EMPLOYMENT TRIBUNALS

Claimant: Mr G Bikakis

Respondent: H. J. Heinz Manufacturing UK Limited

Heard at: Birmingham **On:** 30 October 2023
31 October 2023
1 November 2023

Before: Employment Judge Edmonds
Mrs K Ahmad
Mr C Murphy

Representation
Claimant: In person
Respondent: Mr N Roberts, counsel

JUDGMENT

The unanimous decision of the Tribunal is that:

1. The complaint of direct race discrimination is not well-founded and is dismissed.

2. The complaint of indirect race discrimination is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant is employed by the respondent as a maintenance engineer at the respondent's Telford factory, and remains in the respondent's employment. He is a Greek national and of Greek national origin.

2. This claim relates to the claimant's request to take three rotations of annual leave in August 2022, which was denied. He alleges that the request was denied because he is Greek, and/or that the respondent's holiday policy more generally (which ordinarily limits the length of holiday taken to two rotations of leave) indirectly discriminates against Greek nationals and

those of Greek national origin who he says may need to take longer leave periods at any one time. The respondent's defence is that the holiday request was rejected for legitimate, non discriminatory reasons, and that the holiday policy does not place those of the claimant's race at a disadvantage (or, alternatively, if it does, that can be objectively justified as being a proportionate means of achieving a legitimate aim). The respondent also says that the claim is out of time.

3. The claimant commenced ACAS early conciliation on 2 August 2022 and the certificate was issued on 6 September 2022. His claim form was presented on 5 October 2022 and the respondent's response form was presented on 8 November 2022.

Claims and Issues

4. The issues to be determined in this case were agreed at a Preliminary Hearing before Employment Judge C Knowles on 4 April 2023, and are set out below. The claimant has a further claim against the respondent under claim number 1305122/2023 ("the Second Claim"). That claim is at an early stage: an Employment Judge had considered, prior to this hearing, whether to consolidate the two claims following a request to do so from the respondent, but declined to do so for various reasons including objections raised by the claimant's representative in the second claim. Therefore, we were careful to only address matters which relate to claim 1308106/2022 and not to make any findings which would impact upon the Second Claim.

1. Time Limits

1.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 3 May 2022 may not have been brought in time.

1.2. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2. If there was a failure to do something, when did the person in question decide on it? In the absence of evidence to the contrary, the person will be taken to decide on failure to do something when he does an act inconsistent with doing it, or if he does no inconsistent act, on the expiry of the period in which he might reasonably have been expected to do it.

1.2.3. If the claim was not brought within three months (plus early conciliation extension) of the act to which the complaint relates, was there conduct extending over a period?

1.2.4. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.5. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.5.1. Why were the complaints not made to the Tribunal in time?
1.2.5.2. In any event, is it just and equitable in all the circumstances to extend time?

2. Direct Race Discrimination

2.1. The claimant is a Greek national and of Greek national origin.

2.2. Did the respondent do the following things:

2.2.1. Through Mr Thomas Hook on 15 March 2022, reject the claimant's request to take three weeks' holiday in August 2022?

2.2.2. Through Mr Bovill, agree to reconsider the claimant's request if he assisted with overtime, but then fail to reconsider the claimant's request / to do so in his favour, on or around 11 May 2022?

2.3. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The claimant says he was treated worse than Parvinder and Sagna, who were production operatives, and Thomas Hook, who was an engineering manager. The respondent does not accept they were in comparable circumstances.

2.4. If so, was it because of the claimant's nationality?

2.5. Did the respondent's treatment amount to a detriment?

3. Indirect Discrimination

3.1. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

3.1.1. A policy that holiday leave cannot be for more than two rotations at a time, with any request for an extension being at the discretion of the respondent?

3.2. Did the respondent apply the PCP to the claimant?

3.3. Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic, e.g. persons not of Greek nationality or would it have done so?

3.4. Did the PCP put persons of Greek nationality at a particular disadvantage when compared with persons not of Greek nationality, in that the claimant says that persons with Greek nationality were more likely to require a longer period of holiday if they had to visit a dying relative?

3.5. Did the PCP put the claimant at that disadvantage?

3.6. Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

3.6.1. Ensuring the economic and operational requirements of the business;
3.6.2. Running and providing an efficient service;
3.6.3. Ensuring the fair allocation of annual leave.

3.7. The Tribunal will decide in particular:

3.7.1. Was the PCP an appropriate and reasonably necessary way to achieve those aims;
3.7.2. Could something less discriminatory have been done instead?
3.7.3. How should the needs of the claimant and the respondent be balanced?

4. Remedy

4.1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

4.2. What financial losses has the discrimination caused the claimant?

4.3. Has the claimant taken reasonable steps to reduce any financial losses?

4.4. If not, for what period of loss should the claimant be compensated?

4.5. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

4.6. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

4.7. Should interest be awarded? How much?

Procedure, Documents and Evidence Heard

5. The Tribunal heard evidence from the claimant, and from Mr Thomas Hook and Mr James Bovill on behalf of the respondent. In addition, we were presented with a file of documents which ultimately ran to 253 pages. The file was originally slightly shorter than this, however at the outset of the hearing both parties handed up some additional documents which were agreed to be added to the file (subject to the below in relation to without prejudice documentation). Where page references are noted throughout these Reasons, they relate to the relevant page in the file of documents. The Tribunal informed the parties that, unless they were taken to a specific document, we would not read it.

6. In his witness statement and schedule of loss, the claimant referred to matters which form part of his Second Claim and the Tribunal determined that it should not address those matters in this claim. We therefore disregarded paragraphs 19, 20, 21, 24, 28 and 31 of the claimant's witness statement. We also agreed that we would not address remedy in the event that the claimant was successful because it would be important to separate out any injury related to the matters arising in the Second Claim from those of the first, and there was also a potential need for medical evidence in support of the claimant's submission that he has suffered psychiatric injury. The Tribunal also explained to the claimant that in order to claim losses such as flight costs he would need to provide evidence of those costs being incurred.

7. The claimant also sought to rely on without prejudice correspondence. The Tribunal explained to the claimant that ordinarily such documents were not disclosable to the Tribunal unless he could show that there was "unambiguous impropriety" within them. The respondent's submission was that the document was not in fact relevant to this claim in any case, but they were aware that the claimant was seeking to rely on that document in respect of the Second Claim too. Without seeing the correspondence, the Tribunal enquired initially as to the relevance of the correspondence. The claimant was unable to satisfy us of the document's relevance to the matters being addressed in this claim and therefore I explained to the claimant that the Tribunal would not consider whether or not the document contained unambiguous impropriety, as it was not relevant to proceedings. We clarified that this related only to the first claim and we understand that issues relating to that document will be considered separately in relation to the second claim.

8. The hearing took place in person, save that on the final day we agreed that the respondent could dial in by CVP (video) to receive the oral Judgment and Reasons. Having delivered those oral reasons, the respondent requested written reasons on the basis that they would be useful given the existence of the Second Claim.

Facts

Background

9. The claimant is employed by the respondent as a maintenance engineer at the respondent's Telford factory. It is a skilled role which involves both carrying out scheduled maintenance work (proactive work) and also addressing faults and issues with equipment as and when they arise (reactive work). It is important that faults are fixed quickly to avoid the production line in question having to stop. The claimant started employment on 24 June 2019 and his employment continues. The claimant is a Greek national and of Greek national origin, with two children who at the relevant time for the purposes of this claim were aged 11 and 13.

10. The claimant's place of work specialises in, amongst other things, producing sachets of Heinz sauces. There are 4 kitchens and 18 packaging lines, making a total of 22 production lines. Each production line could have up to around 35 members of production staff. During the COVID pandemic production decreased because businesses had reduced need for sachets of sauce but during 2022, in particular during the period to which this claim relates, production increased. We also heard in evidence that in 2023 production in fact again decreased.

11. The claimant is a night shift worker within the respondent's "blue" team, which works a rota of 4 nights on, 4 nights off. There is another night shift team called the "red" team who work the same shift pattern, but working at the times when the blue team are not. There are also equivalent, but slightly larger, day shift teams. There were also two contractors, who were semi-retired former employees who worked some day shifts "now and then". In addition, it appears that there were two other individuals (Peter McLusky and Jo Wood) who worked in different teams but would assist the morning day shift teams from time to time. The claimant's "blue" team was made up of three individuals – the claimant, Craig Wiley and Stuart Evans, who was the team leader. The claimant is the only Greek, there is one apprentice who is Romanian in the wider engineering team.

The holiday request

12. The respondent operates a holiday policy which sets out certain general principles regarding the authorisation of holiday requests (page 53). Generally, the respondent operates a "first come first served" approach for the authorisation of holiday, and the company reserves the right to refuse holiday requests . The policy holiday states that "Holiday leave cannot be for more than two weeks. If an employee wishes to take a longer period, they can request an extension which may be considered at the discretion of the company". In relation to the claimant's team, because of the rota pattern, two weeks was interpreted as being 2 shift rotations, which would mean 8 working days of leave but 20 days away from the workplace in total once rota'd "off" days were factored in.

13. In February 2022 the claimant submitted a holiday request form to Mr Hook of the respondent (page 57). Mr Hook was not the claimant's line manager however as the Reliability Engineer in the team, he took responsibility for organising holiday schedules across the whole team. Mr Hook worked five days per week on day shifts and therefore did not regularly work with the claimant, however they would occasionally see each other if Mr Hook worked late. There is no evidence of any issues in their relationship prior to the events which led to this claim.

14. The claimant requested to take annual leave from 12 to 31 August 2022 (although there was a typographical error in the form which actually stated September), which would amount to 12 working days (and 28 calendar days), being three shift rotations. No particular reason was given alongside the form for the extended period requested and so there was nothing to suggest any extenuating circumstances that might qualify for taking leave outside of the policy guidelines. Whilst the form did not specifically request this information, we find that the claimant could and should have provided some context for his request which he understood was outside of policy.

15. Mr Hook noted that the claimant's holiday request exceeded the normal policy guidelines on annual holiday and discussed the matter with his own manager, James Bovill. Mr Bovill also worked a 5 day per week day shift and therefore did not work directly with the claimant, but again knew him and we did not see any evidence to suggest any issues in their relationship at this time. Mr Bovill explained in evidence, which we accept, that he took guidance from HR before reaching his decision. Mr Bovill decided that the request should be rejected for the following reasons:

    a. The request was over the ordinary limit under the holiday policy;
    b. No valid reason had been given for the extended request; and
    c. It was August and this is a particularly busy period – both because the production line was busy at that time of year and also because other colleagues would wish to take holiday during the school holiday period. The respondent liked to have 2 engineers on shift at any one time in the team and given that the claimant's team only comprised three people at that time, that meant that ordinarily only one engineer would ideally be on holiday at any given time. To be clear, we refer here to the operational practice in 2022: we accept from the evidence we heard that the position has moved on in 2023 with reduced production and reduced headcount for a period in the team, but we accept that in 2022 those were valid considerations.

16. Mr Hook informed the claimant by email dated 15 March 2022 (pages 58/59) that his request for holiday was refused. The email explained that the request was outside company policy and asked the claimant to re-submit a new form for only two rotations. The claimant did not do so. The claimant has correctly stated that he in fact never received the form itself back with "rejected" marked on it, as would be normal practice, however we find that from the email itself it would have been very apparent to the claimant that his request had been refused.

17. The claimant responded to that email on the same day (page 58), stating that he needed the longer period because he had a "lot of commitments which need to be addressed in Greece". He did not state what these were but in evidence we heard that they were renewing his wife's passport and addressing some tax matters relating to property that he owned in Greece, as well as visiting family. This was not referenced in the email. He also noted in the email that two years earlier he had been granted permission to take more than 2 rotations at the same time (although we accept the respondent's evidence that his prior holiday had been during COVID and therefore operationally the respondent was in a different position to that of 2022). In evidence he also submitted that he could in fact have just taken 2.5 rotations rather than the full three rotations if this had been permitted, but he did not state this here.

The conversation with Mr Bovill

18. Some time later, around the end of March 2022, the claimant had a verbal conversation with Mr Bovill about his leave request. During this conversation, Mr Bovill suggested to the claimant that, if he were to volunteer to do overtime to cover his colleagues' absences, they might be willing to volunteer to cover his own absence. The claimant suggested that the overtime was in fact related to an important upcoming audit that Spring. We find that in fact both types of overtime existed: the respondent needed staff to do overtime to assist with the Spring audit, and separately Mr Bovill was also encouraging the claimant to offer overtime during the summer holiday period to cover colleagues' absences, so that they might offer to cover his additional absence – and in his later grievance (page 74) the claimant expressly stated that the overtime was suggested to help the red shift get their holiday (and not for the audit).

19. Mr Bovill said that the claimant declined this offer, whereas the claimant says that he did not decline it but said he would do what he could, and in evidence he also said that his colleagues needed the additional income from overtime more than him so he had a gentleman's agreement that he would leave overtime to them. Whilst the claimant was not required to do overtime, we can see from the rota (page 137) that other members of the blue and red team did do overtime shifts. The claimant himself appears to have done only one overtime shift between March and August, although we accept his evidence that he tended to leave overtime to those who needed the income.

20. Mr Bovill explained in evidence that at the meeting he also suggested that the claimant could take three rotations at a less busy period, for example taking two rotations at the end of the school holidays and one in September 2022. The claimant denies that this was suggested, but we find that it was and that the claimant was not willing to change his holiday dates because he wanted to take his leave during the school summer holidays.

21. Mr Bovill also suggested that the claimant could just request a shorter holiday period, in line with the policy. Again the claimant rejected this suggestion as he was adamant that he wanted longer than two rotations. The claimant said in evidence that he could have done 2.5 rotations of

leave, however this was not something that he suggested to the respondent and he did not submit a new holiday form to that effect.

22. During the meeting, Mr Bovill says that the claimant's tone and attitude was such that he gave the impression that he was going to go on the holiday regardless. The claimant denies this, however we found Mr Bovill's evidence to be persuasive on this point and we find that, whether or not the claimant meant it in this way, the impression given to Mr Bovill was that the claimant was insistent upon the full three rotations' leave and that he intended to take them. This is also supported by the notes at page 203 of a meeting between the claimant and Louise Hayward of the HR team on 11 May 2022, where it states that "I won't be here in August either way. Nothing is stopping me". We acknowledge that the claimant denies that these words were said however we cannot see why they would have been inputted into the otherwise accurate notes if they were not said, and the writer of the notes, who did them contemporaneously, is someone from the HR department and not Mr Bovill.

23. In relation to the reason why the claimant needed a longer period of holiday to travel to Greece, the claimant told Mr Bovill that his trip was not the same thing as someone else going on holiday or visiting family in the UK. The claimant said that he referenced needing to renew a passport (which we now know to be his wife's passport which was due to expire on 29 August 2022), which Mr Bovill denies. Whilst we find that the claimant may have briefly referenced a passport renewal, we find that the logistical difficulties associated with renewing his wife's passport that the claimant now relies on were not made clear to Mr Bovill because we find that, had Mr Bovill had an understanding of the difficulties involved, he would have looked at the situation more closely, as he said in evidence. More generally in relation to passports, we found the claimant's evidence somewhat inconsistent, in that his witness statement referred to "family's passports", whereas in his grievance he specifically referred to his wife's passport. When asked initially at the hearing about the importance of that holiday period, he said that "all of our passports" were expiring in August, but then when asked to clarify by the Tribunal exactly whose passports were expiring he confirmed it was only his wife's.

24. The claimant says that Mr Bovill told him that "I cannot favour you against your colleague even if you are from a different country". In the context described above, we do not find this to be an unreasonable comment to make, given that the claimant had not articulated any compelling reason why he needed longer than two rotations (being 20 calendar days) away from the workplace in one block.

April 2022 to 11 May 2022

25. In or around April 2022, the claimant was by Mr Hook's desk and noticed that his holiday slip was still attached to Mr Hook's notice board unsigned. We find that this was because Mr Hook was waiting to see if the claimant would re-submit a new holiday request for the two rotation period. In addition, he spotted that Mr Hook had marked out over two weeks in his own calendar over the Easter period for a holiday to Mexico (page 67). We

find that Mr Hook did indeed go on a holiday which was over two weeks in duration, and based on his calendar it appears to have been two weeks and three working days (although we have not had sight of the holiday form and therefore do not have evidence to show the exact dates). However, two days within that period fell on bank holidays and the respondent's position is that these would be discounted from the calculation (and in fact the respondent's position is that the holiday was only two weeks plus the two bank holidays in duration). However, the calendar shows that the leave dates were two weeks and three days so that still leaves the holiday as one day over the normal two week limit even if we accept that bank holidays do not count within the two weeks. Having said that, Mr Hook's situation is distinguishable in that he was in a completely different role being a manager working a 5 day week day shift, and asking to take leave outside of the core summer period.

26. The claimant says that he spoke with his colleagues, to see if they would agree to cover his leave so that he could have the longer period of leave himself. He says that Craig Wiley and Peter Barmer both agreed to this. However the claimant also asked his colleagues to submit their own holiday requests and both Mr Wiley and Mr Evans requested periods during the school holidays. Mr Wiley specifically requested the third week of the leave period requested by the claimant, which suggests that he had not in fact offered to cover that period of leave at least and therefore the claimant would still have the difficulty of having more than one person in the team seeking leave at the same time. Mr Barmer worked on the yellow day shift. We heard in evidence from the claimant that Mr Wiley's son's birthday falls during that week. We find that in reality the claimant had not arranged cover: had he arranged cover we see no reason why he would not have informed the respondent of what specific cover was available, and further in his later grievance meeting on 20 July 2022 he said "I offered them solutions. I said James, do you want me to ask if someone can cover the third rotation…" This suggests that he had not in fact already done so. If he had done so after that conversation, we find that he did not clearly articulate this to anyone.

27. The claimant also said that his colleagues did not mind what weeks they took as leave as they were not planning to travel abroad: that might be the case however we find that they did still wish to take holiday during the school summer holiday period.

28. Mr Wiley put in a holiday request form to cover the period 20 August 2022 to 31 August 2022 (page 71), which would have been rotations 2 and 3 of the claimant's original request. Initially, Mr Evans suggested on 4 May 2022 that only the second rotation of Mr Wiley's request be approved, with the claimant having the previous week (along with the first week of his original three rotation request) (page 70). However, by 11 May 2022, Mr Hook approved the full two weeks for Mr Wiley (page 69), on the basis that he had not received an updated holiday form for the two rotation period from the claimant and therefore the claimant had no valid holiday request at that time. We find that by this point there was a breakdown in communication between the parties: the claimant could and should have re-submitted a holiday form for a two rotation period whilst still arguing about the third week

in the background, to protect his own position. This would have also enabled the claimant to be specific about which two weeks he wanted. Equally however, we find that it was abundantly clear to Mr Hook that the claimant would be wanting to take holiday during the week of 20 August (because either he would take rotation 1 and 2, or rotation 2 and 3) despite the lack of a valid form at that point – and by authorising Mr Wiley's leave that put the claimant's leave in jeopardy. We do not what happened between 4 May 2022 and 11 May 2022 to result in Mr Hook suddenly approving both weeks of Mr Wiley's requested leave, but for whatever reason by 11 May 2022 Mr Hook made a management decision to close the matter down.

29. Having received notification of the approval of their holidays, one of Mr Evans and Mr Wiley informed the claimant of this. Mr Evans was the claimant's line manager and therefore it was not inappropriate for him to have discussions with the claimant, but it would have been prudent for Mr Hook or Mr Bovill to have a personal conversation with the claimant about this. We further find that it was the lack of direct communication with the claimant at this time that specifically angered him.

30. On 11 May 2022 the claimant had a discussion about the leave situation with Louise Hayward of the respondent's HR team, with Katie Holt of the respondent also in attendance taking a note (page 203). We find that this conversation arose because the claimant found out that Mr Evans and Mr Wiley had had their leave approved, which upset him. The claimant felt particularly aggrieved that his holiday request had been submitted first. That is true, but his holiday request had been rejected for being for a 3 rotation period. From the claimant's perspective however he thought that his request for a three rotation leave period was still under review because of the suggestion that if he did overtime he might be able to find someone to cover his shifts. We can understand why he thought this. At the end of the meeting Ms Hayward said she would do some digging around the matter.

Sickness Absence and Grievance

31. The claimant was off sick from 12 May to 2 June (page 72) due to stress at work. Whilst off sick, and not having heard anything more from Ms Hayward following the 11 May meeting, on 25 May 2022 (page 73) he submitted a grievance saying that he been given unfair treatment because of his nationality. He alleged that he was the only person not permitted to get an extra rotation holiday to visit his home country, despite having given more than five months' advance notice of his request.

32. The grievance meeting took place on 20 June 2022 (page 76). At the meeting the claimant explained that he needed to see his family and also renew his wife's passport, and that he always travelled as a family so it needed to be in the school holidays. He said that he had offered to arrange cover, and that his colleagues' holiday was then approved before his. His grievance was not upheld and this was communicated to him on 5 July 2022.

33. He appealed against the grievance outcome and attended an appeal meeting on 26 July 2022. At that appeal meeting (page 95) he referred to the need to renew his wife's passport. Later in the meeting, but not during the discussion about why he needed the holiday, he made a comment (page 99) that his grandmother was in her last days and that he needed a chance to say goodbye. This was the first time his grandmother was referenced as she had recently been diagnosed as terminally ill and therefore this was not something that Mr Hook or Mr Bovill could have been aware of at the time of the holiday request or in the months thereafter. She had previously been bed-bound but a tumour had recently been discovered. We heard from Mr Bovill that, had his grandmother been terminally ill at the time of the holiday request, that would have been something that would have been taken into account and the request might have been granted, and we accept what he has said.

34. The claimant received an email explaining that his appeal was not being upheld on 29 July 2022 (page 84) and signed himself off sick on that same date (page 101). He estimated that he would be able to return to work on 1 September 2022. The respondent has pointed out that this meant that in effect he would be off for the entire period of his original holiday request. It is strange that the claimant would have anticipated on his first day of absence, that the absence would last for over a month, and it is rather coincidental that his anticipated return to work date is when he would have returned to work following his holiday had it been authorised. We find that this was a clear indication that the claimant was by that time planning to go to Greece. We also know that around that time the claimant spoke to the Employee Assistance Programme about potentially going to Greece.

35. The claimant did indeed go to Greece in August 2022, although did not inform the respondent that he was going there during his sickness absence: this came to light when Mr Bovill contacted the claimant about arranging an Occupational Health appointment and the claimant explained that he could not attend as he was abroad. This was initially the subject of a disciplinary investigation, however during that process he provided a death certificate showing that his grandmother died around that time and therefore no disciplinary action was taken against him.

Comparators

36. The claimant has pointed to a number of individuals who he says were treated differently to him:

    a. Mr Hook – as explained above in relation to his Mexico trip.

    b. Parvinder and Sagna (surnames unknown) – these individuals work in the production team, and are not managed by Mr Bovill and so he would have had no involvement in their holiday requests. They are lower skilled roles than the claimant's, with up to 35 individuals on a shift (as opposed to the three maintenance engineers in the claimant's immediate team).

c. Awais Mahmood – this individual was an apprentice, who requested leave of over 2 weeks to go to Pakistan. That request was originally declined (page 138), but the employee asked the respondent (Mr Bovill) to reconsider (page 139) on the basis that his grandfather had recently died but he had not been able to attend the funeral, and he wished to travel home to grieve. Mr Bovill took HR advice on the matter, and HR also had an internal email discussion (page 140) comparing Mr Mahmood's situation to the claimant's, and ultimately agreed to it. It was determined to be a different situation with the individuals being in different roles, and different reasons for absence – HR said that Mr Mahmood's absence should be treated as part bereavement leave and part holiday. This shows the Tribunal that each case was treated on its own merits, and supports Mr Bovill's assertion that if he had known that the claimant's grandmother was terminally ill then he would have looked at things in a different way. It is also relevant to note that this individual was requesting leave outside of the busy school summer holidays (page 138).

d. Colin Roberts – he had prebooked holiday to Australia before he accepted the role with the respondent, so the respondent honoured it. In addition this occurred in 2023 when the respondent had 20% less volume than in 2022 and therefore was proactively encouraging people to take leave.

e. Glyn Downes. In actual fact, we saw no specific evidence that this individual took more than two rotations in a row: we saw a holiday request form showing that a request was made for 9 shifts which would be over two rotations (page 250), with a note attached to the holiday form showing that HR advice was sought on the matter. We were not told whether or not the holiday was ultimately approved or not and the individual's leave record at page 136a showed leave of 8 shifts duration maximum. In any case, one of this individual's leave periods fell around a period of site shutdown and this again occurred in 2023 when the respondent's production lines had reduced volume as explained above.

f. Finally, the claimant has asserted that, if the holiday is reviewed by looking beyond the summer holiday period and expanded to a 54 day period, then each of Craig Wiley and Stuart Evans took three rotations during that period, albeit not in one block. The claimant says that therefore each of them wanted three rotations off, and so they were in fact seeking the same holiday over that period. Firstly, we find the delineation of 54 days artificial, as we cannot understand why those particular 54 days have been chosen other than artificially to capture those additional weeks but not additional weeks taken by the claimant. The claimant in fact took a week's leave in July 2022 and a week's leave in September 2022, and therefore combined with his trip to Greece took far more than three rotations in total. Secondly, that misses the point that Mr Wiley's and Mr Evan's holiday requests were in accordance with the holiday policy, whereas the claimant was asking for discretion to be exercised to go beyond the normal holiday limits.

Law

Time Limits

37. Section 123 of the Equality Act 2010 provides that:

> *(1)* "….*proceedings on a complaint within section 120 may not be brought after the end of -*
>
> *a) The period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *b) Such other period as the employment tribunal thinks just and equitable.*
>
> *(2) ….*
>
> *(3) For the purposes of this section –*
>
> *a) Conduct extending over a period is to be treated as done at the end of the period;*
>
> *b) Failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*
>
> *a) When P does an act inconsistent with doing it, or*
>
> *b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

38. There is a distinction between a continuing act and an act with continuing consequences. Where there is a continuing policy, rule, scheme, regime or practice, that will amount to conduct extending over a period, however where there is a one off act which has consequences over a period of time, that will not (*Barclays Bank plc v Kapur [1991] 2 AC 355, HL* and *Sougrin v Haringey HA [1992] ICR 650, CA*).

39. However, the Tribunal should not focus too heavily on whether there is a policy, rule, scheme, regime or practice. The Tribunal should ask itself whether there was an act extending over a period, rather than a series of unconnected or isolated individual acts (*Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA*). It is relevant whether the same or different individuals were involved, and a break of several months may mean that continuity is not preserved (*Aziz v FDA [2010] EWCA Civ 304*).

40. Whilst it is a broader test that that for unfair dismissal, exercising discretion to extend time is the exception rather than the rule (*Robertson v Bexley Community Centre [2003] EWCA Civ* 576). When considering whether to extend time, the Tribunal should consider all the circumstances (*Robertson,*

cited above), including the balance of prejudice and the delay and reasons for it. Although *British Coal Corporation v Keeble [1997] IRLR 336* sets out a checklist approach in line with section 33 Limitation Act 1980, it is not necessary to go through the full checklist in each case, as long as all significant factors are considered (*Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23* and *Afolabi v Southwark London Borough Council [2003] EWCA Civ 15*). Factors which are almost always relevant include:

a. The length of and reasons for the delay; and
b. Whether the delay has prejudiced the respondent.

The merits of the case can be taken into account when considering the balance of prejudice.

41. The fact that a delay is short does not mean that an extension of time should automatically be granted. Per *Underhill LJ* in *Adedeji (cited above)*:
"Of course employment tribunals very often have to consider disputed events which occurred a long time prior to the actual act complained of, even though the passage of time will inevitably have impacted on the cogency of the evidence. But that does not make the investigation of stale issues any the less desirable in principle. As part of the exercise of its overall discretion, a tribunal can properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may be to open up issues which arose much longer ago".

Direct Discrimination

42. Section 13 of the Equality Act 2010 ("**EA**") provides that:

> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

43. Section 23 of the EA goes on to provide that:

> *(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.*

44. In the House of Lords decision of *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] IRLR 285, ICR 337*, it was held by Lord Scott that "*the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim save that he, or she, is not a member of the protected class"*. The test as to whether there has been less favourable treatment is an objective one: the claimant's belief that there has been less favourable treatment is insufficient. Likewise, the treatment must be less favourable, not merely different.

45. Where there is less favourable treatment, the key question to be answered is why the claimant received less favourable treatment: was it on grounds of race or for some other reason (*London Borough of Islington v Ladele [2009]*

ICR 387). As Mr Justice Linden said in *Gould v St John's Downshire Hill 2021 ICR 1, EAT:*

"The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective…For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision…[and] the influence of the protected characteristic may be conscious or subconscious."

46. In *Nagarajan v London Regional Transport 1999 ICR 877, HL*, Lord Nichols said that

"discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds…had a significant influence on the outcome, discrimination is made out"

47. Often there will be no clear direct evidence of discrimination on racial grounds and the Tribunal will have to explore the mental processes of the alleged discriminator and draw inferences. The claimant will need to prove facts from which a Tribunal could properly conclude that the respondent had committed an unlawful act of discrimination, and this can include the drawing of inferences. However, simply establishing a difference in status is insufficient: there must be "*something more*" (*Madarassy v Nomura International plc [2007 EWCA Civ 33* and *Igen Ltd v Wong [2005 ICR 931]*). Likewise, unreasonable conduct alone is insufficient to infer discrimination.

Burden of proof

48. 219. Section 136 of the EA (burden of proof) states that:

(1) *This section applies to any proceedings relating to a contravention of this Act.*
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

49. Put simply, the claimant must show facts from which the Tribunal could infer that discrimination took place, in the absence of other explanation. If the claimant cannot do that, the claim fails. If the claimant does show such facts, then the burden shifts to the respondent to show that discrimination did not take place. In *Madarrassy v Nomura International [2007] ICR 867 CA,* Mummery LJ stated that "*the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude"*

that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

50. Something more than a finding of less favourable treatment is required in order to shift the burden of proof to the respondent, however the "something" need not be considerable (*Deman v Commission for Equality and Human Rights and others [2010] EWCA Civ 1276*). Unreasonable behaviour alone is not evidence of discrimination (*Bahl v The Law Society [2004] IRLR 799*) but can be relevant to considering what inferences can be drawn (*Anya v University of Oxford & anor [2001] ICR 847*)

51. Where the burden has shifted to the respondent, it is then for the respondent to prove on the balance of probabilities that the less favourable treatment was not because of race.

52. Although the burden of proof is a two stage test, there are cases where an Employment Tribunal can legitimately proceed directly to the second stage of the test (see, for example, *Laing v Manchester City Council and anor 2006 ICR 1519, EAT*).

Indirect discrimination

53. Section 19 Equality Act provides:

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –*
> *a) A applies, or would apply, it to persons with whom B does not share the characteristic;*
> *b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;*
> *c) It puts, or would put, B at that disadvantage, and*
> *d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

54. It is for the claimant to show that there is a provision, criterion or practice ("PCP"), and that it disadvantages his group and him as an individual. If he does that then the respondent must show that it can objectively justify the treatment on the basis of it being a proportionate means of achieving a legitimate aim. In accordance with *Akerman-Livingstone v Aster Communities Limited (formerly Flourish Homes Limited) [2015] UKSC 15*, the PCP must be rationally connected to a legitimate aim, be no more than reasonably necessary to achieve that aim, and not be disproportionate.

55. In showing the group disadvantage, it is not necessary for the claimant to show the reason why (*Essop v Home Office (UK Border Agency) [2017] ICR 640*, but there must be a link between the PCP and the disadvantage. The disadvantage must apply not only to the claimant but also to the group

with whom he shares the protected characteristic i.e. Greeks (*Gray v Mulberry Co (Design) Ltd [2020] ICR 715*.

Conclusions

56. We address time limits last as it is necessary to identify the dates on which any discrimination occurred in order to assess whether the claim was brought in time or, if not, by what margin it was submitted outside of the ordinary time limits.

Direct race discrimination

Did the respondent do the following things:

a. Through Mr Thomas Hook on 15 March 2022, reject the claimant's request to take three weeks' holiday in August 2022?

57. The claimant's request for three rotations holiday (as opposed to three weeks) holiday was indeed rejected on 15 March 2022. Although the form was not returned to him marked "rejected" the contents of the email on 15 March 2022 were sufficiently clear as to amount to a rejection.

b. Through Mr Bovill, agree to reconsider the claimant's request if he assisted with overtime, but then fail to reconsider the claimant's request / to do so in his favour, on or around 11 May 2022.

58. The relevance of 11 May 2022 is that this is the date when Mr Evans and Mr Wiley's own holiday requests were approved. At this point Mr Hook indicated that he needed a revised holiday form for the claimant from 12 to 23 August 2022.

59. We have found that there was a discussion between Mr Bovill and the claimant around the end of March 2022 where one option put forward was that if the claimant assisted with overtime for the red team, then members of the red team might be prepared to offer overtime to enable the claimant to have longer than two rotations of leave consecutively. We conclude that there was therefore an agreement to reconsider the claimant's request if he assisted with overtime, and there has been no suggestion that there was any specific criteria in terms of when the claimant needed to volunteer to do the overtime by or how many days overtime he would need to do, that was left open.

60. We conclude that between 15 March and around the end of March, the request was refused in its entirety, however from the end of March to 11 May 2022 there was a indicated possibility that the additional leave might be granted, subject to the overtime situation being resolved. On 11 May 2022 that option was taken away with the notification of the approval of the other two members of the team's leave. This was communicated to the other two individuals whose holiday had been approved, and they let the claimant know.

61. We conclude however that, prior to closing the matter down on 11 May 2022, Mr Bovill had continued to consider the claimant's request but felt that the claimant had not offered a solution or compromise, and had not offered sufficient overtime to enable a swap with the red team to take place. Therefore, looking at the precise wording of the issue to be determined, Mr Bovill did not fail to reconsider the claimant's request, however he did fail to reconsider it in the claimant's favour. The second part of the factual allegation therefore occurred, but not the first.

Was that less favourable treatment?

62. We address first the initial holiday rejection on 15 March 2022. The claimant needs to show that he was treated less favourably than someone else was, or would have been treated, in materially the same circumstances. To be clear, direct discrimination relates to "less favourable treatment", and the claimant's assertion that he should have been treated more favourably because he was a Greek national, in that he needed more time to visit his family and organise affairs, is addressed under indirect discrimination below.

63. The claimant relies on three comparators. We deal with the first two together as their circumstances were the same as each other.

    a. Parvinder and Sagna. They worked in the production team, which was a much larger team and which was under a separate management chain. Given the larger number of people on shift at any one time, we conclude that this is not a comparable situation in that it would be easier to authorise leave within a larger team than within a team of three engineers when it was highly desirable to always have at least 2 on duty and therefore only one person would ordinarily be on leave at any one time unless cover could be arranged from elsewhere, primarily the red shift. We find that Parvinder and Sagna were not in materially the same circumstances as the claimant and are therefore not appropriate comparators.

    b. Thomas Hook. He went to Mexico in April 2022 on holiday and we have found that this was for longer than two weeks. Part of that period related to bank holidays but even so we have found it was outside the two week ordinary threshold for leave. However, again, he was in a different role to the claimant working a different shift pattern with different considerations as to holiday cover. In addition his leave was in April and not during the peak school summer holiday period when the factory was also in its busiest period (both in terms of production and staff leave). Again we therefore find that Mr Hook was not in materially the same circumstances as the claimant and is not an appropriate comparator.

64. In addition to the comparators named in the Issues, the Tribunal was also given information about various other individuals who it was alleged had additional holiday authorised, so we have also considered whether they are in fact appropriate comparators.

a. Awais Mahmood, an apprentice, was granted 12 working days of leave to travel to Pakistan, to grieve for his grandfather who had passed away earlier that year. His leave was in October and November 2022. This was not a peak production period, and as an apprentice his skills would not have been so in demand as the claimant's. Given the different time of year, the different role and the individual circumstances surrounding his request, we conclude that he was not in materially the same circumstances as the claimant. We also note in any case that his leave request was originally declined based on being over two weeks in duration, and was only reconsidered once he made his exceptional circumstances known.

b. Colin Roberts and Glyn Downs. This occurred in 2023, when the factory's operational position was significantly different to that of 2022 – whereas in 2022 the factory was struggling to meet its production targets, by 2023 production had dropped by 20%. Therefore, in 2023, the respondent actively wanted to encourage people to take holiday because some production had been shut down and there was a focus on reducing costs. In addition, Colin Roberts had been recruited recently and had raised as part of the recruitment process that he had pre-booked a four week trip to Australia, and honouring that leave was a condition of him taking the role. In addition, we were not shown any evidence that Glyn Downs did in fact take more than two rotations at any one time. For these reasons, their circumstances are also materially different to those of the claimant in 2022.

65. For completeness we would also mention that the claimant himself had holiday approved in excess of the two rotation threshold two years earlier, by a different manager. However, again the respondent was in a different operational position at that time, it being during the COVID pandemic when production would have reduced. We were also not shown any evidence from the claimant about the reasons for his request in 2020 and whether they were materially the same circumstances as occurred in 2022.

66. In all of these cases where extended leave was allowed, we would also note that this was still within the respondent's policy overall because the policy allowed for discretion and we have found that consideration was given to the specific circumstances on each occasion, including HR advice where appropriate.

67. We have also considered, given that we have found that the comparators provided by the claimant were not in materially the same circumstances, what we consider would have happened to a hypothetical comparator in materially the same circumstances. We conclude that the hypothetical comparator would have been treated in the same way as the claimant. The hypothetical comparator would also not have given any additional reasons initially for his request, and would also when providing additional details referred to having commitments to attend to without providing details of a specific need to be present in the country in question for more than two rotations (plus rota'd off days). Having seen that the respondent did have a habit of escalating matters when requests were for over two rotations, we conclude that it would have been escalated in the same way as it was for

the claimant, Glyn Roberts and Awais Mahmood, and in the absence of a compelling reason and given operational pressures, would have been refused.

68. In relation to the overtime issue and the ongoing reconsideration of the claimant's holiday request, we have not been pointed to any specific comparator who was informed that doing additional overtime would enable them to take a longer holiday, therefore we have considered the hypothetical comparator. The hypothetical comparator would be someone else who had requested over two rotations, and who had been told that if they did additional overtime that might enable a colleague to cover their own holiday period. The hypothetical comparator would also only have done one or offered one overtime shift. We conclude that this individual would also have had their holiday request refused, on the basis that there was no compelling reason given to justify such a long leave period given operational pressures which had not been resolved through additional overtime.

69. Therefore the claimant has not shown less favourable treatment, and there are not facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent has contravened the Equality Act 2010. Therefore the burden of proof does not shift to the respondent and the claimant's claim for direct discrimination must fail.

If so, was it because of the claimant's nationality?

70. For the avoidance of doubt however, we would add that there has been no evidence to show that any of the treatment he received was because of his nationality: the respondent has shown that the treatment he received was because of his request was outside of the normal thresholds under the policy, he did not provide any compelling reason why he needed to be in Greece for more than two rotations (which would have allowed him 20 days away from the workplace in total), it was the busiest period operationally and in the school summer holidays when other colleagues also wanted leave with their families.

71. Although the claimant did make his holiday request before others, as it would outside of the policy guidelines, the respondent was entitled to take the view that the claimant did not automatically qualify for that additional leave despite getting his request in first. We do consider that it should have been made clearer to the claimant when his colleagues' holiday was approved in May 2022 that his original request was still being treated as first come first served for the first two of the three rotations he had sought, and on what basis the respondent considered that those were the two rotations that he would take off, however there is nothing to suggest that the failure to have that discussion was in any way related to his nationality.

72. He had not offered significant overtime (and to the extent that was because he wanted his colleagues to have first preference on overtime for financial reasons, and he was worried about fatigue, from the respondent's perspective they saw that he had not offered significant overtime). We do not criticise him for not offering overtime, as that was his choice to make,

however the consequence was that he had not created goodwill within the red team by covering their absences so they would be less likely to agree to accord him that consideration. The overtime issue was about trying to find a practical solution to enable the claimant to take additional leave without creating an operational pressure (albeit still creating an expense in paying overtime to people). Therefore, in not doing overtime, the solution was not achieved.

73. The claimant's claim for direct discrimination therefore fails.

Indirect discrimination

A PCP is provision, criterion or practice. Did the respondent have the following PCP: A policy that holiday leave cannot be for more than two rotations at a time, with any request for an extension being at the discretion of the respondent?

74. It did.

Did the respondent apply the PCP to the claimant?

75. It did.

Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic e.g persons not of Greek nationality or would it have done so?

76. We saw several examples of other non-Greek individuals having the PCP applied to them, so they did.

Did the PCP put persons of Greek nationality at a particular disadvantage when compared with persons not of Greek nationality, in that the claimant says that persons with Greek nationality were more likely to require a longer period of holiday if they had to visit a dying relative.

77. During the hearing the claimant referenced that he considered a reasonable adjustment should have been made to the holiday policy because he is Greek. We consider that by this the claimant meant that the holiday policy disadvantages him as a Greek national and therefore that the policy should be disapplied in his case.

78. It is relevant to note that two rotations allows for 20 days away from the workplace. Even accounting for time to acclimatise after a period of night shifts, this does allow for more than two weeks in Greece.

79. Considering first whether persons with Greek nationality are more likely to require a longer period of holiday if they had to visit a dying relative, we accept that those with Greek nationality are more likely to need to travel to Greece if their relative is dying, compared to those of other nationalities. However, given that the holiday policy would allow Greek engineers 20 days away from the workplace in any case (or, for non-shift workers, two weeks), in many cases this would be sufficient to travel to Greece to visit that relative. In the event that it was not, the holiday policy allowed for

discretion and so additional leave might be granted. We accepted Mr Bovill's evidence that, if the claimant's request for leave had been specifically to visit a dying relative, Mr Bovill would have taken that into account and considered making an exception and exercising his discretion. Whilst not exactly the same circumstances, this is in some sense analogous to him allowing Mr Mahmood to travel to Pakistan for an extended period once he became aware of Mr Mahmood's grandfather's death, despite having originally rejected his holiday request for being outside policy guidelines. Therefore, the PCP did not put those of Greek nationality who might have to visit dying relatives at a disadvantage, as we consider that consideration would have been given to exercising discretion within the PCP in that circumstance should the two weeks / two rotations of leave ordinarily allowed be insufficient.

80. Moreover, we find generally that a leave period of two rotations does not place those of Greek nationality at a disadvantage more generally. Two rotations allows sufficient leave to visit family, allowing for over two weeks in Greece. This is particularly so given that the holiday policy specifically allows for discretion to be applied where the circumstances warrant it. The issue in this case is that the claimant did not provide compelling reasons to the respondent to justify exercising that discretion in his specific case, combined with the fact that he wanted to take the leave at the busiest time of year both operationally and in terms of other personnel also wishing to take leave.

Did the PCP put the claimant at that disadvantage?

81. In the claimant's case, the issue of his dying grandmother only arose from late July 2022 when he became aware that she was terminally ill. At the time of his holiday request, and beyond the period when he found out on 11 May 2022 that it was not going to be re-authorised, his grandmother was not known to be dying, either to the respondent or the claimant (although we accept the claimant knew she was elderly and bed-bound). Therefore, the claimant was not put at a particular disadvantage by the holiday policy between February and May 2022 due to having to visit a dying relative. In any case, as outlined above, had Mr Bovill been aware that he needed to visit a dying relative, we have found that Mr Bovill would have considered exercising his discretion to allow additional leave.

82. The claimant has said that he also had tax affairs to resolve: this related to him owning a property in Greece, rather than him being Greek per se, but in any event this was not something he made the respondent aware of or explained why it would take more than two rotations of leave during August in particular to resolve.

83. In relation to his wife's passport, we conclude that even if this may have taken his wife some time to resolve, the real issue was that the claimant wanted to be with his wife even though it was not his passport being renewed, and had chosen the busy school holiday period to travel to Greece to do this, rather than asking for extended leave at a quieter time of year when it was more likely to have been granted. We appreciate that the claimant has school age children and so wanted to take leave in school

holiday periods, but that is not related to his nationality. Similarly, the claimant could have travelled to Greece on multiple (shorter) occasions if he wanted more time with his family: again we appreciate the claimant had financial considerations which made that unattractive to him, but this was not related to his circumstances as a Greek national.

84. We conclude that the claimant was not put to a particular disadvantage when compared to persons not of Greek nationality.

85. Therefore the claim for indirect discrimination fails and it is not necessary to consider whether the respondent's PCP was a proportionate means of achieving a legitimate aim.

Time Limits

86. Similarly, it is not necessary to consider the issue of time limits as the claimant's discrimination claims have not succeeded.

Employment Judge Edmonds

Date: 2 November 2023