EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr Patrick Anyaefena	**ICTS (UK) Limited**

Heard at: London Central
On: 10 – 13 June 2025

Before: EJ G Hodgson
Mr R Pell
Mr J Ballard

Representation

For the Claimant: Mr O Omgbuagu, lay representative
For the Respondent: Mr M Ramsbottom, consultant

JUDGMENT

1. **The claim of unfair dismissal is not well founded and is dismissed.**
2. **The claim of unlawful deduction from wages is not well founded and is dismissed.**
3. **The claim of failure to pay holiday pay fails and is dismissed.**
4. **The claim of wrongful dismissal fails and is dismissed.**
5. **The claim of unlawful direct discrimination fails and is dismissed.**

REASONS

Introduction

1.1 On 17 May 2024, the claimant presented a claim in which he alleged unfair dismissal, direct discrimination, wrongful dismissal, failure to pay wages, and failure to pay holiday pay.

The Issues

2.1 At the start of the hearing the claimant confirmed he brought the following claims:

2.1.1 unfair dismissal;
2.1.2 direct race discrimination;
2.1.3 failure to pay notice period (wrongful dismissal);
2.1.4 failure to pay wages; ad
2.1.5 failure to pay holiday pay due.

Unfair dismissal

2.2 The claimant accepted that he does not have the requisite two years' qualifying period required by section 108 Employment Rights Act 1996. However, he asserts that, pursuant to section 108(3) that requirement for two years continuous service pursuant to section 108(1) is removed. He failed to identify the relevant section.

2.3 The claimant accepts that he was employed from 20 December 2022 until his summary dismissal 19 February 2024.

2.4 If the claimant is able to proceed with a claim of unfair dismissal, the respondent alleges there is a potentially fair reason which related to conduct.

Direct discrimination

2.5 The claimant describes his race as black African. There is one allegation of race discrimination, being the dismissal on 19 February 2024.

Wrongful dismissal

2.6 It is the respondent's case that the claimant was in fundamental breach of contract and it elected to dismiss him summarily.

2.7 It is the claimant's case he was not in breach of contract, and to the extent he was in breach of contract, it was not a fundamental breach entitling the respondent to dismiss him summarily.

2.8 The claimant alleges the applicable notice period was one month. The respondent says it was one week.

Failure to pay wages

2.9 At the start of the hearing the claimant accepted that he had not particularised any claim for failure to pay wages. It was therefore recorded as an unparticularised claim. The tribunal confirmed the claimant must set out the claim, and potentially apply to amend, to set out the detail.

Failure to pay holiday

2.10 At the start of the hearing the claimant accepted that he had not particularised any claim for failure to pay holiday, other than a reference to it a schedule loss at page 126 of the bundle. The tribunal considered that document and noted that it gave no detail. It was therefore treated as an unparticularised claim. The tribunal confirmed the claimant must set out the claim, and potentially apply to amend, to set out the detail.

Evidence

3.1 The claimant gave evidence.

3.2 For the respondent we heard from Mr Alex Ursan, who dismissed the claimant and, Mr Gary Benwell who dealt with the appeal.

3.3 We received a bundle of documents.

3.4 Both parties gave oral submissions.

Concessions and applications

4.1 During submissions, it became apparent that the claim of unfair dismissal may have been disposed of prior to the hearing. We consider this below. In any event, we reached a decision on the merits.

4.2 After the hearing, the claimant filed a considerable number of further comments, but made no applications.

4.3 His letter stated that he relied on section 108 (2) (a) Employment Rights Act 1996 as providing an exception to the need to demonstrate two years' continuous employment in order to bring an unfair dismissal claim. He stated:

> **Section 108(2) explicitly protects employees from unfair dismissal related to discrimination involving any of the protected characteristics under the Equality Act 2010, including RACE. These claims are not subject to the same qualifying service requirements because they are treated as unlawful discrimination and not just standard unfair dismissal.**

4.4 He also referred to two case **Jones v Post Office** [2001] EWCA Civ 558 and **Ojukwu v Nike Store Ltd & Ors** [2022].[1] They have not assisted. Section 108(2) Employment Rights Act 1996 is concerned with section 64(2) Employment Rights Act 1996. Section 64 is concerned with suspension on medical grounds and the requirements which may be imposed under an enactment or by reference to the Health and Safety Work Act 1974. Section 108 (2) is not concerned with the Equality Act 2010. An allegation that the dismissal was unfair by reason of direct

[1] The full citation was not given.

discrimination is not an exemption for the purposes of section 108 Employment Rights Act 1996.

4.5 The claimant sent a statement from Rev Emeka Ejinkonye, who it appears may have been able to give evidence the claimant was in the country. However, that statement was not submitted until after the hearing. No explanation was given for why the witness could not have been called. The letter gave no documentary evidence in support. The claimant did not apply for the hearing to be reconvened, or for that evidence to be given. In the circumstances, we find that this is evidence which could have been presented at the hearing. The detail given is limited. It does not address the question of whether the claimant had bought tickets to travel abroad. We give the evidence little weight. It does not affect the analysis which we set out below.

4.6 The claimant sent various other documents. He sent a further schedule loss. This did not address the question of unlawful deduction from wages, or failure to pay holiday pay. It did not affect our analysis is set out below.

4.7 The claimant disclosed various ways slips, but absent any relevant pleaded case, or explanation, they took the matter no further.

4.8 He disclosed some GP records. One dated 7 November 2023 referred to booking a telephone consultation on 28 November 2023. This is inconsistent with the claimant's assertion that there was an appointment for 27 November, as we will consider below. It fails to explain why there would be no consultation prior to 28 November. This is consistent with the claimant being unavailable prior to 28 November, which would be consistent with him being away from the country. Ultimately, the document is inconclusive. It is not inconsistent with the findings which we have set out below.

The Facts

5.1 The respondent is a company specialising in protection and security services. It has divisions which deal with airports and commercial contracts. It employs approximately 4,000 people.

5.2 The claimant was employed as a security officer at Eighty Strand, an office block.

5.3 The respondent employed the claimant from 20 December 2022 until 19 February 2024. There were approximately 50 or 60 security guards working on the relevant contract. The claimant undertook a flexible shift work pattern. If he wished to take annual leave, he was required to seek approval.

5.4 The claimant's contract provided that his "annual leave entitlement will be expressed in hours and will equate to 12.03% of the number of hours

worked during any annual leave year." It provided that the employer may refuse annual leave during certain periods and the restrictions may vary from time to time.

5.5 The relevant notice provision provided that after one month's service but less than two years the contractual notice period would be one week.

5.6 The disciplinary procedure provides for summary dismissal, following an investigation and disciplinary hearing, when behaviour is deemed to be gross misconduct. Examples of gross misconduct are given including "serious breach of trust or confidence."

5.7 There is a right of appeal appeals which should normally be made within five working days. Appeals are heard by a more senior manager. The decision is expected within seven days of the hearing. Any delays should be communicated in writing with an explanation.

5.8 The claimant applied to take holiday from 13 November 2023 to 24 November 2023. The claimant told us he wrote his request in a written logbook and was granted by his manager, Mr Shaw, who confirmed it in the logbook. That logbook has not been produced. The claimant denied having any conversation about this leave. We have not heard from Mr Shaw. It is unclear when the request was made. It may have been up to a month before the start of the holiday, but the claimant was unsure.

5.9 It is agreed that the initial holiday request was granted.

5.10 On or about 8 November 2023, the claimant requested a further day's absence on 10 November 2023, the Friday before his planned leave. The reason for this request is was disputed. It has been respondent's contention that the claimant asked for time to look after his son, but the claimant denied that in his oral evidence, but did not deal with the matter in his witness statement. However, he accepted he sought a further day off on 10 November, and he did not deal the matter in his evidence.

5.11 As evidenced by the claimant's email of 9 November 2023, he reported himself as sick on 8 November. He stated that he would "not be ready to resume work until Saturday 11/11/2023." He confirmed that he would not be back prior to his holiday starting the following Monday. He, therefore, took 9 November as sickness absence.

5.12 On 10 November, Mr Shaw thanked the claimant for his email and said "As discussed in our meeting on Wednesday, please send me a copy of your flight details."

5.13 We have considered the email exchange between the claimant and his manager Mr Shaw which started on 9 November 2023. In the emails, Mr Shaw refers to a discussion on 8 November 2023. He alleges there was discussion about the claimant's flight details. At no point in that email

exchange does the claimant say that he is not taking a flight, albeit his flight tickets were being requested.

5.14 Mr Shaw s email refers to their conversation and the fact that he booked holiday from 13 November and had requested a day off on 10 November, which required the colleague to be called back from holiday to cover a shift. It is in that context Mr Shaw states that he had asked for the flight details. The email has a date, 4/9/2024, but appears to be a direct response to the claimant's email of 10 November 2023. This was not challenged and we accept that it was a direct response to the claimant's email of 10 November.

5.15 We find on the balance of probability that there was a conversation on or about 8 November 2023 in which the claimant asked for additional leave on Friday, 10 November 2023. That leave was granted, but subject to a condition that the claimant provide details of his flight. It follows we find that there was discussion whereby the claimant indicated he was taking a flight. On the balance of probability, had the claimant not been intending to fly, his email would have made it clear that he was not flying but was staying in the country, and hence there were no flight tickets to present. We find that his response requests the reason for requiring the tickets. He fails to say that he is not flying and is, instead, evasive.

5.16 The claimant never sent any flight tickets. He has now denied leaving the country.

5.17 The claimant did not return to work on 27 November 2023. On 25 November 2023, the claimant sent an email to Mr Shaw stating he would not return until 28 November. His email said, "I can't be able to work on Monday 27/11/23 due to medical appointment.

5.18 Mr Shaw responded and asked for a copy of the appointment letter and also referred to not having received "the information I requested for before you went on holidays." We find that this is a reference to the flight tickets.

5.19 The claimant responded stating it was a personal letter, and by this he is clearly referring to the medical appointment. He states, "I would not be able to provide you with a copy of the letter." His email then referred to Mr Shaw as not being a "health professional" and it not being necessary to hold his medical information. He goes on to say "I can show you the appointment letter as requested on resumption of duty."

5.20 At no time did the claimant show any letter which demonstrated that he had a medical appointment on 27 November 2023.

5.21 The claimant did show the respondent a text. We have limited information. We have not seen the text. However, the matter was discussed at the return to work meeting on 29 November 2023. The minutes record Mr Shaw stated the following:

> **The message that you are showing me doesn't show that you had an appointment on 28 November 2023 but was advising you that you had not called the clinic for them to make the necessary arrangements for your referral.**

5.22 There is further reference to a message concerning a telephone appointment for 28 November 2023. But at no time did the claimant show the respondent, or the tribunal, any appointment referring to 27 November 2023.

5.23 When the claimant returned to work on 29 November 2023, Mr Shaw held a return to work meeting. Mr Shaw produced minutes. Those minutes were ultimately sent to the claimant, with the invitation to the disciplinary hearing, by letter dated 6 February 2024. The claimant could not remember whether he received the minutes. On the balance of probability, we find that had those meetings not been included with that letter, he would have made enquiry. We find that the minutes were sent to the claimant.

5.24 The claimant did not dispute the accuracy of the minutes at the time they were sent. We find on the balance of probability that the minutes were taken at the meeting on 29 November 2023 and, broadly, accurately reflect the conversation that took place.

5.25 It is clear there was some procedure after the return to work meeting whereby there was some form of investigation which led to a disciplinary process. Mr Ursan, regional manager, was nominated to undertake the disciplinary proceedings. He had not been previously involved. He was unable to confirm the details of the investigation, or why the matter was referred to him, other than to say such referrals were routine and were part of his responsibility.

5.26 When inviting the claimant to a disciplinary hearing, Mr Ursan set out the allegations as follows:

> **Alleged unauthorised absence namely on the following occasions 9 November 2023 and 10 November 2023, you fraudulently stated that you were unwell or attending a medical appointment**.

5.27 Supporting documentation was sent as follows: the minutes of the return to work meeting from 29 November 2023; a number of emails between the claimant and his line manager; the disciplinary procedure; and a first and final warning letter issued to the claimant on 8 November 2023. The inclusion of those documents demonstrate there had been some form of process or investigation.

5.28 On 13 February 2024 Mr Ursan conducted the disciplinary meeting.

5.29 Mr Ursan asked the claimant about his travel ticket. The claimant stated this he was annoyed for being asked asking about the tickets and referred to a family issue. Later in the interview he stated that he didn't get any tickets and he had a family issue. He also appeared to state, for the first

time, that he did not travel. They did not discuss the circumstance concerning the delay in returning to work on 27 November.

5.30 Mr Ursan undertook some further investigation. On 14 February 2024 he wrote to Mr Shaw and asked for clarification as to whether the claimant travelled abroad, and whether there was anything in writing. He also asked whether there was a doctor's note concerning his return and whether that was written in the UK or abroad.

5.31 Mr Shaw sent an email on 14 February 2024. He stated the discussion about travel was verbal and was not put in writing. He stated he recalled a discussion with the claimant's supervisor about the claimant needing a day off on 10 November to look after his son during the weekend, as he was travelling. He records that on 8 November he then met with the claimant and asked his reason for absence on 10 November and the claimant had explained that his ex-partner had asked him to look after their son on the weekend. Mr Shaw stated it was at that point he discussed the need for the claimant to demonstrate his travelling arrangements. This email states "He told me that he had not got the ticket yet from the travel agent and I even asked how come you are travelling next week, and you haven't got your ticket with you? He assured me that he will let me have it as soon assume receives it." The email also refers to the events of 9 November. Finally, it states "I remember his supervisor telling me that they spoke with him whilst he was on holiday and he said he was in Nigeria." He confirmed he had spoken with the supervisor who confirmed the conversation. Mr Ursan went on to make his decision and sent a letter of dismissal on 19 February. The letter concludes the claimant's conduct had resulted in a fundamental breach of contract. It doesn't spell out the factual findings on which the conclusion was based. In his evidence, Mr Ursan states at paragraph 12 -

> **I carefully considered what the claimant had told me at the meeting and also the evidence presented to me, particularly his refusal to provide a copy of his flight ticket which I considered to be a reasonable management request. I had a reasonable belief that the claimant had falsified his sickness absence to travel early for his holiday.**

5.32 The claimant appealed the dismissal by letter dated 22 February 2024.

5.33 He raised a number of general matters. He did not agree with the use of the word fraudulent. He alleged that he acted in line with the employee handbook. He alleged the line manager's approach was an abuse of office and the misuse of power. He referred to constant intimidation and embarrassing emails regarding the request to submit his "holiday itinerary." He alleged he had been subject to disciplinary for "getting sick and feeling faintly at work."

5.34 He also referred generally to procedural impropriety and the failure to consider all the facts.

5.35 He noted he had been allowed to continue working, despite his actions now being labelled as gross misconduct.

5.36 The appeal was undertaken by Mr Benwell who reviewed the claimant's letter of appeal and all other relevant document. The appeal took place on 8 March 2024, the claimant was invited to attend by letter of 5 March 2024. The claimant attended in person.

5.37 At the appeal hearing, Mr Benwell found the claimant uncooperative. He specifically asked the claimant whether he had gone abroad: the claimant said "no comment." Mr Benwell stated he was not under caution and this was the claimant's opportunity to convince him that the decision was too harsh. He suggested that to say no comment would not assist him to make a judgement in the claimant's favour. However, the claimant continued to refuse to comment.

5.38 We accept Mr Benwell's evidence that he prepared an appeal outcome and sent it within the time envisaged by the policy. However, it was sent to HR and we also accept it was never sent to the claimant. We have not seen the letter, but we accept Mr Benwells evidence that he upheld that the disciplinary decision because the claimant had not advanced any arguments, or pointed to any evidence, which undermined the conclusions of Mr Ursana.

5.39 The appeal hearing did not explore why the claimant was allowed to continue to work for three months before the disciplinary process started. We have not received details of the action taken prior to Mr Ursan's involvement from either party.

The law

6.1 Sec 108 Employment Rights Act 1996 provides -

> **(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than [two years] ending with the effective date of termination.**
>
> **(2) If an employee is dismissed by reason of any such requirement or recommendation as is referred to in section 64(2), subsection (1) has effect in relation to that dismissal as if for the words ['two years'] there were substituted the words 'one month'.**
>
> **(3) Subsection (1) does not apply if—**
> **(*a*) …**
> **(*aa*) subsection (1) of section 98B (read with subsection (2) of that section) applies,**
> **(*b*) subsection (1) of section 99 (read with any regulations made under that section) applies,**
> **(*c*) subsection (1) of section 100 (read with subsections (2) and (3) of that section) applies,**
> **(*d*) subsection (1) of section 101 (read with subsection (2) of that section) or subsection (3) of that section applies,**

> **(*dd*) section 101A applies,**
> **(*de*) section 101B applies,**
> **(*e*) section 102 applies,**
> **(*f*) section 103 applies,**
> **(*ff*) section 103A applies,**
> **(*g*) subsection (1) of section 104 (read with subsections (2) and (3) of that section) applies, …**
> **(*gg*) subsection (1) of section 104A (read with subsection (2) of that section) applies,**
> **(*gh*) subsection (1) of section 104B (read with subsection (2) of that section) applies,**
> **(*gi*) section 104C applies,]**
> **(*gj*) subsection (1) of section 104D (read with subsection (2) of that section) applies,**
> **(*gk*) section 104E applies,]**
> **(*gl*) subsection (1) of section 104F (read with subsection (2) of that section) applies,**
> **(gm) section 104G applies,**
> **(gn) section 104H applies,**
> **(*h*) section 105 applies,**
> **(*hh*) paragraph (3) or (6) of regulation 28 of the Transnational Information and Consultation of Employees Regulations 1999 (read with paragraphs (4) and (7) of that regulation) applies,] or**
> **(*i*) paragraph (1) of regulation 7 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 applies,**
> **(*j*) paragraph (1) of regulation 6 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 applies.**
> **(*k*) paragraph (3) or (6) of regulation 42 of the European Public Limited-Liability Company Regulations 2004 applies;**
> **(*l*) paragraph (3) or (6) of regulation 30 of the Information and Consultation of Employees Regulations 2004 (read with paragraphs (4) and (7) of that regulation) applies,**
> **(*m*) paragraph 5(3) or (5) of the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (read with paragraph 5(6) of that Schedule applies**
> **…**
> **(*o*) paragraph (3) or (6) of regulation 31 of the European Cooperative Society (Involvement of Employees) Regulations 2006 (read with paragraphs (4) and (7) of that regulation) applies,**
> **(*p*) …**
> **(*q*) paragraph (1)(a) or (b) of regulation 29 of the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009 (SI 2009/2401) applies,**
> **[*r*) paragraph (1) of regulation 17 of the Agency Workers Regulations 2010 applies.**

6.2 Direct discrimination is defined by section 13 Equality Act 2010.

> **(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.**

6.3 When considering these claims, we have in mind the helpful guidance given by the Employment Appeal Tribunal in **London Borough of**

Islington v Ladelle 2009 IRLR 154. In particular, we note paragraphs 40 and 41 as set out below:

> 40. Whilst the basic principles are not difficult to state, there has been extensive case law seeking to assist tribunals in determining whether direct discrimination has occurred. The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:
>
> (1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in **Nagarajan v London Regional Transport** [1999] ICR 877, 884E – "this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.
>
> (2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in **Nagarajan** (p.886F) as explained by Peter Gibson LJ in **Igen v Wong** [2005] ICR 931, para 37.
>
> (3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the **Burden of Proof Directive** (**97/80/EEC**). These are set out in **Igen v Wong**. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:
>
> **"Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer."**
>
> If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal *must* find that there is discrimination. (The English law in existence prior to the **Burden of Proof Directive** reflected these principles save that it laid down that where the prima facie case of discrimination was established it was open to a tribunal to infer that there was discrimination if the employer did not provide a satisfactory non-discriminatory explanation, whereas the Directive requires that such an inference *must* be made in those circumstances: see the judgment of Neill LJ in the Court of Appeal in **King v The Great Britain-China Centre** [1991] IRLR 513.)
>
> (4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne Wilkinson pointed out in **Zafar v Glasgow City Council** [1997] ICR 120:
>
> **"it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that**

he would have acted reasonably if he had been dealing with another in the same circumstances."

Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see
the judgment of Peter Gibson LJ in **Bahl v Law Society** [2004] IRLR 799, paras 100-101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the **Igen** test: see the decision of the Court of Appeal in **Brown v Croydon LBC** [2007] ICR 897 paras.28-39. The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in **Anya v University of Oxford** [2001] IRLR 377 esp.para.10.

(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in **Watt (formerly Carter) v Ashan** [2008] ICR 82, a case of direct race discrimination by the Labour Party. Lord Hoffmann summarised the position as follows (paras.36-37):

> "36 The discrimination … is defined … as treating someone on racial grounds "less favourably than he treats or would treat other persons". The meaning of these apparently simple words was considered by the House in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337. Nothing has been said in this appeal to cast any doubt upon the principles there stated by the House, but the case produced five lengthy speeches and it may be useful to summarise:
> (1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the "statutory comparator") actual or hypothetical, who is not of the same sex or racial group, as the case may be.
> (2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant…
> (3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from

> which a tribunal may infer how a hypothetical statutory comparator would have been treated: see Lord Scott of Foscote in *Shamoon* at paragraph 109 and Lord Rodger of Earlsferry at paragraph 143. This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the "evidential comparator") to those of the complainant and all the other evidence in the case.
>
> 37 It is probably uncommon to find a real person who qualifies….. as a statutory comparator. Lord Rodger's example at paragraph 139 of *Shamoon* of the two employees with similar disciplinary records who are found drinking together in working time has a factual simplicity which may be rare in ordinary life. At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are "materially different" is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator."

41. The logic of Lord Hoffmann's analysis is that if the Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then again it is unnecessary to determine what are the characteristics of the statutory comparator? This chimes with Lord Nicholls' observations in **Shamoon** to the effect that the question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> "employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was." (para 10)

This approach is also consistent with the proposition in point (5) above. The construction of the statutory comparator has to be identified at the first stage of the **Igen** principles. But it may not be necessary to engage with the first stage at all.

6.4 In order to amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract **Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1WLR 698, CA.**

6.5 The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the court or tribunal to decide. In **Briscoe v Lubrizol Ltd 2002 IRLR 607** the Court of Appeal approved the test set out in **Neary and another v Dean of Westminster 1999 IRLR 288, ECJ** where the special Commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his

employment." There are no hard and fast rules. Many factors may be relevant. It may be appropriate to consider the nature of employment and the employee's past conduct. It may be relevant to consider the terms of the employee's contract and whether certain matters are set out as justifying summary dismissal. General circumstances, including provocation, may be relevant. It may be appropriate to consider whether there has been a deliberate refusal to obey a lawful and reasonable instruction. Clearly, dishonesty, serious negligence, and wilful disobedience may justify summary dismissal, but these are examples of the potential circumstances, and each case must be considered on its facts.

Conclusions

Unfair dismissal

7.1 At the start of the hearing, neither party brought to the tribunal's attention paragraph 5 of the case management order of EJ Davidson from the hearing on 9 September 2024. This order recorded the claimant accepted he had less than two years' service and he was unable to pursue a claim for ordinary unfair dismissal. It stated a dismissal judgment would be issued. It does not record that the claim was withdrawn. The parties did not know whether a judgment was issued. It follows there is some doubt as to its status.

7.2 The claimant accepted he did not have two years' continuous service. It follows that, pursuant to section 108(1) he did not have the continuous period of employment of two years required to bring a claim under section 94 in his witness statement, he refers to an exception under section 108(2). That was neither pursued, nor explained, in submissions. Section 108(2) does not apply to the circumstances of this case. The claimant was invited to clarify which part of section 108(3) he relied on. The claimant failed to provide any clarification. His argument was that a claim of direct discrimination gives rise to an exemption under section 108(3). It does not.

7.3 To the extent the claim has not been previously withdrawn and dismissed, we now dismiss it. Section 108(1) requires the claimant to have two years continuous employment. He does not have the relevant continuous employment. We should note that the qualifying period may be extended in certain circumstances where he is dismissed without notice. However, even if the statutory notice were given, he would not have had the requisite period of employment, and we need consider this no further.

Wages

7.4 The claimant failed to set out, at any time, when he alleges he was subject to an unlawful deduction from wages. He failed to give the contractual basis which entitled him to wages. This is an unparticularised claim. The

claimant was given an opportunity to give details, and to apply to amend if necessary. The claimant failed to take any steps. It is for the claimant to plead and to prove his claim. He failed to do either. This claim is dismissed.

Holiday pay

7.5 The claimant failed to set out, at any time, the basis on which he says he is owed holiday pay. He has not set out any calculation. This is an unparticularised claim. The claimant was given an opportunity to give details, and to apply to amend if necessary. The claimant failed to take any steps. It is for the claimant to plead and to prove his claim. He failed to do either.

7.6 The respondent has provided wage slips which demonstrate payment of holiday pay. We accept on the balance of probability that there was no failure, at any time, to give holiday pay. This claim is dismissed.

Direct discrimination

7.7 As noted above, the evidence given by the claimant was limited. During submissions, his representative, Mr Omgbuagu, identified two broad areas which are said to be facts capable of turning the burden. First, he alleged that there was a comparator, Mr Cox, who was in the same material circumstances as the claimant and who was treated more favourably. In the alternative, Mr Cox is cited as an evidential comparator. We understand he is wite British. Second, he alleged that the treatment of the claimant was unfair, and that there was no explanation for the unfairness. A failure of explanation for unfair treatment may be a matter for which the burden could shift. Finally, he rejected the contention the respondent had established an explanation which no sense whatsoever was because of race.

7.8 We will consider first the matters relied on by Mr Omgbuagu and thereafter we will consider the explanation.

7.9 Mr Cox was not cited as a comparator in any pleading or in the claimant's statement. His name was mentioned by the claimant when he was being cross-examined. He was also referred to in the case management order of 9 September, albeit it records no explanation for why the claimant believes him to be a comparator.

7.10 If follows we have no evidence from Mr Cox. The respondent has not produced any specific documents concerning Mr Cox, or dealt with the position of Mr Cox in their own witness statements. Mr Ursan was able to give some information. We accept that it is for the respondent to produce cogent information support of an explanation, if one is required. This may extend to producing evidence concerning alleged comparators. However, where possible comparators are identified late in the day, and there is no

application for an adjournment, it is likely that the evidence relating to any comparator will be, justifiably, limited.

7.11 The height of the claimant's evidence is that Mr Cox was subject to a performance improvement plan (PIP), but he was not dismissed. The claimant alleged that, in some manner, Mr Cox had been treated differently when ill, as he had not been dismissed.

7.12 Mr Ursan confirmed that Mr Cox had been subject to a PIP, as had a number of his colleagues on the same contract. There had been a complaint about standards and the respondent took action, which included Mr Cox and a number of colleagues, to improve the situation.

7.13 In his statement, the claimant referred to "other employees who have involved in similar situations were treated more leniently." He was initially unable to say what the situation was. Following discussion, he identified the relevant situation as the need to notify the control room at least two hours before a shift, of an illness. He stated that Mr Cox was treated more leniently because he was not dismissed for notifying the respondent of illness.

7.14 We find Mr Cox is not a comparator. The relevant circumstances concern the claimant requesting an additional day's absence to look after a child, and agreeing, as a condition, that he would provide copies of his flight tickets. Thereafter, by taking sickness absence, and continuing to fail to provide his flight tickets. There is no evidence that Mr Cox was in the same material circumstances.

7.15 We find there is no evidence that the claimant was treated less favourably than Mr Cox. It is not necessary in all circumstances to construct a hypothetical comparator. In this case, it is appropriate to concentrate on the reason why the claimant was treated as he was. The alleged treatment of Mr Cox does not provide any facts from which we could conclude that the dismissal of the claimant was an act of discrimination.

7.16 The claimant alleges he was treated unfairly. The alleged unfairness falls into a number of broad categories.

7.17 We accept the respondent's evidence that security officers sometimes seek to extend holiday periods by claiming absence for ill-health either shortly before, or shortly after the period of holiday. The respondent has found this to be a common practice. When sickness absence is requested in those circumstances, it may lead to further enquiry and investigation. This is covered by the respondent's general procedures, albeit there is no prescriptive procedure which specifies the specific investigation in those circumstances.

7.18 We find that these circumstances which gave rise to a suspicion of dishonest claiming of holiday and gave rise to an investigation. Part of that investigation may involve obtaining relevant documents. Those documents are designed to verify an account. One way of seeking to

verify the veracity of a claim of illness, when a holiday is imminent, is to check the travel arrangements. If a flight were booked prior to the holiday granted, and illness absences claimed during that period when the flight is to take place, it would be strong evidence of fabrication. It is for that reason that proof of travel arrangements may be relevant.

7.19 In this case, there is no doubt that the claimant by requesting additional absence on 10 November, shortly before his booked holiday was to start, raised suspicion. Mr Shaw dealt with this by enquiring about the claimant's travel arrangements.

7.20 We accept the claimant confirmed he would provide his flight tickets. It was on that basis that the additional leave on 10 November was granted. Further suspicions were raised when the claimant phoned in on 8 November and took 9 November as sickness absence.

7.21 The claimant alleges it was unreasonable to ask him for his flight tickets. It was not unreasonable. The claimant agreed to provide them as a condition of being granted the additional leave. It was the claimant who acted unreasonably in refusing to supply the tickets at any time.

7.22 As the claimant failed to supply the tickets, it was appropriate to undertake further investigation. The respondent had reasonable grounds for suspecting the claimant of misconduct. It obtained relevant documentation and called the claimant to a disciplinary meeting. At that meeting, the claimant was free to provide an explanation and to provide any relevant documents. He could have shown that he had not committed any misconduct by producing flight tickets. However, he chose not to. It would also have been possible, if we were in the country, to produce documentation demonstrating that he remained in the country. He produced no such documentation.

7.23 It would have been possible for the respondent to also investigate the claimant's allegation that he had an appointment on 27 November. He stated he had a letter of appointment. He stated that he would produce a letter of appointment. He failed to produce it. It is unclear why the respondent did not include that as part of the disciplinary investigation. It is possible that the original letter, which referred to 10 November, was a mistake. Whatever the position, it would have been reasonable to investigate that clear potential misconduct, and the respondent acted leniently in ignoring it.

7.24 There has been some suggestion that there was a delay in proceeding with the disciplinary procedure. The material events occurred in November, and it is unclear why he was not invited to a disciplinary until 6 February. However, we have virtually no evidence. It is clear there was some action taken, as documents were obtained, and Mr Ursan was instructed to proceed. We do not find that the delay in itself is evidence of unreasonable conduct relevant to a question of discrimination. We are satisfied Mr Ursan has given a proper explanation. There was some form

of investigation into the claimant's conduct, and he proceeded in accordance with the respondent's procedures.

7.25 The claimant has criticised Mr Ursan for undertaking investigation after the meeting, but failing to fully inform him of it. We do not accept that criticism. Matters may arise in a disciplinary hearing which require further investigation. It does not necessarily follow that the outcome of that investigation must also be communicated to or put to the claimant. Mr Ursan was concerned, reasonably, to establish whether the claimant had been in or out of the country. This was relevant to whether there would be flight tickets, and relevant to the reasonableness of the claimant's refusal to provide them. Raising the question with Mr Shaw demonstrated a careful approach. It also demonstrated an open mind. Had there been evidence the claimant had not travelled abroad, it may have materially influenced his decision. However, the investigation supported finding that the claimant had travelled out of the country, and had refused to provide his flight tickets.

7.26 There is some criticism of the appeal process. It is unfortunate that the outcome of the appeal was not communicated to the claimant. However, it is clear that the failure was an error. Mr Benwell undertook a fair appeal hearing. He explained to the claimant the difficulties caused by his "no comment" approach. We are satisfied he kept an open mind and would have been prepared to overturn the decision had the claimant produced some form of evidence to suggest that he had not acted dishonestly. We accept he produced his outcome letter. It is clear there was administrative failure in failing to send it to the claimant. However, that is evidence of an administrative failure, not of unreasonable treatment.

7.27 We find that there is no evidence of unreasonable conduct which is unexplained.

7.28 We have considered all the facts. It is not necessary for us to set out every fact that we have looked at or considered. We find there are no facts from which we could conclude that the treatment of the claimant was an act of discrimination.

7.29 We have also considered the explanation put forward by the respondent. The reason for dismissal was succinctly set out in Mr Ursan's statement he states, "I had a reasonable belief that the claimant had falsified the sickness absence to travel early for his holiday." In reaching that conclusion, he had grounds. There had been an investigation. He had spoken to the claimant. He had undertaken a further investigation. He was entitled to conclude that the claimant had agreed to provide flight tickets, but then refused to do so. In reviewing this matter, he had regard to the claimant's position and the importance of a security officer demonstrating integrity. He concluded the claimant's conduct had fundamentally undermined the mutual trust and confidence. That was a reasonable conclusion and one he was entitled to reach. We accept that

he formed a genuine and honest belief that the claimant had acted dishonestly in falsifying sickness absence.

7.30 We find that this respondent has, in any event, established, on the balance of probability, an explanation which in no sense whatsoever is because of the claimant's race. It concluded the claimant had acted dishonestly in a way which undermined his integrity and led to a loss of mutual trust and confidence. It is for that reason the Mr Ursan dismissed.

7.31 It follows that the claim of race discrimination fails.

Wrongful dismissal

7.32 Finally, we consider the claim of wrongful dismissal.

7.33 We must first consider whether there was misconduct by the claimant, and if so whether the degree of misconduct amounted to a repudiatory breach. That is a question of fact for the tribunal.

7.34 Here we find that there was misconduct. For the reasons we have given, on the balance of probability, the claimant stated he was travelling abroad and would take flights. He agreed to provide his tickets or about 8 November, when he was granted leave for 10 November 2023. Thereafter, he took on additional day's absence because of ill health.

7.35 When reaching a decision on the balance of probabilities, we are entitled to have regard to the failure to produce evidence which should be available, but has not been disclosed, as well as the documents which are available.

7.36 It has been the claimant's contention before us that he did not travel out of the country. It may be argued that it is difficult to prove a negative. However, we find that there should be positive documentation which would support the claimant's position.

7.37 He has not produced his passport. When questioned about this, he stated that the Nigerian customs would not have stamped his passport either when arriving or leaving. However, that did not prevent the claimant producing his passport to show there was no stamp.

7.38 Had he stayed in the country, it is likely there would be documentation demonstrating this. Any purchase made on a bankcard, for example, would show where the purchase was made. Other activity may leave a data trail that could be easily obtained, and may be appropriate proof of location. On the first day the hearing, the tribunal raised the possibility of the claimant demonstrating, through documentation, that he had in fact stayed in the country. The tribunal explained the importance, particularly to this question of wrongful dismissal. It invited him to consider whether he wished to provide any such documentation. He failed to provide any documentation.

7.39 The tribunal may also have regard to other discrepancies. The claimant alleged that he had a letter of appointment on 27 November. That letter has not been produced either to the respondent during his employment, or to the tribunal during the course of this hearing. The failure to produce that letter calls into question the reason for delaying his return to work. Whilst that is not in itself conclusive, it is consistent with the claimant being out of the country and giving a false explanation, and inconsistent with the explanation is given to the tribunal. The production of that letter would have been clear evidence in support of the claimant's contention that he had not acted dishonestly.

7.40 The claimant accepted that falsifying illness in order to extended holiday would be serious matter.

7.41 We find on the balance of probability that claimant misled the respondent and was dishonest in seeking extra time to extend his holiday. The most likely reason he did that is because he was out of the country. We find that he initially told Mr Shaw about his flight tickets. He either initially misled because there was no flight, or more likely he initially identified the fact that he had tickets, but then refused to disclose those tickets. It is possible that he did not fly out of the country. It is possible he had flights but cancelled them. However, we are satisfied that the claimant has fundamentally misled and has failed to give full or frank disclosure. In the circumstances, we are satisfied that his behaviour amounted to a repudiatory breach which entitled the respondent to dismiss him summarily and bring his contract to an end.

7.42 We have considered whether the period from the end of November until the discipline procedures started was a delay, and if so whether that had the effect of affirming the contract.

7.43 It is arguable there was delay. We have limited evidence as to what happened before the appointment of Mr Ursan. There is no evidence which would demonstrate any express affirmation of contract. In this case, we find that the simple passage of time would not constitute affirmation. It is clear there was some form of investigation. The respondent could not be in full possession of the facts until there had been some form of investigation and until the claimant been given opportunity provided explanation at the disciplinary hearing. At that time, the claimant compounded his breach by refusing to cooperate with Mr Ursan in providing flight tickets and thereafter misleading him in the manner we have described.

7.44 The passage of time was not sufficient evidence of affirmation. There was no express affirmation. In any event, the claimant's further conduct was blameworthy and the respondent was entitled to consider the cumulative effect of the claimant's continuing evasive behaviour.

7.45 In this case, there was a deliberate refusal to comply with a reasonable request to provide the flight tickets. There was clear dishonesty. We find

the claimant was in fundamental breach. The respondent was entitled to summarily dismiss him and it did. It follows that the claim of wrongful dismissal fails.

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Employment Judge Hodgson

Dated: 23 July 2025

Sent to the parties on:

28 July 2025
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For the Tribunal Office