EMPLOYMENT TRIBUNALS

Claimant: Mr Dodou Alieu Bandara Ndow

Respondent: Augusta Care Ltd

Heard at: Cambridge Employment Tribunal
On: 4, 5, 6, 7 and 8 December 2023
Deliberation day 4 January 2024

Before: Employment Judge Hutchings
Miss W. Smith (Tribunal member)
Mr S. Holford (Tribunal member)

Representation
Claimant: in person
Respondent: Miss Hatch of Counsel

RESERVED JUDGMENT

1. The claim of unfair dismissal is not well founded; the claimant was not constructively dismissed. The claimant is not entitled to notice pay.

2. The respondent has not contravened section 13 of the Equality Act 2010. The claimant was not discriminated against due to his race or at all.

3. The respondent has not contravened section 27 of the Equality Act 2010. The claimant was not victimised by the respondent.

4. The claimant is owed holiday pay in the amount of £328.40 (£8.21 hourly rate 2019 x 40 hours)

5. The claim of disability discrimination is dismissed on withdrawal by the claimant.

REASONS

Introduction

6. The claimant, Mr Ndow, was employed by the respondent, Augusta Care Ltd, a provider of supported living for adults with disabilities, as a support worker.

He was contracted to a minimum of 40 hours per week from 9 August 2019 until he resigned by letter dated 29 July 2021, giving 4 weeks' notice. His employment ended on 31 August 2021. Early conciliation started on 5 September 2021 and ended on 17 October 2021.

7. By ET1 claim form dated 23 October 2021 and further and better particulars of claim dated 15 May 2022 the claimant makes the following complaints for the Tribunal to determine. The claim of disability discrimination was dismissed following withdrawal by the claimant before the hearing:

    7.1. Constructive unfair dismissal for breach of the term of trust and confidence implied into his employment contract by law;
    7.2. Direct race discrimination;
    7.3. Victimisation;
    7.4. Holiday pay; and
    7.5. Notice pay.

8. By undated ET3, undated grounds of response and amended grounds of response dated 22 December 2021 the respondent denies the claims. The respondent asserts that the claimant resigned following a period of unauthorised leave. The respondent denies that it discriminated against the claimant due to his race; it does not accept the individuals named by the claimant are comparators.

Preliminary matters

9. At the start of the hearing on 4 December 2023 we set out the issues to be determined by reference to the facts the claimant relies on. We identified 9 claims of discrimination and 6 claims of breach of employment contract / implied term of trust and confidence in the unfair dismissal claim.

Procedure, documents, and evidence

10. The claimant represented himself and gave sworn evidence; he did not call any witnesses.

11. The respondent was represented by Ms Hatch of Counsel, who called sworn evidence on behalf of the respondent from:

    11.1. Carol Clemenson, the respondent's service manager; and
    11.2. Emma White, the respondent's operations manager.

12. The hearing was before a full Tribunal. We considered documents from an initial hearing file of 538 pages. During the hearing additional documents were submitted by both parties (without objection from the other), such that the hearing file totalled 716 pages at the conclusion of evidence.

13. The Tribunal heard evidence as to liability only.

Findings of fact

14. First, the Tribunal makes a general finding on evidence. We found Mr Ndow keen to assist the Tribunal and open and direct in answering the questions put to him, which assisted the Tribunal in understanding the basis on which

he made his claims. On occasion his evidence lacked credibility; his version of events did not accord with contemporaneous documents (for example the respondent's interview notes) and he gave oral evidence which was not recorded in his witness statement or in documentary evidence (suddenly recalling that he handed his mother's diagnosis letter to Tina Arnold in person). In assessing credibility, we have borne in mind the time which has passed (approximately 2 years) since many of the events occurred and this may account for some of the discrepancies.

15. The respondent's witnesses answered the questions put to them to the extent they were able. However, there were gaps in the respondent's evidence. Many of the claims involved Tina Arnold, the claimant's manager. The respondent did not call Tina Arnold as a witness. In the absence of documentary evidence, where the claimant's and respondent's version of events involving Tina Arnold differed, generally we have preferred the evidence of the claimant, except where we found the claimant's sudden recall not feasible. The relevant facts are as follows.

Location of employment

16. On 24 June 2019 the claimant attended an interview with Carol Clemenson and Tina Arnold, He told us that he was employed primarily to work at 25 Oswald Road with service user TR, and while this was not in the job description, Tina Arnold "took notes at the interview" of this agreement. We have seen the notes taken by Tina Arnold and Carol Clemenson. They do not record any agreement about a specific place of work; both interviewers record a recommendation for the claimant to work at 47 Osprey, a different location not related to service user TR. The respective notes are consistent in recording a discussion about the claimant moving from Wellingborough to be closer to the respondent's places of work in the Peterborough area. Parties spoke about the possibility of the claimant moving from Wellingborough, given his desire, expressed at the interview to reduce his commute. We prefer the respondent's record of the interview (which is consistent with the contemporaneous notes of two interviewers). We find that there was no agreement as to a specific place of work for the claimant; no guarantee was given to the claimant that he would with TR at 25 Oswald Road; and no guarantee of overnight stays in Peterborough was given. As the interview notes record the only discussion about place of work was a recommendation for Osprey Road as a suitable location for the claimant.

17. On 27 June 2019 the claimant signed a 48 hour opt out agreement; both parties could terminate this agreement on not less than 3 months' notice. Neither exercised this right. In evidence the claimant confirmed he understood this agreement meant he could be asked to work in excess of 48 hours each week. We have seen several copies of his rotas; they confirm he frequently did.

18. On 14 August 2019 the claimant signed his contract of employment. It provides that he "*will be required to work in various locations…"* a minimum of 40 hours a week based on in a weekly rota, a requirement to sleep in and work a reasonable amount of overtime. In 2019 his hourly rate was £8.21, the national minimum wage at that time.

19. We have considered the claimant's work rotas and his evidence of work

patterns and requests for overnight stays. His working patterns accord with the agreements he signed. During his employment the claimant did work a greater proportion of his time at 25 Oswald Road with TR. He made several requests for overnights stays. We find his work pattern was a result of business need and the terms of his employment contract rather than any pre-agreement at interview stage.

Annual leave

20. The employment contract records the holiday year as 1 January to 31 December, with an entitlement of 5.6 weeks, pro rata in the first year, equating to 244 hours. At the interview the respondent agreed the claimant's request for pre-booked leave for the period 20 December 2019 to 2 January 2020, which is recorded in the interview notes and in a leave request form dated 22 October 2019. This request crosses two holiday years (2019 and 2020). In 2019 the claimant worked 144 hours, entitling him to 84 hours of leave. He used 24 hours of leave (27-31 December), leaving 64 hours to take.

21. On 5 November 2019 told the Tina Arnold agreed the claimant could take an additional 2 days in 2019 (14 and 15 December) and an additional week, leaving 40 hours of the claimant's 2019 holiday entitlement unallocated.

22. On 18 November 2019 in a meeting with his line manager, Tina Arnold, the claimant says he asked to book his remaining 2019 leave but was told by her that he could not take it all by the end of the year. We have no evidence from Tina Arnold. However, the explanation the claimant says he was given by Tina Arnold accords with the respondent's submission it was unlikely to grant further leave requests at this stage in the year due to balancing the needs of the business. As a result of this conversation with Tina Arnold we find the claimant did not take and the respondent did not pay the claimant the outstanding 40 hours of accrued leave for 2019. We find at this meeting the claimant asked Tina Arnold if he could be paid for the leave and was told no. The respondent's policy was not to carry forward leave to the following year; in this context the respondent did not carry over the 40 hours to 2019. This use it or lose it policy is not binding.

23. The respondent suggests that the claimant left it too late to ask for holiday and therefore he lost it. We disagree. His employment contract states: "Annual leave can be taken if authorised by a manager. Annual leave is granted subject to a fair process encompassing the requirements of all staff and the needs of the company". This is supplemented by a non-binding annual leave policy, which includes a use it or lose it statement. While this policy states that employees should book early to avoid disappointment, it also states that "AL will be discussed at supervision meetings to ensure that [employees] plan ahead and book". The respondent has not presented any evidence this happened. The claimant asked to be paid for this holiday or to work. The respondent did not pay him nor offer an explanation as to why it refused this request. We find in doing so it failed to follow its own guidance of adopting a fair process in these circumstances.

24. The claimant has not raised a complaint about non-payment through the respondent's formal grievance process. However, he did raise his lost holiday subsequently. On 14 February 2020 when asked to specify concerns he writes to Julie Boardman: "48 hours of my last year's holiday cancelled ….

due to no available days. Booking time off this year becoming a challenge." He complained in writing about his 2019 holiday in emails to the respondent up to May 2021.

Marcel de Laat

25. From the start of his employment the claimant was allocated to work with service user TR at 25 Oswald Road. In February and March 2020, he raised 2 concerns (request for separate bath sponges for TR and incident involving a chair and colleague Marcel de Laat at Club 73 social club) he alleges were not addressed by the respondent. The respondent told us they did not respond to these concerns, on the basis they did not warrant further action; the claimant had resolved the sponges' issue by purchasing additional sponges and while the incident at the social club involved an employee, it did not relate to that employee's contract of employment and was during his personal time.

26. The respondent did address other concerns the claimant raised about Marcel de Laat (which occurred during the course of his employment) by mediation. The mediation did not resolve the issues between colleagues. The claimant says no further action was taken. At the bottom of the notes Tina Arnold wrote on 28 January 2020 that the issues were resolved, and this was closed. This is a very curious statement in the absence of any evidence to support when and how the issues were resolved. There is no evidence before us of any communications from the respondent to the claimant or Marcel de Laat recording closure of this matter. We have no explanation from the respondent as to the basis on which Tina Arnold concluded the matter was closed. We prefer the claimant's evidence that it was not resolved; the last communication he had was when he signed the notes at the close of the mediation meeting.

Oswald Road

27. We find that the claimant was not transferred from Oswald Road as alleged. In fact, he did not stop working at Oswald Road. We have seen the shift patterns for Oswald Road; there is no evidence that the amount of work allocated to the claimant fell significantly in the weeks following his complaints. The amount of work allocated to him at Oswald Road was irregular throughout his employment. His employment contract required the claimant to work across different locations; we find his shift patterns reflect this.

Excessive shifts

28. The claimant complains he was allocated excessive shifts from November 2019 to July 2021. His work allocation was guided by his contractual agreements: a minimum 40 hour working week, which could be exceeded due to his decision to opt out of the working time regulations. We have considered the shift records; some weeks the claimant worked 70 hours. We have also considered the emails the claimant identifies in his evidence as the complaints he says he made about his hours. The claimant does not complain of excessive hours, but rather he seeks, on occasion, to change his hours to enable him to return home or to be accommodated with a sleepover shift.

29. The evidence before us supports our finding that the claimant was a conscientious worker. His communications are polite. Even accounting for this, the communications he sent do not constitute complaints. Extended periods away resulted from the claimant living in Wellingborough and not following through on the discussion he had at the interview (and recorded in both sets of interview notes) that he would be willing to move to Peterborough. We have read the respondents' responses to these requests and find they were accommodated. During his employment the claimant did not raise concerns about excessive shift patterns in the manner he complains to the Tribunal. Rather, he was willing to work long hours, opting out of the working time regulations to be able to do so, and his emails to his employer centre on changing shift patterns not complaints that they were excessive.

Support for ST

30. The claimant worked with service user ST, telling us that colleagues who had experience of working with ST were subsequently reluctant to do so due to his challenging behaviour and would not agree to these shifts. The majority of support for ST was provided by the claimant or, when he was not allocated, agency workers. Indeed, this was the reason given by the respondent for terminating the service agreement for ST following the claimant's resignation; that it was terminated due to the claimant's resignation. The respondent told us that the claimant's religion played a part in the respondent's decision to place the claimant with ST as the respondent considered it beneficial for ST to have someone of his own religion supporting him. There is no evidence before us that this reasoning was communicated to the claimant at the time he was allocated shifts with ST. We prefer the claimant's evidence that he was allocated to work with ST as colleagues were reluctant to do so.

31. Between April and July 2021, the claimant raised concerns about service user ST in incident support forms ("ISF") submitted online. As a result, the respondent made referrals made to third parties (local authority multi-disciplinary team, ST's social worker and psychologist) to address ST's behaviour. There was no direct support implemented for the claimant. Indeed, the claimant first became aware of the referrals as a result of document disclosure for the hearing.

32. The claimant attended supervision meetings with Tina Arnold. There is no evidence that the respondent's managers discussed the concerns the claimant raised with ST at these meetings or offered him support. We find the respondent failed to address the claimant's concerns about ST's behaviour or tell him about the adjustment (of a platform outside a window as a means of escape for support worker) it had made when ST's behaviour became very challenging). There was no support for the claimant during his time working with ST until 2:1 support was put in place for ST in July 2021. Following an incident with ST involving the police.

Holiday

33. The claimant complains that the respondent refused his request to rebook his January 2021 holiday entitlement, which was postponed due to the pandemic. Initially the respondent did refuse this request, However, in February 2021 the respondent did grant the request to rebook the holiday and the claimant travelled to the Gambia. The holiday is recorded in the claimant's 2021

holiday record. The claimant's frustration is that there was a delay on the part of the claimant in the respondent granting the postponed holiday.

Shifts on return from March 2021 holiday

34. The claimant complains that on his return from this holiday there was a delay in allocating him shifts resulting in a loss of 40 hours pay. The claimant returned from Gambia on 28 March 2021. He had completed the legally required period of isolation by 7 April 2021. Therefore, we find he should have been allocated shifts from 8 April 2021. His first shift was 12 April 2021. He was available to work but not allocated shifts for 4 days (8 to 11 April inclusive).

Unpaid leave request (July 2021)

35. The claimant complains that in June 2021 the respondent refused his request for unpaid leave in July 2021to enable the clamant to visit his ill mother in the Gambia. He wrote to Tina Arnold on 30 May 2021 requesting a "leave of absence for one month" to travel to the Gambia to support his mother during a "surgical procedure taking place in the first week of July 2021". The letter references the respondent's dependent's policy, asking that the request is facilitated under this policy. The letter does not provide any other information about the surgical procedure or the condition of the claimant's mother.

36. We have seen a copy of a hospital document recording the surgery was related to a cancer diagnosis. In oral evidence the claimant told us that he handed this document to Tina Arnold in person. This was the first time he provided this explanation. There is no reference in his witness statement to handing this document to Ms Arnold. We have considered the several exchanges of email between the claimant and Ms Arnold around the time he says he handed her this document. There is no mention of the document.

37. The explanation the claimant provided at the hearing is simply not credible. We find that he did not hand this document to Ms Arnold or any of the respondent's managers. Based on the extensive, detailed email communications we have read from the claimant to his managers, we find had he done so there would have been some reference to the document in the email exchanges and he would have referenced this in his witness statement. His recollection of the order of events is confused. We consider it most likely that he did not receive this hospital document until he travelled to the Gambia. Accordingly, we find that the respondent was not aware at the time of his request for unpaid leave that the claimant's mother had received a cancer diagnosis, and this was the reason for the surgical procedure.

38. On 6 June 2021 Tina Arnold refused the claimant's request for unpaid leave in July 2021 and did so unaware of the condition of the claimant's mother and concluding that the claimant's mother was not a dependent applying the terms of the respondent's policy. We agree. The wording of the dependency policy is clear; the relationship the claimant had with his mother who was living overseas does not satisfy the terms of the policy. The claimant was not entitled to unpaid leave under the dependency policy.

39. We have considered the comparators identified by the claimant. The circumstances of each are materially different to the circumstances of the

claimant in June 2021. For example the comparators travelling overseas did so in very different circumstances to the claimant. Travelling overseas is not sufficient to satisfy the test of materially the same circumstances. Therefore, the Tribunal must apply a hypothetical comparator.

July 2021 shifts

40. The claimant complains that on his return from Gambia in July 2021 he was required to isolate for a period longer than necessary and that he was not allocated him shifts during this period when colleagues were able to return to work immediately. As a result, the claimant complains that he was not scheduled or paid the 40 hours to which he was contracted during his notice period. On his return the claimant received an email from Emma White with a link to government guidelines for isolating on return from overseas travel. It was incumbent on the claimant to identify the period of isolation application to him (based on the government's legal requirements for the country to which he had travelled (Gambia)) and for employer and employee to discuss the requirements.

41. The respondent says the claimant was not allocated shifts as he told his manager he was isolating. By email dated 25 July 2021 Emma White asks the claimant "how long do you need to isolate?" He replies the same day "I am quarantining from 23rd for 10 days". The claimant's recollection of this exchange is misguided. It is not the case that he was told by the respondent to isolate. He now says he was not required to isolate for 10 days. That may be the case. However, at the time it was incumbent on his to identify his period of isolation; he did so, calculating this to be 10 days and informing the respondent of the same. We find that the respondent did not allocate the claimant shifts on his return as they were following his communication that he was required to isolate for 10 days.

Resignation and shifts during notice period

42. The claimant resigned in a letter dated 29 July 2021 giving 4 weeks' notice. He refers to non-payment of 40 hours of leave in 2019, transfer from Oswald Road, refusal of 4 weeks holiday to visit his mother, issues with holiday in 2021 and lack of bereavement pay, issues working with ST and refusal to grant unpaid leave for July 2021 as the reasons he resigned.

43. The claimant complains that he was not scheduled shifts following his resignation. On 6 and 10 August 2021 the respondent emailed all employees offering work. The documents support the respondent's evidence that it did try to contact the claimant to schedule shifts. In an email dated 7 August 2021 Emma White writes: "We have been trying to call you to cover some outstanding shifts…" It was incumbent on the claimant to respond to general offers and attempts to contact him as soon as he had finished isolating. We find that the claimant was not offered 40 hours a week during his resignation. However, this was due to his not responding to the respondent's attempt to contact him.

Issues for determination by the Tribunal

44. We set out below the issues for the Tribunal to determine, as discussed with the parties on 4 December 2024.

Time limits

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

    45.1.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
    45.1.2. If not, was there conduct extending over a period?
    45.1.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
    45.1.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable?
    45.1.5. The Tribunal will decide:
        45.1.5.1. Why were the complaints not made to the Tribunal in time?
        45.1.5.2. In any event, is it just and equitable in all the circumstances to extend time?

Constructive dismissal

46. Did the respondent do the following things:

    46.1.1. In 2019 forfeit payment of 40 hours of the claimant's accrued holiday;
    46.1.2. March / April 2020 transfer the claimant from the service at Oswald Road after the claimant raised complaints against his colleague Marcel De Laat, which he did not receive a formal response;
    46.1.3. Fail to take action following the submission by the claimant of incident report forms about service user ST, until Peterborough Police Safeguarding became involved;
    46.1.4. Refuse the claimant's request to rebook his January 2021 holiday entitlement, which was postponed due to the pandemic;
    46.1.5. Refuse to pay the claimant accrued 2020 holiday pay and 1 week for 2021 not used when requested in February 2021; and
    46.1.6. In June 2021 refuse a request for unpaid leave for July 2021 to enable the clamant to visit his ill mother in the Gambia.

    46.2. Did any of these events which happened as a matter of fact fundamentally breach the terms of the claimant's contract of employment.

    46.3. If not, did any of these events which happened as a matter of fact breach the implied term of trust and confidence? The Tribunal will need to decide:

        46.3.1. whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

        46.3.2. whether it had reasonable and proper cause for doing so.

46.4. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

46.5. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

Direct race discrimination (Equality Act 2010 section 13)

47. The claimant's race is Black African. Did the respondent do the following things:

47.1. In 2019 forfeit payment of 40 hours of the claimant's accrued holiday;
47.2. March / April 2020 transfer the claimant from the service at Oswald Road after the claimant raised complaints against his colleague Marcel De Laat, which he did not receive a formal response;
47.3. Allocate the claimant excessive shifts from November 2019 to July 2021;
47.4. Fail to take action following the submission by the claimant of incident report forms about service user ST, until Peterborough Police Safeguarding became involved;
47.5. Refuse the claimant's request to rebook his January 2021 holiday entitlement, which was postponed due to the pandemic;
47.6. In March / April 2021 Tina Arnold refuse to give the claimant shifts following completion of isolation;
47.7. In June 2021 refuse a request for unpaid leave for July 2021to enable the clamant to visit his ill mother in the Gambia;
47.8. Require the claimant to isolate for a period longer than necessary and not allocating him shifts during this period when colleagues were able to return to work immediately;
47.9. Not schedule to claimant work following his resignation.

48. Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than the colleagues the claimant has named in his further particulars for each claim. 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 he was treated worse than someone else would have been treated.

49. If so, was it because of race?

Victimisation (Equality Act 2010 section 27)

50. Did the claimant do a protected act as follows:

50.1. Email to Tina Arnold on 7 February 2020 raising health and safety concerns. The respondent accepts this email was sent but as a protected disclosure but does not accept the claimant suffered detriment as a result.
50.2. Email to Julie Boardman on 14 February 2020 regarding his holiday and setting out allegations of bullying). The respondent accepts

this email was sent but as a protected disclosure but does not accept the claimant suffered detriment as a result stating the holiday decision was in line with policy.

50.3. Email to Natalie Carey 8 March 2020 about the incident at the club 73 social club. The respondent does not accept that this is a protected disclosure.

50.3.1. Email to Natalie Carey on 4 May 2020 with concerns about his shift patterns and holiday. The respondent accepts this is a protected disclosure but says the claimant has not identified the detriment and that he did note receive a full shift quota as he had informed the respondent that he had to isolate.

50.3.2. Email Natalie Carey 16 June 20 and uploading of the incident report forms. The respondent accepts the incident report forms regarding ST are a protected disclosure but says C was not subjected to detrimental treatment as a result.

50.4. By doing so, did it subject the claimant to detriment?

50.5. If so, was it because the claimant did a protected act?

50.6. Was it because the respondent believed the claimant had done, or might do, a protected act?

Holiday Pay (Working Time Regulations 1998)

51. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

Notice pay

52. What was the claimant's notice period?

53. Was the claimant paid for that notice period?

54. If not, how much is the C owed?

Law

Constructive dismissal

55. Section 95(1)(c) of the Employment Rights Act 1996 (the 'Act') provides that an employee is dismissed by their employer if:

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

56. In order to establish constructive dismissal, an employee must show that the employer has committed a breach of contract (express or implied) which causes an employee to resign (*Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27*) and that the breach is sufficiently serious to justify the employee resigning or is the last in the series of incidents which justify their leaving. The breach of contract by the employer must be significant (*Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27*). A breach of the term of trust and

confidence implied into all contracts of employment is such a breach.

57. A breach of the implied term of trust and confidence occurs where an employer conducts itself without reasonable and proper cause in a manner calculated, or likely to destroy or seriously damage, the relationship of confidence and trust between employer and employee (*Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84*, *Mahmud v BCCI [1997] IRLR 462*, *Yapp v Foreign and Commonwealth Office [2015] IRLR 112*). A Tribunal must consider:

    57.1. Was the conduct likely to destroy or seriously damage the relationship of confidence and trust between employer and employee?
    57.2. If so, was there reasonable and proper cause for the conduct?

58. The Tribunal was directed to the case of *RDF Media Group Plc and anor v Clements [2008] IRLR 207, QB* which held that a breach of the implied term of mutual trust and confidence will only occur where there was no "reasonable and proper cause" for the conduct. The burden on showing an absence of reasonable and proper cause lies with the party seeking to rely on such purported absence.

59. A breach of this implied term is likely to be repudiatory. A Tribunal must consider all the circumstances of the case and ask itself, objectively, is the breach alleged likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in their employer *Malik v BCCI [1997] IRLR 462.* There is no breach merely because an employee subjectively feels that there has been a breach. If, viewed objectively, there has been no breach then the claim must fail (*Omilaju v Waltham Forest London Borough* Council [2005] IRLR 35).

60. The Court of Appeal considered the characteristics of a repudiatory breach of contract in the case of *Tullett Prebon plc & ors v BGC Brokers LP & ors* [2011] IRLR 420. Maurice Kay LJ, who delivered the leading judgment, held as follows at paragraphs 19 and 20:

    "The question whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal": Woods v WM Car Services (Peterborough) Limited, [1982] ICR 693, at page 698F, per Lord Denning MR, who added:

    'The circumstances … are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not' (ibid).

61. The question whether a repudiatory breach of contract has occurred must be judged objectively (*Buckland v Bournemouth University Higher Education Corporation [2010] ICR 908*); this requires the Tribunal to assess whether a breach of contract has occurred on the evidence before it. Neither the fact that an employee reasonably believes there to have been a breach nor that the employer believes it acted reasonably in the circumstances is determinative of this: the test is not one of 'reasonableness' but simply of whether a breach has occurred. When considering the question of constructive dismissal, the focus is on the employers conduct and not the employee's reaction to it.

62. Furthermore, a claimant must show that they resigned in response to this breach and not for some other reason (although the breach need only be a reason and not the reason for the resignation) *Kaur v Leeds Teaching Hospitals NHS Trust* [2019] ICR 1; however, the breach must be a substantial part of the reasons for the dismissal *United First Partners v Carreras* [2018] EWCA Civ 323.

63. It is open to an employer to prove that the employee affirmed the contract despite the breach, perhaps by delay or taking some other step to confirm the contract *Cockram v Air Products plc [2014] ICR 1065, EAT*

64. A claim for in breach of the implied term of trust and confidence may be based on the *'last straw doctrine'* (the name of which is derived from the old saying *"the last straw that broke the camel's back"*). This doctrine provides that a series of acts by the employer can amount cumulatively to a breach of the implied term of trust and confidence even though each act when looked at individually might not have been serious enough to constitute a repudiatory breach of contract. Inherent in the concept of a last straw is that there was one final act which led to the dismissal (*'the last straw'*) and the nature of this was considered in *London Borough of Waltham Forest v Omilaju [2005] IRLR 35* where the Court of Appeal held that the last straw need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of trust and confidence. If the act relied on as the final straw is entirely innocuous however then it is insufficient to activate earlier acts which may have been, or may have contributed, to a repudiatory breach.

65. The breach of contract does not need to be the sole reason for the resignation. It is sufficient for the employee to prove, on the balance of probability, that they resigned in response, at least in part, to a fundamental breach of contract by the employer (*Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859).

66. Of course, where parties are acting reasonably it is less likely that there will have been a breach of contract when judged objectively but this is not necessarily so. If, on an objective approach, there has been no breach by the employer, the employee's claim will fail.

67. This claim identified a grievance procedure as part of the claim for breach of the implied term of trust and confidence. In *Abbey National Plc v Fairbrother [2007] UKEAT/0084/0.* the EAT held that when considering a grievance procedure in the context of constructive dismissal, the standard against which it should be judged was *'the band of reasonable responses'*.

Direct race discrimination in respect of dismissal (Equality Act 2010 section 13)

68. Under section 13, Equality Act 2010, "EqA", direct discrimination is defined:

> "(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."

69. The protected characteristics are set out in section 4 EqA and includes race, sex and disability. Direct discrimination occurs where the employer treats the employee less favourably because of a protected characteristic.

70. Section 23 of EqA provides for a comparison by reference to circumstances in a direct discrimination complaint. The Tribunal must consider whether the employee was treated less favourably than they would have been treated if they did not have the protected characteristic. One way of testing whether or not the employer would have treated them better if they did not have the protected characteristic is to imagine a "hypothetical comparator". There is no actual comparator in this case; therefore, the test of hypothetical comparator is applied. The circumstances of a comparator must be the same as those of the claimant, or not materially different: see section 23 of EqA. The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison: *Hewage v Grampian Health Board [2012] UKSC 37.*

71. The important thing to note about comparators (whether actual or hypothetical) is that they are a means to an end. The crucial question in every direct discrimination case is: What is the reason why the claimant was treated as he/she was? Was it because of the protected characteristic? Or was it wholly for other reasons? It is often simpler to go straight to that question without getting bogged down in debates over who the correct hypothetical comparator should be: *Shamoon v. Royal Ulster Constabulary [2003] UKHL 11.*

72. The Tribunal must consider the "mental processes" of the alleged discriminator: *Nagarajan v London Regional Transport* [1999] IRLR 572. The protected characteristic need not be the *only* reason for the less favourable treatment. It may not even be the main reason. Provided that the decision in question was significantly (that is, more than trivially) influenced by the protected characteristic, the treatment will be because of that characteristic and discrimination would be made out.

73. The burden of proof provisions are contained in section 136 of EqA:

    (2) If there are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [tribunal] must hold that the contravention occurred.
    (3) But subsection (2) does not apply if A shows that A did not contravene that provision.

74. Section 136 prescribes two stages to the burden of proof: Stage 1 (primary facts) and Stage 2 (employer's explanation). At Stage 1, the burden of proof is on the claimant *Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913* *Royal Mail Group Ltd v Efobi [2021] UKSC 22* Stage 2 considers the employer's explanation. Has the employer proved on the balance of probabilities that the treatment was not for the proscribed reason. In a direct discrimination case, the employer only has to prove that the reason for the treatment was not the forbidden reason. There is no need for the employer to show that they acted fairly or reasonably.

75. The Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142 sets out guidelines on the burden of proof. Therefore, the process a Tribunal must

follow is:

75.1. Establish if there are facts from which a Tribunal can determine that an unlawful act of discrimination has taken place;
75.2. If the Tribunal concludes that there are, the burden of proof shifts to the respondent to provide a non-discriminatory explanation for the conduct.

Victimisation (Equality Act 2010 section 27)

76. Section 27 sets out a specific form of prohibited conduct outlawing detrimental action taken against an individual who wishes to bring a discrimination or harassment claim.

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

Conclusions of the Tribunal

77. The Tribunal sets out its conclusions by reference to list of issues for each claim.

Time limits

78. First, we must determine whether the discrimination and harassment complaints were made within the time limit in section 123 of the Equality Act 2010? These complaints date to 2019 (holiday payment) and work undertaken in 2019, 2020 and early 2021 and so fall outside the initial three-month deadline (plus early conciliation extension). As the claims concern holiday pay and work type, both ongoing throughout the claimant's employment, we conclude that there was conduct extending over a period and this period continued until the end of the claimant's employment on 31 August 2021. In reaching this conclusion, we note our finding that up until the date of his resignation the claimant was querying payment of his 2019 holiday pay and work allocation. As such we conclude that these claims are continuing acts.

79. The claim was presented on 24 October 2021 which, accounting for the continuing conduct was within three months (extended by the early

conciliation period between 5 September 2021 and ended on 17 October 2021) of the end of the claimant's employment, we conclude the claims of discrimination is in time.

80. We conclude that the complaint of unfair dismissal (constructive dismissal) was also made within the time limit in section 111 of the Employment Rights Act 1996 in that it was made to the Tribunal on 24 October 2021 which is within three months (extended by the early conciliation period between 5 September 2021 and ended on 17 October 2021) of the effective date of termination of 31 August 2021.

81. Therefore, we conclude all claims are in time and we consider the substantive merits of the claims below.

Constructive dismissal

82. Next, we address the claim for constructive dismissal. The claimant resigned by letter dated 3 August 2021 giving 4 weeks' notice; his employment ended on 31 August 2021. Based on our findings of fact, first we address whether the respondent did the things alleged by the claimant.

Non-payment of 2019 leave

83. We have found that in 2019 the claimant did not take all his holiday entitlement as Tina Arnold told him he could not do so due to business needs. The respondent's use it or lose it policy is not legally binding. We conclude that as a result 40 hours of the claimant's holiday was forfeited.

Transfer from Oswald Road

84. We have found that the claimant was not promised any specific location of work at his interview, and he was required by his employment contract to work where required by the business. He was not transferred from Oswald Road, as alleged. The shift evidence is that the shifts he worked at Oswald Road were not consistent. However, he continued to work there until he resigned. The facts are not as alleged by the claimant. Therefore, the allegation about Oswald Road cannot constitute a breach of his employment contract or the implied term of trust and confidence.

Request for support

85. The claimant says his welfare was disregarded despite many concerns raised to management before police intervention in June 2021. While the claimant did not make requests for support in the way he now claims, we have found that the respondent did not take direct action to support the claimant until police and safeguarding involvement. Third party involvement and references to an escape route do not, in our judgement, respond directly to the claimant's concerns nor offer him the support it is reasonable for an employer to offer an employee in these circumstances. The respondent failed the claimant by not addressing his concerns or offering him direct support in his supervision meetings.

Refusal of 4 weeks holiday in February 2021 to allow the claimant to visit his mother

86. We have found that the claimant was initially refused 4 weeks holiday, but this was subsequently allowed. The complaint is therefore one of delay and not refusal, as framed by the claimant. The facts are not as alleged by the claimant. Therefore, the allegation about refusing holiday cannot constitute a breach of his employment contract or the implied term of trust and confidence.

Request for accrued holiday pay

87. This claim was resolved at the hearing and is not a matter for determination by the Tribunal.

Refusal of leave for July 2021 to visit Gambia for his mother's surgical operation

88. We have found that the claimant was refused this leave. His circumstances at that time and the information he communicated to the respondent did not satisfy the guidance in the claimant's dependent's policy. His mother was living in Gambia and was not a dependent for the purposes of the policy. We have found that he did not tell Tina Arnold the details of his mother's condition as part of his request for this leave.

89. Next, we must consider if any of the events we have found occurred as alleged by the claimant fundamentally breach the terms of the claimant's contract of employment or did the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent.

90. As a matter of fact we agree with the claimant that:

90.1. He did lose some of his 2019 holiday entitlement for which he was not paid;
90.2. He was not supported when he raised concerns about working with ST; and
90.3. His June 2021 request for unpaid July 2021 leave was refused.

91. First, we consider whether the respondent fundamentally breached the claimant's contract of employment. In our judgement it did not: the claimant's employment contract did not:

91.1. Entitle him to be paid for his holiday;
91.2. Address specific safeguarding concerns; or
91.3. Entitle him to periods of unpaid leave.

92. Second, we must consider whether the respondent breached the implied term of trust and confidence.

93. In refusing to pay the 2019 holiday the respondent relies first on the fact that the claimant did not complete the required form in making his request and second on its "lose it or use it" holiday policy, a policy which was not binding. We have found that the claimant was told by Tina Arnold he could not take any more holiday. Given he started mid-year, in our view not rewarding an employee with their full holiday entitlement is a decision likely to seriously damage the trust and confidence. To rely on process and policy in the

dogmatic way the respondent did was unreasonable, breaching the implied term of trust and confidence.

94. Health and safety of employees is fundamentally important in all contracts of employment. The respondent's failure to directly support the claimant when he raised concerns about ST's behaviour breaches the implied term of trust and confidence. We consider this a very serious failing on the part of the respondent. Their explanation that they did support him by contacting outside agencies is, in our judgement, woeful, particularly given the nature of the respondent's business.

95. In our judgement the refusal to agree to the July 2021 unpaid leave did not breach the term of trust and confidence. The claimant had already had periods of unpaid leave agreed. He did not qualify under the dependent's policy and did not make the respondent aware of his mother's diagnosis. The respondent was reasonably applying its dependency policy, which the claimant had misunderstood, and was not aware of all the circumstances (the severity of the claimant's mother's condition).

96. As we have upheld breaches for the 2019 holiday and 2021 lack of support, we must consider whether the claimant affirmed the contract before resigning. We must decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach. The claimant raises both of these concerns in his resignation letter. He continued to work for the respondent after the December 2019 holiday and June 2020 safety complaints and did not raise a grievance for either. While his email correspondence repeatedly raised these concerns throughout his employment, he does not say he is working under protest.

97. The recent EAT case of *Leaney v Loughborough University* [2023] EAT 155 reminds us that tribunals should not focus too much on the passage of time when considering whether affirmation has taken place. All the surrounding facts and circumstances should be weighed. We are mindful that our focus must be on the claimant's conduct first and foremost; the passage of time, although relevant, is a secondary consideration.

98. Looking at the circumstances of the 2019 holiday complaint, the claimant complained about losing his holiday in 2019, resigning 18 months later in July 2021. We note he did not raise a grievance. However, we note the EAT have guided us that, in determining whether a claimant confirmed the contract, we should not focus on what the claimant did not do / what did not happen. Rather the focus should be on what the claimant did do. Crucial is whether the employee continued to be in work from between raising his concerns and resigning.

99. Throughout this period, he continued to raise his concerns about losing his holiday in emails to his managers, the last communication being in May 2021. We consider the content of these communications key. Reading the emails referencing the claimant's concerns about his 2019 holiday, we conclude they reference his complaint in the context of other complaints that arise through this period, specifically the claimant's challenges to the respondent's decisions about his holiday and requests for unpaid leave. The emails do not evidence any attempt by the claimant to negotiate with his managers about the 2019 leave. Throughout this period, the claimant continued to work for

almost 2 years. We conclude that, after raising concerns about his 2019 holiday, in continuing to work for the respondent for almost 2 years the claimant affirmed the contract. In our judgement, referencing his complaint about his 2019 in his resignation letter does not negate the affirmation given the passage of time given he continued to work; indeed, we have found he was actively seeking shifts during this period.

100. Next, we consider whether the claimant affirmed his employment contract after he raised his concerns about working with ST. He completed the incident reports in June 2020. We have found he did not receive direct support from the respondent having done so. Again, the claimant's conduct, rather than the amount of time that has passed, is key. Between his June 2020 complaints (and the failing on the part of the respondent to address these with direct support for the claimant) he continued to work, actively seeking shifts. While he cites the lack of support as a reason for his resignation in his resignation letter, his conduct in actively seeking shifts and engaging with the respondent about his holiday and unpaid leave requests from June 2020 to July 2021, in our judgement, affirmed the contract.

101. For these reasons we conclude the claimant was not constructively dismissed by the respondent.

Direct race discrimination (Equality Act 2010 section 13)

102. Our next consideration is whether the claimant was discriminated against by the respondent due to his race of Black African.

103. We have found that some of the acts of less favourable treatment relied on by the claimant did not take place. For the same reasons stated in our conclusion on the claim of constructive dismissal (where the factual matrix relied on is common to this claim) we have concluded that the following allegations did not take place as alleged by the claimant. Therefore, he cannot rely on them in his discrimination claim and we do not need to consider whether they amount to less favourable treatment or are related to the claimant's race:

103.1. Transfer from Oswald Road
103.2. Refusal of 4 weeks holiday; and
103.3. Request for accrued holiday pay.

104. In the constructive dismissal claim we have upheld following as having taken place as alleged:

104.1. The respondent did not pay the claimant his outstanding 2019 holiday;
104.2. Lack of supported working with ST; and
104.3. June 2021 refusal of a request for unpaid leave for July 2021to enable the claimant to visit his ill mother in the Gambia.

105. Therefore, we must consider whether these allegations amount to less favourable treatment. We have considered the comparators put forward by the claimant. While there are some general similarities, the comparators do not satisfy the test of being in materially the same circumstances as the claimant. Therefore, we have considered a hypothetical comparator. We

conclude that the claimant would have treated any employee in the same way. The refusal to pay holiday was based on a policy. The lack of direct support was, in our view bad management. Anyone seeking to visit a parent overseas following a surgical procedure, who had already had unpaid leave would have been refused; the claimant's circumstances known to the respondent fall outside the dependent's policy, the respondent was not aware of the claimant's mother's diagnosis and in these circumstances the decision was at the respondent's discretion. We conclude the respondent would have treated any employee in the same circumstances in the way it treated the claimant.

106. We conclude the respondent did not treat the claimant less favourably than it would another employee in materially the same circumstances in refusing to pay the claimant's 2019 holiday, failing to support him with ST and not allowing him unpaid leave in July 2021. Therefore, as we have concluded the treatment complained of was not unfavourable, we do not need to consider whether the treatment related to the claimant's race. However, we make the observation that there is no evidence before us that these decisions were made because of the claimant's race. Indeed, the claimant told us in evidence that it had to be because of his race as there was no other reason. There was: policy, poor management and discretion to allow unpaid leave. The claimant may not agree with the decisions made. However, they were not made because of his race.

107. Now we turn to the facts relied on by the claimant in his race discrimination claim only.

Allocate the claimant excessive shifts from November 2019 to July 2021

108. We have found that the respondent did not allocate the claimant excessive shifts from November 2019 to July 2021. The shift pattern varied and was queried by the claimant at times; however, we have found that these queries were not complaints or concerns expressed by the claimant at the time about the number of hours he was scheduled to work.

Not schedule to claimant work following his resignation.

109. We have found that the respondent did contact the claimant by telephone to allocate shifts following his resignation, once he had completed isolating and the claimant did not reply to these calls. Therefore, the allegation he was not allocated shifts was misguided; attempts were made to allocate the respondent shifts.

110. As we have concluded these allegations of discrimination did not, as a matter of fact, take place in the way alleged by the claimant, we do not need to consider whether the treatment was less favourable, nor whether it was related to race. Simply, the treatment did not take place as alleged. Quite simply, our findings are that these events did not happen either at all or in the way alleged by the claimant.

In March / April 2021 Tina Arnold refuse to give the claimant shifts following completion of isolation

111. We have found that the claimant was not required to isolate for longer than necessary. It was the claimant who told the respondent that he was required to isolate for 10 days, and the respondent followed this, allocating work at the end of this period. In March / April 2021 Tina Arnold refused to give the claimant shifts until he had completed a period of isolation. During this time there were 4 days when the claimant could have been allocated work. For this period, he was treated less favourable than a comparator who was allocated work at the end of their isolation period. Therefore, we must consider whether the claimant's race was a factor in delaying the allocation of work. There is no evidence before us that it was. We have found the reason for the delay is poor management by the respondent in miscalculating the claimant's isolation period and when he would be available for work.

Victimisation (Equality Act 2010 section 27)

112. The claimant emailed Tina Arnold on 7 February 2020 raising health and safety concerns. The respondent accepts this email constitutes a protected disclosure. We agree; the email is information raising health and safety concerns. However, there is no evidence before us that the claimant suffered a detriment as a result of sending this email.

113. On 14 February 2020 the claimant Julie Boardman about his holiday entitlement. The email also references allegations of bullying. We agree with the respondent that this email constitutes a protected disclosure. The claimant alleges he suffered a detriment. We agree; he lost his entitlement to his outstanding 2019 holiday due to the application of a non-binding policy which we have found it was unreasonable to apply in the circumstances. However, the respondent had already decided not to pay the claimant for his 2019 leave on the basis of its holiday policy. The respondent did not refuse to pay the leave because the claimant sent this email.

114. On 8 March 2020 the claimant emailed the respondent Natalie Carey about the incident at the club 73 social club. This is not a protected disclosure. Marcel de Laat, about whom concerns were raised, was not at the club during his working hours. The respondent does not accept that this is a protected disclosure.

115. On 4 May 2020 the claimant emailed Natalie Carey on with concerns about his shift patterns and holiday. We agree with the respondent that this is a protected disclosure. We must consider whether the claimant suffered a detriment of losing out on shifts as a result. We have found he lost out on 4 days work. However, we have found that the claimant missed out on 4 days' work due to the respondent miscalculating the end of the claimant's isolation and not because the claimant sent this email.

116. On 16 June 2020 the claimant emailed Natalie Carey and uploaded the incident report forms. We agree with the respondent that these forms are accepts protected disclosures. However, the claimant has not idenitifed the detriment he suffered as a result and there is no evidence before us he suffered a detriment.

Holiday pay

117. We have found that the claimant was entitled to 244 hours of pro rata holiday pay for the holiday year 1 January to 31 December 2019 as he worked 144 hours. He took holiday on 14,15,27,28,29,30,31 December and an additional week was agreed in 2019.Therefore, we find he is entitled to 40 hours of holiday pay. We have found that it was reasonable for the respondent to pay the claimant this holiday as they were unable to accommodate his requests for business reasons and refused to carry it over (relying on a non-binding policy). The claimant was paid an hourly rate of £8.21 in 2019. Therefore, it is awarded £328.40 (40 hours x £8.21).

Notice pay

118. As the claimant resigned without notice and the Tribunal has not upheld his unfair dismissal claim, he is not entitled to notice pay.

119. For the reasons stated, we conclude that:

119.1. The claim of unfair dismissal is not well founded; the claimant was not constructively dismissed. The claimant is not entitled to notice pay.

119.2. The respondent has not contravened section 13 of the Equality Act 2010. The claimant was not discriminated against due to his race or at all.

119.3. The respondent has not contravened section 27 of the Equality Act 2010. The claimant was not victimised by the respondent.

119.4. The claimant is owed holiday pay in the amount of ££328.40 (40 hours x £8.21).

Employment Judge Hutchings

24 January 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
24 January 2024
.....

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FOR EMPLOYMENT TRIBUNALS

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