EMPLOYMENT TRIBUNALS

Claimant: Mr Franklin Davis

Respondent: B & Q Limited

Heard at: London South Tribunal

On: **12th June 2023 to 15th June 2023**

Before: **Employment Judge Clarke**
Ms C Bonner
Mr K Murphy

Representation:
Claimant: In person
Respondent: Mr D Piddington (Counsel)

JUDGMENT having been sent to the parties on 4th July 2023, and having been reconsidered on 15th July 2023 in response to a request dated 11th July 2023, and written reasons having been requested by the Claimant on 31st July 2023 out of time in accordance with Rule 62(2) of the Employment Tribunals Rules of Procedure 2013, and the Claimant having accepted an appeal to the Employment Appeal Tribunal in respect of the judgment on 28th July 2023, the following reasons are provided.

REASONS

Introduction

1. The Claimant was born on 26th July 1949. The Respondent is a large home improvement and garden retailer with numerous stores across the UK. It employees in the region of 27,000 people nationwide. The Claimant was employed by the Respondent as a Customer Advisor at its Croydon Store from 11th September 2016 until his resignation with immediate effect on 2nd August 2021, at a time when he was 72 years of age.

2. The Claimant first notified ACAS under the early conciliation procedure on 8th December 2020 and a certificate was issued the same day. The first proceedings were commenced on 2nd February 2021 and sought compensation for age discrimination and victimisation.

3. Following the termination of his employment on 2nd August 2021, the Claimant notified ACAS again on 30th September 2021 and a further certificate was issued on 11th November 2021. The Claimant commenced the second claim, for constructive unfair dismissal and age discrimination on 4th October 2021.

4. The Respondent resists the claims denying that the Claimant was subject to any discrimination or victimisation and says that the Claimant had been treated consistently with other staff and its treatment of the Claimant was not besaused of any of his protected characteristics. The Respondent also denies that the Respondent had taken any actions which materially breached the implied term of trust and confidence or that the Claimant was unfairly dismissed procedurally, substantively or at all. The Respondent further asserted that the discrimination and victimisation claims were time barred.

5. The two claims were consolidated and listed for a 4 day final hearing to deal with liability and remedy which was heard between 12th and 15th June 2023.

The Issues

6. At the commencement of the hearing, the parties confirmed the list of issues were those set out in the case management order of 16th August 2022. The list is appended to this judgment.

The Evidence

7. The Tribunal considered numbered to page 404 but containing 435 pages and was assisted by a neutral case summary, cast list and chronology prepared by Mr Piddington. During the hearing a further document, namely the annual leave policy effective from 4th April 2019, was admitted without objection from the Claimant, a later version already having been included within the bundle.

8. Additionally, the Tribunal were provided with a bundle of 6 authorities by the Respondent, some of which were cited and relied upon during the Respondent's submissions.

9. Throughout this judgment, text in bold within square brackets refer to the pages of the trial bundle.

10. At the hearing, the Claimant appeared in person and gave sworn evidence.

11. The Respondent was represented by Counsel, Mr Piddington, who called sworn evidence from Mr Matthew Cook, Ms June Williams and Mr Darren English.

12. The Tribunal was also referred to, and considered, witness statements from each witness who gave oral evidence.

13. The Claimant's witness statement did not deal fully with all the matters in issue between the parties and the Tribunal treated 3 additional documents in the bundle as part of his statement on adoption **during his oral evidence. These were his e-mail providing reasons for his resignation [314-315**], particulars contained in his second ET1 [**71-75**], and the further information provided following the case management hearing on 16th August 2022 [**111-115**].

The Submissions

14. The Tribunal also heard oral submissions from both the Claimant and from the Respondent's Counsel and considered the bundle of authorities from the Respondents.

15. The Claimant's submissions were to the effect that his contract required 2 weeks notice of rotas to be given, relying on [**122**] and that the Respondent had breached the grievance and disciplinary procedure by not having a notetaker present at. He asserted that as a result, the disciplinary process was invalid and illegal and that accordingly the reference given to TACT refering to it was unfair and false.

16. He then lost his train of thought and was given 15 minutes in the waiting room to get his thoughts together. When returning he said he didn't want to say anything else. In order to assist him to make submissions on the issues in the case, the Tribunal took him to particular issues and asked him if there was anything he wanted to say about them.

17. In response to these questions, he made further submissions to the effect that he could not trust the Respondent to keep their promise and provide rotas in good time and that the business should lead and it was not reasonable for employees to have to ask for rotas and that he had had enough. Also, a the late rota on 2nd August 2021 was "the last stone that broke the donkey's back" and that it was possible that late provision of rotas was both age and sex discrimination and that he had not been treated fairly. He submitted that it was not fair for an employer to book holiday for an employee without giving them notice or telling them that it was booked and that it took place on a lot more occasions than he had raised in evidence. He was unable to comment on the evidence about another employee whose holiday was also also booked for her.

18. In relation to the victimisation complaint he made submission to the effect that there must have been a reason why the false reference was provided and that it was a lie to say that he was happy for information to be provided. Also that there must be something wrong because of the length of time it took.

19. He was unable to make any submissions regarding the time limit issues save that all the acts had things in common because he was deliberately treated unfairly which punished him. Also, that if a person had suffered because of an act it would fair and equitable for time to be extended and that at the time he was deeply into the fostering of children.

20. Although the Claimant tried to give new evidence during his submissions about a number of matters, he was told new evidence would not be accepted at that stage and the Tribunal did not take any submissions into account which were not supported by the evidence.

21. On behalf of the Respondent Mr Piddington made submissions to the effect that the Claimant's evidence lacked clarity, detail and particularisation, and that he had limited recollection of events and his evidence was at times clearly inconsistent with contemporaneous documentation. It was therefore unreliable. By contrast the Respondent's witnesses were consistent, reliable and credible.

22. He further submitted that all the claims regarding provisions of a reference and holiday booking were out of time and that in respect of the rotas, although the last specified complaint was within time, the duration of the breaks between the last complaint and the specified earlier dates meant that they should be considered to be isolated incidents and could not form part of a series. Also, that the Claimant had provided no evidence to support a finding that it would be just and equitable to extend time.

23. In relation to the unfair dismissal claim, Mr Piddington's primary submission was that the only articulated basis for the resignation was the late provision of rotas and that the Respondent had reasonably established a pattern whereby employees bear responsibility of checking when they are due to work and the Claimant had failed to take such responsibility. There was no fundamental breach of contract and, in relation to any established breach other than the asserted late rota on 2nd August 2021, the Claimant has affirmed the contract.

24. In relation to the age discrimination complaint, in summary the Respondent's submissions were that there was no less favourable treatment or, if there was, it was not because of the Claimant's age and the treatment regarding rotas and holiday booking was consistent across all staff.

25. Mr Piddington accepted that the 2018 Tribunal complaint amounted to a protected act but submitted that the Claimant's unjustified sense of grievance was insufficient to establish detriment and that and that no reasonable worker would would have taken the view in all the circumstances that the Respondent's conduct was to the Claimant's detriment. Also, that holiday booking for the

Claimant had occurred before (as well as after) the protected act and was not linked to the protected act.

26. Mr Piddington also abandoned those parts of the Defence which asserted a legitimate aim behind any discrimination that might be found and advanced no submissions on paragraphs 2.3, 2.4, 4.5 and 4.6 of the list of issues.

27. During his submissions, Mr Piddington referred to the highlighted sections of the cases of ***Madarassy -v- Nomura International plc [2007] ICR 867***, ***Igen -v- Wong [2005] EWCA Civ 142; [2005] ICR 931***, and ***Wharburton -v- Chief Constable of Northamptonshire Police [2022] ICR 925*** in the authorities bundle.

Law:

Standard of Proof

28. The party who bears the burden of proving the claim, or any element of the claim, must do so on the balance of probabilities.

Direct Age Discrimination

29. S.13 of the Equality Act 2010 ("EA 2010") confers on employees the right not to be discriminated against on the grounds of age. Enforcement of that right is by way of complaint to the Tribunal under section 120 EA 2010.

30. The Claimant must show that he was subjected to less favourable treatment by the Respondent and that such less favourable treatment was because of his age.

31. Under section 5 EA 2010, the protected characteristic of age relates to a person of a particular age group.

32. In determining whether there has been less favourable treatment, there must be no material difference between the circumstances of the claimant and the comparator – s23(1) EA 2010. It is a question of fact and degree whether someone whose circumstances are not precisely the same can be an appropriate comparator - ***Hewage -v- Grampian Health Board [2021] UKSC 37***. The tribunal can consider a hypothetical comparator if there is no actual comparator, or as well as any actual comparator but it may be easier to consider "the reason why" the employer treated the Claimant the way it did and then consider whether it was less favourable treatment because of the protected characteristic – ***Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285*** and ***Aylott -v- Stockton on Tees Borough Council [2010] IRLR 994 (CA).***

Victimisation

33. S.27 of the Equality Act 2010 ("EA 2010") confers on employees the right not to be subjected to a detriment because they have done, or the employer believes that they have done or may do a protected act. Enforcement of that right is by way of complaint to the Tribunal under section 120 EA 2010.

34. The Claimant must show that they have been subjected to a detriment because they have done, or the employer believes that they have done or may do, one of the protected acts set out in s27(2), that is:
(a) Bringing proceedings under the EA 2010;
(b) Giving evidence or information in connection with proceedings under the EA 2010;
(c) Doing any other thing for the purpose of or in connection with the EA 2010; or
(d) Making an allegation (whether or not express) that the person subjecting the claimant to detriment or another person has contravened the EA 2010.

35. References to contravening the EA 2010 include references to committing a breach of an equality clause or rule – s.27(5) EA 2010.

36. "Detriment" means a disadvantage. It covers most adverse treatment at work and need not involve economic detriment.

37. In determining whether there has been a detriment, the tribunal must consider the whether the employee/worker was disadvantaged in the circumstances in which he thereafter had to work from the point of view of the victim and the victim's opinion that the treatment was to their detriment is sufficient if reasonably held. However, an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute "detriment". Only if a reasonable worker (but not *all* reasonable workers) would or might take the view that in all the circumstances he had been disadvantaged will there have been a detriment. This is not neither a subjective test nor a wholly objective test. ***Shamoon -v- Chief Constable of the Royal Ulters Constaiulary [2003] UKHL 11; [2003] IRLR 285***, applied in ***Wharburton -v- Chief Constable of Northamptonshire Police [2022] ICR 925.***

38. The person who subjects the Claimant to the detriment must know that the Claimant did the protected act unless they have been influenced or manipulated to carry out the detriment by a different person who was aware of the protected act.

39. The claimant will not however be protected from protected act complaints about discrimination if they make a false allegation in bad faith – s27(3) EA 2010.

Burden of Proof in Discrimination/Victimisation claims

40. S.136 EA 2010 sets out a two-stage burden of proof for claims brought under the Act which has been subject to clarification and guidance, in particular in ***Igen -v- Wong [2005] EWCA Civ 142; [2005] IRLR 258***:

Stage 1: The prima facie case
There must be primary facts from which the tribunal could decide, in the absence of any other explanation, that discrimination took place. It is not necessary that a tribunal would definitely find discrimination, only that reasonable tribunal properly concluding on the balance of probabilities could do so.
The burden of proof is on the Claimant: ***Ayodele -v- (1) Citylink Ltd (2) Napier [2018] IRLR 114, CA.; Royal Mail Group Ltd -v- Efobi [2021] UKSC 22*** and the tribunal must take into account all of the evidence adduced (not only that of the Claimant) and any argument made by the Respondent (eg that a comparator is not truly comparable). The tribunal should not take into account any explanation for the treatment given by the Respondent.
A difference in status and treatment is not sufficient to shift the burden of proof – ***Madarassy -v- Nomura International plc [2007] ICR 867*** and there must also be something to suggest that any difference in treatment was due to the relevant characteristic – ***B -v- A [2010] IRLR 400***.

Stage 2: the burden shifts
The Respondent must prove that it did not discriminate against the Claimant by proving that the treatment was in no sense whatsoever because of the protected characteristic. Cogent evidence is expected to discharge the burden of proof.

41. In ***Hewage -v- Grampian Health Board [2021] UKSC 37*** the Supreme Court said of the burden of proof provisions that "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is on a position to make positive findings on the evidence one way or the other."

42. Provided that the protected characteristic/protected act had a significant influence on the outcome, discrimination is made out even if the discriminator was unconsciously motivated – ***Nagarajan -v- London Regional Transport [1999] IRLR 572, HL***.

43. The tribunal may draw inferences from the primary facts found, should consider not merely each separate incident but the global cumulative effect of the primary facts found and must be mindful that discrimination may be unconscious – ***King -v- The Great Britain-China Centre [1991] IRLR 513 (CA), Anya -v- University of Oxford [2001] IRLR 377 (CA)*** and ***Nagarajan -v- London Regional Transport [1999] IRLR 572, HL.***

44. Less favourable treatment is an objective test. The Tribunal should consider whether the reasonable employee would consider the treatment to be unfavourable. There is a neutral burden of proof in relation to this element.

45. There will be no discrimination on the basis of age if the Respondent can show that its treatment of the Claimant was a proportionate means of achieving a

legitimate aim – s13(2) EA 2010. The legitimate aim must be objectives of a public interest nature, not purely individual reasons particular to the employer's situation- ***Seldon -v- Clarkson Wright and Jakes [2012] ICR 716 (SC)***.

Discrimination/Vicrimisation Time Limits

46. Time limits for claims for bringing a claim for age discrimination are set out in s.123 of the Equality Act 2010 ("EQ 2010"). The primary time limit is within 3 months of the discriminatory act, but this is extended by the ACAS early conciliation provisions – s140B EQ 2010.

47. Where the Claimant relies upon an omission rather than on a positive act of the Respondent, time runs from when the person decided not to do the act. In the absence of evidence to the contrary, someone is taken to decide on failure to do something when either they do an act which is inconsistent with them doing it or (if they do not do anything inconsistent) on the expiry of a period in which they might reasonably have been expected to do it – s.123(4) EQ 2010.

48. If more than one discriminatory action is claimed, the 3 month time-limit attaches to each action.

49. However, under s132(3) conduct extending over a period is treated as if done at the end of the period, so the 3 month time limit only needs to be counted from that point. This is often colloquially referred to as 'continuing discrimination'. In ***Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96***, the CA held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts. There needs to be some kind of link or connection between the actions, especially if different people are involved. This often means that a series of discriminatory actions can be in time provided the claim was brought within 3 months of the most recent action (ie the most recent action which is ultimately found to be discrimination).

50. The Tribunal also has a wide discretion to extend time if it is just and equitable to do so – s.123(1)(b) EQ 2010.

51. The burden is on the Claimant to show that it is just and equitable for an extension to be granted. There is no presumption that the discretion will be exercised, extensions are the exception rather than the rule – ***Robertson -v- Bexley Community Centre t/a Leisure Link [2003] IRLR 434 (CA)***.

52. When considering whether or not to exercise its discretion to grant an extension of time, the tribunal should have regard to the checklist in s.33 of the Limitation Act 1980 (as modified by the EAT in ***British Coal Corporation -v- Keeble & Others [1997] IRLR 336, EAT***). The tribunal should consider the prejudice each party will suffer according to the decision reached and all the circumstances of the case and in particular:
    (i) The length and reasons for the delay;
    (ii) The extent to which the cogency of the evidence will be affected by the delay;

(iii) The extent to which the Respondent has co-operated with any requests for information;
(iv) The promptness with which the Claimant acted once s/he knew of the facts giving rise to the cause of action; and
(v) The steps taken by the Claimant to obtain appropriate advice once s/he knew of the possibility of taking action.

53. The potential merits of the claim may also be relevant to the exercise of the discretion: ***Rathakrishnan -v- Pizza Express (Restaurants) Ltd [2016] ICR 283, EAT***.

Unfair Dismissal

54. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") confers on employees the right not to be unfairly dismissed. Enforcement of that right is by way of complaint to the Tribunal under section 111.

55. The Claimant must show that he was dismissed by the Respondent under section 95. It is for the employer to show the reason, or principal reason, for dismissal.

56. Where there is no express dismissal, then the Claimant needs to establish a constructive dismissal. Section 95(1) states that an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal if:
"(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

57. ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221*** set out the approach to be taken when considering whether there has been a constructive dismissal:
"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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

58. In order to claim a constructive dismissal, the employee must therefore show th at:
(i) there was a fundamental breach of contract on the part of the employer;
(ii) the employer's breach caused the employee to resign; and
(iii) the employee did not lose the right to claim constructive dismissal by delaying too long before resigning and thus affirming the contract.

59. Whether there has been a repudiatory breach is an objective test, the employer's subjective intention is irrelevant: ***Leeds Dental Team Ltd -v- Rose 2014 ICR 94, EAT.***

60. A fundamental breach may either be a one-off breach or a course of conduct on the employer's part which cumulatively amounted to a fundamental breach

(providing that the final act adds something to the breach: ***Omilaju v Waltham Forest LBC [2005] IRLR 35 CA***).

61. In ***Woods -v- WM Car Service (Peterborough) Ltd [1981] ICR 666, EAT*** it was said "The Tribunals function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it". An employee is not therefore justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably.

62. Where an employer breaches the implied terms as to trust and confidence that is inevitably fundamental: ***Morrow -v- Safeway Stores plc [2002] IRLR 9, EAT***. However, the Employment Appeal Tribunal has held, in ***Croft v Consignia plc [2002] IRLR 851***, that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. It is for the Tribunal to determine the gravity of any suggested breach of the implied term. In other words, whether a breach is fundamental is essentially a question of fact and degree.

63. An employee will be regarded as having accepted the employer's repudiation only if his or her resignation has been caused by the breach of contract in issue. Whether an employee left employment in response to his/her employer's breach of contract is essentially a question of fact for the Tribunal.

64. If there is another reason for the employee's resignation, such that he or she would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal. Where there are mixed motives, a tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation. However, the employer's breach will be an effective cause of the resignation if it is one of a number of reasons contributing to the decision to resign, it need not be the only effective cause. As Mr Justice Elias, then President of the EAT, stated in ***Abbycars (West Horndon) Ltd -v- Ford EAT 0472/07 [2005] 5 WLUK 595***, 'the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon'.

65. The Court of Appeal in ***Kaur -v- Leeds Teaching Hospitals NHS Trust 2019 ICR 1***, offered guidance to tribunals, suggesting that it will normally be sufficient for the Tribunal to ask itself:
    (i) what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
    (ii) has he or she affirmed the contract since that act?
    (iii) if not, was that act (or omission) by itself a repudiatory breach of contract?
    (iv) if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

(v) did the employee resign in response (or partly in response) to that breach?

66. If an employee has been dismissed, either constructively or expressly, then the Tribunal must go on to consider the fairness of the dismissal.

67. It is open for an employer to argue that, despite a constructive dismissal being established by the employee, the dismissal was nevertheless fair. The employer will have to show a potentially fair reason for the dismissal and that will be the reason why the employer breached the employee's contract of employment; see ***Berriman v Delabole Slate Ltd 1985 ICR 546 CA***. The employer will also have to show that it acted reasonably. If an employer does not attempt to show a potentially fair reason in a constructive dismissal case, a Tribunal is under no obligation to investigate the reason for the dismissal or its reasonableness; see ***Derby City Council v Marshall 1979 ICR 731 EAT***.

Relevant Findings of Fact and Associated Conclusions

The Witnesses

68. The Claimant clearly struggled with his recollection of events that were now over some years ago, but the Tribunal accepted that he was an honest and straightforward witness who was doing his best to give accurate evidence. He was unable to provide much additional detail or particulars beyond the written evidence although his clear sense of grievance came across. The Tribunal felt unable to place much weight on his evidence where it was unsupported by contemporaneous evidence or other witnesses.

69. The Tribunal found the Respondent's witnesses to be honest, credible, straightforward and reliable. Mr Cook, the store manager, in particular appeared to be extremely sympathetic to, and supportive of, the Claimant.

The Claims

70. The Claimant commenced his employment with the Respondent on 11th September 2016 as a Customer Advisor at the Respondent's Croydon store when he was 67 years of age.

71. He was initially contracted to work 15 hours per week Sunday to Saturday working a varied rota of shifts [**122-125**]. Subsequently the Claimant opted out of Sunday working, as he was entitled to do, which led to a change in his contract [**127**]. Accordingly, from 31st December 2017 he was contracted to work only Monday to Saturday and rostered to work only for 10 hours per week initially. This was the subject of contested previous tribunal proceedings between the parties under claim ref 2303192/2018 which resulted in a judgment in the

Claimant's favour on 7th October 2020 after a 4 day trial during which the Claimant gave evidence [**27-28**]. The Claimant initially included allegations of age discrimination in that claim to the Tribunal but those claims were struck out at a preliminary hearing on 19th June 2019 [**13-26**].

72. At the time of the termination of his employment he was working 15 hours per week on a Monday to Saturday rota.

73. There is nothing in the Claimant's employment contract which explains the procedure by which the shifts he was expected to work would be notified to him. The only provision in the contract which refers to the rotas relates to changes in the rotas and states that the Respondent "will make all reasonable efforts to ensure you receive two weeks notice of any rota changes and your availability will be taken into consideration." [**122**].

74. Although the Respondent has a number of policies and procedures and an employee handbook, the Tribunal were not referred to any provision in these documents which governed the providing of rotas or the notification of expected working hours to the employees.

75. All parties were agreed that the Respondent sought to set rotas 4 weeks in advance. There was a dispute between the parties as to when and how the set rotas were expected to be disseminated to the staff.

76. The Claimant's position was he should receive his rota from the Respondent at least 2 weeks in advance. There was no evidence to support this being a contractual requirement. The Respondent's position was that workers were expected to take shared responsibility for ascertaining when they were expected to work.

77. The Tribunal finds that Team leaders were provided with the rotas once set and had responsibility for distributing them to their team members. No one method of distribution was applied and individual team leaders had different arrangements and bespoke arrangements for different members within their teams. Methods adopted at various times included: printing hard copies and leaving them at a designated till, speaking to members individually and providing them directly with a printed copy, posting the rotas on team whatsapp groups and sending the rotas individually to team members by e-mail or by whatsapp. The rotas were also available to be viewed by team members on the intranet which could be accessed on terminals in stores and in the office or on smart phones using an app (ESS).

78. Staff members were also able to utilise the intranet to book holidays, to access and view the Respondent's policies and procedures and the employee handbook, and to see and print their payslips. If employees did not log onto the intranet for a period of months the system automatically disabled access for that employee but access was readily reinstated by contacting the relevant

department. A hard copy of the employee handbook was also available in the office.

79. The Respondent has a number of policies and procedure applicable to its employees, including an annual leave policy and a disciplinary and grievance policy. These are referred to in the employee handbook [**338-340r**], and were also referred in the July 2014 handbook provided to the Claimant in hard copy at the commencement of his employment. The handbooks also contained information as to where they can be located [**340r**]. The policies and procedures were updated from time to time and when updated employees would be informed of any significant changes by posters around the staff areas.

80. On 7th April 2020, as a result of the Covid 19 pandemic, the Claimant was placed on furlough. He therefore did not attend work for some months until 18th July 2020 [**223**]. Although he returned to work after the end of this period of furlough, in January 2021 the Respondent's staff aged 70 and over were offered the opportunity to be further furloughed at 80% of pay. The Claimant accepted the offer [**128-129**] and between 7th January 2021 and 26th July 2021 he was placed on authorised leave with continuity of service on 80% of pay. As part of the agreement the Claimant agreed that he would make himself available to return to work with 24 hours notice [**129**].

81. It was agreed between the parties that the Claimant was notified on 15th July 2021 that his authorised furlough leave would come to an end on 26th July 2021 and that he would be required to return to work that week. On 15th July 2021 he was provided with a copy of his rota for the week commencing 25/07/21 which required him to work shifts on 27th, 29th and 30th July 2021 [**312**].

82. He didn't return to work on 27th July 2021 but instead called in to say that he was sick and unfit for work. He subsequently e-mailed the Respondent to say that he intended to provide a sick certificate the follow day [**309**]. He did not do so, but e-mailed again on 28th July 2021 to say that he remained unwell and would provide a certificate if required but that his understanding was that he was not required to produce a certificate for the first 7 days of illness [**312**].

83. Under the terms of the sickness policy set out in the employee handbook that was in fact correct, but he was supposed to call in every day that he was scheduled to work and was unable to do either before or within 30 mins of the start of his shift unless covered by a fit note [**340j**]. He didn't call in on either 29th or 30th July 2021 despite not providing a fit note but no issue was taken in respect of this and Ms Williams gave evidence that she understood that he would not be in work on those or subsequent days.

84. The following week commenced on 2nd August 2021. The Claimant was not sent a copy of his rota for that week by the Respondent prior to 2nd August 2021. Nor did he make any attempt to ascertain when he was expected to work that week.

85. Ms Williams gave evidence that she did not expect him to be in work that week but did expect him to provide a fit note as by 2nd August 2021 he would have

been unwell for 7 days and was therefore required to do so if he continued to be absent.

86. At 10:34am on 2nd August 2021 Ms Williams sent the Claimant an e-mail providing him with his rota for the weeks commencing 2nd August 2021 and 9th August 2021 [**312**]. The rota for the week commencing 2nd August 2021 showed that the Claimant was scheduled to work a shift on 2nd August 2021 commencing at 1pm. Ms Williams gave evidence that she thought that the Claimant remained unwell as a result of his previous correspondences regarding providing a fit note and she did not therefore expect him to work any of the shifts the week commencing 2nd August. She had nevertheless provided a copy of the rota so that he would be aware as to when he was scheduled to work so that he could ensure that his fit note covered the relevant dates. The Tribunal accepted this evidence.

87. The Claimant did not attend his shift on 2nd August 2021, call the Respondent or provide a fit note but he e-mailed Ms Williams at 15:37 on 2nd August 2021 stating that he had just seen her e-mail and had not previously been sent a rota [**311**]. He did not indicate whether he was, or was not fit to work, but Ms Williams assumed from his reply that he was fit to work and responded 4 minutes later at 15:41 saying "OK please come in and work todays shift tomorrow instead 1pm to 5pm" [**311**]. In oral evidence the Claimant confirmed that he was indeed fit to work on 2nd August 2021.

88. The Claimant was upset by the late notification of this weeks' rota, which he perceived as being the latest in a long history of late notifications and which he considered was unlikely to change.

89. The Tribunal were satisfied that this was a genuinely perceived grievance but one which had not been formally raised with the Respondent previously by way of the lodging of a formal complaint or formal grievance.

90. Although the Tribunal received evidence of a number of other weeks' rotas having been provided at late notice (in the further information) [**114-115**], no evidence was presented as to when notice of the rotas for these weeks had been given to the Claimant. For the reasons set out above, the Tribunal also found that there was no contractual obligation to provide rotas at any particular period of notice and that the Respondent's custom and practice was to place shared responsibility for ascertaining rostered shift times on both the Respondent and on its staff, including the Claimant.

91. This shared responsibility was a matter which the Claimant did not acknowledge or recognise before this Tribunal but which he appeared to have understood by 27th January 2018 when, during an exchange about rota provision with other staff members and his team leader he concluded the exchange with the message "No problem. My mistake. In the past my rota has always been given or sent to me. I had no idea no member of staff was responsible for distributing rotas. I had no idea staff had to either ask for their rota, or search for it under till 10. Learn something new today…" [**208**]. The Tribunal was also found evidence of

subsequent examples where the Claimant made requests for his rota, such as on 23/08/20 [**404**].

92. Accordingly, the Tribunal was unable to conclude on the balance of probabilities that there had in fact been late notice on any date other than in respect of the week commencing 2nd August 2021.

93. The Tribunal also found no evidence to support the Claimant's contention that he was treated any differently from any other employee of the Respondent in relation to the provision of rotas or that any difference in treatment in respect of rotas was a result of his age and the consequent perception that he had nothing better to do. The Tribunal was satisfied that all employees were expected to share responsibility for ascertaining their working hours and that other employees also experienced instances where rotas were not provided to them substantially in advance of their expected shifts [eg **181**].

94. The Tribunal notes that it does not endorse the Respondent's shared responsibility approach and was surprised that there was no clear system or policy for the provision of rotas or the expected period of notice. The Tribunal considered it to be poor practice to have no clear and consistent policy, record, written documents or system which made it clear to staff where responsibility lay for establishing expected working hours and how, and in what time frame, rotas would be made available to staff. The Tribunal considered that this failure invited misunderstandings, chaos and confusion on the part of at least some employees and could lead, as it did in this case, to employee dissatisfaction. The Tribunal did not consider that this uncertainty was fully mitigated by the flexibility the Respondent clearly afforded to its staff who wished to change their allocated hours, for a variety of reasons, even at the last minute.

95. Feeding into the Claimant's sense of grievance about the late notification of the rota on 2nd August 2021, were a number of other matters where the Claimant felt that he had been poorly treated by the Respondent.

96. One of those matters was the booking of holiday for him without his knowledge or consent.

97. The Respondent's annual leave year runs between 1st January and 31st December. The staff handbook and annual leave policy clearly set out the expectation that leave would be booked early in the year for the entire year [**328-337, 338 & 381**]. The annual leave policy also clearly set out the Respondent's ability to book holiday for an employee in certain circumstances, including where leave had not been booked and the end of the leave year is near [**331**]. Both documents also clearly set out that untaken accrued holiday at the end of the leave year would be lost (save for certain circumstances where a max of a 1 week could be carried over) and would not be paid in lieu [**338 & 381**]. This was understood by the Claimant.

98. The Claimant complains of 3 occasions, on 15th April 2018, 8th September 2018 and 9th October 2020 when leave was booked for him without his knowledge or

consent. There was no evidence to contradict the Claimant's evidence that leave was booked for him without his knowledge and consent on these dates. The Respondent's case is that it was entitled to do so and that it did so in order to ensure that he did not lose his leave at the end of the leave year. Also, that this was done for other employees as well and it continued to be flexible so that if an employee did not wish to take leave on the dates allocated, they were able to work as usual and the leave was simply cancelled without question.

99. The Tribunal found that leave was booked for the Claimant without his knowledge or consent but that this was equally true for other staff who were notable younger, in particular Alma Wagnieri, who was born on 26th April 1966 and was some 17 years the Claimant's junior [**147**]. On accoasion the staff were warned that if annual leave wasn't booked it would be booked for them [[179]The Tribunal was satisfied that both the Claimant and Ms Wagnieri were able to cancel the holiday booked without their consent and work the shifts without any issue arising.

100. The Tribunal also found that the first of the dates complained of by the Claimant (15th April 2018) predated the issue of his first Tribunal claim on 29th August 2018. In light of the fact that the Respondent's practice of booking holidays for the Claimant predated any Tribunal proceedings the Tribunal was unable to find any evidence that those occasions on which the Respondent also booked holiday for the Claimant without his consent but which post-dated his issue of tribunal proceeds was in any way related to the commencement of those proceedings.

101. The Tribunal was also satisfied that there was no detriment to the Claimant from holiday being booked for him without his knowledge or consent as it could easily be cancelled without the loss of any entitlement, should the Claimant wish to work. The booking of holiday was an entirely supportive measure to try to ensure that staff members did not lose their entitlement whilst managing the needs of the business to be appropriately staffed throughout the year.

102. The Claimant also remained aggrieved about another series of events which had occurred earlier in 2020 and 2021 when the Respondent received a request for a reference in relation to the Claimant from a fostering agency (TACT) following the Claimant's application to become a foster carer.

103. The original request was received in October 2020 and on 27th October 2020 the Respondent provided a reference [**269 & 282**] in accordance with its Adoption and Fostering policy and the templates and guidance from the HR user guide [**322-323**].

104. The reference was provided by Mr English from details on the Respondent's computer system. The Tribunal accepted Mr English's evidence that he was unaware of the 2018 Tribunal proceedings brought by the Claimant when he provided the reference, or at any time prior to these proceedings and that he did not have access to any of the Respondent's records regarding the Tribunal proceedings. The past proceedings did not therefore influence him in any way in the information that he provided.

105. The reference that he provided, gave details of the start date of the Claimant's employment, his job title and under the heading "details of any disciplinaries that have been given over the last 12 months" it stated "Informal Action – Breach of Company procedure". No other disciplinary information was provided [**282**].

106. Subsequently, when the foster agency sought clarification and further information regarding the disciplinary by e-mail dated 20th January 2021 [**268**], despite the agency providing a signed consent form from the Claimant, the Respondent independently sought the Claimant's consent before providing the information. On 27th January 2021, the Claimant e-mailed Mr English refusing to provide his consent for further information to be provided to TACT [**292**].

107. After the agency was informed on 28th January 2021 that further information could not be provided as the Claimant had refused consent [**285**] The Claimant e-mailed Mr English later that day in the following terms "If my permission is required, I give consent for the disciplinary action to be shared with the original reference" [**300**].

108. Accordingly, on 29th January 2021 Mr English sent a further e-mail to TACT stating "After our e-mail yesterday Franklin came back to me and advised that he is now happy for us to share the information with you. Although on record it shows a disciplinary action, it was an informal action. The details are below". The details provided were as follows "This informal action was in relation to how Franklin had booked annual leave with us, in that Franklin's annual leave was left unbooked until the end of the year. This expired in December 2020" [**288**].

109. The background to this information was that in 2019 the Claimant had not booked any annual leave in the first 8 months of the year. Then when he sought to book annual leave in September/October 2019 he was unable to access the systems due to his log in having been disabled for inactivity. Once it was re-enabled he sought to book holiday in September/October which was not approved leaving him in the position that by Nov 2019, shortly after Mr Cook became the Store Manager at Croydon, he had not taken any of his annual leave and was unable to provide the required notice to do so and to take his entire accrued allowance.

110. The Claimant made a complaint to the Respondent about this which was treated as a grievance under the grievance procedure and was the subject of a number of meetings between the Claimant and Mr Cook which led to Mr Cook exceptionally taking steps to ensure that the Claimant was not disadvantaged. He did this by allowing the Claimant to take some leave, allowing the Claimant to carry over 1 weeks leave to the following leave year provided that it was taken in January 2020 and authorising an entirely exceptional payment in lieu for the remaining untaken days. He did this because he did not know how the situation had been allowed to arise, having not been the store manager for the majority of the year, and to ensure that the Claimant did not lose out. However, he was also keen to ensure that the situation did not occur again. Consequently, in addition to resolving the Claimant's grievance in the manner described, he also referred the Claimant for disciplinary action for breaching the annual leave policy.

111. That disciplinary action was conducted by another manager, Owen Yaxley. He met with the Claimant on 20th December 2019, which meeting was adjourned to 23rd December 2019. No other persons were present at either of those meetings. The Respondent considered these meetings to be investigatory (or Step 1) meetings under their disciplinary and grievance policy. Consequently, the Claimant was not required to be given notice of the meeting, had no right to be accompanied and there was no clear mandatory requirement for a notetaker to be present [**handbook 383, 5.2 & disciplinary policy 340U**]. The requirement for a notetaker (referred to by the Claimant) appearing at 5.1 of the July 2014 handbook [**383**] appears under the sub-heading "witnesses" and was not applicable to the meetings with the Claimant.

112. During the meeting Mr Yaxley made notes of his discussions with the Claimant on a pro forma meeting script, which the Claimant subsequently signed as being an accurate record [**245- 248**]. The discussion centred on the Claimant's failure to book leave giving twice the amount of notice as the amount of leave requested and the Claimant's reasons for leaving the booking of leave to the end of the year. The Claimant informed Mr Yaxley that he was unaware that leave had to be booked by a certain date and that he was also unaware of the policy regarding annual leave.

113. Mr Yaxley concluded that the Claimant had breached the policy by failing to give the requisite notice [**248**] and by leaving all his holiday to the end of the year [**251**]. In light of the Claimant's explanations, Mr Yaxley decided to deal with the breach by way of informal action.

114. On the meeting script signed by the Claimant Mr Yaxley recorded the outcome as "informal action" and the notes to that section on the signed form clearly state that an informal action form would fully detail the concerns and that a record would remain on the Claimant's file for a period of 12 months and any recurrence may result in formal disciplinary action [**246**].

115. Mr Yaxley also issued an informal action form to the Claimant on 23rd December 2019 [**251**] which the Claimant signed. The Claimant acknowledged in oral evidence that he had received a copy of this informal action form.

116. In oral evidence the Claimant stated that he couldn't remember a word that went on at those meetings as he had other matters he was focused on at that time, namely his health a pending operation for a serious condition.

117. The Claimant gave evidence to the Tribunal that he considered the reference provided to TACT to be unfair because he did not consider he had been or should or been subject to disciplinary action regarding his leave because he had considered it all resolved following the meetings with Mr Cook and the outcome of his grievance [**250**].

118. Although the Tribunal accepted that this was the Claimant's understanding, the Tribunal found that this understanding was mistaken and accepted that in fact

the Claimant had been properly subjected to an appropriate disciplinary procedure which had resulted in informal action.

119. The Tribunal were therefore satisfied that the contents of both the reference and the clarification of the disciplinary action in the e-mails to TACT were factually accurate and neither dishonest or misleading.

120. The Tribunal also considered the Claimant's objection to the use of the phrase "Franklin came back to me and advised that he is now happy for us to share the information with you" in Mr English's e-mail of 29th January 2021 to TACT [**288**]. The Claimant considered this was also to be dishonest because he was not "happy" and had not said that he was "happy". The Tribunal accepted Mr English's evidence that his use of the word happy referred to the Claimant having provided consent and was not intended to reflect the Claimant's emotional state. The Tribunal is satisfied that this was a matter of semantics and different use of language and that there was nothing objectively either misleading or dishonest in this turn of phrase.

121. Returning to the chronology of events, the Tribunal is satisfied that all of these matters referred to above were in the Claimant's mind on 2nd August 2021 when he chose to resign.

122. Also that this background, as well as the receipt on 2nd August 2021 of his rota for that week for the first time showing that he was scheduled to work the same day, and the subsequent correspondence with Ms Williams, all played a part in the Claimant's decision to resign.

123. That decision was communicated in 2 e-mails from the Claimant to the Respondent on 2nd August 2021 [**311 and 314-318**]. Although the e-mails go into some detail regarding the TACT reference, they do not detail all of the matters which the Tribunal is satisfied contributed to the Claimant's decision to resign. Nevertheless, the Tribunal is satisfied that all of the above matters were factors in the Claimant's decision to resign, as the e-mails do refer, in general terms, to "a range of unfair actions" and "the latest sequence of gross and unfair actions" [**311 & 314**]. The Tribunal is satisfied that the Claimant reached the conclusion that nothing would change and that he would continue to be subject to behaviour that he considered to be unfair and was no longer willing to tolerate.

124. The Tribunal finds that whilst the Claimant undoubtedly felt aggrieved about the matters referred to above, save in respect of the late notification of the 2nd August 2021 rota there was no evidence of objectively unfair actions by the Respondent against the Claimant for the reasons that have already been set out above.

125. The Tribunal also noted that the impression left on the Tribunal by the Respondent's witnesses was that the Claimant was a valued employee they had sought to support. That was most clearly evidenced by their response to his resignation. On 9th August 2021 the Respondent wrote to the Claimant inviting him to discuss his concerns with the Respondent and reconsider his resignation

and stating that "you still remain an important part of the Croydon Team" [**319**]. The Claimant chose not to take advantage of that offer.

Conclusions

Unfair dismissal

126. The most recent act on the part of the Respondent which the Claimant said caused or triggered his resignation was the late provision of the rota on 2nd August 2021. The claimant resigned promptly thereafter and did not affirm the contract after that act.

127. Tribunal found that the Respondent's provision of the rota to the Claiamnt on 2nd August 2021 (which required the Claimant to be in work that day) was late. However, this was the only late provision of a rota that was found on the facts presented.

128. The Tribunal did not consider that the late provision of rota on 2nd August 2021 was a fundamental breach of the contract amounting to behaviour by the Respondent in a manner calculated likely to destroy the trust and confidence between the Claimant and the Respondent. This was particularly the case in light of the fact that the Respondent took no issue with the Claimant's failure to work that day and indeed readily sought to rearrange the shift without any penalty, criticism of the Claimant or suggestion of disciplinary action.

129. In view of its findings regarding shared responsibility, the Tribunal was not satisfied that the late provision of rota was either a breach of the implied term as to trust and confidence, or a breach of any other term of the employment contract.

130. It was not, objectively, a fundamental breach that entitled the Claimant to terminate the contract and did not amount to a breach which seriously damagerd or destroyed the necessary trust and confidence. At its highest, judged reasonably and sensibly, this single occasion was a lesser blow the Claiamnt was expected to absorb. This was particulaly the case as the Claimant was aware of the shared responsibility between the Claimant and the Respondent for ascertaining the hours that he was expected to work (see paragraph 90 above) and the Respondent was accommodating when the Claimant took issue with the lateness and did not require him to work the same day.

131. For the reasons set out above, the Tribunal was satisfied that late provision of the rota was a factor (but not the only factor) in the Claimant's decision to resign and for the Claimant amounted to a last straw.

132. However, the Tribunal was not satisfied that the other factors which contributed to the Claimant's decision to resign were breaches of the express terms of the contract or the implied term of trust and confidence. Even if they were, they not fundamental breaches themselves and did not cumulatively amount to a repudiatory breach of the trust and confidence between the Claiamnt and the Respondent.

133. The Tribunal therefore concluded that there was in fact no dismissal of the Claimant by the Respondent. Whilst the Claimant resigned for reasons he considered valid they could not, objectively, be considered to fundamental or to amount to a breach of the implied term of trust and confidence. Accordingly, the claim for unfair dismissal fails and there was no need for the Tribunal go on to consider whether there was a potentially fair reason for the dismissal.

134. Accodringly, the claim for unfair dismissal was not well-founded and was dismissed.

Direct Age Discrimination

135. The Claimant is in the age group "over 65" and compares himself with people who are younger, that is, in the under 65 age group.

136. The Claimant says that the late provision of rotas and booking of holiday without his consent was unfavourable treatment because of his age.

137. For the reasons set out above, the Tribunal is satisfied that the Claimant's shift rota on for the week commencing 2nd August 2021 was provided to him only on 2nd August 2021 and was therefore provided late but was not satisfied that rotas were provided late on any other dates. Against a background of the Claimant having been away from work for an extended absence, this could potentially have amounted to less favourable treatment even though it did not amount to a breach of contract.

138. It was inconvenient to the Claimant if the Respondent did not provide him with a copy of the rota with a reasonable amount of notice. However, the Tribunal was not satisfied that it did in fact amount to less favourable treatment. The Claimant had access to the rota pattern should he wished to obtain it without having to have it provided to him by the Respondent, either by accessing the systems (using app on phone or terminal in store) or by simply making a request for rota to be sent to him. The Tribunal was not directed to any occasion on which the Claimant had requested a rota to be provided to him and was not actually provided with a rota.

139. The Tribunal was also satisfied that holidays were booked for him without the Claimant's consent for the reasons set out above. Whilst the Tribunal was satisfied that this occurred, the Tribunal was not satisfied that this amounted to less favourable treatment of the Claimant. Booking of holiday even without the Claimant's consent sought to preserve the Claimant's holiday entitlement and prevent the Claimant from losing it. However, if unwanted on a particular date it could be rescinded by the Claimant at his request without question. It was not therefore detrimental or less favourable to him but was in fact a positive action which supported the Claimant.

140. Further, the holiday booking and the shift rota pattern provision were no different for the Claimant than for other staff members. There were clear examples of

younger staff members (ie in the age group under 65's) being subjected to exactly the same pattern of behaviour. Therefore even if either action complained of had amounted to less favourable treatment, the Tribunal was not satisfied that the Respondent's behaviour in either respect was for the reasons suggested by the Claimant or because of the age of the Claimant.

141. The Claimant did not therefore satisfy the Tribunal that there was a prima facie case of direct age discrimination and that claim was dismissed.

142. In view of its conclusion, it was unnecessary for the Tribunal to consider whether the Respondent's actions were a proportionate means of achieving a legitimate aim. Further, and in any event, the Respondent did not pursue this line of defence and the Tribunal did not therefore consider this further.

Victimisation

143. The Tribunal was satisfied that the Claimant did a protected act by bringing the previous tribunal proceedings (claim ref 2303192/2018) in 2018. Although the claims of age discrimination did not proceed to a final hearing on their merits, there was nevertheless a claim under the Equality Act which was contained within the proceedings when they were commenced.

144. The Tribunal was unable to find, on the balance of provbailities, that the Claimant also did a protected act by givin evidence in connection with proceedings under the Act as by the time the final hearing took place, there was no claim under the Equality Act before the Tribunal.

145. For the reasons set out above, the Tribunal found that the Respondent did the acts the Claimant complains of. The Respondent did provide a reference to foster agency on 21st October 2020 referring to the Claimant having been subjected to informal discipliary action and also clarified and provided further details of that disciplinary action on 29th January 2021. Also, holiday was booked for the Claimant without his consent.

146. However, the Tribunal Tribunal unable to conclude any of acts the Respondent did in fact subjected Claimant to a detriment.

147. The reference and subsequent clarification were provided at the Claimant's request to assist the Claimant. For reasons set out above, the Tribunal found the contents were accurate and in no way misleading or dishonest. Further, the Tribunal heard no evidence from which it could safely, on the balance of probabilities, conclude that the Claimant's application to foster was adversely affected by the contents of the reference or clarification and the Claimant's evidence was that he did indeed end up fostering, albeit some time after the refence was provided. There was however no reliable or credible evidence that the delay in fostering commencing was as a result of the contents of the reference.

148. For the same reasons as are set out above in paragraph 139 the Tribunal was also unable to conclude that the Claimant had been subjecteded to any detriment by reason of the Respondent's actions in booking holiday for the Claimant without his consent.

149. Notwithstanding that the claimant felt both the actions he complained of had subjected him to a detriment, the Tribunal concluded that no reasonable employee would, or might, take that view.

150. In any event, the Tribunal did not find that the Respondent's actions in providing the reference and booking holiday were attributable to the Claimant having done the protected act, namely brought the Tribunal proceedings in 2018 for the following reasons:

    (1) The Reference provided at the Claimant's request in response to a request by the foster agency and there was nothing incorrect, misleading or dishonest about its contents.
    (2) The Respondent booked holiday for the Claimant without his consent on one occasion which pre-dated the protected act and could not therefore have been related to it. There was therefore a pattern of the behaviour having occurred before the protected act and no evidence or other reason to suppose the Respondent's motivation for the subsequent occasions when holiday was booked without the Claimant's consent was different to the motivation for the action predating the protected act or for the unrelated reasons explained by the Respondent's witnesses.
    (3) Other staff members also had holiday booked without their consent and there was no evidence before the Tribunal that they had undertaken a protected act so as to motivate such conduct.

151. The Tribunal was also satisfied that Mr English, who provided the reference, lacked knowledge of the protected act. He used company records which were not in any way inaccurate to compile the refeemce and clarification and there was no evidence that he had been influenced or manipulated to carry out the detriment by a different person who was aware of the protected act.

152. For these reasons, the claim for victimisation is not well-founded and must also fail. It was therefore dismissed.

Time Limits

153. In light of the findings set out above, the Tribunal did not have to go on to consider this time limit issues arising, but neverhtless did so in the event that the Tribunal were to be found to have erred in respect of any of its conclusions.

154. The constructive unfair dismissal was clearly within time and no time issue was taken by Respondent in relation to that aspect of the claim.

155. The Tribunal found that the the relevant primary limitation dates were as follows:

(i) In relation to the first claim ref 2300453/2021: 2nd November 2020.
(ii) In relation to the second claim, ref 2305024/2021**:** 26th September 2021.

156. The first claim did not include any reference to the provision of the reference to TACT, and the latest date on which the Claiamnt complained that holiday had been booked without his concsent was 9th October 2020. The claimant was on furlouhh between 7th April 2020 and 18th July 2020 and between 7th January 2021 and 26th July 20201 and no acts, other than the provision of the refernces , which are relied upon occurred during these periods. Consequently, the only act relied upon which was within the primary time limit was the Respondent's failure to provide the Claimant with his weekly rota rota in good time prior to 2nd August 2021.

157. The Tribunal also considered whether there was conduct extending over a period.

158. The Tribunal found as a fact that there had only been late provision of a rota on the single occasion of 2nd August 2021. Had the Tribunal found that there had been late provision of rotas on any other occasions, it would have considered that all the occaisons of late provision of rotas were capable of forming part of a series of events. However as a result of the Claimant's lengthy periods of absence from work as a result of furlough and authorised absence, there was a very substantial gap between 2nd August 2021 and next most proximate occasion when the Claimant had asserted that a rota provided late was 10th January 2021 [**115**]. The Tribunal concluded that the time gap was so substantial that it could not accept that there was a course of conduct extending over a period of time which would justify linking all those acts together even if it had been satisfied that the rotas had been provided late on the occasions specified. It would therefore still have concluded that the only act that was brought in time was that on 2nd August 2021.

159. In relation to the claims that holiday was booked without the Claimant's consent, the Tribunal accepted that these occasions had sufficient nexus that they could be linked together as associated acts forming a course of conduct but similalrly concluded that they were too far apart to in fact be so considered.

160. However, there was no such nexus between the booking of holidays without consent and the late provision of rotas so that these acts could not be considered together as part of one series of events. The Tribunal concluded that it was not enough merely that the acts were connected by being acts the Claimant was dissatisfied with and attributed to discrimination, there must be something more, some additional element that connected them, otherwise all acts would be conduct extending over a period. That other connection was absent.

161. In relation to the two acts of providing a reference and its clarification, they could themselves be conntected together and formed a series of events amounting to a course of conduct but were otherwise isolated incidents unconnected to any of the other conduct complained of. For the above reasons, they could not therefore

form part of a course of conduct together with any of the other acts complained of.

162. The Tribunal also considered whether, even if the claims other than that regarding the late provision of rotas on 2nd October 2021 were out of time, it would have found it to be just and equitable to extend time.

163. The Tribunal considered why the complaints were not made to the Tribunal within time but very little evidence had been put before the Tribunal to explain the delay. The Claimant put forward no real or substantive reasons despite prompting, saying only that he was preoccupied with his fostering application during 2021. The only other matter touched on in evidence which could possibly have explained the delay were that he had health problems between about late 2019 to early/mid 2020.

164. The Tribunal considered various factors by analogy with the checklist in s 33 of the Limitation Act as per paragraph 52 above. The delay in taking action regarding those matter which were prima facie out of time was fairly lengthy and the Tribunal found no apparent good reason to explain it.

165. There was no evidence that the Claimant had taken any steps to take advice between the dates of the events complained of and the date that he commenced the Tribunal proceedings. He would have been aware that there time limits applicable to these types of claim as a result of his previous 2018 Tribunal proceedings and as to what those limits were. That is most obviously the case as the detailed case management order of 19th June 2019 in those proceedings struck out parts of his claim which related to discrimination [**13-26**]. It gave detailed reasons for doing so, including clearly setting out the applicable time limits and the factors to be considered and made clear that one of reasons factoring into the decision to strike out the discrimination claims was that claims out of time and it would not be just and equitable to extend time.

166. Although the Claimant acted reasonably promptly to bring proceedings after he resigned and consequently his claim for constructive unfair dismissal and in relation to the late provision of rotas on 2nd August 2021 were brought within time, he did not act promptly in relation to the other actions he complained of. Nor did he raise a grievance with the Respondent during course of his employment about the matters that he complained of so as to give them prompt notice and allow them thoroughly investigate within good time the issues he now raises.

167. It was undoubtedly the case that the quality of the Claimant's evidence has clearly affected by the passage of time. Equally, the Respondent would have been able to bring forward more evidence on some of the matters the Tribunal has had to consider and decide had they been given more contemporaneous notice of them.

168. There is potentially prejudice either if time is/is not extended. If time were to be extended the Respondent would lose the benefit of the protection of law setting down time limits. However if time were not extended the Claimant would not able

to bring a claim, albeit one that the Tribunal has, in the event, not found to be justified.

169. For all those reasons despite considering it carefully, the Tribunal would not have considered it just and equitable in all the circumstances to extend time. Therefore, in any event the claims for age discrimination and victimisation other than related to the late provision of the rota on 2nd August 2021 would have been struck out for lack of jurisdiction.

Employment Judge Clarke
Date: 01 October 2023