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THE EMPLOYMENT TRIBUNALS

Claimant: Ms Wadzanai Gundidza
Respondent: Lloyds Bank Plc
Heard at: East London Hearing Centre
On: 16, 17 and 18 January 2019
Before: Employment Judge Burgher
Members: Ms M Long
Mr ML Wood

Representation

Claimant: In person
Respondent: Mr E Wheeler (Counsel)

JUDGMENT

The Claimant's claims fail and are dismissed.

REASONS

Issues

1. At the outset of the hearing the Tribunal identified the following issues were identified for determination.

Disability

1.1 Whether the Claimant is disabled for the purposes of section 6 of the Equality Act 2010. The Claimant asserts that she was disabled by reason of:

1.1.1 Depression and anxiety; and

1.1.2 Chronic neck and shoulder pain.

2. The Claimant also claims associative disability discrimination by virtue of the serious illness suffered by her father.

3. The Respondent denied that the Claimant was disabled and denied associative disability discrimination connected with the serious illness suffered by the Claimant's father.

Section 15 Discrimination arising in consequence from disability

4. The Tribunal considered whether the Claimant was subjected to less favourable treatment arising in consequence from her disability or the associated disability of her father by being subject to the disciplinary and dismissal procedure for not returning to work from holiday in Zimbabwe, as required on 18 April 2017.

5. The Respondent denies less favourable treatment arising in consequence from disability. It asserts that it did not accept that the Claimant's overstay in Zimbabwe was due to her father's illness or her alleged disability. The Respondent believed that the Claimant was on a DJ tour and pursued the disciplinary and dismissal procedure on this basis.

Reasonable Adjustments

6. The Claimant claims that the Respondent applied the following provisions, criteria or practices that put her at a substantial disadvantage when compared to persons without the disability.

6.1 PCP1 - Insisting on holding the disciplinary hearing in her absence;

6.2 PCP2 - The way in which the Health and Well Being meetings were held;

7. The Claimant asserts the following reasonable adjustments

7.1 RA1 - Allowing her sufficient time to recover before holding the disciplinary meeting;

7.2 RA2 - Following the Health and Well Being procedure;

7.3 RA3 - Separate the disciplinary from the Health and Well Being procedure;

7.4 RA4 - Having different people to undertake different parts of the disciplinary process and the Health and Well Being procedure to ensure independence.

Unfair dismissal

8. Whether the Respondent has established a potentially fair reason for dismissal. The Respondent asserts conduct, namely the Claimant overstaying her permitted holiday period on a DJ tour.

9. If the Respondent establishes a potentially fair reason, whether the dismissal

was fair and reasonable in all the circumstances having regard to all the circumstances including the Claimant's length of service and employment record.

Wrongful dismissal

10. The Claimant was summarily dismissed. The Claimant claims wrongful dismissal and notice pay. The Claimant claims 6 weeks statutory notice.

Procedural matters

11. The Claimant did not provide a witness statement as required by the employment tribunal case management orders. The Claimant attended the first day of the hearing at 12:55am without a witness statement. She stated that she had been collating further relevant documents during the time the Tribunal hearing should have started. The additional documents were provided to the Tribunal and copies were arranged for use during the hearing. The Claimant also stated that she had a witness statement on her computer, that she had not printed or sent to the Respondent. She stated that she was willing to email the statement to the Tribunal for consideration. The Tribunal had regard to the overriding objective of ensuring that parties were on an equal footing and dealing with the case in a way that was proportionate to the complexity and the importance of the issues and avoiding delay. No witness statement had been disclosed to the Respondent and no explanation why it was not printed along with the additional documents was provided. Nearly three hours of Tribunal time had elapsed waiting for the Claimant to attend and if very late disclosure of a witness statement was permitted it would have created further delay for the Respondent to take instructions and could have resulted in the proceedings not being completed in the allocated time. The claims involved a dismissal on 18 November 2017 and further delay was not considered appropriate. Consequently, the Tribunal asked the Claimant whether she was prepared to accept the contents of her ET1 at pages 14 and 15 of the bundle and the contents of her further particulars of disability which were at pages 33 to 38 of the bundle to be her evidence in chief which could be amplified by further relevant questions. These documents were in the knowledge of the Respondent and as such they would have had an opportunity to be able to deal with the contents. The Claimant agreed to this way of proceeding.

Evidence

12. The Respondent called Ms Wendy Morton, senior bank manager and Mr Stephen Adams local director for Essex South to give evidence on its behalf. The Claimant gave evidence on her own behalf. The Respondent's witnesses gave evidence by way of signed witness statements and the Claimant gave evidence by reference to pages 14 and 15 and pages 33 and 38 of the bundle. All witnesses were subject cross-examination and questions from the Tribunal.

13. The Tribunal was also referred to relevant pages in a bundle morning to some 518 pages and permitted an additional documentation submitted by the claimant on the morning of the hearing.

General impression of witnesses

14. The Tribunal was unimpressed with the nature and content of the Claimants evidence. We find that her approach was not seeking to assist the Tribunal in determining the issues. She was generally evasive, unwilling to engage with questions asked and at times her evidence was lacking in credibility. In contrast we find that the evidence given by Miss Morton and Mr Adams was straightforward and generally reliable.

Facts

15. The Claimant was employed by the Respondent from 13 June 2011, most recently as a Customer Advisor in the Respondent's Ilford branch.

16. The Respondents absence on holiday procedures provide that staff must pre-book and receive authorisation prior to taking holiday. On 7 March 2017, the Claimant was initially able to agree with her line manager, Ms Deepa Lal, that she could take a four-week holiday period to visit her sick father in Zimbabwe over the Easter period from 28 March to 27 April 2017. The Respondent does not normally authorise holiday periods of longer than two weeks except in exceptional circumstances. Subsequently the Claimant was informed that she could not take four weeks holiday and that her authorised holiday was limited to 3 weeks between 28 March to 18 of April 2017 to return after the Easter bank holiday. The Claimant had already booked flight tickets for the four-week period and had arranged for her daughter to take leave from school to go with her. The Claimant did not take steps to change the flight tickets to reflect the fact that only three weeks was now authorised. The Claimant stated that she intended to return to work after three weeks and that she had intended to change her flight tickets in Zimbabwe. However, her she stated that ability to do so was overtaken by events.

17. The Claimant arrived in Zimbabwe on 2017 and became aware that her father had suffered a deterioration in his health. The contemporaneous medical evidence that was provided to the Tribunal indicated that her father had collapsed at the end of March 2017 and was moved to the Bikata rural hospital before moving to the Parirenyatwa Group of Hospitals on 1 April 2017. He was discharged from this hospital on 21 April 2017 as the Claimant and siblings had wished to him to be provided with private care. The Claimant agreed with Mr T Maredera to provide private care services for her father for the fee of \$500 for month effective from 21 April 2017. An affidavit to this effect was provided.

18. The Claimant did not return to work as expected on 18 April 2017 nor did she not notify the Respondent of her change of plans before she was due to return. The Claimant first attempted to contact the Respondent on 18 April 2017 by text. A second attempt was made on 20 April 2017. Both texts stated that the Claimant's father was very ill, he had had a stroke and was not talking. The Claimant wrote that she hoped to be back next week. However, neither of these texts were delivered and this was indicated on the Claimant's phone. The Claimant stated that the Zimbabwe was politically unstable and the network was very poor and this affected her ability to inform the Respondent of her inability to return to work as required. The Claimant also stated that the stress of managing and coping with her father's illness affected her state of mind and her ability to act at the time. The Claimant did eventually manage to speak to

someone at the Respondent on 22 April 2017 regarding her reasons for not returning.

19. The Claimant returned to work on 28 April 2017 which corresponded with the date of flight of her original unchanged ticket.

20. Prior to the Claimant's return to work the Respondent was made aware, through an anonymous report made under its whistleblowing procedure, of postings on the Claimant's public Facebook page suggesting that she was performing as a DJ in Zimbabwe during the period of unauthorised absence from work.

21. The Tribunal was taken to a number of Facebook postings under the Claimant's Facebook profile 'Lady G2 Official'. The following are illustrative.

21.1 7 April 2017 – Pablo's Club and VIP Sam Levy's Village, Harare Zimbabwe.

21.2 7 April 2017 – Daily News Newspaper full page article 'UK DJ on Zim tour'

21.3 9 April 2017 – Lady G2 Zim tour 2017 dates. This specified the following events:

Fri 7 April - Pabloz, Borrowdale

Sun 9 April - Surprise appearance – Gochi Gochi

Wed 12 April – Turbulence, Mega Banton & Xplode Welcome

Sat 15 April – ZiFM Live, Club Zi

Mon 17 April - Independence Eve Gala – Glamis Arena

Club Volts - TBC

21.4 12 April 2017 – Turbulence at Red Fox Hotel - *'tonight'*

21.5 13 April 2017 – *'Last night Turbulence'* at Red Fox Hotel *'Thank you for the great reception!'*

21.6 14 April 2017 – *'Tomorrow Sat 15th April – 'I'm online on ZiFM Tune in'.*

21.7 17 April 2017 – *'Tonight tonight!!' Mon 17 April the biggest show in town...See u there!'*. This was in Zimbabwe, the evening before the Claimant was supposed to return to work.

21.8 21 April 2017 – *'Tonight Tonight!! Last and final show....before I return to the UK. Hope to see you there ♡'* This attached a professionally

produced flyer highlighting the Claimant as the headline act for the 'Lady G2 Zim Tour Farewell'. Supported by DJ Candyman and Treehouse. Friday 21 April 2017 at the Volt, Harare.

22. In evidence before us the Claimant stated that she did not attend the events on the 12, 17 and 21 April 2017 and that the posts were made by others without her knowledge and consent. This had not been stated previously to the Respondent as part of the internal process nor was it part of her ET1. The Claimant stated that the Facebook posts were false and were made by her sister as a way of supporting her through her depression that she was suffering at the time which had worsened because of her father's illness. She stated that the posts were made without her orders and without her knowledge and consent. The Claimant added that music was therapy that helped her alleviate stress.

23. We do not accept the Claimant's evidence regarding the Facebook posts or her attendance at events on the Lady G2 Zim Tour. In view of the content of the contemporaneous posts and her failure to indicate during the investigation procedures or appeal hearing we find her evidence in this regard as wholly incredible. The nature and content of the Facebook posts were indicative of the chronological series of event culminating in the farewell date of 21 April 2017, after the Claimant ought to have returned to work. We find it is incredible for the Claimant to assert that the posts were not reflective of reality and that they were made without her knowledge and consent. We therefore conclude, on the balance of probabilities, that the Facebook posts were made by her or with her authority and knowledge and that she attended all the events in question.

24. The Respondent undertook a fact find investigation into the circumstances of the Claimant's absence as it suspected that the Claimant never intended to return to work as required on 18 April 2017. The Claimant was concerned that she was being picked on as her Facebook page must have been accessed by her colleague. The Respondent accepted that there was a concern by staff about the Claimant not returning to work when she should have after the busy holiday period.

25. A fact find meeting with the Claimant on 23 May 2017. The meeting was chaired by Sunila Bagaria. The Claimant stated the reasons for her not returning to work on time was due to her father's illness and that there was unreliable phone signal to contact the Respondent. When the Claimant was shown the Facebook pages she reacted defensively and asked what they had to do with the meeting.

26. The Claimant was asked whether she got paid for gigs. She stated that she did not get paid and it was a hobby and that is all she had to say about her DJing. She stated that she did not see the reason explaining the DJing as it was nothing to do with her not returning to work, she added that some people play golf or read books to distract themselves and she did not see the relevance of the Facebook posts. The Claimant did not say during this meeting that she had not attended the events in question.

27. The Claimant asserted that this meeting was handled in an aggressive manner. However, no contemporaneous complaint about this was made in this regard and this not was this allegation mentioned during the Claimant's appeal against dismissal. We

therefore do not conclude that this allegation is well founded. The minutes of the fact find meeting demonstrate that the Respondent was actually seeking answers to its reasonable suspicion concerning the Claimant's failure to attend work. The Claimant was uncooperative in seeking to address their suspicions during the meeting.

28. Following this fact find meeting the Claimant signed off work due to stress.

29. Ms Bagaria also had separate interviews with the Claimant's line managers, Ms Tracey Ridout and Ms Deepa Lal on 25 May 2017.

30. By letter dated 16 June 2017 Ms Morton sent her investigation report to the Claimant setting out in full the allegations against her with the relevant documentary support. The Claimant was invited to attend a disciplinary meeting on 3 July 2017. She was informed that if she did not wish to attend her chosen representative may attend on her behalf and that detailed written representations would be considered.

31. Ms Lal wrote to the Claimant on 22 June 2017 inviting the Claimant to a first formal review as the Claimant had been absent from 23 May 2017. The meeting was arranged to take place on 14 July 2017.

32. On 27 June 2017 the Claimant wrote to Ms Morton to say that she would not be able to attend the disciplinary hearing on 3 July as she was currently signed off sick and was due to see her GP. The Claimant wrote that once she had seen her GP she would get back to Ms Morton.

33. On 12 July 2017 Ms Morton sent a second invite for the Claimant to attend a disciplinary meeting, now arranged for 3 August 2017. The offer to allow representation or provide written representations was repeated. This letter was extensive and referred to the documentation that had already been sent to the Claimant with the 22 June 2017 letter. Ms Morton provided the Claimant with an opportunity to speak to occupational health for an assessment of her fitness to attend a disciplinary meeting.

34. On 14 July 2017 the Claimant attended a formal review meeting with Ms Lal. The Claimant stated that she was stressed and not supported at work and she was of the view that she was not believed regarding her reasons for extended absence in Zimbabwe. The Claimant stated that she believed that she would be at work if she had support on her return. When asked whether resolving the disciplinary matters could help reduce stress the Claimant stated that as the outcome of the disciplinary action was not known it was not known if it would make her better. Meetings every fortnight were planned as a way forward to seek to support the Claimant in returning to work, the Employee Assistance Programme was offered and the Claimant stated that she was getting support from her doctor.

35. On 2 August 2017 the Claimant emailed Ms Morton to say that she would not be able to attend the disciplinary hearing on 3 August 2017 as she was still signed off sick and had requested an occupational health referral.

36. On 15 September 2017 a second formal review meeting took place with Ms Lal and the Claimant. The Claimant stated that part of her depression was the disciplinary

meeting that she still has not attended. The Claimant stated that if the disciplinary hearing could be dismissed it would help with her condition. In an attempt to get her back to work a phased return or relocation to another branch was suggested. The Claimant declined both suggestions.

37. On 20 September 2017 Ms Morton sent a third invite for the Claimant to attend a disciplinary meeting, now arranged for 3 October 2017. The offer to allow representation or provide written representations was repeated. This letter set out the alleged lack of communication between the Claimant and occupational health to arrange a meeting. Occupational health had informed the Respondent that they had tried to contact the Claimant on several occasions in August and September 2017 without success.

38. On 29 September 2017 the Claimant had a telephone assessment with Ms Debra Knight from occupational health. Ms Knight's view was that the Claimant was currently unfit to undertake the indicated role of Customer Advisor. Ms Knight records the Claimant's shoulder problems and symptoms of anxiety, stress and depression before giving her opinion that the Equality Act 2010 is unlikely to apply to the Claimant's recent health matters. The Respondent's occupational health assessment guidance provides that the service does not replace the support that an employee would receive for their GP. It stated that the GP has overall responsibility for employee health and the occupational health team would be concerned where work appears to be responsible for ill health or where ill health affects ability to work.

39. On 2 October 2017 the Claimant email Ms Morton and stated that she was still mentally and physically unfit to attend the disciplinary meeting. The Claimant stated that this was confirmed during the recent occupational health assessment. She wrote that she was due to see a neurologist, have a mental health appointment, MRI scan, counselling and referral to pain specialist to help with her recovery.

40. Ms Lal made a further enquiry of Ms Knight on 3 October 2017 asking for her opinion as to whether the Claimant was fit to attend a disciplinary hearing. Ms Knight wrote that her clinical opinion was that the Claimant was fit to attend. Ms Knight added that the Claimant was absent from work in relation to her mental health concerns and that it would be reasonable for her to attend the meeting with supportive considerations. It was added that the Claimant would benefit from an independent person to attend with her and it may be necessary to allow short breaks during the proceedings, particularly if the Claimant demonstrates signs of distress and that the Claimant's welfare should be checked at the end of the meeting.

41. On 4 October 2017 Ms Morton sent a fourth invite for the Claimant to attend a disciplinary meeting, now arranged for 13 October 2017. The offer to allow representation or provide written representations was repeated. The letter set out the occupational health opinion that the Claimant was fit to attend a disciplinary meeting.

42. On 11 October 2017, the Claimant's union representative, Ms Alison Thoburn, wrote a lengthy email to Mr Hussain, Respondent HR Case consultant, expressing concern that the Claimant had received another invite to disciplinary proceedings. Ms Thoburn stated that she had been supporting the Claimant through her ongoing absence and disciplinary proceedings and that the Claimant needed to feel strong

enough to take part in meeting. Attending the meeting is likely to raise her stress to an unacceptable level. Ms Thoburn stated that she discussed the possibility of providing a written statement but they did not feel that at that time they could prepare a meaningful document due to the Claimant's poor health and without further medical advice. It was stated that the constant demand to attend a meeting was unacceptable as the Claimant was suffering from a psychological illness and was signed off by her GP. It was suggested to delay the meeting as a reasonable adjustment. Ms Thoburn stated that they were disappointed with the fact that the business had not complied with the duty to make a reasonable adjustment.

43. On 20 October 2017 Ms Morton sent a fifth invite for the Claimant to attend a disciplinary meeting, now arranged for 3 November 2017. The offer to allow representation or provide written representations was repeated. The letter stated that as the meeting had already been rescheduled four times it would not be postponed again and if the Claimant failed to attend the meeting it would be held and a decision taken in her absence.

44. The Respondent's sickness absence management procedure stated that if an employee is absent due to sickness and has been unable or unwilling to attend a disciplinary meeting, a medical report should normally be sought before a decision is made on whether to continue the disciplinary meeting in the absence of the employee. Ms Morton believed that the occupational health opinion of Ms Knight dated 3 October 2017 satisfied this.

45. On 20 October 2017 the Claimant attended a third formal absence review meeting with Ms Lal. The Claimant stated that she is unwell and suffering from anxiety and depression which is causing her underlying situation of neck and shoulder pain. She stated that she believed that part of this is caused due to the disciplinary meeting which was pending.

46. Following this meeting, on 23 October 2017, Ms Thoburn emailed Mr Hussain on the Claimant's behalf stating that the review did not go well. She conveyed that the Claimant was extremely upset and maintained that her health was suffering greatly partly due to the pending disciplinary proceedings. Ms Thoburn stated that the Claimant does not feel well enough to go through the details in a meeting or even with her so that a written response could be submitted to the hearing manager. Ms Thoburn expressed the hope that once the Claimant had effectively completed her courses of treatment she will be strong enough to talk about returning to work and completing the disciplinary process.

47. On 30 October 2017 the Claimant submitted a sick note signing her off as not fit for work from 26 October 2017 to 17 November 2017. This note was received by the Respondent on 3 November 2017. The narrative was that the Claimant had depression and was currently unable to attend any appointments or meetings at this is causing her significant distress and worsening her mood. This sick note did not express a view about the Claimant's ability to submit written representations or instructing a representative to put her case for her.

48. The disciplinary hearing took place in the Claimant's absence on 3 November 2017. The notes of the meeting, with all the questions that Ms Morton would have

asked were sent to the Claimant to consider on 9 November 2017 and on the same date Ms Thoburn was contacted to see if the Claimant would like to provide any additional information regarding the allegations against her.

49. Ms Thoburn replied on the 15 November 2017 attaching the Claimant's long email to her of the same date. The Claimant stated that she did not feel well enough mentally and physically to deal with the matters to do with the disciplinary in any capacity at this time. She stated that the notes of the meeting that she had reviewed and the request to respond had increased her stress levels. The Claimant continued that the disciplinary issue is constantly increasing her stress levels and interfering with her treatment. The Claimant concluded that she was hopeful that the majority of her treatments would be completed in the next 12 weeks or so and once she was better she believed that she would be in a better position to attend or deal with matters regarding the disciplinary hearing.

50. On 16 November 2017 Ms Morton provided the outcome of the disciplinary meeting. She concluded that the Claimant was to be dismissed without notice for gross misconduct. It was concluded that the Claimant had:

- 50.1 failed to return to work on 18 April 2017,
- 50.2 failed to contact her manager to explain her absence,
- 50.3 failed to be contactable during her absence,
- 50.4 been working as a DJ in Zimbabwe and was flagrantly disregarding her responsibilities as an employee
- 50.5 caused additional workloads on colleagues who had to cover for her unauthorised absence
- 50.6 been in breach of the Respondent's policies and the relationship of trust and confidence had broken down.

51. Notwithstanding the Claimant's asserted health difficulties, she was able to draft a lengthy coherent document with 9 grounds of appeal against her dismissal specifying her position on the evidence. This was submitted on 29 November 2017. The Claimant's stated 12-week period to try and get better had not elapsed by this time. The Tribunal questioned why such a document could not have been provided before the 3 November 2017 or 16 November 2017 as the Claimant was invited to do. The Claimant's evidence in this regard was unconvincing and we find that her position was that she did not wish a disciplinary hearing to take place at all. This is supported by her comments in the review meetings where she if the disciplinary hearing could be dismissed it would help with her condition. Further, once the disciplinary meeting had eventually taken place, in her absence, her ability to delay further was thwarted and she had to then respond.

52. The appeal was acknowledged by letter of 30 November 2017 and on 7 December 2017 Mr Adams informed the Claimant that he would hear the appeal to

take place on 9 January 2018.

53. The Claimant did not attend the appeal hearing as expected on 9 January 2018. The meeting was rearranged to take place on 2 February 2018. Ms Thoburn attended with the Claimant. During the appeal the Claimant's grounds of appeal were fully addressed and the Claimant was able to amplify her concerns and put her case regarding the allegations and the alleged procedural shortcomings. The Claimant's statements to Mr Adams on the events highlighted in Facebook were markedly different from the Claimant's evidence to the Tribunal on this matter. Specifically, in relation to whether the postings were accurate and whether the Claimant actually attended the events. There was no indication by the Claimant to Mr Adams that this was not the case.

54. Mr Adams dismissed the Claimant's appeal by letter dated 12 February 2018.

Disability

55. The Claimant's evidence on disability impact appeared at pages 33 to 38 of the bundle. She stated that she was disabled by reason of:

55.1 Depression and anxiety; and

55.2 Chronic neck and shoulder pain.

56. Section 6 of the Equality Act 2010 states:

"(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

57. Schedule 1 section 2 of the Equality Act 2010 sets out the provisions regarding long term effects. It states:

"Long-term effects

2 (1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that

effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term."

58. The Tribunal referred to the case of Richmond Adult Community College v McDougall¹. This states that the assessment of disability must be undertaken as at the time of the alleged disability discriminatory acts.

59. The Respondent also referred to the Guidance on the definition of disability, in particular paragraphs C1 - C7 and the Appendix examples. The Guidance on disability states:

"C6 A woman has two discrete episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she suffers a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the 12-month period."

60. The Claimant stated that she suffered depression and anxiety and that this was first diagnosed in 2013. However, the medical evidence provided in this regard was very limited. The Claimant did not submit her GP notes for consideration by the Tribunal. However, she criticised the Respondent for not providing a full record of the sick notes she submitted to them.

61. The sick notes that were referred to in the bundle show that the Claimant had a period of neurasthenia, nervous debility from 15 May 2014 to 23 May 2014. Her condition was labelled neurasthenia, nervous debility/ depression for the period 23 May 2014 to 1 July 2014. She was signed off for an 8-week period from 1 July 2014 for neurasthenia, nervous debility and then for a further a 2-month period from 26 August 2014 for stress at work and depression.

62. An occupational health report was obtained on 22 October 2014 and recommendations were made to try and facilitate the Claimant's to return to work. The report stated that the Claimant had a difficult relationship with a number of managers and it was implied that there were difficulties with the Claimant's domestic circumstances.

63. The Claimant provided a sick note of 6 November 2014 which stated that she was suffering from stress and depression and signed her off for one month. A further sick note dated 4 December 2014 signed the Claimant off for a stress related problem for one month. The final sick note in this batch was dated 2 January 2015 and signed

¹ [2008] ICR 431, CA

the Claimant off for a stress related problem until 15 January 2015. The Claimant returned to work and there was no medical evidence of any stress related problem or depression or anxiety until the Claimant was confronted with disciplinary allegations on 23 May 2017. There was no medical evidence of continuing medication or medical evidence that the Claimant suffering from depression whilst in Zimbabwe, which was a central part of her given evidence to the Tribunal. Specifically, for the Tribunal's consideration, there was no medical provided of the Claimant suffering from an underlying condition.

64. The Claimant was signed off for stress and depression for the period from May 2017 to her dismissal on 16 November 2017. This period was less than 12 months. The Claimant's difficulties 3 years previously also lasted less than 12 months. The Claimant was receiving medication and counselling during this time and following. However, the review meetings and occupation health reports that cover that period refer to the disciplinary proceedings being a significant factor in the Claimant's ill health. It was hoped that once this was dealt with a significant stressor that the Claimant faced would be removed. However, we find that the Claimant's preferred way for this to be dealt with was for the disciplinary not to take place at all.

65. Having balanced the evidence, the Tribunal is not satisfied that the Claimant has established that at the relevant time her depression was likely to last 12 months.

66. The Tribunal then considered whether the Claimant had a condition that was likely to recur. The Tribunal had regard to the fact that there was no evidence of an underlying condition suffered by the Claimant. Paragraph C6 on the guidance of disability gives the following example:

"...a woman has two discrete episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six weeks. In month nine she experiences a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the 12-month period."

67. At the relevant time, in November 2017, the Claimant had not been suffering from depression for more that 12 months. When considering whether her depression was likely to last for more than 12 months, there was an absence of medical evidence pointing to any underlying condition. The reasons stated for the Claimant's condition in this instance related to the disciplinary hearing. Her previous evidenced stress related absence 3 years before related to management issues and did not last 12 months. It was therefore reasonable to conclude that once the stressor of disciplinary was removed the Claimant's condition would abate. In these circumstances the Tribunal conclude that the Claimant was not disabled by reason of depression at the relevant time.

68. The Tribunal then considered the Claimant's condition regarding her neck and shoulder pain. The Claimant stated that she was suffering constant pain preventing her

from cooking, bathing and affecting her physical coordination. The medical evidence in this regard was also limited.

69. However, an occupational health report of 29 September 2017 notes that the Claimant is restricted by musculoskeletal concerns.

70. There is a new patient admission document dated 2 October 2017 which states that the Claimant has neck right and shoulder pain for three years which was worse for the last six months. It was stated that there was random weakness and tingling affecting the right arm and creating headache. The range of painkillers and medication that the Claimant was prescribed for this was recorded.

71. The Claimant was also provided pre-authorisation for BUPA treatment for sprains and strains of shoulder and upper arm on 10 October 2017 and there is evidence of the Claimant having hospital appointments treatment for her shoulder and back between March and July 2018.

72. In view of this medical evidence, and the Claimant's impact statement, disregarding the effect on the Claimant of the medication she was taking, we conclude that she has established that is disabled by reason of this condition.

73. The medical evidence concerning the Claimant's father's medical condition was not provided to the parties until November 2018. The Respondent did not know the nature or diagnosis of his condition at the relevant time although we find that the Claimant had informed the Respondent that he had suffered a stroke.

Law and conclusions

Section 15 Discrimination arising in consequence from disability

74. Section 15 of the Equality Act 2010 states:

"Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

75. The Tribunal considered whether the Claimant was subjected to less favourable treatment arising in consequence from her disability or the associated disability of her father by being subject to the disciplinary and dismissal procedure for not returning to work from holiday in Zimbabwe, as required on 18 April 2017.

76. We conclude that the Respondent did not institute the disciplinary procedure and dismissal arising from her disability or her father's disability. The Claimant was disciplined due to the Respondent believing that she was on unauthorised absence undertaking a DJ tour. In view of the evidence they had the Respondent did not accept the Claimant's explanation that she overstayed in Zimbabwe due to caring for her father. The Respondent believed that the Claimant was on a DJ tour and pursued the disciplinary and dismissal procedure on this basis.

77. When considering this matter separately, with the additional evidence and explanations that the Claimant provided to the Tribunal we do not accept that she overstayed in Zimbabwe due to her father's condition. We conclude that, on the balance of the evidence, the Claimant had no intention of changing her flight tickets when she booked them and that she completed all the stages of the Lady G2 Zim tour as was planned and publicised at various stages on Facebook and the newspaper article. In these circumstances the Claimant's claim that the disciplinary and dismissal process was less favourable treatment arising in consequence from disability fails and is dismissed.

Reasonable Adjustments

78. Section 20(3) of the Equality Act 2010 states:

"... where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

79. The Claimant claims that the Respondent applied the following provisions, criteria or practices that put her at a substantial disadvantage when compared to persons without the disability.

79.1 PCP1 - Insisting on holding the disciplinary hearing in her absence;

79.2 PCP2 - The way in which the Health and Well Being meetings were held;

80. The disciplinary meeting was held in the Claimant's absence. The Claimant was seeking more time to recover before she engaged with the disciplinary issues. We accept that Claimant had depression at the time and this exacerbated her ability to manage the pain that was associated with her neck and shoulder pain. The disciplinary hearing had been delayed on four separate occasions from June 2017. On 15 November 2017, in response to being given the disciplinary meeting notes the Claimant sought a further 12-week delay. The Respondent had occupational health opinion that the Claimant could attend a disciplinary meeting and a later GP sick note stating that the Claimant could not attend a meeting. At all times the Claimant was invited to instruct a representative or provide written representations. On the evidence we find that the Claimant was unwilling, as opposed to unable, to do this. The Claimant attended review meetings during this time, had occupational health assessments and was able to discuss matters with Ms Thoburn so lengthy emails could be sent. The Claimant was seeking the disciplinary action to be dismissed. This

was not a reasonable option.

81. We conclude that the threat of on going disciplinary action against the Claimant's wishes was of continuing upset to her and that a further delay in considering the matter was not a reasonable adjustment. A further delay, whether, as suggested, 12 weeks or longer to consider the disciplinary matter would not have been a reasonable adjustment as the delay would have been unlikely to have resulted in the Claimant being willing to participate and engage with the disciplinary process. It is apparent that once the disciplinary process was conducted and she was dismissed, she then felt willing and able to engage with the allegations by providing her grounds of appeal and setting out her position.

82. We conclude that the Respondent followed its Health and Well Being procedure and the Claimant had 3 review meetings with her line manager. They were undertaken in a sympathetic and appropriate manner. The review meetings were separate from the disciplinary proceedings, with different managers involved. Whilst the Claimant sought to use the review meeting to achieve the dismissal of the disciplinary proceedings they were separate processes undertaken by independent managers.

83. We therefore conclude that the Claimant's claims that the Respondent failed in its duty to make reasonable adjustments fails and are dismissed.

Unfair dismissal

84. Section 98 of the Employment Rights Act 1996 states:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection

(2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) *In subsection (2)(a)—*

(a) *“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*

(b) *“qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*

(4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

(a) *depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

(b) *shall be determined in accordance with equity and the substantial merits of the case.*

85. When considering the law, the Tribunal have considered the principles in the case of BHS v Burchell, that is where the employer believed in the allegation against the employee, whether reasonable grounds for that belief and whether the employer carried out such investigation as was reasonable in the circumstances.

86. When considering the nature of the investigation we have considered the principles in the case of Sainsbury’s Supermarkets Ltd v Hitt where the investigation had to be within a reasonable band of options open to the employer. We had in mind that it is not for the Tribunal to substitute the view for that of a reasonable employer.

87. The Tribunal concludes that the Respondent has established a potentially fair reason for dismissal namely the conduct of the Claimant overstaying her permitted holiday period on a DJ tour.

88. When considering whether the dismissal was fair and reasonable in all the circumstances the Claimant had an opportunity to consider the allegations against her on several occasions but was unwilling to engage. The full information specifying the allegations and documentary support was provided to the Claimant to consider. The disciplinary meeting was postponed on 4 occasions.

89. The disciplinary proceedings related to events in April 2017. The first proposed disciplinary hearing was for July 2017. The Claimant clearly did not wish to engage with this process.

90. The Claimant’s sick note of 30 October 2017 stated that she could not attend any appointments or meetings at work until 17 November 2017. This sick note did not address whether the Claimant could provide written representations or ask someone to attend on her behalf.

91. The Respondent balanced this against the occupational health report of 3 October 2017 that indicated an opinion that the Claimant could attend a meeting.

Whilst the Respondent could have sought a further occupational health view by this time it was very clear that from emails received from Ms Thoburn on the Claimant's behalf that the Claimant did not wish to engage with the disciplinary process at all. The Respondent was also aware that the Claimant had previously been uncooperative with occupational health in seeking to arrange an assessment. In these circumstances the Tribunal conclude that it was reasonable for the Respondent to proceed with the meeting in the Claimant's absence on 3 November 2017.

92. After the disciplinary meeting but prior to dismissal, the Claimant was given a further opportunity to respond by providing her with the full list of questions that would have been asked of her had she actually attended the disciplinary hearing on 3 November 2017. The Claimant was invited to comment. However, on 15 November 2017 the Claimant stated that she was unable to engage with the disciplinary process at all for at least another 12 weeks.

93. The Claimant was summarily dismissed by letter dated 16 November 2017. She was offered a right of appeal that she was willing and able to engage in this exercise.

94. We conclude that the dismissal of the Claimant was within the band of reasonable responses open the Respondent, notwithstanding her good work record and length of service. The allegations amounted to gross misconduct and the necessary trust and confidence required in her as an employee had been broken.

95. In these circumstances we conclude that the dismissal of the Claimant was fair and reasonable. Her claim for unfair dismissal therefore fails and is dismissed.

Wrongful dismissal

96. The Claimant was summarily dismissed for gross misconduct. On the evidence that we have heard we conclude that the Claimant did in fact overstay in Zimbabwe to complete her DJ tour. This amounted to gross misconduct entitling the Respondent to terminate the contract without notice.

97. The Claimant's claim for notice pay is therefore dismissed.

Employment Judge Burgher

Dated: 13 February 2019