



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs F Atif

**Respondent:** Luisa Spagnoli UK Limited

## RECORD OF A HEARING

**Heard at:** London Central

**On:** 1, 2 and 3 October 2025

**Before:** Employment Judge Joffe

### Appearances

For the claimant: Represented herself

For the respondent: Mr H Dhorajiwalla, counsel

## RESERVED JUDGMENT

1. The claimant's claims of direct race discrimination are not upheld and are dismissed.
2. The claimant's claims of direct discrimination because of religion are not upheld and are dismissed.
3. The claimant's claims of breach of contract are not upheld and are dismissed.

# REASONS

## Claims and issues

1. The issues were agreed at a case management preliminary hearing in front of Employment Judge Clark on 19 September 2024. They were as follows:
  - (A) Jurisdiction (Discrimination)
    1. Were the complaints of discrimination made within the time limit in section 123 of the Equality Act 2010:
      - a. Was the claim made to the Tribunal within 3 months (allowing for early conciliation) of the end of an act, or the end of conduct extending over a period of time?
      - b. If not, were the claims made within such further period that the Tribunal thinks is just and equitable?
    - (B) Race & Religion or Belief Discrimination
    2. The racial grounds on which the claimant relies are her ethnic origins, which she describes as Arab. She compares herself with people who are not of Arab ethnicity. It is understood that her comparator is hypothetical,
    3. The religion or belief the claimant relies on is Islam. She compares herself to people who are not Muslim and it is understood her comparator is hypothetical.
    4. Did the respondent treat the claimant less favourably because of her race or religion than it would have treated someone of a different race or religion in doing the following things:
      - 4.1 Dismissing her.
      - 4.2 Failing to uphold her grievance following her dismissal.
      - 4.3 Failing to uphold her appeal against dismissal.
    - (C) Remedy for Discrimination
    - 5 What financial losses has the discrimination caused the claimant?
    - 6 Has the claimant taken reasonable steps to mitigate her losses?
    - 6.1 If not, for what period should the Claimant be compensated for?

7 What injury to feelings has any discrimination caused the Claimant and how much compensation should be awarded for that?

8 Is there a chance the claimant would have been fairly dismissed anyway?

9 If so, should the claimant's compensation be reduced? And by how much?

(D) Jurisdiction (Breach of Contract)

10 Were any complaints of breach of contract made within the time limit in art 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623:

10.1 Was the claim presented within the period of 3 months (allowing for early conciliation) beginning with the effective date of termination of the contract giving rise to the claim?

10.2 If it was not, is the tribunal satisfied that it was not reasonably practicable for the complaint to be presented within that ordinary time period, and that it was presented within such further period as the tribunal considers reasonable?

(E) Breach of Contract

11 Is the claim one which a court in England & Wales would have jurisdiction to hear and determine?

12 Is the claim an excluded claim?

13 Is the contract claim arise or outstanding on the termination of the employment of the claimant?

14 Is the claim for damages for a breach of a contract of employment?

15 Were the following terms of the claimant's contract of employment?

15.1 That HR had to be involved in any dismissal;

15.2 That the ACAS Code of Practice on Disciplinary and Grievance procedures would be followed prior to a dismissal.

15.3 That the claimant would not be dismissed without the respondent's disciplinary policy/procedure being followed.

16 If so, did the respondent breach any of those terms?

17 If so, what damages should be awarded for any breach?

## Findings

### The hearing

2. I was provided with a bundle running to 260 pages. The claimant had also prepared a supplementary bundle which contained documents relating to previous procedural matters.
3. The claimant made an application for specific disclosure of screenshots of WhatsApp messages provided in the bundle in the form of text printouts. I rejected that application for reasons I gave orally at the hearing.
4. I had witness statements and heard evidence from the following:
  - a. The claimant on her own behalf;
  - b. For the respondent: Ms C Malacarne, store manager at relevant times and Ms A Soave, head of HR & operations, a consultant from an organisation called VerFides.

#### *Applications*

5. At the outset of the hearing, the claimant renewed an application she had made for a postponement of the hearing. I rejected that application for reasons I gave orally at the hearing.
6. The claimant also applied to vary the order made that the hearing should be before a judge sitting alone (which was itself a variation of a previous order that there should be a full panel). I rejected that application for reasons I gave at the hearing.

#### *Management of the proceedings*

7. Given the submissions the claimant has made, it is necessary to say something about the management of the hearing and the claimant's conduct.
8. This was a challenging hearing. The claimant was unhappy that the hearing was proceeding despite her application for a postponement and she continued to raise issues which had already been dealt with. I had to give her a break after the initial applications were heard as she continued to argue with me about the applications after I had made decisions on them.
9. The claimant was also unhappy with an earlier decision made by Employment Judge Brown extending time for the response and continued to seek to relitigate that issue. She remained unhappy with the decision I made about her request for specific disclosure and continued to refer to that. The language in which the claimant conveyed her discontent with orders was strong language (by which I do not mean to suggest she used any profanity)

and she accused me at various times of stopping her presenting her case and punishing her. She seemed suspicious of and raised challenges to even seemingly very innocuous directions, such as the direction that, when giving evidence, she should use the clean bundle on the witness table. I understand that she continued to raise some of these issues with Tribunal administrative staff clerking the hearing.

10. I realised on the first day of the hearing that Tribunal staff had not set up the recording equipment in the hearing room. I therefore asked for this to be done by the second day of the hearing and drew the parties' attention to the fact that a recording was being made.
11. When she gave her evidence, the claimant frequently did not answer questions and essentially sought to make points she wished to make about documents or asked questions herself. Her response to questions about whether something was said or done was often to demand a record of the thing which had allegedly been said or done. She required significantly more guidance on answering questions than most litigants in person in my experience. I explained at one stage that if she did not behave reasonably there could come a point when the hearing could not go ahead.
12. Later in her evidence, I did, in an effort to make her understand how inappropriate her approach was, raise with the claimant that the way she was presenting herself appeared to me to be aggressive. The claimant continued to argue with me when I directed her to answer questions and accused me of being unfair to her.
13. When cross examining, the claimant sometimes shouted at the witness and I considered her manner was at times intimidating. She tried to insist Ms Malacarne only answer 'yes' or 'no' to questions and insisted I had taken that approach with her when she gave her evidence. I said to her that that was not correct and gave her some time to consider her approach. At other times she repeated questions a number of times despite the witness having responded.
14. At some point during Ms Malacarne's evidence, I gave the claimant a warning that if her conduct continued to be unreasonable her claim might be struck out. This was at a point where less strongly worded interventions appeared to have had no effect and I was concerned that a fair hearing would not be possible. The claimant said I was punishing her, behaving unfairly and taking advantage of her as a litigant in person. I did in this interchange describe her behaviour as exceptional. With hindsight, it seems to me that it was not helpful to describe the claimant's conduct in that way. Nothing I had said had had any significant impact on her conduct, except possibly to make it worse,

but trying to make her see how exceptional it was in this way was not likely to produce the desired result and did not do so.

15. Cross examining witnesses is a very difficult job for almost any litigant in person and it is right that a Tribunal should exercise restraint in terms of interventions and make allowances, whilst also endeavouring to ensure fairness to the witnesses and the other party. My experience is that most litigants in person are happy to be guided by the Tribunal. This was not the case with the claimant. Fundamentally the claimant did not appear to accept that it was my job to manage the proceedings.
16. The claimant's body language and expressions appeared disrespectful. She often raised her eyebrows when I spoke to her and her manner, expression and posture conveyed a sense generally that she did not have respect for the Tribunal. I accept that some of the physical signs of disrespect may have been unintentional on the claimant's part and that body language may not always be a reliable indicator of attitude, but these features added to the difficulty of the hearing.
17. As I have said, the claimant also raised her voice to the extent that it seemed to me she was shouting on a number of occasions. Again, she may not have intended to shout, and I accepted that the proceedings were difficult for her, but it was not acceptable for witnesses to be shouted at or indeed for the Tribunal.
18. The claimant became very upset whilst delivering her oral submissions and I gave directions for her to put in further submissions in writing should she wish to do so. I also allowed the respondent the opportunity to put in a further submission in response if appropriate. The claimant's objection to that response in correspondence is accordingly misconceived.

#### Findings of fact

19. The respondent is an Italian fashion brand. It has multiple stores in Italy but only one in the UK, in London.
20. The claimant is a British citizen of Arabic background who is a practising Muslim.
21. Ms C Malacarne was the store manager of the London store at the time of the claimant's employment by the respondent.

22. There were eight – ten members of staff in the respondent's UK branch. Ms Malacarne ultimately managed a team of eight in the London store.
23. Ms Malacarne reported to Mr L Vaselli, the respondent's chief financial officer and head of UK HR, based in Italy. Mr Vaselli was responsible for HR in Italy but was not an expert on UK employment law so assistance on HR matters was provided by Ms Soave, an independent HR consultant. Dr G Lorenzoni was the director and chief executive officer of the respondent's UK operations.
24. On 27 December 2022, the claimant was hired to work in the London store as a senior sales assistant. Ms Malacarne said she had reservations about hiring the claimant and was concerned as they could not obtain references for the claimant. She appointed the claimant anyway as she said that they were desperately in need of staff, particularly bilingual staff. The claimant speaks Arabic.
25. At that time there were three Arabic-speaking employees in the London store. The target market for the respondent in London was 60 – 70% Middle Eastern so Ms Malacarne was keen to have Arabic speakers, particularly during peak tourist seasons.
26. Ms Malacarne said she was very conscious of accommodating religious holidays for all staff, given the religious diversity of the staff group.
27. The claimant's contract of employment contained the following relevant provisions:

***START DATE, PROBATIONARY PERIOD AND CONTINUOUS EMPLOYMENT***

*1.1 Your employment, and your period of continuous employment with the Company, will commence on 27th December 2022.*

*1.4 Your employment is subject to a probationary period of six (6) months, during which time your performance and conduct will be monitored. At the end of the probationary period you will be notified in writing if you have successfully completed your probationary period.*

...

***15. DISCIPLINARY GRIEVANCE RULES AND PROCEDURE***

*The Company's Disciplinary and Grievance Procedures will be provided to you. These procedures do not form part of your terms and conditions of employment and may be varied by the Company at any time.*

28. Schedule 2 of the contract was a job description for the role of senior sales assistant which said, relevantly:

*Image and punctuality*

*- A Sales Assistant is the first representative of the Company in front of customers, therefore you must always respect LS standards in terms of personal grooming and hygiene (clean face with light make up, no visible tattoos, accessories, clean and tidy hair and nails with any nail varnish is to be neutral or red) and always wearing clean and ironed uniform;*

*- You are to arrive at least ten minutes before your shift begins, and clock in on time and with your uniform already on;*

*- You must leave all your belongings in your locker and use your personal phone only in emergency cases/during your breaks;*

*- It is not permitted to use personal mobile phones on the sales area;*

29. I saw the respondent's disciplinary and capability procedure, which includes the following provisions:

*1 About this procedure*

*1.1 This procedure is intended to help maintain standards of conduct and performance and to ensure fairness and consistency when dealing with allegations of misconduct or poor performance.*

*1.2 Minor conduct or performance issues can usually be resolved informally with your line manager/supervisor. This procedure sets out formal steps to be taken if the matter is more serious or cannot be resolved informally.*

*1.3 This procedure applies to all employees regardless of length of service. It does not apply to agency workers or self-employed contractors.*

*1.4 This procedure does not form part of any employee's contract of employment and we may amend it at any time.*

30. I also saw the respondent's grievance procedure, which commences:

*1 About this procedure*

*1.1 Most grievances can be resolved quickly and informally through discussion with your line manager or supervisor. If this does not resolve the problem you should initiate the formal procedure set out below.*

*1.2 This procedure applies to all employees regardless of length of service. It does not apply to agency workers or self-employed contractors.*

*1.3 This procedure does not form part of any employee's contract of employment. It may be amended at any time and we may depart from it depending on the circumstances of any case.*

*1.4 This Grievance Procedure should not be used to complain about dismissal or disciplinary action. If you are dissatisfied with any disciplinary action, you should submit and appeal under the disciplinary procedure.*

31. The respondent had a rota system at the London store. The shifts were: 9:30 am – 6:30 pm, 10 am – 7 pm and 10:30 am to 7:30 pm. The shift pattern would be agreed week to week depending on staff availability.
32. Punctuality was important to the respondent. The building had a requirement for two members of staff to be present for the store to open. There were time cards or sheets in the bundle. Ms Malacarne said in evidence said that the format of the timesheets in the bundle was not one she had seen at the relevant time but it was the same data she would have had available to her in the London store.
33. This material showed that in January 2023, the claimant was late for six out of 16 shifts which she worked. Ms Malacarne said that she realised she could not trust the claimant to be there at 9:30 to open the store so started putting her on the 10 or 10:30 am starts. Ms Malacarne said that the claimant's lateness and the fact that she had to be put on later shifts put a strain on other staff.
34. The timesheets then showed that the claimant was late four times in February and March 2023 and five out of 22 shifts in April 2023. She was late on three occasions during the first five shifts in May 2023.
35. The claimant disputed the accuracy of the timesheets in the bundle and said that the fact that there were not WhatsApp messages in the bundle on each occasion the timesheets recorded the claimant being late demonstrated that the allegation of lack of punctuality was fabricated. On some occasions of lateness there were WhatsApp exchanges about the lateness between the claimant and Ms Malacarne. Ms Malacarne said that on other occasions the claimant might have telephoned. Sometimes she might not have informed Ms Malacarne that she was going to be late.
36. Ms Malacarne said she had no access to create or alter the timesheet data which was automatically generated by an employee swiping her card. She independently observed the claimant's lateness.
37. Ms Malacarne said that the claimant usually said she was late due to issues on public transport. Many of the staff lived further away than the claimant but did not have an issue with punctuality. Ms Malacarne said that she became sceptical about the claimant's excuses.
38. As to the claimant's performance more generally, Ms Malacarne said that the claimant was not very good at learning and implementing processes. She was however a strong salesperson.

39. On 18 April 2023, Ms Malacarne asked Ms Soave to check the claimant's notice period and probation period. She said that she had concerns about the claimant's attitude and performance and was considering terminating her employment at the end of her notice period. She said that the claimant was not popular amongst her colleagues and was considered to be too aggressive in her approach to making sales and had been verbally abusive to some colleagues.
40. On 2 May 2023, Ms Malacarne asked Ms Soave by email to prepare a termination letter. She had another Arabic speaker due to join on 12 June 2023. Ms Soave wrote to say she would prepare a draft. They agreed that the claimant would be paid in lieu of notice. Ms Malacarne said:

*I m not planning to talk to her until the 31th of May, in order to keep the team balanced and the business necessities covered at the best of our capability.*
41. Ms Malacarne said that she spoke with the claimant shortly after this correspondence and decided to give her an extension to her probation period rather than dismissing her. She said that she met with the claimant with an open mind and an open heart and the claimant promised to fix the things which were not going well and to have a supportive attitude to colleagues.
42. On 29 May 2023 Ms Malacarne conducted a performance review of the claimant. I saw a document which Ms Malacarne said she filled in to give to HR and then discussed with management in Italy. In this document, which was on a template written in Italian, the claimant was awarded a number of 1s and 2s, which were negative scores. Handwritten comments were largely in English. There was a comment: 'she is not a team player, verbally aggressive'.
43. Ms Malacarne said the review was discussed with the claimant in front of a witness. She said that the practice was to have one-to-ones in front of a witness. If there was no witness, a note would be kept and the employee asked to sign the note. She said that there were three or four issues to discuss about treatment of colleagues on the shopfloor. If she had put the matters in writing and given the claimant a formal warning, management in Italy would not have agreed to extend the claimant's probation and give her a further chance, so she decided to deal with the matter without recording it.
44. Ms Malacarne decided the claimant should pass her probation and gave her a letter to that effect on 27 June 2023.
45. There had been an incident in June 2023 with a colleague, Ms A Durrani. The claimant had returned from lunch and said to Ms Durrani she had eaten so much she looked pregnant. Ms Durrani responded that the claimant looked bloated. The claimant responded by saying she had recently had sexual intercourse with Ms Durrani's husband and was indeed pregnant. Ms Durrani

became upset and the two shouted at each other on the shop floor. Both employees were sent home early but, because they resolved their differences, a decision was made not to investigate further through the disciplinary procedure.

46. Shortly after that, on 30 July 2024, a colleague, Ms S Mahajna, raised a grievance against the claimant:

*As you are already aware, I have been facing persistent challenges with one of my colleagues for some time now, and I have apprised you of each incident in which I expressed my concerns. During our previous discussion, I communicated my apprehensions about my colleague, Fadila, exhibiting aggressive behaviour towards me, and I even expressed my worry that this aggression may escalate into physical harm.*

*Approximately two months ago, Fadila began displaying rude behaviour towards me, which included body shaming, insulting my cultural background, speaking aggressively, giving menacing looks, and maligning me to customers (resulting in customers approaching me with negative comments about my character). Due to the gravity of these actions, I have made the decision to completely avoid any interaction with Fadila and maintain a professional distance.*

...

*During my tenure at the company, I have personally witnessed Fadila engage in verbal altercations with two of my colleagues, and in both instances, matters escalated significantly. Consequently, I have persevered in my efforts to disengage from any confrontations and maintain professionalism at all times.*

*Regrettably, on Monday, the 24th of July, Fadila physically pushed me aside while I was attending to tasks at the till, dismissing the incident as an accident. I immediately informed you of this occurrence, and subsequently discussed it with you in the stockroom. Despite being aware of my pregnancy, Fadila once again pushed me aggressively on Friday, the 28th of July, while we were both in the stockroom. In your absence, I reported the incident to my supervisor, Cindi, only to receive an unhelpful response to "leave it."*

47. Ms Malacarne said that Ms Mahajna was very religious and a devout Muslim.
48. Ms Soave investigated Ms Mahajna's grievance. On 31 July 2023, Ms Soave notified the claimant of the grievance and invited her to an investigation meeting. Ms Soave also met with a number of other members of staff.
49. The claimant put to Ms Malacarne that Ms Mahajna was actually of Italian nationality. Ms Malacarne said that was not the case; Ms Mahajna had had to

supply her passport and it was not an Italian passport. Ms Mahajna did not speak Italian.

50. The claimant asked why CCTV was not looked at in relation to the allegations. Ms Malacarne said that she did look at the CCTV but there was no CCTV covering the area where the pushing incident was said to have occurred.
51. The claimant complained that she had been contacted about the grievance on her holiday and asked Ms Malacarne in cross examination why that had happened. Ms Malacarne said that she wanted to protect the claimant by making sure she knew about the complaint. It was a small environment and the other staff might be gossiping about the matter.
52. Ms Malacarne said that she had to cancel her own holiday because of the situation. She did not take sides and sought to support the claimant as well as the other employees. Ms Malacarne said in cross examination that she included the matter in her witness statement not because it formed part of the reasons for dismissing the claimant but because the claimant had alleged she favoured Ms Mahajna.
53. On 3 August 2023, Ms Malacarne wrote to Ms Soave about the negative feeling in the store:

*Anyway this is creating a terrible mood in store*

...

*I really hope we can close this asap. I have doubts regarding the future .. I want to collaborate with a team that share the same work ethic.*

54. The claimant had gone on annual leave. On 3 August 2023, Ms Soave wrote to the claimant:

*I understand from Cristiana that you may still be in London. If this is the case and you are still here next week, would it be possible for us to meet either Wednesday or Thursday? If this is not possible, please do not worry as it can wait until your return.*

55. The claimant replied:

*I am replying to your email to confirm to attend the meeting on Wednesday 09/08/2023.*

*Even I shouldn't be in this position as I am on holiday.*

56. On 4 August 2023, Ms Soave wrote:

*Thank you Fadila. I'm really sorry as I know you are on annual leave. Hopefully it shouldn't take very long but if you prefer to wait until you are back at work, I completely understand.*

*If you do want go ahead and meet, will 12pm work for you?*

57. Ms Soave held an investigation meeting with the claimant on 9 August 2023. The claimant denied the allegations.
58. On 30 August 2023, Ms Soave held a meeting with Ms Mahajna where she told her she had not upheld the allegations. She had previously told Ms Malacarne and management in Italy that:

*I have not upheld her grievances simply due to the consistencies and the fact that none of the staff I interviewed witnessed any of the alleged offences.*

59. Ms Malacarne wrote to the claimant the same day to tell her that the grievance had not been upheld and that 'all is fine'. Ms Malacarne said that at this point, Ms Mahajna would stay home to avoid the claimant, which was difficult for Ms Malacarne in terms of work planning. She had to try to ensure there was minimal contact between the two until Ms Mahajna went on maternity leave in around November 2023. Ms Malacarne said she was supportive to the claimant during this period.
60. Also that day, Ms Soave wrote to the claimant:

*I can confirm that the grievance process has been concluded and no further action is being taken for now.*

*My findings were that there was no evidence to support the grievances raised. I do feel however that what was previously a close relationship has sadly deteriorated and in order to move forward, I propose some form of mediation, if you and Shimaa are both in agreement. I also believe the company's commission arrangement needs to be clarified in order to avoid any future misunderstandings or bad feeling.*

61. The claimant wrote to Ms Soave on 3 September 2023:

*I want to make it clear that I am not willing to engage in mediation with Shimaa. The allegations she has raised against me are not only serious but also dangerous. It appears that she has fabricated these allegations to further her own agenda, even at the cost of distorting the truth. Regrettably, I do not feel safe working with someone who has resorted to falsehoods and false grievances, as it puts my well-being and safety at risk while causing unnecessary stress.*

62. In September and October 2023, Ms Malacarne said, the claimant was regularly late for work.
63. In October 2023, the store premises were temporarily closed for building works to take place. The store was relocated for this period. The staff had to assist in moving stock and other items. Ms Malacarne said that the claimant was reluctant to assist with this or work during a period when she could not

earn commission. The claimant had sickness absence from 16 to 22 October 2023, coinciding with the store relocation. Ms Malacarne believed that the claimant was off because she did not want to help with the relocation.

64. There was correspondence between the claimant and Ms Malacarne about the claimant's sickness certification. On 19 October 2023, Ms Malacarne sent a WhatsApp message:

*Good morning Fadila Im so very sorry you are not well. As you are missing 5 days now as per company policy I need a gp certificate, Im sure you already went to your doctor. I wish you a prompt recovery. Have some rest*

65. The claimant sent a photograph of a prescription for antibiotics. Ms Malacarne wrote back to say: *Thank you Fadila but we dont need your prescription just the doctor referral for day of rest.*
66. The claimant then sent a copy of her application for statutory sick pay.
67. On 20 October 2023, the claimant wrote to say that she was still sick and Ms Malacarne asked for her 'GP letter'. The claimant sent her SSP document again. She also sent a text from her GP surgery:

*Dear Miss Atif,*

**AS PREVIOUSLY ADVISED, YOU NEED TO SELF CERTIFY FOR THE FIRST 7 DAYS OF YOUR ILLNESS**

**THIS IS THE LAW OF THE UK**

**YOUR EMPLOYER SHOULD BE AWARE OF THIS**

**THE GP ALSO ADVISED YOU OF THIS WHEN YOU SAW HIM**

68. Ms Malacarne then sent the claimant an explanation of what a fit note was and said that Sunday would be the seventh day the claimant had not worked. She also sent the claimant the following extract from her contract of employment:

*12.3 If you are absent from work for a period of five or more consecutive working days you must provide your Manager with a doctor's certificate to cover the period of absence. The certificate should be provided within one week of your return to work.*

*The Company reserves the right to require doctor's certificates for shorter periods of sickness absence.*

She added:

*This is the company policy Im so very sorry they stress you with this, all your colleagues Cindi, Loredana Ayesha had a certificate without issues.*

69. The claimant said she would chase on Monday. Ms Malacarne said in evidence that she repeatedly told the claimant that if she asked nicely, her GP would give her a fit note. Instead the claimant gave Ms Malacarne the telephone number of her GP and asked her to contact the GP herself. This was not normal practice but the claimant was insistent so the assistant store manager, Ms C Bittencourt, telephoned the claimant's GP. Ms Bittencourt told Ms Malacarne that the surgery told her that the GP was unable to assist the claimant further as she had been abusive to employees at the surgery. In spite of these events, a decision was made to exercise discretion and pay the claimant contractual sick pay for this period.
70. The claimant complained to me that the respondent should not have been asking for a fit note after five days of absence since for SSP purposes a fit note was only required where absence exceeded seven days.
71. The claimant then took holiday the last week of October and first week of November 2023. Ms Malacarne said she would usually have expected more notice but the claimant was insistent about taking the holiday. Ms Malacarne believed that the claimant wanted the holiday so as not be involved in the store relocation. The claimant's evidence in cross examination was that Ms Malacarne had denied her some holiday she had previously booked and had then pressured her to take her holiday at this point; her evidence on this issue was difficult to follow. She said that she was not permitted to take holiday which she said was planned and approved well in advance but the particulars of this allegation were not clarified and there was no documentary evidence in support.
72. On 30 October 2023, Ms Malacarne messaged the claimant about the difficulty caused by late holiday notification:

*It is quite simple, I agreed on giving you holidays as you were very insisting and I hope you appreciated the effort everyone is doing in this emergency situation. As per any emergency there is no planning at the moment. As agreed you will be back at work on Monday the 6th at 10am. Your shift will be the usual 10-19.15, I will let you know on that day your rota for the week. I will be also more specific on giving you dress code for the 6th. I take the opportunity to inform you that we vacate your locker as you left personal items and I could not find your badge. I assume is with you. Pls keep it in a safe place as you already lost 2 badges in case something happened again you will be charged 15£. I hope you will enjoy your holiday.*
73. Ms Malacarne said that her patience with the claimant was wearing thin by this point. The claimant was starting arguments with colleagues; she started discussions on political and cultural topics which caused offence. A Jewish employee left her shift in tears after the claimant made racial and political comments about Israel relating to the conflict with Palestine. A Moroccan

Muslim employee told Ms Malacarne that the claimant had made insulting comments to her, saying that Morocco was abusive to other countries, the people were arrogant and Morocco was inferior to other countries. This employee asked not to escalate matters as she preferred to avoid confrontation with the claimant. Ms Malacarne asked the claimant to keep her views private if they were likely to offend and to be respectful of everyone regardless of nationality.

74. On 4 December 2023, the claimant called in sick. The claimant remained off sick for several weeks and Ms Malacarne had to chase her for a fit note. She provided one for 11 – 17 December 2023 but under her contract should have obtained one for 9 and 10 December 2023 also. The claimant by this point had had some 28 days of sickness absence in total.
75. On 13 December 2023, Ms Malacarne wrote to Ms Soave:

*was about to ask you a call regarding Fadila, but we are opening the sale tomorrow so it a bit of crazy around here.*

*As you see, after 1 month we have another leaving person, Im sad because Reyla was a fantastic team player.*

*Regarding Fadila I have the following:*

*30 days between holidays and rest*

*28 sickness day*

*from 27.12.2022 to now*

*I have a list of complains:*

- 1 temp crying with Cindy and Jessica because apparently Fadila made unpleasant political comments*
- Souhalia very upset for Fadila political comments on her country (Marocco)*
- Reyla feeling uncomfortable working with Fadila's attitude*

*No need to mention Shimaas points.*

*During the week of the move Fadila did 1 week of sickness and become obsessive in requesting holidays, she took 2 weeks while everyone was doing overtime and covering.*

*Regarding her sickness she has persistent cough, but she does not respect company policy nor display a responsible attitude regarding communications and feed back.*

*Her behaviour is putting the team under persistent stress - constantly understaff, and force the company to last minute temporary covers.*

*I need to sit with her, because the situation is intolerable, and by the way she already requested another week of holiday in February....*

*Let me know when you have some minutes to discuss the best action plan, she will be back to work on the 18th of December.*

76. On 14 December 2023, Ms Soave wrote to Ms Malacarne:

*To be honest, you were really supportive of her during the grievance issue but to be aware of another two incidents with other staff are saying she has been made inappropriate comments together with her sickness record, I would definitely be dismissing her. You cannot tolerate somebody in the store who even if their comments seem innocent, does not have the emotional intelligence after all that has happened to realise that there are certain issues you do not discuss at work. I think you should speak with Giorgio or Luca as I know she is a good seller but her attitude seems to have changed and she's not even be with you a year!*

*If you dismiss, you'll have to pay notice of 4 weeks.*

77. That day, Ms Malacarne spoke with Ms Soave and Mr Vaselli about the situation. Ms Soave said that she advised that the respondent had sufficient grounds for dismissing the claimant based on the matters Ms Malacarne had detailed. She prepared a termination letter for Ms Malacarne to use. She said that she advised that it was not necessary to conduct a formal disciplinary process as the claimant did not have two years' service. There was a concern that if the claimant were to work her notice she might cause a bad environment on the shop floor.
78. Ms Malacarne then spoke to Dr Lorenzoni who gave her authority to dismiss the claimant. Ms Malacarne said that Dr Lorenzoni would have been aware that the claimant was Muslim and an Arabic speaker but would have seen the latter as a valuable asset to the London store. Ms Malacarne said she herself did not consider the claimant's nationality or religion when discussing the claimant's dismissal with Dr Lorenzoni. Dr Lorenzoni would have seen the records showing the claimant's lateness and absence. Ms Malacarne said in evidence that the claimant's sickness absence was not itself a key factor in the decision to recommend her dismissal, rather the claimant's attitude and behaviour whilst sick - failing to provide updates, or properly certify – were a significant factor because they created uncertainty in relation to the shift rota.
79. In the period after this, but prior to the dismissal, Ms Malacarne said that the claimant asked to take three further days of holiday, including New Year's Eve, despite other staff having booked those dates months in advance. The claimant had previously said that she was happy to work this period. Ms Malacarne said that she had formed the view that the claimant deliberately requested holidays she knew other staff had already booked as there was a

holiday calendar in the staff room. She said that the claimant was insistent about having this holiday. The claimant denied this account.

80. Although the original plan had been to terminate the claimant's employment after the Christmas and New Year period, Ms Malacarne said that she decided that enough was enough. She decided that since the claimant was so unreliable it would be better to let her go sooner despite the Christmas period being a busy period for the store. Ms Soave suggested to Ms Malacarne that they should pay the claimant in lieu of her notice period and Ms Malacarne agreed.
81. The claimant received SSP only for the days she was sick in December in the December 2023 payroll (paid 22 December 2023) and she wrote that day asking for that payment to be reviewed.
82. Ms Malacarne invited the claimant to a meeting on 29 December 2023 and told her that she was dismissing her. She thanked the claimant and said she was grateful for her work. She handed her the dismissal letter which said:

*It is with regret that we confirm the decision to terminate your employment with Luisa Spagnoli (UK) Limited with effect from 30th December 2023.*

*Rather than asking you to work your four weeks notice in full or place you on garden leave, you will be paid in lieu of notice. This will be paid to you in the usual way at the end of month (January 2024). Your final wage-slip and P45 will be emailed to you.*

*We hope you can appreciate that this has been a very difficult decision and we wish you all the very best for the future.*

83. She said that the claimant refused to take the letter and became insulting to her; the claimant said that 'bad karma' would get Ms Malacarne. She said that Ms Malacarne was dismissing her because she had taken sick leave.
84. On 30 December 2023, the claimant wrote to Ms Malacarne and Ms Soave:

*I am very surprised that Christiana has terminated my employment after I had meeting with her this week, on the 27/12/2023, to provide an outcome and explanation as to why she has deducted 2 weeks of my salary, despite me being sick with relevant documents from my GP.*

*While waiting for her to come with a reasonable explanation, she has decided to terminate my contract immediately and without providing me with any suitable clarifications.*

*I kindly request an investigation in regards to the following:*

*1- First an outcome in regards to why Christiana has failed to deal with my request I have made in regards 2 weeks of deductions from my wages,*

*without giving me reasonable explanation by breaching and not complying with sickness policy as it is in the contract of employment of Luisa Spagnoli handbook in page (6) sickness and injury (12.7).*

*2- Christiana has failed in her managerial duty to deal with my request, but rather she has decided to terminate my contract immediately without following any company procedures or prior warnings.*

*I have dedicated my time, my skills, my work ethic and professionalism, my commitment, my loyalty and I have worked with dignity resulting in great figures and sales numbers despite all. Christiana has terminated my employment without providing me with reasonable reason and without following due procedure.*

*In conclusion, I strongly contest the unlawfulness of the termination of my contract by Christiana, as it does not comply with the terms outlined in my employment agreement. Her actions, which seem fraudulent given her failure to address my initial request, do not surprise me. I insist on a thorough investigation into the matters I've raised above, as the situation appears more akin to a farce than a valid employment decision.*

*Christiana's actions constitute a clear breach and violation of my rights as outlined in the Luisa Spagnoli Employment Handbook. I am formally requesting the company to conduct an immediate and thorough investigation into her actions, as they are not in alignment with the guidelines set forth by Luisa Spagnoli.*

85. On 1 January 2024, the claimant wrote to Ms Soave with a grievance against Ms Malacarne:

*I am writing to formally file a grievance against Christiana following my recent termination from Luisa Spagnoli. I believe that my dismissal was unjust and without cause, as detailed in my previous email dated 30/12/2023.*

*Throughout my time at the company, Christiana consistently failed to adhere to LS policies, particularly neglecting a return-to-work investigation. Despite being one of the top sellers during my employment, my contributions were never properly recognized. Additionally, there were instances where Christiana contacted me during my annual leave without valid reason.*

*Furthermore, despite providing advance notice for annual leave requests, there were times when Christiana disregarded them until the last moment. This happened especially during the store closing and transition to the new pop-up store. As a result, I had no choice but to take that week as holiday without receiving a proper rota.*

*I also had to request changes to the December rota due to Christiana's failure to accommodate my requested days off during the festival season. It felt unfair as she accommodated other team members except for me.*

*Throughout my tenure at LS, I consistently demonstrated my value to the company through exceptional sales performance and meeting or exceeding KPIs. I consistently delivered on the responsibilities outlined in my job description at a high level. Regrettably, Christiana failed in her role by selectively favouring certain employees for recognition and advancement. It's evident that this bias played a role in her immediate termination of my contract, which goes against the principles of fairness and impartiality expected in her position*

*In conclusion, I firmly believe that both unlawfulness and unfairness played a role in my termination. By using sickness as punishment and circumventing company policies outlined in UK ACAS law while abusing her position of authority, Christiana violated my rights.*

*It is ironic that someone like Christiana who made minimal contributions towards business performance took actions against me - someone who worked diligently alongside our dedicated team members to enhance Luisa Spagnoli's success. Her lack of involvement compared starkly with our collective efforts.*

86. Much of the claimant's cross examination of Ms Malacarne related to why Ms Malacarne had not taken the claimant through a formal process if there were the issues Ms Malacarne had described with the claimant's performance and conduct. Ms Malacarne said that she would not issue a formal warning unless something very serious had occurred. She said that she did issue the claimant with one such warning when she had been screaming at another staff member in front of a number of other members of staff. The warning was placed on the door in the store and the claimant was sent home mid shift. She said that she would not give a formal warning unless something was extremely serious because it could damage the mood in the store. She said that retail was a peculiar environment and employees were very exposed emotionally. It was not a police state. She only issued a warning where there was something really relevant to the wellbeing of the store community. That was her way of managing the store.
87. On 5 January 2024, the claimant sent an appeal against dismissal and she sent a further grievance against Ms Malacarne to Ms Soave on the same day. Like her earlier emails, these documents did not raise complaints of discrimination.
88. Ms Soave's evidence was that the claimant's complaints centred on:

- the deduction of two weeks' salary during December 2023, when the claimant was on sick leave. Ms Soave commented that company sick pay was discretionary;
  - that Ms Malacarne had terminated the claimant's employment without following prior warnings or a formal procedure. She said Ms Malacarne had no valid reason for dismissing her as she was a top sales performer and had made the decision unilaterally and without HR involvement;
  - that Ms Malacarne had not followed the respondent's policies, including failing to conduct a return to work interview after the claimant's sick leave;
  - that the respondent was punishing her for her sickness absence.
89. Ms Soave made the point that there was no reference to the claimant's race or religion in these documents so Ms Soave did not investigate any alleged discriminatory treatment. The claimant said in response to cross examination about her failure to raise an allegation of discrimination that she was expecting to be invited to a meeting at which she would have raised discrimination. She compared her treatment in this respect in evidence with that of Ms Mahajna. Ms Mahajna's grievance had been the subject of a formal investigation with interviews. The claimant suggested in evidence that Ms Mahajna was Italian and Jewish. It was put to her that Ms Mahajna was Palestinian and Muslim and of Arab ethnicity. The claimant was taken to a passage in the notes of the investigation meeting the claimant attended on respect of Ms Mahajna's grievance where the claimant was recorded as saying Ms Mahajna 'is Muslim and speaks Arabic'. The claimant was asked if she was saying the note was fabricated and she replied that the whole case was fabricated. Ms Malacarne in evidence said that Ms Mahajna was an observant Muslim who observed Muslim holidays and wore Muslim religious dress
90. Ms Soave gave evidence that she investigated the claimant's complaints with Ms Malacarne between 30 December 2023 and 9 January 2024. She considered whether the claimant should be paid company sick pay for her absence in December 2023. She concluded that there was no contractual right to full pay during sickness absence and that paying the claimant SSP only had been lawful.
91. On 9 January 2024, Ms Soave responded to the claimant's various emails. She briefly dealt with the points the claimant had made about sickness and holiday and told her that she considered that the dismissal was fair:

*Your dismissal was fair and as you have worked for the Company for less than two years, the Company has no obligation to demonstrate reasons for the dismissal and are not obliged to adhere to the disciplinary or dismissal procedure. The Company has, however, fulfilled its obligation of ensuring you*

*are being paid in lieu of notice as confirmed in your dismissal letter dated 29th December 2023 and as permitted in Clause 18.2 of your Contract of Employment where it clearly states “The Company may elect, in its absolute discretion, to terminate your employment without notice or payment to you of an amount equal to your Basic Salary for all or part of your notice period”.*

*- The Company does not have to conduct return to work interviews for every period of absence. According to 12.3 and 12.4 of your Contract of Employment, you are obliged to complete a “self-certificate” and/or a GP note depending on the period of absence which you have not always complied with.*

*- Clause 12.7 clearly states that it is at the Company’s discretion to pay Company Sick Pay and, in fact the Company did exercise its discretion in paying you in full for your absence from 16th October 2023 to 22<sup>nd</sup> October 2023 as a gesture of goodwill. The payment of Company Sick Pay on one occasion does not mean you will get receive Company Pay for future absences whether you follow the procedure or not and I can confirm that other employees have also not received Company Sick Pay. The Company does consider length of service, the nature of absence and if any sickness absence has previously been paid. Where Company Sick Pay has not been paid, Statutory Sick Pay has been paid if employees are entitled to this. Whilst you indicate that you requested and was not given an explanation of the policy, you did have a meeting with both Cristiana and Cindi on the 27th December 2023 where the Company policy was explained to you. I therefore disagree that your sickness has been used as a punitive measure.*

*- You have taken 32 days of annual leave in 2023. Cristiana seems to have gone over and above to accommodate your requests even if this has left the store in a vulnerable position and when other staff have not been able to take their annual leave.*

*- When your performance at the store has been good, this has been recognised by you receiving appropriate bonuses. You have also been shown goodwill not afforded to other members of staff (for example, with annual leave and paid sick leave).*

*- You refer to “company protocols” regarding the decision-making of your dismissal but it is unclear as to where you have obtained this information. In any case, I can confirm that Cristiana did not make the decision unilaterally.*

92. The claimant wrote to Ms Soave on 10 January 2024 to raise issues with Ms Soave’s findings and to allege that her dismissal had been discriminatory, although she did not refer to race or religion or identify the type of discrimination she was complaining about. Ms Soave rejected the claimant’s allegations in an email dated 22 January 2024. The claimant wrote further on

24 January 2024 saying amongst other things that she had still not had reasons for her dismissal. After further correspondence, Ms Soave wrote to the claimant on 12 February 2024:

*We have made every reasonable effort to respond to the numerous emails received so far in a timely, professional and fair way. Despite this, you continue to send further emails which appear petty and unprofessional.*

*This is to confirm that we will no longer be replying to any further emails from you so that the company can focus on the business and current staff.*

## **Submissions**

93. I received written and oral submissions from both parties, including additional written submissions after the hearing. I do not set these out in their entirety but I took all the submissions into account.

### *Claimant's submissions*

94. The claimant repeated her concerns about my decisions on interlocutory matters and complained that I had not treated her fairly.
95. The claimant introduced some matters which had not been canvassed in evidence, for example that other staff had been promoted ahead of her and allegations about Ms Malacarne being in touch with other employers. I could not take into account matters which had not been tested in evidence. She referred to other claims she has brought against other employers which she said showed a pattern of discriminatory treatment. Those were not matters I could take into account as I had no evidence to connect those claims to these claims.
96. The claimant pointed to what she alleged were failures to follow policies and procedures. The disciplinary procedure was not followed prior to her dismissal. There was no investigation or disciplinary hearing. She was not told the reason for her dismissal.
97. The claimant said that she had complied with the respondent's sickness absence policy and reported her sickness absence appropriately.
98. She said that Ms Malacarne had fabricated complaints against her. She said that the respondent's head office and HR supported Ms Malacarne against the claimant because Ms Malacarne was Italian.
99. The claimant submitted that the failure to follow a disciplinary procedure or the grievance procedure were themselves facts from which I could reasonably infer discrimination because of race and religion. The burden of proof shifted

and the respondent had not satisfied me that its actions were not due to the claimant's race and/or religion.

### Respondent's submissions

100. The respondent made the point that despite prompting, the claimant largely failed to put to the witnesses that their actions were due to her race or religion. Her claims should fail on that basis alone.
101. Alternatively, given the large number of issues with the claimant's employment and the further opportunities she had been afforded, there were no facts which could reasonably cause the burden of proof to shift.
102. Ms Mahajna had not been identified as a comparator in the list of issues and the claimant was not entitled to rely on her as a comparator in relation to her grievance. In any event, Ms Mahajna was herself of Arab ethnicity and Muslim faith.

### **Law**

#### Direct discrimination

103. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.
104. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that 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."
105. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

*(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the*

*claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.*

*(2) If the claimant does not prove such facts he or she will fail.*

*(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.*

*(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*

*(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*

*(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.*

*(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.*

*(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.*

*(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.*

*(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.*

*(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.*

*(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.*

*(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.*

106. I bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.' The 'something more' need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.
107. The tribunal cannot take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a *prima facie* case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)
108. The distinction between explanations and the facts adduced which may form part of those explanations is not a watertight division: Laing. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.
109. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16, Mrs Justice Simler said: 'It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'
110. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

111. I remind myself that it is important not to approach the burden of proof in a mechanistic way and that my focus must be on whether I can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If I can make clear positive findings as to an employer's motivation, I need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.

#### Breach of contract

112. The task of a court or tribunal is to decide the objective meaning of the language in which the parties have chosen to record their agreement. If there are two possible constructions, the court or tribunal is entitled to prefer the construction which is consistent with business common sense: Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune") [2018] EWHC 163 (Comm).
113. The court or tribunal must place itself in the same 'factual matrix' the parties were in when concluding the contract: Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 W.L.R. 989.
114. Where there is ambiguity, a contract is also construed more strongly against the party who has made the contract: Borradaile v Hunter (1843) 5 M. & G. 639.

#### *Implied terms*

115. There is a useful summary of the principles to be applied by a court or tribunal in deciding whether a terms should be implied in Ali v Petroleum Company of Trinidad and Tobago, [2017] ICR 531:

"It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

[Per Lord Hughes]

## Conclusions

116. In terms of credibility and reliability, I found the claimant consistently less credible and reliable than the respondent's witnesses. Her approach to documents which were inconvenient to her case was to say that they had been fabricated. I found no evidence that any documents had been fabricated. She frequently sought to evade giving direct answers to questions in cross examination and seemed to take the view that it was open to her to deny anything which was not the subject of a documentary record. She said, for example, that her lateness had been invented by Ms Malacarne despite what seemed to me to be reliable documentary evidence which showed she had been late on numerous occasions.

### (A) Jurisdiction (Discrimination)

1. *Were the complaints of discrimination made within the time limit in section 123 of the Equality Act 2010:*

a. *Was the claim made to the Tribunal within 3 months (allowing for early conciliation) of the end of an act, or the end of conduct extending over a period of time?*

b. *If not, were the claims made within such further period that the Tribunal thinks is just and equitable?*

117. I did not have to make findings on jurisdiction as the claimant was unsuccessful in relation to the substantive merits of her claims.

### (B) Race & Religion or Belief Discrimination

2. *The racial grounds on which the claimant relies are her ethnic origins, which she describes as Arab. She compares herself with people who are not of Arab ethnicity. It is understood that her comparator is hypothetical,*

3. *The religion or belief the claimant relies on is Islam. She compares herself to people who are not Muslim and it is understood her comparator is hypothetical.*

*Issue: 4. Did the respondent treat the claimant less favourably because of her race or religion than it would have treated someone of a different race or religion in doing the following things:*

#### 4.1 Dismissing her.

118. Are there facts from which I could reasonably conclude that the claimant's race and/or religion played a role in the decision to dismiss her?

119. I bear in mind the context that the store felt the need to have Arabic speakers for its Middle Eastern clientele and there were therefore other Arabic speaking / ethnically Arab staff. This was seen as a feature in the claimant's favour

when Ms Malacarne was looking to appoint someone to the role. There were also other Muslim staff. The claimant's difficulties with other staff included conflict with other staff who shared her protected characteristics. There was no evidence of other shop floor staff of a different race or religion being treated more favourably than the claimant.

120. The claimant pointed to a lack of process by the respondent in relation to the dismissal as a feature which she said should cause the burden of proof to shift. The respondent did not invoke its own disciplinary procedure. The claimant had not had a series of prior warnings and there had not been a formal process in respect of matters such as the claimant's lateness. There was no investigation or hearing and the claimant was not told the reasons for her dismissal.
121. The claimant also pointed to the fact that Ms Malacarne was Italian and the respondent was in effect an offshoot of an organisation based in Italy. She submitted in essence that Ms Malacarne's decisions were supported by the respondent for this reason
122. I accepted Ms Malacarne's evidence about the various matters which had caused her to decide to recommend termination of the claimant's employment. She was a consistent and credible witness. The lateness issue was supported by documentary evidence which I had no reason to conclude was fabricated. The failures in relation to providing medical certificates were documented. There was documentary evidence to support what Ms Malacarne said were the claimant's difficult interactions with colleagues. It was not in dispute that the claimant had had a significant amount of sickness absence during her employment (some thirty days in a year). I accepted, and it was apparent from the documents, that the claimant did not comply with the *contractual* obligations in respect of sickness notification / certificates and I accepted Ms Malacarne's evidence about the claimant's approach to holidays – that her requests were made at short notice and in an insistent manner.
123. I found Ms Malacarne generally to be a thoughtful and reliable witness. The impression she gave was of someone who had tried to be sympathetic to the claimant and to accommodate the numerous challenges the claimant presented from very early in her employment by the respondent. The claimant's factual challenges to Ms Malacarne and Ms Soave mainly seemed to be based on the premise that if the respondent had not documented a particular matter, the respondent's account must be rejected. I am of course not bound to follow that approach.
124. The fact that Ms Malacarne had sought to retain the claimant in the respondent's employment during the early months of her employment despite issues arising which might well have caused an employer to conclude that she was unsuitable was a factor which pointed away from Ms Malacarne

entertaining any animus against the claimant based on a protected characteristic. There were various supportive messages to the claimant in the bundle and Ms Malacarne had caused the claimant to be retained after her probation period despite a rocky start.

125. In relation to her decision to advise that the claimant be dismissed, there are contemporaneous documents which evidenced Ms Malacarne's thinking at the time. She took advice from Ms Soave. Ms Soave advised that a process was not necessary given that the claimant did not have two years' service. That is an approach which in the Tribunal's experience is not uncommon. If it is unreasonable, taken together with the decision not to inform the claimant of the reason for her dismissal, I am satisfied that the unreasonableness is explained by reasons which are not connected with race or religion. Ms Malacarne acted on the advice of Ms Soave, which advice clearly had nothing to do with the claimant's race or religion and everything to do with the fact that her length of service meant that she did not have unfair dismissal rights.
126. I note also that the claimant herself does not appear to have thought at the time of her dismissal or for some while after that her race or religion played any role and I was not convinced she actually believed it even at the time of the hearing. She alleged that Ms Malacarne dismissed her due to her sickness absence and to save costs. During her evidence she said that Ms Malacarne had a plan to 'hire and fire' her, to use her for a period and then let her go.
127. Although the decision was taken by Dr Lorenzoni, from whom I did not have evidence, it was clear that he was effectively just agreeing a recommendation made by Ms Malacarne. I had no evidence on the basis of which I could have inferred that he would not have authorised the dismissal had the claimant not been Arab / Muslim. The list of issues Ms Malacarne raised were ample reason for him to conclude that her recommendation was an appropriate one.
128. I was satisfied that the claimant's dismissal was by reason of the conduct described by Ms Malacarne. In the alternative, I did not find facts from which I could reasonably conclude that the claimant's race and/or religion had played a role and the burden of proof did not shift.
129. I did not uphold this claim and it is dismissed.

*Issues: 4.2 Failing to uphold her grievance following her dismissal.*

*4.2 Failing to uphold her appeal against dismissal.*

130. These were both matters dealt with by Ms Soave. The claimant's account in evidence about motivation appeared to be that she believed that Ms Soave just supported Ms Malacarne because she was Italian.

131. Ms Soave undertook a truncated grievance and appeal process and did not invite the claimant to a hearing for her appeal against dismissal or her grievance. She did however make some investigations and she did respond to the claimant explaining why the respondent dismissed the claimant in the way it did, and why she was not entitled to company sick pay for her December absence and dealing with the other points the claimant had raised. Her response about sick pay was consistent with the claimant's contract and her responses about annual leave were consistent with what Ms Malacarne had said about the claimant's taking of leave. Her decision on the dismissal was in accordance with the advice she had previously given. She responded in detail again to the claimant when the claimant wrote further.
132. The claimant had not sought to rely on Ms Mahajna as a comparator when the case was case managed. Even if she had, Ms Mahajna was not an appropriate comparator as it appeared that they had the same relevant protected characteristics and materially different circumstances. In particular, Ms Mahajna was still in the employment of the respondent when she raised her grievance. And although the claimant compared her treatment with that of Ms Mahajna in respect of whether there was a formal investigation under the grievance procedure, her complaint to the Tribunal was about the outcome of her grievance. Ms Mahajna's grievance was also unsuccessful so in that respect there was no material difference in the treatment.
133. The claimant also said that Ms Soave favoured Ms Malacarne because she was Italian and she protected her and that this influenced the outcome of the grievance. I could see no facts from which I could properly infer that this was the case.
134. I was satisfied that the reasons why the grievance and appeal were not upheld were that Ms Soave genuinely concluded that they were not meritorious. The truncated process was consistent with Ms Soave's earlier advice that because of the claimant's short service, she did not need to be taken through the respondent's formal procedures.
135. Alternatively I was satisfied that there were no facts from which I could reasonably conclude race / religion had played any role in Ms Soave's decisions.

*(D) Jurisdiction (Breach of Contract)*

*10 Were any complaints of breach of contract made within the time limit in art 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623:*

*10.1 Was the claim presented within the period of 3 months (allowing for early conciliation) beginning with the effective date of termination of the contract giving rise to the claim?*

*10.2 If it was not, is the tribunal satisfied that it was not reasonably practicable for the complaint to be presented within that ordinary time period, and that it was presented within such further period as the tribunal considers reasonable?*

136. I did not have to consider the limitation issues as I did not conclude there had been a breach of contract.

*(E) Breach of Contract*

*11 Is the claim one which a court in England & Wales would have jurisdiction to hear and determine?*

*12 Is the claim an excluded claim?*

*13 Is the contract claim arise or outstanding on the termination of the employment of the claimant?*

*14 Is the claim for damages for a breach of a contract of employment?*

137. Had I found there were breaches of contract, I would have found they were breaches which arose or were outstanding on termination and were otherwise ones which the Employment Tribunal has power to determine.

*Issue: 15 Were the following terms of the claimant's contract of employment?*

*15.1 That HR had to be involved in any dismissal;*

138. There was certainly no express term in the claimant's contract to this effect and I could see no basis upon which such a term could be implied. The claimant did not put forward any basis on which she said such a term should be implied. It was not necessary for the functioning of the contract to include such a term and it was not obvious that the parties would have agreed that such a term was included had they been asked by the officious bystander.

139. The term as described is in any event insufficiently precise in my view to form part of a contract.

*Issue: 15.2 That the ACAS Code of Practice on Disciplinary and Grievance procedures would be followed prior to a dismissal.*

140. Again there was no express term of her contract relied upon by the claimant and I could see no basis on which such a term could be implied, nor did the claimant put one forward. Such a term would sit very uneasily with the express provision in the contract that the disciplinary and grievance procedures themselves are non-contractual.

*Issue: 15.3 That the claimant would not be dismissed without the respondent's disciplinary policy/procedure being followed.*

141. The contract expressly says the opposite – that the disciplinary and grievance procedures are non-contractual. It would be impermissibly inconsistent with the express terms of the contract to imply such a term.

*Issue: 16 If so, did the respondent breach any of those terms?*

142. I have not found that there were any terms as asserted by the claimant. Had I done so, there would have been no breach of the term at 15.1 since Ms Soave was 'involved' in the claimant's dismissal. There would have been breaches of the other two alleged terms.
143. For the reasons set out above, the claimant's claims for breach of contract are not upheld and are dismissed.

Employment Judge Joffe

Date: 11 December 2025

Sent to the parties on:

30 December 2025

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For the Tribunal Office:

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