyone else in the area, and she said no.

34. Mr Miltiadou asked the claimant why she had not reported this at the time. She said that she had panicked and did not think it through. He asked her whether there were any points of mitigation she wished to raise. She said that this was an exceptional incident, and she accepted that leaving the money unattended was a grave error. She said that she had nowhere to keep the cash safe and thought that this would not have happened if there was a safe or a lockable drawer available. She also questioned whether FT may have taken the money.

35. After the disciplinary meeting, Mr Miltiadou took time to consider the evidence and wrote an outcome letter to the claimant on 25 May 2017 stating that she would be summarily dismissed. The letter confirmed that the claimant admitted allegation (i), i.e. the claimant took £1000 cash from a customer for an upgrade without recording any details of the transaction, or providing the customer a receipt of payment. As to allegation (ii), which was that the claimant upgraded a customer with no record of payment, and without prior authorisation to waive the fee, the claimant admitted this in part

but did not accept that she had waived the fee. Mr Miltiadou was satisfied that she had technically waived the fee by accepting full responsibility for allowing the £1000 to go missing. There would have been an expectation on her to have reported this matter at the time of the incident to the Company and by not doing so she had made a conscious decision to waive the fee.

36. The claimant did not accept allegation (iii), which was that she had stolen the £1,000. Mr Miltiadou decided that she had, stating the following reasons:-

> ***"• There was an inconsistency in terms of the information you had provided at the initial investigation meeting on 27 March 2017 and you told John 'no cash exchanged hands' (Appendix 3) and at the further investigation meeting on 13 April 2017 you accepted receiving £1000 cash from the customer (Appendix 5);***
> ***• You had time to count £1000 and it was your choice to keep the white envelope of cash in the top-shelf of your check-in desk rather than keeping it secure or on you at all times;***
> ***• There is no supporting evidence to suggest that the customer or Mr FT could have stolen the money;***
> ***• The money has not appeared following the incident and if you had reported what happened to the Company on 27 March 2017 then an immediate search could have been carried out with the involvement of the Airport Police; and***
> ***• The incident took place on Wednesday 22 March 2017 [but] you had not brought this matter to the Company's attention at any point. The initial conversation with you was on Monday 27 March 2017 and this was due to the customer's representative calling the Contact centre team on Sunday 26 March 2017 raising a query about the customer's booking."***

37. Mr Miltiadou concluded that, on balance, the above factors were not consistent with the claimant's account that the money went missing and was taken by someone other than her. He decided that it was not credible that she misplaced that sum of money and it had then gone missing. He considered that she would have alerted her colleagues or management to this fact at a much earlier stage, even if Mr Miltiadou were to accept that she had "panicked".

38. Mr Miltiadou took into consideration mitigation put forward by the claimant at the disciplinary meeting and other mitigating factors, including that she had been employed with Virgin Atlantic since 24 March 1997. He also took into consideration that she had a clean disciplinary record

and had no live disciplinary warnings on file. He considered whether there should be a lesser sanction than dismissal but decided that would not be appropriate. He appreciated that the claimant had worked hard to build a good reputation at Virgin Atlantic for over 20 years and regarded herself as a good employee, but he said:

> ***"(…) I cannot ignore that this was a serious matter where you have accepted full responsibility for taking £1000 in cash from the customer and that this cash then went missing.***
> ***• During the investigation process, you had given two different explanations where you initially stated that there was no cash exchanged and then said you had received £1000 in cash.***
> ***• This was an extremely serious case of where you were in a trusted position to handle cash and as a Ticketing and Support Agent and you had failed to report this matter to the Company immediately.***
> ***• My findings are that you did take the money and that you have been dishonest in a) doing so initially and b) attempting to avoid dismissal by alleging that the money simply went missing.***
> ***• This dishonesty goes to the heart of whether you can be trusted to remain in any position within the Company going forward and my view is that therefore summary dismissal is the only viable option given my findings and conclusions."***

39. The claimant was summarily dismissed with effect from the date of the letter of 25 May 2017 accordingly. She was given the opportunity to appeal but did not do so.

The Wrongful Dismissal Appeal

40. The single ground of appeal against the dismissal of the wrongful dismissal claim is, as we have said, that the ET failed to take account of relevant matters and made errors in respect of the wrongful dismissal claim. This is not, in itself, very informative or specific, and it is necessary therefore to identify the various particular points that are made in support of this part of the appeal.

(1) Failure to take account of relevant matters on the wrongful dismissal claim

41. Six points are argued in this respect in paragraph 2.1.1 of the amended grounds against the reasoning of the ET judgment quoted above.

42. (i) The ET adopted the reasoning of Mr Miltiadou, who, it is suggested, took the evidence of FT at face value in concluding that the claimant stole the money despite FT not being a reasonable witness, as the amended grounds put it. FT is said not to be a reliable witness because when spoken to on 3 April 2017 he could not recall from memory issues such as the agreed amount for the premium economy upgrade, the agreed amount for upper class and whether the upgrade was confirmed as a one-way upgrade or return trip ticket change. He could not, it is said, recall from memory whether the cash was given back to the customer and what happened to the cash. It is said that there are inconsistencies in FT's account. First it is said that he said both *"When I got back I did the bags"* and *"Myself and Karin tried to do tags"*. Second, it is argued that he said on 27 March 2017 he did not see any cash given back to the customer, but on 3 April 2017 he said he did not remember cash being given back to the customer.

43. Appeals to the EAT lie only on a point of law. It is not possible to challenge on appeal the ET's assessment of the evidence, of the credibility of the witness or the credibility of the witnesses who either gave evidence to them or whose evidence was in the notes before the ET. The various evidential points relied upon do not appear from the ET judgment. When giving permission for the appeal to proceed after a rule 3(10) hearing, HHJ Tucker gave directions in an order (the order) which in paragraph 7 stated:

> **"If it is considered by any party that a point of law raised in the appeal or cross-appeal cannot be argued without reference to evidence given (or not given) at the Employment Tribunal, the nature of which does not, or does not sufficiently, appear from the written reasons of the Employment Tribunal, then the parties so contending shall within 28 days of the seal date of this Order give notice to the other party(, and they shall seek to co-operate in the agreement of a statement or note in that regard; in the absence of such agreement within 14 days of such request, either party shall be at liberty to apply on paper within 7 days thereafter to the Employment Appeal Tribunal, giving notice to the other party in relation to such evidence (whether for the purpose of resolving such disagreement or of seeking answers to a questionnaire or requesting the Employment Judge's notes (in whole or in part), from the relevant Employment Tribunal)."**

44. No steps have been taken to augment the ET judgment in this respect.

45. The points made are in any event lacking in substance. Criticisms of FT's recollection are trivial and, even taken at face value, would not make him an unreliable witness. The ET and the respondent did not consider him to be unreliable, and that was very much a matter for them. The claimant's evidence, by contrast, was found to be lacking credibility for numerous cogent reasons, including inconsistencies in her account, the late stage at which she produced the account she ultimately relied upon, and the lack of support for her account in other independent evidence. The ET judgment and the decision of the respondent rested on multiple points of evidence and were by no means dependent on FT's recollection, which formed only part of the evidential picture. FT was not a witness called by either side at the two-day hearing before the ET.

46. (ii) The ET judgment adopted Mr Miltiadou's reasoning, who, it is argued, failed to consider alternative explanations for why the money went missing. The ticket desk was not secure, it was in an open area with no lockable safe or drawer, and indeed Mr Miltiadou is said to have stated (although this is not in the ET judgment and has not been produced to us through a procedure compliant with paragraph 7 of the order quoted above), *"In hindsight, you should have kept the money on you at all times, even if there was not a safe or drawer which you could lock"*, and the claimant could have taken steps to keep the cash secure such as by keeping it on her person.

47. This is also not a point of law and not a permissible argument on an appeal to the EAT. In this argument, *"failed to consider"* is code for *"did not regard as decisive in favour of the opposite conclusion"*, which is again simply rearguing a point of fact on the evidence.

48. The whole of the claimant's case, whether to Mr Mallard, Mr Miltiadou or the ET itself, was an alternative hypothesis, namely that she had received the cash but someone else had taken it. It is obvious both from Mr Miltiadou's account and from the ET judgment that this alternative explanation was both considered and rejected. The hypothesis here advanced that the money went missing without being taken by the claimant herself did not dispose of the point, which she admitted, that she

had taken the money in cash, that she had failed to provide a receipt and that she had not made any note of it in the booking notes, that she had allowed the passenger her upgrade without securing the cash and let it stand when on her own account it went missing after she had left it unsecured at the desk, that she had not raised the alarm when, for example, the CCTV was available and that she had misstated the position when Mr Mallard got wind of it from an independent source. She told Mr Mallard on 27 March that "no cash had changed hands".

49. (iii) The ET judgment adopted Mr Miltiadou's reasoning, which, it is argued, was flawed, as to why another person including FT could not have taken the money. It is said that Mr Miltiadou asserted that it is unlikely that FT or the customer would have taken the money since another person would have seen this and that this is flawed because the same reasoning would apply to the claimant also.

50. However, this assertion by Mr Miltiadou is not noted in the ET judgment and has not been produced to us in accordance with the procedure in paragraph 7 of the order. It is not part of the ET reasoning at all. The presence or absence of this point makes no difference to the substance or the soundness of the decision in the ET judgment, which lies on a very much broader foundation.

51. (iv) The ET is said to have failed to take into account various alleged breaches of the respondent's own policy.

52. The relevance of this argument is not clear in circumstances where there is no appeal against the rejection of the unfair dismissal claim.

53. None of the alleged policies or breaches of policy are apparent from the ET judgment from which the appeal is brought, and in the absence of compliance with paragraph 7 of the order, this point is not open to the claimant/appellant because she has not brought before the EAT the materials necessary to argue it.

54. Even taken at face value from the amended grounds, however, there does not appear to be anything in these arguments. Taking them briefly in turn from subparagraph 2.1.1(iv) of the amended grounds of appeal:

(a) Reliance is placed on the policy that "informal discussions should take place confidentially" to criticise Mr Mallard's original questions to the claimant/appellant at the podium on 27 March 2017. However, the claimant did not ask for the discussion to take place elsewhere. This does not in any case appear to affect the substance of what she told him on that occasion. She was also given another opportunity to give her account on 13 April 2017 during the investigation phase and on 9 May 2017 at the disciplinary meeting.

(b) It is said that Mr Mallard completed his investigation without feedback from the claimant/appellant, and this is said not to be in accordance with its own policies, although no reference is given for the policy or section of policy in question. However, the claimant/appellant was asked for and gave her account both at the podium on 27 March 2017 and when questioned again on 13 April 2017. She was then able to comment on the case as a whole at the disciplinary meeting on 9 May 2017.

(c) It is said that the claimant/appellant was not given an opportunity to confirm the truth or accuracy of the contents of what she had said at the podium to Mr Mallard on 27 March 2017. By contrast, it is said that FT was asked by email to confirm what he had said. Again, this is not a point which appears from the face of the ET judgment or which has been produced to us in the form of materials pursuant to paragraph 7 of the order. It does not appear to be a point of substance at all, given that the findings that the claimant/appellant challenges on the appeal are findings of primary fact reached on all the evidence rather than procedural matters. However, it does not seem

to be well founded in any case. What she had said at the podium was noted in a contemporaneous record, namely Mr Mallard's email of the same date, 27 March 2017. She does not appear ever to have challenged this account of what she had said or to have claimed to have said anything else of significance on that occasion which was not noted in the email. It is clear from the ET judgment that the claimant/appellant had what she had said at the podium put to her in later questioning. It was part of the case against her.

(d) It is said that the claimant/appellant did not receive a copy of Mr Mallard's investigation report until the day of the disciplinary meeting on 9 May 2017. This is pre-eminently a point which fell to be taken in relation to the claim of unfair dismissal, as it appears to be a challenge to procedural fairness, but there is no appeal against the dismissal of the unfair dismissal claim. In any case, this point is disposed of by paragraph 21 of the ET judgment, which notes that although the claimant/appellant had not received Mr Mallard's investigation meeting notes, "*(...) she was given the opportunity to review those notes before the meeting and she confirmed that she was happy to proceed with the meeting"*.

55. (v) It is argued that when, in paragraph 68 of the judgment, it is said that the claimant/appellant did not report receiving £1,000 in cash from the passenger to her managers despite having every opportunity to do so, the ET failed properly to take into account the appellant's credible and reasonable explanation as to why she did not have the opportunity to speak to Mr Mallard until 27 March and why she was not able to make full and frank disclosure since they were in a public area.

56. This is again an impermissible challenge to the ET's findings of fact. It heard her explanation. It did not accept it. For example, her claim that "she did not feel comfortable speaking

about this at the podium" and "just panicked" and "told no one, I just froze" was set out both in Mr Mallard's notes and in the quotation of that passage of his notes in paragraph 19 of the ET judgment. The ET judgment found (and this does not appear to be disputed) that the claimant/appellant "failed to issue a receipt or make any record that £1,000 cash had been received"; that she "failed to report on 22 March 2017 or subsequently until 13 April 2017", and she did so at that point only when the payment had come to Mr Mallard's attention by another route so that it was he who raised it with her and not the other way around. No explanation from the claimant/appellant compelled the ET to set these points aside or to find that they did not weigh in the balance against her

57. (vi) It is argued that the ET judgment failed to take account of the claimant/appellant's mental health condition that she relied on in asserting that her medical condition made her panic and caused her not to report the matter to her managers and/or not to give a full disclosure to her managers from the incident on 22 March 2017.

58. That is not correct. The ET noted that "At no point until the tribunal proceedings did the claimant suggest that her conduct on the day or subsequently had been caused by or arose in consequence of any underlying mental health condition of depression or her disability" (paragraph 62 of the ET judgment). It therefore had this aspect of her case in mind but found its credibility reduced by the fact that it was not front and centre of her explanation to Mr Mallard and at the disciplinary hearing to Mr Miltiadou.

59. Reliance is placed on what is said to be an admission in paragraph 29 of the ET3 grounds of resistance, which became paragraph 30 of the amended grounds of resistance, that *"*(...) *the only reference made by the Claimant during the internal processes to a medical condition affecting her actions which led to her dismissal were in the disciplinary meeting, when she made a brief and oblique reference to having suffered mental health issues and not being on medication at the time of the incident (...)"*.

60. The case fell to be decided on the evidence, and it does not appear from the ET judgment or from any materials produced to us in accordance with paragraph 7 of the order that the claimant/appellant gave evidence that she had, prior to the ET hearing itself, as the ET judgment puts it, suggested *"that her conduct on the day or subsequently had been caused by or arose on consequence of any underlying mental health condition of depression or her disability*". The "brief and oblique reference" mentioned in paragraph 29 of the grounds of resistance is not inconsistent with that.

61. It is also relevant to cite the paragraph which immediately follows this one in the grounds of resistance: *"The claimant's main defence was that she panicked, which she says explains her change of position around whether the cash was taken by her, did not steal the money and that someone else must have done so.* ***The claimant is not arguing and has at no point argued that she stole the money but did so because of impaired thinking due to a disability***" (emphasis added).

62. Whether the claimant/appellant's failure to report the matter at all and her inconsistent accounts when she was asked to explain it were to be attributed to disability or a mental health condition was a matter for the ET. It is clear that the ET decided that this was not the explanation. The explanation was that the claimant/appellant was hiding what had happened and, when challenged, was not telling the truth about it. That is a finding of fact on the evidence as a whole against which there can be no appeal to the EAT, which only considers points of law.

63. Reliance is placed on various medical notes and reports.

64. The first is a report of Dr Liliya Burrett of 26 March 2018. This person did not give evidence at the ET. The witnesses were the claimant/appellant, Mr Mallard and Mr Miltiadou. However, her report was apparently produced in compliance with a directions order from the ET dated 8 January 2018, which directed itself to report to deal with the issue of whether the claimant/appellant was a disabled person for the purposes of section 6 of the **Equality Act 2010**. As we have mentioned, it

was later conceded that she was a disabled person. This evidence did not therefore fall for specific consideration in the ET judgment.

65. However, for what it is worth, the passage relied upon in this appeal in the Burrett report referred to the claimant/appellant's diagnosis of anxiety and depression in 2016 and said that subsequently:

> **"(…) almost a year later on 22 March 2017 an incident occurred at work. Her condition deteriorated due to the lack of support and treatment required. Her mental incapability was exacerbated by the incident and had she received the treatment when recommended by the CBT clinic, her actions and behaviour would have been different."**

66. This passage was written in answer to the question: "Is the claimant capable of performing the work for which they are currently employed? If so, since when, and are they likely to remain capable of doing so?" It was not in answer to any question specifically about the events of 22 March 2017 and afterwards. The author of the report was not asked in this passage or in any part of the report to comment on the three disciplinary allegations, namely that the claimant/appellant (1) took £1,000 cash from a customer for an upgrade without recording any details of the transaction or providing the customer with a receipt of payment, (2) upgraded the customer with no record of payment and without prior authorisation to waive the fee, and (3) stole the £1,000 received from the customer. No doubt for this reason the report does not, either in the passage we have quoted and which is relied upon or elsewhere in the report, say that these allegations were disproved or, if admitted or proved, explained in any way by the claimant's diagnosis. Although it says that if she had had more treatment "her actions and behaviour would have been different", it does not say which actions or behaviour would have been different and in what way they would have been different. It does not for example say that the claimant did not know what she was doing or that she was unable to report what had happened accurately or at all. We therefore do not accept the submission that this passage was so relevant that it called for specific citation and consideration in the ET judgment. The fact was that it was too lacking in substance on the questions in dispute to require specific reference.

This is no criticism of the author. She had not been asked to consider those questions.

67. This report was written well after the event by a person who was not the treating doctor at the material times. It was no substitute for the statements of the claimant/appellant, both to the investigating officer and disciplinary meeting and at the ET hearing. These did not, as already stated, claim that she had stolen the money, but only because of anxiety and depression, or that she had failed to act appropriately, for example by reporting the loss of the cash at the time or at least not untruthfully saying when asked about it that no cash had changed hands, because of anxiety and depression.

68. The second document relied upon in the amended grounds is a compliance statement from the appellant/claimant dated 16 February 2018. This is not in our papers, and it is not clear how it advances the appeal or why it was essential that it should have been expressly referred to in the ET judgment or why it demonstrates an error of law on the part of the ET or even an error of fact. In oral argument, Mr Clark abandoned this point.

69. The third document relied upon is a set of clinical notes from 9 August 2016. This was well before the alleged theft on 22 March 2017. They go only to the question of whether the claimant/appellant was a disabled person at that later date, and since it was conceded that she was, they did not call for specific consideration.

70. The fourth document relied upon is the claimant/appellant's disability impact statement of 14 May 2018. This detailed her medical history but did not demonstrate any link between it and the incident on 22 March 2017, still less provide any exoneration for the events of that day.

71. The fifth document relied upon is an occupational health report dated 9 August 2016. This referred to the claimant/appellant suffering from acid reflux, eczema and depression at that date. It said however that she was fit for work. It said she was *"maintaining good rapport with her colleagues and clients and generally is managing her work well"*. It was relevant to whether the

claimant/appellant was a disabled person a year later on 22 March 2017, but when that ceased to be an issue, it was no longer relevant. Given its date, the year before the incident in question, it did not deal with the causes of that incident. The ET judgment had to decide the issues as it did on the evidence it heard and read about the events of 22 March 2017 and their aftermath, including evidence from the claimant/appellant herself. This document did not call for specific comment in the ET judgment.

(2) Errors in the ET judgment on the wrongful dismissal claim

72. All the errors are said to be of fact. None of them provide an avenue of appeal to the EAT which considers only errors of law.

73. Four points are taken.

74. The first is the statement in paragraph 10 of the ET judgment that "There was one no-show and the claimant therefore arranged to have the seat assigned to passenger WO". It is objected that an email from Mr Mallard to FT on 3 April 2017, which is not in our papers, referred to "a potential no-show" and referred to others checking and confirming that "it was okay to take the no-show customer's seat". These refinements make no difference to anything. They do not affect the reasoning of the ET judgment and it is impossible to see how, on the issues that fell to be decided, they could or should have made any difference. This is not a good point, quite apart from not being a point of law.

75. The second is the statement in paragraph 14 of the ET judgment that *"Passenger WO's assistant had called the respondent's contact centre on 26 March 2017 to change the date of WO's return and was quoted a change fee which the assistant challenged on the basis that £1,000 had already been paid at Heathrow. That matter was escalated to Mr Mallard to look into and that was why he spoke to the claimant on 27 March 2017".* It is argued that this is not what the assistant had

said. That was a matter of evidence for the ET to decide, and we are not persuaded that it made any error, still less any error of law. Furthermore, the essential point was that the claimant/appellant did not report missing £1,000, and Mr Mallard had to find about it by other means, which he clearly did.

76. The third is the statement in paragraph 36 of the ET judgment that all the relevant people who could have been witnesses and who could have provided relevant evidence were interviewed by Mr Mallard and were referred to in the investigation report. The claimant/appellant suggests, on the basis of evidence which is not referred to in the ET judgment and which has not been produced to us in accordance with paragraph 7 of the order, which makes the point inadmissible in any event, that a person called Shriya might have been interviewed, but was not, and was an important witness. She is said to have been important because, quoting paragraph 2.21(iii) of the amended grounds of appeal, she was *"(...) the senior member on duty on 22 March 2017 who would have collected the cash"*. It does not appear from anything we have been shown that the claimant/appellant told the disciplinary meeting that Shriya ought to have been consulted or said what Shriya might have said that would have exonerated her. On the question of wrongful dismissal, in which the ET had to make its own decision about the alleged misconduct on the balance of probabilities, the claimant/appellant did not lead any evidence from Shriya, as she might have, in any form. The case put forward by the claimant/appellant in relation to the cash was as set out in the ET judgment, and it was rejected for the reasons given in the ET judgment, which were firmly based in the evidence that it heard and read.

77. The fourth is the reference in paragraph 41 of the ET judgment of a previous incident in which £30 was missing from a float. The ET judgment found that this was *"not materially similar to the circumstances involving the claimant and the allegations against her"*. It is said, on the basis of evidence which has not been produced to us in accordance with paragraph 7 of the order or at all, that the correct figure was £130, not £30. That still falls far short of the £1,000 which the claimant/appellant took without providing a receipt or any record in the booking notes, then said she

had not received, and was eventually found (on the evidence) to have taken for herself. It is also said that the £1,000 incident was no different from earlier incidents which Mr Mallard said were due to human error. However, it does not appear that even the claimant/appellant said that what had happened was due to human error. Rather, she seemed to be suggesting that the money had been taken by some person other than herself. That was an issue of fact which the ET judgment resolved against her by deciding, on the evidence, that she had kept it for herself.

(3) Failure to take account of the claimant/appellant's medical condition in the wrongful dismissal claim

78. To some extent, this overlaps with the points already considered.

79. However, some additional points are made.

80. Objection is taken to paragraph 62 of the ET judgment, which said:

> **"At no point until the Tribunal proceedings did the Claimant suggest that her conduct on the day or subsequently had been caused by, or arose in consequence of, any underlying mental health condition of depression, or her disability."**

81. Against this, the claimant/appellant argues that "The evidence before the tribunal showed that she suffered from the long-term effects of anxiety and depression". That evidence was recognised in paragraph 2 of the ET judgment, which said that she was a disabled person at all material times. It did not however say anything about whether the conduct in question "had been caused by or arose in consequence of" this.

82. Objection is taken to the finding in the ET judgment at paragraph 56 that "the tribunal found no evidence to support the contention that the claimant having panicked and not having issued a receipt was something arising in consequence of her disability. There was no medical evidence to support this contention, and the claimant did not raise it herself during the course of the investigation or the disciplinary procedure".

83. This was a finding of fact against which there can be no appeal unless such evidence can be identified. The evidence relied upon in this respect is evidence of disability and of various medical conditions, such as acid reflux, eczema, PTSD, depression and anxiety, but none of it ties any of these conditions to what happened in relation to the £1,000 or the claimant/appellant's conduct in that respect. Nor, as the ET judgment correctly states, did the claimant/appellant make that connection at any point prior to the ET proceedings. She did make that connection in the ET proceedings, and the ET was entitled to and did reject it on the evidence. What the ET judgment said about a lack of evidence was therefore correct.

84. Finally, objection is taken to the finding in paragraph 39 of the ET judgment that "neither Mr Mallard nor Milriadou could reasonably be expected to know that the effects of depression played any part in the events they were investigating". It is argued that the ET ought to have found differently because (1) the claimant/appellant was being managed under a sickness absent policy and (2) Mr Mallard had referred the claimant/appellant to occupational health on 17 July 2016 in respect of various medical conditions, including depression, and that he was aware of her being depressed, sleeping poorly, suffering from eczema and gastric reflux in August 2016. Again, however, knowledge of medical conditions in 2016 did not carry with it awareness that these conditions provided any explanation for what happened about the £1,000 on 22 March 2017, especially when the claimant/appellant was given three opportunities to speak for herself, at the podium on 27 March, during the investigation on 13 April and at the disciplinary meeting on 9 May 2017, and did not make this connection.

85. This is the very point made in paragraph 39 of the ET judgment, which states:

> **''The Claimant complained that neither Mr Mallard nor Mr Miltiadou took account of the effects of the Claimant's ill health on her conduct during the period of 22 – 27 March 2017. While both had some knowledge that the Claimant suffered from depression in 2016, the Claimant did not at any time inform them that her conduct had been affected by, or caused by, depression or the effects of depression. It was not raised during the investigation or the disciplinary meeting. In these circumstances, neither Mr Mallard not [sic] Mr**

> **Miltiadou could reasonably be expected to know that the effects of the depression played any part in the events they were investigating."**

The Section 15 Equality Act Appeal

(1) Burden of proof

86. In support of the appeal against the ET's dismissal of the claimant/appellant's claim under section 15 of the **Act**, it is argued that the ET judgment misstated the burden of proof in paragraph 48. During a discussion of the law which quoted accurately and verbatim from sections 14 and 136 of the **Equality Act 2010** and referred also to **Madarassy v Nomura International plc** [2007] IRLR 2, **Igen v Wong** [2005] IRLR 258 and the **Equality and Human Rights Commission Code of Practice on Employment 2011** at paragraphs 46 to 50 of the ET judgment, the following sentence appears:

> **"The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment."**

87. That is partly incorrect, in that the claimant does not have to prove a reason for differential treatment before the burden shifts in accordance with the authorities cited.

88. This paragraph was in the ET's statement of the law applying to her section 13 claim, not her section 15 claim. There is no appeal against the dismissal of her section 13 claim.

89. The ET's decision on the section 13 claim, which immediately follows this passage at paragraphs 51 to 52 of the ET judgment, did not turn on the burden of proof. The claimant/appellant claimed that she was dismissed because of her disability. She relied on a hypothetical comparator, that is, a person who was not disabled but where £1,000 in cash was missing in the same circumstances. As stated in paragraph 52 of the ET judgment, "the tribunal found no evidence whatsoever to support this allegation. As found above in the claim for unfair dismissal, there was a

clear, well-documented and fully-evidenced non-discriminatory reason for the dismissal. The dismissing officer had concluded based upon the evidence gathered by the investigating officer that the claimant had stolen £1,000".

90. This conclusion was not surprising, and there is no appeal against it.

91. The section 15 claim, similarly, which immediately follows this passage (at paras 51-52 of the ET judgment) was not decided on the burden of proof. It was decided on the basis of clear findings of fact on the evidence.

92. The point about the ET judgment slip when stating the law, therefore, while in itself well taken, is simply irrelevant to the decision under appeal. As Underhill J said in **Martin v Devonshires Solicitors** [2011] ICR 352 at paragraph 39:

> **''(…) a misconception … has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally, that is, facts about the respondent's motivation … because of the notorious difficulty of knowing what goes on inside someone else's head – "the devil himself knoweth not the mind of man' (*per* Brian CJ, YB 17 Ed IV f.1, pl. 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other (…)''**

93. This passage was approved by the Supreme Court in **Hewage v Grampian Health Board** [2012] ICR 1054 at paragraph 32, which added:

> **''(…) it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. That was the position that the tribunal found itself in in this case."**

94. That was also the position of the ET in the case under appeal to us.

(2) Failure to take account of relevant matters and making errors in respect of the section

15 Equality Act claim

95. The alleged failure to take account of relevant matters and errors upon in support of the appeal against dismissal of the section **15 Equality Act** claim are identical to those we have already considered in relation to the appeal against dismissal of the wrongful dismissal claim.

96. We have found that none of them has any substance and consequently they do not help the claimant/appellant in her section 15 appeal any more than they do in support of her wrongful dismissal appeal.

Conclusion

97. In deference to the permission given under Rule 3(10) to argue this appeal, notwithstanding the earlier determination of HHJ Tayler under Rule 3(7) that it was unarguable, and in order to dispel any perception that there was anything wrong with the ET judgment's findings of fact, we have thoroughly considered all the points raised by the claimant/appellant in support of the appeal. We have found that none of them has any substance.

98. However, in doing this we are going beyond our function and jurisdiction, which is by section 21 of the **Employment Tribunals Act** to consider any question of law only.

99. Per Mummery LJ in **Yeboah v Crofton** [2002] IRLR 634; [2002] EWCA Civ 794 at paragraph 93, a perversity appeal *"(...) ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached".*

100. The present case is not convincing, let alone overwhelming.

101. The appeal is, therefore, dismissed.