



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

Mrs Atinuke Ashaye

v

National Fostering Group Limited

**Heard at:** Norwich

**On:** 9, 10, 11, 12, 13 September 2024

**Before:** Employment Judge Postle

**Members:** Mrs Buck and Mr Lynch

## Appearances

**For the Claimant:** Mr D Adams, Counsel

**For the Respondent:** Miss J Connolly, Counsel

## JUDGMENT

1. The Claimant's claim that she was constructively unfairly dismissed is not well founded.
2. The Claimant's claim she was discriminated against on the grounds of sex and race is not well founded.
3. The Claimant's claim for notice pay is not well founded.

## REASONS

### The Claims

1. The Claimant brings claims under the Equality Act 2010 for the protected characteristic of sex and race, in particular direct discrimination in respect of both counts. The Claimant's gender is female and black Nigerian. The Claimant also has claims under the Employment Rights Act 1996 for constructive dismissal.

2. The specific issues are set out in a List of Issues provided by the Respondent's Counsel at the outset of the Hearing which were agreed by the Claimant's Counsel, subject to a couple of amendments. These were direct sex and race in respect of 2.1.1.6 of the Claimant's claims for constructive dismissal as added and a further claim, again direct sex and race in respect of the Respondent's failure to reply to the Claimant's request for waiver of the restricted covenant contained in the Claimant's contract. The Respondent's Counsel was neutral on the Application to Amend, but nevertheless indicated they could deal with them in evidence.
3. The Tribunal therefore granted the Application to Amend.
4. Finally, there was a claim for notice pay.

### **Evidence**

5. In this Tribunal we heard evidence from the Claimant and also former employees of the Respondents, namely: Mr J Terry and Mr M Smith. There was also a further Witness Statement tendered from Ms Broughton again, a former employee. In respect of that Witness Counsel for the Respondent confirmed there would be no cross examination.
6. All Witnesses gave their evidence through prepared Witness Statements.
7. For the Respondent we heard evidence from: Mr Christie (and a Supplemental Witness Statement), the Managing Director; Mrs S Platts, Chief People Officer; Ms Walberg head of People Services at the time; and Mr Flanagan, Regional Director at the time. All giving their evidence through prepared Witness Statements.
8. There was a further Witness Statement from Mrs Gardner who is no longer employed by the Respondents and was unable to attend this Hearing.
9. The Tribunal also had the benefit of a Bundle of documents consisting of 552 pages, together with a chronology, a cast list and a helpful written submission from the Respondent's Counsel.
10. The Respondent is a subsidiary of Outcomes First Group (OFG), the largest combined Children Services Group in the UK. OFG provides a wide range of services to children with additional needs including front line fostering, educational and care services. They support Local Authorities with childcare services including the provision of foster placements and supporting Social Care.

## Findings of Fact

11. The Claimant's employment with the Respondent commenced on 3 July 2014. At the time of her resignation she was employed as a Registered Manager for the London and South Eastern Region of the Respondent. The Claimant's responsibilities included the management of the Operations and Professional Practice of the Social Work Teams in her Region which included the supervision of Team Managers. The Claimant having been originally employed as a Practice Manager and was promoted to the Registered Manager on 2 January 2018.
12. The Claimant's employment terminated with effect from 1 February 2022 as a result of the Claimant's resignation.
13. Fostering Services are subject to regular Ofsted Inspection which takes place approximately every three years. Ofsted had inspected the London and South Eastern Agency on 2 – 6 July 2018 (while the Claimant was going through the Registered Manager's application process) and was then rated as 'Outstanding', pages 144 – 154. Ofsted also made a strong recommendation when providing their feedback that the Agency covered a far too large geographical area and that it would be better to re-structure the service with two or more Agencies covering the area.
14. Given the highly regulated environment the Respondents operate, all the Respondent's Fostering Agencies are subject to regular Internal Reviews, which are scheduled by the Respondent's Audit Team in accordance with their own Risk Management Criteria which will take into account practices such as staff turnover, notification as to regulation and the number of unplanned ending of fostering arrangements. These Reviews will also take place more frequently when an Agency is due an Ofsted Inspection to allow the Respondent to identify and address any issues within the Agency.
15. Ofsted typically inspect Fostering Agencies every three years or so and the London and South East Agency was therefore due to be inspected during 2021. However, Ofsted had suspended inspections during Covid and inspection frequency was somewhat delayed, although that Agency was certainly due one at some stage in the future.
16. In or around September and October 2020, the Respondent's Audit Team conducted a Fostering Review of the service at NFA London.
17. The purpose of the Internal Review was to make findings and recommendations in relation to the performance and effectiveness of the Agency. That Review revealed a number of potentially serious concerns and findings across a number of areas including Risk Management and Safeguarding (pages 168 – 179).
18. The shortfalls identified by that Review were deemed serious enough for the Respondents to commence a Performance Board (a Formal

Improvement Plan) for the London and South East Agency. That Performance Board remained in place until June 2021. The process was instigated to raise standards within the London and South East Service. It was the Service and not the Claimant personally that was subject to an Improvement Plan, although the Claimant as Registered Manager would have been responsible for managing and implementing the required improvements.

19. At the time Mr McCarthy was Registered Manager for Heath Farm, at which there had been a number of pre-existing issues with clients and Carer retention before he was appointed. It was never the subject of an Improvement Performance Board. In any event these were legacy issues and in fact performance had improved under Mr McCarthy's leadership as confirmed by Mr Christie in evidence.
20. In or around November 2020 the Claimant applied for the role of Regional Director. There were a number of applicants for this vacancy and after the Recruitment Team had performed an initial sifting, thirteen candidates including the Claimant were put through to the first interview stage, as was Mr McCarthy.
21. Mr Christie, Vicky Hale and Helen Gardner formed the Recruitment Panel for this role. At this first interview stage candidates were assessed and the scores were based on responses they provided to a number of performance / experience based questions.
22. The Claimant was interviewed for the Regional Director role on 20 November 2020, the notes for that interview are at pages 180 -197.
23. On the basis of the Claimant's responses to the Interview Panel's questions, she was not progressed to the next stage of the recruitment process. Mr McCarthy did progress to the second stage of the interview process. It is important to note at this stage that Mr McCarthy was white Asian. However, ultimately Mr McCarthy was not successful and did not progress to the final stage of the recruitment process.
24. Following each of the applicants' interviews Mrs Gardner arranged a meeting with them to provide an overview of the Panel's feedback and at that stage they were told whether they were going to progress to the second stage. During the Claimant's feedback session she was informed that whilst her application was very detailed, during the interview she did not provide sufficient levels of detail regarding how she made things happen with real examples. It was clear to the Interview Panel that the Claimant had underestimated the full extent of what was required for the role of Regional Director and that the Claimant did not have the requisite level of leadership skills required for that role. In that feedback session Mrs Gardner made it very clear to the Claimant, as was also made clear to Mr McCarthy, if they wanted to discuss the next steps in their career development they should both contact Mr Christie. That would have been mentioned to any candidate who did not progress or was not successful.

25. It is clear the emphasis is on the individual to progress a Development Plan and make contact with Mr Christie.. It is not for the Managing Director to chase individual candidates to discuss Development Plans. The onus clearly must be on individuals to approach Mr Christie to discuss their personal objective where they see themselves going in the organisation. This is a standard practice within the Respondent's organisation and would be the case in other organisations.
26. Mr McCarthy did contact Mr Christie for more detailed feedback and what he needed to develop in reaching a standard for a Regional Director's role. It was agreed, having met with Mr Christie that Mr McCarthy would be given additional roles within the organisation to broaden his experience and undertake some HR Investigation and other company wide projects, which he did. It is clear that the Claimant did not approach Mr Christie to arrange a more detailed discussion about feedback following the interview and the way forward in her career.
27. In January 2021, the organisation was going through a recruitment freeze, largely as a result of the Covid pandemic. This policy was applied and was communicated to all Registered Managers including the Claimant. However, following a number of departures from the Claimant's Region and her submission of a Business Case, Mr Christie agreed to override the recruitment freeze so she could recruit to fill a number of vacancies in her Agency, (pages 207, 208, 212, 215, 220, 240, 246 and 247). In the end the Claimant was permitted to recruit fifteen members of staff during a period of the recruitment freeze. This is an example of how the Claimant was supported, not only by the organisation but particularly by Mr Christie. Indeed this was further supported on the arrival of Mr Flanagan in discussions with the Claimant and the progress of the Improvement Plan NFA London in which he agreed additional resources to support the Claimant's Agency. Indeed, Mr Flanagan worked closely with the Claimant to support her management workload and achieve the requirements of the Performance Board.
28. It was in or around June 2021 the Performance Board successfully concluded the London and South East Agency and the Claimant was written to by Mr Flanagan confirming the outcome, page 252.
29. Mr Flanagan, having joined the organisation in February / March 2021 as the new Regional Director, was specifically delegated by Mr Christie to support the Improvement Plan to bring about a speedy conclusion to bring that Agency up to standard.
30. Mr Flanagan met with the Claimant on 10 March 2021 to formally agree the parameters and timescales for the Improvement Performance Board and the support that would be put in place. It was agreed that additional training and resources would be provided as necessary.
31. As previously mentioned, the London and South East Region was the largest Agency and covered a wide geographical area. Given Ofsted's

previous recommendation to split the Registration into a number of smaller Agencies, around June 2021 Mr Christie made the decision to implement that recommendation. Mr Christie tasked Mr Flanagan with the implementation of splitting the Region.

32. As a result of the above, Mr Flanagan had conversations with the Claimant in the planning stages to explain that if the split was implemented she would be on board with it and that her job title and responsibilities would remain the same and that salary and bonuses would not be affected. There was no proposal to reduce staff or their terms and conditions. Originally the Claimant and the Practice Manager confirmed that they thought the proposal was beneficial and the right way forward. Subsequently wider staff were engaged. However, the Claimant did express the view that the re-structure felt like a demotion and around June she had indicated to Mr Flanagan she was thinking about leaving the Respondents. However, she had indicated to Mr Flanagan she would support the re-structure and leave in a planned and managed way. At the same time she asked if an Exit Package could be put together for her.
33. Mr Flanagan relayed the Claimant's views and plans to Mr Christie who at the time indicated he was not opposed to offering a package if the Claimant could be persuaded to remain in the business until December 2021, which would allow a smooth transition for the re-structure.
34. Mr Christie then authorised an Exit Package based on a payment in lieu of notice, together with a sum equal to what the Claimant would have received had she been made redundant and that offer was put forward on that basis. It was further agreed a bonus if the Claimant saw the Agency through any further Ofsted Inspection and maintained the outstanding rating. This was notwithstanding the fact that at no time the Claimant's post was redundant. In error, the offer was originally made that the payment in lieu of notice would be tax free, however, HR rightly confirmed that this was not the case and tax would have to be deducted.
35. Whilst the settlement discussions were ongoing with the Claimant, Mr Christie and Mr Flanagan discussed trialling the introduction of a new role of Assistant Regional Director reporting to Mr Flanagan. In early to mid August, Mr Flanagan created a proposal document recording how this new trial role would sit within the existing structure and job description, pages 514 – 515.
36. It was then decided by Mr Christie to second Mr McCarthy from the Heath Farm Agency to trial this new role. At this stage the Claimant had indicated to the Respondents she was still planning to leave in December 2021, although a settlement agreement had not been concluded. Nevertheless the Claimant had given no indication that her planned departure was in question. It is apparent that part of the Exit discussion, the Claimant had informed Mr Flanagan on a number of occasions that she wished to take a break in order to consider her career and further was planning to visit her Mother in Nigeria for an extended period.

37. The final proposal (at page 512), namely the details of the arrangements that would be put in place for the secondment and how Mr McCarthy's responsibilities at Heath Farm would be back filled during the trial.
38. Mr Christie subsequently made the Claimant aware in early September that the organisation was considering introducing an Assistant Regional Director role and offered the Claimant the opportunity to take a paid sabbatical for three months so that she could take a break and pursue her travel plans and then return to the organisation. This was discussed on 8 September 2021.
39. On 9 September 2021, Mr Christie sent an email to staff, particularly direct reports including the Claimant, about the announcement of trialling the Assistant Regional Director role to which Mr McCarthy had been seconded to. The email confirmed that any permanent role would be subject to an open recruitment process (pages 279 – 280).
40. Around the same time, 9 September 2021, the Claimant emailed Mr Christie, copied to Mr Flanagan to confirm that following discussions she had considered all aspects and decided to proceed with her original plan to leave the business. At this stage the Claimant did not challenge the decision to second Mr McCarthy to the trial role, only indicating she wanted a better Exit Package (page 293).
41. Mr Christie responded confirming that there was no room to increase the Exit / Sabbatical Package (page 293).
42. The Claimant subsequently raised a Grievance on 18 September 2021 (page 297). The crux of the Claimant's Grievance was that she did not get a Development Plan following her unsuccessful application for the role of Regional Director in 2020. In addition she expressed concern over the Exit Package and a further allegation as a black woman she had been discriminated against.
43. The Grievance was clearly thoroughly investigated by Mrs Platt and the outcome of that Grievance was communicated to the Claimant on 2 November 2021.
44. The Claimant subsequently appealed given the outcome was not in the Claimant's favour and that Appeal again was thoroughly investigated by an independent Consultant and again, the Appeal was not in the Claimant's favour.
45. In the meantime the Claimant had an extended period of annual leave in December 2021. At this stage the Claimant and the Respondent had been unable to reach an agreement in respect of the Exit Package, so there clearly was some uncertainty as to whether the Claimant intended to work beyond 31 December 2021, or decided to remain at the Respondents. Mr Flanagan sought to clarify this with her and the Claimant's response was she was unable to give a definitive answer whilst the Grievance Appeal

process was ongoing. It was agreed the Respondents would put in place cover for December and assume the Claimant would return.

46. On 3 January 2022, the Claimant emailed Ms Walberg indicating she had been taken ill over the Bank Holiday and would not be in work that week (page 412). Mr Flanagan responds on 6 January 2022 to say he was sorry to hear she had been unwell and requested a catch up call from a welfare perspective, particularly whether she needed any support.
47. The Claimant responded saying she was not able to have a welfare catch up at the present time but hopefully would be, in another week and requested that the welfare check be via email (page 421).
48. Ms Walberg responded on 7 January 2022 noting the Claimant's request and agreed that Mr Flanagan would liaise via email the following week. Ms Walberg goes on to request consent to write to the Claimant's GP so they could understand the Claimant's illness and what adjustments if any were required to support the Claimant.
49. The Claimant's response, again on 7 January 2022, indicating that she had disclosed her condition in the Health Questionnaire prior to her taking up the employment and therefore in her view it was unnecessary to obtain a report from her GP. At that stage there was no indication as to when the Claimant would return.
50. It is accepted that Mr Flanagan informed the Claimant's Team, around 27 January 2022, that the Claimant had some long term health issues but did not provide any further information. The reason for that was the Claimant had been off for a period of extended leave and then was signed off sick and it was not clear when the Claimant was going to return. Mr Flanagan therefore felt it was reasonable to provide some limited information to the Claimant's Team to clarify the situation in order to allay concerns and avoid speculation.
51. Given the Claimant's role as Registered Manager which carries important statutory duties, the Respondents were required to notify Ofsted of the Claimant's absence and ensure proper cover for the role. The trigger was 28 days, given that the Claimant had extended leave in December and absence in January, the decision was made and in order to comply with the Regulations decided to engage a Barbara Ennis, Interim Registered Manager, to cover the Claimant's role until the Claimant was well enough to return. The Interim Manager's contract allowed for the contract to be terminated on one week's notice. This was notified to all staff on 26 January 2022 (page 455).
52. The Claimant, without any further warning or notice, resigns on 1 February 2022.



53. In the meantime the Claimant's contract provided 10 days full pay in any 12 months and thereafter the employee would revert to statutory sick pay, depending on their position within the organisation.
54. If an employee put forward a case for the Respondents to exercise a discretion to extend contractual sick pay, in other words full pay rather than statutory sick pay, this would be looked at by the Respondents and as appropriate a decision would be made. However, the emphasis was on the employee to make a case to their Line Manager for the Respondents to exercise their discretion to go beyond the contractual provisions.
55. There was then some correspondence passing between the Respondents and the Claimant's Solicitors. The Claimants Solicitors put forward what the Respondents considered was a totally unreasonable offer and they were in their rights to reject it. Thereafter there was no attempts by the Claimant, or her Solicitors, to apply for a waiver of the restrictive covenant contained in the Claimant's contract regarding working for competitors or poaching clients of the Respondents. Had there been, there would have been negotiations by the Respondents usually Mr Christie, depending on where the person was going as to whether or not that restrictive covenant would be waived.
56. Every employee was notified at the end of their employment by a standard letter from HR reminding them of their duty to comply with the covenance.

## **The Law**

### Direct Discrimination

57. Section 13 of the Equality Act 2010 provides as follows:

13. Direct Discrimination

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

58. There are two matters for the Tribunal to consider before a claim of direct sex or race discrimination can succeed:

- 58.1. the comparison of the less favourable treatment of the Claimant;  
and

- 58.2. because of her sex or race.

59. In relation to the statutory comparator s.23 of the Equality Act 2010 provides,

23. Comparison by reference to circumstances

- (1) On a comparison of cases for the purposes of s.13 there must be no material difference between the circumstances relating to each case.

60. The treatment of which the Claimant complains is not inherently because of sex or race.
61. The second issue for the Tribunal is the reason why the Respondents took the decisions it did. This will inevitably require an enquiry into the mental processes, conscious or unconscious, of the relevant decision makers.
62. Therefore less favourable treatment will be because of sex or race if the fact that the Claimant was a woman, or black, or Nigerian that had a significant influence (in the sense of material or more than trivial) on the mind of the decision makers when taking the relevant decision.

Burden of Proof

63. Section 136 of the Equality Act 2010 provides,

136. Burden of Proof

- (1) ...
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) has contravened the Equality Act 2010, the tribunal must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

64. In summary, the Claimant must establish a prima facie case that she was unfavourably treated and that the reason why she was treated in that way was because of her sex or race, in order for the burden of proof to shift.

Constructive Dismissal

65. The first point to make is the burden of proof is on the Claimant. The Claimant must prove that she terminated the contract under which she was employed (with or without notice) in circumstances in which she was entitled to terminate it without notice by reason of the Respondent's conduct, s.95(1)(c) Employment Rights Act 1996.
66. Therefore in order to prove constructive dismissal, the Claimant must establish that:
  - 66.1. there was a fundamental breach of contract on the part of the employer;

- 66.2. the employer's breach caused the employee to resign; and
- 66.3. the employee did not delay too long before resigning thus affirming the contract losing the right to claim constructive dismissal.
67. The hurdle facing a Claimant is a high hurdle to overcome, as Lord Denning then Master of the Rolls put it in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27, CA:

“An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

To amount to a breach of the implied term of trust and confidence, misconduct on the part of an employer must be so serious as to amount to constructive dismissal entitling the employee to leave immediately without notice on discovering it. The test is whether that conduct is such that the employee cannot reasonably be expected to tolerate it a moment longer after discovering it and can walk out of his job without prior notice.

Not every action by an employer which can properly give rise to a complaint by an employee amounts to a breach of trust and confidence. The conduct must be repudiatory, it must demonstrate objectively by its behaviour that it is abandoning altogether refusing to perform the contract.

The breach of trust and confidence may be established by a succession of events ending with the last straw, the effect of which may be considered cumulatively.”

## **Conclusions – sex and / or race**

### November 2020 – the non-provision of a Development Plan for the Claimant

68. It is the case that the Tribunal can make clear findings of fact as to the reason why the Claimant was not provided with a Development Plan and therefore it would be unnecessary to deal with statutory comparators and / or the shifting of the burden of proof.
69. The reason why the Claimant was not provided with a Development Plan after the November 2020 Regional Director interviews, is set out in Helen Gardner's Witness Statement at paragraphs 8 – 10 and Mr Christie's Witness Statement at paragraph 26. It was quite simply because she did not contact Mr Christie and book herself into the diary for a detailed

feedback and discussion about development. It had nothing to do with the fact that she was a woman, that she was black or that she was Nigerian.

70. Therefore that claim fails at the first hurdle.

August / September 2021 – the secondment of Mr McCarthy to the trial Assistant Regional Director role

71. It was clearly Mr Christie's decision to create the trial role and to second Mr McCarthy into it. The reason for the creation of the trial role within the Respondent's organisation is: Mr Flanagan managed a group of eight Fostering Agencies in London and the South East Region, the Claimant was the Registered Manager in respect of a single Agency in Mr Flanagan's group, NFA London and South East Region, so when the Respondents decided to split the NFA London and South East Region into three Agencies it was plain this would lead to an excessive number of Regional Managers reporting into Mr Flanagan. This would in turn leave him with an unmanageable span of control. Therefore the reason for the split is dealt with in Mr Christie's Supplemental Witness Statement at paragraph 3 and is clearly corroborated in the announcement at the time at page 503. Furthermore, the creation of such a role would have assisted with the development for internal candidates ultimately seeking promotion.
72. Mr Christie therefore decided to trial the role thereby creating a cluster of a number of Agencies in Mr Flanagan's Region and second an existing Regional Manager to them as a trial Assistant Regional Director into whom those four would report, therefore reducing the number of direct reports to Mr Flanagan. It would be Heath Farm, Next Steps, Safe Houses and Ryan Care (page 503). They were clearly able Agencies and suitable for a trial new role. The trial group clearly needed to be easy to manage because the seconded Assistant Regional Director would retain their Registered Manager's status within their own Agency and take on the additional Assistant Regional Director's responsibilities. Because it was a seconded role there also needed to be available temporary back fill staff to assist in managing the Agency for which the trial Assistant Regional Director was the Registered Manager.
73. The Claimant's Agency was not included in the trial because it was a large Agency with a relatively recent history of going through a Performance Improvement Board with ongoing issues of staff retention. It was going through a change process of being split into three separate Agencies, the process of change would be difficult to manage. This being a fact accepted by the Claimant. It also required new Registrations with Ofsted, the more it required the division and transfer of Carers between Agencies and it needed a Registered Manager to be hands on. It would take six to nine months to complete at the time the secondment was being considered. It was therefore important that an experienced Regional Director, not a trial Assistant Regional Director, retain direct oversight of this Agency.

74. Mr McCarthy was the obvious candidate for the trial secondment because the sub-division of the Agencies included the Agency for which he was Registered Manager. The Agency for which he was Registered Manager was performing well which reflected well on his personal performance. Mr McCarthy was therefore well placed to remain Registered Manager while carrying out the Assistant Regional Director's role on the trial basis. There was also appropriate back fill staff available to fill in.
75. The Claimant was therefore not seconded to the trial because her Agency was not part of the trial cluster. She was not the natural candidate for secondment because it would not have been feasible for her to remain as Registered Manager of an Agency outside the cluster and manage the cluster and / or replace her as Regional Manager of the London and South East Region for a trial period in a state of flux of her Region, plus the process of Registering new individuals as Registered Managers with Ofsted. Furthermore, her Agency had recently been on a long Performance Improvement Board process which reflected poorly on her performance. It clearly had ongoing problems with staff retention and was undergoing a period of re-structuring.
76. The Claimant was also in the middle of discussions about the terms of her Exit from the Respondents at the time the decision to second Mr McCarthy was taken. The relevant month in which the decision was taken was in August 2021, there is clear evidence of a planning document in August 2021 and at the time the Claimant was in discussions about Exit from the Respondent's organisation.
77. Mr McCarthy was therefore seconded to the trial Assistant Regional Director's role for clear, good, objective commercial reasons and the Claimant's sex or race played absolutely no part in that decision.
78. This claim therefore fails at the first stage.

January 2022 – non-payment of full pay during sickness absence

79. In January 2022 the Claimant was absent by reason of illness against the backdrop of uncertainty as to whether she was going to return to work or go ahead with her decision to leave the Respondent. She repeated at the Grievance Hearing that she no longer had faith in the Respondent, she did not want to stay there and she wanted to move on. The fact that she was almost hedging her bets by not responding to Mr Flanagan's reasonable email to ascertain what the Claimant's position was (page 350). The Respondents were very much in the dark as to what the Claimant was going to do ultimately.
80. The written contract for the Claimant as a Registered Manager stated she would be entitled to ten days absence in any one year on full contractual pay.

81. It is clear it is open to any employee personally, or through their Line Manager, to make a case for an additional payment, a discretionary payment over and above their contractual entitlement. Clearly, if such a case is not made out then an employee will be paid at their contractual rate. Quite clearly the Claimant's own Witnesses support the fact that the emphasis is on the individual employee to make a case, either personally or to their Line Manager, i.e. that other than be paid statutory sick pay when their contractual entitlement runs out, they should be paid full pay. It is clear on the evidence that the Claimant did not ask Mr Flanagan, Ms Walberg, or indeed anyone else for her contractual entitlement to be extended beyond ten days. Therefore, when the January pay roll was processed, the Claimant's pay was paid in accordance with her contractual entitlement.
82. In the circumstances the Claimant has not established any facts from which the absence of an explanation the Tribunal could properly conclude that she was not paid full sick pay, but paid statutory sick pay after ten days because of her sex or race.
83. That claim clearly fails.

February 2022 – failure to respond to a request to be released from restrictive covenant

84. The Respondent's standard approach is to remind employees of their restrictive covenants on termination of their employment (pages 535 and 541). It is the approach they adopted with the Claimant (pages 466 and 473). The Claimant sought to be released from some of her restrictive covenances as part of her 'without prejudice' offer. The Respondent's Solicitors, as they are entitled to do, responded and rejected that offer (page 530). The Claimant's firm of Solicitors did not revert to the Respondents or their Solicitors to specifically request, notwithstanding the financial settlement could not be agreed, that she be released from her restrictive covenances.
85. Quite clearly the Claimant has not shown the Respondents failed to respond to a request that she be released from her restrictive covenances.
86. In the circumstances the Claimant has not established facts on which the complaint is based. Even if she could, she has not established facts which would lead the Tribunal to properly conclude that the refusal (which there was not) was because of the Claimant's sex or race.
87. That claim clearly fails.

**Conclusions – constructive dismissal**

88. The question arises, was the Claimant dismissed as a result of conduct calculated to or likely to destroy or seriously damage trust and confidence, and acted in a way that amounted to a repudiatory conduct.

89. It is correct in a constructive dismissal case there is a very high bar set in respect of conduct which can be seen as calculated or likely to destroy or seriously damage trust and confidence between employer and employee which is then said to be repudiatory, indicating that the employer no longer intends to be bound by the contract.
90. The Claimant puts her dismissal case on the basis that the Respondent discriminated against her in the first three allegations set out above and in addition the further four set out in the List of Issues provided at the outset of this Hearing.
91. The Tribunal, repeats its conclusion in relation to the first three complaints of discrimination in the Claimant's constructive dismissal claim.
92. In respect of the other matter as follows:

Mr Flanagan's welfare check, appointment of Interim Manager and an email re: the Claimant's absence

93. In relation to the welfare checks, the Claimant had been absent against the backdrop of a great deal of uncertainty as to whether the Claimant would ever return to work. She had failed to reply to Mr Flanagan's email trying to ascertain the Claimant's position.
94. When the Claimant informed the Respondents in January 2022 following her extended leave, that she would be absent because of illness, Mr Flanagan sent her good wishes in the email and expressing he was sorry to hear she was ill and simply requested a welfare catch up to see how she was and whether she needed any support in returning to work (page 691).
95. The fact that the Claimant seems to accept in cross examination that it was a reasonable request.
96. When the Claimant requested email and telephone contact rather than Teams, Mr Flanagan accepted that request (pages 433, 443, 450 and 451).
97. The Respondents / Mr Flanagan's conduct and indeed Ms Walberg's in seeking to have conversations with the Claimant about her absence and whether she needed any support when she returned, were clearly reasonable and in context.
98. The Respondent were not trying to investigate whether the Claimant was in fact ill, they were merely welfare checks and to see if she needed anything. That conduct was clearly not unreasonable and does not come anywhere near being a breach of the implied term of trust and confidence.
99. In relation to the Respondent's appointment of an Interim Manager, again the Claimant had been absent on annual leave from 3 December 2021 to

4 January 2022. She was then absent by reason of illness from 4 January 2022 and had a Fit Note that stated she would be unfit for work until 6 February 2022. This being a minimum period of illness in excess of four weeks without adding on the annual leave period. The Claimant had said in a welfare discussion on 20 January 2022 she did not know when she would be fit to return and indeed in one email on 24 January 2022 she indicated she was going to hospital for tests.

100. The Respondents were in a difficult position. Given the regulatory requirements of Ofsted they needed to notify them that their Registered Manager was absent for more than 28 days and given the importance of the Claimant's role, it was entirely reasonable and appropriate for Mr Flanagan to appoint an Interim Manager the week commencing 31 January 2022. This appointment was on an interim basis which was made clear from the start and the contract for the Interim Manager was terminable on one week's notice (page 255).
101. That was entirely reasonable and proper in the circumstances.
102. As to the Respondents advising the Claimant's Team that she would be absent due to a long standing health issue which had flared up causing her to be unable to work (page 455), given the fact the Claimant had been absent from the Respondent due to leave and ill health for two months and the need to appoint an Interim Manager, the Respondent / Mr Flanagan needed to avoid speculation and allay concern within the Claimant's Team by giving some information about the Claimant's continued absence. Mr Flanagan did not say what the condition was and it was therefore important to share some information with the Claimant's Team that the reason for absence was illness and nothing else. Clearly there was nothing unreasonable about the intention behind the announcement.
103. It clearly was not a breach of the Claimant's contract in any fundamental way which could lead an individual to resign.
104. Dealing with Ms Walberg's request to contact the Claimant's GP, the purpose of this was to understand the Claimant's condition and to ascertain what adjustments, if necessary, would be required on the Claimant's return to work, if indeed she did. Ms Walberg was not sure the Respondent's formally knew that the Claimant's illness was Sickle Cell disease and the Respondent's Attendance Policy does allow the Respondents to obtain medical information where appropriate. When the Claimant refused consent, the matter was not pressed any further.
105. Clearly, looking at the Claimant's allegations for constructive dismissal, when viewed objectively we simply get nowhere near discharging the burden of proving that she was constructively dismissed because the Respondent in a fundamental way breached the Claimant's contract particularly the implied term of trust and confidence.



106. The Respondent's actions were for good reason, for good cause and were not designed in any way to seriously damage or undermine the trust and confidence between the employer and the employee. The Claim for constructive dismissal fails.

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Employment Judge Postle

Date: 20 November 2024

Sent to the parties on: 28/11/2024

N Gotecha

For the Tribunal Office.

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