EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss M Rzeszotek	**v**	**Poundland Limited**

Heard at: **Cambridge ET** **On**: **21, 22, 23 & 24 August 2017**

Before: **Employment Judge K J Palmer**

Members: **Mrs C Smith and Mrs Ann Carvell**

Appearances

For the Claimant: Miss M Wisniewska (lay representative)

For the Respondent: Miss J Price (trainee solicitor)

Interpreter : Mrs Tindal – Language : Polish

RESERVED JUDGMENT

It is the unanimous Judgment of this Tribunal that:

1. The Claimant's claim for unfair dismissal succeeds
2. The Claimant's claim in race discrimination fails
3. The Claimant's claim in disability discrimination fails
4. The Claimant's claim for wrongful dismissal fails.

REASONS

1. The Claimant pursued a variety of claims before this Tribunal in a four day hearing at Cambridge Employment Tribunal from 21 - 24 August inclusive.
2. The claims and the issues had been set out by Employment Judge Adamson at a preliminary hearing which took place on 24 February 2017.

3. By way of summary the claims which are before this Tribunal are:

    1. A claim for unfair dismissal under Section 98 of the Employment Rights Act 1996.

    2. A claim in direct race discrimination under Sections 13 and 39 of the Equality Act 2010. The less favourable treatment claimed is the dismissal.

    3. Discrimination arising from a disability contrary to Sections 15 and 39 of the Equality Act 2010. The unfavourable treatment claimed is dismissal. The matters arising from the Claimant's disability which the Claimant asserts resulted in her dismissal was that she took time off work to obtain treatment for her disability.

    4. Breach of contract or wrongful dismissal pursuant to the Respondent's failure to give the Claimant notice of dismissal or pay monies in lieu of notice.

4. The Claimant is Polish. The hearing was conducted throughout with a Polish interpreter provided by the Tribunal, a Mrs Tindal.

5. With reference to the Claimant's claim in disability discrimination the disability is disputed. The Claimant's claimed disability is stated to be depression.

6. The Claimant's claim in race discrimination is based on the use of a hypothetical comparator being British, Rumanian or Hungarian.

7. Judge Adamson made certain Orders at the preliminary hearing, some of them specifically to deal with the issue of the Claimant's disability. These involved the Claimant preparing a schedule in date order of all the matters she relied upon to establish that the Respondent knew or ought to have known of her disability and to provide all relevant copies of all medical records in her possession, power and control relevant to the question of her disability. There was then an order for disclosure generally on 26 May and an order that by 16 June a single agreed bundle should be compiled. The Respondent agreed to be responsible for the carriage of that bundle

8. Judge Adamson finished the preliminary hearing by indicating that the matter should be set down for four days for this hearing.

9. The Tribunal decided to read documents with a view to starting the Tribunal at 11 a.m.

10. Before the Tribunal got underway proper Miss Wisniewska made an application to introduce additional documents before the Tribunal which had previously not been disclosed and were therefore not in the bundle. These documents consisted of print outs of text messages sent by the Claimant to various colleagues at the Respondent. It was Miss Wisniewska's submission that these were crucial to the Claimant's claim in demonstrating that she contacted the Respondent concerning her sickness absence.

11. Miss Price on behalf of the Respondent objected to their inclusion arguing that the extracts produced were fragmented and did not give a full picture of likely communications between the Claimant and her colleague.

12. The Tribunal retired briefly to discuss the application to include further documents. The Tribunal must bear in mind the overriding objective set out in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. On balance the Tribunal took the view that there was little prejudice to the Respondent in allowing these documents in and that on the question of relevance we were persuaded by Miss Wisniewska that they should be allowed into the bundle. We therefore added them. They are marked C1.

13. An attempt was made to proceed further but the mention of discrimination on the grounds of disability brought a further application from Miss Wisniewska. She said that there were at least 100 documents relating to the issue of the Claimant's disability which she had sent to the Respondent in accordance with the Order of Judge Adamson but that the Respondent had not included those documents in the bundle. When questioned Miss Wisniewska admitted that she had realized over a month before the commencement of the Tribunal that these key documents were not included in the bundle but had not brought it to the Respondent's attention.

14. Miss Price argued that no further documents should be allowed into the bundle at what was beyond the 11th hour. She argued that they had not been produced and that it was not appropriate to produce them during the hearing as it was hugely prejudicial to the Respondent who she claimed had not seen them and could not take instructions on them.

15. The Tribunal retired to consider Miss Wisniewska's application. After 20 minutes the Tribunal concluded that it was not prepared to allow further documents to be included in the bundle to be before the Tribunal at the hearing at this late stage. The hearing was supposed to start some 1 hour 45 minutes ago and Miss Wisniewska had only just raised this issue. She had known that the documents to which she said she sought to rely upon had been missing from the bundle for some considerable time but had chosen to do nothing about it until during the hearing.

16. Having regard to the overriding objective and the necessity to be fair to both parties the Tribunal concluded that it rejected Miss Wisniewska's application and would not allow further documents to be included at this stage. Miss Wisniewska and the Claimant would have to proceed on the basis of those documents currently in the Tribunal bundle.

17. The Tribunal heard evidence during the course of the hearing from Miss Moldovan, a store manager at the Respondent and Darren Robinson, area sales manager at the Respondent. In support of the Claimant's claims the Tribunal heard evidence from the Claimant and from a Sebastian Lis, a friend of the Claimant.

Findings of Fact

18. The Claimant started working for the Respondent as a sales assistant originally for a company known as 99p Stores on 13 August 2007. In or about March/April 2016 99p Store was bought by Poundland Limited, the Claimant's employment was transferred to Poundland Limited. There was before the Tribunal a sickness absence policy which was a Poundland sickness absence policy.

19. That sickness absence policy makes it clear that communicating absence by text or sending a message via a colleague is not acceptable. It also makes it clear that only sickness certificates from within the United Kingdom are acceptable.

20. In evidence the Claimant disputes that she ever saw this sickness absence policy. When cross examined by Miss Price about it in due course she did concede that it was possible that it had been pinned up on the noticeboard next to the office as Miss Moldovan indicated in her evidence. However she said she had never considered looking at it.

21. The sequence of events which led to the Claimant's dismissal and subsequently these proceedings essentially commenced in or about April 2016 when the Claimant requested from her line manager, Miss Moldovan that she wished to take holiday between 16 May 2016 and 2 June 2016. The reason was that she wished to travel to Poland for an important family event. Unfortunately, at the time of the request another sales assistant had already booked a similar period of time and it was not possible for the Claimant's holiday request to be granted.

22. To be clear, the Claimant had asked for holiday from 16 May to 2 June but she had flights booked to Poland on 17 May for the family event. Instead however the Claimant went off sick and still went to Poland, she says to get treatment for her illness. She says she suffers from depression and this started some years ago. When cross examined by Miss Price she said that she could not get the same medication in the UK which is why she went back to Poland for treatment.

23. She informed or purported to inform her employers of her absence by text message on 10 May 2016 to Airvas, a work colleague who the Claimant believed was a supervisor and indeed who certainly had acted as such previously. She did not comply with the Respondent's sickness absence policy which she said she had not seen but accepted that she may have had the opportunity to see it. She was cross examined on the text exchanges with Airvas, the first of which was at 12.34 which the Tribunal considers was rather late in the day for her to be sending a message indicating she could not attend when her shift had already started.

24. Under cross examination she was uncertain in her evidence and it is the Tribunal's view that she was not entirely credible. The text messages, in particular those on 10 May, are not entirely clear. The Claimant sent a letter dated 12 May to the Respondent which she says was addressed to the

store manager. The Respondent is of the view that it was backdated and posted at a later date. Miss Moldovan in her evidence suggested that the letter was not received until 14 May albeit the Claimant under cross examination said she had posted it on 12 May. It refers to personal problems and health and uses the word 'depression' and refers to the necessity of her visiting her doctor in Poland. She goes on to say that the period of illness will be indefinite.

25. On her own evidence she did then not contact her employers again until 20 May.

26. No medical certificate was provided for the Claimant's absence from 10 May to 17 May and the first certificate received was received in June and was a translation from a Polish certificate and ran from 18 May to 25 May citing the reason for absence as "because of illness". The Tribunal had a copy of this document in the bundle. This of course was also not in accordance with the sickness absence policy which clearly stated that sickness certificates were only acceptable from UK doctors.

27. A further translated medical certificate was provided which again cited the absence as being "because of illness". This was stated to run from 26 June to 13 June 2016 which of course makes no sense but it is common ground that in fact the translated copy had a typo in it. Significantly, depression was not at any stage mentioned.

28. We heard evidence from Miss Moldovan that she tried to call the Claimant on several occasions but did not get an answer and could not leave a message. On 22 June Miss Moldovan wrote to the Claimant at 182 Gladstone Road, Northampton inviting her to a welfare meeting at 11 a.m. on 27 June. The letter states that the purpose of the meeting is to explore the Claimant's absence in further detail and to ascertain when she would be in a position to return to work.

29. Under cross examination it is worth mentioning that the Claimant accepted that it did look like an enormous coincidence that having requested holiday to attend a family function which was refused she went off sick at or about the same time and still travelled to Poland and attended the family function.

30. The Tribunal did not find her evidence in this respect entirely credible or believable and considers that on the balance of probabilities it was likely that this was not a coincidence and that the Claimant had decided that whatever happened she was going to Poland. She accepted that she attended the family function and was not too ill to do so.

31. Under cross examination the Claimant accepted that she had taken until 18 May to try and book an appointment with her Polish doctor who saw her out of hours. That means that she waited until she got to Poland to attempt to book an appointment with him albeit that she had gone off sick on 10 May and written to the Respondent under cover of a letter dated 12 May, she knew that she needed to see her Polish doctor as soon as she got there yet she waited until she arrived before making that appointment.

32. Her explanation for this was that she wasn't sure whether she was going to Poland until the last minute albeit that she already had flights booked from some time earlier. The Tribunal does not accept this as a credible explanation.

33. She saw her Polish doctor on 18 May and 25 May. She said in between she was in bed watching television. She also accepted that there was a 6 day delay between her last text to Airvas and her next contact with her employers on 20 May. She said that the 6 day delay was because of the cost of contacting her employers and also that she didn't feel well enough to do so. When closely questioned, once again her explanation was uncertain.

34. Whilst in Poland the Claimant sprained her ankle. Her evidence is that she was due to fly back on 28 May but stayed longer. It was her right ankle and she said she was seen by a doctor on 31 May. Her mother took her to an emergency unit at the Hospital. The Tribunal had before it a translation of a document from Polish purportedly issued on 31 May which cited as a diagnosis 'a foot sprain in the lisfranc joint. It goes on to say that after torsion trauma of the right foot the foot was stable and the tendons were efficient. The Claimant did not have the Polish original certificate.

35. The Claimant was then referred to page 92 of the bundle which was essentially her letter of appeal against her subsequent dismissal wherein the 3rd paragraph she refers to her injury in Poland to her ankle as a "fractured leg". She accepted that that was wrong. Further at page 56 the translated medical certificate covering absence from work from 1 June to 3 July does not mention the foot injury at all. The Claimant said she could not explain that, she was not a doctor.

36. The sick note covering the Claimant's absence from 26 June to 13 June (page 50 in the bundle) and others was not sent by the Claimant to her employers until approximately the middle of July. A friend of the Claimant delivered one certificate covering the period from 1 June to 3 July but this was not until mid-July. The Claimant's evidence on this was uncertain but what was clear was that she had only contacted her employer sporadically with large gaps between her contact and large periods of time when her employer did not know what was happening and no medical certificates had been sent to cover periods of absence. She did not contact her employer between 20 May and 20 June and could not provide an explanation for why she had not picked up the telephone between that period and spoken to her line manager.

37. The Claimant did attend at work on 13 July and handed over a translated medical certificate purportedly signing her off work until 31 August. It was explained to her that this was not valid as it was not a UK certificate. She was asked to seek an appropriate UK certificate by Miss Moldovan in a telephone conversation 3 days later.

38. The Claimant had returned to the UK on 6 July. When cross questioned she agreed that she had been signed off until 3 July but having returned on 6 July but she did not contact her employer straight away. She knew that her

employer only had a sick note covering her to 3 July and that it had expired. Albeit she had a further sick note but she had not given this to her employer yet. There seems little excuse for her failure to contact them until after she had received the letter of 7 July from her employer complaining that she had not provided appropriate sick certificates to cover periods of absence before she contacted them.

39. Her only explanation of this was that she was tired and needed to rest upon her return.

40. On 28 July Miss Moldovan wrote to the Claimant at 182 Gladstone Road explaining that correct reporting procedures in terms of the Claimant's absence had not been followed and invited her to contact her line manager by no later than 12 p.m. on Thursday 4 August 2016. The letter stated that if she did not comply with this request and they did not hear from her then she would be invited to attend a disciplinary hearing on a formal basis thereafter.

41. The Claimant did not comply with that request and accordingly Miss Moldovan wrote to the Claimant on 11 August inviting her to a disciplinary hearing in respect of her persistent unauthorised absence and her failure to respond to the letter of 28 July. The letter sets out all the usual parameters prior to a disciplinary hearing including giving the Claimant the right to be accompanied and explaining that the matter the subject of the disciplinary procedure is very serious and may amount to gross misconduct and the Claimant's dismissal.

42. The disciplinary hearing was fixed for Monday 15 August at 11 a.m.

43. The Claimant failed to attend at the disciplinary hearing and it was conducted in her absence resulting in her dismissal for gross misconduct. It was a summary dismissal.

44. It is the Claimant's evidence that she did not receive the letter of 28 July or the letter of 11 August and could not have responded to either.

45. A letter was sent to 182 Gladstone Road on 22 August notifying the Claimant of her dismissal.

46. The Claimant accepts that she received this letter on or about 22 August or shortly thereafter as her friend Sebastian Lis from whom we did hear evidence was wont to attend her former home at 182 Gladstone Road and collect mail. It was at that point the Claimant said she saw the letter of 11 August but in her evidence she did not refer to the letter of 28 July.

47. It is the Claimant's case that she moved out of 182 Gladstone Road on 25 July and was homeless until 5 August. She stayed with friends and had no permanent address between that period. At that point she signed a tenancy agreement at her new address on 4 August, such tenancy to run for 6 months from 5 August. However, she chose not to inform her employers that she had moved to that new address until she sent her letter of appeal at page 92 dated 26 August. This was the first time that she had had any

contact with her employer since a telephone call with Miss Moldovan on 16 July.

48. The Claimant accepts that she should have informed her employer of her new address somewhat sooner.

49. The telephone conversation on 16 July, some 3 days after the Claimant visited the office of her employer is significant. The Claimant says that she informed Miss Moldovan at that time that she was being evicted from her property and would be moving.

50. When cross examined by Miss Price she was very uncertain about what she claims she said to Miss Moldovan about her moving. She argued that she made it clear to Miss Moldovan that she was being evicted and would be moving out on 25 July.

51. In her evidence under cross examination Miss Moldovan agreed that she spoke to the Claimant on 16 July but it was to tell her that the certificate she had lodged on 13 July was unacceptable as it was not properly translated and was not from a UK GP. Miss Moldovan when questioned said that she agreed that the Claimant had over the telephone said she was looking for a new place to live but did not mention any specific dates about when she might move out. She accepts that the Claimant did ask for a property reference.

52. We heard evidence from Sebastian Lis who indicated that he was present when the phone call took place and in his witness statement he says he heard the Claimant tell Miss Moldovan that she had to move out on 25 July. However, under cross examination he was very uncertain about that. He was very uncertain about the telephone call and couldn't remember who called who.

53. He said that the phone was on loudspeaker from the start but when pressed said that he really couldn't remember the whole conversation and that he didn't hear Miss Molvovan speak. The Tribunal do not regard his evidence as helpful.

54. Even if it was mentioned to Miss Moldovan it is the Claimant's responsibility to formally inform her employers of a change of address. She conspicuously failed to do this when she moved out on 25 July and didn't even do it when she found new accommodation on 5 August. She did not tell her employer about her new address until her letter of 26 August, after she had been dismissed and some four days after she had known about her dismissal.

55. The Tribunal was not impressed with the Claimant's evidence on this issue. At one point under cross examination she said that she only received ultimately the letters dated 11 August and 22 August because her friend Sebastian would attend at her old address and collect the post. She said that for some reason her former landlord she believed was withholding post from her and may even have destroyed the letter of 28 July. Her evidence

was uncertain and at one point she admitted that she hadn't attended at her old premises to seek any post because it was too much effort.

56. Moreover, she could not answer Miss Price's questions about why she did not immediately contact her employers when she saw the letter of dismissal dated 22 August and explain that she had not seen the letter inviting her to a disciplinary hearing and that she had specifically told Miss Moldovan that she was moving out of her premises on 25 July. She mentioned this in her appeal letter of 28 August.

57. All in all her evidence was uncertain and where there is a dispute on the evidence we prefer the evidence of Miss Moldovan.

58. Even when she eventually told her employers that she had moved she supplied them with an inaccurate address. She had actually moved to 129 Ruskin Road but her letter of appeal specified 126 Ruskin Road. Nothing turns on that but it is further indication of her lacklustre approach to keeping her employer informed.

59. The appeal was dealt with by Darren Robinson who is an area sales manager at the Respondent. We heard evidence from him.

60. He wrote to the Claimant on 14 September requesting certain further information in order to progress the appeal. He asked for all medical certificates, confirmation of flight details, that is, when the Claimant left the country to travel abroad and when she returned and evidence that she visited her GP on her return to the country. He asked for this information by no later than 21 September.

61. In an undated letter received by the Respondent on 30 September, some 9 days after she was requested to provide it, the Claimant provided certain documentation. Her evidence is that she didn't receive the letter of 14 September until close to the end of September, possibly because she had in her letter of 28 August given an inaccurate address, albeit that she said she then attended at the inaccurate address to retrieve her mail.

62. Nevertheless, in the letter received on 30 September the information provided was still incomplete. A further letter was sent to her on 5 October by an HR adviser, Pav Virak reiterating the request for confirmation of flight details and asking that these be submitted no later than 12 October. The letter goes on to say that in the absence of that information being received a decision will be taken on the basis of the information available to Mr Virak.

63. Subsequently on 20 October Mr Robinson wrote to the Claimant dismissing her appeal. In that letter he points out that not all the information requested was at any stage provided prior to the appeal being determined.

64. The lack of information led Mr Robinson to conclude that the Claimant had decided to take annual holiday to attend the family event despite such request being refused. He confirmed the original decision to dismiss.

65. The Claimant did not accept in cross examination that she hadn't provided all details requested albeit that she could not explain in evidence why it was the Respondent had not received details of her flights.

66. It is of significant interest that when the Claimant did eventually visit a GP in the UK, and we have some sympathy with her in that we understand the difficulty in arranging appointments, the doctor, Dr N Zafar referred only to the Claimant's absence due to her sprained ankle and did not refer to any other illness and certainly did not mention the word' 'depression'. It was the Claimant's evidence that she showed Dr Zafar all her sick notes but he confirmed he could not testify her absence due to depression as none of her translated Polish sick notes referred to it. Once again the Claimant was uncertain in the giving of this evidence and on a couple of occasions did contradict herself.

67. When cross-examined about the flight details the Claimant was once again uncertain and said that she thought she had deleted those details from the website but then went on to say that her sister had booked the tickets for her and therefore did not have access to the "Manage my account" facility on the airline website.

68. Under cross-examination the Claimant did become very tired and we as a Tribunal felt that it was appropriate for her to have a decent break before she continued. This took place. Even after the break the Claimant was very uncertain in her evidence about whether she sent the flight details prior to the appeal or whether she didn't.

The Respondent's disciplinary process

69. We are bound to say that we were extremely unimpressed by the Respondent's disciplinary process. We have no issue with the credibility of the evidence put before us by Miss Moldovan and Mr Robinson who answered all questions absolutely with clarity and in our view honesty.

70. However, it was most unusual for the Tribunal to have no contemporaneous notes before it of either the disciplinary hearing which of course did take place in the absence of the Claimant or the appeal. This is most unusual. There is no disciplinary policy of the Respondent before us and no appeal policy. In evidence it is clear no policy was adhered to.

71. Of even greater concern however was the evidence given to us by both Miss Moldovan and Mr Robinson as to who made the decision to dismiss.

72. Under cross examination Miss Moldovan said that there had been notes of the disciplinary and these had been sent to Human Resources. She also said that Alex Adams, a supervisor, was present at the time.

73. The hearing lasted 40 minutes. Under cross examination she accepted that all the letters that she had sent had been drafted by HR. It was clear that Miss Moldovan had sought extensive advice from HR, referred to as ER by the Respondent, and in particular had sought advice from someone in the

ER called Pav Virak. It was very clear to the Tribunal that in fact the decision had been taken not by Miss Moldovan but by Mr Virak. This was admitted by Miss Moldovan.

74. More concerning still was the fact that Mr Virak was involved in the appeal process. It was he who wrote the letter previously referred to dated 5 October seeking further information from the Claimant and it was he who specifically said he would take a decision based upon the information available to "him".

75. Mr Robinson also accepted that he had essentially sought Mr Virak's say so in coming to his conclusion upon the appeal.

76. Thus it is clear that neither the dismissing officer or the appeal officer made the decision and that the same ER officer was involved in making the decision both to dismiss and to confirm that dismissal on appeal.

77. Mr Robinson admitted that the outcome letter of 20 October had been written by Mr Virak and that he had simply signed it.

78. The fact that there were no notes before the Tribunal, we had no disciplinary policy or process in front of us which the Respondent had adhered to and it was clear that Mr Virak had made the decision both to dismiss and to confirm the dismissal is a huge failing on the part of the Respondent.

79. The Respondent is a very large company employing thousands of people in the United Kingdom and it is extraordinary that they should not have proper policies and procedures in place or indeed training for those staff who are charged with conducting disciplinary and appeal hearings.

Submissions

80. The Tribunal heard submissions both from Miss Wisniewska and from Miss Price.

81. Miss Wisniewska referred the Tribunal to section 98 of the Employment Rights Act and essentially outlined the **Burchell** test and the band or reasonable responses test. She went on to refer the Tribunal to section 15 and 39 of the Equality Act 2010 in respect of the Claimant's claim in disability discrimination and in respect of the Claimant's race discrimination claim, sections 13 and 39 of the Equality Act 2010. She indicated that the hypothetical comparator was a British, Rumanian or Hungarian person. On the question of the Respondent's knowledge of the Claimant's disability she referred us to pages 35 to 42 of the bundle which essentially was a letter dated 18 December 2009 being a grievance raised by Equinox Law on behalf of the Claimant and in particular the penultimate paragraph which refers to stress arising from the subject matter of the grievance causing the Claimant to suffer from depression.

82. She sought to rationalise and excuse the Claimant's behaviour in respect of her failures to inform the Respondent appropriately throughout her period of

sickness which led to her dismissal on the basis that the Claimant's cousin had had to have her leg amputated. The Claimant was facing eviction and her depression worsened.

83. Miss Wisniewska quoted from an NHS website on depression.

84. She reminded us that the Claimant had never seen the sickness absence policy and that the Respondent did not appear to have a disciplinary or appeal policy.

85. She pointed out that Miss Moldovan clearly had little experience of disciplinary process and that she had managed only one before. She pointed out that there were no notes of the disciplinary hearing and that Miss Moldovan was very uncertain in deciding or in giving evidence as to who had made the decision to dismiss.

86. She dealt with the change of Claimant's address and argued that it was not reasonable to invite the Claimant to a disciplinary hearing when she was off sick.

87. She pointed out there was no appeal hearing and therefore the Claimant had no real chance to put forward her argument. She argued that the Respondent should have waited for the Claimant to come back to work before starting an investigation.

88. Dealing with the disability discrimination she said that the Respondent was on notice of the Claimant's disability as the translated doctor's letter at page 42 dated 19 September 2012 had put them on notice. She said it was not reasonable for the employer not to accept Polish fit notes and she argued that she would not have been treated in the way in which she was if she had been British, Hungarian or Rumanian. On the question of any consideration of contributory fault this should be set against the Respondent's failure to contact her when she was in Poland. She asked the Tribunal to consider on the balance of probability that it was highly likely that she had told Miss Moldovan that she was being evicted from her house. She referred us to a couple of authorities concerning her disability discrimination claim. She said the Respondent's actions were disproportionate and that it would have been proportionate for them to wait longer. On the unfair dismissal claim she referred us to the section 98 test and said a reasonable employer would not have dismissed. She referred us to authorities concerning investigation.

89. We then heard submissions from Miss Price on behalf of the Respondent. She set out the various heads of claim. With respect to the unfair dismissal claim she said that the Respondent argues that the dismissal was fair. She took us through the sub-sections of section 98. She said the dismissal was for conduct or misconduct only not for absence but the complete failure to communicate and update and communicate with the Respondent about her absence. She referred us to **Iceland Frozen Foods v Jones** and pointed out that the Respondent only had to rely on the facts known at the time of the dismissal and that in respect of those facts they knew nothing about the Claimant's apparent longstanding depression. They didn't know she was still

in Poland and they didn't know that she had moved. She said the dismissal was on the basis of the Claimant's failure to provide proper medical certificates and stay in proper touch. She said there was essentially a seven week period between 20 May and 6 July when no effort was made to contact the Respondent. She said when certificates were produced they were in Polish with no covering letter and it was clear that the Claimant did not feel it was her responsibility to keep her employer updated either about her sickness or indeed about anything else.

90. She said that on 16 July the Claimant was specifically asked to obtain a UK GP note to cover her absence until 31 August but that it took some six weeks for the Claimant to do that. She was clearly aware of the gravity of what she was facing but chose not to react to it. She simply did not see the need to get in touch. She asked us to consider that the decision to dismiss fell well within the band of reasonable responses of an employer faced with the set of circumstances with which the Respondent was faced. She went on to remind us that the Claimant did not inform the Respondent of her change of address and she accepts that she didn't. She asked us to consider that the evidence of Mr Lis was very uncertain and of very little value.

91. She then turned briefly to the appeal letter and briefly made submissions on the ACAS Code of Conduct.

92. On the wrongful dismissal claim she said that the Claimant's conduct was sufficiently serious to amount to a fundamental breach of contract and therefore she was not entitled to notice.

93. On the race claim of the Claimant she said there was absolutely no grounds even ventured to the Tribunal upon which the Tribunal would be capable of finding evidence of race discrimination. She said the Claimant had wholly failed to discharge that burden.

94. On the disability discrimination claim she said there was absolutely no basis upon which the Claimant could show she was a disabled person for the purposes of the Equality Act 2010. She said none of the sick notes referred to depression and she said any evidence to support the Claimant's absence was related to her ankle sprain and not depression. She said that in support of the Claimant's claim that she was a disabled person she relies on a letter dating back to 18 May 2009 which has one reference to depression in the penultimate paragraph. She said that hardly puts the Respondent on notice. She points out that no personnel files were retained after the purchase of 99p Store by Poundland Limited in April of 2016 so the Respondent could not possibly have knowledge of a letter going back to May 2009 nor indeed the Polish medical report of September 2012. Moreover, that translated report of 2012 does not help the Claimant in any way whatsoever because it is made clear in that report that she is not a disabled person within the meaning of the Regulations.

The Law

Unfair dismissal

95. Claims in the Employment Tribunal for unfair dismissal are essentially governed by section 98 of the Employment Rights Act 1996:

> ***98 General***
>
> *(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.*

96. It is the Respondent's case in this matter that the reason for the dismissal was conduct.

97. Dealing with the fairness of any dismissal the Tribunal has to consider section 98 (4):

> *(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.*

98. In arriving any determination under section 98 (4) the Tribunal in conduct cases is bound by a number of guidelines. The Tribunal must have mind to

what is known as the **Burchell** test pursuant to the case of **British Home Stores v Burchell [1980] ICR 303.** The **Burchell** test is:

(1) Did the employer have a genuine belief in the employee's misconduct;

(2) Was the belief reasonably held;

(3) Was that conclusion arrived at after an appropriate investigation in all the circumstances.

99. Further, a Tribunal is bound to consider whether a decision to dismiss fell within a band of reasonable responses of an employer faced with the set of circumstances with which the Respondent was faced. This is the guide as set out in **Iceland Frozen Foods v Jones [1983] ICR 17.** It is worth remembering that it is not for the Tribunal to substitute its own view but it must decide whether the view of the particular employer in question fell within the band of reasonable responses.

100. The Tribunal must also have mind even if it concludes that a Respondent has passed the **Burchell** test and that the decision to dismiss fell within a band of reasonable responses whether the dismissal might be unfair for a failure to follow proper procedures. In this respect the Tribunal must have mind to the ACAS Code of Conduct and whether a fair procedure was followed.

101. It is possible that the Tribunal may conclude that a dismissal is unfair solely due to a failure to follow a fair procedure and may conclude that that failure would have made no difference to the eventual outcome under the case of **Polkey v A E Dayton Services Limited [1988] AC344.**

Disability Discrimination

102. It is for the Claimant to show that she is a disabled person under the auspices of section 6 of the Equality Act 2010:

6 Disability

(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.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

103. If the Claimant succeeds then the Claimant's claims in this matter fall under section 15:

15 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.

39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

104. Under section 15 it can be seen that there are two possible avenues of defence for the Respondent even if the Tribunal considers discrimination proven, that is that such discrimination was justifiable and/or that the Respondent did not know and could not reasonably have been expected to know that B had the disability.

Race Discrimination

105. The Claimant's claims in race discrimination are based upon the fact that she is Polish and she cites hypothetical comparators being British, Rumanian or Hungarian. She relies on section 13 of the Equality Act 2010 which is the section detailing direct discriminaton:

> ***13 Direct discrimination***
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
>
> *(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*
>
> *(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*
>
> *(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*
>
> *(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.*
>
> *(6) If the protected characteristic is sex—*
>
> *(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;*
>
> *(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.*
>
> *(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).*
>
> *(8) This section is subject to sections 17(6) and 18(7).*

Wrongful discrimination

106. It is the Claimant's contractual claim based upon the fact that she was dismissed without notice. She claims 8 week's pay. The Respondent's position is that they were entitled to summarily dismiss the Claimant because she was in repudiatory breach of contract based upon her conduct and that that repudiatory breach essentially goes to the root of her contract discharging the Respondent from its responsibilities to the Claimant under that contract including the requirement to give her notice of dismissal. It is worth mentioning that it is not necessary for an employer to behave reasonably in accepting a claimant's repudiatory breach and dismissing them without notice nor is it necessary for them to pursue a fair procedure.

Conclusions

Disability Discrimination

107. The Tribunal concludes that the Claimant has got nowhere near the threshold required under section 6 of the Equality Act 2010 to show that she was a disabled person for the purposes of the Act. There was very little reference to her disability during the 4 day Tribunal and the only documentation before us was the former grievance lodged by the Claimant in December of 2009 by Equinox Law which makes a passing reference in the penultimate paragraph to her suffering from depression. That is wholly insufficient.

108. Moreover, the only medical evidence before the Tribunal was the translated Polish report consisting of one page dated 19 September 2012. Whilst this does describe the employee's health as including neurosis/depression disorder it is really rather unhelpful to the Claimant in that it goes on to state that the "mental state of the patient is not a disability within the meaning of the Regulations or the disability evaluation".

109. Whilst of course this would not in any way restrict a Tribunal from concluding that the Claimant was a disabled person for the purposes of section 6 as the determination of that point is a matter of law and not a matter of medical evidence, it is customary for the Tribunal to be guided by such medical evidence as is available to it.

110. Accordingly, this report is not helpful.

111. There is nothing else before us and no proper submissions were made to us on the question of whether the Claimant was a disabled person or not.

112. It is the Tribunal's Judgment that the Claimant has got nowhere near satisfying the tests set out in section 6.

113. On that basis alone her claim in disability discrimination must fail.

114. However, the Tribunal is also bound to conclude that even if the Claimant had been a disabled person for the purposes of section 6 we would also conclude that under section 15 of the Equality Act that in any event the Respondent did not know and could not reasonably have been expected to know that B had a disability. This is because the only evidence before us of that disability stretches back to 2009 and 2012. There is no reasonable expectation that, particularly after the sale of 99p Stores to Poundland, the Respondent knew or ought reasonably to have known.

115. For the reasons set out above the Claimant's claim in disability discrimination fails.

Race Discrimination

116. It is the Tribunal's Judgment that not a shred of evidence has been placed before us which in any way supports the Claimant's claim that she was treated less favourably because of the protected characteristic of race. We have had no evidence before us and not even any reference to such

treatment that would even begin to persuade this Tribunal that the treatment of the Claimant was because of her race and that she was treated less favourably because of it.

117. There is not even any requirement for us to analyze any evidence put forward as we have seen none. The claim is nothing more than a bold assertion without any evidence whatsoever to support it.

118. The Claimant's claim in race discrimination fails and is dismissed.

Unfair dismissal

119. We have carefully considered the evidence which we have heard during the course of the 4 day Tribunal hearing.

120. Applying the various tests set out in the legislation and in the common law we conclude that the reason for the dismissal was conduct.

121. The Respondent has therefore passed the tests set out in section 98(1) and 98(2).

122. Turning to section 98(4) and the guidance set out in the **Burchell** test and the **Iceland Frozen Food and Jones** case, it is the Tribunal's Judgment that the Respondent satisfies the **Burchell** test.

123. They certainly had a genuinely held belief in the Claimant's misconduct. We conclude that it was reasonably held.

124. The Claimant did not in any way help herself. We find that the Claimant is bound by the sickness and absence policy which she admitted she probably had access to. We consider that it is incumbent upon employees to take very seriously the procedures concerning informing their employer of sickness absence. The Claimant failed to do this.

125. We also conclude, as set out in our Findings of Fact, that the Claimant was hell bent on going to Poland in any event and did so in order to attend the family gathering rather than genuinely due to illness.

126. She exhibited a flagrant disregard not only for the contents of the sickness and absence policy which we accept she had not read, but also for keeping her employers informed of her absence, the reason for it and any likely return date.

127. As we have set out there were large periods of time when she failed to inform her employers of her current situation at all and when she did such attempts to do so were often perfunctory and half-hearted.

128. The onus was very much upon her to inform her employers formally of any change of address and she did not do this. She only informed them considerably after the event when she appealed the decision to dismiss her.

129. We consider that the employers were more than reasonable in writing to her and seeking a meeting with her to discuss her absences and giving her the opportunity of attending a disciplinary hearing. As far as they were aware she simply had ignored their letters.

130. We are not convinced by the evidence of Mr Lis or the Claimant's evidence concerning the phone call of 16 July. We much preferred the evidence of Miss Moldovan and accept that Miss Moldovan tried consistently to contact the Claimant without success. We do not consider it is an employer's duty to constantly chase an employee who is off sick for sick certificates and evidence of their sickness and absence. It is for the employee to provide this information to their employer.

131. Taking into account all of those facts set out in this Judgment we believe that the **Burchell** test was passed in that the employer conducted a reasonable investigation prior to arriving at a reasonably held belief in the Claimant's misconduct.

132. Moreover, the decision to dismiss fell well within a band of reasonable responses to the situation with which the employer was faced.

133. Where sadly the employer fell down very significantly was in the procedure conducted at the disciplinary and appeal stage of the dismissal. There was no formal disciplinary policy. The ACAS Code was not applied or employed and the individuals conducting both the disciplinary process and the appeal process ultimately did not make the decisions that arose out of those two processes.

134. This was admitted by both Miss Moldovan and Mr Robinson.

135. Procedurally therefore we find that the dismissal was unfair. However, applying the principle in **A E Dayton Services v Polkey [1988]** we conclude that that was the only reason for the dismissal being unfair. Had a fair and proper procedure been followed the Respondent would have been perfectly entitled to dismiss the Claimant and such dismissal would have been fair. The dismissal therefore is procedurally unfair only.

Wrongful dismissal

136. For the reasons set out above we also find that the actions of the Claimant amounted to a repudiatory breach of her contract of employment which the employer accepted duly dismissing her summarily without notice and justifiably. The Claimant's claim therefore for wrongful dismissal fails and is dismissed.

Remedy

137. A remedy hearing will be listed for a three hour hearing before the **Cambridge Employment Tribunal** at **Cambridge County Court, 197 East Road, Cambridge, CB1 1BA** on a date to be arranged. Three hours will be permitted for the hearing of this remedy.

138. As a guide to remedy the Tribunal concludes that the only basis upon which the Claimant is entitled to remedy is the fact that the Tribunal have found that the dismissal was unfair purely on procedural grounds. Applying the principles set out in the **Polkey** case we conclude that the Claimant should be entitled only to a basic award and a compensatory award limited to one month's pay plus loss of statutory rights. The compensatory award should be subject to an uplift of 25% for failure to follow the ACAS Code of Conduct. Both the basic and compensatory award should be subject to a reduction of 50% for contributory fault.

139. It is to be hoped that the parties can come to an appropriate settlement on remedy and if they are able to they should inform the Tribunal and the date listed for the remedy hearing will be vacated.

_____
Employment Judge K J Palmer

Date: 22 November 2017

Sent to the parties on: .....

.....
For the Tribunal Office