EMPLOYMENT TRIBUNALS

Claimant: Mr I Sardar

Respondent: Ixora Healthcare Ltd

Heard at: Manchester **On:** 9-11 May 2023

Before: Employment Judge Phil Allen
Ms E Cadbury
Mr I Frame

REPRESENTATION:

Claimant: Mr M Arnold, consultant
Respondent: Miss G McGrath, consultant

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was constructively dismissed by the respondent and that constructive dismissal was unfair. The claim under sections 95 and 98 of the Employment Rights Act 1996 for unfair constructive dismissal succeeds.

2. The claimant was dismissed in breach of contract and the respondent did breach the claimant's contract of employment with regards to notice. The breach of contract claim for notice succeeds.

3. The respondent did fail to pay the claimant the full sum due for accrued but untaken annual leave as at the termination date. The respondent is ordered to pay the claimant the sum of **£667**.

4. The respondent made unauthorised deductions from the claimant's wages in the period from September 2021 until 5 May 2022. The respondent is ordered to pay the claimant the sum of **£3,514.50**.

5. The claimant was not treated less favourably by the respondent because of sex. The claim for direct discrimination because of sex under section 13 of the Equality Act 2010 is dismissed.

6. The claimant was not treated less favourably by the respondent because of race. The claim for direct discrimination because of race under section 13 of the Equality Act 2010 is dismissed.

7. The claimant was not subjected to a detriment by the respondent because he had done a protected act. The claim for victimisation under section 27 of the Equality Act 2010 is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a Healthcare Assistant working in the White House care home from 28 August 2018 until his resignation effective on 5 May 2022. The claimant alleged that he was subjected to direct discrimination on the grounds of race and sex. He alleged victimisation, after he complained of discrimination to his manager Samantha Henshall. He also claimed that he was constructively dismissed, wrongfully dismissed, that unauthorised deductions were made from the wages due to him, and that he was not paid for all of the accrued but untaken annual leave to which he was entitled.

Claims and Issues

2. A preliminary hearing (case management) was conducted on 19 December 2022 and the issues were identified in the case management order made following that hearing (35).

3. At the start of this hearing the Tribunal was provided with a list of issues by the claimant's representative which he stated had been agreed with a previous representative of the respondent. After the time taken for reading, the respondent's representative at this hearing confirmed that the list of issues was agreed. That list confirmed that the complaints were as follows:

    a. Section 13 race and sex discrimination;

    b. Section 27 victimisation;

    c. Notice pay;

    d. Holiday pay;

    e. Unauthorised deduction from wages; and

    f. Constructive unfair dismissal.

4. The issues identified were as set out at paragraphs 5-12 below.

5. The Tribunal will be required to decide whether

    a. the claimant contacted ACAS within three months of each act of discrimination complained of and

b. whether the acts were stand alone decisions or part of a course of conduct

c. do the acts amount to a continuing act?

6. In respect of the claimant's section 13 race and sex discrimination claim the Tribunal will be required to decide whether the claimant was subjected to less favourable treatment as follows:

a. Failure by Samantha Henshall to allocate the 30 hours work per week to which the claimant says he was entitled from August 2021 to May 2022

b. Refusal by Samantha Henshall of request to take annual leave, made on 20 July 2021 for two weeks' leave from 14 August 2021, ongoing difficulty in achieving leave

c. Failure by Samantha Henshall and the respondent generally to continue to financially support the NVQ training the claimant was undertaking/telling the training provider that the claimant did not have enough hours or was not employed. This happened in March or April 2022.

7. The claimant relies on actual comparators Mirka Miroslava, Kelly Ashworth, Lian Miroslava, Louise Cazlans, Racheal Brennan (and in relation to holiday allocation Samantha Henshall).

8. In respect of the claimant's section 27 victimisation claim the claimant relies upon the following protected act:

8.1 Verbally telling Samantha Henshall on a date in August 2021 that he cannot remember, that he was being discriminated against (he did not say race or sex) in the way that he was being denied holiday.

8.2 The claimant relies on the following detriments same acts as for direct discrimination above at

- Det1: failing to allocate 30 hours per week
- Det2: difficulty in achieving leave
- Det3: the training issue, not paying and misinformation
- Det4: in addition he says he suffered the detriment of his hours getting fewer and fewer, as though he were being punished beyond August 2021.

8.3 The Tribunal will be required to determine the following:

(a) was the act in 8.1 a protected act?

(b) did the respondent subject the claimant to the detriments set out in 8.2 because of the protected act?

9. Constructive unfair dismissal

9.1 Did a gradual reduction in hours allocated to the claimant; refusing to give the claimant leave and not paying for his NVQ training and giving him leave seriously damage or destroy the relationship of trust and confidence between the claimant and the respondent?

9.2 Do the breaches set out in 9.1 above amount to a breach of contract sufficiently serious entitling the claimant to resign?

9.3 Was the 'final straw' of not allocating shifts to the claimant the reason that prompted the claimant to resign?

10. Holiday pay

10.1 What was the claimant's leave year?

10.2 How much leave had accrued when the claimant's employment ended?

10.3 How much leave had the claimant taken in the year?

10.4 Were any days carried forward from the previous leave year?

10.5 how many days (if any) remain outstanding and unpaid?

11. Unlawful deductions from wages

11.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much?

11.2 Was any deduction required by statute?

11.3 Was any deduction required or authorised by the contract of employment?

11.4 Did the claimant agree in writing to the deduction before the deduction was made?

12. Notice pay

12.1 What was the claimant's notice period?

12.2 Did the claimant work either in whole or in part any period of the notice period?

12.3 Was the claimant paid for that notice period either in whole or in part?

13. It was agreed at the start of the hearing that the Tribunal would determine liability issues first, with remedy to be addressed later if the claimant succeeded in any of his claims. For the claims for unauthorised deductions from wages and for

non-payment of holiday, it was confirmed that the claims would be determined in their entirety, there not being the same distinction between liability and remedy for those claims.

14. In the course of the hearing, the issue of hypothetical comparators was raised. The respondent's representative in her final submissions accepted that the claimant was able to rely upon a hypothetical comparator even though the list of issues and pleadings had relied upon named comparators. That concession was correctly made in the light of the Court of Appeal decision in **Balamoody v UKCC** [2001] EWCA Civ 2097.

Procedure

15. The claimant was represented at the hearing by Mr Arnold, a consultant. The respondent was represented by Miss McGrath, consultant.

16. The hearing was conducted in person with both parties and all witnesses in attendance at Manchester Employment Tribunal.

17. An agreed bundle of documents was prepared in advance of the hearing. The bundle initially ran to 170 pages. Where a number is included in brackets in this Judgment it refers to the relevant page number in that bundle. A number of relevant additional documents were identified and provided during the hearing. All of the documents provided, obviously being documents which were relevant to the issues, should have been disclosed earlier. The documents were:

a. A letter from Mrs McColgan to whom it may concern of 13 May 2019 about the claimant, which was added to the bundle on the first day as page 171 after being provided by the claimant;

b. Three sets of documents which were provided by the respondent at the start of the second day in a separate supplementary bundle, consisting of holiday request forms completed by the claimant, Ms Henshall's contract of employment and starter form, and an email exchange with Ms Henshall. Where documents are referred to from that supplemental bundle in this Judgment, the page number in the supplemental bundle is prefaced with an S;

c. Some emails provided by the claimant at the start of the second day, which included an account of an incident given by the claimant to Ms Henshall on 9 March 2022; and

d. The relevant pages from the respondent's handbook which addressed holidays and termination of employment, which were provided on the afternoon of the second day.

18. The Tribunal was provided with three witness statements for witnesses who attended the Tribunal hearing: the claimant; Mr David Mathieson, one of the respondent's directors; and Ms Lianne Behan, who had been the deputy manager. In the bundle prepared by the respondent there were emails providing some account about the case from: Ms Henshall (156); Ms Miroslava Justusova (158); and Ms Kelly Ashworth (159). The first of those was an email which responded to the

detailed grounds of claim with numbers which matched that document's paragraph numbering. The claimant did not object to those documents being read by the Tribunal, both parties having accepted/highlighted the limited weight which could be given to such statements/documents where the relevant individual did not attend the hearing and was not able to be cross-examined. One of the additional documents provided by the respondent on the second day was a further account provided in an email by Ms Henshall (S8), to which the same applied. The Tribunal read the witness statements and the documents in the bundle which were referred to in those statements or to which the Tribunal was directed by the parties.

19. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal (and being re-examined). The Tribunal provided an interpreter (Urdu) throughout the hearing, who interpreted for the claimant. During the claimant's evidence the interpreter interpreted in full the questions asked and the answers given.

20. On the second day, the claimant was recalled to give evidence at the respondent's request and following the provision of the additional documents provided by the respondent. The claimant's representative did not object to the application for the claimant to be recalled and, in the light of the fact that he did not do so, the Tribunal agreed that the claimant could be recalled and asked questions about the additional documents only.

21. Throughout the rest of the second day the Tribunal heard evidence from the respondent's two witnesses, who were each cross examined by the claimant's representative and asked questions by the Tribunal panel (as well as being re-examined).

22. After the evidence was heard, each of the parties was given the opportunity to make submissions. The respondent's representative provided written submissions which were provided to the Tribunal and the claimant's representative (as agreed) by 9 am on the third day of the hearing. Both representatives made oral submissions on the morning of the third day.

23. Judgment was reserved. The Tribunal took the remainder of the time available on the third day of hearing to reach its decision. Accordingly, the Tribunal provides the Judgment and reasons outlined below.

Facts

24. One notable aspect of this case was the paucity of evidence provided to the Tribunal, particularly on the respondent's behalf. The Tribunal did not hear from Ms Shirley McColgan, the Registered Manager of the White House who had signed the second contract provided by the claimant (50) and who was the Manager until July 2021. The Tribunal also did not hear from Ms Samantha Henshall who had been the Registered Manager for much of the relevant time, and who was the person alleged to have treated the claimant less favourably and unfavourably, and to whom the claimant alleged he had spoken when doing the protected act. The limited reason given for not calling Ms Henshall was due to personal reasons. No reason was provided for Ms McColgan not attending (Ms Behan's evidence being that she knew Ms McColgan's contact details). It was very clear to the Tribunal during the hearing,

that had they heard evidence from either or both of those witnesses it would have been better informed about what happened and why. The Tribunal has needed to reach findings based upon the evidence heard. For the majority of the evidence heard from the claimant, there was no evidence heard from any witness called by the respondent which contradicted what was said. The claimant's evidence was accepted as being true as a result, save only where the contrary is expressly identified.

25. The claimant worked for the respondent at the White House Care Home from 28 August 2018. He was a Health Care Assistant. There was no dispute that he was employed. Initially he was employed on a statement of terms and conditions which stated that his contracted hours were nil, and that he would need to work to the needs of the service. That was signed by the claimant and signed by Ms McColgan on behalf of the respondent on 28 August 2018 (49).

26. The Tribunal was also provided with a second statement of terms and conditions (50). That document was signed by the claimant on 13 May 2019. It was signed by Ms McColgan, Registered Home Manager, on the same date. That document said the following about normal hours of work (paragraph 9):

> "*Your normal working hours are 30 hours per week, Monday to Sunday. Actual hours and days of work are as agreed rota. You may be required to work additional hours when authorized and as necessitated by the needs of the business"*

27. When questioned about the terms of the contract, Mr Mathieson accepted that the words used meant that the actual hours and days to be worked required the individual's consent (albeit he disputed that the claimant should have been provided the contract at all).

28. The Tribunal was also provided with a letter written by Ms McColgan to whom it may concern about the claimant, also dated 13 May 2019. That confirmed that the claimant worked thirty hours per week plus overtime when required.

29. The claimant's evidence was that both himself and Ms McColgan signed and accepted the updated terms and conditions of employment that changed his hours of work, and it was his evidence that the contract guaranteed him at least thirty hours per week. In cross-examination the claimant acknowledged that the second contract and the letter came about in the context of him wishing to make a mortgage application. The respondent accepted that Ms McColgan provided the claimant with the second contract on 13 May 2019.

30. Ms McColgan was the Manager of the White House. As a Registered Manager, she was registered with the CQC. There was no dispute that she was the manager of the home in which the claimant worked and the person to whom he reported. Mr Mathieson's evidence was that Managers were able to issue and agree zero-hours contracts, but they were not able to agree contracts which provided hours of work. He said that those contracts needed to be approved, or signed, by a director. His evidence was that the Managers would have known that because they would have been told. He accepted that a Health Care Assistant would not have known that. He said that the directors (Mr and Mrs Mathieson) had to sign such

contracts, but in evidence he confirmed that he had not done so for any staff other than those in management. Mr Mathieson equated the second contract to fraud when answering questions, however he also accepted that the claimant was honest. There was no evidence that cast any doubt upon the claimant's evidence that the second contract was genuine and agreed by Ms McColgan. There was no evidence which supported the assertion of fraud.

31. Neither Mr Mathiseson nor Ms Behan were aware of the second contract (at least until the claimant told Mr Mathiseson about it in April 2021), and the respondent's evidence was that a copy was not retained on the claimant's personnel file. From the emails from Ms Henshall, it did not appear that she was aware of the second contract.

32. The claimant worked significant numbers of hours each week during 2020 and at least the first half of 2021. In 2020 the weekly hours which the claimant worked were almost invariably significantly more than thirty hours per week and, on occasion, exceeding seventy hours per week (148). In practice the claimant worked greater hours throughout 2020 than that which would traditionally be considered full-time.

33. In 2021, from 4 January until 6 September, the claimant worked over thirty hours in all but three weeks and often worked considerably more (146). For an eight week period between 10 May and 4 July 2021, the claimant averaged over fifty hours per week. In July and August, the hours reduced, with approximately thirty-three weekly hours being the norm in August. From the week commencing 13 September 2021, the hours the claimant worked dropped significantly, being no more than a maximum of twenty-two hours per week for the remainder of 2021.

34. It was the claimant's evidence that a rota was prepared for a month, at least two weeks in advance. The rota allocated shifts to employees. Employees were also able to request other shifts where there were gaps in the rota. There was no evidence that the claimant rejected shifts allocated to him which were recorded on the rota. As addressed below, there were occasions later in his employment where it was evidenced that the claimant provided information about availability, made requests about specific shifts, or responded to offers of additional shifts made outside of the main rota by rejecting them or offering only alternative hours when he was available.

35. Ms McColgan left the respondent in mid-2021. It was not entirely clear from the evidence heard precisely when she stopped actively working in the business, but Ms Behan's evidence was that it was in early July 2021. For a short period, the role was covered by deputy managers.

36. It was the claimant's evidence that, on 20 July 2021, he asked Ms Henshall if he could take holiday from 14 August 2021, but this was refused. He complained to Ms Henshall about this. It was the claimant's evidence that he said that he felt discriminated against because of the difference in treatment he had received compared to others who were allowed their holiday requests. His witness statement dated the complaint as being in August 2021. In answers to question in cross-examination the claimant asserted that Ms Henshall shouted at him, and in answers

to questions from the panel he explained that she had shouted about the papers; which he explained were the papers recording Ms Henshall's own leave request.

37. The respondent's case was that Ms Henshall had not commenced employment with the respondent until 13 September 2021. That was evidenced by the contract of employment (S5) and starter form (S7) provided only at the start of the second day. Ms Behan also confirmed Ms Henshall's start date when giving evidence.

38. The Tribunal was provided with documented holiday requests and approvals. The Tribunal was provided with a holiday leave request form for the claimant from 1 March 2021 (S2) in which it appeared that leave was approved for two periods: 16-23 July; and 13-19 August (for 41 hours for each period). The form itself was unapproved or sanctioned, but it was Ms Behan's evidence that the writing on the form was Ms McColgan's and a tick identified authorisation.

39. A second holiday leave form dated 28 October 2021 (S1) was provided for leave from 16 November to 2 December 2021 and in a column for whether the manager had sanctioned it, it recorded "*too short notice declined*". In his evidence the claimant detailed only the leave being declined by Ms Henshall in July 2021, he did not give evidence about any later date. When asked questions about this and whether he was sure about the date, he acknowledged that the date he gave might not have been exact.

40. In her evidence, Ms Behan addressed the request for leave referred to by the claimant and explained that it was an example of being given very short notice to request the holiday saying he had only given two days notice. However, when questioned about which request she was referring to, her evidence became confused. She explained to the Tribunal that the event referred to in her witness statement was the October request shown on the relevant form (only produced during the hearing). However, when challenged about the fact that the leave request referred to by the claimant had been in July, she was unable to explain how and why her evidence was about the October request. The Tribunal found that part of Ms Behan's evidence to be unreliable.

41. The claimant's payslips for July and August 2021 recorded him as being paid for annual leave in each of those months. He was paid for 44 hours in July (136) and 33 hours in August (137), in addition to working 180 hours in July and 109 hours in August. The claimant's evidence was that he was paid for the leave but was not allowed to take it.

42. The Tribunal found that the request for holiday made by the claimant which Ms Henshall refused, did not occur when the claimant said that it did. It could not have done so as Ms Henshall was not employed at that time. The Tribunal accepted that such a conversation had occurred, but that the dates of leave requested and the conversation when the leave was refused, must have occurred much later in 2021. The conversation could not have taken place any earlier than 13 September 2021 and, in practice, it would have been unlikely to have taken place in the very first days of Ms Henshall's employment. Based upon the leave requests documented, on balance, the Tribunal found that the request which was refused was that made on

the form on 28 October 2021 (for leave from 16 November until early December) and the conversation would have occurred either on that date or shortly afterwards.

43. Ms Behan's unchallenged evidence was that, in December 2021, she was contacted by the claimant who asked to be paid for his accrued annual leave and the claimant was paid for it in January 2022 (as he had missed the pay cut-off date for December). That evidence was supported by the claimant's payslip for January 2022 (142) which recorded the claimant being paid for 60 hours of holiday (in addition to 52 hours of work).

44. In his witness statement, the claimant contrasted his treatment regarding leave with Ms M Miroslava, Ms Ashworth, Ms L Mirsolava, Ms Cazlans and Ms Brennan. The claimant provided very limited specific evidence about the leave requests they had made which had been granted or about the length of notice they had given for leave requests. Three of the people to whom the claimant compared himself were members of management staff. The claimant alleged they had leave approved without having given the relevant notice. He said that he knew this because he had seen the leave request forms. He accepted that he did not know when other leave was requested. He gave no other examples of employees having leave approved at short notice. Ms Behan's evidence was that leave would be approved if it could be accommodated, including at shorter notice. She explained it was more difficult for night staff (such as the claimant). It was also easier for managers to have leave approved at short notice.

45. The claimant's hours of work notably decreased from mid-September 2021. From 13 September 2021 until the end of 2021, he worked the following weekly hours (147): 19.25; 21.25; 21.25; 22; 22; 22; 11; 22; 22; 22; 0; 11; 11; 22; 22; and 19. In practice where he worked 11 hours that was one night shift in the week and where he worked 22 hours that was two. The claimant had Covid-19 in October 2021.

46. In 2022 the claimant's weekly hours of work were as follows (145): 11; 22; 11; 33; 33; 19.25; 30; and 16.5. It was not in dispute that the last date upon which the claimant worked was 5 March 2022. Thereafter the claimant did not work any hours for the respondent despite remaining employed. He was not allocated any work on the rota.

47. The Tribunal was provided with an exchange of text messages between the claimant and Ms Henshall in February 2022 (56). On 15 February Ms Henshall asked the claimant for his availability for the next four weeks. The claimant responded by saying that he was only available Saturdays and Sundays 8-5. On 17 February the claimant was informed that he had been put down for Saturday and Sunday the following weekend and the claimant responded to explain that he could not do that Sunday that week as he had a plan with his family. It was not entirely clear why availability of work was being addressed by text a couple of days prior to the relevant weekend, rather than by use of the normal advanced rota as was normally the case. Copies of limited further texts in February 2022 were also provided (58) in which Ms Henshall made clear that she was struggling to staff particular shifts, and the claimant offered to cover a night shift but only if he could work 7-7 (which was not possible).

48. On 5 March the claimant worked a night shift. An issue arose. The claimant's evidence was that it was resolved before he left the shift. The claimant left the shift ten minutes early. The Tribunal was provided with a text sent by the claimant to Ms Henshall on 8 March (61) explaining this. Ms Henshall responded to ask for the account in writing. The claimant did so in an email sent early in the morning on 9 March. The claimant was not rota'ed to work another shift after the shift of 5 March. On 15 and 16 March the claimant and Ms Henshall exchanged text messages about the claimant's availability (62). The claimant's requests regarding shifts were not accommodated and Ms Henshall confirmed to the claimant that he was off that weekend.

49. On 19 April the claimant telephoned Mr Mathieson. He informed him that he had not been given the correct number of hours under his contract and protested about the lack of hours which he was being allocated. He did not explicitly mention thirty hours.

50. On 25 April Mr Mathieson sent an email to Ms Henshall following his call with the claimant (64). He referred to what the claimant had told him about his contract and stated that, for operational purposes "*we only give zero-hour contracts. Any fixed hour contract has to be authorized & signed by either myself or Chinelo*". Ms Henshall was asked to check the claimant's contract. Mr Mathieson also asked why Ms Henshall had been using agency staff rather than the claimant.

51. Ms Henshall responded in an email on the same day (64). She attached the claimant's first contract and confirmed it was a zero-hours contract. She mentioned reference requests and her belief that the claimant was also working as a taxi driver and for another care agency. She stated that the shifts when agency staff had been used were due to the claimant being unable to work due to other commitments (the Tribunal saw no evidence this was true, save for the occasions explained). She referred to the claimant having left the specific shift early. She summarised her position by saying:

> "*When he contacted me I explained that I have to prioritise our carers who's main job is The White House and those who do not have secondary jobs"*.

52. There was no dispute that the claimant did undertake other work whilst he was employed by the respondent. The claimant emphasised that, after his hours had reduced, he had no choice but to do so to receive income. The claimant and his wife also made childcare arrangements after the reduction in hours being offered, meaning that the claimant was less able to accept hours offered. In his evidence the claimant stated that on occasions he tried to agree rotas to accommodate the needs of his two year old daughter, but this was often refused by Ms Henshall. He accepted that he had sometimes said he could not work due to reasons of childcare. He also acknowledged that, after the hours allocated to him had been reduced by the respondent, the claimant did not agree to some shifts as he had given an advance commitment to the other work-providers to avoid not earning at all, as he was able to earn money from those other opportunities. The Tribunal understood that the claimant needed to accept other work opportunities in circumstances where the hours offered by the respondent had dropped significantly from those previously offered (and from the thirty hours per week detailed in the second terms and conditions document).

53. The claimant resigned by email. No notice was given (or paid). The resignation was acknowledged. It was common ground that the resignation was effective on 5 May 2022.

54. In his witness statement, the claimant said that he believed that his resignation was forced upon him by the respondent's continuing act of reducing his hours, which left him no choice but to resign. In the list of issues, the last straw was recorded as the claimant not being allocated shifts.

55. The Tribunal was provided with two invoices which showed that the respondent had paid (or at least had been invoiced) £180 each towards the costs of two level 3 apprenticeship standard 188 lead adult care worker courses and assessment in March 2020. One of the invoices related to the claimant (155). An email of 21 April 2023 from Ms Jones-Hill of the Growth Company was also provided to the Tribunal (160) in which she stated that, on 13 April 2022, the trainer had contacted the claimant's employer and spoken to someone (who it appeared from what was said was Ms Henshall), confirmed that the claimant had failed his EPA test, and had been told that the claimant had not been in the business for a few weeks. At the time that was recorded as having been said, the statement would have been factually accurate. The email also confirmed that no discussion about a resit took place. The claimant's evidence was that he was told by his trainer that the respondent had refused to pay for him to resit his end of training exam. There was no evidence to support his contention that the respondent had done so; and the assertion was entirely contrary to what was stated in the email of 21 April 2023. Mr Mathieson accepted during the hearing that the respondent had paid the amount shown in the invoice. His evidence was that the respondent did not and would not have paid for someone to resit their exams. It was also his evidence that he did not know about the claimant's need to resit.

56. The Tribunal heard evidence from Mr Mathieson, who was one of the respondent's two directors. He was able to evidence some matters which were within his direct knowledge, such as his conversation with the claimant on 19 April 2022. However, Mr Mathieson accepted that he was not involved in the day to day running of the home. He was unable to evidence what Ms McColgan had agreed with the claimant. He was not able to provide any evidence about the arrangements of rotas and the hours offered to the claimant, as he left that responsibility to the manager and the only evidence he could genuinely provide about any decisions which Ms Henshall had made and the reasons for them, was confirmation of what she had told him (which was limited).

57. The Tribunal was provided with an email from Ms Henshall to one of the respondent's directors of 15 December 2022 (156). The email appeared to have been written in response to the claimant's Tribunal claim form. The Tribunal did not hear from Ms Henshall and, as her evidence could not be subject to cross-examination and there was no evidence that the email had been prepared on the expectation that it would be considered to be formal evidence, the content of the email was given very limited weight. In it, Ms Henshall confirmed that she was not in post until September 2021 and that she would not have been in post when an annual leave request would have been submitted in July 2021. The email included the statement that at no point did the respondent pay for any qualifications, something which was clearly untrue in the light of the invoice provided to the Tribunal. In the

email Ms Henshall stated that she was not aware of the claimant being employed on a thirty-hour contract.

58. During the hearing a further email from Ms Henshall to the respondent was provided, dated 14 November 2022 (S8). That email was a reply to an email from Mr Mathieson. As with the other email, in the absence of Ms Henshall giving evidence, the content was given limited weight. It provided some detail about a leave request made by the claimant. In the email, Ms Henshall stated that the claimant had verbally requested a week off, two days prior to the leave being requested. The claimant had not completed a leave request form. It was stated that the night shifts could not be covered due to the short notice given and because another member of night staff was on annual leave. The dates of that request were not provided.

59. The Tribunal was also provided with emails from Ms Justusova and Ms Ashworth. The emails addressed matters raised in the claim. As with the email from Ms Henshall, those emails were given very little weight as the individuals did not attend to give evidence.

60. The Tribunal claim was entered on 12 October 2022, following ACAS Early Conciliation between 4 August and 15 September 2022. The White House subsequently closed and the keys were handed over on 28 November 2022.

The Law

10. An unfair dismissal claim can be pursued only if an employee has been dismissed as defined by Section 95 of the Employment Rights Act 1996. Section 95(1)(c) provides that an employee is dismissed by his employer if:

> **"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."**

11. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

12. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA** [1997] ICR 606 the House of Lords considered the scope of that implied term, and the Court approved a formulation which imposed an obligation that 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."**

13. The test is an objective one in which the subjective perception of the employee can be relevant but is not determinative.

14. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. The respondent submitted that the test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of an innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract (relying upon **Eminence Property developments Ltd v Heaney** [2010] EWCA Civ 1168).

15. If an individual delays to long in resigning, they will have affirmed the contract and waived the breach. The respondent's representative in her written submissions emphasised that a delay of seven months fatally undermined a constructive dismissal claim in **W E Cox Toner v Crook** [1981] IRLR 443.

16. The claimant also brings direct discrimination claims in which he relies on section 13 of the Equality Act 2010 which provides that:

> **"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."**

17. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include any other detriment and dismissal. The characteristics protected by these provisions include race and sex.

18. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same.

19. Where there is no actual comparator found, the Tribunal is not only permitted to consider how a hypothetical comparator would be treated, but it is incumbent on the Tribunal to do so (**Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting** 2002 ICR 646).

20. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(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 sub-section (2) does not apply if A shows that A did not contravene the provision".**

21. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent

committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that he has been treated less favourably than his comparator and there was a difference of a protected characteristic between them. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation (**Madarassy v Nomura International plc** [2007] IRLR 246). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

22. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

23. In practice Tribunals normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, second, whether the less favourable treatment was on the ground that the claimant had the protected characteristic. However, a Tribunal is not always required to do so, as sometimes these two issues are intertwined. Sometimes the Tribunal may appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of the protected characteristic or for some other reason?

24. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act (the respondent in its submissions referred to **Nagarajan v London Regional Transport** [1999] IRLR 572 and **IPC Media Ltd v Miller** [2013] IRLR 707 as relevant authorities). Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not her motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?

25. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare and that Tribunals frequently have to infer discrimination from all the material facts. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment.

26. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different race or sex would have been treated reasonably

27. Section 27 of the Equality Act 2010 says:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because – (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act – (a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act…"**

28. In a victimisation claim, the first question is whether the claimant did a protected act. In her submissions the respondent's representative referred to the following:

a. That there is no need for the allegation to refer to the legislation, or to alleged contravention, but the gravamen of the allegation must be such that, if it were proven, the alleged act would be a contravention of the legislation (**Beneviste v Kingston University** UKEAT/0393/05);

b. The person at the receiving end of a complaint of victimisation ought to be able to identify what protected characteristic it is in respect of (**Fullah v Medical Research Council** UKEAT/0586/12); and

c. Using the word discriminated in a general sense of unfair treatment was not sufficient (**Durrani v London Borough of Ealing** UKEAT/0454/12).

29. If the claimant has done the protected act, the next question for the Tribunal is whether the respondent subjected the claimant to a detriment because of that protected act, in the sense that the protected act had a material or significant influence on subsequent detrimental treatment. That exercise has to be approached in accordance with the burden of proof, which has already been explained.

30. If the Tribunal concludes that the protected act played no part in the treatment of the claimant, the victimisation complaint fails even if that treatment was otherwise unreasonable, harsh or inappropriate. Unreasonable behaviour itself does not necessarily give rise to any inference that there has been discriminatory treatment.

31. The respondent's representative submitted that the protected act must be more than simply causative of the treatment. It must be the real reason (**Chief Constable of Greater Manchester v Bailey** [2017] EWCA Civ 425).

32. The word detriment in section 27 is to be interpreted widely. The key test is for the Tribunal to ask itself: is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance would not pass this test, but the test is framed by reference to a reasonable worker, so it would be enough if a reasonable worker would or might take such a view.

33. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over

a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it. A Tribunal may also need to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. If out of time, a Tribunal would need to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*

Conclusions – applying the Law to the Facts

61. At the start of the list of issues was some background to the matters to be determined and therefore the matters included as issues 1-4 did not set out separate matters which needed to be determined. The numbering in the list was the same as the paragraph numbering above for the issues which did need to be determined. The Tribunal did not start with the first issue which was listed and actually needed to be determined (issue five). The Tribunal left the issue of time and jurisdiction to be determined after the other matters had been addressed.

62. Issue six in the list of issues detailed the claimant's allegations of direct sex and race discrimination. The question asked was whether each of the matters alleged were less favourable treatment of the claimant because of his sex or race.

63. During his evidence the claimant effectively conceded that what he alleged was not less favourable treatment because of sex. There was no evidence whatsoever which could or would have provided the something more which would support the claim that the reason for the matters alleged was sex. As explained in the section on law, even if there is a difference of treatment and a difference of sex, there is still something more required for the burden of proof to shift. That something more would have needed to demonstrate that sex could (subject to any reason put forward by the respondent) be the reason for the treatment alleged. There was nothing at all which provided that something more. The claimant's claims for direct sex discrimination did not succeed.

64. For the allegations of direct race discrimination, whilst the list of issues recorded a list of named comparators and the claimant referred to them in his evidence, in practice there was insufficient evidence provided about any of the named comparators to enable the Tribunal to find that any of the individuals named were a valid comparator in genuinely comparable circumstances for any of the matters relied upon. The comparators may have had leave approved on occasion, but there was no evidence about when any requests were made, what advance notice was given, or what factors might have been relevant to the decisions made. Three of those named were members of management staff and the Tribunal accepted that they were not in materially the same circumstances when leave requests were considered, as the need for cover for managers differed from the requirements for staffing a home and health care workers. The claimant did not provide sufficient evidence about his comparators and their circumstances for his claims to succeed based upon those individuals having decisions made about them in circumstances which were not materially different. Accordingly, the Tribunal considered a hypothetical comparator for each of the claimant's allegations.

65. The first allegation of less favourable treatment relied upon, was that Ms Henshall allocated the claimant fewer than the thirty hours to which he was entitled from August 2021 to May 2022. The claimant was allocated fewer than thirty hours per week for all but a few weeks in the period from 13 September 2021 to the end of the claimant's employment. It was not clear when Ms Henshall had first been responsible for the rota and allocation of hours, but it could not have been prior to 13 September 2021. The Tribunal therefore considered the allegation from mid-September 2021.

66. The second alleged less favourable treatment relied upon was Ms Henshall refusing the claimant's request to take leave. The Tribunal did not find that the refusal occurred as recorded in the list of issues, as it did not occur on that date or for the period referred to. The Tribunal found that Ms Henshall did refuse leave in October 2021 and considered the allegation for that refusal.

67. The third allegation arose from the NVQ. For the NVQ, what was included in the list of issues was not found to have been what occurred. The respondent did not fund a resit of the NVQ and that was considered by the Tribunal. The Tribunal did not find that the respondent had informed the training provider that the claimant did not have enough hours or was not employed in April 2022, as there was no evidence that they did so, save for the claimant's evidence about a conversation he had. The email which detailed what was said of 13 April 2022 (160) (and which the Tribunal accepted as being the accurate account) recorded that the training provider was accurately informed that the claimant had not been in the business for a few weeks at that time.

68. For each of the matters relied upon, the Tribunal found that the treatment alleged was capable of being less favourable treatment. That was true of all three matters: being allocated fewer hours per week; having leave refused (when it occurred, although not on the date alleged); and not funding the NVQ resit.

69. Applying the burden of proof, the Tribunal needed to determine whether the claimant had shown the something more required to shift the burden of proof. That is the something more which showed (absent an explanation) that the reason for the alleged less favourable treatment was race. The Tribunal reminded itself that unfavourable treatment of itself was not enough. The Tribunal did not find that the burden of proof shifted. The claimant had not shown the something more required for the burden to shift for any of the matters alleged.

70. For the third alleged less favourable treatment, the Tribunal accepted the respondent's evidence that it would not have paid the costs of a resit for anyone. The Tribunal found that the claimant was not treated less favourably at all, because the respondent would not have paid for the resit whoever had made the request.

71. Issue eight was the claimant's victimisation claim. The alleged protected act upon which the claimant relied was verbally telling Ms Henshall that he was being discriminated against in the way that he was being denied holiday. The list of issues detailed this as having been said on a date in August 2021 that the claimant could not remember. The Tribunal found that this did not occur on the date alleged, as Ms Henshall was not employed by the respondent at that time. However, based upon the claimant's evidence, the Tribunal accepted that the conversation occurred at

some time, just not when it was said to have done. As recorded above, the Tribunal found that, on balance, the protected act occurred on or shortly after 28 October 2021.

72. The Tribunal accepted that the claimant telling Ms Henshall that he was being discriminated against was a protected act, even though he did not expressly refer to the Equality Act 2010 or state the protected characteristic upon which he relied at the time. Whilst the Tribunal noted the respondent's submissions about what was required for a protected act, the Tribunal accepted that in the circumstances of this case what was said was sufficient to satisfy the statutory test. The claimant's use of the word discrimination was sufficient. The respondent would have been able to identify that the protected act relied upon was likely to be race. The word discrimination was not used to describe a general sense of unfair treatment. It was something done in connection with the Equality Act 2010 as required.

73. The first alleged detriment was Ms Henshall failing to allocate the claimant thirty hours a week. As already recorded, the claimant's hours notably decreased from 13 September 2021. Following that date, with the exception of three weeks in 2022, the claimant was not allocated thirty hours a week. Indeed, it appeared to be the case that once she was responsible for the rotas, Ms Henshall never allocated the claimant thirty hours a week (save the three weeks in 2022). It was a detriment to the claimant.

74. The Tribunal did not find that the reason why the claimant was allocated fewer than thirty hours per week was because of the protected act. Whilst the date of the protected act was uncertain, it was found to have occurred on (or shortly after) 28 October 2021. The claimant's hours had reduced from 13 September. Ms Henshall did not allocate the claimant thirty hours a week at any time when she was responsible for the rota. The reason why she did not do so was not because of the protected act, as she had already started doing so before the protected act occurred. In any event, the claimant did not demonstrate the something more required to shift the burden of proof and show that the reason for being allocated fewer than thirty hours per week was because of the protected act.

75. The second alleged detriment which the claimant alleged occurred as a result of his protected act, was him having difficulty in achieving leave. As already recorded, the Tribunal accepted that the claimant was refused leave on one occasion. Being refused leave was a detriment.

76. The Tribunal did not find that the reason why the claimant was refused leave was because of the protected act. The leave was refused before the protected act. The reason why the claimant alleged discrimination was because his leave had been refused, so the leave must have been refused first. Whilst the claimant asserted there were other occasions, only one occasion was evidenced and that was the occasion which resulted in the protected act. In any event, the claimant did not demonstrate the something more required to shift the burden of proof and show that the reason any leave he requested was refused, was because of the protected act.

77. The third alleged detriment was the training issue. As already recorded, what was found was that the respondent did not pay for the claimant to resit his NVQ. It was not found that there was any misinformation as alleged. Not paying for a resit

was a detriment. The Tribunal did not find that the respondent refused to pay for a resit because of the protected act. There was simply no evidence whatsoever which linked any decisions made about further funding the claimant's training with the protected act. The Tribunal accepted the respondent's evidence that they would not have funded a resit for anyone. The decision was not because of the protected act.

78. The fourth alleged detriment raised similar issues to the first. It was found that the claimant's hours did become fewer and fewer in 2022 and ceased altogether. That was a detriment. The reduction in hours had started prior to the protected act, suggesting that it was not the reason for it. The claimant did not demonstrate the something more required to shift the burden of proof and show that the reason for the reduction and cessation in his hours, was because of the protected act.

79. Issue nine was the claimant's constructive unfair dismissal claim. The breach relied upon by the claimant was a breach of the duty of trust and confidence and not an express breach of a term in his contract regarding hours. The final straw was alleged to be the claimant not being allocated shifts at all. Whilst not the express term relied upon, the first issue which the Tribunal determined was the contractual terms which applied to the claimant regarding hours of work and, in particular, which of the contracts/statements of terms and conditions in the bundle was the one which applied to the claimant.

80. The Tribunal considered the second statement of terms and conditions and the status of it (50). The document was signed by the claimant and by Ms McColgan, the registered home manager of the respondent. That is the contract was signed by the manager responsible to the CQC for the home at which the claimant worked and the person who was held out to the staff as being responsible for the employees as their line manager. Ms McColgan was also the person who had signed the claimant's previous terms and conditions (for which there was no dispute it had been validly entered into). It was clear that the document was signed in the context of the claimant having raised the issue of him seeking a mortgage. The Tribunal did not accept that there was anything fraudulent about the document or its agreement. A registered manager of the respondent signed a contract which was also signed by the claimant. In those circumstances, the terms of the contract were binding on the respondent. Mr Mathieson's evidence that Ms McColgan should not have entered into the contract, was in practice of very little relevance to the Tribunal's decision as that was an internal issue for the respondent. There was no evidence that the claimant was aware that Ms McColgan could not entered into the contract. A registered manager of the home in those circumstances clearly had the ostensible authority to do so. The Tribunal found the second document to be a contract binding on the respondent.

81. In her submissions, the respondent's representative contended that the zero-hours arrangement remained intact following the second contract being issued and, she said that, in practice, the claimant remained employed on a zero-hour contract throughout his employment. The Tribunal did not accept that submission. The second contract clearly contained the terms regarding hours which were agreed between the claimant and the home's registered manager (on behalf of the respondent). That document was accepted as recording what was agreed at the time, the Tribunal having heard no evidence from either signatory which would suggest that it was not a genuine agreement. The Tribunal found no other reason

why alternative terms regarding hours should be implied into the contract or determined as having been the actual terms of the contract, contrary to what was recorded in the second contract. The lack of knowledge of Ms Henshall or Mr Mathieson about terms agreed on the respondent's behalf, did not vary the contract. The Tribunal also did not accept that the contract was varied by custom and practice or by the subsequent actions of the parties. The fact that the claimant worked over thirty hours in many weeks did not vary the contract (the terms envisaged additional hours). The fact that the claimant was offered fewer than thirty hours per week by Ms Henshell also did not do so (one party cannot vary a contract by failing to adhere to its terms). The Tribunal did not find that any of the following varied the contract or evidenced that the terms agreed had ceased to genuinely be the contractual terms: the fact that the claimant sought to agree specific days and hours of work; that for a short period the claimant said he was unable to work the minimum hours set down; or the fact that the claimant was unable to work certain hours offered after he took on other work to make a living in the absence of being allocated the contractual hours agreed.

82. In her submissions the respondent's representative submitted that the claimant repeatedly sought to accommodate changes requested by the claimant, and that the claimant frequently minimised his own hours. The Tribunal did not find that to have been the case. In determining the facts, the Tribunal has recorded the evidence provided which showed occasions when the claimant did seek changes and when he did indicate that his availability was limited. Those occasions were not frequent. They did not alter or vary the contractual terms agreed about the hours which should be allocated, save to the extent that there was possibly a temporary variation for a four-week period when the claimant stated that he was not available to work for thirty hours a week.

83. As a result, the terms of the second contract as to the hours of work were binding on the respondent. That provided that the normal hours of work were thirty hours per week. The contract provided that additional hours could be worked, over and above those basic hours. It was submitted by the respondent that the number of hours worked by the claimant and the fact that they were rarely (if ever) only thirty hours per week in some way evidenced that the agreement reached was not (or did not remain) a term of the contract. The Tribunal found there to be nothing inconsistent between the terms of the contract and the claimant frequently working many more hours than the minimum provided (and not specifically working thirty hours per week).

84. The second contract provided that the actual hours and days of work were "*as agreed rota*". Whilst not entirely clear, the Tribunal agreed with Mr Mathieson that the words used included some element of consent or agreement to the precise hours to be worked. The emails and text messages provided to the Tribunal evidenced discussion about the precise hours and days of work, they did not prove that the agreed contractual terms had (in some way) ceased to apply. The words also made reference to the rota. The evidence heard by the Tribunal was that the rota was published on a rolling basis to give employees advanced notice of when they would be asked to work. The Tribunal heard no evidence that the claimant ever turned down or refused to work an actual shift that he had been recorded to work on the rota. The terms of the contract provided that the actual hours and days of work would be as agreed rota.

85. Having found that the terms of the contract between the claimant and the respondent entitled the claimant to at least thirty hours per week, the Tribunal did find that the gradual reduction in the claimant's hours (below thirty per week) was a breach of the duty of trust and confidence. Most significantly, the fact that the claimant was not allocated any hours at all after 5 March 2022 was clearly capable of being a breach of the duty of trust and confidence and, on the facts of this case, the Tribunal found that it was. The respondent had breached the duty of trust and confidence by allocating the claimant fewer hours than he was entitled to by his contract. It breached the duty by allocating him no hours at all. There was certainly a contractual breach. The claimant relied upon the allocation of no hours as being the last straw. The Tribunal accepted that it was.

86. The Tribunal did not find that the respondent's responses to the claimant's annual leave requests or the decisions made regarding the claimant's NVQ, were breaches of the duty of trust and confidence or were capable of being (either on their own or in conjunction with the other matters alleged).

87. The Tribunal found that the breach of the duty of trust and confidence found was sufficiently serious to entitle the claimant to resign.

88. In her submissions, the respondent's representative submitted that the true reason for the decrease in shifts was the claimant's prior work commitments and him consistently turning down shifts. The Tribunal did not find that to be the case and, in particular, did not find it to be the reason why the claimant was allocated no shifts at all at the end of his employment.

89. The Tribunal found that the claimant did resign in response to the breach found. The claimant did not resign when he was first allocated fewer hours than he was contractually entitled. He did however resign in response to the gradual reduction in the hours being allocated and, in particular, in response to no hours whatsoever being allocated. The respondent submitted that the claimant took at least eight months from the breach to resign and that amounted to affirmation of the breach. Had the Tribunal found the breach to have been when the respondent first failed to allocate the claimant the contractual hours due, that submission would have had considerable merit. However, the Tribunal found that the contractual breach, which was a breach of the duty of trust and confidence, was the gradual reduction in hours allocated and the last straw was the hours ceasing altogether (based upon the list of issues). The Tribunal did not find that the claimant waived that breach or delayed too long in resigning in the circumstances of this case. The delay between being allocated no hours from 7 March to resigning on 5 May, was not found to be too long a delay and did not mean that the contract had been affirmed after the breach.

90. The Tribunal accepted that neither Ms Henshall nor Mr Mathieson were aware of the contract on which the claimant was employed or the terms which applied to his contract. The fact that they did not know that the respondent was contractually obligated to provide the claimant at least thirty hours per week made no material difference to the fact that the reduction in the claimant's allocated hours to the point where he was allocated no hours at all, breached the duty of trust and confidence.

91. As a result of those findings, the Tribunal found that the claimant was dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996. The claimant terminated his contract with the respondent in circumstances in which he was entitled to terminate it by reason of the respondent's conduct. As the respondent did not seek to argue that the dismissal was fair, the Tribunal also found that the claimant was unfairly dismissed as provided by section 98 of the Employment Rights Act 1996.

92. The remedy due for unfair dismissal will need to be determined at a remedy hearing (if not agreed by the parties).

93. The claimant's notice pay claim (issue 12), was a claim for breach of contract regarding notice. The outcome effectively followed the Tribunal's finding that the claimant was unfairly constructively dismissed. The Tribunal has found that the respondent (fundamentally) breached the duty of trust and confidence and therefore breached the contract. The claimant accepted that breach by resigning. In those circumstances, the respondent breached the claimant's contract by not giving him the required notice to terminate his contract. The required notice was agreed as being three weeks. The precise sum due to the claimant as damages arising from the breach will need to be determined at a remedy hearing (if not agreed by the parties).

94. In respect of the holiday pay claim (issue twelve), on termination of employment the respondent calculated the holiday pay due based on the actual hours worked by the claimant, when the calculation should have been based upon the contractual hours to which the claimant was entitled (being at least thirty hours per week). The sum claimed by the claimant was £667. That was agreed as being the sum due if the Tribunal found his entitlement was to at least thirty hours per week. Accordingly, the Tribunal found that the respondent failed to pay the claimant the full sum to which he was entitled for accrued but untaken annual leave on termination of employment, and awarded the claimant the £667 agreed as being the sum due. On that basis the Tribunal did not need to determine all of the issues set out as the sub-issues for issue ten in the list.

95. For the claim for unauthorised deduction from wages, the Tribunal found that the claimant was contractually entitled to be allocated work for at least thirty hours per week, and to be paid for those hours each week. The respondent failed to do so. Accordingly, the respondent made unauthorised deductions from the claimant's wages on each and every occasion when the respondent failed to pay the claimant for thirty hours for each relevant week.

96. In addressing issues 11.2-11.4, the Tribunal found that: the deductions were not authorised by statute; the deductions were not authorised by contract; and the claimant did not agree in writing to the deductions before the deductions were made.

97. In the bundle was a table prepared for the claimant which suggested the sums due (164). The Tribunal did not find that what was included was accurate or enabled the Tribunal to calculate the sums which were deducted without authorisation.

98. The Tribunal considered the documents included which recorded the hours worked each week by the claimant in 2021 (146) and 2022 (147), for which the

claimant was paid. Prior to the week commencing 13 September 2021, the claimant worked thirty hours or more. The Tribunal therefore calculated the hours worked from 13 September 2021 and the hours for which the claimant should have been paid based upon thirty hours per week. For the sixteen-week period in 2021, the claimant was paid for 311.75 hours, when he should have been paid for 480 (16x30). The shortfall was 168.25 hours.

99. In 2022 the position was more complicated. There were 17.8 weeks prior to the date of termination. At thirty hours per week, the claimant should have been paid for 534 hours in total. He worked and was paid for 175.75 (leaving a shortfall of 358.25). The claimant was paid for annual leave, which also needed to be taken into account. He was paid sixty hours of annual leave in January 2022 (142) and twenty-eight hours of annual leave in March 2022 (144), being a total of eighty-eight hours of annual leave to be reduced from the shortfall (leaving a reduced shortfall of 270.25 hours). In addition, for a period of four weeks the claimant had made clear that he was only available to have worked 8-5 on Saturdays and Sundays (56), meaning he could only have worked a total of eighteen hours a week for those four weeks rather than thirty irrespective of the hours actually offered to him. The failure to pay the claimant for hours when the claimant had made clear he was not available could not be an unauthorised deduction, resulting in a further forty-eight hours needing to be deducted from the shortfall. That meant that the total hours for which unauthorised deductions were made in 2022 was 222.25.

100. As a result, the Tribunal found that the respondent had made unauthorised deductions from the claimant's wages by failing to pay him for 390.5 hours (168.25 in 2021 and 222.25 in 2022). At £9 per hour, that resulted in the total unauthorised deduction from wages having been £3,514.50.

101. As a result of the decisions reached on the substantive issues, the Tribunal did not also need to determine issue five. As the discrimination and victimisation claims did not succeed on their merits, the Tribunal did not need to determine whether they were brought within the time required (or which would have been if they had been found).

Summary

102. For the reasons explained above, the Tribunal found that the claimant was constructively unfairly dismissed. The respondent breached the claimant's contract with regard to notice. The respondent made unauthorised deductions from the claimant's wages of £3,514.50 and failed to pay the claimant £667 for annual leave due. The claims for race and sex discrimination and victimisation did not succeed.

103. A further hearing will be listed to determine the remedy due in the claims for unfair dismissal and breach of contract (notice). That will be a hearing to be listed for one day by CVP. Separate case management orders will be issued to address remedy.

Employment Judge Phil Allen
15 June 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
22 June 2023

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2408354/2022**

Name of case: **Mr I Sardar** v **Ixora Healthcare Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 22 June 2023

the calculation day in this case is: 23 June 2023

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.