



EMPLOYMENT TRIBUNALS

Claimant: Mr D Ali

Respondent: Mitie Ltd

Heard at: London Central Employment Tribunal in public by CVP

On: 25, 26, 27, 28, 29, April 2022 / 3 May 2022 (4 May 2022 in chambers)

Before: Employment Judge Adkin
Ms O. Stennett
Mr S. Godecharle

Appearances

For the Claimant: represented himself
For the Respondent: Ms T Hand, counsel

JUDGMENT

1. All of the following claims are dismissed:
 - 1.1. Constructive unfair dismissal (section 94 Employment Rights Act 1996 “ERA”);
 - 1.2. Constructive discriminatory dismissal (section 39(2)(c) Equality Act 2010 (“EA”));
 - 1.3. Constructive wrongful dismissal i.e. claim for notice pay;
 - 1.4. Direct religious and/or disability discrimination (section 13 EA)
 - 1.5. Victimisation (section 27 EA);
 - 1.6. Discrimination arising from disability (section 15 EA);
 - 1.7. Claim for redundancy payment (section 136 ERA).

Background

2. The Respondent is a facilities management company. The Claimant was employed by the Respondent as a security officer from 14 October 2011. He resigned on 16 February 2021, giving one month's notice. His employment ended on 15 March 2021.
3. The Claimant engaged in the ACAS early conciliation process from 8-9 April 2021. He presented two claim forms to the Tribunal on 7 May 2021 (claim number 2203510/2021) and 8 May 2021 (claim number 2202097/2021). The Claimant had two different, but similar, written documents attached to his claim forms.

Procedure

4. The entire hearing with the parties took place by video link (CVP), which in the main performed reasonably well. There were several glitches where someone "dropped out" for a minute or two, but these were quickly resolved.
5. This hearing took place by video (CVP). The content of the hearing was interpreted into Urdu by an interpreter Mr Naz Hussain, save for a few points on which Mr Ali decided to express himself with English.
6. The Tribunal took a slightly longer lunch break on the Friday during the course of the hearing to allow Mr Ali time to make it to his Mosque to attend Friday prayers.

Evidence

7. The Tribunal received:
 - 7.1. An 'updated bundle' of 217 pages. Pages numbers above 173 were added during the course of the hearing on the application of both sides at various stages.
 - 7.2. Witness statement from the Claimant and from the Respondent's witnesses: Mr Tunde Funmilayo, Ms Ayrevier Ayre and Mr Peter Rumbold.
 - 7.3. Oral evidence.

8. The Tribunal did not refuse either side's applications to admit new evidence, even as far as considering a new document during the course of the Claimant's submissions
9. The Tribunal panel deliberated in person in Victory House.

FINDINGS OF FACT

History

10. On 14 October 2011 the Claimant commenced employed as a Security Officer at the Respondent's Mangroup premises in London
11. At times material to this claim, the Claimant worked the night shift commencing at 19:00 - 07:00 on a shift pattern of four days on four days off.
12. At sometime in 2018 Mr Tunde Funmilayo was promoted. At one stage the two men had the same role but Mr Funmilayo was promoted first to Supervisor then to Manager. The Claimant says that his attitude changed. Both men agree that their relationship deteriorated following Mr Funmilayo's promotion.

Medical condition

13. Also in around 2018 the Claimant says that he began to suffer from a urological condition caused by an enlarged prostate (benign prostatic hyperplasia). The fact of the Claimant suffering from this condition is not disputed by the Respondent, but whether this is a disability and knowledge of it by the Respondent at the material time was in dispute.
14. For reasons set out below, the Tribunal found this is was a disability at the times material to the claims brought.

Overtime

15. On 21 December 2018 Mr Funmilayo sent the whole security team at the site, including the Claimant, available overtime [175].
16. Three days later the Claimant sent an email from a generic "securityriverbank" email address an email, copied to his personal yahoo email address headed 'Over Time' as follows:

"As per your email dated 21 Dec regarding overtime for month of January 2019. Can you please allocate me allocate me 22nd and 29th January night shift. Kind regards, Dilshad Ali

17. On 7 February 2019 the Claimant wrote from his personal yahoo account to Mr Funmilayo an email "Over time":

Hi Tunde,

We received your email in month of December regarding overtime for month of January first time. Our team became beneficiary of your that email and everyone picked some overtime. But we didn't receive your email in month of January regarding February overtime, although overtime was available in month of February. Our Line Manager Xiever is very clear about overtime. This is team right not favour. I believe you will publish available overtime in future .

Many Regard

Dilshad Ali

18. It was Mr Funmilayo's oral evidence in response to this letter that it was not clear from this letter that Mr Ali wanted overtime. We consider that it is fairly clear that the Claimant is writing on behalf of himself and others expressly to request clear communication about and access to overtime
19. Although overtime allocation were supposed to be captured on a large wall planner in Mr Funmilayo's office, we find that this system had fallen into disuse and Mr Funmilayo's desk planner or diary was were he capture who was doing overtime. Mr Funmilayo's evidence was that security officers could request overtime in any way, whether orally, by email, WhatsApp. Another method of allocating overtime was agreeing among security officers themselves who would cover for an individual on annual leave. We can see that Mr Funmilayo using a diary rather than a wall planner was less helpful and made the system seem opaque from the Claimant's perspective.
20. The Claimant contended that Mr Funmilayo was deliberately using a work email which the latter knew that the former had a problem accessing. We did not find based on the evidence that we had heard that this was a deliberate ploy by Mr Funmilayo. The only evidence we have received that the latter was informed that the Claimant was having difficulty with the Respondent's IT system came in October 2019, i.e. some eight months later than the letter above. There is no evidence to support a conclusion that in early 2019 Mr Funmilayo was deliberately using a means of communication which he knew would not be effective for the Claimant.
21. The Claimant found that the system was opaque and he was unable to see what overtime was available. The system was from his perspective unsatisfactory. He had a poor relationship with Mr Funmilayo generally by this stage, which made it harder to make a request for overtime face to face

and we find that the Claimant became suspicious about the way that overtime was allocated.

22. Mr Funmilayo's oral evidence was that he gave overtime to those that requested it and that the Claimant did not request overtime for the period 9-10 months before the submission of a grievance in February 2020, i.e. from approximately April 2019 onward.

Annual leave requests

23. On 1 August 2019 security officer Mr Augustine Igwubor requested annual leave for the period 23 September 2019 to 4 October 2019. Mr Funmilayo told Ms Igwubor that this clashed with someone's request, and therefore he should submit a different request. The original request was then cancelled, and a new request submitted on 7 August 2019 [122].
24. On 6 August 2019 the Claimant requested annual leave for a period of 4 weeks in October 2019. This was in order for him to go overseas for medical treatment which would be too costly to undergo on a private basis in the UK. This request was refused based on the Respondent's annual leave policy of trying, generally, to avoid multiple security officers being off at the same time.
25. The Claimant suggests that this was a breach of the first come first serve policy for annual leave, on the basis that his request of 6 August 2019 had been made before Mr Igwubor's request made on 7 August 2019. That interpretation however ignores Mr Funmilayo's explanation that the request of 7 August was an alteration of Mr Igwubor's request already made. We accept Mr Funmilayo's explanation, and consider that this did not amount to a breach of a first-come first-served principle.
26. By an email dated 4 October 2019 the Claimant complained about his holiday request being declined twice although it was "important for me". The email stated:

"You declined my holiday request twice this year although that was very important for me and my supervisor was also agree about my holiday dates. You stated that day security Officer booked holidays in same time, due to that clash you declined my holidays. Although that clash was not relevant because I do only nights.

In above scenario I am confuse about my holiday because I haven't any clue which days you have available for me.

If you don't mind can you tell me please which days I can book my holidays. I want to avoid any upcoming stress regarding my holidays and don't want to see any refusal again. I hope you will understand situation.

Pleas notify me available days as soon as possible via my personal email address because I haven't access my work email due to technical IT reasons. "

27. There is no mention in this email about a medical reason. In his closing submissions the Claimant admitted that he did not show the doctor's letter on which this application was based to Mr Funmilayo. We find that the Claimant did not make it clear at all to Mr Funmilayo that there was a medical reason for requesting leave at this particular time.
28. The Tribunal accepts the evidence of Mr Funmilayo that the Claimant did not at any stage explain to him that this request for annual leave was for medical reasons, nor did he show him any documentation.

20 December 2019 incident

29. On 20 December 2019 there was an incident shortly before the end of the Claimant's shift involving intoxicated member of the public, which was handled by the Claimant and Tunde Funmilayo and others, which Mr Funmilayo says he subsequently used as a training exercise for all officers (which the Claimant did not attend).
30. At 09:19 Mr Funmilayo provided a short incident report in fairly bland and summary terms for the benefit of the Respondent's client, in which he describes an inebriated male walking in at 06:58, being escorted out and, a report being made to the police using 999 and the incident ending by 07:22. This document was not included in the original bundle and was added in late in the hearing.
31. The short incident report did not capture the detail that the drunken male was evicted before re-gaining entry, a point which
32. Later on 20 December 2019 a "training exercise" took place.
33. The Claimant was not at work, but understood based on subsequent conversations with colleagues, including Muhammad Ali (50):

"After this incident Mr Funmilayo, I learned, showed Closed Circuit Television (CCTV) footage to every staff member by calling them into the control room. In doing so he was laughing at me and been stepping back because I was Muslim and therefore had an aversion to alcohol. He also stated that I was ill and therefore weak."

(This version was submitted to the Tribunal in October 2021).

34. Ramon Taiwo's witness statement dated 20 April 2021 was not called as a witness, statement annexed to the Grounds of Complaint. This was not included in the bundle by the Respondent initially. The Tribunal can only place

a limited weight on this statement since Mr Taiwo has not been subject to cross examination. We have had to look at the evidence on this incident, of which this is one piece. We have no basis to accept the suggestion put forward on behalf of the Respondent that this was not a bone fide statement signed by Mr Taiwo. That would amount to accepting an allegation of fraud or forgery of which we do not have compelling evidence.

35. On Mr Taiwo's account dated 20 April 2021, Mr Funmilayo:

"showed me a video clip regarding an incident that happened at 07am, early morning. He played a video in forwarding mode and laughed at it, to humiliate Dilshad Ali about his act at the time of the incident. When he was playing the video and laughing, he said do you know why Dilshad Ali is running away from the drunk person? It is because he is Muslim and doesn't want to touch a drunk person and he has no courage and strength to handle trespasser because Dilshad Ali is ill and physically not strong.

...

I pointed out to Tunde at the time that it's not good to humiliate and laugh at Dilshad Ali, and I told him why did you bring religion and his health problem? As he played video in forwarding mode it looked funny to me."

36. In cross examination, Mr Funmilayo rejected this version of events. He suggested that Mr Taiwo was motivated by his dismissal for gross misconduct. We have not received any evidence in support of that contention.
37. Some of the central elements of the Claimant's account are not in dispute.
38. Mr Funmilayo's own account was:

"When I was viewing the CCTV footage with the team on the night shift I made some suggestions for the team to use as talking points, one of those comments was to open up to the team why the Claimant might have stepped back. Suggestions were made as to perhaps a religious reason or a medical reason. This was said amongst a lot of talk about considering a situation fully when assessing, it was not said in a derogatory or less favourable manner or meant in such a way. The team and I engaged in dialogue about what they observed and how to act differently, if needed. At no time was the sessions purpose to undermined or humiliate the Claimant. I did not pass any comments about the Claimant's performance or make suggestions that would cause him to feel upset. It was at all times meant as a helpful training session. I instructed the same

comments and dialogue to be discussed with the Claimant, at his next shift so that he received the same training."

39. Mr Funmilayo's witness statement is not specific about who was that made the suggestions about the religious reason or the medical reason. On the balance of probabilities we find that it was Mr Funmilayo who put forward these talking points.
40. In the grievance outcome dated 9 November 2020 Ms Xavier Ayre's finding "He asked a question to the team could the reasons for you [i.e. the Claimant] standing back when the male approached you have been because of a religion?" Although it is clear that this allegation was made as part of the grievance from the points summarised in the grievance outcome letter, there is no finding in the grievance outcome as to whether the Claimant's health condition was discussed.
41. In the grievance appeal outcome letter dated 2.2.21 Mr Rumbold concluded that the following question was asked of all the team, including during a separate private session between supervisor Mohammed Jallow and the Claimant:

"Do you think religious beliefs could be a contributory factor and what impact could this have"

42. Again in the grievance appeal outcome there is no reference to health.

Conclusions on training exercise

43. The Tribunal accepts that the motivation for discussing the CCTV footage with members of staff was "lessons to be learned". Given the reference to religious belief, paraphrased in the grievance appeal outcome, we find that something like that was said. We find that the reference to health was in similar terms i.e. whether health might have been a contributing factor and what impact it might have had.
44. We have concluded that it was likely, based on Mr Taiwo's statement and also what the Claimant subsequently heard from colleagues that some degree of amusement was caused by watching the footage in fast forward mode. We find that the Claimant, who was not present when the footage was viewed by colleagues became embarrassed given that he felt that his actions were being regarded with amusement by those watching the footage. We find that he felt that he was being talked about behind his back. That was a natural reaction and made worse by the fact that his relationship with Mr Funmilayo was by this stage not particularly good.

Discussion with Claimant/appraisal document

45. On or around 23 December 2019 Mohammed Jallow the Claimant's Supervisor discussed the learning points and training following the incident on 22 December 2019 with the Claimant. The Claimant during the course of this hearing has maintained that Mr Funmilayo was present throughout that discussion. This contrasts with what he said at the grievance hearing on 28 August 2020 when he said this:

"When I came back from my last shift, Tunde was there in the control room and I think he was waiting for me to ask some questions and clarified that it was not about religion or my health, he then discussed with Muhammad Jallow in the meeting room for over an hour, then they both came back to the control room and when Tunde left, Muhammad Jallow told me about what they discussed and he showed me the video footage that Tunde was questioning which was in forwarding mode. Then after that, he wanted me to write my appraisal and state that the incident was not due to my fitness."

46. We have come to the conclusion that the Claimant assumed that Mr Jallow was acting on Mr Funmilayo's instructions.
47. We find that the Claimant overstates it when he alleges that he was "forced" to deny that his religion or health had a bearing on the way that he conducted himself in this incident. We do however accept that because he had been asked about those matters he felt that he should set the record straight when he wrote about the incident in his appraisal document at [Pg 96-99 of the bundle].
48. In that document the Claimant wrote:

"I want to explain the incident dated 20-12-2019 @ 06.59 to 07:15 during which I was aggressively approach by intoxicated man. I was concerned about his ill intention why I found it necessary to avoid direct conflict. I would therefore wish to expand my professional approach thus seeking to complete the following Mitie courses recommended by site manager Tunde 1 - Communicating under pressure 2 – dealing with conflict 3 - Communicating with emotional intelligence.

My approach to the giving [given] scenario did not have anything to do with religious believes not health issues. This was purely due to my safety concerns". (sic) [99]

February 2020 sick absence

49. On 11 February 2020 the Claimant was signed off by his GP with stress at work for the period of 11-25 February 2020.

Grievance

50. On 12 February 2020 the Claimant submitted a written grievance in relation to "discrimination, harassment, bull[y]ing, unprofessionalism" by Mr Funmilayo, specifically with regard to
51. the incident on 22 December 19 and Mr Funmilayo showing members of the team the video of these circumstances by reference to religion and/or the fact that he might be sick;
52. allocation of overtime [not said to relate to a protected characteristic];
53. an allegation of discrimination relation to an attempt made by the Claimant to move a holiday booking from September 2019 to October 2019 so that he could attend a urologist appointment in Pakistan.
54. There was a period of delay. Very little happened with regard to the grievance until 21 August 2020 when Ms Xavier Ayre was appointed to investigate the Claimant's grievance and sent a letter to invite the Claimant to a grievance hearing.
55. The Tribunal takes account of the fact that in March 2020 the UK went into the first of the national lockdowns in response to the Covid-19 pandemic. In our experience many organisations at this time experienced delays in internal processes such as grievances at this time for understandable reasons, given the number of people working from home and prioritisation of matters relating to the pandemic. The delay however in this case was quite substantial, over six months. The Tribunal considers that at the very least the Respondent could and should have updated the Claimant that there were delays.

Grievance hearing

56. On 28 August 2020 a grievance hearing took place, chaired by Ms Ayre and with Courtney Hetherington as note taker.
57. On 30 September 2020 Mr Funmilayo says that overtime request made by him declined by the Claimant. Mr Ali points out that this was the same Mr Funmilayo this is the same day as he was interviewed in the grievance process.

October 2020 holiday request

58. On 8 October 2020 the Claimant submitted a request for holiday on 3 November 2020. This request was rejected on 12 October 2020 on the basis that there was "insufficient holiday cover on site"

59. On 26 October 2020 "stress at work" recorded in the Claimant's GP record [202].

Complaint regarding holiday request

60. On 27 October 2020 in an email from the Claimant to Ms Ayre he complained that attempted to book one day holiday on 8 October 2020 for 3 November 2020 for "very important commitment". Again this was not said to be a medical matter. The Claimant wrote [183]:

"I am getting mentally torture from Tunde constantly under the shadow of company.

I would like to bring to your notice the unpleasant attitude of the site manager Mr Tunde. He doesn't have any courtesies while interacting/talking to with me. Most of the time he show rude behave and motion. This is creating very unhealthy working environment and grave concerns for me and most of the times he threats by saying "I will sack you".

This creates very humiliating and stressful situation for me. My family life is also disturbing due to this mental torture and stress. I almost became psycho and peak of stress at the moment."

61. It is clear to the Tribunal that the relationship between the two men was quite acrimonious and that the Claimant found this period stressful. Mr Funmilayo's response to being asked about his alleged threats to the Claimant was to allege that the Claimant himself had made threatening comments to him. This is not something that appeared in his witness statement.

Grievance outcome

62. On 9 November 2020 a grievance outcome letter was sent to the Claimant, which did not uphold any of the Claimant's grievance grounds [151- 152].

Further application for annual leave

63. On 13 November 2020 the Claimant made an application for a period of annual leave for the period 3 - 6 March 2021. This application was still pending on 1 January 2021
64. Mr Funmilayo failed to process this either to confirm it or reject it. We have not seen any evidence of a communication from him to the Claimant, acknowledging the request.
65. The explanation in his oral evidence was that Christmas was a busy time of year, and that security guards frequently sought to take leave in March which was just before the end of the annual leave year, and for this reason he had

delayed dealing with the application. This explanation is unsatisfactory for a couple of reasons. 13 November is early for Christmas to be a reason for not processing or at least acknowledging the request. The Respondent's policy is said to be a first come first served in respect of annual leave. It is not entirely clear therefore why Mr Funmilayo needed to wait.

Grievance appeal

66. On 15 November 2020 the Claimant appealed the grievance outcome on the basis that Mr Ayre was not impartial and did not investigate certain allegations. He was invited by letter to an appeal meeting.
67. The Tribunal has not received the letter or email of appeal as part of the bundle of documents the grounds of appeal are however summarised in the grievance appeal outcome letter [153] as follows:
 - 67.1. 1. Failure to investigate the facts impartially;
 - 67.2. 2. Use of Religious beliefs to ridicule the Claimant;
 - 67.3. 3. Discrimination and unfair treatment when booking annual leave.

Grievance appeal hearing

68. On 1 December 2020 a grievance appeal hearing took place, chaired by Peter Rumbold.
69. On 12 January 2021 the Claimant sent an email to Mr Rumbold, to chase an outcome. He wrote:

"I am waiting for my grievance appeal outcome. This grievance has been pending for almost a year. Tunde was aware of my grievance immediately after I filed and his attitude became more worse with me during this pending process. I told to Ms Ayrevier about his worse, humiliated attitude with me on phone conversation when she asked me. Can you move me somewhere at least until you finish your investigation??.

Can you please tell me when you will complete your investigation??"

70. The Respondent has relied upon a limited amount of overlap in shift timings between the two men, and did not move either of them. We note that the Claimant's immediate interactions with the management chain would be with Mr Jallow who was his supervisor.

71. Mr Funmilayo gave evidence that although his core hours were during the daytime he varied his start and end time so as to overlap with different parts of the shift. There would have been some overlap on some days at the beginning and end of the Claimant's shifts.
72. On 29 January 2021 Mr Rumbold replied to the email of 12 January 2021, apologising and explaining that he had been ill. He stated that "It was believed that it was better to fully investigate matters and delay the outcome result rather than provide a potentially inaccurate response quickly."

Appeal outcome letter

73. On 2 February 2021 an appeal outcome letter sent to the Claimant, which did not uphold any of the Claimant's appeal grounds [162 – 168].
74. In respect of the training exercise which took place in the Claimant's absence on the day of the drunken intruder incident 22 December 2019, Mr Rumbold concluded the following:

As the incident had not been dealt with effectively and professionally Tunde Funmilayo used the incident as a training exercise for all of the officers on the dayshift that day, as you had left for home due to being on nightshift you were not involved in this training session, Mohamed Jallow (Supervisor) went through the learning points / training with you on your next nightshift.

As part of this learning and improvement in client service several questions were asked of all the team such as:

"What lessons can we learn from this"

"Why do you think officers backed away from the intruder"

"How could we have managed the situation better"

"Do we think the man was under the influence of drugs or alcohol"

"Do we think he was a terrorist and how should we deal with him"

"Do you think religious beliefs could be a contributory factor and what impact could this have"

These were the questions that were raised both in the group training session and with yourself by Mohamed Jallow, therefore these were not directed specifically at yourself, they formed part of the overall learning points in an attempt to equip all team members with the skills to deal with such an event in the future, there was no criticism of any one person, the incident was purely used as a collective "toolbox talk" to improve the service to the client in the future."

75. The Tribunal accepts Mr Rumbold's finding reflects what occurred on 22 December in respect of the "talking points" including religious belief. Additionally we find that "a medical reason" was another talking point suggested by Mr Funmilayo. He admits as much at paragraph 9 of his witness statement.

Resignation

76. On 16 February 2021 the Claimant submitted his resignation via email to Mr Rumbold providing one months' notice. The email read as follows:

"Hi Peter,

Please consider this email as a my resignation due to unfair treatment from company in my matter. I am giving you a month notice. I shall not be available for work after 15th March 2021. The reason of resignation is mentioned below.

1- I have serious reservations/concerns about my grievance and appeal outcome and way of company investigation.

2- The appeal outcome is the final decision of my grievance as per your outcome letter.

3- I strongly believe I was discriminated, harassed, bullied and ridiculed several times.

4- I shall invite to a Judicial fact finder to probe the matter as a impartial institution

5- I am annual holiday at the moment and coming back to work on 3rd March 2021.

6- I am working 8 nights until resignation date 15th of March.

It's my humble request to you please stop Tunde Funmilayo during my shift in work place because I have threat from him. If he come during my shift I shall walk out from site. I hope you will consider my request due to security purpose.

It's my humble request to you please stop Tunde Funmilayo during my shift in work place because I have threat from him. If he come during my shift I shall walk out from site. I hope you will consider my request due to security purpose." [169 – 171]

77. On 15 March 2021 the Claimant's employment came to an end.

Legal proceedings

78. On 8 April 2021 ACAS Early Conciliation period began. It ended on 9 April 2021.
79. The Claimant submitted a claim on 7 May 2021.

Mr Funmilayo's religion

80. One hotly contested point of dispute between the parties arose after the Respondent's witness Mr Funmilayo swore on the Koran for his evidence. He gave evidence to the effect that as a Muslim he had discussed mutual matters of interest to do with their shared religion with the Claimant. The Claimant was adamant that Mr Funmilayo was not Muslim and that they had never had these conversations. This was a somewhat surprising development. Surprisingly Mr Funmilayo did not address this in his written evidence, but it came out in his oral evidence.
81. Had a witness deliberately lied about their religion and sworn to tell the truth on a Holy book that was not meaningful to them, this would be of concern to a Tribunal. It seems to us however that Tribunal would require cogent evidence before making a finding in a public document that a witness did not practice the religion they claimed to practice. The Claimant is adamant that Mr Funmilayo is not Muslim. Mr Funmilayo is adamant that he is.
82. While this was a curious feature of the case, it was not one of the issues that we needed to resolve. It does not follow necessarily from Mr Funmilayo's own religion that he did not or could not directly discriminate or harass the Claimant who is a Muslim.

THE LAW

Constructive Unfair dismissal

83. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".
84. It is established law that (i) conduct giving rise to a constructive dismissal must involve a fundamental breach (or breaches) of contract by the employer; (ii) the breach(es) must be an effective cause of the employee's resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.

85. *Fundamental breach* - in this case the Claimant claims breach of the implied term that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer (*Malik v Bank of Credit and Commerce International SA* [1997] ICR 606, per Lord Steyn 621)). In these reasons the terms “serious breach”, “fundamental breach” and “repudiatory breach” are used interchangeably.
86. In considering the question of constructive dismissal the primary focus is on the employer’s conduct, not the employee’s reaction to it. In other words, what amounts to a serious breach is to be judged objectively not by the subjective view of the employee.
87. Merely unreasonable conduct is not sufficient to amount to a serious breach (*Bournemouth University Higher Education Corporation v Buckland* 2010 ICR 908 CA). *Buckland* made clear that attempts to make amends by an employer do not undo a fundamental breach and if an employee chooses to reject the offer to make amends and resign they can still do so. It is open to an innocent employee to waive or accept the breach such that the employee relation continues (per Sedley LJ).
88. It is irrelevant that the employer does not intend to damage this relationship, provided that the effect of the employer’s conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it (*Woods – v- Car Services (Peterborough) Limited* [1981] ICR 666).
89. It is not however enough to show that the employer has behaved unreasonably although “reasonableness is one of the tools in the employment tribunal’s factual analysis kit for deciding whether there has been a fundamental breach” (*Buckland*).
90. Even where the employer’s actions do amount to a repudiatory breach of contract, the employee can only claim constructive dismissal if his or her resignation was caused by the breach. Thus an employee who waits too long before resigning, or otherwise acts in such a way as to indicate that he or she would wish the contract to continue, will be taken to have waived the breach and affirmed the contract.

Equality Act 2010 claims

Discrimination

91. The Equality Act 2010 contains the following provisions:

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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act— ...

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

110 Liability of employees and agents

(1) A person (A) contravenes this section if—

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

92. We have considered the guidance set out in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, EAT, as approved and revised by the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* [2005] ICR 931, CA.

93. We have also considered *Nagarajan v London Regional Transport* [1999] IRLR 572, *Madarassy v Nomura International plc* [2007] IRLR 246 CA, *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. In *Hewage v Grampian Health Board* [2012] ICR 1054, SC in which Lord Hope endorsed the following guidance given by Underhill P in *Martin v Devonshires Solicitors* 2011 ICR 352, EAT:

“the burden of proof provisions in discrimination cases... are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent’s motivation... they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less

where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law'.

94. In *Glasgow City Council v Zafar* 1998 ICR 120, HL, Lord Browne-Wilkinson said that in the context of a discrimination claim 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'. It follows that mere unreasonableness may not be enough to found an inference of discrimination.

Harassment

95. In *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 the EAT (Underhill, P) emphasised both the subjective and objective elements of a claim of harassment under section 26. There is a minimum threshold and following guidance was given at paragraph 22:

"it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase"

CONCLUSIONS

96. The issues the Tribunal will decide are set out below.

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 9 January 2021 may not have been brought in time.

97. The claim was submitted on 7 May 2021.
98. It has been convenient to deal with various points about time in a single narrative.

99. The Claimant has not put forward any special circumstances in this case, such as his own incapacity, or discovering information about potential discrimination long time after the event, or being unaware of his right to pursue a claim in the Employment Tribunal.
100. We have considered that the Claimant did initiate a grievance process in February 2020, followed by a grievance appeal process which took approximately a year to resolve, which was in part due to the Covid-19 pandemic and associated lockdowns. The practical effect of this is that the Respondent was aware of the substance of the allegations during this time and have the opportunity to investigate them. The Tribunal is entitled to take account of the fact that a claimant is exhausting an internal grievance process as a reason to exercise the just and equitable discretion in their favour.

1.2.4.2 ... is it just and equitable in all the circumstances to extend time?

101. Taken account of the grievance and grievance appeal process above, we consider that it was just and equitable to extend time such as to consider the claim on its merits, as we have done below.

2. Unfair dismissal

2.1 Was the claimant dismissed?

2.1.1 Did the respondent do the following things:

Shirts

2.1.1.1 At the end of 2018, when the claimant requested four replacement shirts, did Mr Funmilayo shout at him?

102. This is an allegation that was raised for the first time significantly after it was alleged to have occurred.
103. We accept the Respondent's submission that this allegation lacked detail. It is unclear what Mr Funmilayo is alleged to have shouted and the context. We note that this matter was not raised as part of the grievance process in February 2020.
104. The burden of proof is on the Claimant. We do not find he has established this allegation on the balance of probabilities.

Overtime

2.1.1.2 In 2019, when the claimant requested overtime, did Mr Funmilayo ignore him and refuse all his requests?

105. While it is clear that the Claimant did make a request for available overtime to be set out in the same way as it had been set out for December 2018 by his email of February 2019, we do not have evidence of the Claimant making requests for overtime and of these requests being refused or ignored.

Holiday requests

2.1.1.3 Did Mr Funmilayo refuse the claimant's requests for holiday? Specifically:

2.1.1.3.1 In August 2019, did Mr Funmilayo refuse to change the claimant's holiday that had been booked for September 2019?

106. The Claimant says that he needed to change his holiday so that he could see a medical specialist abroad. He says that Mr Funmilayo refused to change the dates as he said there was no cover, but the Claimant knew there was plenty of cover available. The Claimant says that he also suggested to Mr Funmilayo that he could extend his booked holiday for another nine days. This was rejected by Mr Funmilayo as he said a one-month holiday was not allowed by the Respondent's policy.

107. We do not accept the Claimant's case that there was a clear breach of the "first come first served" policy. We find that page 116 shows that the Claimant was told that his holiday request made on 6 August 2019 for annual leave for the period 8 – 11 October 2019 had been declined due to another officer on site already being on holiday and that he should select another date and reapply.

108. We accept the Respondent's case that page 122 demonstrates that the Claimant's colleague Mr Augustine Igwubor made a request on 1 August 2019, pre-dating the Claimant's request. This was cancelled by Mr Igwubor in order that he could adjust the dates he was requesting from 23 September – 4 October 2019 to 30 September 2019 – 11 October 2019. Both sets of dates clashed with those requested by the Claimant.

2.1.1.3.2 The Claimant says that he asked Mr Funmilayo for holiday on 3 November 2020, as he had an appointment with his urologist, and Mr Funmilayo refused this request.

109. This was a request for a single day's leave, which was refused.

110. We accept Mr Funmilayo's evidence that he was not aware of the Claimant's medical condition otherwise he would have granted this request.

Removal of drunk intruder

2.1.1.4 On 22 December 2019 was the claimant made to help remove a drunk person from the offices when he only had one minute left on his shift and the security officer for the day shift was in the control office at the time?

111. The Claimant conceded that he was still on shift when this incident developed.
112. We do not find it was an unreasonable expectation for the Respondent to expect the Claimant to complete the removal of the intoxicated person even if it ran slightly over the end of his shift.

CCTV footage and aftermath of 22 December 2019 incident

2.1.1.5 Did Mr Funmilayo show CCTV footage of the December 2019 incident to every staff member?

113. A particular group namely all of the officers who were on the day shift after the shift on which the Claimant had been working were shown the video.
114. The Tribunal finds that there was amusement caused by the video footage watched in fast forward, but do not accept the Claimant's case that this was laughter particularly directed at the Claimant's protected characteristics.
115. The version put forward by the Claimant in the grievance (a little under two months after the incident) was that it was suggested that he might be sick. This version is 'second-hand' in the sense that it was based on things said to the Claimant by colleagues.
116. In the version of events suggested in the witness statement of Mr Taiwo, dated 20 April 2021 i.e. one year and four months after material incident, the word weak is not used, the phrase is "physically not strong".
117. By the time the claim was submitted in May 2021 the following month, the Claimant's allegation was that colleagues had been told "I was ill and therefore weak". Each one of these represents a slight evolution or change in the allegation as to what had been said. In fairness to the Claimant he was not present in the conversations on 22 December and was reliance on the accounts of others.
118. We find that a question was made about the state of health being a reason why a security guard may not have robustly confronted an intoxicated person. This is slightly different in emphasis to the allegation pursued in front of this tribunal that Mr Funmilayo said in terms that the Claimant was ill and therefore weak.
119. We accept the Respondent's evidence that this was an opportunity to learn lessons from a real incident and train the staff.

120. We do not find that this contributes to a breach of contract.

Comments in appraisal document

2.1.1.6 Four days after the alleged CCTV incident, did Mr Funmilayo and Mr Jallow (supervisor) make the claimant write in the respondent's training sheet that he had stepped back from the drunk person because of his religion and health issues? Did the claimant protest and say that he stepped back because of security, not because of his religion or health?

121. The list of issues was not formulated correctly, as we have clarified by looking at the claim form. The allegation is same as in the grievance, i.e. that the Claimant was forced to explain that it was not his religion or health but rather because of security.

122. Our finding is that the Claimant was not forced to provide this explanation, but rather that he should correct a possible misunderstanding. The language he used at the time "I want to explain the incident..." does not suggest to the Tribunal that there was coercion or that the Claimant felt at the time that he was being coerced.

123. We do not find that this contributes to a breach of contract.

Grievance

2.1.1.7 Did the respondent fail to carry out a reasonable and fair grievance process in respect of the claimant's grievance of 12 February 2019? The claimant says that the grievance process was unfair as the respondent only considered Mr Funmilayo's version of events. They did not listen to the claimant's account, look at his documents, consider the CCTV, or ask other witnesses;

124. The Claimant says that his holiday and overtime should have been checked as part of the grievance process. We find that Ms Ayre did check this as part of her investigation.

125. What the Tribunal has found difficult to understand is why the contemporaneous notes of interviews other than the one with the Claimant were not retained. Ms Ayre admitted in oral evidence that this was in breach of the Respondent's grievance policy.

126. The outcome letter dated 9 November 2020 makes reference to what Mr Funmilayo stated. We conclude that Ms Ayre must have spoken to Mr Funmilayo as part of her investigation. Beyond this, as she acknowledged in cross examination, it would appear there is no evidence that she spoke to anyone else.

127. In her witness statement she does not mention speaking to anyone other than Mr Funmilayo. She did not consider the CCTV. This in itself is not entirely

surprising given that the thrust of the grievance was about comments made subsequent to the incident rather than the incident itself.

128. We find on the balance of probabilities that Ms Ayre did not speak to anyone other than the Claimant and Mr Funmilayo.

2.1.1.8 Did the respondent fail to carry out a reasonable and fair process in respect of the claimant's appeal against the grievance outcome? Was the appeal outcome inadequate?

129. There is some evidence that Mr Rumbold did carry out more extensive interviews as part of the grievance appeal than had been carried out at the grievance stage contained in the grievance appeal outcome letter. It seems that he viewed CCTV, went to the building, interviewed Mohamed Ali (who was one of the interviewees suggested by the Claimant in the original grievance hearing), the grievance manager Ms Ayre and Mr Funmilayo.

130. Again, however, somewhat surprisingly no notes of the grievance appeal interviews other than the interview with the Claimant were retained. Mr Rumbold says that he placed the notes in the confidential waste in a red and black notebook. In response to the Tribunal's questions on this point he said that this is a learning point for the Respondent.

131. The grievance appeal outcome document captures Mr Rumbold's conclusion that religious beliefs had been referred to as part of a broader discussion about the way that the incident involving the intoxicated intruder had been managed. He did not deal with the other part of the Claimant's original complaint which was that his illness or health had been inappropriately referred to as part of the CCTV review with team members. We note that this is not one of the summarised grounds of appeal, suggesting that Mr Rumbold perhaps did not understand that this point was a particular concern to the Claimant at the time.

132. The allegation about annual leave was investigated in a reasonable degree of detail. Mr Rumbold also offered the Claimant future guidance on how to ensure that he understood what annual leave was available and how to volunteer for it.

133. The Tribunal finds that a more thorough job was done during the grievance appeal than had been done in the original grievance investigation. There are imperfections, however. Mr Rumbold addressed the issues that had been raised by the Claimant and reported back to him.

134. We do not consider that this in itself could amount to a serious breach of contract.

Alleged threat of dismissal

2.1.1.9 Did Mr Funmilayo's behaviour towards the claimant become worse after he raised the grievance and appeal? Did Mr Funmilayo state to the claimant that he would "get rid of him"?

135. It is unclear from the Claimant's witness statement where and when this was alleged to have been said. The principal evidence in support of the Claimant's case is a email dated 27 October 2020 sent by the Claimant to Ms Ayre which contains the line

"most of the times he threats by saying "I will sack you".

136. By implication this was a threat that the Claimant was trying to suggest that Mr Funmilayo had made repeatedly.

137. The Tribunal finds that, with the grievance still pending, it was an awkward working environment between the two men. The suggestion in the email dated 27 October that "most of the times he threat made by saying "I will sack you"" is very general and does not give a specific date or dates on which this occurred. We find it somewhat implausible that Mr Funmilayo was repeatedly making this remark, which would have been very threatening indeed and especially surprising with no basis for it.

138. We accept Mr Funmilayo's evidence to the Tribunal that he was particularly cautious around the Claimant because of the fact that there was a grievance pending. The impression we have is that he felt he was "walking on egg shells" around the Claimant rather than making threats toward him.

139. The Tribunal does accept that the Claimant suffered from workplace stress and that the situation was uncomfortable for both men at times. We take account of the fact that the contact between the two men would have been on the overlap between them working, given that the claimant worked nights and Mr Funmilayo worked the greater part of his shift during the day. Mr Funmilayo was one level of management removed from the Claimant with Mr Jallow the supervisor in between the two of them.

140. We do not find that the Claimant has made out conduct on behalf of Mr Funmilayo at that time that would amount to or contribute to a breach of contract.

Failure to consider transfer

2.1.1.10 Did the claimant write to Peter Rumbold on 12 January 2021 to request a transfer to a new site because of the stress caused by Mr Funmilayo? Did the respondent fail to respond, and did the respondent ignore, the claimant's request?

141. During his oral Mr Rumbold evidence he apologised unreservedly for the lack of immediate response to the Claimant's 12 January 2021 email.

"I know I missed that — I missed that email completely – I apologise profusely".

142. The Tribunal considers that, given the duration of the combined grievance and appeal and the fact that the Claimant had twice reported his concerns about the difficulty caused by the ending grievance/grievance appeal process, it would have been better had the Claimant been moved to another role way did not come into contact with Mr Funmilayo. This was a failing on the part of the Respondent as Mr Rumbold appropriately acknowledged.

Breach of implied term (trust & confidence)

2.1.2 If so, did that breach the implied term of trust and confidence? The Tribunal will need to decide:

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

143. There are criticisms that can be made of the Respondent and the way that the situation was managed between the Claimant and Mr Funmilayo, in particular the failure to consider moving one of the two of them or at the very least acknowledging the Claimant's concern.

144. We accept that the Claimant experienced an awkward and at times stressful situation during the period pending the resolution initially of the grievance and the grievance appeal. On the other hand we accept Mr Funmilayo's evidence that he was extremely cautious around the Claimant.

145. The Respondent was not bound to find in the Claimant's favour at the grievance or grievance appeal stages. We have not come to the conclusion that these matters viewed cumulatively amounted to a serious breach i.e. behaving in a way that was likely to destroy or seriously damage the trust and confidence between the Claimant and Respondent.

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

146. We have not needed to deal with this point.

2.1.3 If so, did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

147. We find that the Claimant's resignation was a response to the grievance appeal outcome which was not in his favour.

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

148. We do not find this is a case that could be characterised as the Claimant affirming the contract. He was plainly protesting about his treatment through the grievance and grievance appeal and then resigned shortly after the outcome of the of the latter.

2.2 If the claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract?

149. We do not find that the Claimant was dismissed.

2.3 The respondent says the reason was a substantial reason capable of justifying dismissal. If the respondent wants to make this argument at the final hearing, they have been ordered to explain the reason in their amended response.

150. We have not needed to deal with this point.

2.4 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

151. We have not needed to deal with this point.

3. Remedy for unfair dismissal

152. Given our finding that there was no dismissal, it is not been necessary to consider this heading.

4. Wrongful dismissal / Notice pay

4.1 What was the claimant's notice period?

153. The Claimant gave months notice and worked this period.

4.2 Was the claimant paid for that notice period?

154. On the claim for the Claimant did not tick that he was owed notice pay, nor is there a claim for notice pay under the heading Schedule of Loss at page 21 – 22 of the bundle.

155. The burden is on the Claimant to show that he did not receive payment for that notice period. We do not find that there was a failure to pay notice pay.

4.3 If not, what compensation is payable to the claimant for his notice pay?

156. There is no compensation payable under this head of claim.

DIRECT DISCRIMINATION (section 13 Equality Act 2010)

5. Disability

5.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

5.1.1 Did he have a physical impairment, namely a benign enlarged prostate?

157. That the Claimant suffered from a Benign prostatic hyperplasia is not disputed by the Respondent. They do however dispute that these amounts to a disability and that the Respondent had knowledge of it at the material time.

5.1.2 Did it have a substantial adverse effect on his ability to carry out day-to-day activities?

158. Nocturia nearly every hour was reported to the GP in a clinic on 17 January 2018 [192]. The Claimant commenced medication at this point, initially Tamulosin and then later on Vesomni. He was reported to be responding fairly well to the first medication in a clinic on 14 January 2019. By the time of a clinic on 27 October 2020 one the claimant was reporting nocturia x5. We have assumed that this means that he has had to interrupt his sleep five times, although the precise meaning is ambiguous given that he was a nightshift worker. The Claimant has not made any reference to being tired, although we infer that repeatedly interrupted sleep would leave him feeling tired.
159. As to the effects on day-to-day activities, in the Claimant's first impact statement dated 16 December 2021, the Claimant said that it made it difficult to walk and perform activities; it also meant that he had to take more rest breaks and toilet breaks. His comment is "this obviously makes working life difficult as was the case when I was working with the Respondent". Under the heading "effect of stopping medication or treatment" he has written "if I did not have the above tablets I would be going to the toilet even more frequently and I would be in a severe amount of pain." We take this to be a reference to the discomfort caused by urgency.
160. The Tribunal has struggled to really understand in what way it made it difficult for the Claimant to walk, and this is not supported by any evidence. As to activities, the Claimant has not identified particular activities, however we acknowledge that the repeated need to use the toilet would at the very least amount to an inconvenience.
161. We consider that this is a borderline case as to whether the adverse effect was substantial. We have reminded ourselves that, based on authority, a substantial adverse impact is defined as being more than trivial. Based on that definition, and considering the deduced effect (i.e. the effect of the condition without medication) we find that there was a substantial adverse effect on day-to-day activities.

5.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

162. The Claimant was on medication, namely Tamsulosin as evidenced by a letter dated 23 January 2019 and also on Vesomni as evidenced by a letter dated 17 April 2020.

5.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

163. The finding of the Tribunal is that the impairment would have had a substantial adverse effect on his ability to carry out day-to-day activities without the medication set out above

5.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

5.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

164. We find that the effects of the impairment were long time.

5.1.5.2 if not, were they likely to recur?

165. We find that the effects were likely to recur.

166. It follows from our considerations above that the Claimant was a disabled person at the material time.

6. Direct disability discrimination (Equality Act 2010 section 13)

6.1 Did the respondent do the following things:

6.1.1 Did Mr Funmilayo make a comment about the claimant stepping back from the drunk person during the December 2019 incident? Did Mr Funmilayo state that this was because the claimant was a Muslim and/or because he was ill and therefore weak?

167. We do not find the allegation is made out as alleged, in the sense that do not accept that Mr Funmilayo said in terms that the Claimant stepped back from the drunk intruder because he “was ill and therefore weak”

168. We do however accept the conclusion of Mr Rumbold in the grievance appeal that there was a discussion about the way that the situation was managed, led at Mr Funmilayo’s request in which at his request health and religion as possible causes were used as talking points.

6.1.2 Did Mr Funmilayo share the CCTV footage of the December 2019 incident with all staff members?

169. We find that the CCTV footage was shared on the day shift on the following day rather than all staff members.

6.1.3 Did the respondent fail to investigate these comments, or Mr Funmilayo's behaviour more generally, when the claimant raised this with the respondent?

170. There was a grievance investigation and grievance appeal investigation. We would not characterise this as a failure.

6.1.4 Did the respondent fail to stop Mr Funmilayo from abusing the claimant on a regular basis throughout 2020, after, and because the claimant had raised the grievance?

171. Our finding is that there was an uncomfortable atmosphere between the two men but this could not be characterised as "abuse".

6.1.5 Did the respondent tell the claimant that he could only raise one issue with the grievance investigation? Did this prevent the claimant from addressing all of the flaws with the grievance investigation?

172. The Claimant could not explain this allegation. We have treated this as not pursued.

6.1.6 Did the respondent fail to address the issues with the grievance procedure when the claimant raised them in his appeal?

173. We do not consider that this allegation has been made out.

6.1.7 Dismiss the claimant. Did the respondent force the claimant to resign, which constituted a constructive dismissal?

174. We did not find that the Claimant was dismissed, see the discussion above.

6.2 *Was that less favourable treatment?*

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

175. We have only dealt with those allegations that have been to some extent made out.
176. As to 6.1.1, we find that there was a broader discussion about possible causes for the Claimant stepping back which included the possibility that religion or health were factors. Dealing with what occurred and Mr Funmilayo's thought process at the time, in the context of a discussion about reasons why the Claimant acted as he did, we accept that he had introduced these factors by way of possible explanation as part of a broader discussion of other factors. Given this we do not find that this amounted to less favourable treatment. This is not a case in which the Claimant faced any disciplinary sanction arising from the incident on 20 December 2019, nor has this ever been suggested.
177. As 6.1.2 sharing of the CCTV footage, to the extent that this was made out, we do not find that this was less favourable treatment. The Claimant's actions were discussed as part of a review of the management of an intoxicated intruder in which Mr Funmilayo concerned by the team's response generally.
178. The remaining allegations 6.1.3 – 6.1.7 were not made out.

6.3 If so, was it because the claimant was disabled?

179. We have not found that there was less favourable treatment, but if we are wrong about that we have gone on in the alternative to consider causation i.e. was it because the Claimant was disabled?

Inference from absence of documentation

180. The Tribunal has considered carefully in this case whether if we had found less favourable treatment, it would have been appropriate for us to draw inferences from the surprising paucity of documentation produced by the Respondent in respect of the grievance and the grievance appeal processes, as commented upon above.
181. We accept the evidence of the grievance manager and grievance appeal managers that interview notes were destroyed at the time. It follows that these documents fell outside of the Respondent's possession or control when disclosure took place. It follows that there was not a failure to disclose these documents as part of the litigation process.

182. Having dealt with the question of whether these documents could have been disclosed as part of disclosure, we have taken a further step and considered whether we form the impression these documents were deliberately destroyed or suppressed in the relevant periods in late 2020/early 2021 because they contained evidence that the Respondent's managers considered was embarrassing regarding a potential claim of discrimination, in particular against Mr Funmilayo. We do not have any direct evidence that this was the case. Ms Ayre acknowledged that it was a breach of the Respondent's own procedure not to retain these documents. In the circumstances, given that this organisation has an HR function we do find it somewhat surprising that the notes were not kept.
183. We have had the benefit of hearing both Ms Ayre and Mr Rumbold gave evidence. In essence they seem to have taken the view that their outcome letters in each case encapsulated the key points. While this is not particularly satisfactory, we have not come to the conclusion that the notes were deliberately suppressed, but rather that they were destroyed for reasons of confidentiality.
184. Mr Rumbold described this as a learning point. Were he or Ms Ayre to find themselves giving evidence before an Employment Tribunal again, they may struggle to successfully persuade a different tribunal in a different case that their motivation for destroying documents as part of a grievance process should not lead to a negative inference. This is now on the public record.

'Because of' disability

185. As to 6.1.1 we do not find that this comment about stepping back from the drunk person was 'because' the Claimant was disabled. We accept the evidence of Mr Funmilayo that he was not aware at the material time that the Claimant was unwell.
186. As to 6.1.2 the reason for the review of the CCTV footage and the comments, we accept Mr Funmilayo's evidence that he was concerned that this incident had not been handled as well as it could have been, he needed for lessons to be learned and for the situation to be avoided again. He was mindful that the client might be critical of management of the incident. We accept that this was the reason why this footage was shared, not because of the Claimant's disability.
187. The remaining allegations were not made out.

7. Direct religious discrimination (Equality Act 2010 section 13)

7.1 The claimant is a Muslim. He relies on that protected characteristic for his claim.

7.2 Did the respondent do the things listed at paragraph 6.1 above?

188. As to 6.1.1 this is not established as alleged, but to the limited extent set out above.
189. As to 6.2.2 this is not established as alleged, but to the limited extent set out above.
190. The other allegations have not been established.

7.3 Was that less favourable treatment?

191. We have found above under 6.2 that this was not less favourable treatment.

7.4 If so, was it because the claimant is Muslim?

192. As to 6.1.1 it is not disputed by Mr Funmilayo that he was aware that the Claimant was Muslim. Indeed he contended in his oral evidence that he himself was Muslim and the two of them talked about their religion. As set out above, we have not resolved that surprising factual dispute. Given our finding that this was not less favourable treatment we have not needed to address whether the treatment was because the Claimant was Muslim.
193. As to 6.1.2 the reason for the review of the CCTV footage and the comments, we accept Mr Funmilayo's evidence that he was concerned that this incident had not been handled as well as it could have been, he needed for lessons to be learned and for a similar situation to be avoided in future. He was mindful that the client might be critical of management of the incident. We accept that this was the reason why this footage was shared, not because of the Claimant's religion.
194. The remaining allegations of direct religious discrimination were not made out.

8. Discrimination arising from disability (Equality Act 2010 section 15)

*8.1 Did the respondent treat the claimant unfavourably? The claimant relies on things at **paragraph 6.1** above. He also alleges that Mr Funmilayo made derogatory comments about the claimant's need to take regular toilet breaks.*

195. The Tribunal has struggled to understand precisely what the Claimant's case is on this allegation. It is not set out in his witness statement at all. It seemed to us in the interests of justice to deal with this allegation as far as we could establish it from other documents.

196. In a document entitled "Claimant's submissions" (48-56), described in the bundle index as "Particulars of Claim issued at Preliminary Hearing", dated 14 October 2021 the Claimant wrote as follows:

67. my enlarged prostate means that I have to use the toilet much more regularly than the average person.

68. My regular toilet breaks were not only noticeable but known to the respondent. It was for this reason Mr Funmilayo made the comment that he did regarding the incident in 2019.

197. This seems to be a reference to the comments made about health being a potential reason for the Claimant's conduct in the incident with the intoxicated man on 22 December 2019.

8.2 Did the claimant's need to have regular toilet breaks arise in consequence of the his disability?

198. The Claimant's need to have regular toilet breaks did arise in consequence of the his disability.

8.3 Was the unfavourable treatment because of the claimant's need to have regular toilet breaks?

199. The Claimant has not established this allegation. It was not put to Mr Funmilayo in cross examination. Leaving that technicality aside, the Tribunal does not find that there was any connection between Mr Funmilayo raising the question of health in the discussion on 22 December 2019 and the Claimant needing regular toilet breaks. We do not see the connection between confronting an intruder and the need to take more regular toilet breaks. We do not see that Mr Funmilayo make such a connection.

Justification section 15

8.4 Was the treatment a proportionate means of achieving a legitimate aim? If the respondent wishes to argue this defence, they have been ordered to set out the legitimate aim in their amended response. The Tribunal will decide in particular:

8.4.1 was the treatment an appropriate and reasonably necessary way to achieve those aims?

8.4.2 could something less discriminatory have been done instead?

200. We have not needed to deal with the Respondent's justification defence.

HARASSMENT

9. Harassment related to disability (Equality Act 2010 section 26)

9.1 *Did the respondent do the things listed at paragraph 6.1 above?*

201. These are dealt with above. Allegations 6.1.1 and 6.1.2 were made out in part.

9.2 *If so, was that unwanted conduct?*

202. Insofar as 6.1.1 & 6.1.2 of the allegations are made out above we accept that this was unwanted conduct. From the Claimant's perspective, speculation about his religion and health in the context of a discussion of alleged mismanagement of an intruder was not wanted.

9.3 *Did it relate to disability?*

203. Mr Funmilayo's evidence is "no time was I ever aware that the Claimant was unwell".

204. The Claimant disputed this point in his own oral evidence, but did not challenge Mr Funmilayo during Mr Funmilayo's oral evidence. There is no direct evidence that Mr Funmilayo was aware of the Claimant's disability. We have not seen for example occupational health report or a pattern of sick absence that would mean that Mr Funmilayo was likely to have been aware as a manager. We have formed the impression that the Claimant was motivated to keep quiet about his medical condition and we note that the two men's relationship had deteriorated from 2018 onward, which was around the time that the Claimant received the diagnosis of large prostate.

205. This has led us to the conclusion that the reference to health as a possible explanation for failing to challenge an intruder was raised in the abstract and not by reference to the Claimant's disability. There was nothing about the context of managing an intruder which suggested that the discussion about health related to the enlarged prostate specifically or even the need to take toilet breaks.

206. We find that the unwanted conduct was not related to the Claimant's disability.

207. It is not necessary for us to deal with other elements, but we have done so for completeness

9.4 *Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

208. We did not find that the unwanted conduct was deliberate i.e. done with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

9.5 If not, did it have that effect? The Tribunal will consider the claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

209. We find that the Claimant did feel embarrassed and humiliated as a result of his perception that the team were discussing a failure on his part as a security guard and, his belief that this was related in part to his disability.

210. For clarity we find that the Claimant had crucially misunderstood that the general discussion about health as a possible factor of the incident on 22 December 2019 related to his disability whereas in fact it did not.

10. Harassment related to religion (Equality Act 2010 section 26)

10.1 Did the respondent do the things listed at paragraph 6.1 above?

211. These are dealt with above. Allegations 6.1.1 and 6.1.2 were made out in part.

10.2 If so, was that unwanted conduct?

212. We find that there was some unwanted conduct as set out above with regard to 6.1.1 and 6.1.2. Unwanted in that there was a discussion about the Claimant's actions in the context of Mr Funmilayo's discussion about the fact that the matter was not as well handled as it might have been.

10.3 Did it relate to religion?

213. By contrast with the position with regard to the 'talking points' on the topic of health, which we find was in the abstract we find that religious belief could only be a reference in the case of the Claimant to him being Muslim, which was clearly known by Mr Funmilayo and, we infer, all of the team. The Claimant is a practising Muslim, was known to be so and this was a protected characteristic.

10.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

214. We find that the purpose was not intimidating, hostile, degrading, humiliating or offensive environment for the claimant, but rather an exploration of mitigating factors which might have explained the Claimant's conduct in managing the intoxicated person.

10.5 If not, did it have that effect? The Tribunal will consider the claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

215. We find that the Claimant did feel embarrassed and humiliated as a result of his perception that the team were discussing a failure on his part as a security guard in the context of his religious belief potentially being a contributory factor.

216. It seems to the Tribunal that this is a combination of both the conduct i.e. a question being raised about whether religious belief could be a contributory factor, but also the way that this had been represented to the Claimant. Colleagues had, on our finding somewhat misrepresented what had been said and how it had been said.

217. As to whether it was objectively reasonable, we have considered of the fact that this was a conversation about failings of the security team in managing the incident on 20 December 2019. The question of religious beliefs was brought into the matter as potentially a mitigating circumstance, i.e. because of an assumption that a Muslim would not want to touch a drunk person.

218. Considering "the other circumstances of the case", as we are required to do under section 26(4)(b) of the Equality Act 2010, we find that an element of misreporting from a number of the Claimant's colleagues to him is the cause of his embarrassment. We have reminded ourselves that following **Dhaliwal** the Employment Appeal Tribunal has provided guidance that it is important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.

219. We acknowledge that the Claimant felt embarrassed by the circumstances in which his conduct was discussed by colleagues in his absence.

220. We have considered carefully the nature of the unwanted conduct. We find that it was unfortunate that the Claimant's religion (and also the topic of his health) were raised as part of a group discussion, particularly in his absence. If either of these matters were relevant to understanding what had occurred these points matters should have been discussed with him privately. To raise or suggest raising religion and health as factors for a general discussion seems to the panel to have been unfortunate and something of a misjudgement on the part of Mr Funmilayo.

221. We have considered the context, which was an informal discussion trying to understand what had happened and not a disciplinary or even a precursor to a disciplinary. Ultimately we have come to the conclusion that the reference to religion was at worst at the level of an “unfortunate phrase” per Dhaliwal.
222. In the circumstances of this case we do not find it is appropriate to impose legal liability or to categorise this as harassment.

11. Victimisation (Equality Act 2010 section 27)

11.1 Did the claimant do a protected act as follows:

11.1.1 His grievance of 12 February 2019; and

223. In the grievance document the Claimant says more one occasion that he felt discriminated against. He refers to the medical problem that we have found to be a disability. We find that this was a protected act.

11.1.2 His appeal against the grievance outcome.

224. Based on the short summary of the appeal, which appears in the grievance appeal outcome letter dated 2 February 2021, we find that this was also a protected act.

11.2 Did the respondent do the following things:

11.2.1 Did Mr Funmilayo refuse the claimant’s request for holiday to attend a medical appointment with his consultant urologist on 3 November 2021?

225. The list of issues refers to a date in error in 2021, when it should be 2020.
226. The Claimant’s request for a holiday on 3 November 2020, which he submitted on 8 October 2020 was refused by Mr Funmilayo on 12 October 2022 gave the reason “insufficient holiday cover on-site”. There is no information given by the Claimant in the “notes to ops manager” section, nor was there any response from the employer in the “notes to employee” section. When the Claimant later complained about this refusal, which he did by email to Ms Ayre, in an email dated 27 October 2020, which was quite critical of Mr Funmilayo, he did not mention that the reason for his request was medical, but merely “very important commitment”.

227. In short we find that Mr Funmilayo did refuse the request for holiday, but do not find that he was aware that it was for a medical appointment. The allegation as alleged is not made out.

11.2.2 Did Mr Funmilayo tell the claimant that he would “get rid of him”?

228. This is dealt with above. We did not accept that the Claimant has made out this allegation.

229. This allegation lacks particulars, i.e. specifics about when this was said. The email dated 27 October 2020 – most of the times he threatens by “I will sack you”. As set out above the Tribunal found it implausible that this would be something that would be repeated in this way and we accept the evidence Mr Funmilayo that he was cautious around the Claimant, precisely because the latter had complained about him.

230. This allegation of detriment does not succeed.

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

231. The Tribunal accepts that allegation 11.2.1 (refusal of one-day holiday request) was potentially a detriment.

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

232. This allegation was not dealt with in Mr Funmilayo’s witness statement, but he did give oral evidence on this point. He told the Tribunal that he did not have information about the medical appointment, that there was an officer on holiday at the time and that there were some particular pressures on him. The pressures were the effects of Covid 19, the Respondent’s client site was cutting back, there was a redundancy of one of the night shift officers. He was concerned about falling below the SLA (service level agreement) provided by the Respondent to the client which he described in rather dramatic terms as being “like committing suicide”.

233. When he was asked by the Tribunal whether there was documentary evidence that someone else had already put in a holiday request, he confirmed that the bundle did not contain this document but immediately offered to search the system to identify the individual who had taken holiday.

234. Mr Funmilayo also told the Tribunal that if the Claimant had shown him medical evidence suggesting that he needed to attend an appointment, he would certainly have made arrangements to grant this leave.
235. The Tribunal accepts Mr Funmilayo's evidence, and do not find that the refusal of leave for this one day was in any way because of the protected acts.

12. Vicarious liability and section 109(4) Equality Act 2010

12.1 If Mr Funmilayo did the things alleged by the claimant, were they done in the course of his employment? The respondent says that they were not done in the course of his employment and the respondent is therefore not liable (responsible) for them.

236. We do not consider that the Respondent has made out that any of the actions by its employees fell outside of the course of their employment. We do not accept that the Respondent would not have been liability if the allegations of unlawful conduct made against the Respondent's employees had been successful.

12.2 Alternatively, the respondent seeks to rely on the defence in section 109(4) EA. Did the respondent take all reasonable steps to prevent Mr Funmilayo from doing that thing, or from doing anything of that description?

237. Again this is academic, but we do not find that the Respondent has made out a statutory defence. This would only however have been relevant had any of the claims potentially succeeded.

13. Remedy for discrimination or victimisation

238. It is not necessary for us to deal with these matter.

14. Redundancy payment (Employment Rights Act 1996 section 136)

14.1 The claimant says that his resignation was a constructive dismissal, and that the reason for his dismissal was redundancy.

239. The Claimant admitted in preliminaries during the hearing that there was no reduction in the number of people. We do not find that there was a redundancy situation.

Employment Judge Adkin

21 June 2022

Sent to the parties on:
21/06/2022

For the Tribunal
Office