



EMPLOYMENT TRIBUNALS

Claimant

Ms. F. Mudekunye

Respondent

The Royal Free London NHS Foundation
Trust

v

Heard at: Watford

On: 3 - 5 July 2018

Before: Employment Judge Heal,
Mr. P. Miller,
Mr. A. Scott.

Appearances

For the Claimant: Mr Mudekunye (claimant's husband)

For the Respondent: Miss L. Robinson, counsel

WRITTEN REASONS

1. Judgment with reasons was given orally on 5 July 2018 and sent to the parties in writing on 27 July 2018. On 14 July 2018 the claimant made a request in writing for 'comprehensive details on the decision'. The tribunal understands this to be a request for written reasons. That request was made in time. Accordingly, these written reasons are provided.

2. By a claim form presented on 20 March 2017 the claimant made complaints of constructive unfair dismissal and race discrimination.

3. We have had the benefit of a bundle running initially to 273 pages. The following documents have been added to the bundle by consent: pages 138 A - J, and 274 to 277.

4. We have also heard oral evidence from these witnesses in this order:

Mrs. Fagesi Mudekunye, the claimant,
Ms. Deborah Kirby, Matron, Intensive Therapy Unit,
Ms. Sarah Jane Woollard, Divisional Nurse Director for Medicine and Urgent Care and
Ms. Nicola Wills-Eversley, Employee Relations Manager.

5. Each of those witnesses gave evidence in chief by means of a prepared typed witness statement which we read before the witness was called to give evidence and then the witness was cross examined and re-examined in the usual way.

6. The issues were identified by EJ Manley at a telephone preliminary hearing held on 16 November 2017. Those issues are set out in bold type in our analysis.

Concise statement of the law

Constructive dismissal

7. So far as is relevant section 95 of the 1996 Act provides:

95 Circumstances in which an employee is dismissed

(1) *For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—*

(a) ...

(b) ...]

(c) *the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

8. To succeed in establishing a claim under section 95(1)(c) the claimant must show that the employer is guilty of a fundamental or repudiatory breach of the contract of employment. Behaviour that is merely unreasonable is not enough. The test is not one of whether the employer was acting outside the range of reasonable responses but the question is whether, considered objectively, there was a breach of a fundamental term of the employment by the employer.

9. Although unreasonableness on the part of the employer is not enough, an employee may rely upon the "implied term of trust and confidence". Properly stated the term implied is "*the employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.*"

10. The duty not to undermine trust and confidence is capable of applying to a series of acts which individually might not themselves be breaches of contract.

11. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the tribunal to warrant treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship. The question is, does the cumulative series of acts, taken together, amount to a breach of the implied term?

12. The employee must leave in response to the breach of contract, which may mean the tribunal deciding whether it was *an* effective (but not necessarily the sole or

the effective) cause of the resignation. Accordingly, if an employee leaves both in order to commence new employment and in response to a repudiatory breach, the existence of the concurrent reasons will not prevent a constructive dismissal arising. What is necessary is that the employee resigned in response, *at least in part*, to the fundamental breach by the employer.

13. There is *no* legal requirement that the departing employee must tell the employer of the reason for leaving however.

14. A repudiatory breach is not capable of being remedied so as to preclude acceptance. The wronged party has an unfettered choice of whether to treat the breach as terminal, regardless of her reason or motive for so doing. All the defaulting party can do is to invite affirmation by making amends.

15. The fact that a dismissal is constructive (within sub-section (2)(c)) does not of itself mean that it will be held to have been unfair (though in practice that will often be the case); we must still go on to consider fairness in the usual way.

Discrimination

16. We have reminded ourselves in particular of the principles set out in the annex to the Court of Appeal's judgment in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] IRLR 258.

17. It is the claimant who must establish her case to an initial level. Once she does so, the burden transfers to the respondent to prove, on the balance of probabilities, *no discrimination whatsoever*. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing a claimant which it would be very difficult to overcome if she had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race. What then, is that initial level that the claimant must prove?

18. In answering that we remind ourselves that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption, such as that "he or she would not have fitted in".

19. We have to make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must at all times be the question whether we can *properly and fairly* infer race discrimination.

20. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the *'same, or not materially different'* as those of the claimant.

21. Facts adduced by way of explanations do not come into whether the first stage is met. The claimant, however, must prove the facts on which she places

reliance for the drawing of the inference of discrimination, actually happened. This means, for example, that if the complainant's case is based on particular words or conduct by the respondent employer, she must prove (on the balance of probabilities) that such words were uttered or that the conduct did actually take place, not just that this might have been so. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.

22. If unreasonable conduct therefore occurs alongside other indications (such as under-representation of a particular group in the workplace, or failure on the part of the respondent to comply with internal rules or procedures designed to ensure non-discriminatory conduct) that there is or might be discrimination on a prohibited ground, then a tribunal should find that enough has been done to shift the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. However, if there is no rational reason proffered for the unreasonable treatment of the claimant, that may be sufficient to give rise to an inference of discrimination.

23. It was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] ICR 337 (at paragraphs 7–12) that sometimes it will not be possible to decide whether there is less favourable treatment without deciding '*the reason why*'. This is particularly likely to be so where, as in this case, a hypothetical comparator is being used. It will only be possible to decide that a hypothetical comparator would have been treated differently once it is known what the reason for the treatment of the complainant was. If the complainant was treated as she was because of the relevant protected characteristic, then it is likely that a hypothetical comparator without that protected characteristic would have been treated differently. That conclusion can only be reached however once the basis for the treatment of the claimant has been established.

24. Some cases arise (See *Martin v Devonshire's Solicitors* [2011] ICR 352 EAT paragraphs 38 - 39) in which there is no room for doubt as to the employer's motivation: if we are in a position to make positive findings on the evidence one way or the other, the burden of proof does not come into play.

Facts

25. We have made findings of fact on the balance of probability.

Background

26. The respondent is an NHS trust.

27. The claimant describes herself as black, of African origin and from Zimbabwe, speaking English as her second language. She is a registered general nurse. Although she does not have a qualification in Intensive Therapy Nursing, she has gained skills in that area.

28. The claimant began her employment with the respondent as a Band 5 Staff Nurse at Barnet Hospital on 25 March 2008. Initially she was employed on a full time fixed term basis until the expiry of her current dependant visa on 27 June 2011. In

August 2011, when the claimant was given permanent leave to remain in the UK, her contract was varied to become a permanent contract. In 2014 the claimant made a flexible working request to reduce her working hours from 37.5 hours per week to 23 hours worked on two long shifts, for childcare reasons. Ms Nassau approved this request.

29. The claimant's statement of principle terms and conditions of employment is headed with this paragraph:

'This appointment is subject to and in accordance with, the National Terms and Conditions of Service as determined by the Department of Health and agreed by the NHS Staff Council, details [of] which are contained in the Agenda for Change: NHS Terms and Conditions of Service Handbook and the Agenda for Change Final Agreement as varied from time to time by the NHS Negotiating Council.'

30. There is no express provision in the statement of terms and conditions which incorporates the special leave policy or the flexible working policy as terms and conditions of the claimant's contract.

31. Clause 34 of the statement of terms and conditions says follows:

'This post is subject to the Trust's policies and procedures, as revised from time to time, including any statutory and purchaser obligations....'

32. The claimant was a reliable and conscientious nurse. She concealed the stress which arose at difficult times of her life behind a pleasant smile.

33. The respondent's staff handbook states the respondent's commitment to equal opportunities. It also says that the staff are entitled to make reasonable requests for flexible working. It adds, *'managers need to take into account the needs of the service when considering flexible working applications and therefore it may not always be possible to agree to flexible working requests.'*

34. The respondent's Special Leave Policy and Procedure recognises a number of different types of leave. It states that special leave is not an automatic contractual entitlement. Special leave is additional to an employee's annual leave entitlement and is provided for a number of reasons subject to line management discretion. There is no qualifying period of service needed before an employee can claim special leave.

35. Bereavement leave might be provided in the event of the death of a member of the employee's immediate family (spouse, civil partner, partner, child, sibling or grandparent). For immediate family up to 5 working days paid bereavement leave might be provided. The list of immediate family is as set out in parenthesis above, however that list is not exhaustive. Up to 3 days paid bereavement leave might also be granted in other exceptional circumstances subject to management discretion, for example for the death of a relative not mentioned in the list of immediate family, and an immediate colleague or close friend.

36. Carer's leave can be requested to provide support to deal with unexpected or sudden family emergencies such as to deal with the unexpected disruption or

termination of arrangements for the care of a dependent, including the need to look after dependents during the partner's illness. In such circumstances the employee must inform the manager of the reason for requesting special leave as soon as reasonably practicable and give some indication of how much time off she will need. She should keep her manager fully informed of developments so that the service can be covered and any additional support provided to her. The policy envisages that 1 working day's paid special leave is sufficient to deal with the problem and any additional days are to be taken as annual leave. However, managers can use their discretion to grant a maximum of 3 working days paid carer's leave to cover a single period of absence in any 12 month period.

37. At all material times, the claimant was employed in the respondent's Intensive Therapy Unit ('ITU').

38. The ITU is a 23-bed critical care unit which treats the sickest patients in the respondent's hospital at Barnet. These patients often have complex needs and are very unwell. Some of the patients have had planned elective surgery, but most of the patients are emergency admissions from the wards or from Accident and Emergency. There are 100 full-time equivalent qualified nurses in ITU.

39. The respondent employs a multicultural workforce. In December 2015, 48% of the registered nurse workforce was white and 52% was non-white. In December 2016, 43% of the nurse workforce was white and 57% was non-white.

40. The nurses in ITU are particularly keen to take their annual leave during peak periods at Christmas and during school holidays. The demand for leave especially at Christmas is strengthened by the desire of many nurses to return to their country of origin at that time.

41. Rotas for the ITU are prepared and are available for staff to view 4 weeks in advance. This should allow all staff sufficient time to put in place necessary arrangements, including childcare arrangements, so as to attend work.

42. There are financial pressures on the respondent to avoid using agency or bank staff whenever possible. Moreover, the respondent's experience is that it is more difficult to find temporary staff at peak times, including Christmas and New Year. Many nurses who choose to work as agency or bank workers do so because of the additional flexibility it gives them and because it enables them to avoid working when they do not want to. Therefore, they tend to choose not to work over Christmas and New Year.

43. Use of temporary staff also has a negative effect on continuity of care.

Chronology

44. At the material times, the claimant was living in the UK together with her children and without her husband. He remained in Zimbabwe and paid his family occasional visits. The claimant's sister-in-law was unwell and the claimant was caring also for her sister-in-law's children. She had care of four children aged 2, 9, 13 and 15.

45. In October 2015 the claimant suffered a bereavement and was granted 2 days' compassionate leave.

46. The claimant was on the rota to work nights on 30 and 31 December 2015 and 1 January 2016. The claimant had planned to rely on her 'cousin sister' for childcare on those nights. At the time the rota was published, the claimant had no reason to believe that there was a problem with this childcare arrangement. However, the cousin sister made travelling arrangements and on 11 December told the claimant that she would be departing on 12 December.

47. So, the claimant knew from 11 December that she was without childcare on 30 December to 1 January. She began to look for alternative child carers. She asked family and friends to cover for her, but without success.

48. Therefore, on 14 December claimant wrote by email to Deborah Kirby saying,

'Due to unforeseen circumstances and seasonal activities of families and carers in regards to childcare issues, I am hereby kindly requesting a swap of shifts from nights to days on the first week of the January Rota. I am doing 30/12/15, 31/12/15 and the 1/1/16 nights but I am kindly asking to do long days on the following days: 28/12/15, 30/12/15 and the 1/1/16. I usually work 2 days a week but I guess I am paying off one of the days on this week in question thereby making it really difficult to work out childcare issues around. Sorry for the inconveniences this may cause. I do understand.'

49. Ms Kirby replied by email on the same day, saying that she had discussed the issue with Matron and they were unable to accommodate the claimant's request to change her shifts. She said that, as with all staff, the claimant had the opportunity to request her shifts prior to the rota being done. She told the claimant to swap her shifts with other staff on the unit.

50. By 29 December 2015, the claimant had still not been able to find alternative childcare or to find anyone to swap shifts with her. Accordingly, she sent an email to Julie Nassau, the Matron responsible for ITU, saying that for the last 3 weeks she had been struggling to get a swap of shifts for the 3 relevant nights as she did not have someone to help her with childcare at night. The usual helper had '*travelled*'. One of her family had promised to help her out but one hour earlier had let the claimant down because she had her own family commitments. The claimant said that she was now disturbed, exhausted and stressed and she requested/applied for unpaid annual leave for the 3 nights.

51. We have not heard evidence from Julie Nassau, who we are told has retired from the respondent's service. The claimant's evidence is that she had no conversations with Julie Nassau aside from the emails to which we have referred. She says that without further discussion, Ms Nassau issued her with an 'Improvement Notice'.

52. On the balance of probability, we consider that there were some additional telephone conversations besides the email exchanges between the claimant and Ms Nassau. We think that because something clearly convinced the respondent that it

was appropriate to grant the claimant unpaid leave. We accept the respondent's evidence that it did not doubt that the claimant was genuine.

53. However, there is no evidence from the respondent that it conducted any sort of conversation with the claimant in which it told her that she was at risk of an improvement notice or gave her an opportunity to make representations about why the notice should not be issued. We note the haste with which Ms Nassau's letter appears to have been written (it is full of spelling mistakes) and that it omits to tell the claimant about any possibility of appeal. So, we think that Ms Nassau made a hasty decision to issue an improvement notice and did so without being overly fair to the claimant in that she did not give the claimant the chance to persuade her not to do so.

54. We do not doubt that the respondent was facing a very difficult management situation given everything that we have been told and recorded above about the high demand for annual leave over the Christmas period, about the financial need to avoid using bank and agency staff, and about the difficulty in finding bank or agency staff in an emergency over the Christmas period. We fully bear in mind that the managers concerned were tasked with the safe running of an ITU and the nursing of the sickest patients in the trust. Having said all that, given that the respondent accepted the genuineness of the claimant in this situation, we consider, objectively, that it acted unfairly both in the process of issuing the improvement notice and in its decision to do so.

55. An Improvement Notice is an informal stage of discipline which, though informal, is retained on the claimant's personal file. The notice said (preserving the spelling and grammar of the original),

'I am writing to acknowledge our conversations on the 30/12/2015 and following a number of emails that day where you informed me that you were unable to carry to your allocated duties due to unavailability of childcare arrangements.

I understand you had a previous discussion regarding this matter with Sister Kirby before Christmas would advise you to swap these days. However you informed me that you had been unable to arrange this, this information you only informed me of on the morning of the 30th.

I discussed this situation with the Head of Nursing Jane Woollard and the deputy divisional nurse Julie Meddings. They felt you should attend work and that you had the responsibility to arrange suitable childcare in a timely fashion, all staff with children have to make suitable arrangements in time, we have a service to run and levels of staffing to maintain. After consideration of these 3 days 30-1/1/16 was allowed off.

These 3 days will be marked as unpaid leave, payroll has been informed.

We also expect you to work both Christmas next year and New Year as you worked neither Christmas Eve, day or Boxing Day or new year eve or day this year all staff are expected to work one or other of the holiday days.

This improvement notice will remain on your file for a year.'

56. In January and February 2016, the claimant suffered the loss of two family members who she regarded as sisters. Strictly, she had lost sisters in law, however in her culture such family members are regarded as sisters. In any event the claimant found these events traumatic and distressing. She asked Deborah Kirby for one month's bereavement leave, telling Ms Kirby that her sister had died. Ms Kirby understood this differently to the claimant but that does not mean that the claimant was attempting to mislead Ms Kirby.

57. Ms Kirby knew that according to the respondent's Special Leave Policy and Procedure an employee might be granted up to 5 working days leave in the case of the death of a sibling. Regarding the matter as such a case, she granted the claimant 4 days leave from 27th February to 7 March 2016. (The claimant had already had some bereavement leave earlier in the year). She then arranged for the claimant to take 11 to 16 March as annual leave. That used up the claimant's annual leave until the end of the financial year. Ms Kirby further granted the claimant from 17 to 31 March as authorised unpaid leave.

58. On 10 March 2016, the claimant forwarded to Ms Kirby a death certificate and an official letter evidencing those 2 bereavements. We accept Ms Kirby's evidence that she did not ask the claimant to send her those documents. There is no email request and we accept Ms Kirby's evidence that she simply did not request such documents from any staff.

59. On 7 April 2016 Deborah Kirby sent an email around her staff telling them that they could start booking annual leave for the year until end March 2016. She told her staff that during the three-week period over Christmas and New Year, they would only be able to book one week's leave to ensure that all staff who wanted to have some time off during that period should have the opportunity to do so. Requests for time off during the Christmas and New Year period had to be submitted before 6 May 2016.

60. On 7 July 2016, the claimant applied for two weeks' annual leave from 12 December 2016 to 25 December 2016. She said that she needed to attend the unveiling of the tombstones of her two late sisters who had passed away earlier in the year. This occasion was to take place on 17 December 2016 in Zimbabwe.

61. By email dated 11 July 2016 Ms Kirby replied, reminding the claimant of the email to all staff asking them to submit their Christmas annual leave requests. She said that all of the available spaces for the week commencing 19 December had been taken and were therefore unavailable. She acknowledged that the claimant had not known when the unveiling of the tombstones would be, but she said that there were other staff who had requested leave for the week commencing 19 December and had been refused due to the demand.

62. Ms Kirby said that there was leave availability for the week commencing 5 December and the week commencing 12 December which ran up to and included 18 December. She added that the claimant could request days off for the week commencing 19 December which would still allow her to be in Zimbabwe for the occasion on 17 December.

63. In order to write this letter, Ms Kirby had got out and looked through the annual leave book to work out how she might accommodate the claimant's request. She had seen that the week commencing 19 December had already been given to those who responded within the 6 May deadline. She saw that there was leave available between 5 and 18 December. For the week commencing 19 December she thought that the claimant could request to work her 2 long days towards the end of that week. Taking this approach, the claimant would have nearly 3 weeks off work and Ms Kirby thought that would give her sufficient time to attend the tombstone unveiling.

64. The claimant was experiencing technical difficulties with her work email account during this period and although she accepts that the email was sent, she did not receive it.

65. On 15 September 2016 the claimant sent an email to Ms Kirby asking for a response to her request for December annual leave. Ms Kirby replied the same day saying that she had responded and she forwarded to the claimant her earlier response.

66. By email on 16 September the claimant thanked Ms Kirby and said that it was a helpful alternative that she had suggested, but it was difficult for the claimant to book her annual leave from the week commencing 5 December due to schooling and childcare issues. Therefore, she requested annual leave from the week commencing 12 December which the respondent had said was open to requests for annual leave. Further, the claimant requested 2 days unpaid annual leave for the week commencing 19 December.

67. On 16 September, Ms Kirby told the claimant by email that she had allocated her annual leave for the week commencing 12 December but she was unable to accommodate unpaid leave for the following week. She invited the claimant to discuss the matter further with her or Jane Woollard, Head of Nursing, if she wished.

68. Throughout these discussions, Ms Kirby's approach, bearing in mind the vital need to staff the ITU and to be fair to those members of staff who had applied for leave, was to give the claimant an alternative which was as workable as possible.

69. The claimant did not respond to Ms Kirby's email of 16 September and she did not approach Ms Kirby or Ms Woollard in person to discuss matters further.

70. By email dated 21 September the claimant sent to Ms Kirby a letter of resignation. In that letter she said that she had worked for the respondent for 8½ years without blemishes.

71. She went on,

'The events of last year around New Year, about me requesting change of shifts to convenient days that would help with childcare for those particular days and for that particular week alone ended up being a nightmare of which I am sure you are aware of because you were involved. (correspondence emails forwarded). I ended up requesting unpaid annual leave which I was granted after a struggle. The unpaid leave came with a penalty that I am being monitored of my behaviour for a year and I must work Christmas and New year this year. I did not fight this not because I don't know

my rights. I was going through a very traumatic period, the sickness of my sister, her 3 children who were under my care. This was just unbearable. What sort of behaviour needed to be monitored? I am a Christian and believe in standing by the truth.

Within a week following this incident, my sister passed away and my other sister died again a month after, which you are aware. Proof of all this was provided. The circumstances of the death of my 2 sisters this year, my failure to bury them back home in Zimbabwe, the denial of a convenient leave to attend their tombstones ceremony left me with so many questions that perhaps will remain unanswered for ever.

In light of the above information, I feel like I cannot compromise my human rights because I have a job or employers who are not supportive and don't see the importance of such circumstances all the situations I am going through. It is a phase not a permanent situation as compared to the 8 ½ years of serving the Trust faithfully. I have been left with no option but to tender my resignation from my employment and this is my formal notice of the 2 months period of notice.

Thank you for the time we have been working together.'

72. By further email dated 21 September 2016 the claimant attempted to send an email to Mr Nathan Christie-Plummer, Head of Employee Relations at time. This email contained a grievance which the claimant wished the respondent to deal with. However, the claimant addressed this to Naphan.Christir-Plummer@nhs.net and, Mr Christie-Plummer did not therefore receive the email. This explains why the complaint was not dealt with.

73. Ms Kirby took the view that the claimant's resignation letter was really a 'rant'. The respondent's usual policy in any event is to allow someone in the claimant's position a cooling off period and then to speak to them about whether they really wish to resign.

74. Although Ms Kirby did see the claimant in passing while the claimant worked out her notice, she did not sit down and speak to the claimant about whether she wished to change her mind and whether she really wanted to resign.

75. We consider that a more experienced matron would have done this and that Ms Kirby would do it now. On the evidence before us we consider that she did not take this step because she was relatively inexperienced in the matron's role, having taken up the post in February 2016.

Analysis

76. We find it helpful to analyse this case using the structure given to us by the list of issues, as amended at the outset of this hearing.

What term of the claimant's contract is alleged to have been breached leading to the claimant's resignation?

Page 1 of the claimant's 'better particulars of claim' states that the claimant relies on 'special leave terms on page 16 paragraph 2 of the trust employee handbook that reads 'all applications for special leave will be considered sympathetically in the light of individual circumstances''

77. We note that the respondent's Special Leave Policy and Procedure at paragraph 1.2 expressly states that special leave is not an automatic contractual entitlement.

In addition the claimant asserts that the respondent has breached the claimant's contract of employment in relation to:

- 1. The right to flexible working**
- 2. the right to take an unpaid leave**
- 3. right to take paid time off for childcare, paternity and adoption leave.**

78. We do not consider that the special leave policy and flexible working policy are expressly incorporated into the contract of employment so as to have contractual effect. We note the difference in wording between the header paragraph at page 2 of the statement of terms and conditions which expressly states that the appointment is in accordance with the documents to which it refers. We think that paragraph has the effect of expressly incorporating, for example, the National Terms and Conditions of Service into the claimant's contract employment. Although we note that the claimant's appointment is subject to the various policies, we do not think that they are apt to be incorporated into the contract of employment and we do not think that they are expressly incorporated so as to become terms of the employment.

At the outset of this hearing, with the consent of the respondent, the claimant added the implied term of trust and confidence.

What act is the respondent alleged to have committed to constitute a fundamental breach of those terms?

- The claimant contends that on 7 July 2016 she applied to Deborah Kirby (now Matron) for special leave over the Christmas 2016 period, for the unveiling of her dead sisters' tombstones. This request was refused and the claimant was offered a restricted period of annual leave as an alternative suggestion.**

79. The claimant in fact asked for annual leave, not special leave. We think that we have to analyse what Ms Kirby did in the light of what the claimant actually asked for.

80. The claimant asked for two weeks' annual leave from 12 to 25 December. The claimant did not ask for special leave, in any event she had no contractual right to special leave, and on the facts, we think that Ms Kirby did consider a request for annual leave sympathetically.

81. Ms Kirby did not grant the claimant exactly what she asked for, however nor did she give an outright refusal.

82. Insofar as Ms Kirby refused the claimant's request we consider that she had reasonable and proper cause for doing so. That is, the deadline for applying for annual leave over the Christmas period had already passed and all the available spaces for leave in the week commencing 19 December had been filled. Indeed, other staff had applied for leave during that week and had been refused. Ms Kirby was under financial constraints to avoid using bank and agency staff. More importantly, she knew how difficult it was to secure bank and agency staff over the Christmas period and she was responsible for an ITU treating some of the trust's most sick and vulnerable patients. Although she understood the importance of the claimant's request to her and that the claimant could not have made that request before 6 May she had to balance against this the practical constraints set out above.

83. Because she understood the situation and was sympathetic towards the claimant, Ms Kirby did her best to offer a solution which she thought would enable the claimant to be able to attend the event on 17 December.

- **The claimant asserts that the Employment Rights Act 1996 states that an employee has a right to bereavement leave.**

84. We consider that what the claimant was requesting was not bereavement leave. The Employment Rights Act 1996 does not give a right to bereavement leave as such. Section 57A does give a right to an employee to take a reasonable amount of time off during working hours in order to take action which is necessary in consequence of the death of the dependant. A dependant is defined as a spouse or civil partner, child, parent, or a person who lives in the same household as the employee, otherwise than by reason of being his employee, tenant, lodger or boarder. 'Dependant' also includes any person who reasonably relies on the employee for assistance on an occasion when the person falls ill or is injured or assaulted or to make arrangements for the provision of care in the event of illness or injury. For the purposes of a person who lives in the same household as the employee 'dependant' includes any person who would reasonably rely on the employee to make arrangements for the provision of care.

85. We have not heard sufficient evidence to tell us whether the claimant's sister-in-law in fact fell under the definition of dependant. Leaving that aside, we do not consider that the attendance at the unveiling of the tombstone, despite its emotional and cultural importance to the claimant, was *necessary* within the meaning of section 57A of the Employment Rights Act 1996. The claimant did stress to us that she considers her attendance important because she had not been present at the burial of her sisters-in-law and we take into account the obvious cultural significance to her of attending the event. We have also noted evidence which we heard that another member of staff had been given permission to take leave in August 2018 to return to Zimbabwe for a tombstone unveiling. However, we do not consider that the evidence amounts to attendance being 'necessary'.

86. In any event, we consider that the creative solution suggested by Ms Kirby would have enabled the claimant to return to Zimbabwe for the tombstone unveiling. Although the claimant was unwilling to take the children out of school, we notice that she did in fact do so. The time given to her would have enabled her to fly to Harare and then to travel overland some 450 kilometres to her destination. That journey would

have been arduous and time-consuming but we consider that the time given would have permitted it.

Did the breach consist of a one-off act or a continuing course of conduct, extending over a period of time, which culminated in the 'last straw'?

- **The claimant contends that there were earlier occasions when she was also refused leave:**
- **On 14 December 2015 she asked Matron Julie Nassau and (then Sister) Deborah Kirby to swap upcoming shifts that she was due to work owing to childcare difficulties, and this request was refused.**

87. On 14 December 2015 the claimant did ask Deborah Kirby for a change of shifts for 30, and 31 December and also 1 January. Ms Kirby and Ms Nassau did refuse to change her shifts. However, they did also tell her to swap shifts with other members of staff. They took this decision at this point because the claimant still had between 14 and 30 December in which to make alternative arrangements and because of the real difficulties which we have already set out in our findings of fact involved in staffing the ITU over the New Year period. These include the vital requirement to provide staff for very sick patients, the difficulty of securing bank or agency staff, the financial consequences of using bank or agency staff, and the need to treat all staff fairly given the high demand for time off over New Year.

88. We consider that Ms Kirby and Ms Nassau had reasonable and proper cause for taking this decision at this point.

- **On 29 December 2015, she applied to take 3 night shifts due to start the following evening as unpaid leave, and that this request was also refused by Matron Nassau and Deborah Kirby.**

89. The claimant did make this application on 29 December and initially, Julie Nassau refused it. This was because, as Ms Nassau's email says, the claimant was expected to work shifts and she could (from Ms Nassau's point of view, given her then limited state of knowledge) have made arrangements in time to fulfil shifts the were allocated in time for her to have done so.

90. It appears that there were then subsequent telephone conversations and Ms Nassau changed her mind and did grant the claimant 3 nights' unpaid leave.

91. Had Ms Nassau maintained her refusal, without speaking further to the claimant to discover the reality of the claimant's situation, then we consider that she would have acted without reasonable and proper cause. The facts have shown us that the claimant was in a situation not of her making, in which 2 consecutive attempts to find childcare had fallen through, so leaving her at risk of leaving four children, some of them very young, unattended if she attended work. However, Ms Nassau did not maintain her refusal.

- **On 24 February 2016 she requested one-month compassionate leave following family bereavements. Instead the claimant was granted a**

combination of paid compassionate leave, annual leave and unpaid leave. The claimant was asked to provide death certificates as evidence of the bereavements.

92. The claimant did ask for one month's bereavement leave. The claimant was granted 4 days bereavement leave, and annual leave and authorised unpaid leave to enable the claimant to have her month. The claimant was not asked to provide death certificates.

93. Ms Kirby took this approach because the respondent's policy allowed her to grant up to 5 days bereavement leave. We consider that she reacted promptly, creatively and sympathetically to enable the claimant take the time off requested.

- **The claimant contends that the breaches were a continuing course of conduct extending over a period of time.**

94. Looking at those findings altogether, we consider that the respondent had reasonable and proper cause for its decision on 14 December. We consider that Ms Nassau's reaction on 29 December, that is initially to refuse the request for unpaid leave without speaking to the claimant, would have been unduly harsh without more. However, it appears that there were further conversations with the claimant and Ms Nassau did grant the 3 days unpaid leave. Thereafter, we see no grounds to criticise the respondent and on the contrary we consider that Ms Kirby on each occasion has done her best to deal with the claimant's requests with sympathy and with lateral thinking so as to enable the claimant as much as possible to have what she asked for.

95. Therefore, we do not consider that, taken singly or together, these matters amount to a fundamental breach of contract.

Did the claimant accept the breach?

96. This does not now arise.

97. For those reasons, the complaint of constructive unfair dismissal is not well founded and is dismissed.

Direct race discrimination

What are the act or omissions of the respondent that are alleged to constitute discrimination on the grounds of the claimant's race?

The claimant relies on the same matters as stated in paragraphs 1.2 and 1.3 above. Specifically she alleges that the respondent treated her less favourably by:

- **Refusing her request to swap shifts made on 14 December 2015;**
- **refusing a request for 3 days unpaid leave made on 29 December 2015;**
- **imposing an improvement notice on the claimant on 30 December 2015 and stating that she would be expected to work the 2016 Christmas and New Year periods;**

- refusing her request for compassionate leave in February 2016;
- refusing a request for annual leave made on 7 July 2016.

In respect of each of the allegations of discrimination on the grounds of the claimant's race, who is the relevant comparator relied on by the claimant?

The claimant relies upon a hypothetical comparator and/or a specific example of the nurse of English origin who was granted annual leave during the summer holidays.

98. The claimant was unable to identify the nurse of English origin referred to. She did not know who the nurse was by name or otherwise because she had been given the information by a third party who declined to give her further details on grounds of confidentiality. We probed with the respondent how it would have gone about discovering the identity of this nurse. The respondent would have had to work through its annual leave book finding all the possible candidates and would then have had to conduct a detailed search of the individual personal files and/or email inboxes looking for evidence of why the particular leave had been granted. We note that the claimant simply refers to leave during the summer holidays without giving a specific year. Holidays cover some 7 weeks of time and we consider that it would have been difficult if not impossible to discover exactly which nurse was referred to.

99. On that evidence, it is impossible to say whether the nurse in question was the same as the claimant in all material respects apart from that of race. We do not have sufficient detail about her situation for her even to shed light on how a hypothetical comparator would be treated. There are circumstances in which we would be prepared to draw an inference of discrimination from non-disclosure by the respondent of relevant documents, however in these circumstances we do not consider that it would be proper to do so.

Has the claimant proven facts which the tribunal could draw an inference of discrimination on the grounds of race by reference to the above comparators?

100. We consider that the claimant has not proven such facts. There is no evidence before us to suggest that a hypothetical comparator would have been treated any differently to the claimant. In cross examination the claimant was quite unable to suggest why she said that a nurse of a different race or origin would have been treated more favourably than she was. All we have is a bare assertion that the claimant is of a particular race and considers that she has been treated unfavourably. That is not enough.

The claimant states that she believes this practice is discriminatory due to her race and ethnic background.

The claimant asserts that asking her to produce death certificates amounts to conclusive proof of the discrimination she was subject to.

101. We have found that the claimant was not asked to produce the death certificates. Even if we were wrong about this, we do not consider that it is evidence from which we could infer race discrimination.

If so, can the respondent show reasons that are not in fact discriminatory for the relevant acts and omissions?

102. We have accepted the respondent's reasons for its actions on 14 December 2015. The request for three days unpaid leave on 29 December 2015 was not in fact refused. We have accepted that Ms Kirby was doing her best in February 2016 to grant the claimant's request within the limits of the policy and the circumstances and we have accepted the respondent's explanation about the request of 7 July.

103. We have not heard Ms Nassau's explanation for the improvement notice, but in any event, we do not consider that the burden of proof transfers to the respondent. We have not considered the issue of the improvement notice fair, but that alone is not a ground for drawing an inference of discrimination. There may be occasions where unexplained unfairness is a ground for the burden of proof passing, however we do not think it would be proper to take that step on the facts of this case. Ms Nassau was clearly running an ITU under pressure. The claimant's request, however reasonable from the claimant's point of view, will have placed Ms Nassau in an extremely difficult situation. The earlier incident shows that she tends to be hard headed about such decisions: no doubt that is a necessary management style given the conditions she was facing and the critical nature of her role. So, we think that her rather tough approach, even if somewhat unfair, is not something that should lead us to draw an inference of discrimination.

Victimisation

104. The claimant relies upon the email of 29 December 2015 as a protected act. There is nothing in that email that amounts to a protected act.

Time

105. Given those findings, time is now academic. However, we record that we read EJ Smail's judgment as extending time for all claims. It has not been appealed, so no time issue arises before us.

106. For those reasons we also dismiss the complaints of race discrimination and victimisation.

Employment Judge Heal

Date: 05.09.18.....

Sent to the parties on:

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For the Tribunal Office