EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms. A. Betcher	v	**John Cox Cold Stores and Distribution Services Limited t/a Midlands Bacon co**

Heard at: **Birmingham by CVP/Hybrid On: 28,29,30 June & 1 July 2021**

Before: **Employment Judge Wedderspoon**
Mr. C. Greatorex
Mr. P. Wilkinson

Representation:

Claimant: **Ms. Inkin, Legal representative**

Interpreter **Miss. Anne Marie Kaczmarczyk**

Respondents: **Mr. Gillie of Counsel**

RESERVED JUDGMENT

1. The unanimous judgment of the Tribunal is that :- (a)the claimant was procedurally unfairly dismissed;
(b)the claimant contributed to her dismissal by 100%;
(c)the wrongful dismissal claim is not well founded and is dismissed;
(d)the claimant was not disabled at the material time;
(e)the claim of discrimination arising from disability is not well founded and is dismissed;
(f)the victimisation claim is dismissed upon withdrawal.

REASONS

2. By claim form dated 2 January 2020 the claimant brought the following live complaints of :- (i)unfair dismissal;
(ii)discrimination arising from disability contrary to section 15 of the Equality Act 2010;
(iii)wrongful dismissal.

3. Subject to an agreed amendment to the claim of discrimination arising from disability, the parties agreed the issues identified by Employment Judge

Choudhry for determination at the Preliminary Hearing on 2 June 2020 as follows :-

Unfair dismissal

(i)Was the claimant dismissed within the meaning of section 95 (1)(a) of the Employment Rights Act 1996 ("ERA");

(ii)The Respondent contends that the claimant by her words and/or conduct resigned from her employment;

(iii)If the claimant was dismissed what was the principal reason for the dismissal and was it a potentially fair one in accordance with sections 98 (1) and (2) of the ERA? The respondent asserts that it was for misconduct (namely her unreasonable failure to provide G.P.'s fit note to support her sickness absence and/or going AWOL) and/or some other substantial reason;

(vi)Was the dismissal fair or unfair in accordance with section 98 (4) of the ERA and in particular did the respondent in all respects act within the so-called "band of reasonable" responses?

(v)If the claimant's dismissal was unfair did the claimant's actions cause or contribute to her dismissal such that no compensation should be awarded alternatively that any compensation awarded should be reduced by her level of contributory fault?

(vi)If the claimant's dismissal was unfair would the claimant have been fairly dismissed in any event in the very near future such that no compensation should be awarded, alternatively that any compensation awarded should be reduced?

Remedy for unfair dismissal

(i)If the claimant was unfairly dismissed and the remedy is compensation; (a)If the dismissal was procedurally unfair what adjustment if any should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair procedure been followed/have been dismissed in time anyway? **Polkey v AE Dayton Services Limited (1987) UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews (2007) ICR 825; W. Devis & Sons Ltd v Atkins (1977) 2 All ER 40; Credit Agricole Corporate and Investment Bank v Wardle (2011) IRLR 604;**

(b)would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal pursuant to ERA section 122 (2); and if so to what extent?

(c)did the claimant by blameworthy or culpable actions cause or contribute to dismissal to any extent and if so by what proportion if at all would it be just and equitable to reduce the amount of any compensatory award pursuant to ERA section 123 (6)?

Disability

(ii)Was the claimant a disabled person in accordance with the Equality Act 2010 ("EqA") at all relevant times because of the following condition; a severe bilateral hand pain and swelling.

Section 15 of the EqA

(iii) Did the respondent treat the claimant unfavourably by dismissing her?
(iv)What caused the treatment or what was the reason for the treatment ? Was it the claimant's inability to work ?
(iv)Is the reason or cause of the treatment something arising from the disability?
(v)If so, has the respondent shown that dismissing the claimant was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim (s); managing employee absence and ensuring productivity, customer service and effective and profitable working practices within the business, ensuring staff moral and reasonable workloads and working conditions of other employees avoiding cost inefficiencies and otherwise promoting the business interests of the respondent.
(vi)Alternatively has the respondent shown that it did not know and could not reasonably have been expected to know that the claimant had the disability?

Breach of contract
(xi)Was the claimant dismissed and therefore entitled to any notice?
(xii)Did the claimant fundamentally breach the contract of employment by an act of so-called gross misconduct? N.B. This requires the respondent to prove on the balance of probabilities that the claimant actually committed the gross misconduct; if so did the respondent affirm the contract of employment prior to the dismissal? If not was the claimant dismissed in response to that fundamental breach of contract (to put it another way was it a reason for dismissal- it need not be the reason)?

4. The Tribunal was provided with an agreed bundle of 257 pages and an agreed chronology. The claimant's first language is Polish. The Tribunal was greatly assisted by the interpreter, Miss. Anna Marie Kaczmarczyk throughout the hearing. The claimant gave evidence along with her son, Mr. Michal Tarkowski and Ms. Katarzyna, a work colleague. The claimant also submitted a written representation from Mr. A. Furtak, a work colleague. The Tribunal attached minimal weight to this witness statement because the witness had not attended the Tribunal to be cross examined. The Respondent relied upon the evidence of Kim Tierney, HR and payroll manager and Mr. Paul Agg, Branch Secretary of the WM/6140 Branch and a West Midlands Lay companion for the Unite trade union.

5. The hearing was time-tabled and the parties were given time to prepare and exchange written submissions before supplementing these with oral submissions on the morning of day 4. The Tribunal reserved its judgment.

6. The Tribunal was mindful when considering the evidence that the claimant's first language was not English and that language difficulties should not reduce the claimant's or her witnesses' participation in the hearing (see the Equal Treatment Bench Book paragraph 114; page 231).

Law
Disability defined

7. For the purposes of section 6 of the Equality Act 2010 (EqA) a person is said to have a disability if they meet the following definition:

"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."

8. The burden of proof lies with the claimant to prove that she is a disabled person in accordance with that definition.

9. The term "substantial" is defined at section 212 as "*more than minor or trivial".* Normal day to day activities are things people do on regular basis including shopping, reading and writing, having a conversation, getting washed and dressed preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, socialising (see D2 to D9 of the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011).

10. Further clarity is provided at Schedule 1 which explains at paragraph 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."

11. Likely should be interpreted as meaning "it could well happen" rather than it is more probable than not it will happen; see **SCA Packaging Limited v Boyle (2009) ICR 1056**. In the case of **Patel v Metropolitan Borough Council (2010) IRLR 280** the EAT stated that the issue of whether the effect of an impairment is long term may be determined retrospectively or prospectively. A claimant must meet the definition of disability as at the date of the alleged discrimination.

12. As to the effect of medical treatment, paragraph 5 provides: -

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day to day activities if- (a) measures are being taken to treat or correct it and (b) but for that it would be likely to have that effect.
(2) Measures include in particular medical treatment...

13. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled "Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Disability" The guidance should not be taken too literally and used as a check

list (see **Leonard v Southern Derbyshire Chamber of Commerce (2001) IRLR 19**).

14. Some guidance is given in paragraph B1 as to the meaning of "Substantial adverse effects" namely,

"The requirement that an adverse effect on normal day to day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect."

Section 15 EqA 2010

15. Section 15 of the Equality Act 2010 provides that

"(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 can not 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."

16. **Pnaiser v NHS England (2016) IRLR 170** says,

"From these authorities the proper approach can be summarised as follows :

(a)A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b)The tribunal must determine what caused the impugned treatment or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment and so amount to an effective reason for or cause of it.

(c)Motives are irrelevant. The focus on this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant; see Nagarajan v London Regional Transport. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises..

(d)The tribunal must determine whether the reason/cause (or if more than one) a reason or cause is "something arising in consequence of B's disability". That expression "arising in consequence of" could describe a range of causal links..

(f)This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(h)Moreover the statutory language of s.15 (2) makes clear ..that the knowledge required is of the disability only and does not extend to a requirement of knowledge that the something leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover the effect of s.15 would be substantially restricted on Miss. Jeram's construction and there would be little or no difference between a direct

disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

Wrongful dismissal

17. In **British Heart Foundation v Roy UKEAT/49/15** the Employment Appeal Tribunal sets out the difference between the test in an unfair dismissal claim and the test for wrongful dismissal. That Judgment helpfully summarises what the Tribunal needs to decide when considering the wrongful dismissal claim and identifies why the questions to be asked are so different in respect of the two claims. It says :
"The law as to wrongful dismissal (in respect of which the appeal arises) needs to be set out. A member of the public might express some surprise if the law were to the effect that an employee whom the employer on reasonable grounds suspected of having been guilty of theft and in respect of whom a Judge concluded that indeed she probably was, had to be kept on at work until the expiry of her full notice period and could not be dismissed immediately. Whereas the focus in unfair dismissal is on the employer's reasons for that dismissal is on the employer's reasons for the dismissal and it does not matter what the Employment Tribunal thinks objectively probably occurred or whether in fact the misconduct actually happened, it is different when one turns to the question either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal. There the question is indeed whether the misconduct actually occurred. In a claim for wrongful dismissal the legal question is whether the employer dismissed the claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily. An employer will only be in that position if the employee is herself in breach of contract and that breach is repudiatory.

Unfair dismissal

18. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.
19. In determining whether there has been a dismissal the conduct of the parties is one of the surrounding circumstances to be taken into account when alleged words of dismissal or resignation is ambiguous. In **Harrison v George Wimpey and Co Limited 1972 ITR 188 NIRC** the claimant became sick at Christmas and stayed away for four months without communicating with his employer although he was in fact obtaining sick notes every two weeks. Sir John Donaldson said "*Where an employee so conducts himself as to lead a reasonable employer to believe that the employee has terminated the contract of employment, the contract is then terminated".* The NIRC upheld a tribunal's finding of implied resignation by H but also pointed out that the employer was under a duty to make enquiries and to warn the employee of its intentions. It is only in exceptions circumstances, that resignation will be the proper inference to draw from an employee's conduct. The concept of "constructive resignation" or "self dismissal" was firmly rejected by a majority of the Court of Appeal in the case of **London Transport Executive v Clarke 1981 ICR 355 CA** which held that a repudiatory breach by an employee, such as taking a 7 week holiday without permission did not bring the contract to an end automatically. The contract would only end when the employer accepted the employee's breach

that is by dismissing the employee. If an employer refuses to have the employee back after an act of misconduct the employer can not claim that the employee has dismissed herself; this will be a dismissal by the employer. In the Supreme Court case of **Geys v Societe Generale 2013 ICR 117** it confirmed the elective theory to repudiatory breaches of an employment contract that is that a repudiatory breach will only be effective to terminate the contract once the other party has elected to accept the breach.

20. If the dismissal is established the respondent bears the burden of proving on the balance of probabilities that the dismissal was for an admissible reason; here misconduct or some other substantial reason. If the respondent fails to persuade the tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed her for that reason, the dismissal will be unfair.
21. If the respondent does persuade the tribunal that it held the genuine belief and that it did dismiss the claimant for that reason the dismissal is only potentially fair. The tribunal must then go on and consider the general reasonableness of the dismissal under section 98 (4) of the Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof is this regard is neutral.
22. In conduct cases when considering the question of reasonableness the Tribunal is required to have regard to the test outlined in **British Home Stores v Burchell (1980) ICR 303.** The three elements of the test are :
    (a)Did the employer have a genuine belief that the employee was guilty of misconduct?
    (b)Did the employer have reasonable grounds for that belief?
    (c)Did the employer carry out a reasonable investigation in all the circumstances?

23. The additional question is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach.
24. The Tribunal may not substitute its own view for that of the employer as made clear in the case of **London Ambulance Service NHS Trust v Small (2009) EWCA Civ 220.** The appropriate standard of proof for those at the employer who reached the decision was whether on the balance of probabilities they believed that the misconduct was committed by the claimant. They did not need to determine or establish that the misconduct was committed beyond all reasonable doubt.
25. In considering the investigation undertaken the relevant question for the Tribunal is whether it was an investigation that fell within the range of reasonable responses that a reasonable employer might have adopted. Where the tribunal is considering fairness, it is important that it looks at the process followed as a whole including the appeal. The Tribunal is also required to have regard to the ACAS code of practice on disciplinary and grievance procedures.

Contributory Fault

26. Pursuant to section 123 (6) of the Employment Rights Act 1996 the Employment Tribunal may reduce the compensatory award where it considers it to be just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action by the employer. The starting point is to consider whether the claimant had been guilty of "blameworthy conduct" (**Nelson v BBC (No. 2)).** The next stage is to consider whether the blameworthy conduct contributed to or caused the dismissal. If so the Tribunal should consider to what extent the blameworthy conduct contributed to or caused the dismissal and apply the appropriate deduction to compensation.

27. On the conclusion of the case, neither party relied upon **Polkey**.

FACTS

28. The respondent is a family run business and it employs 100 members of staff. It also has a sister company called Central Foods with approximately 50 employees. Ms. Tierney provides Human Resources and pay roll tasks for both companies. The respondent is in the business of meat wholesale. Equality Act training is not provided in the workplace to employees. Ms. Tierney underwent Equality Act training in about 2012.
29. The claimant initially worked for the respondent through an agency from June 2017. She was then offered permanent employment with the respondent from 11 September 2017.

30. The claimant gave evidence that she had not received a statement of terms and conditions during her employment and that the statement found at pages 60 to 68 had never been provided to her until September 2019. Her evidence was that the respondent had effectively fraudulently transplanted the date of signed receipt of the statement of terms and conditions from her agency agreement and edited the same on the document by adding a "1" before the "0" to make it look as though she received the document in October 2017 when she did not. Mr. Tierney's evidence for the respondent was that the claimant was provided with a copy in October 2017; she signed it on 13 October 2017 and returned it to the respondent who signed it on 16 October 2017 and the respondent kept their copy in the claimant's employee file and provided her with an additional copy on request in September 2019. The Tribunal preferred the evidence of the respondent and were not satisfied that the respondent had fraudulently added a date from the claimant's agency agreement to page 68. The claimant's allegation was a very serious one but she did not raise any concerns about the alleged fraudulent action of the respondent when she was given a copy of the dated contract in September 2019. The Tribunal found the claimant's evidence unpersuasive and unconvincing.

31. Overall, the Tribunal found the claimant's evidence to be unsatisfactory and inconsistent. The Tribunal did take account of the fact that the claimant was giving evidence through an interpreter because English is not her first language and in the course of her dealings with the respondent her son or another party had translated for her. Nevertheless, the Tribunal found there were so many

inconsistencies that any purported difference in language could not be a credible explanation for them.

32. In the claimant's impact statement, the claimant's evidence was that she *"can not even make a fist, I struggle with gripping I find it difficult to hold items".* This was in contradiction to her oral evidence that she was able to grip the handle of a wheelie suitcase and pull it along on her trip to Poland. Further the Tribunal found the claimant's alleged incapacity inconsistent with the note of her G.P. who had recorded that the claimant could do three hours of housework and 3 hours of gardening/DIY a week in October 2019.

33. The claimant's initial explanation to the Tribunal as to why she failed to inform her employer she was travelling to Poland was because she made the decision spontaneously for urgent dental treatment because she could not get an NHS appointment. Under cross examination when it was put to the claimant she could attend any NHS hospital for emergency dental treatment the claimant then said the dental treatment was cheaper.

34. Under cross examination the claimant said she had been abroad previously and had never informed the respondent. Later following the member's, Mr. Greatorex's questioning, the claimant stated she had notified the respondent she had gone abroad before.

35. The claimant stated she had commenced early ACAS conciliation on 9 October 2019 because her grievance was not being dealt with and she could see no process being pursued. The contemporaneous evidence showed Ms. Tierney had held grievance meetings in September; a discussion took place with the claimant and her trade union representative on 20 September 2019; one aspect of the grievance process was re-opened and the grievance outcome meeting was arranged for 17 October 2019.

36. The claimant informed the respondent as it could not sack Orville, she asked to be moved to the gammon room. In oral evidence she said she was "fine" for Orville to work in the bacon room with her. This is despite the fact she had stated she was frightened of him.

37. The claimant's G.P. records and consultant's letters say she had morning stiffness for one hour and she took pain relief intermittently. However, in cross examination the claimant stated that she was not able to perform any activities normally and after 2 to 3 hours she could take up small activities when medication starts working.

38. Also, the claimant's evidence was that her G.P. said that she could not work until December 2019. At the same time, she said she could do light duties at work.

39. Initially under cross examination the claimant stated that her hand problems started after being required to put 4 packets of bacon weighing 2.25 k.g. each into a box on a pallet for 5 days. Then later on in her evidence she said she was not struggling and had never suggested that her hand problems were caused by the respondent's actions.

40. Under cross examination the claimant stated she did not know she had to provide another sick note on 1 October 2019. Following questions from the Tribunal the claimant stated she had 30 years experience working in Poland where fit notes were required too and people also got sick in Poland and had to provide fit notes.

41. Under cross examination the claimant said she did not provide another sick note on 1 October 2019 because the respondent knew she would be off sick until December 2019. Following questions of the Tribunal the claimant said that she did not give the respondent another sick note because she had indicated to Ms. Tierney that she would be having another appointment with the doctor in October and would provide it then.

42. The claimant's evidence was that she had only seen Ms. Tierney's letter of 9 October 2019 in June 2021 because she did not see Ms. Tierney's email of 9 October 2019 when it was sent. The email to the claimant on 24 October 2019 from Mr. Tierney attaches the letter of 9 October 2019; the claimant did state she read the email of 24 October 2019 and left things to her lawyers.

43. Under cross examination the claimant stated she wanted to attend an OH assessment because it was beneficial to her; she expected the respondent would arrange this. Following questions of the Tribunal as to whether if she was keen to have an assessment whether she asked for an OH assessment or further pursued the suggestion of a referral further; she stated it was not her role to do so but Mr. Agg's.

44. The Tribunal concluded that the claimant's evidence was unreliable.

45. In the statement of terms and conditions, the claimant's role was defined as "bacon operative". This meant that the claimant worked in the bacon room and her work mainly concerned labelling boxes of bacon for dispatch. The contract also stated that her title did not define or limit the scope of her employment with the company which might reasonably require her to perform other duties from time to time.

46. At page 64 the contract set out an absence reporting procedure and payment of sick pay. The requirement upon an employee unable to attend work for any reason was a mandatory requirement to telephone the manager and keep the company informed as to the continuation and likely duration of sickness absence and make daily contact when the expected length of absence is exceeded. There was a mandatory requirement to provide a self certified sick

note for absences less than 7 calendar days and a doctor's note (fitness for work form) for absences of 7 calendar days. No wages were paid for unauthorised absence from work. The contract was supplemented by an employee handbook. At page 83 it states *"Any further doctor's medical certificates should be submitted promptly. Subsequent notes must be obtained and submitted to cover all of the remaining absence. Failure to provide medical certification will result in your absence being marked as unauthorised."*

47. The respondent reserved the right pursuant to its employee handbook to see medical information about an employee. At pages 84/5 it is stated *"The company can ask you for your consent for the submission of a medical report by your own doctor at any time in the event of doubt about your fitness to undertake your normal duties. You do not have to give the company permission to obtain a medical report but you should be aware that the company must continue to make employment decisions based on any information that is available. The lack of medical information may therefore be to your detriment."*

48. Due to the nature of the respondent's business of handling foods, where an employee had been abroad on holiday or for some other reason an employee was required to report to the manager/supervisor in order that an employee's health during and immediately after the trip abroad could be discussed (see page 64 and page 88 of the employee handbook). This provision was a requirement because of the nature of an employee's work in the business and handling meat. The Tribunal found that the claimant was aware of these requirements having travelled abroad before and knowing she had to report this to the respondent.

49. The notice period for 2 years of continuous service was 2 weeks.

50. Although the claimant stated that the employee handbook was a separate document and not provided to employees, the Tribunal found that she was aware of it and its contents by the fact she had signed for receipt of it on 13 October 2017 and was aware of its provisions namely submitting a grievance, providing sick notes and informing her employer when she travelled abroad.

51. On 2 December 2018 the claimant complained about her manager Orville and made allegations of aggression, discrimination and bullying against him. The claimant alleged that he had caused her a mental breakdown. This matter, with the claimant's agreement, was dealt with by the manager.

52. On 14 June 2019 (page 110) the claimant lodged a second complaint expressing her dissatisfaction and wish to make a formal grievance against Orville and Gabriellius. She alleged aggression, discrimination and bullying against Orville.

53. On 15 June 2019 the claimant joined the Unite trade union (page 111A). From 21 June 2019 the claimant went off sick and in fact did not return to work. The

claimant provided a fit note, covering the period 21 June to 31 July 2019, dated 4 July 2019, stating that the claimant was not fit for work because of *"pain in joint -arthralgia.".* The timing of this fit note complied with the respondent's absence policy which required a fit note to be produced on the seventh day of absence.

54. The Unite trade union contacted Mr. Agg a unite representative, on 9 July 2019 to assist the claimant with her bullying grievance (p.111A). Mr. Agg met the claimant and her son in a café on 16 July 2019. The two grievances were discussed; the claimant stating that after the first complaint in December 2018 changes occurred for a time. Her son stated he believed that his mother was lifting meat that was too heavy and she had been forced to do cleaning duties and other mundane duties and was being victimised.

55. On 24 July 2019 Mr Agg requested a meeting with Mr. Tierney to resolve the grievances. He stated that the company's failure to resolve the grievances had led to the claimant's absence due to work related stress. On 29 July 2019 the claimant submitted a further fit note for one month; she was unfit for work by reason of *"joint pain and work-related stress"* (p.113). In a meeting with the claimant (with her son acting as interpreter) and Ms. Tierney, the claimant stated that she requested her doctor to include "work related stress" on the instructions of her trade union; the tribunal also found that the claimant was unaware that she could include this on the fit note prior to speaking to Mr. Agg. The claimant agreed that the first complaint in December 2018 had been discussed and sorted. A further meeting was arranged for 6 August 2019 when the claimant, her son, a friend, the trade union representative Mr. Agg, Ms. Tierney and Steve Cooper the supervisor were expected to attend.

56. Ms. Tierney spoke to Steve Cooper on 29 July who stated that the claimant had said she could not do packing as it hurt her fingers. Due to changes in the company and the reduction of the use of labels, packing work was now available to the claimant. Due to the fact that the claimant did not want to do packing she was given the alternative task of cleaning.

57. On 6 August 2019 the grievance meeting took place (see pages 117-122C). In attendance was the Claimant, with Mr. Furtak as interpreter, Mr. Agg, Steve Cooper and Ms. Tierney. Mr. Agg did not make full notes and did not do so for all meetings he attended with the claimant but he gave evidence to the Tribunal that he was satisfied that the respondent's meeting notes encapsulated the main points discussed. During the meeting, the claimant explained that she was being put on packing without training. She said she was not happy with the outcome from her grievance in December 2018. This differed from her comments in the previous meeting on 24 July. She described she had been subject to discriminatory treatment. At this meeting the claimant was directly asked what she wanted. The claimant responded she knew the respondent could not sack Orville but suggested moving to a different department; the gammon room. Steve Cooper stated there was a risk that Orville may have to

interact with the claimant if she was placed in the gammon room and suggested alternatively the rib room; it had different breaks and slightly longer hours. The meeting ended with the claimant stating that she was waiting for the results from a scan; then she would know when she could return to work. A meeting was scheduled for 6 September 2019.

58. Prior to the grievance outcome meeting on 6 September 2019, the claimant's son contacted Mr. Agg to state that the claimant wanted to pursue legal action against the respondent for bullying and harassment.

59. On 6 September 2019 (page 127-131) at the grievance outcome meeting in attendance was the claimant, her son as interpreter, Mr. Agg, Ms. Tierney and Steve Cooper. The claimant was provided with the outcome of the grievance (page 124) and given an opportunity to read it. The claimant did not accept the conclusions that there was no bullying and no discrimination. The claimant was asked whether she wanted the bullying grievance re-opened or wished to appeal. The claimant requested the respondent to re-open the grievance (page 131). Ms. Tierney agreed to this and the claimant was invited to submit further witness statements in support of her grievance. On 6 September 2019 the claimant also submitted a further fit note that she was unfit for work because of *"joint pain"*; the fit note was valid between 31 August 2019 to 30 September 2019.

60. A further meeting was arranged for 20 September 2019 when the claimant could provide fresh evidence and/or accept the offer of a move (p.131B). Ms. Tierney spoke to Kevin Dawes about the claimant being given tasks of packing and cleaning and he stated he did not consider Orville a bully or a racist.

61. On 16 September 2019 (page 131B) Mr. Agg submitted an update to the Unite trade union commenting that he felt great strides were achieved on 6 August with the prospect of an agreement at the following meeting. However he raised that the claimant wanted to pursue legal action against the respondent and he had to remind the claimant's son that the claimant had joined the union with a pre-existing problem and that internal procedures had not yet been exhausted.

62. On 20 September 2019 (page 132-134A) at the reconvened grievance meeting, the claimant, her son, Mr. Agg and Ms. Tierney were present. The claimant had brought witness statements from two individuals still working in the business and five former employees (pages 135 to 142). The claimant requested to know what punishment Orville had received. Ms. Tierney advised the claimant she could not tell her this. It was decided a further meeting would take place on 17 October 2019 to discuss and provide an outcome on the bullying allegations. The claimant raised why she hadn't been given light duties. Ms. Tierney said the claimant had not requested these before and the fit note did not indicate she could return to work on light duties. The claimant requested to return to the bacon room instead of the rib room on light duties. Ms. Tierney questioned why the claimant wanted to come back to work for someone (Orville) she was

unhappy to work for. The claimant stated she was afraid to come back to work but questioned why Orville was allowed to continue. The claimant stated she did not wish to be moved. The claimant said she believed the rib room was not light work as she had spoken to a colleague who said the work was harder. The claimant wanted to return to work in the bacon room and was refusing to come back to the rib room so the only option is that the claimant stays off sick. The claimant declined the offer of a post in the rib room. Ms. Tierney suggested another option to the claimant of moving to the sister business Central Foods working with chicken and small joints. Ms. Tierney said she would have to speak to managers and enquired whether the claimant would consider this work if available. The claimant stated that she would go on the sick so she can think what she wanted to do and she wanted light work but won't make a decision. Ms. Tierney regarded this as an abuse of the sickness procedure. The claimant then stated that the doctor doesn't want her to work until December 2019. There was a dispute of evidence as to whether the claimant referred to her specialist medical appointment in December at this meeting. On the balance of probabilities, the Tribunal preferred the respondent's evidence on this point and found that the claimant did not explain that she had a medical appointment in December which is consistent with Ms. Tierney's evidence and her notes of the discussion corroborated by Mr. Agg. In the meeting, Mr. Agg raised the issue of a referral to Occupational Health. He stated that the respondent may refer the claimant to occupational health to see if the claimant can work which may result in the claimant being considered to be unfit. The claimant stated in evidence to the Tribunal that she would have been willing to attend Occupational Health. The Tribunal found that she did not. It was only once the claimant became aware from Mr. Agg in the meeting that she might be considered to be unfit by Occupational Health that the claimant agreed she would work at Central Foods. Ms. Tierney stated that the claimant would have a new contract and she would let the claimant know before 30 September 2019. A further meeting was arranged for 17 October 2019.

63. Ms. Tierney undertook interviews in the course of investigating the grievance (pages 149-155).

64. By letter dated 27 September 2019 (page 156) Ms. Tierney informed the claimant there was no possibility of transferring the claimant to Central Food Services because following enquiries there were no available positions. She further stated that although the claimant wanted to return to the Bacon/gammon room the respondent did not consider this to be a viable option because of a breakdown in relationships with managers/supervisors; working in the room had caused the claimant stress and that work in the room was shared so that there may be some jobs the claimant may not like. Ms. Tierney stated that the claimant had been offered work in the rib room with a group of ladies which was less boisterous and with less banter. The workload was said not to be heavy but the claimant had declined the offer. Ms. Tierney stated she was unsure what work she could offer the claimant but sought to discuss this further with the claimant at a meeting on 1 October 2019 at 10 a.m. Ms. Tierney forwarded a copy by email to Mr. Agg on the same date.

65. On 28 September 2019 the claimant flew to Poland. She had not told her employer she was travelling abroad whilst on sick leave or her trade union representative. The plane taken by the claimant (p.156C) departed at 8.55 in the morning and the claimant took with her as hand luggage a wheeled trolley and another piece of hand luggage. Her fit note expired on 30 September 2019.

66. On 30 September 2019 Mr. Agg, text the claimant's son regarding a meeting on 1 October 2019 and enquiring whether the claimant had considered the respondent's offers. Mr. Agg told the claimant's son to check the claimant's incoming mail. Michal responded to Mr. Agg that his mother was in Poland and it was impossible for her to attend the meeting on 1 October. Michal actually received the letter for the meeting on 1 October 2019 at about 2p.m. The claimant did not make any contact with the respondent until 8 October 2019 when she rang Ms. Tierney. Mr. Agg telephoned Ms.Tierney and told her the claimant was in Poland so would not be attending the meeting.

67. On 7 October 2019 (page 157) Ms. Tierney wrote to the claimant. She stated *"As you are aware your fitness to work note expired on 30/9/19 and we invited you to a meeting on 1/10/19. This was to discuss your return to work but you did not attend nor contact us regarding your absence from this meeting in order to reschedule. Furthermore, you have not contacted the company regarding your absence from work since your fitness to work note expired on 30/9/19 (failure to follow company absence reporting procedure). Given this situation I can only assume that despite not receiving notification of your resignation in writing you no longer wish to work for the company and you are terminating your employment. If this was not your intention please ensure that you contact me immediately. On the basis that my assumption is correct I confirm that I accept your resignation from the Company's employment with immediate effect. Your date of termination of employment is therefore 7 October 2019. The period from 1 October 2019 to 7 October 2019 will be classed as unauthorised absence for which the company does not pay. Unless we hear from you to the contrary by 14/10/19 any monies outstanding up to 7/10/2019 will be paid into your Bank.."* Ms. Tierney sent a copy of the letter to Mr. Agg (p.157A). At this point the respondent was corresponding with the claimant by post because it did not have the claimant's agreement to email her.

68. On 8 October 2019 the claimant telephoned Ms. Tierney. On 9 October 2019 the claimant attended work with a letter (page 158) and further fit note (p.159) indicating the claimant was unfit for work from 30 September 2019 to 15 December 2019 by reason of *"severe bilateral hand pain and swelling causing difficulty working- being investigated by the hospital"*. The claimant did this to indicate she wished to continue to be employed. The claimant's letter stated *"On the meeting which occurred at 6 September I have informed you about the appointment with specialist which will occur at 16th December. Also I have said that I will be on sicknote until that date. As I have declared on the meeting which occurred at 20th September from the few options you have gave me, I*

have chosen again to stay on the sicknote until the appointment with specialist who will verdict if my pain in my joints is work related. I am aware that my sicknote expired on 30th September and at the end of September I have set an appointment with the doctor. The appointment will occur at 9th of October and this is the date where I can hand you in another sicknote. I would like to notice that some of the previous sicknotes were also not handed in at the same day on which the actual one is expiring. This wasn't a problem before, so I can't understand why is this situation suddenly assumed as my resignation from work. Because of the fact that you were informed about the expected duration of sicknote I did not feel obligated to call the company everyday to inform why I am not attending the work. In addition I would like to say a word about the meeting on 1st October which you have established. I did not appear on the meeting because I did not receive the information about it on time. Official letter which you have sent has been delivered to my flat around 2 pm at 1st of October. I believe that post office is not the fastest way to send information and I would like to be informed about the meetings like that via email or phone. I received the information from Paul Agg that he received information about that meeting via email. Why didn't you inform me about that meeting by email too?".

69. Ms. Tierney responded to the claimant's letter by email on 9 October 2019 (page 160-1) and posted the same to the claimant. In that letter Ms. Tierney disputed that the claimant had informed her at the meeting on 6 September 2019 about a specialist appointment on 16 December 2019. She stated *"From your letter you haven't stated so I am unsure what your desired outcome is regarding your employment if you are wishing to revoke your resignation and return to work can you please write to me in the before 15/10/19 to confirm. If it is that you wish to resign then I wish you all the best and every success for the future".* Miss. Tierney sent a copy to Mr. Agg on the same date (p.161A). The Tribunal did not find the phrase used by the respondent *"revoke your resignation"* was intelligible to an employee of the respondent and in particular an employee who's first language is not English. In any event any reasonable employer would have understood by the claimant's attendance at the business on 9 October 2019 with an accompanying letter and fit note that the claimant intended that she remained an employee.

70. A further meeting to discuss the grievance outcome (re-investigated) took place on 17 October 2019 with the claimant, Mr. Agg, Ms. Tierney and two friends translated for the claimant at different points of the meeting. The claimant was presented with the outcome letter (pages 162-165) and was given time to read it. Ms. Tierney's conclusions were that Orville may not have conducted himself in the best manner. She determined that his conduct greatly improved in April 2019 under the management of Kevin. She was not convinced he was a bully or aggressive; she felt his frustrations came out in mannerisms which were unacceptable to the company. She stated that she did not consider Orville's conduct was bullying but could be considered to be unreasonable behaviour. The claimant was given a right of appeal. In the meeting Mr. Agg raised that the claimant had not set out all the evidence and provided it to the respondent. The claimant stated that the doctor does not know what's up with her hand and she had an appointment on 16 December 2019. After that she will know if she can

return to work. Ms. Tierney said on 20 September 2019 meeting the claimant had not told the respondent about the appointment. The claimant stated her doctor had said she cannot do light duties. Ms. Tierney said that this was different to what the clamant said on 20 September 2019. The claimant said she didn't know until she had the sicknote dated 9 October 2019. The claimant said she wanted to return to work with Orville *"as Orville had changed"*. Bearing in mind the very serious allegations made by the claimant against Orville the Tribunal were very surprised by these comments made by the claimant.

71. The claimant received her P45 on 19 October 2019. It was dated 15 October 2019 and showed a leaving date of 7 October 2019. On 24 October 2019 (page 172) the claimant emailed Ms. Tierney requesting to appeal the decision about dismissing her from the workplace. She was currently on a sick note but she had now received her P45 and she wanted to know the reason for dismissing her.

72. By email dated 24 October 2019 Miss. Tierney attached all correspondence between the claimant and her from 7 to 9 October 2019. Ms. Tierney referred to her letter dated 9 October 2019 and that she had asked the claimant to confirm in writing before 15 October 2019 whether the claimant wished to revoke her resignation or stand by it and the claimant did not. She stated at the grievance meeting the claimant did not say anything in respect of the letters. Ms. Tierney stated that the claimant was too late.

73. On 16 December 2019 (page 173) the representative of the claimant wrote to Mr. Agg and requested him to provide the full copy of the claimant's file, including the notes he took during the meeting on 17 October 2019 in line with the Data protection Act 1998. Mr. Agg responded on 23 December 2019 stating that he was not prepared to share his notes as they belong to the Unite branch. He stated official notes were taken by the respondent, the claimant had been provided with copies and he was unaware that the claimant had made any complaint that they were inaccurate. The claimant's representative followed this up with further communication to Mr. Agg on 2 January 2020 and 13 January 2020 which was not responded to. The claimant invited the Tribunal to find that Mr. Agg was unreliable and not impartial. The Tribunal found that Mr. Agg was following the process he perceived was correct by not forwarding branch "owned" notes and that he was in fact unsympathetic to the claimant having formed the opinion that the claimant was not working with him to seek a resolution to her work issues and that the claimant's perceived issues with her employer were without merit.

Submissions

74. The Employment Tribunal was greatly assisted by the written submissions provided by the parties which were supplemented with oral submissions. The Tribunal do not replicate the detailed submissions here but provide a summary. In an agreed list of authorities the parties drew the Tribunal's attention to the

following cases; **Harrison v George Wimpey and Co. Limited (1972) ITR 188, Robert Whiting Designs Limited v Lamb (1978) ICR 89; Nelson v BBC (No. 2) (1980) ICR 110, London Transport Executive v Clarke (1981) ICR 355, Holier v Plysu Limited (1983) IRLR 260, Oram v Initial Contract Services Limited EAT 1279/98, SCA Packaging v Boyle (2009) 4 All ER 1181, Wilcox v Birmingham CAB Services Limited UKEAT/0293/10, EHRC Guidance on the Definition of disability 2011, Kelso v Department for Work and Pensions (UKEATS/0009/15), Secretary of State for Justice v Dunn EAT 0234/16, A Limited v Z (2020) ICR 199.** The Tribunal have considered these authorities in reaching its conclusions.

75. The respondent submitted that the respondent's witnesses were credible and reasonably conceded points. By contrast, it was submitted various factors cast serious doubts on the claimant's account of events and she was inconsistent. The respondent relied upon a number discrepancies including between the claimant's impact statement as to the level of her limitations and the records of the G.P.; her knowledge about informing her employer about overseas travel; the claimant's differing accounts about not attending work but ability to do light work; complaint about her colleague Orville but happiness to work with him; ignorance about having to submit a sick note contrasted with knowing she had to submit a sick note; alleged the respondent forged a document but did not raise this in September 2019. The respondent also relied upon Mr. Agg's evidence to the Tribunal, the trade union representative who gave evidence for the respondent at the trial and who stated that the claimant was *"constantly moving the goal posts"* and it was "clear Ms. Betcher was not *"interested in returning to work."* The Tribunal was invited to accept that the claimant's lack of English was not a barrier faced by the claimant in understanding her rights and obligations at work taking into account she had worked for the respondent for over two years, raised two grievances; obtained sick notes from her G.P. contacted and joined a trade union for advice and representation; met two different officers of the trade union (Mr. Agg and Ms. Harding); attended four meetings with her employer between June and October 2019; started ACAS early conciliation process on 9 October 2019, complained to the respondent she had been dismissed and appealed against the dismissal and attended NHS consultant appointments.

76. The respondent submitted that an employer's acceptance of any employee's repudiatory breach of contract may amount to a resignation or a dismissal depending on the circumstances. In short where a worker commits a fundamental breach of contract and does not claim to be entitled to resume work she will have repudiated the contract and no question of a dismissal will arise; the repudiation is accepted by the employer not taking any action to affirm her contract. Where a worker commits a repudiatory breach and thereafter claims she is entitled to continue working, then her contract is terminated when the employer accepts her repudiation (e.g. by refusing to allow her to return to work.) The respondent relied on the case of **London Transport Executive v Clarke (1981) ICR 355.**

77. It is for the respondent to prove the reason for a dismissal. The employer merely needs to show that the reason is more than trivial or unworthy and that it could justify dismissal on the face of it; **Gilham v Kent County Council (No.2) (1985) ICR 233.** The reason for the dismissal is "the set of facts known to the

employer or it may be of beliefs held by him which cause him to dismiss the employee (**Abernethy v Mott, Hay and Anderson (1974) ICR 323**). Only of those facts or beliefs that the employer knew at the time of dismissal are relevant here (**W Devis & sons Limited v Atkins (1977) ICR 662**). It is sufficient at this stage of the analysis that the employer genuinely believed on reasonable grounds (even if wrong) that the employee was guilty of misconduct. The employer does not have to prove the offence (**Alidair Limited v Taylor (1978) ICR 445).**

78. In respect of contributory fault the respondent submitted that blameworthy conduct is not restricted to conduct amounting to a breach of contract or gross misconduct. It is enough that the conduct in question is perverse or foolish, bloody minded or foolish and the focus for the tribunal should be on what the employee did or failed to do not on the employer's assessment of how wrongful the employee's conduct was. There should be a causative link between the culpable actions of the employee and the dismissal and the Tribunal is entitled to take a broad view of how an employee's behaviour contributed to the dismissal. If an employer finds out after it has dismissed an employee that the employee was guilty of a fundamental breach of contract which would have justified summary dismissal the employer can rely on this to rebut a claim of wrongful dismissal.

79. The respondent disputed that the claimant could establish she was a disabled person. She did not suffer the alleged substantial adverse effect on her ability to carry out day to day activities; was not likely in October 2019 that it could have lasted until June 2020. Further it was disputed that the respondent had knowledge taking into account general assertions by the claimant that her hands/fingers hurt; there was minimal information about the claimant's condition. The information indicated that the claimant could return to work but chose not to. In respect of the section 15 claim, the respondent submitted that the statutory test requires the tribunal to address the question of whether the unfavourable treatment is because of something arising in consequence of disability; it does not have to be the sole reason but if must be more that a trivial reason. The claimant's dismissal was because of her unauthorised leave and not because of the claimant's sick leave.

80. It was submitted that Ms. Tierney's information at the time was that the claimant took unauthorised leave abroad, failed to follow the contractual sickness procedure and failed to attend a return to work meeting; the respondent assumed that the claimant had resigned and that any dismissal was for misconduct. For all these reasons the claimant contributed to her dismissal largely or wholly. In addition her letter dated 8 October 2019 indicated that she was on sick leave because she did not agree with the options to return to work; she did not need to obtain a GP sick not to cover the absence and she did not propose to return to work until such time as a medical professional might say work caused her hand pain. Further she was not wrongfully dismissed having breached the terms and conditions of her employment by being absent from work without permission or any notification of the respondent and breached the duty of mutual trust and confidence by stating she was unfit for work and went on a foreign holiday whilst on sick leave.

81. The claimant submitted that she was dismissed unfairly both substantively and procedurally. Further she submitted that she was discriminated against because

of something arising from her disability. The claimant submitted that Mr. Agg, the claimant's trade union representative was an unreliable witness; he had failed to take proper notes of the meetings he attended with the claimant and refused the claimant's solicitor's request to provide documentation in his possession.

82. Further it was submitted that the relevant time for the purposes of disability was October 2019 when the claimant's employment ended. The claimant's medical notes mentioned rheumatoid arthritis and severe bilateral hand pain and swelling causing difficulty working. She relied upon the claimant's evidence that she was suffering from severe pain in her hands, inability to sleep because of the pain, unable to hold a glass of water or make a fist, dropping items and inability to hoover, do laundry, wash dishes or her hair, carry shopping, hold a knife or fork or even write. She needed pain and anti-inflammatory medication before she was able to do basic activities. The claimant was unable to work from 21 June 2019. It was a long-term condition because she reported pain to her G.P. on 4 July 2019 and remained sick until the end of her employment in mid-October 2019. The claimant is still suffering. In any event it was submitted "it could well happen" applying **SCA Packaging v Boyle and EHRC (2009) IRLR 746** and the 2011 Guidance on the definition of disability. It was further submitted that the claimant could be considered to have a progressive condition pursuant to paragraphs B18 and 19 of the guidance taking into account the reference to inflammatory arthritis on 4 July 2019.

83. The claimant submitted that the respondent had actual or constructive knowledge of the claimant's disability. According to her sick notes the claimant was suffering from pain in the joint arthralgia on 4 July 2019, joint pain and severe bilateral hand pain and swelling causing difficulty working and this last one was submitted to the respondent on 9 October 2019. It was submitted that the respondent should have known that the claimant was disabled by this date. The claimant submitted that the respondent had not done what it was reasonably expected to do to find out whether the claimant was disabled by referring her to occupational health or make enquiries with the claimant's G.P. By 15 October 2019 the claimant had been off sick from work for 4 months. The claimant referred the Tribunal to a number of paragraphs in the "Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011" in her detailed submissions.

84. In respect of the respondent's knowledge the claimant submitted that it was evidently clear that the claimant was suffering from a serious condition by reason of her sickness from work for four months from June; pain in joint arthralgia on 4 July 2019; joint pain and severe bilateral hand pain and swelling causing difficulty working (submitted to the respondent on 9 October 2019). It was submitted that the respondent did not refer the claimant to an occupational health specialist; did not make enquiries with the claimant's G.P., did not organise a welfare meeting to discuss the claimant's health. It was submitted that if the respondent has made appropriate enquiries as late as 15 October 2019 it would have found that the claimant had been off sick for 4 months, had undergone an xray; suffering from a severe level of pain, swelling and tenderness, found it even harder to make a fist, finger movements were restricted, symptoms worsened and she suffered from a progressive condition. The entry on 4 July 2019 (page 215) states the claimant may be suffering from

inflammatory arthritis. It was submitted at the very least the respondent could have been reasonably expected to know that the claimant was a disabled person and the respondent did not do all they can reasonably be expected to do to find out if the claimant had a disability.

85. In respect of the dismissal the claimant submitted that the claimant genuinely did not believe that a delay with the submission of her sick note would have caused a problem. It was a bizarre assumption to consider that the claimant had resigned and it was submitted the respondent wanted to end the claimant's employment. Any objective person reading the claimant's letter submitted on 9 October would see that the claimant did not resign and wished to remain employed by the respondent. During the meeting on 17 October 2019 the claimant raised that she had another meeting with her doctor in December 2019; this was ignored by the respondent. Upon receipt of the P45 the claimant appealed to Ms. Tierney on 24 October 2019. Ms. Tierney could have easily reversed the P45 and agreed for the claimant to re-commence her employment but she said it was too late.

86. It was submitted that the respondent dismissed the claimant. It fell outside the range of reasonable responses because the respondent knew or should have reasonably been aware that she would submit another sick note, the respondent failed to contact the claimant between 1 and 7 October and she had submitted sick notes with a delay on two previous occasions and there had been no suggestion by the respondent that the claimant had failed to follow reporting procedures.

87. In respect of the discrimination arising from disability it was submitted that it was highly unlikely that the respondent's actions were a result of genuine innocent miscommunication. The respondent made minimal effort to resolve the situation. The claimant was unable to work because of her disability from June 2019 and it was submitted that the respondent dismissed (so treated her unfavourably) because of her disability related absence. Further it was submitted that the respondent has not produced any evidence in respect of a justification defence.

Conclusions

88. The claimant bears the burden of proof of establishing that she was a disabled person at the material time. The claimant relies upon the impairment of "rheumatoid arthritis and severe bilateral hand pain and swelling causing difficulty working" in October 2019 (the relevant time).

Disability

89. The claimant stated in her disability impact statement (page 57-59) that she has been suffering from severe joint pain. Her doctor has suggested that she may be suffering from "seronegative inflammatory arthritis" a type of rheumatoid arthritis. The claimant described suffering from early morning stiffness for about one hour, swelling in her joints of both hands and left wrist. She stated she can not make a fist and she struggles with gripping and have a restricted range of motion of these joints. The claimant described experiencing pain during any physical activity involving her hands which means she cannot undertake the simplest of chores. She described difficulty in holding items and dropping them. She said she is unable to clean, hoover, cook, do laundry, carry items, wash the

dishes, wash my chair, hold the knife and fork when eating or event write. The claimant described an inability to function without painkillers. She takes nonsteroidal anti-inflammatory drugs but her doctor is considering prescribing her with immunosuppressive medication.

90. On 30 July 2019 the claimant was referred to a clinic in respect of early arthritis. The claimant attended an appointment at the rheumatology clinic. She underwent an x ray in August 2019. The Tribunal notes that this was normal (page 211). On 6 September 2019 her G.P. noted on examination left knuckle and index finger swollen. On examination on 16 December 2019 with a Consultant Rheumatologist there was tenderness noted at the right PIP joints, 2nd to 5th on both sides and on the right MCP, 2nd to 3rd and left MCP 4th to 5th joints, left wrist tenderness and minor swelling. She also had an ultrasound in January 2020. This revealed no active synovitis and no evidence of tenosynovitis in the left hand or wrist or the right middle finger and no effusion. At an examination with Consultant Rhemuatologist on 14 September 2020, there was some tenderess at some PIP joints and left wrist with restricted range of motion of these joints. At this time a prescription for naproxen and omeprazole was provided to the claimant. In a letter dated 20 April 2021, the Consultant Rhemuatologist stated that the claimant's MRI scan of the left wrist showed possible features of "ulnar impaction syndrome and partial tear of the scapholunate ligament with sprained".

91. The Tribunal finds that the claimant did not establish that she was disabled within the meaning of section 6 of the Equality Act 2010 at the relevant time in October 2019. At present there is no clear diagnosis but that is no bar to establishing a disability under the Equality Act 2010 because the focus for the tribunal must be whether the claimant has an impairment and whether the impairment has a more than minor effect on normal day to day activities. The tribunal is mindful it must discount any treatment such as painkillers taken by the claimant in considering these matters.

92. Fundamentally the Tribunal was wholly disatisfied with the credibility of the claimant. The Tribunal has set out its findings about this above. Much of the claimant's reported symptoms are based on her evidence and complaints. The objective medical observations of the treating doctors indicates the x ray in August 2019 was normal. There was some swelling noted to the left knuckle and index finger in September 2019. In October 2019 at page 159 the doctor has recorded on the fit note "severe bilateral hand pain and swelling causing difficulty working- being investigated by hospital." This is in the context that the claimant had travelled to Poland and managed to grip her wheelie trolley to and from the plane. In December 2019 there was some tenderness at the right PIP joints including wrist tenderness and minor swelling. In January 2020 there were no inflammatory features. A report dated 20 April 2021 (page 256) indicates that there were features possibly suggestive of ulnar impaction syndrome/partial tear of the scapholunate ligament with sprained. However, the Tribunal cannot be satisfied, on the basis that it finds the claimant not to be credible, that her description of her incapacity, namely the effects on normal

day to day activities focusing on what she cannot do and can do with difficulty is correct. The Tribunal disregard the medication in considering whether the claimant's symptoms were more than minor but are still left with the predicament that the claimant's evidence is unsatisfactory and not credible.

93. The Tribunal is not satisfied on the balance of probabilities that the claimant was disabled at the material time.

Knowledge of disability

94. In the alternative and if the Tribunal is incorrect on this conclusion and it is assumed that the claimant was disabled at the material time within the meaning of section 6 of the Equality Act 2010, the Tribunal considers whether the respondent did have actual knowledge or constructive knowledge of the claimant's disability.

95. The fit notes produced by the claimant indicated an ever changing picture. On 4 July 2019 the fit note states *"pain in joint arthralgia";* the fit note dated 29 July 2021 states *"joint pain; work related stress';* the fit noted dated 6 September 2019 states *"joint pain"* and the latest fit note dated 9 October 2019 says *"severe bilateral hand pain and swelling causing difficulty working -being investigated".* These notes are inconsistent with the claimant's own evidence about what she was able to do. On the one hand the fit notes state that the claimant was unable to work. However, on 20 September 2019 the claimant was indicating she would do light work in the bacon room (page 133). If she did not obtain the job she wanted she would remain on sick (page 134). The claimant's case has been inconsistent as to whether she was fit for any work. With this background and the fact that the claimant was able to take a flight whilst on sick leave, the Tribunal finds that the respondent could not have actually known or ought to have known that when the claimant presented her fit note dated 9 October 2019 that "it may well happen" that her condition could last 12 months. The Tribunal rejects the suggestion that the respondent could have found out more had it liaised with the claimant's doctors or sent her to occupational health. The doctors were unclear as to the claimant's problems and the claimant was reluctant for occupational health to be involved when Mr. Agg raised this at the meeting on 20 September 2019. The respondent could not have had actual knowledge or constructive knowledge of the alleged disability.

Resignation or Dismissal

96. The tribunal finds that the claimant did not resign by way of her actions of going on holiday during sick leave and failing to provide an up-to-date fit note. The tribunal do not find looking at all the circumstances that this is sufficient to establish the claimant resigned by her actions.
97. The Tribunal notes that the claimant contacted her employer on 8 October 2019 and returned to the workplace on 9 October with a letter and fit note; this indicates by her actions that this claimant did not resign but it was her intention she remained in employment. These actions the Tribunal find a reasonable employer would have concluded the claimant had not resigned but was

indicating her intention to remain in employment with the respondent. However, by acting in this way she did act in repudiatory breach of her contract.

98. There is a requirement upon the claimant pursuant to her terms and conditions to comply with absence reporting procedures (see page 64). A failure to do so amounts to a breach of contract because it is "unauthorised leave."

99. The claimant has sought to suggest that the claimant's failure to provide a sick note on time had not been an issue on previous occasions. The Tribunal was directed to the sick notes dated 4 July (page 111) covering absence from 21 June; but the claimant was not required to have a sick note for the first 7 days (see page 64). The claimant provided a sick note dated 6 September 2019 (page 123) for the period from 31 August 2019 but this was following a meeting on 6 August 2019 when the claimant had informed the respondent she was awaiting the results from a scan and this would be considered at the meeting on 6 September 2019 (page 122). At the meeting on 20 September 2019 the respondent with the claimant's agreement was looking for alternative work to facilitate a return to work. The claimant was asked to consider working with chicken and small joints at the sister company; the claimant had stated she "*will go on sick so she can think about what she wants to do."* The Tribunal finds that this did not reasonably indicate to the respondent that the claimant was unfit for all work. The Tribunal finds that this event gives a different context to a failure to provide a sick note on or by 30 September 2019.
100. In breach of the respondent's procedure, the claimant took unauthorised leave when she failed to provide a fit note on or by 30 September 2019. Due to the fact that the claimant was in Poland she was not present in the U.K. to either receive the invitation to a further meeting or attend on 1 October 2019.
101. The further letter to the claimant dated 9 October 2019 (page 160-1) from the respondent requesting the claimant to confirm whether she had revoked her resignation was unnecessary. The claimant had already confirmed by her actions on 9 October 2019 and submission of a sick note for the period that she was not resigning her employment. The terminology of *"revoke your resignation"* was unusual in the circumstances and the fact that the claimant's first language is not English was unhelpful.
102. At the meeting on 17 October 2019 there was little discussion about the alleged resignation or any misconduct by the claimant. The Tribunal considers that this is because the respondent had already made up its mind that the claimant's employment would be terminated because she had taken unauthorised leave in breach of her terms and conditions.
103. The respondent's reason for dismissal was principally the fact that the claimant has been absent without leave. She had indicated at the meeting on 6 September 2019 she would stay off work on the sick until she can think about what she wants to do. This did not reasonably indicate that the claimant was unfit for all work. It was imperative by 30 September 2019 for the claimant to indicate to the respondent the state of her health. The respondent was looking for work alternatives for the claimant. The claimant failed to do provide an upto date fit note but instead took a flight and failed to communicate with her employer. The Tribunal finds that the respondent decided to dismiss the claimant on 15 October 2019 when it accepted her repudiatory breach of

contract and sent the P45 to the claimant. The claimant was also aware of the policy of not travelling abroad without the permission of the respondent. She had followed the procedure before.

104. The dismissal was procedurally unfair. The respondent failed to follow any process of investigation, hold a disciplinary hearing or in fact comply with the steps set out in the ACAS Code of Practice concerning disciplinary hearings. The substance of the meeting on 17 October 2019 was to discuss the outcome of the re-investigated grievance (page 162-3). The dismissal was procedurally unfair.

105. However, by failing to comply with the sickness reporting procedures and failing to keep her employer informed she had travelled abroad the claimant contributed to her dismissal. The Tribunal considers in all the circumstances that the claimant was guilty of blameworthy conduct; she was fully aware of the processes and had a blatant disregard for them; she was completely to blame and deducts 100%.
106. In respect of the claimant's discrimination arising from disability. The Tribunal have already found that the claimant was not disabled within the meaning of section 6 of the Equality Act 2010. Alternatively, if the Tribunal is incorrect about this and the claimant was disabled and if the respondent could have been aware of the alleged disability, the Tribunal finds that the respondent dismissed the claimant because she had acted in breach of the policy. The policy is clear the burden rests upon an employee to report her sickness to the employer and to submit fit notes. She was dismissed for this misconduct. The Tribunal find it unnecessary to consider justification in the circumstances.
107. In all the circumstances the claimant's claim of discrimination arising from disability is dismissed.
108. In all the circumstances the Tribunal finds that the claimant acted in repudiatory breach by failing to keep her employer informed about her sickness and submit sick notes, this amounted to gross misconduct. She was dismissed for this gross misconduct. The claim for wrongful dismissal fails.

Employment Judge on 04.08.2021

Sent to the parties on 10.08.2021

For the Tribunal: Jelena Trifonova

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