



# EMPLOYMENT TRIBUNALS

**Claimant**

Ms L Katemauswa

v

**Respondent**

Willows Care Centre Limited

**Heard at:** By CVP

**On:** 13, 14 & 15 October 2021

**Before:** Employment Judge M Warren

**Members:** Mrs J Costley and Mr B Lynch

**Appearances:**

**For the Claimant:** Mr Onibokun (Solicitor).

**For the Respondent:** Mr S Morley (Consultant).

**JUDGMENT** having been sent to the parties on 4 November 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Background

1. Ms Katemauswa brings complaints of automatic unfair dismissal and race discrimination. Her employment with the respondent began on 29 January 2018, she was dismissed on 13 November 2018 and these proceedings were issued on 11 April 2019. She was employed by the respondent as a Registered Nurse.
2. This hearing was conducted by CVP and I did not have the tribunal file before me. I have not had sight of the early conciliation certificate, but I assume that everything is in order in terms of time, otherwise any issue would have been raised and dealt with before now.

### The issues

3. This case was case managed by Employment Judge McNeill QC at a closed preliminary hearing on 4 December 2019, at which she identified the issues, subject to deletion of two paragraphs which erroneously made reference to s.98 of the Employment Rights Act 1996; because Ms Katemauswa did not have the required 2 years' service, she is unable

to bring an ordinary unfair dismissal claim under s.98. Her complaint of unfair dismissal must therefore rely upon the automatically unfair dismissal reason of dismissal for asserting rights to leave under the Working Time Regulations 1998. At the outset of the case, Mr Onibokun and Mr Morley both confirmed that the Tribunal could rely upon the list of issues as set out by Employment Judge McNeill.

4. I replicate below Employment Judge McNeill's identification of the issues:

*Unfair dismissal*

- (i) Was the reason or principal reason for the Claimant's dismissal that she refused (or proposed to refuse) to forgo a right conferred on her by the Working Time Regulations 1998 (WTR)?

The Claimant clarified at the Preliminary Hearing that she relied only on s101(1)(b) of the ERA. She relied on two rights conferred by the WTR:

- (a) the right to take leave; and  
(b) the right to receive a response to the Claimant's notice requesting leave given on 15 August 2018.

She contended that the Respondent's reason or principal reason for dismissing her was that she refused to forgo one or both of those rights.

The Respondent disputes the Claimant's claim. The Respondent contends that it had no obligation to service a notice in response to the Claimant's notice. The Claimant had requested 3 weeks' holiday, having already taken 3 weeks' holiday earlier in the year. The was not "leave to which she [was] entitled" within the meaning of regulation 15(1) of the WTR. The notice provisions were simply not engaged and the Claimant did not forgo any right.

In any event, the Respondent contended, regulation 15(5) of the WTR applied. The parties agreed that the Claimant's rights under regulations 15(1)-(4) had been varied by a relevant agreement. Under that agreement, the Respondent operated a holiday request procedure which included provisions (1) that employees must not book holidays without receiving prior authorisation and (2) that it did not normally allow more than two consecutive working weeks of annual holiday.

The Respondent disputed that the Claimant refused (or proposed to refuse) to forgo a right conferred on her by the WTR.

The Respondent contended that the reason for the Claimant's dismissal was that the Claimant chose to take a

period of 3 weeks' leave which had not been authorised and which she had been told was not authorised.

- (ii) If the Claimant proved that the reason or principal reason for her dismissal was that set out in s101(1)(b) of the ERA, her dismissal was automatically unfair.

*EqA, section 13: direct discrimination because of race*

- (iii) The Claimant defines her race as Black African. She relies on a hypothetical comparator.
- (iv) Did the Respondent subject the Claimant to the following treatment:
  - a. Failing during the Claimant's grievance proceedings to investigate the Claimant's assertion that the contents of Kayleigh Wright's written statement dated 12 October 2018 was false and never happened;
  - b. By preferring the contents of Kayleigh Wright's written statement dated 12 October 2018 over her assertion, despite the glaring inconsistency in the contents when juxtaposed against the contents of the Claimant's holiday slip allegedly referred to in the statement, during the grievance appeal proceedings;
  - c. Refusing to consider her assertions that the statement of Kayleigh Wright dated 12 October 2018 was false and inconsistent with the written documentation before the Appeals Officer during the disciplinary appeal hearing?
- (v) Was that treatment or any of it "*less favourable treatment*", in that the Respondent treated the Claimant less favourably than it would have treated comparators who were white/not black African?
- (vi) If so, was this because of the Claimant's race and/or because of the protected characteristic of race more generally?

*Remedy*

- (vii) If the Claimant was unfairly dismissed, she seeks compensation. The issues that arise are as follows:
  - a. What is the Claimant entitled to by way of a basic award?
  - b. What is the Claimant entitled to by way of a compensatory award?
  - c. What adjustment, if any, should be made to any compensatory award to reflect any chance that the Claimant might still have been dismissed in any event?

- d. Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA s122(2); and if so to what extent?
  - e. Did the Claimant, by blameworthy or culpable actions, cause or contribute to her dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to s123(6) of the ERA?
  - f. Has the Claimant taken reasonable steps to mitigate her losses?
- (viii) If the Claimant succeeds in her race discrimination claim, the issues arising will be similar to those set out above, save that contributory fault will not arise.
- (ix) What is she entitled to by way of compensation for injury to feelings?

### **Evidence**

- 5. We had before us a bundle put together by Mr Morley. I would mention in that regard for future reference, the President's direction about bundles does ask the parties to try and make sure that their electronic bundles have Optical Character Recognition. The significance of that is it enables highlighting annotation for the Tribunal, which is hugely helpful to us.
- 6. We had witness statements for the respondent from Mrs Cooper, Mrs Pearson, Miss Wright and Ms Blease. For the claimant we just had a witness statement from Ms Katemauswa. In respect of Ms Katemauswa's witness statement I mention that a witness statement really ought to just contain statements of fact, not argument or opinion. Some of the content of Ms Katemauswa's statement were really matters for submissions.
- 7. We make the observation that none of the respondent's four witnesses are currently in the respondent's employment and that the events in question in this case are primarily in October 2018, which was 3 years ago. Everybody had difficulty in recalling the detail of those events when giving their oral evidence. The witness statements we noted, all seem to have been signed in September 2020, a year ago, when perhaps memories were slightly more fresh.

### **The Law**

- 8. I explained to the parties that I had prepared a detailed explanation of the law relating both to the automatic unfair dismissal ground under the Employment Rights Act 1996 s.101A and also in relation to direct race discrimination under the Equality Act 2010 and that if reasons were required, that detailed exposition would be set out.
- 9. What I said to the parties in the hearing was as follows:

- 9.1 In very straightforward lay man's terms, s.101A of the Employment Rights Act says that a claimant shall be automatically unfairly dismissed, regardless of the claimant's length of service or the procedure followed, if it is the case that the reason for their dismissal was that they were proposing to assert a right under the Working Time Regulations.
- 9.2 In respect of direct race discrimination; that is where a person has been treated less favourably because of their race than they would have been treated had they been of a different race. The Tribunal compares the way a claimant has been treated to the way another person, in this case a white person or a non-black African, would have been treated, (or had been treated if there is an actual comparator).
- 9.3 It is for Ms Katemauswa to prove facts from which the Tribunal could, (ignoring any explanation from the respondent) properly conclude that there was discrimination. If she does that, the burden of proof will shift to the respondent to satisfy the Tribunal that race in fact played no part in its decision making.

10. My lawyers explanation of the law is set out in the paragraphs below.

***Unfair Dismissal***

11. Section 101A(1)(b) of the Employment Rights Act 1996 provides that an employee shall be unfairly dismissed if the reason for their dismissal is that they have refused or proposed to refuse to forgo a right conferred by the Working Time Regulations 1998.
12. Those regulations include the statutory right to annual holiday. Regulation 15 sets out a procedure for requesting and granting leave. Regulation 15(5) provides that those procedures may be varied or excluded by agreement.
13. In accordance with Regulations 13 & 13A, the annual leave entitlement is 28 days.
14. In the first year of employment, entitlement to leave accrues at the rate of 1/12 per month, Regulation 15A(2A).

***Discrimination***

15. The relevant law is set out in the Equality Act 2010.
16. Section 39(2)(d) proscribes an employer from discriminating against an employee by subjecting the employee to any detriment.
17. Race is one of a number of protected characteristics identified at s.4.
18. Race is defined at s.9 and includes colour, nationality, ethnic and national origins.

19. Ms Katemauswa says that she was directly discriminated against because of her race. Direct discrimination is defined at s.13(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”.*

20. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the claimant, but not having her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that she has been treated less favourably than that real comparator was treated or than the hypothetical comparator would have been treated.

21. How does one determine whether any particular less favourable treatment was, “because of” a protected characteristic? There is no difference in meaning between the term, “because of” in section 13 and “on the grounds of”, under the pre-Equality Act legislation, (see Onu v Akwivu and Taiwo v Olaiqbe [2014] IRLR 448 at paragraph 40).

22. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572. Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic? - (see paragraphs 13 and 17).

23. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, “significant influence”:

*“Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.”*

24. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the

view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work. However, an unjustified sense of grievance does not amount to a detriment.

25. Section 136 deals with the burden of proof:

*“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

*(3) But subsection (2) does not apply if (A) shows that (A) did not contravene the provision.*

26. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there had been discrimination. If she does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no discrimination. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was provided in Igen Limited v Wong and others [2005] IRLR 258, which sets out a series of steps that we have carefully observed in the consideration of this case.

27. This does not mean that we should only consider the Claimant’s evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a prima facie case; there is a difference between factual evidence and explanation.

### **Findings of Fact**

28. The pages numbers that I will give during these findings are the electronic page numbers from the electronic bundle and not the handwritten page numbers on the physical bundle.
29. The respondent is a care provider operating something like 34 care homes in London, Cambridge, Essex and Milton Keynes. In the Milton Keynes area it employs approximately 500 employees. It has a multicultural workforce, although we were not provided with a statistical breakdown of the ethnic composition of its workforce.
30. Ms Katemauswa’s employment with the respondent began on 29 January 2018, working as a Registered Nurse at a home called Willows.
31. Ms Katemauswa’s contract of employment is at page 43. This provides that her normal hours of work are 36 hours per week. It states that her holiday year begins with the date of commencement of her employment and that the conditions relating to taking holiday are shown in the Employee Handbook, a copy of which she was provided with. Excerpts

from that handbook appear in the bundle at page 46. This sets out a number of provisions relating to holiday, including that holiday is calculated by reference to contractual hours. The procedure is set out for requesting holiday; the respondent expressly states that it reserves the right to vary a request in order to meet the needs of the organisation. The employee is encouraged to ensure that she submits holiday requests in good time and is warned not to book any holiday without first receiving authorisation from the respondent. Employees are warned that if they take holidays without authorisation, they will be subjected to disciplinary action. The handbook also contains the following statement:

“Normally we do not allow more than two consecutive working weeks of annual holiday. We may make an exception for a “Once in a life time” opportunity. However, we must first consider the needs of the organisation and staffing levels. Our decision in this respect will be final.”

32. The respondent has an Equal Opportunity Policy within the handbook, which is replicated in the bundle at page 107.
33. At the relevant time an Administrator at Willows was a Mrs Cooper, the General Manager was Mrs Pearson and the Regional Director was Ms Blease.
34. Ms Katemauswa worked weekend night shifts – Friday, Saturday and Sunday. In April 2018, Ms Katemauswa requested 21 days leave. We can see this in the holiday request form which appears in the bundle at page 103. This request for leave was initially refused. The decision to refuse was that of Ms Blease, the Regional Director, because it was a request for more than 14 days leave. Had it been for a lesser period, the decision to grant or refuse would have been that of Mrs Pearson. We can see in the document at page 103 that there is a column headed ‘Holiday refused’ and within that column Mrs Person’s signature appears and is dated the 13/4/18.
35. Ms Katemauswa asked Ms Blease to reconsider the refusal. She said that she wanted 3 weeks leave so that she could attend her graduation. She never explained to us specifically why 3 weeks leave was necessary for a graduation ceremony, but it really does not matter. Ms Blease relented and the leave was authorised, thus we can see on page 103 in the third line from the bottom, Mrs Pearson’s signature then appears against the dates 27 July to 12 August 2018. Her signature appears in the column headed ‘Holiday approved’.
36. In August 2018, Ms Katemauswa requested a further 3 weeks leave from 12 to 27 October 2018. This leave request also appears on the document at page 103. Mrs Cooper explained to Ms Katemauswa that again, Mrs Pearson would not have authority to grant her request for a further 3 week period. She therefore suggested to Ms Katemauswa that she should put in writing why she wanted another period of 3 weeks leave. As a consequence, Ms Katemauswa wrote a letter, (page 58) in which she set out the dates that she was seeking, to include 28 October. She gave as the reason, that she wanted to travel abroad to see her parents, as it had been 4 years since she had seen them and her mum, “is not feeling very



well". Mrs Cooper passed that letter onto Mrs Pearson on 4 September. Mrs Pearson then went to Ms Blease, who refused the leave request because Ms Katemauswa had already recently been granted extended leave and such extended leave should only really be granted for one period, and then only exceptionally, in accordance with the handbook. She also refused the leave request because Ms Katemauswa, being in the first year of her employment, had not accrued enough leave at that time to cover the proposed period.

37. The sequence of events that follows is disputed. The evidence of both parties is muddled, but the respondent's is muddled particularly. Wherever possible, we look to contemporaneous documents for corroboration to help us piece together what we think, on the balance of probabilities, is most likely to have happened. We are alert to the possibility that documents can be retrospectively created and can be self-serving.
38. The normal procedure is that once a holiday request has been submitted on the form that we have seen at page 103, the decision is communicated to the employee by completion of a document called 'Confirmation of Annual Leave Request'. One such and that relevant in this case, is copied at page 104. The procedure is that document is left in the individual's post tray by Mrs Cooper.
39. Mrs Pearson says that she notified Ms Katemauswa by telephone that her leave was refused on 5 September and that the Leave Request Form was completed accordingly at that time and the confirmation form left for her in her tray at that time.
40. Ms Katemauswa says that is not true. Ms Katemauswa says that the first she knew her leave had been refused was when, after a staff meeting on 10 October, she checked her tray, found the note at page 104 which stated that she should speak to Mrs Cooper about her leave request, (this at paragraph 20 of her statement). She says that she then went to see Mrs Cooper, was told that her leave request had been declined and that she should speak to Mrs Pearson about it the next day, which she did.
41. In deciding what we think is most likely to have happened, we have considered the following:
  - 41.1 If leave had not been approved in September, why did Ms Katemauswa not chase for a response before 10 October? Ms Katemauswa says that she checked her tray daily and she was not challenged about that. However, Ms Katemauswa is an intelligent woman; she would have known her leave request would be controversial and one would have thought she would not have left it that long without chasing.
  - 41.2 Had Ms Katemauswa on the other hand been told in September that her leave was refused, it seems to us she would very likely have protested at that time and made an issue out of it then. There is no corroborative evidence that a conversation took place on the 5<sup>th</sup> September, or at all before October. Indeed, in a letter

Mrs Pearson wrote on 11 October, (page 61) she referred to having met and told Ms Katemauswa on 8 October, (something she now denies) but makes no mention of having informed Ms Katemauswa in September. If Mrs Pearson had informed Ms Katemauswa in September that her leave was refused, one would have thought that she would have made mention of that in her letter of 11 October.

- 41.3 Mrs Pearson's signature in the, "holiday refused" column of the document at page 103 is undated. Mrs Pearson says that Ms Katemauswa was perhaps seeking to exploit that by leaving it to the last minute before querying the outcome of her request. Equally, it may be the case that Mrs Pearson may have left it undated, having signed it in October, in order to disguise the fact that she had overlooked Ms Katemauswa's request.
- 41.4 Mrs Cooper's oral evidence was that she was instructed to place the request outcome slip in Ms Katemauswa's tray in October. She said that Ms Katemauswa spoke to her the next day, that she explained to her that her leave request had been refused and she should speak to Mrs Pearson. Interestingly, her witness statement does not offer a date for when this happened. From her oral evidence it was in October, in her witness statement she wrote that she gave Ms Katemauswa a copy of the holiday request form with "refused" noted on it. That would be in accordance with the document at page 103. However in her oral evidence, Mrs Cooper said that she only gave Ms Katemauswa the refusal slip which simply contains the alternative, "Authorised/Not Authorised".
- 41.5 The respondent obtained a statement from an employee called Kayleigh Wright. This is in the bundle at page 106. The date of the statement is given as the 12 October 2018, the time of the incident is given as 19:50. There is no date for when the incident occurred. The content of the statement is worthy of quotation and reads as follows:
- "Lizzie come in at 20:00 to start her shift she handed me and Karen Donkin her annual leave slip that said not authorised and asked us what it meant. We explained that it meant she can't have the leave. Attached to the form was a note saying please see Bonnie. Lizzie instantly put it all away and said that she's going whether management like it or not."
- 41.6 Karen Donkin is Kayleigh Wright's mother. Kayleigh Wright works day shifts, Karen Donkin worked night shifts. Kayleigh Wright was in our view a credible witness and her evidence is corroborated by this note. She was adamant that the conversation took place at about this time in October and not a month earlier and not months earlier as would have been the case if the conversation had been in relation to her earlier holiday request, (as Ms Katemauswa later suggested in the disciplinary hearing).
- 41.7 Miss Wright's evidence is consistent with Ms Katemauswa's paragraph 20, that she picked up the note from her tray on

10 October. We note that in her witness statement at paragraph 19 Ms Katemauswa says that she met Mrs Pearson on the Monday before, which was 8 October, she asked her about her leave and was told by Mrs Pearson to speak to Mrs Cooper.

- 41.8 Mrs Pearson's letter of 11 October at page 61 refers to meeting on 8 October. In evidence, Mrs Pearson denied meeting Ms Katemauswa on 8 October. Ms Katemauswa's evidence is corroborated by her grievance, which she raised in an email of 13 October, (page 62) where she wrote that she had waited on Monday 8 October to speak to Mrs Cooper, unfortunately Mrs Cooper was not in the office, but she saw Mrs Pearson, who said that she should come back and see Mrs Cooper. On the Wednesday, 10 October, she saw Mrs Cooper, who told her that her holiday had been declined and that she should speak to Mrs Pearson the next day, that is on 11 October.
- 41.9 Ms Katemauswa also referred to a meeting on 8 October in the opening salvo of the disciplinary hearing, the notes of which are at page 71.
42. Weighing all of this evidence in the balance, trying to unravel the confusing and conflicting evidence, we make the following findings of fact as to what actually happened:
- 42.1 We find that Mrs Pearson overlooked Ms Katemauswa's leave request in September and did not communicate her refusal at that time.
- 42.2 Ms Katemauswa kept checking her in-tray for a response. She went to the office to speak to Mrs Cooper on Monday 8 October. There, she found Mrs Pearson. She asked her about her leave and Mrs Pearson told her to speak to Mrs Cooper. Because of that, Mrs Pearson realised that she had overlooked the leave request, she subsequently completed the documents and gave Mrs Cooper instructions to put the outcome document in Ms Katemauswa's tray.
- 42.3 Ms Katemauswa then found the outcome document and asked Miss Wright and her mother Mrs Donkin what it meant. She then spoke to Mrs Cooper on Wednesday 10 October, who explained that her leave request had not been granted. In response to Ms Katemauswa's protests, Mrs Cooper told her to speak to Mrs Pearson.
- 42.4 Ms Katemauswa then spoke to Mrs Pearson on 11 October, who explained that her request was refused and why. The outcome of that conversation was that Ms Katemauswa indicated that she was going to take a weeks leave anyway, in other words she was not going to work the following weekend the 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> October. Following that conversation, Mrs Pearson wrote the letter which is at page 61 which includes the following paragraph:

“I now write to confirm that I advised you in writing and verbally on 8<sup>th</sup> October 2018, when you came to clarify that this holiday request had been declined due to there being no holiday availability and that the leave request was for a duration of over 2 weeks and you had already had one period of extended leave this year. You stated to Bonnie Cooper, administrator on 10 October 2018 that you intended to take this annual leave, even though this had not been authorised. You also stated to me on 11<sup>th</sup> October 2018 that you will taking your annual leave on 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> October 2018. Therefore, I must advise you that you are formally instructed not to take time off during this period, nor are you to report yourself absent due to sickness.”

Mrs Pearson then goes on to warn Ms Katemauswa that if she takes leave or absents herself, that will be regarded as gross misconduct.

- 42.5 Ms Katemauswa did in fact absent herself from work, not just for the weekend of 12 to 14 October, but in fact until 28 October 2018.
43. Miss Wright had overheard a conversation about Ms Katemauswa’s unauthorised absence and she interrupted to explain the conversation she’d had with Ms Katemauswa. She was subsequently asked to provide the written statement which we have already quoted.
44. On 13 October 2018, Ms Katemauswa submitted a written grievance, which is at page 62. We have already noted her reference to the meeting on 8 October. She wrote that on the morning of 11 October she had met with Mrs Pearson, who told her that her holiday had been declined and that she had to go to work. She quotes Mrs Pearson as explaining that they do not have the ability to provide cover for her. She wrote:
- “I told Dionne that you did not come back to me you have messed up my plan I am unable to come to work this weekend 12/13/14 October, you have to look for a cover. Dionne refused and said I can’t get cover.”
45. On 14 October, Ms Katemauswa completed her timesheet for that week showing that she had been on annual leave for the 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup> October.
46. Ms Katemauswa returned to work on 2 November.
47. A grievance hearing was held on 5 November, the minutes of this meeting are at page 66. The grievance was heard by a Donna Hines, Head of Learning and Development, from whom we did not hear evidence. Included here is a note that Ms Katemauswa had made reference to meeting Mrs Cooper on 8 October and then meeting her again on 10 October. She said that she had wanted holiday so as to see her family in Nottingham. She complained that it was very unfair for Mrs Pearson to have refused her leave request and that Mrs Pearson would not negotiate with her. She said she should have been given at least a week or two annual leave.
48. Subsequently on 7 November 2018, Mrs Pearson wrote to invite Ms Katemauswa to a disciplinary hearing, (page 69). The charges were:

- 48.1 Failure to follow a reasonable management instruction by taking leave from work when that had been declined;
  - 48.2 Dereliction of duty;
  - 48.3 Failing to attend work for a 3 week period, placing vulnerable people at risk, and
  - 48.4 Falsification of her timesheet.
49. The disciplinary hearing took place on 11 November before Mrs Pearson. The minutes for this are at page 71. In this hearing, Ms Katemauswa said that Kayleigh Wright was lying, that her leave had been important to her so she took it, that the situation was Mrs Pearson's own fault for refusing to negotiate with her and with regard to the accusation that she had falsified the timesheet, her response had been, "If you don't want to pay me then don't".
  50. Mrs Pearson decided to dismiss Ms Katemauswa, as communicated to her in a letter of 13 November 2018, (page 73).
  51. Ms Katemauswa appealed against her dismissal in a series of emails which appear at pages 75-80, on or about 15 November.
  52. On 23 November 2018, Ms Blease heard the appeal against dismissal. The minutes for this are at page 82. After that hearing, Ms Blease spoke to Kayleigh Wright, who confirmed that the statement she had given (page 106) was true.
  53. On 26 November 2018, Ms Katemauswa was given the outcome to her grievance (page 86). The grievance was not upheld. We note the grievance outcome letter includes the following statement:

"The process was followed and a slip informing that your leave was declined was put into the tray, you shared this with other staff members, as you asked what did decline mean."
  54. On 27 November 2018, Ms Katemauswa received the letter at page 88 dismissing her appeal against the decision to dismiss.
  55. On 29 November 2018, Ms Katemauswa appealed against the grievance outcome, (page 90).
  56. On 3 December 2018, Ms Katemauswa sought to appeal against the decision of Ms Blease, who replied that her decision was final and that Ms Katemauswa had exhausted all internal appeals in relation to dismissal.
  57. Ms Blease heard the appeal against the grievance decision on 4 January 2019, (page 98). She upheld the grievance outcome.

## Conclusions

### *Unfair dismissal*

58. We are satisfied that the reason for dismissal was that Ms Katemauswa had taken 3 weeks leave when her request for the same had been refused and because she had falsified her timesheet by claiming for holiday pay when she knew her request for leave had been refused and that she was not entitled to holiday pay. The reason for her dismissal was therefore her conduct and not for any automatically unfair reason. Not having 2 years' service means that the procedure followed is not at issue. Ms Katemauswa's complaint of unfair dismissal fails.
59. We have though considered the Working Time Regulations and the s.101A aspect to the claim. An employer is entitled to refuse leave on any particular day, that is regulation 15(2). Regulation 15(5) permits the procedures for requesting and granting leave in regulation 15 to be varied. The contract of employment contained such variation by cross reference to the handbook. That provides that holiday may be refused or varied by the employer and that no more than 2 weeks may ordinarily be taken.
60. Ms Katemauswa's leave request had been refused. The leave which she had requested and which she had taken was in excess of that which she had accrued. She was not entitled to take such extended leave under the Working Time Regulations in any event. Our calculations in this respect would be that her annual entitlement was 201.6 hours as the document at page 103 confirms, at the time in question she had served 8.5 months, which amounts to 4 weeks annual leave accrued or 144 hours. Her 3 weeks leave in August amounted to 108 hours as shown at page 103, leaving her as at 12 October 36 hours, (one week) accrued leave. She took 3 weeks leave. She had not taken leave in accordance with the Working Time Regulations. That would then deal with the first part of the claim for automatic unfair dismissal as set out in the list of issues at (i)(a).
61. As for (i)(b), this is a complaint that Ms Katemauswa was dismissed because she refused to forgo her right to receive a response to her leave request, in accordance with the Working Time Regulations. In this respect the contract does not appear to vary the timeframe within which a response should have been given by the employer in accordance with regulations 15(3)(b) and (4)(b); at least 3 weeks' notice of the decision. However, Ms Katemauswa was not dismissed because she had refused to forgo her right to 3 weeks' notice of refusal within the specified timeframe, she was dismissed because she had taken leave in excess of her entitlement contrary to an express denial of permission to take leave and for, in the genuine perception of Mrs Pearson and Ms Blease, falsification of her timesheet.
62. For these reasons the claim of unfair dismissal fails and is dismissed.

### *Direct race discrimination*

63. There is no named comparator. Ms Katemauswa therefore relies upon a hypothetical comparator. That would be a white person or a non-black

African in the same circumstances as Ms Katemauswa, who makes the same leave request in the same circumstances and for whom the events occur within the same timeframe and who behaves just as Ms Katemauswa behaved. With that hypothetical comparator in mind, we consider each of the 3 allegations of direct discrimination set out in the list of issues at (5)(vi)(a), (b) and (c).

64. Starting with that at (a), strictly speaking it is not correct to state that the respondent did not during the grievance proceedings investigate Ms Katemauswa's assertion that the content of Miss Wright's statement was false and that event never happened. Ms Blease, who heard the appeal against the grievance outcome, which is part of the grievance process, did investigate and considered that very point, by speaking to Miss Wright. There is no note of that conversation. Mr Onibokun suggests that we should raise an inference from that to the effect that no such discussion took place.
65. Having heard the credible oral evidence of Miss Wright and Ms Blease, we found that such a conversation did take place. At the time of the original grievance hearing before Donna Hines, from whom we did not hear evidence, on 5 November Ms Katemauswa did not know of the statement from Miss Wright. She did not know of its existence until she received the invitation to a disciplinary hearing on 7 November. She did not therefore raise its existence or its veracity in the disciplinary hearing. Mrs Hines did not have before her an assertion that the statement was false. However, we noted that in the grievance outcome Mrs Hines included the comment as we have quoted, (page) 86) to the effect that she had shared the content of the holiday confirmation form with other members of staff. From that we gather the statement from Miss Wright had probably come to Mrs Hines' attention in the meantime. It was wrong for Mrs Hines to take into account evidence she had not raised with Ms Katemauswa. That is a procedural error, but it is an error corrected by Ms Blease on appeal, who did speak to Miss Wright. The allegation is that there was a failure to investigate Ms Katemauswa's assertion that the statement was false, no such assertion was made to Mrs Hines. The factual basis of this allegation of discrimination is not therefore made out.
66. Allegation (b), Ms Katemauswa says that there was a glaring inconsistency between Miss Wright's statement and what is written on the holiday slip and that Miss Wright's note was preferred in the grievance appeal. Ms Katemauswa's case is that Miss Wright reports her as asking what "Not Authorised" means, whereas she had the holiday request form at page 103, which uses the expression "Refused". On the evidence, our finding is that the claimant had the "confirmation of annual leave request" form at page 104, which does use the expression "Not Authorised" and that is what Ms Blease understood her to be referring to. There is no such inconsistency. Mr Onibokun argued in cross examination and closing that it is inconceivable that a Registered Nurse would not understand the meaning of "Not Authorised" and so Miss Wright's statement should have been disregarded. However the way the document at page 104 was completed by Mrs Cooper was not clear. There are blank boxes against headings 'Annual Leave Requested' and another heading 'Authorised/Not Authorised' and another 'Annual Leave Remaining'. Mrs Cooper has

simply written across the form “Please see me regarding October’s request” signed Bonnie. We can readily understand why a relatively new employee looking at that would be confused as to what it meant, was her holiday authorised or not? The question therefore that Ms Katemauswa is quoted as raising before Miss Wright and her mother seems to us plausible. The factual basis of the allegation is not made out.

- 67. We considered whether Ms Blease preferring Miss Wright’s statement to Ms Katemauswa’s denial that such a conversation took place was an act of discrimination. There are no facts from which we could conclude properly conclude, absent an explanation from the respondent, that the reason Ms Blease did so was because Ms Katemauswa was black African. The burden of proof does not shift to the respondent. Ms Blease would have reached the same conclusion had Ms Katemauswa had been white British. This allegation of race discrimination therefore fails.
- 68. As for allegation (c): that Ms Blease refused to consider in the disciplinary appeal Ms Katemauswa’s assertion that Miss Wright’s statement was false and inconsistent. The factual basis of this allegation is not made out; Ms Blease did consider whether the statement was inconsistent and false and concluded that it was not.
- 69. For these reasons, Ms Katemauswa’s complaint of direct race discrimination also fails and is dismissed.

Employment Judge M Warren

Date: 23 November 2021

Judgment sent to the parties on

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For the Tribunal office