EMPLOYMENT TRIBUNALS

Claimant: **Miss B Edgerton**

Respondent: **Global Experience Specialists (GES) Limited**

Heard at: **Bristol** **On:** **10 – 13 September 2018**

Before: **Employment Judge O'Rourke**
Members Mrs S Maidment
Mr H Launder

Representation
Claimant: **In Person**
Respondent: **Mr W M Ho, Respondent's in-house Counsel**

JUDGMENT

1. The Claimant's claims of unfair dismissal, breach of contract and disability discrimination (discrimination arising from disability and failure to make reasonable adjustments), fail and are dismissed.

AMENDED REASONS

(having been requested subject to Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013) (the only amendment is to paragraph 7(10), as shown underlined)

Background and Issues

1. The Claimant was employed by the Respondent as a European Congress Manager for just over two years, with her employment terminating, by way of summary dismissal for alleged gross misconduct, on 16 February 2017. During her employment she was responsible for the organising of live events for one of the Respondent's clients, Pfizer, the well-known pharmaceutical company.

2. As a consequence of that dismissal, the Claimant brings claims of unfair dismissal, breach of contract in respect of failure to provide pay in lieu of notice, discrimination arising from disability (s.15 of the Equality Act 2010) and failure to make reasonable adjustments (ss.20 – 22 of the Act). The Respondent does not accept that the Claimant was disabled.

3. The issues in respect of these claims are set out in the Case Management Order of Employment Judge O'Rourke dated 15 August 2017 and are not therefore repeated here.

4. There were several subsequent case management hearings, but there was no fundamental change to the issues set out at the original hearing. However, at this hearing the Claimant accepted, in respect of her unfair dismissal claim that the only issue arising was whether or not her dismissal was within the range of responses of the reasonable employer. She accepted that the acts of which she was accused could have constituted misconduct and she had no dispute as to the procedure adopted by the Respondent in the disciplinary process.

The Law

5. Mr Ho referred us to numerous items of case law, but we record only the following:

   (1) The well-known dictum set out in **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 UKEAT**, namely that Tribunals were not to substitute their own decision as to what was the right course to adopt for that of the employer and that "*in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another quite reasonably take another*. *The function of the Industrial Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band of dismissal, it is fair if the dismissal falls outside the band it is unfair*".

   (2) In respect of the claims of discrimination and as established in the case of **Madarassy v Nomura International Plc [2007] EWCA Civ 33**, the initial burden of proof is upon the Claimant to establish facts from which the Tribunal could infer discrimination, before then in turn placing the burden on the Respondent to provide an explanation, or a non-discriminatory explanation for its treatment of the Claimant.

The Facts

6. We heard evidence from the Claimant. On behalf of the Respondent, we heard evidence from the following witnesses:

   - Ms Eva McCartney – at the relevant time a manager of account services, with knowledge of the claimant's workload.

- Mr Phillip Eagle – the Claimant's line manager and an Operations Director.

- Ms Katriana Rowbury – HR Director who provided advice in respect of the Claimant's suspension.

- Mr Ian Ellis – an Operations Director, who took over management of the HR process.

- Miss Tiffany Pritchard – EMGA Internal Audit Manager, who conducted the disciplinary investigation and heard the Claimant's grievance.

- Miss Carol Gibbs – Director of Venues and the Disciplining Officer.

- Mr Andrew Lawson – The Respondent's Financial Controller and who conducted the Claimant's appeal against the disciplinary outcome.

- We were also provided with a statement from Mr Jeffrey Lee – a Managing Director and who was appointed to hear the Claimant's appeal against the grievance outcome. While he was available to give evidence, the Claimant confirmed at this hearing that she did not wish to cross examine him and therefore we took his statement as read.

Chronology

7. We set out a list of relevant dates and events.

   (1) June 2014 – the Claimant commences engagement with the Respondent as a contractor.

   (2) 1 October 2014 – the Claimant becomes an employee and completes two medical questionnaires at that point [44 – 51].

   (3) End of 2015 to early 2016 – the Respondent entered into discussions with Pfizer (for which account the Claimant was responsible), as to alterations to the Claimant's role.

   (4) Early 2016 to July 2016 – discussions continued, both internally and externally.

   (5) May 2016 – another account manager was appointed, with the intention of supporting Ms McCartney and thus releasing her to assist the Claimant.

   (6) 6 July 2016 – the Claimant and Mr Eagle had a telephone meeting, the main purpose of which was to discuss her workload. Following that meeting, the Claimant sent Mr Eagle a suggested plan to deal with that issue [244 – 246].

(7) 7 July 2016 – not having had a response, the Claimant chases Mr Eagle [247]. On the same date, Mr Eagle responds, stating "*we would need to be very careful about what we ask Virginia to take back on and this needs to be only areas which she believes should stay with her, rather than be transitioned* (Virginia was the Claimant's opposite number at Pfizer). *I believe that our focus should be on what we can transition into the Sheffield office and everything else is a "plan B" ok? I understand we need to move quickly and I will discuss more with Terry and Eva and get back to you. I think we should hold off discussing this with Virginia until next week*" [248]. On the same day, the Claimant replies, essentially disagreeing with Mr Eagle's approach stating "*I do understand your perspective, but Virginia works in a way that she would rather know immediately the work has not been completed and do it herself, than deadlines be missed. I am sure you have already communicated the current status to Virginia as you did not attend the call out I scheduled today. However the communication needs to come ASAP, as responsibility currently sits with me as well as the deadlines (☹). Until I hand this over we are not meeting our business objectives you mentioned yesterday which are vital! I understood clearly from our call yesterday you could put this all in place for me on Monday and wondered why the deadline has now moved to next week? Let me know if I can hand the work/responsibility over on Monday to whoever you feel appropriate, this is your decision of course, alternatively, I do understand not the best solution but Virginia works in a very open honest understanding way and could they receive the work from Monday until we resolve this internally?..."* [249].

(8) 8 July – the Claimant writes again, reasserting her view as to informing the client as to these issues, stating [252] "*I hope you are well. Just touching base if you have any progress at all? I do need to inform Virginia on Monday that I am not currently overseeing any contractual/financial coms from the brand team/associations, due to capacity. I hope you understand that this responsibility sits with me, unfortunately I was not included on the call with yourself and Virginia as we had planned, so as far as the client is aware this is being done by myself unless I inform otherwise directly. Virginia will honestly not mind and will very much appreciate the upfront approach…"* On the same day Mr Eagle replied [253] "*as I have said on a few occasions now, I need to discuss a few options with Eva on Monday. Virginia is aware that you have workload challenges and that we are working on a solution - please do not mention any specific changes to responsibilities on Monday to Virginia. I appreciate you identifying possible options, please be patient until we can determine the best way forward during the day on Monday*". There is a further email from the Claimant that afternoon reiterating her previous views.

(9) 11 July (the Monday) – the Claimant not having had further instructions from Mr Eagle wrote again to him chasing further detail [255]. Mr Eagle's reply promised a prompt substantive response [256]. At 17.54 that evening the Claimant wrote [258] "*please do get back to me tonight (☺) or I'll just update Virginia, she won't mind at all*". Mr Eagle responded at 19.12 [259], stating "*we have a strategy that we kick in from tomorrow. I*

will call you in the morning to discuss next steps - there is no need for you to concern Virginia and as requested previously please do not discuss this directly". The Claimant attempted to call Mr Eagle that evening, but he was unable to take the call. At 20.19 the Claimant sent an email to the client [263], stating *"I understand Phil is in coms with you on our current workload solutions for the EUCM transition and is implementing urgent support to myself within the GES team which is fantastic. Certain global Congress is moving to the US, both staffing strategy and 2017 master schedule management, planning slide management support from within the GES team, directly to the teams etc. Of course, I do understand these implementations take time and work in a very open and honest way (☺). Therefore, I wanted to also inform you directly that part of the transition role, which currently sits within my remit, is unfortunately not been overseen at all by myself, due to current workload. I am not able to support the teams on any of the financial liaison with the association/payment status/POs. We are looking to also move this area of support to within the GES team in due course but I understand that you often like to step in and wondered if you would like me to forward any questions/queries I have to yourself until everything is implemented by Phil? I hope you don't mind, I wanted to continue with an open honest approach to ensure we continue to deliver to the teams*". That email was copied to Mr Eagle and at 20.44 he emailed the Claimant, stating "*what you said to Virginia is incorrect. I requested that you not contact Virginia regarding your workload issues. We will discuss tomorrow. Please let me know the next time you are free after 9.00am tomorrow we need to discuss transition. I am disappointed that you could not follow my simple instruction not to contact Virginia regarding our support*" [265].

(10) 12 July – Mr Eagle confirmed his views by email [268] and mentioned that he would be discussing the matter with HR. He did so and subsequently arranged for the disconnection of the Claimant's computer system. At 17.26, the Claimant received a generic email from the client's IT team giving notice of her need to return her computer. At 17.43, Mr Eagle attempted to arrange a call with the Claimant, which she was unable to make. At 18.13, the Claimant sent a second email to the client (copying in seventeen managers of the client), stating [279] – "*It is with great regret that unfortunately I am about to be asked to leave my position as European Congress Manager. If you are not aware, I am a contractive resource for GES and unfortunately they felt myself being in the role was not a success for you. Apologies if that was the case (☺). Working with Pfizer as always, has been such a pleasure. I started twenty years ago I did love my daily job and communications with you all as your Congress Manager. I would like to thank you all for such a fantastic experience over the last two years in the role (particularly to Virginia) and hopefully our paths will cross again in the future*". There is an email sent almost immediately afterwards by Ms Hayward of the client, simply stating "*OMG…*". At 21.52, the Claimant writes to Miss Rowbury of the Respondent, to confirm that she is the correct HR contact for her query and makes mention of "work stress" and seeking medical advice [283].

(11) 13 July – the Respondent sent a letter of suspension [284], setting out the allegations against her.

(12) 15 July – Miss Rowbury writes seeking to arrange a disciplinary investigation meeting.

(13) 18 July – the Claimant writes asking for delay in the process until her health improves.

(14) 15 September – the Claimant informs the Respondent that her current sick leave, due to expire on 18 September, has been extended to 18 October and reiterating her request to delay the investigation meeting.

(15) 16 September – the Claimant writes requesting reasonable adjustments in relation to a disability [315]. She refers to various symptoms, to include fibromyalgia but states that diagnoses are awaited.

(16) 20 September – the Respondent replies [317] expressing surprise as to the Claimant's stated medical conditions and attaches a consent form to allow them to approach her GP. The Claimant responds, stating that she will return the form.

(17) 26 September – the Respondent writes seeking to set up the investigatory meeting and reiterating the charges against the Claimant [321]. The Claimant responds, asking for the investigatory meeting to be delayed until after 18 October, when her sick note expires. She asks at that point also for a referral to OH [323].

(18) 28 September – the Respondent states that they will arrange her an OH consultation and repeat their request for return of the GP's consent form [325], stating that they need clarity in respect of her medical conditions.

(19) 5 October – the Claimant writes, effectively asking for the consent forms to be re-sent to her and mentions the possibility of her part-time return to work.

(20) 17 October – the Respondent sends the Claimant the consent form for her OH consultation. The Claimant says that she would be able to return to work three days a week and the Respondent reminds the Claimant that she has still not supplied her completed GP consent form. The Respondent also attempts to make further arrangements in respect of the investigatory meeting.

(21) 21 October – the Respondent reiterates their request for the GP consent form.

(22) 26 October [348] - the Claimant brings a grievance as to the Respondent's handling of the process to date. The Claimant returns the completed GP and Occupational Health forms [352].

(23) 4 November – the Respondent confirms receipt of the forms [357] and that an OH appointment will be made and her GP will be approached

and states they will be holding off the disciplinary investigation until both sets of information are received.

(24) 9 November – the Claimant asks for the investigation meeting to take place.

(25) 14 November – the Respondent requests a report from the Claimant's GP.

(26) 22 November – the Claimant confirms that her grievance includes the members of the HR team with whom she has been dealing, resulting in their subsequent withdrawal from contact with her and Mr Ellis shortly thereafter appointed to liaise with the Claimant.

(27) 24 November - the OH report [378] concludes that the Claimant is fit for part-time work and to engage in the disciplinary process and is also likely to be disabled.

(28) 29 November – Mr Ellis writes seeking to arrange the disciplinary investigation.

(29) 1 December – the Claimant confirms her availability.

(30) 6 December – Mr Ellis provides a range of dates, subject to receipt of the GP's report.

(31) 14 December – the Claimant disputes the need to await the GP's report [409]. Mr Ellis agrees that if the report is not received by 3 January 2017 the investigatory meeting will proceed nonetheless.

(32) 20 December – Mr Ellis sets out possible meeting dates in January.

(33) 6 January – Miss Pritchard invites the Claimant to the investigatory meeting on 12 January and to a grievance hearing on the following day [450].

(34) 12 January – the investigatory meeting proceeds and Miss Pritchard confirms the charges and recommends that a disciplinary process be commenced.

(35) 13 January – the Claimant declined to attend on 13 January to have her grievance heard and, for medical reasons, numerous subsequent attempts to rearrange this meeting failed and eventually, on 12 March 2017, Miss Pritchard dealt with the matter on the papers, rejecting the Claimant's grievance.

(36) 1 February – Miss Gibbs conducted the disciplinary hearing and by her decision letter of 16 February [734], summarily dismissed the Claimant for gross misconduct.

(37) 23 February – [746] the Claimant appealed against that outcome.

(38) 30 March – the appeal was heard by Mr Lawson and rejected by letter of 12 April [923 – 926].

(39) 16 May – the Claimant appealed against the grievance outcome, but no subsequent hearing could be arranged with her and therefore there was no appeal outcome.

Unfair Dismissal

8. The Claimant confirmed at this hearing that her emails of 11 and 12 July 2016 to Pfizer could be construed to be misconduct on her part and therefore her only complaint was that the sanction of dismissal was outside the range of responses of the reasonable employer. We find however that it fell squarely within that range, for the following reasons:

(1) The emails were in direct contravention of a clear instruction from Mr Eagle. We did not accept the Claimant's evidence that she was confused as to what she was being instructed to do, or what information she was not permitted to communicate to the client and in this respect refer to our subsequent findings as to her credibility (below). Further, she was in effect trying to force Mr Eagle to acquiesce to her demands by "putting him on the spot" with the client. This was also therefore, we consider, insubordination on her part. Both of these offenses are described as 'gross misconduct' in the Respondent's disciplinary procedure.

(2) The actual or potential damage caused to the Respondent's reputation with a very important client (a contract worth £20m) and also collateral reputational loss in what the Respondent's witnesses have said was a close-knit industry. Mr Eagle's and Mr Lawson's evidence on this point was compelling.

(3) The Claimant's actions indicated a complete breakdown in trust and confidence between her and the Respondent. Mr Lawson said that he did not trust her to repeat such actions and in turn, the Claimant said that she did not trust Mr Eagle to deal with her concerns.

(4) To the extent that the Respondent considered the Claimant had been under pressure at work (and they did not concede that this was excessive), such factor was taken into account in mitigation, but it was not considered sufficient to reduce the sanction.

Breach of Contract

9. As we have found that summary dismissal was justified, there can be no breach of contract in respect of non-payment of pay in lieu of notice, as the Claimant's contract of employment allowed for such non-payment in those circumstances.

Disability

10. While it could appear from the medical documents provided that certainly from October 2016, the Claimant may have been disabled, subject to s.6 of

the Equality Act, we do not consider it necessary to make a finding in that respect, for the reasons set out under each head of claim below.

11. Discrimination arising from Disability

(1) The first point we consider is the Respondent's state of knowledge as to any disability suffered by the Claimant. The Respondent accepted that at least from September 2016, they were on notice of her potential disabilities, but that however, prior to that date, they were not. The Claimant contends that the medical questionnaire documentation that she provided at the outset for employment in October 2014 should have put the Respondent on notice of her disabilities. Those documents set out the following:

> [44] A medical health insurance questionnaire in which the Claimant recorded that she had "*suspected sinusitis*" and that had been the only reason she had visited her GP in the previous year. She also listed under 'previous hospital treatment in the last five years' "*Benign Endometrial Polyp, stage 2 Endometriosis, with treatment of a laparostomy and removal of the polyp in August 2012*".
>
> In October 2011 she also had "*a benign Seborrhoeic keratosis*" which was treated with nitrogen.
>
> In a pre-employment medical questionnaire [50 and 51], she declared nil days sickness absence in the last year. She ticked boxes to indicate she suffered from "*serious allergies"* and "*headaches/migraines*". She mentioned a knee operation in 2000 and again, referred to her Endometriosis operation in 2012 (corrected from 2011). The only ongoing conditions were the allergies and "*headaches/sinusitis*". In answer to the question "*do you normally enjoy good health*?" She simply answered "*yes*". As to the question as to "*whether there was anything else in her medical history or circumstances which might affect her employment?"* she said "*No*".

(2) Finally, in an email exchange in the same month [161], she sought confirmation of the extent of the medical health insurance cover provided by the Respondent and stated "*there is absolutely nothing ongoing medically wise or treatment wise at all at this time (never had a day off sick)".*

(3) The Claimant said in oral evidence that she had taken some sick leave in the subsequent two years of her employment, thus implicitly indicating some ongoing medical problems. However, she could provide no documentary evidence of such leave, or request for it. There was some discussion as to how this leave would have been recorded, but it would have required her at least to have effectively self-certified by email (as she was a remote worker) and no such correspondence was provided.

12. Generally, we did not find the Claimant to be a credible witness, for the following reasons:

(1) She was consistently evasive in answering what were often straightforward questions.

(2) She denied having been requested on several occasions by the Respondent to provide a recording she had made of a telephone conversation with Mr Eagle on 6 July 2016, in order that the transcript she subsequently provided could be checked against it, when in fact it was clear that those requests had been made. When confronted with that evidence she then said she had decided not to disclose the recording, due to alleged delays by the Respondent in providing the bundle.

(3) She consistently claimed not to have received documents both during the disciplinary and grievance procedure and also in these Tribunal proceedings, when there was good evidence that she had in fact been sent those documents. One example was the consent form for her GP, but there are others. As stated in the Hearing, while it might be plausible that one or two items of correspondence might go astray, multiple such events are not.

(4) Her obviously feigned "confusion" at the disciplinary investigation hearing as to the reason she was attending, despite numerous written communications prior to that meeting, confirming the obvious charges against her and the purpose of the meeting. This was all a part of her practice of deflection from the real issues – her two emails to Pfizer, which, in her witness statement for this hearing, she somewhat bizarrely failed to refer to in any way.

(5) Her obvious deceit in asserting that Mr Eagle had agreed in advance of the 6 July telephone conversation for her to record it. His evidence was clear that firstly he was unaware of such a recording and if informed, would have, entirely understandably, have had grave concerns about any member of staff seeking to do so.

13. For these reasons, where we have to balance the Claimant's oral evidence against that of the Respondent, we prefer that of the Respondent witnesses.

14. Accordingly, therefore, we do not accept the Claimant's contention that the Respondent either was on notice or, should have been on notice, of any alleged disability of hers, until that is September 2016, two months after her suspension. Accordingly, any alleged detriments pre-dating September 2016 cannot have been because of a disability.

15. Looking at the remaining detriments post-dating September 2016, they are as follows:

(1) The delay in the disciplinary process. This was pleaded both as a detriment under 'discrimination arising' and a PCP putting her at a substantial disadvantage in relation to 'reasonable adjustments'. This latter is the sole remaining relevant PCP, i.e. post-dating 1 September 2016. Considering the alleged detriment/substantial disadvantage to the Claimant in this respect we find the following:

(i) There is no medical evidence that her condition was so much worse between October 2016 and 12 January 2017 that this

disadvantaged her at the disciplinary investigation hearing. In respect of her oral evidence, we reiterate our finding in respect of her credibility.

(ii) She was able to attend a four-hour meeting, at which she raised her concerns at length and she was also able to engage in lengthy correspondence throughout the history of this matter.

(iii) Even on her own evidence, the delay caused was a period of five weeks, allowing for the Christmas holidays.

(iv) We do not consider therefore the Claimant suffered any detriment/substantial disadvantage in this respect.

16. The Claimant had no complaint about the timing or conduct of the subsequent disciplinary process.

17. It was clear from the evidence that the delay in dealing with her grievance was entirely due to her inability to agree a date, or when agreed, to attend at several subsequent arranged hearings. These had been arranged at some expense and difficulty by the Respondent.

18. Clearly, her dismissal was a detriment post-dating September 2016, but there is no evidence that it was because of something arising in consequence of a disability. The reason for the dismissal was clear from the outset: her disobedience of Mr Eagle's clear instructions and she was unable to establish any link between her medical conditions and her dismissal. In the light of the seriousness of her misconduct and the immediate grave reaction of the Respondent to it, it is highly unlikely that any subsequent disclosure by her of her medical conditions will have further influenced the Respondent in any way, in the eventual decision to dismiss her.

Conclusions

19. For these reasons therefore, the claimant's claims of unfair dismissal, breach of contract and disability discrimination fail and are dismissed.

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Employment Judge O'Rourke

Date 18 October 2018 Re-dated 18 February 2019