EMPLOYMENT TRIBUNALS

Claimant: **Miss Evelyn Otoo**

Respondent: **Bestway Panacea Holdings Limited**

Heard at: **Bristol (by video)** **On: 5 & 6 July 2023 (hearing)**
7 September 2023 (Judgment)

Before: Employment Judge Midgley
Mrs W Ellis
Mr E Beese

Representation
Claimant: In person
Respondent: Miss G Hicks, Counsel

JUDGMENT having been sent to the parties on 22 September 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and Parties

1. By a claim form presented on 14 January 2022, the claimant brought claims of constructive unfair dismissal, direct discrimination on grounds of race and unpaid holiday pay.

2. By the time of the final hearing, as a consequence of decisions made at a preliminary hearing on 21 December 2022, the claims were limited to constructive unfair dismissal and direct race discrimination.

Procedure, Hearing and Evidence

3. The parties had agreed a bundle of relevant documents (214 pages). I heard evidence from each of the following, who had produced witness statements: for the claimant, the claimant herself (22 pages); for the respondent:

   3.1. Mrs Leanne Passaway, Area Operations Manager (formerly Branch Manager Calne, and Relief Support (8 pages);

   3.2. Mrs Kerry Rundle, Branch Manager (3 pages).

4. The respondent submitted a single page document containing corrected page references in it statements.

5. I heard evidence from each of the witnesses, who answered questions from the other side and from me. At the conclusion of evidence I heard oral submissions from each of the parties, and read the written submissions prepared by Miss Hicks for the respondent. Given there was insufficient time to deliberate and promulgate a judgment, I relisted a further day for handing down judgment.

Factual Background

6. The respondent is an independent pharmacy retail chain.

7. The claimant began employment with the respondent on 1 February 2011. At the time of the events which form the subject of this claim, she worked as a qualified Pharmacy Assistant, a role she held since 2 November 2014. Initially she worked at the Filton Road branch, before transferring to Horfield HC branch in 2013. She then transferred back to Filton Road in 2019, where she remained until her resignation.

8. The claimant's line manager was Augustin Dick until September 2021. Thereafter, following his departure from the business, Mr Sadik Al Hassan, the Area Manager, acted as the claimant's line manager.

9. The claimant's role as a pharmacy assistant included labelling medicines, providing medicines on prescription, requesting prescriptions for patients, and giving advice to customers about non-prescription items. Her normal hours of work were 16 hours a week, operated on a roster system.

10. It was the respondent's practice to have 2 to 3 staff on duty in a pharmacy at any one time to cover the volume and nature of the work interactions required: in addition to dispensing medicines, staff had to serve customers and answer the telephones. The minimum number of staff was two, of whom one had to be a qualified pharmacist (as distinct from a Pharmacy Assistant). That policy or practice will hereinafter be referred to as the "Minimum Staffing Level").

<u>The respondent's annual leave and relief system</u>

11. The respondent operated a system for booking holidays, which was addressed in the policy document entitled the Well Absence Policy ("the Policy"). The Policy required that all leave should be booked through the HR system, "HR Evolution" and that requests to be submitted four weeks in advance, especially in relation to busy leave periods, and stipulated that 90% of leave had to be booked by 1 October of the new holiday year.

12. Requests were required to be submitted to the employee's line manager, who was responsible for approving the request. The Policy further stipulated that annual leave was granted on a first-come first-served basis, and provided that leave requests would not be approved where approval would create staff shortages which would negatively impact on service levels. It noted that "to ensure appropriate levels of customer service and operational requirements are maintained, it may not be possible to grant annual leave to more than one

colleague at any one time."

13. Mr Dick was very particular when considering annual leave requests to ensure that cover was found before authorising leave. His practice in that respect was to require employees to put their requests in writing to him, rather than through the HR Evolution system, so that he could make an enquiry with the Relief Support Coordinator, Mrs Leanne Passaway, to see whether there was appropriate cover to maintain the Minimum Staffing Level.

14. The respondent also operated a relief system to cover sickness absences and annual leave. A team of employees, headed by Mrs Passaway, provided cover for the branches, attending the branches where cover was required. Mrs Passaway was also the Branch Manager at the respondent's premises in Calne.

The background events

15. On 21 August 2020, the claimant requested annual leave for 2 September 2020. The request was refused on the grounds that another team member had booked annual leave for that date, and usually four weeks' notice was required. (The claimant makes no allegation of discrimination in respect of this leave but relies upon it as a background fact from which she invites us to draw an inference of discrimination).

16. In the event, the claimant chose to take annual leave, notwithstanding the refusal of her request, and was absent between 27 August and 9 September 2020. The claimant travelled to the Netherlands to collect her son in that period, and so was required as a consequence of the regulations then in force to spend a period of 14 days in isolation on her return. She did not return to work until 10 September 2020 as a result.

17. In consequence the respondent initiated a disciplinary investigation which resulted in the claimant being issued with a written warning which remained live for nine months. The warning was reduced from 12 months given the mitigating circumstances connected to the claimant's anxiety about collecting her son. The claimant did not appeal that sanction.

18. On 16 April 2021, one of the claimant's white work colleagues, Sasha Mathias ("Sasha"), emailed Mr Dick to request annual leave for the periods 21 July and 4 August and 23 August and 1 September. In accordance with his practice Mr Dick emailed Mrs Passaway who confirmed that she could cover some of the days but not others, suggesting that Mr Dick would need to arrange team members to cover the missing days as overtime if he wished to approve the request. It is unclear when the request was authorised, but it is apparent from the subsequent change to the dates of Sasha's leave that it was.

Workplace disputes

19. The claimant was involved with a workplace dispute with two of her colleagues on the 6 and 20 May 2021. The details of the disputes are not material to the issues in the case, it is sufficient to record that the claimant alleged that her colleagues had suggested she sought to avoid her duties in serving customers.

20. Mrs Passaway tried to resolve the dispute informally; regrettably it appears that she only spoke to the two colleagues with whom the claimant had had the dispute, but not with the claimant herself, before sending an email to Mr Dick and Mr Al Hassan, expressing her conclusions as to what had happened, which included suggestions that the claimant had refused to serve a customer and, when challenged, had accused one of her colleagues of being racist, which, Mrs Passaway concluded, there was no evidence to support. She ended the email by saying,

    "from what I've seen and gathered from the conversations between all the colleagues present that day it's become apparent that the root cause of all this is Evelyn's attitude and behaviour and I am greatly concerned by this."

21. The claimant relies on Mrs Passaway's approach as further evidence from which she argues we should draw an inference of discrimination, because Mrs Passaway reached an adverse and critical conclusion without first speaking to her to understand her complaint.

22. The claimant therefore began a period of sickness absence on 26 May which continued until 17 June 2021. She presented sick notes covering the period 3 to 4 June and 9 to 17 June, which identified stress at work and hypertension as the reasons for the absence.

    <u>The claimant's requests for annual leave.</u>

    The first request 7 June 2021

23. On 7 June 2021 the claimant made a request for annual leave to Mr Dick for the period the 12 to 21 August 2021. Mr Dick emailed Mrs Passaway that day to check whether there was cover to maintain the Minimum Staff Level in accordance with his practice.

24. Mrs Passaway replied on 8 June, stating that she did not have any spare cover for the dates because one relief member of staff was away, and another had already been booked to provide cover for a different store. She stated that it was entirely up to Mr Dick to decide whether to authorise the request, but there was no relief to cover it.

25. On 19 June Mr Dick began a period of sickness absence.

26. The request was neither authorized nor refused and, because it was in writing rather than on the HR system, it was not considered because of Mr Dick's absence and subsequent departure from the respondent.

    The second request 18 June 2021

27. On 18 June 2021, the claimant submitted a further request for annual leave for the period the 15 to 16 July. As Mr Dick was absent, the request was not processed.

28. The claimant had a period of unauthorised absence on 24 June and did not report her absence until 28 June.

29. On 29 June the claimant began a period of sickness absence which continued

until 2 July. She submitted a Fit note citing a bad back as the cause of her absence.

The first grievance

30. On the same day, 29 June 2021, she lodged an informal grievance making complaints about the manner in which Mr Dick, and Mr Al Hassan had managed the workplace disputes in May, and also making complaints of bullying against the two colleagues involved. In the grievance the claimant stated that she was avoiding working on certain days to avoid the two colleagues in question, and that was having an impact both on her health and her finances.

31. As a consequence of the claimant's sickness absence, the respondent approached Sasha, asking her whether she would forego her annual leave at the end of July and beginning of August in return for being permitted more leave at the end of August.

32. On 1 July the claimant notified Mr Al Hassan, 10 minutes after her shift was due to start, that she was sick and was unable to attend. She did not provide an explanation for her absence. Mr Al Hassan emailed Mrs Passaway advising her of those events.

33. On 5 July, the respondent acknowledged the claimant's grievance, and requested that she provide more information in relation to the complaints by 9 July. The claimant complied with that request, providing further detail on 8 July. She provided an account of the events of the 6 and 20 May, and alleged that Mr Dick had promised to investigate them, following a call she made to him prior to returning to work on 18 June. However, she said that when she returned to work on the 18th, Mr Dick was no longer employed and had left. It was clear that the nature of her complaint against Mr Dick and Mr Al Hassan was that they had failed to investigate her complaints of bullying by her two colleagues.

The third request 16 July 2021

34. On 16 July 2021, the claimant made a further request for annual leave through the HR evolution system for the period the 4 to 18 August 2021. She received a response the same day advising her that the request had not been authorised. Although the respondent was unable to call Mr Al Hassan to give evidence, it is apparent that Mr Al Hassan had refused the request for the reasons below.

35. On 19 July the claimant sent a WhatsApp message to Mr Al Hassan, stating "I have requested my holidays again as you asked me to do. Here is Sasha's holiday that she told me before I requested mine in May." She forwarded to Mr Al Hassan details of Sasha's request which had been made initially for the period 26 July until 4 August and 23 until 31 August. The claimant did not know, at that time, of the respondent's request to Sasha to change the leave as detailed above.

36. On 20 July 2021, the claimant's request for annual leave was refused through the HR evolution system. For the same reasons as before, it is apparent that Mr Al Hassan had refused the request. The respondent was unable to call him

to give evidence to explain why he had refused it.

The fourth annual leave request

37. On 24 July 2021, Mr Al Hassan spoke to the claimant to explain the refusal, (so the claimant must herself have been aware of the reasons) and the claimant asked whether she could take three days of the second or third week of August. Mr Al Hassan emailed Mrs Passaway that day, noting that it was a further last-minute request and did not comply with the 28 day policy rule, but asked whether it could be accommodated.

38. Mrs Passaway replied the same day, advising that it was not possible because there was no cover for her shifts. She explained,

> *"I have [an employee in the Relief team] off on the second week so I'm lighter on cover anyway and I'm already booked up with cover for request we've had in earlier from other stores and the third week Sasha was offered two weeks in Filton Road, so at this time I am unable to provide cover for Evelyn's request."*

39. Mrs Passway spoke to Sasha to see whether she was willing to move her annual leave to accommodate the claimant's request, but she refused as she had made plans. The claimant was not told that her request was refused, and Mr Al Hassan was not present to give evidence to explain why, but it must have been apparent to the claimant from 29 August (the last working day of the third week of August) that it had not been approved.

40. On 4 August 2021, Mr Al Hassan instructed the claimant that she must return work as she was rostered to work on Thursdays. That was a day when one of the two colleagues with whom the claimant had had the workplace dispute was also rostered to work.

41. The following day, the claimant attended work with one of those colleagues.

42. On 19 August the claimant attended a grievance investigation meeting in relation to the complaints she had made on 29 June with the investigator, Kerry Rundell. The respondent conducted investigation meetings with relevant members of staff between the 2 and 9 of September.

43. Between 1 and 3 September 2021, the claimant had a further period of unauthorised absence. The claimant was absent because she was frustrated with the continual refusal of her requests for annual leave and wanted to spend some time with her son before he returned to school.

44. On 2 September Mr Al Hassan wrote to the claimant in relation to the period of unauthorised absence between 1 and 2 of September, reminding her of the appropriate reporting procedures and expressing concern for her well-being. He requested that she should contact him within three days of receiving his letter to update him as to the reasons for absence. He advised her that as she was absent without leave, he had put a temporary stop on her pay.

The fifth request September 2021

45. On 9 September 2021 the claimant's request for annual leave between the

18th and 24th of September was granted.

46. The claimant began a period of sickness absence on 8 September which continued until 17 September. The reason cited on the fit note was stress.

47. On 17 September 2021, the claimant emailed Miss Rundle chasing an outcome for her grievance. Miss Rundell replied, explaining that there had been delays in interviews due to staff holidays and sickness absence. The claimant was provided with an outcome to her grievance on 22 September. Her grievance was not upheld, Miss Rundell concluded that there had clearly been a breakdown in communication between the parties, but it was unclear where fault lay for that breakdown. She proposed mediation between the parties.

48. The claimant began a period of sickness absence on 29 September which lasted until 13 November. She did not submit sick notes in respect of that absence. The respondent recorded the reason as stress on the HR absence system.

The second grievance

49. During that period of absence, on 12 October 2021, the claimant prepared a further grievance on a letter headed with the Citizens Advice Bureau letterhead. The grievance reiterated her complaints about one of the workplace colleagues, but also made complaints about the refusal of her request for annual leave, the details which we have addressed above. The claimant complained that the refusals were unfair, although she did not at that stage suggest they were less favourable treatment on the grounds of race.

50. The respondent did not receive the grievance until 27 October 2021.

51. In the intervening period the respondent wrote to the claimant on 15 October requesting she attend a meeting on the 20 October to discuss her sickness absence, and on 18 October the claimant replied stating that she would not attend the meeting until her grievance had been resolved.

52. On the 29 October 2021 the respondent acknowledged the claimant's second grievance and, on 1 November, invited the claimant to a grievance meeting on 5 November 2021. The claimant attended the grievance meeting on 5 November; the meeting was chaired by Mr Rob Skornia. The claimant reiterated her complaints relating to annual leave, requesting reasons why Mr Al Hassan and Mrs Passaway had refused her requests. Mr Kornia interviewed Mrs Passaway on 8 November and Mr Al Hassan on 9 November.

53. During his interview Mr Al Hassan stated that (a) he had spoken to the claimant on 24 July when she made a request for annual leave for mid August (detailed above). (b) Sasha was on annual leave that week as her annual leave had been moved to accommodate the claimant's sickness absence, (c) he asked Mrs Passaway whether there was cover, (d) Mrs Passaway spoke to the claimant and offered alternate dates for a period 2 weeks after those requested by the claimant, (e) he checked the HRevolution system twice to see whether the claimant's request could be accommodated with cover, but it could not.

54. The claimant was absent due to sickness between 13 and 27 November 2021. On 19 November she supplied a fit note identifying the reason for her absence as stress at work.

55. On 22 November 2021, Mr Kornia sent the claimant the outcome to the grievance. He did not uphold the grievance, noting that the reason for the refusal of the claimant's request for leave in August 2021 was because Sasha was on leave and had moved her leave to help the business to cover the periods of the claimant's sickness absence. In addition, he found that there was a usual practice on sourcing cover [relief] before any request for annual leave work approved.

56. On 24 November the claimant commenced early conciliation through ACAS.

57. On 29 November 2021 the claimant resigned with immediate effect. She wrote, "I am writing to hand in my notice because I believe I was treated unfairly in relation to my holiday allocation and because I do not believe my grievance was taken seriously."

58. The respondent wrote to her the same day, expressing concern that she had resigned in haste and asking her to reconsider, permitting her five days in which to do so.

59. In her final payslip, the claimant was paid £584.37 for unpaid holiday pay, indicated by the acronym "LHOL".

60. The early conciliation ended on 20 December and the claimant issued a claim on 4 January.

The Issues

61. Time

61.1. The claim form was presented on 14 January 2022. The Claimant commenced the Early Conciliation process with ACAS on 24 November 2021 (Day A). The Early Conciliation Certificate was issued on 20 December 2021 (Day B). Accordingly, any act or omission which took place before 13 September 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

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

61.2.1. If not, was there conduct extending over a period?

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

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

61.2.4. Why were the complaints not made to the Tribunal in time?

61.2.5. In any event, is it just and equitable in all the circumstances to extend time?

62. Constructive unfair dismissal

62.1. The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breaches were as follows:

62.1.1. The refusal of her leave applications of June/July 2021;

62.1.2. The rejection of her grievance in respect of that matter. (The last of those breaches was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

62.2. The Tribunal will need to decide:

62.2.1. 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

62.3. Whether it had reasonable and proper cause for doing so.

62.4. Did the Claimant resign because of the breach?

62.5. Did the Claimant tarry before resigning and affirm the contract?

62.6. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98(4) of the Act?

63. Direct Race Discrimination

63.1. The Claimant describes herself as a Dutch citizen of Ghanaian heritage.

63.2. It is not in dispute that the Respondent refused her leave application of June/July 2021.

63.3. Was that less favourable treatment? The Claimant says she was treated worse than Sasha Matias.

63.4. If so, was it because of race?

63.5. Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to race?

64. Holiday Pay

64.1. Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when their employment ended?

64.2. What was the Claimant's leave year? The Claimant states that it was July to June.

64.3. How much of the leave year had passed when the Claimant's

employment ended?

64.4. How much leave had accrued for the year by that date?

64.5. How much paid leave had the Claimant taken in the year?

64.6. Were any days carried over from previous holiday years?

64.7. How many days remain unpaid?

64.8. What is the relevant daily rate of pay?

The Relevant Law

Constructive unfair dismissal

65. It is trite law that a constructive dismissal within the definition in section 95 (1)(c) ERA 1996 may be an unfair dismissal, applying the principles within the definition in section 98(4) ERA 1996. A constructive dismissal is not necessarily unfair. The tribunal will err in law if it fails to make explicit findings on the reason for the dismissal and whether the employer has acted reasonably in all the circumstances: Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166, CA.

Breach of the implied term

66. In order to establish that there had been a dismissal within the definition of section 95(1)(c) ERA 1996 a claimant must demonstrate that the respondent has committed a repudiatory breach of the contract (see Western Excavating (EEC) Ltd v Sharp [1978] ICR 221.)

67. Where the repudiatory breach is a breach of the implied term of trust and confidence, the test to be applied is whether the employer "without reasonable and proper cause conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee." (Malik v BCCI [1979] IRLR 462). Where an employer breaches that term, the breach is "inevitably" fundamental (see Morrow v Safeway Stores plc [2002] IRLR 9.)

68. It makes no difference to the question of whether or not there has been a fundamental breach either that:

68.1. the employer did not intend to end the contract (see Bliss v South East Thames Regional Health Authority [1987] ICR 700, CA.)

68.2. the employer acted in breach of contract because of the circumstances at the time; the circumstances are irrelevant to the issue of whether a fundamental breach has occurred (see Wadham Stringer Commercials (London) Ltd v Brown [1983] IRLR 46, EAT);

68.3. The respondent's conduct, although unreasonable was within a range of reasonable responses open to a reasonable employer. That is not the test, it is the test in Malik above (see Bournemouth University Higher Education Corporation v Buckland [2010] if ICR 908, CA); or

68.4. That the employer had remedied the breach (see Buckland above).

69. "Not without reasonable and proper cause" is a relevant part of the test that the tribunal must consider and to do so it will be necessary to assess the reasons for the employer's conduct: Sharfugeen v T J Morris Ltd UKEAT/0272/16 (3 March 2017, unreported).

70. There will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held: Omilaju v Waltham Forest London Borough Council [2005] IRLR 35.

71. If the treatment complained of is fundamentally an exercise of discretion given to the employer by the contract of employment then the claimant must show Wednesbury unreasonableness / irrationality in order to claim that there has been a breach of implied term of trust and confidence: IBM UK Holdings Ltd v Dalgleish [2017] EWCA Civ 1212.

72. In cases of cumulative breach, the final act need not be a breach in itself but it must add something to the breach: Omilaju v Waltham Forest.

Causation/affirmation

73. The breach of contract must be *an* effective cause of the claimant's decision to resign, it need not be *the* effective cause (see Wright v North Ayrshire Council [2014] ICR 77, EAT. As Mr Justice Elias, then President of the EAT, stated in Abbycars (West Horndon) Ltd v Ford EAT 0472/07,

> *'the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon'.*

74. Where a claimant argues that the decision to resign was caused by a course of conduct and he or she resigned in relation to a last straw, the guidance in Kaur v Leeds Hospital NHS Trust [2018] EWCA Civ 978 applies; it does not apply where there is no reliance on the last straw doctrine; a point expressly made by LJ Underhill at paragraph 42; it is the first of his four points.

75. An employee must not wait too long before accepting the breach and resigning, or they may be deemed to have affirmed the contract (see Western Excavating (EEC) Ltd above); although the law looks very carefully at the facts before deciding there has been such an affirmation in the context of employment (see the comments of Lord Justice Jacob in Buckland above).

76. The employee must resign in response to the breach and not because of some other unconnected reason: Norwest Holst Group Administration Ltd v Harrison [1984] IRLR 419.

Race Discrimination

77. The claimant brings claims under the Equality Act 2010 of direct discrimination (s.13 Equality Act 2010 ("EqA").

78. The relevant law is contained in sections 39, 13 and 23 EQA 2010 which provide respectively (in so far as is relevant) as follows:

> *39 – Employees and applicants*
>
> (2) An employer (A) must not discriminate against an employee of A's (B)—
> (a) as to B's terms of employment;
> (d) by subjecting B to any other detriment.
>
> *13. Direct discrimination*
>
> (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.
>
> *23. Comparison by reference to circumstances*
>
> (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.

Section 13

79. The basic question in every direct discrimination case is why the complainant was subjected to less favourable treatment (Amnesty International v Ahmed [2009] IRLR 884, per Underhill P, para. 32).

80. Once it is established that the treatment is because of a protected characteristic, unlawful discrimination is established and the respondent's motive or intention is irrelevant (Nagarajan v London Regional Transport [1999] IRLR 572 HL).

81. The protected characteristic does not need to be the only reason for the less favourable treatment, or even the main reason, so long as it was an 'effective cause' of the treatment: O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372, EAT.

The reverse burden of proof

82. The statutory tests are subject to the reverse burden of proof in section 136 EQA 2010 which provides:

> (2) If there are facts on 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.

83. The correct approach to the reverse burden of proof provisions in discrimination claims has been the subject of extensive judicial consideration. In every case the Tribunal has to determine the "reason why" the claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional

Transport [1999] IRLR 572 HL). This is "the crucial question."

84. It is for the claimant to prove the facts from which the Tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong [2005] IRLR 258 CA and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18), i.e., that the alleged discriminator has treated the claimant less favourably or unfavourably and that the reason why it did so was on the grounds of (or related to if the claim is under s.26) the protected characteristic. That requires the Tribunal to consider the mental processes of the alleged discriminator (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

85. In Igen the court proposed a two-stage approach to the burden of proof provisions. The first stage requires the claimant to prove primary facts from which a Tribunal properly directing itself could reasonably conclude that the reason for the treatment complained of was the protected characteristic. The claimant may do so both by their own evidence and by reliance on the evidence of the respondent.

86. However, at the first stage, explanations (as opposed to evidence) should not be taken into account at this first stage as the statutory language mandates that the tribunal must ignore any explanation for those facts given by the respondent and assume that there is no adequate explanation for them (Efobi at [22]) and the Tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn [30])

87. If the claimant does so, the second stage requires the respondent to demonstrate that the protected characteristic was in no sense whatsoever connected to the treatment in question. That requires the Tribunal to assess not merely whether the respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question. If it cannot do so, then the claim succeeds. However, if the respondent shows that the unfavourable or less favourable treatment did not occur or that the reason for the treatment was not the protected characteristic the claim will fail.

88. The explanation for the less favourable treatment advanced by the respondent does not have to be a 'reasonable' one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

89. Furthermore, it is not sufficient for the claimant simply to prove that there was a difference in status i.e. that the comparator did not share the protected characteristic relied upon by the claimant) and a difference in treatment. 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 act of discrimination (see Madarassy v Nomura International Plc [2007] ICR 867 CA at [56] ; Hewage v Grampian Health Board [2012] IRLR 870 SC and Royal Mail Group Ltd v Efobi [2019]

EWCA Civ 18.)

90. The effect of the burden of proof provisions is not to place a blanket obligation on the employer to prove the non-discriminatory motivations of every employee (Reynolds v CFLIS (UK) Ltd [2015] ICR 1010at [51]):

> "*The effect of those provisions was not to place a blanket obligation on Canada Life, as respondent, to prove the absence of discrimination in every act of every employee that formed part of the chain of causation leading to the act complained of. On the contrary, the starting-point is that the claimant was required to prove a prima facie case (in the sense explained in Madarassy) that the termination of her contract was discriminatory. Whether she reached that stage had to be decided by reference to the specific case which she advanced… To put it another way, the burden of proof provisions apply for the resolution of the factual issues raised before the tribunal: they cannot operate to extend those issues."*

91. The Tribunal does not have slavishly to follow the two-stage process in every case - in Laing v Manchester City Council and anor [2006] ICR 1519, EAT, Mr Justice Elias identified that 'it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment." That approach was endorsed by the Court of Appeal in Stockton on Tees Borough Council v Aylott [2010] ICR 1278.

92. It is for the claimant to show that the hypothetical comparator in the same situation as the claimant would have been treated more favourably. It is still a matter for the claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

Time limits

Conduct extending over a period

93. Section 123(3)(a) EqA 2010 provides that "conduct extending over a period is to be treated as done at the end of the period."

94. An 'act extending over a period' (also known as a 'continuing act') may arise not solely from a policy, rule, scheme, regime or practice but also from 'an ongoing situation or continuing state of affairs' (Hendricks v The Commissioner of Police for the Metropolis [2003] IRLR 96, CA, paras 51-52 per Mummery LJ, approved by the Court of Appeal in Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA).

95. In Coutts & Co plc v Cure [2005] ICR 1098, EAT, the Employment Appeal Tribunal (HHJ McMullen QC presiding), setting out categories into which the factual circumstances of alleged discrimination may fall, found (albeit obiter) that there are two types of situation in which alleged discrimination may constitute an 'act extending over a period':

95.1. where there is a discriminatory rule or policy, by reference to which decisions are made from time to time; and

95.2. where there have been a series of discriminatory acts, whether or not set against a background of a discriminatory policy.

96. In the former case, an act will be regarded as extending over a period, and so treated as done at the end of that period, if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant (Barclays Bank plc v Kapur [1989] IRLR 387).

97. In the latter case, the main issue for the Tribunal tends to be whether it is possible to identify some fact or feature linking the series of acts such that they may properly be regarded as amounting to a single continuing state of affairs rather than a series of unconnected or isolated acts (Hendricks). A single person being responsible for discriminatory acts is a relevant factor in deciding whether an act has extended over a period: Aziz v FDA [2010] EWCA Civ 304, CA.

98. Therefore, whether the acts complained of are linked so as to amount to a "continuing act" is essentially a question of fact for the tribunal to determine.

99. In cases where the act complained of by the claimant is not the mere existence of a policy but rather the application of that policy to the claimant, the Tribunal must consider the following question in relation to when that policy ceased to be applied to the claimant: "when did the continuing discriminatory state of affairs, to which the policy gave rise, come to an end?" (Fairlead Maritime Ltd v Parsoya UKEAT/0275/15/DA, HHJ Eady QC).

The just and equitable discretion

100. While employment tribunals have a wide discretion to allow an extension of time under the 'just and equitable' test in S.123, it does not necessarily follow that exercise of the discretion is a foregone conclusion in a discrimination case. Indeed, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA at para 25, that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule.' The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit.

101. These comments were endorsed in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32:

"In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened,

and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."

102. Before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was (Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan).

103. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable -.

104. In exercising their discretion to allow out-of-time claims to proceed, tribunals may also have regard to the checklist contained in S.33 of the Limitation Act 1980 (as modified by the EAT in British Coal Corporation v Keeble and ors *1997 IRLR 336, EAT*, at para 8). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

105. However, although, in the context of the 'just and equitable' formula, these factors will frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (Southwark London Borough v Afolabi [2003] EWCA Civ 15, [2003] IRLR 220 at para 33, per Peter Gibson LJ).

106. In Department of Constitutional Affairs v Jones 2008 IRLR 128, CA, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. No one factor is determinative of the question as to how the Tribunal ought to exercise its wide discretion in deciding whether or not to extend time. However, a claimant's failure to put forward any explanation for delay does not obviate the need to go on to consider the balance of prejudice.

107. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other: Pathan v South London Islamic Centre EAT 0312/13 and also Szmidt v AC Produce Imports Ltd UKEAT 0291/14.

108. It is always necessary for tribunals, when exercising their discretion, to identify the cause of the claimant's failure to bring the claim in time (Accurist Watches Ltd v Wadher UKEAT/0102/09, [2009] All ER (D) 189 (Apr)). In Wadher Underhill J stated that, whilst it is always good practice, in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form.

109. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents.

110. A delay caused by a claimant invoking an internal grievance or disciplinary appeal procedure prior to commencing proceedings is just one factor to be taken into account by a tribunal when considering whether to extend time: Robinson v Post Office [2000] IRLR 804, EAT, approved by the Court of Appeal in Apelogun-Gabriels v London Borough of Lambeth [2002] ICR 713. As the EAT said in Robinson (para. 25, per Lindsay P): “as the law stands an employee who awaits the outcome of an internal appeal and delays the launching of an [ET1] must realise that he is running a real danger.”

111. A failure to provide an explanation for the delay is fatal to an application because there is no evidence upon which the tribunal could exercise its discretion Habinteg Housing Association Ltd v Holleron EAT 0274/14 confirmed in Edomobi v La Retraite RC Girls School EAT 0180/16, Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283. , those authorities are inconsistent with Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194. In Morgan at §25, Leggatt LJ observed:

> *“There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard.”*

112. In Concentrix v CVG Intelligent Contact Ltd [2022] EAT 149, HHJ Auberach observed at §61 that Leggatt LJ’s comments in Morgan were strictly obiter, however, he held that the Morgan approach set out the correct

principle to apply. In other words, the length of, and reasons for, the delay, are a relevant consideration, however, if no reasons are apparent from the evidence, it is not the case that tribunal is bound to refuse an extension. HHJ Auerbach observed at §49 that previous EAT authorities on the point were in conflict and he was therefore required to choose the correct approach. Concentrix is the most recent EAT authority on the point, and therefore, as a matter of precedent, it sets out the approach which this tribunal is required to follow.

Discussion and Conclusions

Race Discrimination

113. We address the allegations of race discrimination first.

Time limits

114. In the present case, the respondent argues that the decisions were each made by Mr Al Hassan. They were all made in respect of requests for leave made by the claimant, in circumstances (a) where she had been ill for periods and (b) in circumstances where she had made complaints of discrimination about colleagues that she had worked with, and which the respondent regarded as being without merit and (c) where Mrs Passaway had provided information as to the availability of cover if leave were granted.

115. We are satisfied that it is appropriate to regard this as a case where those facts link the decisions to reject the claimant's requests for annual leave so that they may properly be regarded as a single continuing state of affairs. Time therefore runs from the last of those refusals. When should that refusal be deemed to have taken place?

116. Ms Hicks argues, and we accept, that the appropriate time is the 29 August 2021, being the last date on which the claimant had asked for leave (3 days in the second or third week of August).

117. The primary time limit therefore expired on 28 November 2021. The claimant approached ACAS on 24 November 2021 and a certificate was issued on 20 December 2021. The operation of section 140B EqA 2010 is that the 26 days of conciliation are discounted for the purposes of the computation of time. Adding 26 days to the primary time limit of 28 November produces an adjusted time limit of 24 December 2021. The claims were issued on 14 January 2022 and are therefore 21 days out of time.

118. We must therefore consider, first why the primary time limit was not met, and secondly why after the expiry of the time limit, the claim was not presented sooner. As Adeji v University Hospitals Nottingham identifies, the length and reasons for missing the primary time limit are of particular importance.

119. The claimant's evidence was as follows:

119.1. In August she consulted ACAS and was told that she had 3 months to submit a claim; there is therefore no issue in this case that the claimant did not know of her rights or of the time limits applicable to those rights.

119.2. Secondly, the claimant stated that she was hoping that the internal grievance would resolve the dispute.

119.3. Thirdly, the claimant argues that she required help to complete the ET1 form and submit it, and she was waiting for an appointment with ACAS to do so.

119.4. Lastly, she argues that after her employment ended, she had to move to temporary accommodation, and she therefore had no internet access, and all the libraries were closed because of Covid.

120. We consider each argument in turn.

120.1. Waiting for the conclusion of an internal process can be a relevant factor for a tribunal to consider. But as was identified in Robinson v Post Office "an employee who awaits the outcome of an internal appeal and delays the launching of an [ET1] must realise that he/she is running a real danger." The claimant knew of the time limit, it was her choice to delay the presentation of the claim, and she therefore runs the risk of that course. This was not a case where there was unreasonable delay in the process, or where the claimant was mislead as to when she might expect an outcome.

120.2. That the claimant required help to complete the form does not assist her in relation to the period prior to the expiry of the primary time limit; she made a conscious decision to delay the presentation of the claim during the period of the primary time limit, pending the outcome of the grievance. She then sought assistance with the presentation of the form sometime after receiving the outcome to the grievance on 22 November 2021. The point is therefore only relevant to the issue of whether the claimant presented the claim within a reasonable further period.

120.3. The same issue arises for the claimant in relation to the fact that she needed to move to temporary accommodation – we were not told that the claimant had moved before she had received the outcome to the grievance, and it is reasonable to conclude on the balance of probabilities that it occurred after the funds paid in November had been exhausted.

121. It follows that we have found that the primary reason for the delay was the claimant's decision to await the outcome of the grievance.

122. Next, we must consider the balance of prejudice caused if we were to exercise our discretion to allow the claim out of time. Ms Hicks argues there is significant forensic prejudice; both Mr Dick and Mr AL Hassan have left the respondent's employment and were not available to give evidence. There is a limit to that point; Mr Dick's employment ended in September 2021 following his resignation. However, it is not the respondent's case that Mr Dick made the decision to reject the claimant's holiday request: he was absent on sick leave from June 2021.

123. Secondly, whilst it is the respondent's case that Mr Al Hassan made the decisions which are alleged to have been discriminatory, he was still employed when the claimant initiated ACAS conciliation and when she

presented her claim on 14 November 2021. It was open to the Respondent to take a proof of evidence from him then and to obtain a witness order to secure his attendance. Moreover, Mr Al Hassan was interviewed on 9 November 2021 as part of the investigation of the claimant's grievance and gave an account of the reasons for his decisions. Whilst there was no clear allegation of discrimination in the grievance, the respondent's non-discriminatory explanation for the rejections of the claimant's applications for annual are contained within Mr Al Hassan's answers in his interview.

124. Weighing the competing prejudice caused by permitting the claimant to present her claim out of time by 21 days, against preventing her from doing so, we are satisfied that the balance of prejudice favours the claimant. We are really only considering forensic prejudice on the facts of this case, as we have heard the claims and the respondent has therefore already been put to the time and expense of defending them.

Substantive allegations

125. We must therefore ask ourselves what the reason was for each of the refusals for annual leave, made in June and July 2021. We address each in turn.

The first request

125.1. As is apparent from our findings above, there was in fact no refusal of the claimant's request. Rather, Mr Dick began a period of sickness absence following which he resigned, and during the intervening period he neither confirmed a decision in relation to the claimant's request, nor forwarded the application to any other individual to make such a decision.

125.2. Insofar as there is evidence from which we could infer the reason, given Mrs Passaway's email explaining that there was no cover, we are satisfied on the balance of probabilities that insofar as Mr Dick's failure to grant leave is concerned the respondent has shown that the reason was because there was no cover, and Mr Dick had a practice of not authorising leave in the absence of such cover. That is a non-discriminatory reason. We are not persuaded that we should draw any inference from the refusal of the claimant's annual leave request in 2020 in assessing the reason for the respondent's approach to this request. The claimant has not adduced any facts from which we could infer that the reason for the refusal of her request in 2020 was in any way connected to her race. Similarly, there is no evidence to link Mrs Passaway to that request, with the consequence, that even if we were persuaded there was something discriminatory in relation to Mrs Passaway's approach to the disputes at work, we would not draw an inference that that discriminatory approach had any bearing on the decision to refuse annual leave in 2020.

125.3. Therefore, the claim in respect of the first request is not well founded and it is dismissed.

The second request

125.4. There is no evidence of this request being refused. Again, in so far

as there is evidence from which we could infer reason for the failure to authorise the request, we are satisfied on the balance of probabilities that the reason was Mr Dick's practice of requiring requests to be made in writing. As a consequence, there was no record of the request on the respondent's HR system.

125.5. The claimant has not adduced any evidence from which we could infer either that the failure to address the request or the implicit refusal was in any way influenced by her race. That is for the same reasons as identified in paragraph 125.2 above.

The third request

125.6. It is clear that the third request was refused by Mr Al Hassan. In reaching that conclusion, we have had regard to the claimant's suggestion that it was Mrs Passaway who refused it as a consequence of discussing the claimant's grievance with her on 15 July. We unhesitatingly rejected that allegation. It was made for the first time in the claimant's cross examination, and there was not a shred of evidence to support it. It was not part of the claimant's pleaded case, and it was not put to Mrs Passaway in cross examination. Critically, the claimant was unable to challenge Mrs Passaway's evidence recorded in the grievance investigation that she knew nothing about leave request in question.

125.7. The respondent was unable to call Mr Hassan to provide direct evidence of the reason for the refusal, but relies on the inferences to be drawn from the following evidence to demonstrate a non-discriminatory reason:

125.7.1. first, that Mr Al Hassan gave a non-discriminatory explanation during his grievance investigation, namely that it was not possible to cover the period, given the "trade" that had been conducted with Sasha by which she rearranged her annual leave to cover the claimant's sickness absence;

125.7.2. secondly, the evidence supporting both the *need for*, and the *fact of* that trade contained in the emails from Mrs Passaway.

125.8. We accept that the facts identified demonstrate non-discriminatory reasons for the refusal. The claimant has argued that we should draw an inference that Mr Al Hassan had adopted a discriminatory mindset against her because of his failure to act on her complaints against her colleagues. That is an allegation which is not fully supported by the facts: it is right that Mr Al Hassan told the claimant that she needed to focus on the future and work with her colleagues, but that was after Mrs Passaway had concluded the investigation of the workplace dispute. There was no evidence to suggest that Mr Al Hassan's approach was itself born out of discrimination or any discriminatory mindset towards the claimant because of her race.

125.9. Furthermore, we note that the claimant did not make any direct allegation of race discrimination against Mr Al Hassan until she instituted proceedings; her complaint was only that his refusal of her annual leave request was unfair. That is important, in the circumstances where Mr Al

Hassan had explained his reasons for the refusal to the claimant in person. We are satisfied that if there were any basis for the claimant to believe that explanation were tainted by discrimination, she would have raised it at the time or in her grievance. She did not.

125.10. The claimant has not therefore demonstrated facts from which we could, properly directing ourselves, draw an inference that the reason for Mr Al Hassan's refusal was in any way connected with the claimant's race. In any event, we have accepted that the respondent has proved its non-discriminatory reason, namely a lack of cover for the claimant's requested period of leave as a consequence of Sasha rearranging her annual leave.

125.11. It follows that the allegation is not well founded and it is dismissed.

The fourth request

125.12. The respondent argues that the reason that the fourth request was refused was because there was insufficient cover. It relies upon the contemporaneous email of Mrs Passaway in that regard. The claimant argues that Mrs Passaway's approach was tainted by discrimination, relying upon her approach to the workplace dispute in May 2020.

125.13. We have carefully considered that allegation, but on balance reject it for the following reasons: whilst Mrs Passaway's approach to the grievance investigation was far below the standard that might be expected of a reasonable employer, the claimant was unable to produce any evidence to demonstrate that the reason for that shortcoming was in any way connected to her race. In particular, we note in reaching a conclusion on that issue that

125.13.1. despite the Judge advising the claimant, prior to her cross examination of Mrs Passaway, that if that were her allegation she needed to put the specific allegation, namely that Mrs Passaway's conduct was influenced by the claimant's race, to her. She did not. She shied away from making that direct allegation. There was therefore insufficient evidence from which we could have concluded that Mrs Passaway's approach to the workplace dispute was tainted by discrimination as the claimant alleged. It was not therefore permissible for us to draw any inference from that that her approach to her relief function was influenced by discrimination.

125.13.2. Secondly, the nature of Mrs Passaway's involvement of itself does not identify or suggest any discriminatory element. She simply looked at the relief diary and at the annual leave request, and recorded matters of fact which she reported to Mr Al Hassan. The claimant has not sought to suggest that there was any inaccuracy in what she reported. There is therefore nothing from which we could, properly directing ourselves, infer that Mrs Passaway's approach and involvement was in any way tainted by discrimination.

125.14. For the purposes of completeness, we record that we accepted the respondent's non-discriminatory reason for the refusal of this request for annual leave, namely that there was insufficient cover and Sasha was

unwilling to sacrifice any of her days of annual leave to permit the claimant to take some. In reaching that conclusion, we had regard to the claimant's argument that Mrs Passaway had not sought to investigate whether Sasha was willing to make such a sacrifice. We were concerned that such an important passage of evidence was not contained in Mrs Passaway's witness statement, but on balance we accepted it notwithstanding that omission. We found Mrs Passaway to be an honest and credible witness and there was nothing to suggest that passage of her evidence was unreliable. Furthermore, it would make sense in the context of an employee having changed her annual leave once that they would be unwilling to do so again at short notice, whether or not they had made firm plans in relation to it.

125.15. For those reasons the allegation is not well founded and it is dismissed.

126. It follows that all of the allegations of discrimination are not well founded and the claim has failed.

Constructive unfair dismissal

127. The claimant relies upon the same refusals of annual leave as actions constituting a breach of the implied term of mutual trust and confidence. As we have indicated in the law section above, it is a necessary element of a breach of the implied term that the respondent had no reasonable and proper cause for the actions in question. Put simply, there are many actions which an employee might regard as breaching the implied term of trust and confidence, such as disciplinary sanctions, suspensions, relocations et cetera, but where there are reasonable and proper reasons for those actions as a matter of law they cannot constitute a breach of the implied term. The claimant has a high hurdle to clear in that regard. As Miss Hicks rightly points out, the claimant must show that the respondent's decisions were decisions that no reasonable manager could have made (see IBM UK Holdings Limited v Dalgleish).

128. In that context, we are satisfied for the reasons we have given in relation to the allegations of race discrimination above, that the respondent had reasonable and proper cause for refusing all of the annual leave requests.

129. It is important in that context to note that the claimant's complaint was focused upon their refusal. She did not allege that the failure to respond to the first or second requests was a breach of the implied term.

130. Separately, the claimant alleges that the rejection of her grievances was a breach of the implied term. In the circumstances where we have concluded that the respondent had reasonable and proper cause for refusing the claimant's requests (or would have done so in relation to the first request) it is an incredibly difficult task for the claimant demonstrate that no reasonable manager could have rejected her grievance in respect of them.

131. We are satisfied that the respondent's rejection was reasonable in light of the facts as we have found them. In reaching that conclusion we have had regard to the thoroughness of the investigation and the evidence that was obtained during it. That evidence did not demonstrate any unfairness, far less did it demonstrate any act of discrimination (not that that was a complaint that

the claimant made in the context of the grievance).

132. The claimant has not therefore showed that the respondent committed any breach of the implied term and her claim of constructive unfair dismissal is therefore not well-founded and it is dismissed.

Annual leave.

133. We had very little evidence in relation to the claims of annual leave, but we note that the claimant received payment in respect of annual leave in her final payslip. On the basis of Miss Hick's calculations as to the claimant's entitlement, which we accept, we are satisfied that the claimant was paid all that she was properly due in respect of annual leave. There was therefore no unauthorised deduction of wages and no breach of the requirement to pay a sum representing untaken annual leave upon the point of termination.

134. The claim for unpaid annual leave is therefore not well-founded and it is dismissed.

Employment Judge Midgley
Date: 2 February 2024

Reasons sent to the Parties: 2 February 2024

FOR THE TRIBUNAL OFFICE