EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Sylvia Bone	**v**	**West Hertfordshire Teaching Hospitals NHS Trust**

Heard at: Watford

On: 15-24 March 2022 & 26 April 2022. On 21 & 22 June 2022, 15 and 26 August 2022 (in chambers)

Before: Employment Judge Bedeau
Mrs A Brown
Mr C Surrey

Appearances

For the Claimant: Ms J Parkes, Paralegal
For the Respondent: Mr S Nicholls, Counsel

RESERVED JUDGMENT

1. The claims of victimisation under section 27 of the Equality Act 2020 'EqA') are not well-founded and are dismissed.

2. The claims of harassment under section 26 of the EqA are not well-founded and are dismissed.

3. The claims of direct race discrimination under section 13 of the EqA are not well-founded and are dismissed.

4. The claim of indirect disability discrimination under section 19 of the EqA is not well-founded and is dismissed.

5. The claims of discrimination arising in consequence disability under section 15 of the EqA are not well-founded and are dismissed.

6. The claims of failure to make reasonable adjustments under section 20 of the EqA are not well-founded and are dismissed.

7. The claim of constructive unfair dismissal is not well-founded and is dismissed.

REASONS

1. In her claim form presented to the Tribunal on 23 May 2020, the claimant made claims of: unfair dismissal; discrimination because of race and disability; other unspecified payments; breach of the data legislation; and breach of contract. She stated that she worked for the respondent from 7 November 2016 to 11 May 2020, as Clinical Lead MDAU/ANC.

2. In the response presented to the Tribunal on 30 June 2020, the claims are denied.

3. At the Preliminary Hearing held on 5 March 2021, before Employment Judge Quill, the claims and issues were clarified. The claimant pursues claims of constructive unfair dismissal; direct race discrimination; discrimination arising in consequence of disability; indirect disability discrimination; harassment related to race; harassment related to disability; victimisation, and failure to make reasonable adjustments.

The issues

4. Before us the parties agreed the final list of the claims and issues dispute covering 43 paragraphs over 10 pages. Below is the list as amended:

INTRODUCTION

1. By way of an ET Claim Form lodged on 23 May 2020, The Claimant brings claims of:

a.Constructive unfair dismissal under section 95(1)(c) of the Employment Rights Act 1996 ('ERA');
b. Victimisation under section 27 of the Equality Act 2020 'EqA');
c. Harassment under section 26 of the EqA;
d. Direct race discrimination under section 13 of the EqA;
e. Indirect disability discrimination under section 19 of the EqA;
f. Discrimination arising from disability under section 15 of the EqA;
g. Failure to make reasonable adjustments under section 20 of the EqA.

2. By way of an ET3 and Grounds of Resistance lodged on 30 June 2020, the Respondent resists these claims.

JURISDICTION
TIME LIMITS

3. Were each of the claimant's EqA complaints presented within the time limits set out in section 123 of the EqA?

a. Dealing with this issue may involve consideration of the subsidiary issues including;

i. When the treatment complaint about occurred;

ii. Whether there was an act and/or conduct extending over a period of time; and

iii. Whether time should be extended on a just and equitable" basis.

4. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 13 February 2020 is potentially out of time, so that the Tribunal may not have jurisdiction to deal with it, subject to consideration of the matters mentioned in the previous paragraph [GOR6].

The respondent abandons the argument set out at paragraph 7.3 on page 3 of the Tribunal Orders sent to the parties on 2 June 221 regarding the date of 23 February 2020.

CLAIMS

CONSTRUCTIVE UNFAIR DISMISSAL - section 95(1)(c) ERA

(There is no claim for breach of contract for damages for alleged loss of notice period)

5. Was the claimant dismissed? ie:

a. Was there a fundamental breach of the contract of employment ,and/or did the respondent breach the so-called "trust and confidence term", ie, did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and eh claimant (see paragraphs 6 and 7 below of the alleged breach of contract)?

b. Did the claimant affirm the contact of employment before resigning?

c. Did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation – it need not be the reason for the resignation)?

6. The express terms as per the claimant's contract of employment which the claimant relies on as having been breached, and the reason for alleging a fundamental breach of contract, are as follows:

a. *Failure to comply with Clause 16 "Flexibility") by changing the claimant's role without "appropriate consultation and discussion" with the claimant and their "nominated representative" in communications with Elaine Johnson (Maternity Matron, Hospital Inpatient Services) from 30 April to 7 May 2020* [POC 5.c,9, FBPs 3.b];

b. *Failure to comply with Clause 41 ("Grievances") by demoting the claimant from Clinical Lead as recrimination further to raising a grievance for victimisation, bullying harassment and discrimination on 3 Mach 2020* [POC 5.c, 9 & 10];

c. *Failure to comply with Clause 35, Paragraph 5 ("Code of Confidentiality") by nonfulfillment of the claimant's Subject Access Request by the time of her termination* [POC 12, FBPs 3.c];

and

d. Failure to comply with Clause 41 ("Grievances") by failing to investigate the claimant's complaint of race discrimination raised on 3 March 2020 [POC 8].

7. The conduct the claimant relies on as breaching the trust and confidence term is:

a. The conduct mentioned above at paragraph 6 that is alleged to breach express terms; and

b. *The conduct mentioned below at paragraph 33 that is alleged to be harassment* [POC 4].

8. If the claimant was dismissed:

a. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) ERA?

b. If so, was the dismissal fair or unfair in accordance with section 98(4) ERA?

c. In particular, did the respondent in all respects act within the so-called "band of reasonable responses"?

DISABILITY

9. The respondent accepts that the claimant was disabled within the meaning of section 6 of the EqA by reason of chronic bilateral knee problems from 26 August 2018, bilateral massive rotator cuff tears from 31 October 2018 and osteoarthritis of the knees from 5 December 2018.

DIRECT DISCRIMINATION BECAUSE OF RACE

10. The claimant asserts that she is black and of African origin.

11. Has the respondent subjected the claimant to the following treatment:

a.*Failed to investigate a complaint of race discrimination allegedly made on 3 March 2020 (or, in the alternative, failed to adequately investigate it)* [POC 8, FBPs 6.c(i)];

b. *Failed to investigate a complaint of harassment allegedly made on 3 March 2020 (on the purported grounds that it was out of time)* [POC 8.c, FBPs 6.c(ii)];

c. *Failed to involve (e.g by interviewing) Ms Lydia Gerrie and Ms Ane0Marie Shand in the investigation of the claimant's grievance of 3 March 2020* [POC8.c];

d. During the grievance meeting on 18 March 2020 and in a letter to the claimant dated 14 April 2020, accepted that there was a general workplace culture of bullying and harassment within the respondent's organisation but failed to investigate the claimant's complaint that she had been bullied or harassed because of race [POC 8.-d, FBPs 6.cIi)] *[For the avoidance of doubt, the respondent does not admit it accepted that there was a culture of bullying and harassment within its organisation];*

e. *Failed to support the claimant's professional development by non-attendance to Clause 14 Staff Development Review") in the employment contract. Specifically, the respondent failed to hold regular one-to-one meetings with the claimant* [POC 5.a, 12, FBPs 6.c.iii(a)];

f. *Failure to investigate (or, in the alternative, failed to adequately investigate) the claimant's complaint allegedly made on 3 March 2020 regarding promotion from Band 7 to Band 8 in accordance with Clause 13 ("Pay Progression") in the employment contract and/or Agenda for Change Guidelines* [POC 5.c, 8, FBPs 6.c.iii(f)[;

g. Failed to ensure that the claimant had equal access to training and promotion opportunities as compared with other maternity staff. Specifically:

i. *The respondent failed to provide the claimant with access to training opportunities, for example the Third Trimester Scanning course in about 2018-2019* [POC 5.a, FBPs 6.c.iii(b)];

iv. *The respondent failed to promote the claimant to Band 8A* [POC 11, FBPs 6.c.i.iv(g)(j)].

12. Was the treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

The claimant relies on the following comparators [BPs 6.c.iv[:

a. In respect of paragraph 11.a, the claimant relies on a hypothetical comparator, being a white colleague making such an allegation in the same workplace environment. The claimant asserts that in this hypothetical scenario, the complaint would be treated seriously and investigated.

b. In respect of paragraph 11.b, the claimant relies on a hypothetical comparator, being a white colleague making such an allegation in the same workplace. The claimant asserts that in this hypothetical scenario. The complaint would be treated seriously and investigated.

c. In respect of paragraph 11.c, the claimant relies on a hypothetical comparator, being a white colleague raising a grievance in the same workplace environment . The claimant asserts that n this hypnotical scenario, all relevant parties would be interviewed.

d. In respect of paragraph 11.d, the claimant relies on a hypothetical comparator, being a white colleague who is subjected to bullying or harassment because of race ad raises a complaint about it to the respondent. The claimant asserts that in this hypothetical scenario, the respondent would investigate and/or uphold the white employee's complaint.

e. In respect of paragraph 11.e, the claimant relies on the actual comparators of Ms Gerrie, Ms Shand, Ms Nora Lucey, and Ms Jenny Fake [as specified in FBPs 6.c.iv(b), (g) and (j)] who the claimant alleges are all white employees whose professional development resulted in promotions.

f. In respect of paragraph 11 f, the claimant relies on as hypothetical comparator, being a white colleague who raised a complaint to the respondent regarding promotion from Band 7 to Band 8. The claimant asserts that in this hypothetical scenario, the respondent would investigate he complaint and/or promote the white employee.

g. In respect of:

i. paragraph 11.g.i, the claimant relies on the actual comparator of Ms Nicola Wood as specified in FBPs 6.c.iii(b);

ii. paragraph 11.g.ii, the claimant relies on a hypnotical comparator, being a white colleague. The claimant asserts they would more likely be successful and if not would at least be provided with an explanation;

iii. paragraph 11.g.iii, the claimant relies on a hypothetical comparator, being a white colleague. The claimant asserts that they would more likely be successful and if not would at least be provided with an explanation.

iv. Paragraph 11.g.iv, the claimant relies on the actual comparators of Ms Shand, Ms Lucey and Ms Fake.

13. If so, was this because of the claimant's race and/or because of the protected characteristics of race more generally?

DISCRIMINATION ARISING FROM DISABILITY (section 15, EqA)

14. Did the following thing(s) arise in consequence of the claimant's disability?

a. *Temporary inability to perform her clinical duties in respect of performing vaginal examinations and palpitations on patients* [FBPs 7.a.ii]

15. Did the respondent treat the claimant as follows and, if so, was it unfavourable treatment:

a. *On 07 September 2018, Ms Lydia Gerrie (Matron, Line Manager) made a referral to Occupational Health (OH) with regard to the claimant's use of a special chair. Ms Gerrie insisted that an assessment was necessary to determine whether the costs for such a chair was justifiable. Ms Gerrie also stated that a previous assessment made recommendations of the claimant's use of the chair for her 'desk-bound job', despite that he claimant's role at the time required substantial seating times for computer-based booking procedures and updating of records. Even if seating was not required for the role itself, the claimant would have needed to be sit intermittently throughout the day given her disability*. [FBPs 7.a.i];

b. *Following a Manual Handling Assessment on 13 November 2018, Ms Gerrie removed the claimant from clinical duties, assigned her to telephone triage and suggested that she consider retirement on health grounds. The latter occurred prior to case conference scheduled for 9 January 2019 and in the absence of discussion around reasonable adjustments* [POC 6.d];

c. *Prior to the conference scheduled for 9 January 2019, Ms Gerrie emailed Dr Sterland a written enquiry regarding the claimant's fitness to practice as a Band 7 Midwife, of which the claimant was hitherto unaware* [POC 6 e-n];

d. *During a Long Term Sickness ("LTS") meeting on 10 January 2020, the claimant stated that she would eventually have the ability to access a woman both abdominally and vaginally once her shoulder had fully recovered. This comment was omitted from the meeting record. The record was amended by Rupi Virdee (Senior Employee Relations Advisor) on 10 February 2020 upon the claimant's request* [POC 6.i];

e. *The claimant had an Occupational Health ("OH") assessment prior to the LS meeting on 1 January 2020. After the LTS meeting, Ms Gerrie emailed OH on 10 January at 4:15pm on the same date requesting that prior to completing its report, OH should take into account the essential duties of the claimant's role as a Band 7 Midwife and registered*

midwife. Ms Gerrie stated, 'I am concerned to hear her account of the review that she is unfit to perform her role as a midwife', which is contrary to the claimant's account [(see last sub-paragraph) [POC 6.j];

f. Ms Gerrie's email of 10 January 020 was unnecessarily copied to various members of staff [POC7];

g. *Ms Gerrie's email of 10 January 2020 was sent to OH outside of the claimant's knowledge* [POC 6.f];

16. In relation to any such unfavourable treatment that is found to have occurred, did the respondent treat the claimant that way because of any of the things found to arise in consequence of the claimant's disability?

17. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

The respondent relies on the following as its legitimate aim. *To manage employee's sickness absence and provide accurate referrals of employees to OH, for support and management, with a view to adhering to the relevant standards and codes of conduct, ensuring patient health and safety maintaining a safe and productive working environment* [GOP 53].

18. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

INDIRECT DISABILITY DISCRIMINATION (section 19 EqA)

19. A "PCP" is a provision, criterion or practice. Id the respondent have the following PCP:

a. A requirement that staff be left to work on ANC/MDAU wards on their own with minimal or no staff [POC 6.b, FBPs 8]? For example, on 24 December 218, the claimant was working a 12-hour shift which was meant to end at 8:15pm. Between 6:20pm to the end of her shift, the claimant was the only member of staff on the ward, although the claimant avers that tis occurred frequently throughout her employment]

20. Did the respondent apply the PCP to the claimant at any relevant time?

21. Did the respondent apply (or would the respondent have applied) the PCP to persons with whom the claimant does not share the characteristics?

22. Did the application of the PCP at paragraph 19 put the claimant at a disadvantage?

The claimant avers that the PCP placed considerable strain on her physically, in light of her disability, resulting in severe exhaustion and pain. The claimant avers the application of the PCP therefore put her at the following disadvantages [FBPs 8.d];

a. The claimant struggled to be relived for basic entitled breaks, as was the case on 24 December 2018 when the claimant attempted to liaise with Triage to obtain a break on this shift but was unable to due to workplace demands.

b. The claimant was unable to request additional breaks as needed in view of her disability.

23. Did the PCP put disabled person at one or more of the particular disadvantages asserted above at paragraph 22 when compared with persons with whom the claimant does not share the characteristic?

24. Did the PCP put the claimant at that/those disadvantage(s) at any relevant time?

25. If so, has the respondent shown the PCP to be a proportionate means of achieving a legitimate aim?

The respondent relies on the following as its legitimate aim. *The business needs to allocate staff to wards in line with its policies and procedures, available staffing resources and business viability* [GOR 56].

REASONABLE ADJUSTMENTS sections 20 & 21 EqA)

26. Did the respondent not know and could not reasonably have been expected to know that the claimant was a disabled person.

27. Did the respondent have the following PCP:

a.*A requirement that persons permitted to use the Essential Car Park pay car parking charges*.

28. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

The claimant avers that the application of the PCP subjected her to the following substantial disadvantage. *The respondent provide the claimant an Essential Car Park permit in accordance w with OH recommendations. The claimant avers that the respondent placed her at a substantial disadvantage by requiring her to pay for this permit (in November 2016 and from January 2017 to March 2020 according to the claimant's Schedule of Loss dated 16 April 2021), which the claimant alleges was in breach of the Equality Act 2010 Section 20(7)* [POC 6.a]

29. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

30. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage?

The claimant avers that the respondent should have made the following reasonable adjustments: *Refunding her for the cost of the Essential Car Park permit* [POC 6.a, FBPs 9.b].

31. If so, would it have been reasonable for the respondent to take those steps at any relevant time?

32. In the alternative, is the respondent in breach of a duty to make reasonable adjustments by (a) allowing the claimant to use a particular car park as a reasonable adjustment but then (b) requiring her to make a financial contribution to the cost of that reasonable adjustment.

HARASSMENT RELATED TO PROTECTED CHARACTERISTICS (section 26, EqA)

(The "relevant protected characteristic" relied on in each case is as stated in the brackets after each item of alleged conduct)

33. Did the respondent engage in conduct as follows:

a. On 18 May 2017, was the claimant subjected to sarcasm and aggression from Anna Chapman (Band 6 Triage Midwife) further to questioning the advice Ms Chapman gave to an MDAY patient. Ms Chapman stated that she did not like the claimant's "tone" [POC 4.c, FBVPs 5.b.i], *(race)*

b. In 2018, the claimant was reprimanded by Ms Shand for seeing a patient at 18 weeks instead of 20 weeks (in accordance with standard protocol) where the patient was showing signs of pre-eclampsia and soon after diagnosed with the condition [POC 4,d, FBPs 5,b,ii]. *(race)*

c. On 13 March 2018, Teresa Bond (Band 6 Triage Midwife) verbally attacked the claimant in front of two members of staff and a patient because she considered a referral made by the claimant to be "inappropriate", threatened to write an incident report and accused the claimant of shouting at her first; the latter was later confirmed to be untrue [POC 4,e, FBPs 5,b,iii]. *(race)*

d. On 10 January 2019, in a meeting with Justine Chung (Labour Ward Matron) and Ms Shand, the claimant was verbally disciplined, told that she was disliked by fellow staff, that they did not want to work with the claimant and they did not like her "tone", without providing specific incidents to support the claims made [POC 4.f, FBPs 5.b.iv]. *(race)*

e.In around August 2019, Ms Gerrie denied the claimant's request for one week of annual leave prior to the claimant's shoulder surgery operation on 22 August 2019 [POC 4.g, FBPs 5.b.v] *(disability)*

f. In December 2019, Zowie Guminska (Band 7 Deputy Matron) told the claimant that the five weeks of annual leave the claimant intended to take from 25 November 2019 was not approved as it was not in line with the Trusts leave policy, a claim that was unfounded [POC 4.g, FBPs 5.b.iv]. *(disability)*

g. In January 2020, Ms Guminska told the claimant that she would be placed on unpaid leave from January because OH did not explicitly state the claimant was fit to work. [This is alleged to be a decision which Ms Guminska later reversed] [POC 4.h, FBPs 5.b.vii]. *(disability)*

h. *On 25 February 2020, in a meeting regarding electronic patient records a Band 6 midwife named Olivia Goldsmith was argumentative in response to the claimant's suggestions, requiring intervention from another staff member on the claimants behalf (Consultant Folasade Akhanoba)* [POC 4.i, FBPs 5.b.viii]. (race)

34. If so, was that conducted unwanted?

35. If so did it relate to the relevant protected characteristic"?

36. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct

to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

VICTIMISATION (section 27, EqA)

37. The claimant relies on the following protected act.

a.*A tribunal claim 3301919/2003 which alleged race discrimination (under the relevant legislation then in force) and was decided in 2004* [POC 1, 10, 11].

38. The respondent accepts that the above act at paragraph 37 is a protected act.

39. Did the respondent subject the claimant to any detriments as follows:

a.Demotion (claimant allege she was Clinical Lead but was told on 7 May 2020 that she was not Clinical Lead) [POC 5.c, 9];

b. Each of the same items of alleged conduct as appear under the heading harassment above at paragraph 33.

40. If so, was this because the claimant did the protected act and/or because the respondent believed that claimant had done the protected act as set out above at paragraph 37 [POC 1, 10, 11]?

REMEDY

Remedy for unfair dismissal

41. If the claimant was unfairly dismissed and the remedy is compensation:

a.If the dismissal was unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed and/or would have left the employment in time anyway (*Polkey*)?

b. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy of culpable conduct before the dismissal, pursuant to section 12(2)ERA, and if so, to what extent?

c. Did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent, and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to section 123(6) ERA?

Remedy for discrimination , harassment and/or victimisation

42. If the claimant succeeds in these claims, in whole or part, should she be awarded compensation and/or damages?

43. If so, how much should she be awarded?

The evidence

5. The claimant gave evidence but did not call any live witnesses. The witness statement by Mr Gbekeloluwa Olaleye Sanu, Consultant in Obstetrics and Gynaecology, was admitted into evidence.

6. On behalf of the respondent evidence was given by: Ms Olivia Nicole Goldsmith, Band 6 Midwife; Ms Justine Chung, Band 8A Labour Ward Matron; Ms Anna Ruth Chapman, Band 6 Triage/Ante-Natal Midwife; Ms Lydia Joy Charlotte Gerrie, Band 8A Maternity Matron In-Patient Services; Ms Teresa Bond, Band 7 Delivery Suite Midwife; Ms Colette Martina Mannion, Band 8D Director of Midwifery and Gynaecology Nursing; Ms Donna Elaine Johnson, Band 8A Maternity Matron Hospital In-Patient Services; and Mr Christopher Douglas Port, Deputy Information Governance Manager and Data Protection Officer.

7. In addition to the oral evidence the parties adduced a joint bundle of documents comprising of 1,286 pages. The claimant produced three supplementary bundles of documents. References will be made to the documents as numbered.

Findings of fact

8. The respondent has a maternity division otherwise known as Women and Children's Services (WACS) in its Women's Department. The Maternity Division incorporates a number of services for areas such as Antenatal Services, care during pregnancy; the Delivery Suite, care relating to birthing/delivery; and Postnatal Services, and care relating to newborns/post-delivery. The Antenatal Services is split into the Antenatal Clinic (ANC), Maternity Day Assessment Unit (MDAU), and the Antenatal Ward, also known as the Victoria Ward. The ANC is staffed by midwives and obstetricians and offers healthcare and support services to pregnant patients and their unborn babies, such as pregnancy information, health check-ups, tests, birth plans and treatment plans. The Antenatal Ward is a hospital ward offering care to pregnant patients who require hospital admission or ongoing treatment. The MDAU is a unit which sees patients who require short treatments such as blood tests or blood pressure checks. Patients either have pre-booked appointments or walk in.

9. The claimant commenced employment with the respondent as a Band 7 Midwife on 7 November 2016. Her direct supervisor was Ms Susan Alcock, Patient Services Matron. From 30 April to 19 August 2018, she was seconded to the role of Band 7 Patient Safety Midwife. She then returned to her Band 7 Midwife role, working in the Antenatal Clinic and Maternity Day Assessment Unit. On or about 6 August 2018, Ms Lydia Gerrie, Maternity Matron Inpatient Services and Clinic, became her direct supervisor.

10. The claimant qualified as a nurse and a year later as a midwife, in Kenya. She practised as a midwife in Kenya from 1983 to 1990. She emigrated to the United Kingdom in 1990. In 1991 she took an Adaptation Course in

nursing at Moorfields Eye Hospital. Thereafter she took a career break for marriage and family reasons.

11. In 2002 she completed a Return to Practice Course for Nursing, and from 2002 to 2003, the Midwifery Adaptation Training Course at Watford General Hospital, part of West Hertfordshire Hospitals Teaching NHS Trust. She then registered as a qualified midwife with the Nursing and Midwifery Council in 2003. She commenced her first period of employment with the respondent which was from 15 April 2002 to 15 February 2003, and was on several fixed clinical placements as a student.

The claimant's first tribunal claim

12. The claimant presented her first claim form to the Tribunal on 14 August 2003 claiming unfair dismissal and direct race discrimination. A hearing took place on 19-23 April 2004 before a full tribunal. The Judge in the case was Employment Judge Mr Nigel Mahoney. The case proceeded along the lines that the claimant had been discriminated against in two respects. The Tribunal did not consider her unfair dismissal claim. One of the issues raised and relied upon by the claimant in support of her current race discrimination claims is the reference in EJ Mahoney's judgment to the following: "Did the respondent directly discriminate against the applicant on the grounds of her race by not recommending her for registration with the Nursing and Midwifery Council (NMC)?"

13. The Tribunal concluded the following.

> "16. Having considered the totality of the evidence in this case the Tribunal is satisfied that the applicant has proved on the balance of probabilities facts from which the Tribunal could conclude that the respondent had committed an act of discrimination in the absence of an adequate explanation. However, the Tribunal is not satisfied that the respondent has on the balance of probabilities provided such an explanation. In particular, it is clear to the Tribunal that initially midwives Colley, and Scomersich felt the applicant's midwifery knowledge and experience from her time in Kenya was inadequate and passed that information on to their superiors, midwives Burt, Shand and Lucey, who accepted what they had been told without question. They took no steps whatsoever to ascertain what the current position was regarding the applicant's progress on the adaptation course, in respect of which they had no direct knowledge at all. The respondent had an Equal Opportunities Policy but this was unknown to the respondent's Midwifery Department and was not applied in any form whatsoever. All the concerns raised by the management midwives of the respondent at WGH arose directly from the fact that the applicant was a black Kenyan. The Tribunal rejects the submission made by the respondent that the decision not to recommend the applicant to the Nursing and Midwifery Council was the decision of Mrs Lawrence at the University of Hertfordshire. The decision not to recommend the applicant arose directly from matters raised by the management midwives at WGH. The Tribunal also rejects the contention put forward by the respondent that the applicant was indeed incompetent and had been signed off as competent throughout her training begrudgingly when the assessors were aware that she should have failed. The applicant was properly passed as being competent at all the relevant stages in her Practical Assessment Programme. In the light of the concerns raised by the Management

> Midwives at WGH it was impossible for Mrs Lawrence not to act otherwise than the way she did. To suggest that she should have gone ahead and recommended the registration of the applicant, regardless of the concerns raised, would have been the height of professional irresponsibility on her part. The Tribunal specifically finds that her actions in this matter were entirely appropriate." (297)

14. The claimant was eventually referred to the NMC for registration and was subsequently offered a midwifery position at Watford General Hospital by the respondent. She declined because she did not want to be managed by Ms Shand, Ms Lucey or Ms Burt. Subsequently, she engaged in agency work as well as her full-time job at North Middlesex Hospital.

15. She was registered with the Standard Nursing Agency, the body that requires registrants to undertake regular training. While attending training in Obstetric Emergencies, she met Dr Gloria Rowland, Associate Director of Midwifery with the respondent at the time. The claimant was encouraged by Dr Rowland to consider a position at Watford General Hospital which was 10 minutes away from her home whereas North Middlesex Hospital was one hour away. She said in evidence that having disclosed her history with the respondent leading up to her first Employment Tribunal case, Dr Rowland reassured her that she did not have to worry about being subjected to discriminatory treatment again because she, Dr Rowland, was employed by the hospital. She informed the claimant that a Band 7 position was going to be advertised and invited her to apply. The claimant did apply and was successful in her application for the post of a Band 7 Midwife working for the respondent at Watford General Hospital.

16. After completing her induction, she asked Dr Rowland where she would be working. She told the tribunal that Dr Rowland responded by telling her that she would be assigned the role of Clinical Lead for the Maternity Assessment Day Unit, "MDAU". A few months later Dr Rowland called a meeting on 25 May 2017 at 8 o'clock in the morning and invited the claimant, Ms Julie Martin, her Deputy Matron, Ms Nicola Wood, a Band 6 Midwife. The claimant said that Dr Rowland assigned her to the role of Clinical Lead for the Antenatal Clinic (ANC). Her role of Clinical Lead covered MDAU at Watford General Hospital and ANC at Watford General Hospital, Hemel Hempstead General Hospital and St Albans City Hospital. A name badge was subsequently printed for her by the respondent which had, "Clinical Lead Midwife MDAU/ANC". She said that she carried that title throughout her employment from 2016 to 2020 except for when she worked on secondment as a Patient Safety Midwife from April to August 2018, and when assigned to Telephone Triage in December 2018 for a few months for health reasons. When she completed these placements, she said that she returned to her role as Clinical Lead. (276, 187 and 439)

17. Dr Rowland left the respondent in 2018 to take up a post with another Trust.

18. The claimant told the Tribunal that she decided to keep a diary of any negative experiences in view of her history with the respondent. She

started typing her diary entries in 2018. However, the typed entries cover the period from 24 December 2018 to 1 February 2019. (473-478)

19. The claimant asserts that during her second period of employment she was the victim of racial harassment, direct race discrimination, victimisation, and disability discrimination. As the list of issues covers 10 pages, we have decided to address each act relied on by the claimant in turn, having regard to the structure of her witness statement.

The law

20. Under section 13, EqA direct discrimination is defined:

> "(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."

21. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

22. Section 136 EqA is the burden of proof provision. It provides:

> "(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 provisions 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."

23. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions has an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is able to make positive findings on the evidence one way or the other.

24. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation, and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33

separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

25. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

26. The Court then went on to give a helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

27. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting, or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

28. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy, or gender reassignment.

29. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

30. The tribunal could skip the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age, or sex.

31. A similar approach was given by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

32. In relation to discrimination arising in consequence of disability, section 15 provides,

> "(1) A person (A) discriminates against a disabled person (B) if --
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

33. In paragraph 5.7, Equality and Human Rights Commission Code of Practice on Employment (2011), unfavourable treatment means being put at a disadvantage. This will include, for example, having been refused a job; denied a work opportunity; and dismissal from employment, paragraph 5.7.

34. In paragraph 4.9 it states the following,

> " 'Disadvantage' is not defined by the Act. It could include denial of an opportunity of choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, was something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker could reasonably say that they would have preferred to be treated differently."

35. In the case of Pnaiser v NHS England [2016] IRLR 170, the EAT, Mrs Justice Simler DBE, held that the "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant or more than trivial, influence on the unfavourable treatment and amount to an effective reason for or cause of it. A tribunal should not fall into the trap of substituting motive for causation in deciding whether the burden has shifted. A tribunal must, first, identify whether there was unfavourable treatment and by whom in the respects relied on by the claimant. Secondly, the tribunal must determine what caused the treatment or what was the reason for it. An examination of the conscious and unconscious thought processes of the alleged discriminator will be required. Thirdly, motive is irrelevant as the focus is on the reason or cause of the treatment of the claimant. Fourthly, whether the reason or cause of it was something arising in consequence of the claimant's disability. The causation test is an objective question and does not depend on the thought processes of the alleged discriminator. Fifthly, the knowledge required in section 15(2) is of the disability.

36. Section 19 EqA, on indirect discrimination, states:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

37. In determining justification, an Employment Tribunal is required to make its own judgment as to whether, on a fair and detailed analysis of working practices and business considerations involved, a discriminatory practice was reasonably necessary and not apply a range of reasonable responses approach, Hardy & Hansons plc v Lax [2005] ICR 1565.

38. In the case of Seldon v Clarkson Wright & Jakes [2012] ICR 716, a judgment of the Supreme Court, Lady Hale held that,

> "The measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so…, paragraph 50 (5).

> The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen…, paragraph 50 (6)
>
> 55. It seems, therefore, that the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) they are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it."

39. We have considered the landlord and tenant case of Akerman-Livingstone Aster Communities Ltd [2015] UKSC 15 on justification. In the case of Heskett v Secretary of State for Justice [2020] EWCA 1487, the Court of Appeal held, in relation to costs being a legitimate aim in an indirect age discrimination claim, that if the measures taken were a proportionate means of achieving a legitimate aim, then it could be justified. In that case the claimant, a probation officer, who was employed by an agency of the Ministry of Justice, appealed against a decision that the agencies progression policy did not amount to indirect age discrimination. In 2010 the government announced a policy limiting pay increases across the public sector. Under the previous policy, a probation officer could progress three pay points each year. Under the new policy, the officer could progress only one pay point per year. It would, therefore, take the appellant 23 years to progress from the bottom to the top of his pay band, rather than seven or eight years. Under the new policy, older employees at the top or near to the top of the band would earn significantly more in salary and accrue greater pension benefits than those lower down the band. The Employment Tribunal found that the progression policy was prime facie discriminatory, but that it was justified. It acknowledged that the government's aim in issuing a pay cap had been a cost-cutting exercise, but that the agency had issued the new policy as a temporary measure, not simply to cap pay, but to enable it to operate within its means. The tribunal also relied on the fact that the agency was giving active consideration to changing the system to reduce the age discriminatory effects. The Employment Appeal Tribunal upheld the tribunal's judgment. The claimant appealed and submitted that the respondent could not rely on cost alone. On reviewing the authorities, the Court of Appeal held that an employer could not justify the discriminatory payment to A of less than B simply because it would cost more to pay A way the same. It followed that the essential question was whether the employer's aim in acting in the way that gave rise to the discriminatory impact could fairly be described as no more than a wish to save costs. If so, the defence of justification could not succeed. If not, it would be necessary to arrive at a fair characterisation of the employer's aim taken as a whole and decide whether that aim was legitimate. The distinction involved might sometimes be subtle, but it was real. The "cost plus" label was not wrong, but it should be avoided, as it could lead the parties and tribunal to adopt an inappropriately mechanistic approach rather than asking the central question. An employer's need to reduce its expenditure, and specifically its staff costs, to balance its books could constitute a legitimate aim for the purpose of a justification defence. There was no principled basis for ignoring

the constraints under which an employer was in fact having to operate. That was particularly so where the action complained of was taken in response to real financial pressures. However, while an employer could rely on a real need to reduce staffing costs as a legitimate aim, it still had to show that the measures complained of represented a proportionate means of achieving that aim, having regard to the disparate impact on the group in question, and whether that aim could have been addressed in a way which did not have a discriminatory effect. The tribunal was entitled to treat the agency's need to observe then constraints imposed by the pay freeze, as a legitimate aim.

40. In paragraph 4.29 Equality and Human Rights Commission Code of Practice in Employment, an employer solely aiming to reduce costs cannot expect to satisfy the test that it is a legitimate aim.

41. Section 20, EqA on the duty to make reasonable adjustments, provides:

> "(1)Where this Act imposes a duty to make reasonable adjustments on the person, this section, sections 21 and 22 and the applicable Schedule apply; for those purposes a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion of practice of A's put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as is reasonable to have taken to avoid disadvantage."

42. Guidance has been given in relation to the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20**,** a judgment of the EAT. An employment tribunal considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment must identify:

> (1)the provision, criterion or practice applied by or on behalf of an employer, or
>
> (2)the physical feature of premises occupied by the employer;
>
> (3)the identity of a non-disabled comparator (where appropriate), and
>
> (4)the identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.

> A tribunal deciding whether an employer is in breach of its duty under section 4A, now section 20 Equality Act 2010, must identify with some particularity what "step" it is that the employer is said to have failed to take.

43. The employer's process of reasoning is not a "step". In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. To decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

44. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift;

> "…it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.", Elias J (President).

45. Paragraph 6.10 of the Code 2011 provides:

> "The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

46. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."

47. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

48. In the case of Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, a judgment of the Court of Appeal, Elias LJ gave the leading judgment. In that case the claimant, an administrative officer, was employed by the Secretary of State for Work and Pensions. She started to experience symptoms of a disability identified as viral fatigue and fibromyalgia. She was absent for 62 days for a disability related sickness. After her return to work

her employer held an attendance review meeting. Its attendance management policy provided that it would consider a formal action against an employee if their absence reached an unsatisfactory level known as "the consideration point". "The consideration point" was 8 days per year but could be increased as a reasonable adjustment for disabled employees. The employer decided not to extend the consideration point in relation to the claimant and gave her a written improvement notice which was the first formal stage for regular absences under the policy. She raised a grievance contending that the employer was required to make two reasonable adjustments in relation to her disability, firstly, that the 62 days disability related absence should be disregarded under the policy and the notice be withdrawn. Secondly, that in future "the consideration point" be extended by adding 12 days to the eight days already conferred upon all employees. Her employer rejected her grievance and proposals.

49. Before the Employment Tribunal the claimant argued that her employer failed to make the adjustments and was in breach of the section 20 EqA 2010, the duty to make reasonable adjustments. It was conceded that she was disabled within the meaning of the Act. The tribunal, by a majority, found that the section 20 duty was not engaged as the provision, criterion, or practice, namely the requirement to attend work at a certain level to avoid receiving warnings and possible dismissal, applied equally to all employees. The Employment Appeal Tribunal dismissed the claimant's appeal upholding the tribunal's findings and adding that the proposed adjustments did not fall within the concept of "steps". It further held that the comparison should be with those who but for the disability are in like circumstances as the claimant.

50. The Court of Appeal held that the section 20 duty to make reasonable adjustments had been engaged as the attendance management policy had put the claimant at a substantial disadvantage but that the proposed adjustments had not been steps which the employer could reasonably have been expected to take. The appropriate formulation of the relevant pcp in a case of this kind is that the employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. Once the relevant pcp was formulated in that way, it was clear that a disabled employee's disability increased the likelihood of absence from work on ill health grounds and that employee was disadvantaged in more than a minor or trivial way. Whilst it was no doubt true that both disabled and able-bodied alike would, to a greater or lesser extent, suffer stress and anxiety if they were ill in circumstances which might lead to disciplinary sanctions, the risk of this occurring was obviously greater for that group of disabled workers whose disability resulted in more frequent, and perhaps longer, absences. They would find it more difficult to comply with the requirements relating to absenteeism and would be disadvantaged by it.

51. The nature of the comparison exercise under section 20 is to ask whether the pcp puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may

both be subject to the same disadvantage when absent for the same period of time, does not eliminate the disadvantage if the pcp bites harder on the disabled, or a category of them, than it does on the able-bodied. If the form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability but if the disability leads to disability related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by the category of disabled employees. Thereafter the whole purpose of the section 20 duty is to require the employer to take such steps as may be reasonable, treating the disabled differently than the non-disabled would be treated, to remove a disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant. The Employment Tribunal and the Employment Appeal Tribunal were wrong to hold that the section 20 was not engaged simply because the attendance management policy applied equally to everyone.

52. There is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of section 20(3). Any modification of or qualification to, the pcp in question which would or might remove a substantial disadvantage caused by the pcp is in principle capable of amounting to a relevant step. Whether the proposed steps were reasonable is a matter for the Employment Tribunal and must be determined objectively.

53. In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is structured and organised to accommodate those who cannot fit into existing arrangements.

54. The test under is an objective test. The employer must take "such steps as….is reasonable in all the circumstances of the case." Smith v Churchills Stairlifts plc [2006] IRLR 41.

55. Section 27 states :

> "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-
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;

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

56. For there to be unlawful victimisation the protected act must have a significant influence on the employer's decision making, Nagarajan v London Regional Transport [1981] IRLR, Lord Nicholls**.** In determining whether the employee was subjected to a detriment because of doing a protected act, the test is whether the doing of the protected act had a significant influence on the outcome, Underhill J, in Martin v Devonshire Solicitors [2011] ICR EAT, applying the dictum of Lord Nicholls in Nagarajan**.**

57. Section 95(1)c Employment Rights Act 1996, provides,

> "(1) For the purposes of this Part an employee is dismissed by his employer if …..
>
> (c) 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."

58. It was held by the Court of Appeal in the case of Western Excavating (ECC) Ltd-v-Sharp [1978] IRLR 27, that whether an employee is entitled to terminate his contract of employment without notice by reason of the employer's conduct and claim constructive dismissal must be determined in accordance with the law of contract. Lord Denning MR said that 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.

59. It is an implied term of any contract of employment that the employer shall not without reasonable cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee, Malik-v-Bank of Credit and Commerce International [1997] IRLR 462, House of Lords, Lord Nicholls.

60. In the case of Lewis-v-Motorworld Garages Ltd [1985] IRLR 465, the Court of Appeal held in relation to the "last straw" doctrine that,

> "…the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?", Glidewell LJ.

61. Dyson LJ giving the leading judgment in the case of London Borough of Waltham Forest-v-Omilaju [2005] IRLR 35, Court of Appeal, held:

> "A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with earlier acts on which the employee relies, it amounts to a breach of the implied term of mutual trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be…. .
>
> If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.", pages 37 - 38.

62. The test of whether the employee's trust and confidence has been undermined is an objective one, Omilaju.

63. In the case of Tullett Prebon plc v BGC [2011] IRLR 420, on the issue of whether the first instance judge had applied a subjective test rather than an objective one to the actions of the alleged contract breaker, the Court of Appeal held, reading from the headnote,

> "The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is a 'question of fact for the tribunal of fact'. It [is] a highly specific question. The legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract-breaker has clearly shown an intention to abandon and altogether refused to perform the contract. The issue is repudiatory breach in circumstances where the objectively assessed intention of the alleged contract breaker towards the employees is of paramount importance.
>
> In the present case, the judge had approached the issue correctly. He had not applied a subjective approach. He had objectively assessed the true intention of Tullett and had reached the conclusions that their intention was not to attack but to strengthen the employment relationship. That was a permissible and correct finding, reached after a careful consideration of all the circumstances which had to be taken into account in so far as they bore on an objective assessment of the intention of the alleged contract breaker."

64. Mr Justice Cavanagh in the case of Lacey v Wechseln Ltd t/a The Andrew Hill Salon UKEAT/0038/20/VP, held in relation to the last straw doctrine,

> "The very essence of the "last straw" doctrine is that the last straw need not be something of major significance in itself. It need not even amount to a breach of

> contract, when looked at on its own. It need not even have the same character as the other incidents that preceded it: Omilaju v Waltham Forest London Borough Council, at paragraphs 15-16. Rather, the significance of the last straw is that it tips things over the edge so that the entirety of the treatment suffered by the employee amounts to a repudiate a breach of contract.", paragraph 71.

65. Harassment is defined in section 26 EqA as;

> "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 and intimidating, hostile, degrading, humiliating or offensive environment for B"

66. In deciding whether the conduct has the particular effect, regard must be had to the perception of B; other circumstances of the case; and whether it is reasonable for the conduct to have that effect, section 26(4).

67. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race Relations Act 1976. The EAT held that the claimant had to show that:

> (1) the respondent had engaged in unwanted conduct;
>
> (2) the conduct had the purpose or effect of violating his or her dignity or of creating an adverse environment;
>
> (3) the conduct was on one of the prohibited grounds;
>
> (4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and
>
> (5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances, including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity had been violated, or an adverse environment created.

68. Section 123 EqA provides that a claim be presented to the tribunal within three months from "the date of the act to which the complaint relates.", (1)(a), or "such other period as the employment Tribunal thinks just and equitable.", (1)(b).

69. "Conduct extending over a period is to be treated as done at the end of the period," (3)(a).

70. Time limits are applied strictly and the exercise of the discretion on just an equitable grounds, is the exception rather than the rule, Robertson v Bexley Community College [2003] IRLR 434, and Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

71. Time is extended under the conciliation provisions of section 18A Employment Tribunals Act 1996, as amended, and section 104 EqA.

72. We have considered the claimant's written witness statement and the allegations made and have made findings of fact and reached our conclusion in respect of each.

73. We have also taken into account the other cases and Codes of Practice referred to by the parties.

74. We now consider the claims, making findings of fact and applying the relevant law in our conclusions.

May 2017 - Ms Anna Chapman, List of Issues bundle pages 66, 94, par 5(b)(i); paragraph 33a, List of Issues "LOI"

75. The claimant alleges that on 18 May 2017, she suffered harassment related to her race and had been victimised by Ms Anna Chapman, a Band 6 Triage Midwife. She alleges that Ms Chapman said she did not like her "tone".

76. The claimant said that a patient arrived on MDAU around 1-2pm and told her that she had not felt her baby move since 8.30 that morning after she fell down the stairs at her home. She asked her why she did not ring the hospital first. The patient replied that she did, but a midwife told her that she did not need to come in but to wait for at least four hours and if the baby was not moving to go to MDAU. The claimant was of the view that the advice given to the patient was wrong. She connected the patient to a machine to monitor foetal heartbeat, and then arranged for her to be scanned. The claimant then rang Triage and spoke to Ms Chapman and asked whether she had given the advice the patient had recounted to her. The claimant said that Ms Chapman's first comment to her was, "Get off your high horse, Sylvia. Not everyone who falls down has to come in." The claimant then asked Ms Chapman whether she had checked the patient's blood group as trauma patients who have rhesus negative can experience complications. Ms Chapman replied, "What's that got to do with it?". At that point the claimant said, "It's okay, don't worry about it", and ended the call. Ms Chapman asked the claimant to send the patient up to Triage but the claimant told her that she was already taking care of the patient. The claimant emailed Ms Justine Chung, Matron, raising the issue concerning the patient. Ms Chung's response was to confirm that the patient should have been seen straightaway in Triage. (349)

77. Ms Chung emailed the claimant stating:

> "I have discussed the case with the midwife involved and on reviewing the details I believe she should have been invited straight into Triage and reviewed following a fall, had a CTG and reviewed by a doctor. The midwife is aware of this and in future will follow this course of action. However, she was most upset about the way in which you spoke to her on the phone and I would appreciate if we can discuss this at your next convenience." (350)

78. The claimant felt that Ms Chapman's comment, "Get off your high horse", made her feel as if she, the claimant, was speaking above her place and that as a black African midwife, she had no right to express her professional expertise.

79. In evidence, Ms Chapman said that in relation to the victimisation claim, she had no knowledge that the claimant had brought proceedings against the Trust in 2003. She had only became aware of this during these current proceedings.

80. We find that there was no evidence that Ms Chapman knew about the claimant's earlier Tribunal claim against the respondent by the date of the alleged discussion with the claimant. The victimisation claim against her therefore, cannot be substantiated and is not well-founded.

81. In relation to the conversation giving rise to the racial harassment claim, Ms Chapman further could not recall the conversation referred to by the claimant due to the lapse of time as she was required to recount events over 4 years ago. She stated that what she may have said and done in relation to the patient was a clinical decision she had made at the time. She did not believe that she would have been sarcastic or aggressive towards the claimant as her understanding was that there was just a difference of clinical opinions on how the patient should be treated. She could not recall whether the claimant had ever raised any concerns regarding her behaviour, and said that if the claimant had complained she would have apologised for any upset she had caused.

82. Ms Chapman referred to the email sent by the claimant to Ms Chung as demonstrating the different clinical opinions and that she, the claimant, was seeking guidance from Ms Chung as to the correct process in such circumstances, and not as a concern she had regarding her, that is, Ms Chapman's behaviour.

83. It is alleged that Ms Chung spoke to Ms Chapman about the incident during which she said that she was upset at the way the claimant had spoken to her. Ms Chapman could not recall that conversation. We surmised that if she had said to Ms Chung she was upset it could only have been because she felt the claimant had spoken to her in an unprofessional manner and not because of anything to do with her race.

84. We find that this incident highlighted a difference in views taken by the claimant and Ms Chapman in relation to how the patient should be treated. The claimant did not raise with Ms Chung the issue of race playing a part in how Ms Chapman spoke to her. The claimant made the assumption that

the reference to "get off your high horse" was a reference to her speaking above her station and that, as a black African, she had no right to express her professional opinion. That was an assumption she made without either any evidence to support it, or evidence upon which we could infer that such a comment was related to race.

85. We made no findings of fact from which we could decide that Ms Chapman had engaged in unwanted conduct related to race or to the claimant's race.

2018- Ms Ann-Marie Shand - bundle pages 66, paragraph d; bundle 94, par 5(b)(ii); paragraph 33a LOI

86. From her diary entry, the claimant referred to an incident with Ms Ann-Marie Shand, Band 8B Deputy Head of Midwifery. She asserted that she was reprimanded for seeing a patient at 18 weeks instead of 20 weeks in accordance with standard protocol even though the patient was showing signs of pre-eclampsia. She stated that it was later confirmed that the patient was indeed suffering from the condition and required medical intervention. In the claimant's witness statement, paragraph 32(b), she wrote:

> "Despite my explanation, Ms Shand chided me for seeing a patient who was 18 weeks pregnant and was frustrated about the fact that MDAU was not allotted funding to treat women under 20 weeks. I appreciate that this may have been a valid concern, but I would expect patient care to ultimately be most important.
>
> What was particularly upsetting about that exchange is that my clinical intervention, which proved that the patient had pre-eclampsia despite being only 18 weeks and ensured an appropriate care pathway moving forward, was treated by Ms Shand as irrelevant. Ms Shand appeared determined to put me in my place for acting outside of protocol. I cannot view Ms Shand's behaviour as anything other than racism based on our history."

87. Following on from the earlier Employment Tribunal case in which Ms Shand was cited as one of the perpetrators of racially discriminatory behaviour towards the claimant, the claimant was wary working with her. In relation to the incident involving the patient with pre-eclampsia, she said in evidence that Ms Shand had chided her in a private room where others could hear.

88. Her case is that Ms Shand's conduct amounted to harassment related to race and victimisation.

89. In evidence the claimant acknowledged that Ms Shand had made reference to not having funding to treat women under 20 weeks of pregnancy, and understood that may have been a valid concern but disagreed that she expected patient care to be most important. If the claimant is right about the incident, Ms Shand was well within her area of responsibility and had a duty to inform her about the funding arrangements in such circumstances. More is required than a difference in professional approach to be taken in relation to a patient. We find that it was not a personal issue which required a conversation to have taken place in a private room. Accepting the claimant's

account of the incident, what Ms Shand was doing was pointing out to her what the policy was at the time.

90. Ms Shand was not called to give evidence, and there was no other evidence in support of the contention that she behaved in a racist way towards the claimant. We find that the claimant did not approve of Ms Shand referring to lack of funding because she, the claimant, was motivated by the patient's care and welfare. We do not find that Ms Shand's conduct was unwanted, nor do we find that it was related to race. This harassment related to race claim is not well-founded.

91. We accept that Ms Shand was aware of the claimant's earlier tribunal case, which is accepted in the list of issues by the respondent as a protected act. If the claimant was spoken to in the presence of others it would have been humiliating for her. The question is whether there was a causal connection between the detriment and the protected act? In other words, was the detriment significantly influenced by the protected act?

92. We have come to the conclusion that the reason for the statement made by Ms Shand was unrelated to the protected act. In the claimant's account there is no reference to her having discussed with Ms Shand the earlier tribunal case. There is no other evidence that the conduct was in any way related to race. We have not made any findings from which we could decide that the protected act significantly influenced the detriment suffered. This claim is not well-founded.

March 2018 – incident with Ms Teresa Bond bundle pages 66, paragraph e; bundle 94, par 5(b)(iii); paragraph 33a LOI

93. The next matter in time is an incident on 13 March 2018. The claimant alleges that Ms Theresa Bond, Band 6 Triage Midwife, white British, verbally attacked her in front of two members of staff and a patient because she, Ms Bond, considered that a referral made by the claimant to be "inappropriate". It is further alleged that Ms Bond threatened to write an incident report and later, when speaking to a manager, she falsely accused the claimant of shouting at her first. The claimant further states that two Healthcare Assistants, Ms Lorraine Solecki and Ms Amalia Antony, provided witness statements stating that Ms Bond was the aggressor. She claims that the incident was harassment related to race as well as victimisation.

94. In evidence the claimant said that the background to this was that a patient had visited Triage the day before with back and pelvic pain which is an acute presentation. Ms Bond, when the patient returned to Triage after the claimant had referred her there as she still reported back and pelvic pain, confronted the claimant in anger because the patient apparently had no "scar pain" which Ms Bond accepted as fact without speaking to the claimant directly. In a statement the claimant had written at the time, she stated that the patient did in fact report scar pain to her.

95. The matter was raised with Ms Kim McGuckin, Matron, who promised to speak to Ms Bond. The claimant heard nothing from Ms McGuckin, who

subsequently left her position with the respondent. The claimant then went to speak to Mr Jatinder Bham, Employee Relations Advisor, who reported the issue to Ms Shand. Ms Shand suggested to Ms Bond that the matter should be taken forward although the claimant was the person who first raised the complaint. According to the claimant this demonstrated clear bias against her. She had suggested that Mr Bham speak to witnesses who saw the incident, before a scheduled facilitated meeting. This was because Mr Bham had advised her that Ms Bond had falsely accused her, the claimant, of shouting at her which the claimant said was not true. At the time of the facilitated meeting on 25 October 2018, according to the claimant, Mr Bham had spoken to the witnesses who confirmed that it was Ms Bond, who shouted at her.

96. Both the claimant and Ms Bond gave their written accounts of the incident. In Ms Bond's case, on 13 April 2018. She questioned why the patient was again referred to Triage. (363-365)

97. The claimant's account was forwarded by Mr Bham on 16 April 2018, to Ms Danielle Boyd and to Ms Shand. Mr Bham suggested that there should be a formal facilitation meeting rather than an investigation. (366-367)

98. Ms Benedicta Agbagwara-Osugi, Assistant Divisional Manager, facilitated the meeting on 25 October 2018, at which the claimant and Ms Bond were in attendance, as well as Ms Rupi Virdee, ER Advisor.

99. Both the claimant and Ms Bond were written to in similar terms on 26 October 2018, in which it was stated by Ms Agbagwara-Osugi, that the claimant was happy with the apology, stating that it was all she wanted. Ms Bond had apologised to her,

> "…if she was rude, as it was not how she wanted to come across however she was also having an extremely busy day in Triage and she was more annoyed with the system as it doesn't work. At the time Triage was very busy and Ms Bond was more annoyed with the system that was not working. Teresa confirmed that when she said she would submit a Datix if it happened again, this was not intended towards you however the process. Teresa went on the talk about various aspects of if it happened again, it was not intended towards the claimant but to the process. There were various concerns around the escalation process which you were in agreement with.
>
> You said that you were happy with the apology and that is all you wanted, you both agreed to move forward from the incident however you both agreed work needs to be done on the escalation process which you will both take forward.
>
> You both expressed relief that the meeting had taken place even though there had been a lot of anxiety in the build-up.

100. Ms Agbagwara-Osugi also wrote that the meeting closed with both confirming that they felt much better about working together in the future. (406-409)

101. The claimant stated that she intended to make a complaint but later resiled from that as it was in no-one's benefit to pursue the matter if Ms Bond apologised to her for her behaviour. (382)

102. In her witness statement, however, she wrote, in paragraph 32C(viii), the following:

> "I considered Ms Bond's behaviour towards me to be racially motivated. There was no other explanation for the aggressive, disrespectful way that she addressed me in front of colleagues. This was not the behaviour of someone who had genuine concerns about the referral process. I spoke to Daisy Peets (Joint Connect Multi-Cultural Staff Network Chair) and asked her to attend the meeting with me which she did."

103. She did not refer to Ms Bond's behaviour as being racially discriminatory in email exchanges leading up to the facilitated meetings.

104. In relation to the victimisation claim, we find that Ms Bond was unaware of the earlier Tribunal claim. Therefore, her subsequent behaviour towards the claimant, as alleged, was unrelated to the protected act of the tribunal claim.

105. We further find that the claimant received the apology from Ms Bond that she had earlier asked for and that the outcome of the facilitated meeting was amicable. There was no reference made during the course of that meeting, as recorded in the letter, that the claimant had accused Ms Bond of racism.

106. In the respondent's system of reporting procedural and systemic issues using Datix, its internal computer system, in Ms Bond's Datix report dated 13 March 2018, she wrote, after setting out her account of events, the following in relation to action taken:

> "Discussed at patient safety meeting and previously discussed at numerous safety meetings. This is a longstanding issue. There has been no senior midwife who has ownership of this area and there are many problems which have been highlighted in this area."

107. What Ms Bond was highlighting was a systemic issue in relation to referrals to Triage. (998-1002)

108. In the claimant's Datix report dated 21 March 2018, she sets out her account of the incident and that she was putting in a formal complaint. (1003-1007)

109. We have made no findings upon which we could decide the conduct of Ms Bond could be described as racist towards the claimant. Further, the exchange between them in relation to the referral of the patient to Triage was not unwanted conduct related to race.

110. We have come to the conclusion that the claimant's racial harassment and victimisation claims, in relation to Ms Bond, are not well-founded.

January 2019 – incident with Ms Ann Shand and Ms Justine Chung bundle pages 66, paragraph f; bundle 94, paragraph 5(b)(iv); paragraph 33d LOI

111. On 10 January 2019, the claimant arrived for work at 7:35 in the morning to start work on Telephone Triage ten minutes later. The first four callers or so, she referred them to MDAU. The Triage Midwife called her and asked if she had referred anyone to her as she did not have access to the calendar. The claimant informed her that she had not but would alert her should she do so. The claimant informed her that she was rediverting the calls to her as she, the claimant, needed the bathroom and wanted to explain a referral to MDAU and would take the calls back upon her return. She then took her bathroom break. Upon her return, she rediverted the calls and was on call when she noticed Ms Justine Chung, who at the time was a Band 8A Labour Ward Matron, standing behind her. Ms Chung instructed her to divert the calls to Triage as she wanted to speak to her in the company of Ms Shand. The meeting took place in Ms Shand's office. The claimant prepared a diary entry of this meeting in which she wrote that Ms Chung began the meeting by stating that the Triage midwives had put in a complaint that their workload had increased since she, the claimant, started working on Telephone Triage; they did not like her tone; the Triage results had not been done; she was making lots of inappropriate referrals to Triage; and next wrote that she could not recall the other thing that was said. She then set out, in a large paragraph, her account of events and how she exercised her professional judgment when making the referrals.

112. She stated that she had been accused of a number of things, and had not been prepared for "this confrontation, being on my own with no support with me". She then left the room where the meeting was taking place and went to the staff kitchen where she said she broke down and was approached five minutes later by Ms Shand who gave her a tissue and asked her to return to the office to complete the meeting. The claimant's response was to say that she needed more time, whereupon Ms Shand left the room. The claimant said that she was too distressed at the time and a colleague came to comfort her. She returned to Ms Shand's office stating that she was stressed and wanted to go home. At that point Ms Chung responded by saying, "It will only take an hour", but the claimant refused stating that she wanted to leave. She left the room, collected her belongings and left the premises. She then sent a text message to Ms Zowie Guminska, who, at the time was her friend and work colleague.

113. From the text message Ms Guminska sent at 12:14 on 10 January 2019, she wrote:

> "MDAU need a meeting with triage to stop this as its barriers of transfer for everyone".

114. The claimant replied one minute later:

> "Linda needs to know this. Please tell her. After this morning I am now feeling paranoid… ie it me and I don't see it ???"

(71 of the claimant's stated supplementary bundle)

115. In her witness statement the claimant stated that the issue about her tone never came up in her appraisals as they showed that she was "always approachable", "willing to help", "guides and encourages staff working with her", "supports the Trust's values". (354)

116. She stated that Ms Shand was central to the racism which occurred during her previous time with the respondent and she knew Ms Chung from that time. She also accused them of being spokespersons on behalf of those who had apparently came to a consensus about her conduct and that midwives did not like working with her. This was racism all over again, she alleged. They had come together to draw false conclusions about her before because she is a black Kenyan. She claims racial harassment as well as victimisation.

117. As previously stated, Ms Shand was not called to give evidence, however, Ms Chung did give evidence to the effect that she recalled having a meeting with the claimant in the company of Ms Shand but could not remember the date. She also was unable to recall the subject matter of the meeting. From the rota entry she determined that she was the Bleep Holder for maternity on the day in question. As the Bleep Holder, if there were any concerns raised on the day by any member of staff within maternity, she would probably have been involved and would have dealt with those concerns. If an employee had a concern about another employee about their behaviour, practice or otherwise, it was normal and appropriate for them to raise it with her as a manager. The way she dealt with such matters was to have a meeting with the employee and raise the matter with them informally in the first instance. If the claimant was called to a meeting with her in the company of Ms Shand, it would have been an informal meeting to discuss a concern that had been raised that day by other staff members. It would have had nothing to do with the claimant's race or the fact that she had brought a previous tribunal claim. She stated that she was aware of the Tribunal claim against the Trust in 2003 and until these proceedings, she did not know any of the details. She did not speak to Ms Shand about the earlier claim and she could not recall how she became aware that the claimant had brought an earlier claim against the Trust. Given that she had worked at the Trust since 1994, she surmised that it may be because, at the time, she was employed by the Trust and became aware.

118. The only evidence of Ms Chung's knowledge of the claimant's earlier tribunal claim, was from her. The claimant did not produce evidence to the contrary. It follows from this that she was unaware of the claimant having made a protected act, that is, the issue of race in her earlier claim until these proceedings. We find having regard to Ms Chung's evidence, that she would not have been significantly influenced by a vague recollection in or around 2002-2004, of a claim brought by the claimant against the Trust. The victimisation claim, therefore, fails. It is not well-founded.

119. In relation to the claim of harassment related to race, we find that there was an informal meeting. There appeared to have been a difference in

professional views as to referrals to Triage and to MDAU. The claimant made no reference in her diary entry to the behaviour of Ms Chung and Ms Shand being on grounds of race or to race. Further, in relation to the messages between her and Ms Guminska, she did not refer to her treatment being on grounds of race in respect of the conduct of that meeting. From her account, and from her diary entry, there is the absence of any racially overt comments about her. It was necessary to have the meeting to put to her the concerns raised by her professional colleagues in order to engage in an informal discussion and a way forward. The conduct of the meeting and, in particular, Ms Chung's conduct was unrelated to the claimant's race or to race. This claim is not well-founded.

August 2019 – incident with Ms Lydia Gerrie, bundle pages 66, paragraph g; bundle 94, paragraph 5(b)(v)

120. The claimant alleges that she was scheduled for a total right shoulder replacement on 22 August 2019 and was owed eight weeks' annual leave at the time. She required one week's annual leave to prepare for surgery. Ms Lydia Gerrie, Band 8A Maternity Matron In Person Services, denied her request without explanation. She, the claimant, had to take sick leave instead of annual leave from 15 August 2019, one week prior to her surgery. She stated that she had to rely on sick leave rather than annual leave pay during that time. She claims harassment related to disability, paragraph 33e LOI.

121. The respondent has admitted that the claimant was, at all material times, a disabled person by reason of her chronic bilateral knee condition from 26 August 2018; bilateral massive rotator cuff tears from 31 October 2018; and osteoarthritis of the knees from 5 December 2018, paragraph 9 LOI.

122. The claimant stated in her witness statement that when she requested leave for the week prior to her operation, Ms Gerrie refused even though she admitted that no one else was on annual leave at the time, and failed to explain why she would be required to work while others were not on leave even though she had been left to work alone while several members of staff were given annual leave at the same time. She is right hand dominant. She said that she explained that she wanted the week to prepare for surgery on her right shoulder, and explained that she was owed several weeks' annual leave and felt it appropriate for her to use a week at that time. She asserts that her explanation made no difference to Ms Gerrie's decision and took sickness as time off instead of paid annual leave. She further asserts that she found Ms Gerrie's decision to be harsh, uncaring, and discriminatory to her as a disabled person. She felt harassed and picked on and it was difficult not to connect Ms Gerrie's behaviour to Ms Shand's because Ms Shand was her mentor, and had seen Ms Gerrie in Ms Shand's office on many occasions, and had witnessed them conferring on the wards. She stated that they worked closely together and believed that Ms Gerrie's attitude towards her, as a disabled person, was negatively affected by her association with Ms Shand.

123. On 1 November 2018, the claimant was diagnosed with bi-lateral massive rotator cuff tears in both shoulders and would likely require total shoulder replacement (411).

124. On 13 November 2018, she underwent a Moving and Handling Risk Assessment and was advised that she could not work in MDAU as she found it difficult to perform vaginal examinations and palpations on patients as they require reaching over the patient causing the shoulder to be extended. In respect of emergencies, she would need to step down and act as support. (414-416)

125. In the Occupation Health report dated 5 December 2018, it was confirmed that she had progressive osteoarthritis in her knees and shoulders. She could not work in high mobility roles or undertake ANC clinical work, or ultrasounds or CPR. She could assist in emergencies but not lead interventions as she was vulnerable to injury. She could manage Telephone Triage, non-clinical ANC administration, non-clinical duties and the Bacillus Clamette Guerin "BCG" clinic for babies. She could not be patient facing except for meeting and greeting patients. (431-432)

126. She had been off sick from January to July 2019 at various stages, comprising of 32 days. On 15 July 2019, Ms Guminska held a long-term sickness meeting with her. At the time the claimant was still suffering from shoulder pain, could not lift heavy objects and needed support. She was working in ANC/MDAU but was on restricted duties. She was due to have her total right shoulder operation on 22 August 2019 due to her arthritis.

127. We find that the reason why Ms Gerrie refused the claimant's request was that Ms Angelina Ankionah, Lead Diabetics Specialist Midwife, was on annual leave at the material time and had put in her request in good time. Her workload needed to be dealt with by those in the ANC/MDAU team. This meant that the team would not be adequately staffed if the claimant was to be on leave at the same time as Ms Ankionah. She wrote to the claimant on 9 August 2019, stating the following:

> "I have had a look at the off-duty for next week and unfortunately I am unable to give you any annual leave due to staffing and ensuring that the clinic is adequately staffed. While there is no-one taking annual leave from the MDAU/ANC rota, Angelina is on annual leave and we are needing to support her workload from within the team.
>
> I am sorry that this is not the outcome you were hoping for. I am happy to discuss this next week with you." (549)

128. The claimant went on sick leave from 15 August 2019 until 22 August 2019 due to stress. Following her operation, she remained on sick leave to 23 November 2019. There was a long term sickness absence meeting on 9 October 2019 with Ms Guminska. She informed Ms Guminska that there was no change to her shoulder since the operation and could not use her right arm. (552, 560-563)

129. We find as fact that the reason why Ms Gerrie refused the claimant's request for annual leave prior to her operation, was that Ms Ankiomah, Lead Diabetics Specialist Midwife, was on a pre-booked annual leave and someone from the ANC/MDAU team had to cover her work during her absence. The reason for the treatment was not the claimant's disability but the need to provide adequate coverage during Ms Ankiomah's absence. It was not unwanted conduct related to the claimant's disability, although it is accepted that she was a disabled person at the time.

130. There is also a victimisation claim, paragraph 39b LOI. Although Ms Gerrie was aware that the claimant had brought a tribunal claim against the respondent for discrimination and was successful, she could not remember exactly how she became aware of the claim. She was also aware that Ms Shand had featured in the claim. She believed that the claimant may have mentioned the earlier tribunal claim to her. It was not Ms Shand who told her about it. Ms Shand was her line manager to whom she went for supervision on occasions in relation to staffing issues and management decisions. She stated that she never felt Ms Shand's decisions were clouded by the earlier tribunal claim.

131. In relation to the victimisation claim, it is accepted that Ms Gerrie was aware of the claimant's first tribunal claim against the respondent and that she had been successful, and that Ms Shand featured in that claim. However, on the balance of probabilities, we find and do conclude, that the reason for the refusal was unconnected to the protected act of the first tribunal claim. We acknowledged that the refusal to grant leave led to the claimant suffering a detriment, in that, she had to take sick leave and not annual leave to prepare for her operation. The reason for the refusal was to ensure that there was adequate staff cover during Ms Ankiomah's leave and was not significantly influenced by the earlier tribunal claim. Accordingly, this claim is not well-founded.

<u>December 2019 – incident with Ms Zowie Guminska bundle pages 66, paragraph g; bundle 94, paragraph 5(b)(vi)</u>

132. The claimant wanted to take six weeks' annual leave after her sick note had run out on 24 November 2019. She was advised by Ms Gerrie that she had three weeks' annual leave remaining which would be applied from 24 November 2019 once her sick note ran out. Her return to work date would be 16 December 2019. She further stated that she would contact Occupational Health as the respondent may need to request that the claimant be assessed for the types of duties she would be able to do following her surgery and any necessary adjustments to her role. A provisional meeting had been arranged for 22 November with Human Resources. (565)

133. The claimant spoke with Ms Rupi Virdee, Senior ER Advisor, who informed her that she had 14 days to use between December 2019 and March 2020. As she wanted to take 20 days before returning to work, it needed to be discussed and agreed with management. (568)

134. The claimant believed that she had more leave owed to her and decided to email Ms Caroline Lankshear, Head of Employee Relations, explaining that she needed time to recover from her surgery. She asked for confirmation that she could take seven weeks' annual leave which was what she said was owed to her. (571-572)

135. Ms Lankshear confirmed to the claimant that she had 300 hours annual leave remaining and that she would be able to use 217.5 hours before returning to work. She wrote:

> "While Rupi is correct in that you should use your accrued annual leave before you return to work, you only need to keep 37.5 hours from January to March 2020 as set out in the annual leave policy. I would therefore see no issue in you being able to take the 217.5 hours now prior to your return in January.
>
> You will need to discuss this with Zoe for approval…" (570)

136. The claimant emailed Ms Guminska, Deputy Matron/Ward Manager, on 3 December 2019 in which she wrote:

> **"**Dear Zowie,
>
> I have been signed off by my GP til 15 December however, having seen my surgeon last week, my arms still has restricted movement. I will forward the sick note as well as the surgeon's letter once I get it. In view of this, I spoke to Caroline Lankshear HR and I would like to take the 6.8 weeks' annual leave commencing in January in its entirety. This will take me to mid-Feb by which time my arm will have had more time to improve.
>
> I hope this will be okay. Thank you." (576)

137. In Ms Guminska's email dated 12 December 2019, she stated that she was aware, on 7 November 2019, that there was a discussion about the claimant potentially taking annual leave for six weeks and then wrote:

> "However at present this is no longer the case. You confirmed on 3.12.2019 that your GP has signed you off till 15 December and I am still awaiting that note linked to your surgeon's letter. Can this please be sent in asap along with an additional note to cover from 15 December."

138. It is clear from Ms Guminska's email that she did not refuse the claimant's request, nor does it refer to the respondent's annual leave policy but asked that the claimant provide further information. (578)

139. The claimant emailed Ms Guminska on 6 January 2020, attaching an email she sent to her on 3 December. She stated that she had hoped that Ms Guminska and Ms Gerrie would confirm that annual leave had been approved commencing 1 January 2020. She had sent in her sick note which ended on 31 December 2019, and according to calculations done by Ms Lankshear, she was owed 6.8 weeks' annual leave which would take her to mid-February 2020. She was also waiting to be informed of the time of the return from sickness absence meeting with Human Resources scheduled to take place on Friday 10 January 2020. She wrote that she

would be meeting with Occupational Health at 10am that morning, and then stated:

> "It's unfortunate that there has been a breakdown in communication however, I hope all this can be sorted out on Friday. Please could you confirm my annual leave which I would like to take in its entirety as I do not want to lose it? Thank you." (584)

140. On 8 January 2020, Ms Guminska responded stating that she had spoken to Ms Virdee who confirmed that she, the claimant, could take the full amount of outstanding annual leave which Ms Guminska had authorised on e-roster, taking the claimant up to 19 February 2020. When Occupational Health give her the recommendations, after the claimant's meeting on Friday, she would give the claimant her shifts. (584)

141. It is the claimant's case that Ms Guminska's decision not to approve her leave request was harassment related to disability and victimisation, paragraphs 33f and 39b LOI.

142. We bear in mind that the claimant had a good relationship with Ms Guminska and they regularly exchanged text messages. The claimant had been signed off for a further period of sick leave which was not envisaged on 7 November 2019. The result being that she was on continuing sick leave rather than commencing six weeks' annual leave. There was a change in circumstances rather than a refusal of annual leave. We find that there was some confusion over the dates when the claimant required annual leave. We further find that there was a misunderstanding in relation to the information being communicated. Once the matter had been resolved the annual leave was approved by Ms Guminska.

143. We could not find evidence of unwanted conduct related to the claimant's disability. The policy does not allow for annual leave to be taken during a period of sick leave. Ms Guminska's decision was unrelated to the claimant's disability as she was following policy.

144. In relation to the victimisation claim, it is unclear whether Ms Guminska was aware of the claimant's first tribunal claim. In any event, the real reason for her initial decision was the claimant's change in circumstances and was unrelated to her earlier tribunal claim. Even if Ms Guminska was aware of the first tribunal proceedings because she was a friend and work colleague of the claimant, the claimant had not established that Ms Guminska's decision was significantly influenced by the protected act.

145. Further and or alternatively, this claim is out of time. There are only two acts relied upon by the claimant in which Ms Guminska has been cited as the perpetrator, the other being January 2020. The claim form was presented on 23 May 2020. The case against her is specific in time without any other acts forming a course of conduct. Ms Parkes is a trained employment law specialist and should have presented a timeous claim. By 23 May 2020, the last act in January 2020, was over the primary time limit of

three months. The respondent submitted that it is prejudiced as Ms Guminska was unable to give evidence and be questioned.

<u>January 2020 – incident with Ms Zowie Guminska bundle pages 66, paragraph h; bundle 94-95, paragraph 5(b)(vii)</u>

146. The claimant made further claims that in December 2019, Ms Guminska advised her that she would be placed on unpaid leave from January 2020 because Mr Stoyan Stanoevski, Moving and Handling Occupational Health Practitioner, did not explicitly state in his report that she was fit to work. This was despite the fact that the claimant's remaining annual leave was approved in December 2019. The decision was later reversed by Ms Guminska based on the concerns raised by the claimant. The claimant claims harassment related to disability and victimisation paragraphs 33g and 39b LOI.

147. Mr Stanoevski met with the claimant on 10 January 2020, who reported to him that she was suffering with pain, stiffness, weakness and limited movements in her shoulders over the last couple of years with the left being worse affected. They were related to osteo-arthritis diagnosed in 2019. The claimant also reported that she had partial bi-laterial knee replacements in 2010, and was under the care of her GP and a consultant. She was taking steroid injections in both shoulders with no improvement, and had a reverse total right shoulder replacement in August 2019. She had been having physiotherapy following surgery and her symptoms had improved but worsened again. She said to Mr Stanoevski that she would be on annual leave until 19 February 2020. He stated that she was not fit to return to work and that he had booked a review for 14 February 2020. (591-592)

148. Ms Gerrie had a conversation with Mr Stanoevski and wrote to Ms Virdee on 15 January 2020, stating the following:

> "Following this meeting, we had contact with OH who confirmed that they had not cleared Sylvia at that meeting to be fit for work. They later sent through a report which stated that she was having ongoing treatment with her consultant and physiotherapist therefore had not been able to say that she was fit for work and booked another assessment for 14 February. I called Stoyan from OH to confirm this and he confirmed that she would need to have this assessment on 14 February prior to saying that she was fit to return. With this in mind, we cannot put Sylvia on annual leave and she must remain on sick leave. I have discussed this with Stella as well who is in agreement. Please see the OH report.
>
> I am obviously leaving today, but have changed the off-duty back to stating Sylvia is on sick leave. I have tried to call her but there was no answer." (597)

149. Ms Virdee spoke to Ms Lankshear with regard to the claimant's situation and following that conversation emailed Ms Guminska on 20 January 2020 stating:

> "I have spoken to Caroline Lankshear, Head of ER regarding the below, and she has said as we are so close to the end of the financial year it is best for Sylvia to

> remain on annual leave as there is quite a lot of leave to take, and we can re-assess at the end of the leave period.
>
> She was due to be seen by Occupational Health on 14 February 2020 however Occupational Health have highlighted this to Dr Sterland as they feel she should be seen by him. I have spoken to Ann Holmes in Occupational Health and she will be calling Sylvia this morning to arrange the appointment which should be end of January beginning of February therefore we will know next steps before her annual leave finishes.
>
> Zoe can you please email Sylvia and update her about her annual leave?" (601)

150. The claimant did not want a drop in her pay from full pay to half pay while on sick leave hence the request to take annual leave.

151. It would appear that Ms Guminska attempted to speak to her following Ms Virdee's email but was unsuccessful and sent her emails on 15 and 16 January, as well as leaving a voice message and text. She eventually did speak to the claimant but it was brief as the claimant, according to Ms Guminska, hung up. In her email to the claimant dated 17 January 2020, she stated that she would contact Ms Virdee to see what they could do regarding her annual leave because she did not want to drop down to half pay. (606)

152. Ms Guminska, on 20 January 2020, and Ms Virdee on 21 January 2020, emailed the claimant respectively, stating that her annual leave would remain the same as initially approved. (603-604)

153. The claimant was expecting to go on annual leave but the Occupational Health report stated, by inference, that she was unfit for work. The policy being staff could only take annual leave if fit for work. As the claimant was unfit for work she could not take annual leave. In order to get sick leave she had to produce a sick note. The difficulty for her was that it could not be retrospective. There was the possibility that for a short while she would not receive any pay.

154. The sequence of events was such that the position of the respondent changed primarily due to the fact that Occupational Health was of the view that the claimant was not fit for work in January 2020. She was due to take her leave from 1 January 2020 and the respondent's managers were adhering to policy and not to the claimant's disability. None of the correspondence referred to the claimant's disability being an issue but her fitness for work. In the event, as it was close to the end of the financial year, and with the distinct possibility that the claimant may lose all of her leave entitlements, Ms Lankshear decided that the best approach was for the claimant to be allowed to take her annual leave. On these facts, we do not find that the respondent's conduct was unwanted nor was it related to the claimant's disability. This claim is not well-founded.

155. In relation to the victimisation claim, we do not find as fact that the change in position by Ms Guminska was significantly influenced by the claimant presenting the first Employment Tribunal claim. We find that Ms Guminska

genuinely wanted to resolve the difficulty the claimant was in, in that she was not fit to take annual leave at the time. The matter was eventually resolved following the intervention of Ms Lankshear. We have concluded that this claim is not well-founded.

<u>February 2020 – incident with Ms Olivia Goldsmith bundle pages 66, paragraph i; bundle 94, paragraph 5(b)(viii)</u>

156. The claimant alleges that on 25 February 2020, during a meeting regarding electronic patient records, a Band 6 Midwife, Ms Olivia Goldsmith, was argumentative in response to her suggestions, requiring intervention from another staff member on the claimant's behalf, namely Mr Folasade Akhanoba, Consultant in Obstetrics. She claims harassment related to race and victimisation paragraphs 33h and 39b LOI.

157. We find that the meeting had been arranged as a focus group discussion on the introduction of electronic patient records. In attendance were midwives, sonographers, consultants, as well as several external individuals. The discussion began about Gap and Grow charting which was unrelated to electronic patient records. Gap and Grow charts are charts which monitor the personalised growth of foetuses, and had been recently introduced by the Trust. They assist in focusing on the foetus's health and where a risk factor is identified, the mother is directed to have a scan to make sure the foetus is growing normally. If the foetus is not, the responsible midwife can refer the mother to the appropriate medical professional, if necessary. Some of those in the meeting were saying that women had to have scans at their local hospital but would then have to travel to the Trust to get their scans reviewed. The claimant had submitted a recommendation and maternity management had agreed, that patients should be scanned for GAP and Grow irregularities at their local hospitals within the Trust and then later reviewed in MDAU at Watford. She stated that the procedure avoided needless delays in required interventions for patients and ended the excessive backlog of obstetric scanning appointments at Watford.

158. Ms Goldsmith attended because she described herself as "tech-savvy". She said during the discussion that it was not fair from a patient's experience perspective, to expect or require a woman to have to pay for parking at one hospital, wait a long time to receive their scan, then travel to another hospital, pay for parking again and wait a long time again for a doctor to review their scan. Even more so if the doctor merely says everything is looking fine and they would need to see the woman again for another scan in a few weeks' time.

159. Ms Goldsmith had not met the claimant before and had no knowledge that she had brought a previous Employment Tribunal claim against the Trust. She could not recall whether the claimant responded to her opinion or whether her opinion differed, but she disputed the allegation that she had voiced her opinion in an aggressive manner. She stated that she is not an argumentative person but if she had been involved in a verbal altercation she would have remembered it. She was unaware that the claimant did not agree with her opinion and with the way that she had said it.

160. The claimant did not say anything to Ms Goldsmith about her being argumentative either during the meeting or afterwards. We find that, as it was a focus group meeting, everyone shared their opinions. Ms Goldsmith could not recall anyone needing to intervene during the discussion, certainly not Mr Akhanoba.

161. The claimant alleges that Ms Goldsmith, being junior to her at Band 6, aggressively challenged her and could only conclude that she had been influenced by rumours and comments she had heard about her which were a product of "historical racism" she had suffered.

162. The claimant did make a recommendation that was endorsed by those managing maternity. Based on the difference in views expressed by Ms Goldsmith it is not obvious that her concerns about women having to visit two hospital premises with attendant parking costs, were related to the claimant's race, nor can it be inferred from it. She was simply expressing the view as to inconvenience and cost involved in having one venue take scans and another venue reviewing the scans, and the attendant parking costs. We find that these were perfectly reasonable opinions to express. We were not referred to any diary entries by the claimant expressing her concerns and that Ms Goldsmith had acted in a racially discriminatory way towards her. Furthermore, there were a lot of people in attendance and not one was called by the claimant to corroborate her evidence on Ms Goldsmith's conduct towards her.

163. Moreover, the claimant in her witness statement wrote:

> "I can only conclude that Ms Goldsmith had been influenced by the rumours and comments she had heard about me which were a product of the historical racism I had suffered, and that this caused her to also act in a discriminatory way towards me on the basis of my race."

164. This is all speculation on the claimant's part without any evidence in support.

165. We were unable to make findings of fact from which we could decide Ms Goldsmith had engaged in unwanted conduct related to race or to the claimant's race. Accordingly, the harassment related to race claim is not well-founded.

166. There was no evidence that Ms Goldsmith knew of the claimant's earlier Employment Tribunal claim against the Trust, and no evidence had been adduced upon which the Tribunal could infer that she knew about the claimant's previous claim. Accordingly, the victimisation claim is not well-founded.

<u>Failure to make reasonable adjustments – parking charges: bundle 67, paragraph 6(a); bundle 102, paragraph 9 LOI</u>

167. In relation to the claim of failure to make reasonable adjustments in respect of the claimant being charged for using the Essential Car Park. As already

referred to the respondent accepted that the claimant is disabled within the meaning of s.6 Equality Act 2010.

168. The claimant states that she received temporary use of an Essential Car User Parking Permit in December 2016 after she started work with the respondent. This allowed her to park closer to the building rather than in the standard car park which is further away requiring her to walk up a hill or incline, to her place of work. She was unable to do that because of her arthritic knees.

169. On 18 January 2017, the respondent received a letter about the claimant from Dr John Sterland, Consultant Occupational Physician, stating, "She has had a temporary permit for the Essential Users' Car Park but nothing permanent planned." In managing her situation he advised:

> "1 – She will require a level parking space in an appropriate area, for the duration of her contract, on multiple sites as needed.
>
> 2 - Until arrangements can be made I suggest three-monthly permits."

170. Dr Sterland also wrote that "The Equality Act will apply to her situation." (347)

171. In an Occupational Health report dated 27 September 2018, it further confirmed that the claimant was covered under the Equality Act as a disabled person and it was essential for her to park "on the flat".

172. When she was planning her return to work in February 2020 after long-term sickness absence, she emailed her line manager, Ms Elaine Johnson, stating that she hoped that Ms Johnson would sort out her parking issues. (646-647)

173. The claimant was allowed to use the Essential Car Park but had to pay for her permit while on sick leave. Using the Essential Car Park which was closer to her place of work than the standard car park, was classed by the respondent as a reasonable adjustment. She requested a refund of the charges that she paid while on sick leave but this was refused. Her case is that she should not have been required to pay for her use of the Essential Car Park facilities. The respondent's position is that she should pay for the permit. (712)

174. The claimant stated that she never considered refunding the parking charges to be a reasonable adjustment but raised the requirement to pay for permit during the grievance process.

175. Ms Colette Mannion, Director of Midwifery and Gynaecology, wrote to the claimant on 14 April 2020, copying her representative, Ms Parkes, in which she stated:

> "I dispute that reasonable adjustments must be paid for by an employer, this can take various forms such as changing work patterns and changing the content of work therefore not having any financial impact. As you have not been in the workplace we have been unable to establish what reasonable requirements are

> required or whether we need to support redeployment to another role. Though you do state that you believe that you will be able to return to your full duties.
>
> With regards to your specific request for reimbursement of parking charges, all employees, including our disabled colleagues, have to pay for onsite parking permits, your role means you are entitled to a standard permit. By enabling you to park in the essential car park this is deemed an appropriate adjustment for you, but there is a requirement to pay for a permit."

176. In the respondent's Parking Policy, at paragraph 11, it states:

> "Allocation of a Temporary Disabled Supplementary Staff Permit is dependent on written confirmation from Occupational Health of a special medical condition preventing the applicant from walking more than 300 metres at any one time. This permit type shall be valid for a maximum of three months. During that period if the medical condition continues the person will need to apply to the local authority for a blue badge. If unsuccessful, the Trust will withdraw the Temporary Disabled Permit."

177. The policy provision also states that disabled staff would be required to pay the standard staff rate (942).

178. The cost of the permit for disabled employees is 0.05% of annual salary calculated on each month's earnings. (939)

179. Adjustments were made to the claimant's shift start times to one late shift per month by Ms Guminska in an attempt to assist her with finding a parking space as permits did not guarantee spaces in the Essential Car User parking lot.

180. This is the only failure to make reasonable adjustments claim. The provision criterion or practice is the requirement of all users of the Essential Car Park to pay the car parking charges. The claimant as a disabled person stated that she should not be required to pay the cost of her permit. What was the substantial disadvantage? The claimant was paid the salary of a Band 7 Midwife. She, like all other car drivers using the car park whether disabled or not, had to pay for their permits. The bald statement that she should not pay is not enough to support this claim. She was not substantially disadvantaged.

181. As disability is not in issue, the respondent had a duty to make reasonable adjustments. We find that it did do so on two bases. Firstly, it allowed her to use the Essential Car Park to avoid her walking up a slope or a slight incline. Secondly, that shift start times were reduced to one late shift per month to enable her to find a car parking space. The requirement to pay the permit applied to all users of the car park. Although it might be viewed as a desirable step not to require disabled persons to pay for the use of the essential car park, the question is was it a reasonable step in the circumstances? Paying for the use of the car park put her at a financial disadvantage not at a substantial disadvantage because of her disability. She was on salary commensurate with her position and was able to pay the use of the permit. The point of a reasonable adjustment is either to

ameliorate or to remove altogether the substantial disadvantage. We have come to the conclusion that the claimant was not substantially disadvantaged by the PCP. There was also no failure to make a reasonable adjustment.

182. The decision of Ms Mannion in her letter of 14 April 2020, setting out the respondent's position, we find that time began to run from that point onwards. The claimant's claim form was presented on 23 May 2020. The reasonable adjustment claim was presented in time.

Indirect disability discrimination – bundle page 67, paragraph 6(b)

183. In relation to indirect disability discrimination, the amended provision criterion or practice is, "a requirement that staff be left to work on ANC/MDAU on their own with minimal or no staff.

184. The claimant's case is that on many occasions she was often left to work without sufficient staff which exacerbated her arthritic pain, leaving her exhausted. We find that Midwifery across the NHS was understaffed during the claimant's employment and that currently is the position. The claimant did not believe that the respondent allocated staff to ANC/MDAU effectively. This would often lead to her either working without sufficient staff members, or with no staff at all, and at times having to work extra hours to ensure the service's needs were met. In her November 2018 appraisal, Ms Gerrie acknowledged the extra hours she worked. (426)

185. In the week commencing 29 October 2018, the claimant drafted an email to Ms Gerrie as five staff members were given annual leave and she was left to work on ANC alone. She said in evidence that in the end she never sent the email as she believed that her concerns would not be taken seriously. She stated at least seven people were on annual leave in October on the day she drafted her email to Ms Gerrie.

186. She further stated that she worked on her own on 1 November 2018 and emailed Ms Gerrie to let her know that she had been left alone to work at least twice that week. (410, 412)

187. In a Moving and Handling Risk Assessment report dated 13 November 2018, following the claimant's assessment, it is recorded that in relation to actions and timescales, that the, "Manager to ensure sufficient staffing to support Sylvia"

188. It was also recommended that there be an appropriate chair in ANC and that the claimant would need to liaise with staff to ensure that she was able to use it and for her manager to support her. (414)

189. In the list of issues she asserts that on 24 December 2018, she was working a 12-hour shift which was due to the finish at 8.15pm. Between 6.20pm to the end of her shift, she was the only member of staff on the ward. She further claims that this occurred frequently throughout her employment.

190. In her witness statement she relies on the events of 24 December 2018 but no subsequent events. She stated that on 24 December 2018, she asked Ms Gerrie if she could take half an hour for lunch and leave an hour early but Ms Gerrie said no. (451)

191. On 30 January 2018, she was on Telephone Triage following the Moving and Handling Assessment in November 2018. A case conference was held on that day during which she agreed to return to the role of Clinical Lead but did not want to be left alone at work as the problem of poor staff allocation had persisted. It was clear that staffing was an issue for the claimant and she wrote to Ms Gerrie, Ms Guminska, Ms Mannion and Ms Shand on 2 August 2019, "It is with great concern that I have to let you know that staffing on ANC/MDAU is at crisis point." She then briefly set out her concerns. (543)

192. In an email from Ms Shand on the same day addressed to both the claimant and Ms Gerrie, Ms Shand appeared to have blamed them for the staffing issue in ANC/MDAU and the late escalation of it. (548)

193. It is acknowledged that ANC/MDAU suffered from staffing issues between 2017 to 2019. There were high levels of sickness absences which meant that, occasionally, staff would have to work additional shifts, overtime and with minimal staff to ensure that the service was not impeded and patient care was not jeopardised. This impacted on all staff. The claimant was responsible for organising the rota and for identifying the staff issues to senior management. It was difficult to understand how she put her case against the respondent of indirect disability discrimination. She did not produce any evidence of group disadvantage and it was unclear if the disadvantage she suffered was over and above disadvantage suffered by non-disabled persons or those without her disability, who were required to work in situations where there were not enough staff. As the claimant is unable to establish that there was a PCP the respondent applied, group disadvantage, as well as the disadvantage to her, this claim is not well-founded.

194. We conclude that there was no PCP requiring staff to work in ANC/MDAU on their own with minimal or no staff. It is accepted that the claimant, on occasions, did work on her own long hours, but that was not a general requirement for all staff imposed by the respondent either expressly or in practice.

195. In addition, it is the claimant's case that she worked a twelve hour shift on 24 December 2018. This claim stands on its own and is out of time. No evidence had been given as to why she was unable to present this claim in time and we do not exercise our discretion on just and equitable grounds to extend time because she had previous experience in presenting a Employment Tribunal claim. The tribunal does not have jurisdiction here in determinate and it.

<u>Application to amend by substituting discrimination arising from disability – September 2018 – incident regarding a special chair: bundle 99, paragraph 7(a)(i), with failure to make reasonable adjustments</u>

196. On the second day of the hearing Ms Parkes, on behalf of the claimant, applied to amend the claim of discrimination arising in consequence of disability in relation to the allegation that the claimant was not provided with a special chair as she was suffering from her arthritic knees, to failure to make reasonable adjustments.

197. The application was refused because it was considerably out of time. Ms Parkes is an experienced employment practitioner, and not a lay person. She should have made the application much earlier. There was no good reason for the delay. The respondent would require time obtain evidence in rebuttal and it is uncertain whether this could be achieved. The cogency of the evidence may be affected if the application is granted. We apply the judgment of HHJ Tayler in the case of Vaughan v Modality Partnership UKEAT/0147/20/BA. Having regard to the balance of prejudice, the respondent is likely to suffer the greater prejudice if the application is granted, whereas the claimant has many claims she can proceed with against the respondent. Accordingly the application was refused.

December 2018 to January 2019 - Occupational Health Incident 1 with Ms Gerrie: bundle page 67, paragraph 6(e); bundle pages 99-100, paragraph 7(a)(ii)(a-e), paragraphs 14 and 15 LOI

198. The claimant referred to the period between December 2018 to January 2019 and the referral to Occupational Health by Ms Gerrie regarding her suitability to carry out duties as a Band 7 Midwife. She stated that following the Manual Handling assessment on 13 November 2018, Ms Gerrie removed her from clinical duties, assigned her to Telephone Triage and suggested that she consider retirement on health grounds.

199. It is not disputed by Ms Gerrie that the claimant was removed by her from her clinical duties and assigned to Telephone Triage. This was in line with the advice from Occupational Health. Following receipt of the Occupational Health report, she held a meeting with the claimant on 14 December 2018 together with Ms Rupinder Virdee, Senior Employee Relations Advisor, and Ms Guminska. During the meeting they talked about the Occupational Health report, its recommendations and the tasks it advised the claimant could and could not do. Occupational Health had advised that she could not do any roles that involved being patient-facing. At the time the only jobs available which did not involve patient facing were specialist roles for which the claimant did not have enough experience. The respondent was unable to create a job that was not needed merely to meet her needs. She was informed that Occupational Health had advised that she could not do any clinical work which meant she could not work in MDAU. In addition, she could not do CPR which was the minimum requirement for staff.

200. The claimant informed Ms Virdee and those at the meeting, that she had recently attended a resuscitation training session and passed which meant that she could do CPR in theory. She stated that doing it on a patient would still hurt her and that if someone needed CPR she would call for help and wait.

201. Having considered various positions and options which were not suitable, the other option was redeployment somewhere else within the Trust or within the department. They agreed that a case conference would be useful to discuss the recommendations in detail and to plan a proper way forward to support the claimant who agreed to participate in the conference. It was not an option for the claimant to continue to undertake clinical work until the case conference as this was against the advice from Occupational Health. It was then discussed the option of her undertaking Telephone Triage work. The Triage hours were extended specifically for the claimant to accommodate her needs. At no point did she express any unhappiness in engaging in Telephone Triage work. As far as Ms Gerrie was aware, they had found a mutually acceptable temporary solution which took into account the claimant's health and safety pending a formal discussion with Occupational Health about the way forward.

202. In a letter from the claimant's surgeon, Mr Will Rudge, Consultant Orthopaedic Surgeon Shoulder and Elbow Unit, dated 1 November 2018, she was diagnosed with bilateral massive rotator cuff tears to both shoulders and would likely require total shoulder replacements. (411)

203. It was in the Moving and Handling risk assessment of 13 November 2018, when the respondent was advised that she could not work in MDAU as she found it difficult to perform vaginal examinations and palpations on patients and, that in respect of emergency situations, she would need to step out of these situations and act as support. (414-416)

204. She was referred to Occupational Health in order that the respondent could better understand what duties she was able to undertake and what it could do to support her.

205. We find that there was nothing unusual in Ms Gerrie's referral seeking to ascertain what the claimant could do, and a standard referral was submitted by her on 13 November 2018. (417-420)

206. In a report sent on 5 December 2018, by Dr John Sterland, Consultant Occupational Physician, he stated that it was not possible for the claimant to be patient-facing except for Bacillus Clamette-Guerin, "BCG", clinics. She could meet and greet patients but not engage with clinical work. She was not able to manage CPR but could assist in emergencies. She was not able to perform palpations on the abdomen because of shoulder issues, and would not be able to lead interventions as she was vulnerable to injury but could manage BCG vaccination clinics. He suggested a further three months of adjusted duties to allow the shoulder condition to stabilise. She could manage Telephone Triage and non-clinical ante-natal administration. (431-432)

207. The claimant said that at the case conference held on or around 30 January 2019, she was upset to realise that questions about her suitability as a Band 7 Midwife had been raised. She asserted that with the right medical interventions and reasonable adjustments at work, she was more than capable of remaining in her role as Clinical Lead. She was hurt that Ms

Gerrie went behind her back to obtain medical information about her capabilities. She asserted that Ms Gerrie seemed preoccupied with her, that is, the claimant's inability to intervene during hypothetical emergency situations which rarely occurred on a daily basis. In response the claimant said that she would just dial the emergency number 2222 which she had previously done following an emergency on ANC while she was the Patient Safety Midwife. She said that immediately a Crash Team and multiple other members of staff soon arrived and the person in need of support was helped. Ms Shand who was using a walking stick, was also present but did nothing because she was physically unable to, and remained a Band 8 Midwife until her retirement in 2020. The claimant further claimed that she had never seen Ms Shand do any clinical work of any kind, yet there were no issues around her suitability. She made reference to her Certificate of Competence that she received from the mandatory resuscitation training session on 6 December 2018, and that the feedback from the session was that the trainers were very impressed with her work. (440)

208. The claimant's claim is that she was treated unfavourably as she had been discriminated for a reason arising in consequence of disability.

209. At the time, the claimant's disabilities were her arthritic knees and shoulders. She was removed from carrying out vaginal examinations and palpations which put her at a detriment, in that, those were part of the duties she carried out as a Band 7 Midwife. She was, therefore, treated unfavourably.

210. Was the treatment justified? It is clear from the Moving and Handling assessment that the recommendation was that she should not engage in vaginal examinations and palpations because of her shoulder condition as it would cause her a lot of pain in her shoulders and arms. This was something that she had acknowledged having read the Occupational Health report by Dr Sterling who supported the position taken in the Moving and Handling assessment. The respondent's managers had a duty of care to the claimant to comply with the medical recommendations. If they failed to do so and a patient suffers an injury as a result, they would be legally liable. The legitimate aim is to manage an employee's sickness absence and provide an accurate referral to occupational health for support and management, with a view to adhering to the relevant standards and codes of conduct, ensuring patient health and safety and maintaining a safe and productive working environment. In doing so, the proportionate means were to rely on reports from occupational health and on any workplace assessments. It acted upon them. It can justify the unfavourable treatment. We would also agree with Mr Nicholls' submissions on this claim. This claim is not well-founded.

<u>Ms Gerrie's suggestion that the claimant retire on health grounds, paragraph 15a LOI, paragraph 15a LOI</u>

211. The claimant asserts that Ms Gerrie had suggested during the meeting on 14 December 2018, that she should consider retirement on health grounds.

The claims discrimination arising in consequence of disability, paragraph 15a of the list of issues.

212. Ms Gerrie denied this stating that in considering the options available to the claimant retirement was the last resort and she did not suggest that to the claimant. She stated that either Human Resources or Occupational Health was better placed to advise the claimant on retirement on health grounds.

213. We do not find as fact that Ms Gerrie suggested that the claimant should consider retirement on health grounds. It is notable that in the referral of Dr Sterland, a question was asked at paragraph 12, namely "Would you support an application for ill health retirement?". That box was not crossed or ticked by Ms Gerrie suggesting that she was not asking for information in relation to retiring the claimant on ill health grounds. Likewise, she did not cross the box in section 4 of the referral form on reasons for the referral, one possible reason being, "Consideration of ill health retirement". (417-419)

214. The claimant said in evidence, under cross-examination, that she was not complaining about moving to Telephone Triage on health grounds. She was complaining about Ms Gerrie suggesting that she, allegedly, consider retirement. We find and do conclude that Ms Gerrie was not suggesting that the claimant should retire on ill health grounds. There was no unfavourable treatment of the claimant by her.

215. For these reasons, this aspect of the claim of discrimination arising in consequence of disability, is not well-founded.

"Prior to the case conference scheduled for 9 January 2019, Ms Gerrie emailed Dr Sterling a written enquiry regarding the claimant's fitness to practise as a Band 7 Midwife, of which the claimant was hitherto unaware.", paragraph 15b LOI.

216. The claimant claims, in relation to the above, discrimination arising in consequence of disability.

217. We find that Ms Gerrie was asking questions of Occupational Health about what the claimant was capable of doing. The questions were not directed at challenging the claimant's professional suitability to work as a Band 7 Midwife. Normal practice, she said in evidence, was not to disclose the referral of an Occupational Health report, to the employee. In any event, she was prepared to disclose the form to the claimant and the claimant did receive a copy of it. The Occupational Health report dated 5 December 2018, from Dr Sterland, stated that the claimant had progressive osteo-arthritis in her knees and shoulders and that she was unable to work in high mobility roles or undertake ANC clinical work, palpations, ultrasounds or CPR. We find that it was the role of Occupational Health to state whether, in its opinion, the claimant was physically able to carry out her role and to consider other possible alternative roles for her. We find that it was not unfavourable treatment as it was necessary to obtain Occupational Health advice to assist the respondent in deciding together with the claimant, a way forward. This aspect of the claim is not well-founded.

"During a long term sickness (LTS) meeting on 10 January 2020, the claimant stated that she would eventually have the ability to assess a woman both abdominally and vaginally once her shoulder had fully recovered. This comment was omitted from the meeting record. The record was amended by Rupi Virdee (senior employee relations advisor) on 10 February 2020 upon the claimant's request.", paragraph 15c LOI.

218. On 4 February 2020, the claimant emailed Ms Lankshear making a Subject Access Request. She stated that she was requesting a copy of the handwritten notes made by Ms Rupinder Virdee when she had a meeting with Human Resources, Ms Gerrie and Ms Guminska, on 10 January 2020. Ms Virdee was copied in the email.

219. Ms Virdee then emailed the claimant on 6 February 2020, stating:

> "Unfortunately I do not keep my handwritten notes. The transcript on the LTS meeting notes template is lifted from the handwritten notes however if you are not happy with them you are welcome to make comments and send them back to me."

220. The claimant replied on 10 February 2020, stating:

> "Dear Rupi,
>
> I requested your handwritten notes due to the conflict between what was said in the meeting and the report as well as Lydia's email which was not copied to me. I would assume that you would have the original handwritten report should there be a discrepancy raised. At the meeting, I specifically stated that I will eventually have the ability to assess a woman both abdominally and vaginally once my shoulder has fully recovered, however, your report and Lydia's email raises concerns as to my ability to perform these duties with no reference to the fact that I need time to retrain the repositioned muscles in my shoulder."

221. Ms Virdee responded later in the day stating:

> "Dear Sylvia,
>
> Apologies I do remember you saying this and I thought I had added it into the notes therefore I have amended, if there is anything else please let me know."
>
> (631-635)

222. In the notes it is recorded by Ms Virdee that the claimant said,

> "She will not initially be able to carry out internal examinations or palpations therefore would only be able to work in ANC to start with."

223. In the amended notes of the meeting it states:

> "SB [Sylvia Bone] said she has had surgery and doesn't want to do anything to jeopardise the recovery as there has already been one injury since the operation, however SB explained that SB will eventually have the ability to assess a woman both abdominally and vaginally once her shoulder has fully recovered."

224. It is clear that Ms Virdee recollected the claimant's statement during the meeting and was prepared to correct the notes. This was not down to the claimant's disability but to Ms Virdee's failure to recollect and to put in the original notes what the claimant had said. The matter was corrected within days. It is unclear what was the something arsing and the detriment the claimant suffered.

225. We have not made findings of fact from which we could decide that the claimant had been discriminated and had suffered unfavourable treatment.

226. We have come to the conclusion, applying the "reason why" approach, that the failure to originally put what the claimant had said during the meeting was not discrimination arising in consequence of her disability but a genuine failure on Ms Virdee's part to initially put down what the claimant had said which was quickly corrected and she apologised. This claim of discrimination arising in consequence of disability is not well-founded.

Paragraph 15d LOI, Ms Gerrie's questions to Occupational Health.

227. Another act relied upon by the claimant in support of her discrimination arising from disability claim is that she stated that she had an Occupational Health assessment prior to the long-term sickness absence meeting on 10 January 2020. After that meeting, Ms Gerrie emailed Occupational Health on 10 January 2020 at 4.15, on the same day, requesting that prior to completing their report, Occupational Health should take into account the essential duties of her role as a Band 7 Midwife and Registered Midwife. Ms Gerrie also stated: "I am concerned to hear her account of the review that she is unfit to perform her role as a midwife". The claimant asserts that this was contrary to her account.

228. On 10 January 2020, Mr Stoyan Stanoevsky, Moving and Handling and Occupational Health Practitioner, emailed Ms Guminska, copying in the claimant, in relation to an Occupational Health report. He wrote:

> "Please see the attached partially finished OH report for Sylvia.
>
> As per our telephone conversation earlier today, I believe it will be more beneficial if Sylvia is reviewed closer to the date she plans to start working (19 February 2020) as at present she is still undergoing treatments and improvements are expected by that time. This will result in a more appropriate advice and recommendations.
>
> Hence I booked a review on 14 February 2020 at 09:45am.
>
> I have also advised and booked an MSD/DSE appointment for Sylvia booked for 25 February 2020 at 09:00 which will be done in Sylvia's office/clinic area.
>
> Can you please fill in the attached form for the MSD/DSE risk assessment ASAP and send back to the generic M&HG email found at the bottom of the forms." (589-590)

229. On the same day at 4.15pm, Ms Gerrie wrote to Mr Stanoevsky copying in Ms Virdee, Mr Paul Dagama, Chief People Officer, Ms Stella Roberts, Ms Collette Mannion, and Ms Guminska, stating the following:

> "Dear all,
>
> I understand that Sylvia Bone was seen today in an Occupational Health appointment.
>
> She has reported back off sick (absent due to sickness since August until reporting back fit for work on 1 January 2020) having undergone shoulder surgery. However, she has not had an OH review prior to this "return". This return to work (based on her reporting back fit for work) has been spent with her being on annual leave.
>
> Prior to you completing your report from her OH review I would like to request that this report/your findings is set against her role and ability to undertake her role as a Band 7 midwife, for which I attach her job description. I would also request that this assessment is set against her role as a registered midwife (NMC registrant and able to perform all aspects of her role against NMC standards and code of conduct). I also attach the document outlining the standards of competence for a registered midwife.
>
> Please can you contact me to provide me with an overview of your findings/discussions today in the OH meeting as I am concerned to hear her account of the review that she is unfit to perform her role as a midwife. Can I please remind you that in line with her contract of employment she would be expected to do so in ANY care setting, as childbirth can be unpredictable and she must be able to adapt to changes in women's care in all environments; even if based in an ante-natal clinic (as I know she is requesting this to perform only an administrative role?).
>
> In addition, she informed me that she was unable to perform internal examinations and abdominal palpations. This is a key aspect of the role of a midwife and I need to assess whether she is able to perform the role of a midwife <u>safely</u>.
>
> Therefore, please can you establish Sylvia's ability to perform the following Essential tasks in line with her role, duty of care and expectations of her functioning as a registered midwife:
>
> Vaginal examination
> Delivery of a baby
> Suturing
> Abdominal Palpations
> Cannulation
> Basic life support
> Newborn life support
> Obstetric emergencies
>
> In addition, I am concerned about her ability to comply with manual handling requirements for her own wellbeing as well as IPC requirements can this also be assessed.

> In the event that she is not able to undertake her role as a midwife I have copied Paul Dagama and Rupee HR to support us in her management and make a decision whether redeployment is an issue etc. as if she fails this assessment she would be unable to work in the maternity department. I have also copied Stella Roberts, our HOM and Collette Mannion, our DOM for awareness. (595-596)

230. The claimant asserts that despite Mr Stanoevsky's recommendation, and outside her knowledge or consent, Ms Gerrie had again attempted to intercept the outcome of the Occupational Health report by sending Occupational Health multiple questions regarding her fitness to practise as a Band 7 Midwife on the basis of her disability. She also unnecessarily copied in multiple parties who had no reason to be included. She found it deeply offensive that Ms Gerrie wrote, "I am concerned to hear her account of the review that she is unfit to perform her role as a midwife". The claimant alleges that this was a complete fabrication which contradicted her statement at the long-term absence review meeting. She stated that she expected to be able to resume clinical duties after recovery. Ms Gerrie's statement also contradicted Mr Stanoevsky's statement that he expected to see improvements in her condition by February 2020.

231. The claimant accused Ms Gerrie of being dishonest, and being engaged in damaging her professional reputation. She also accused her of hypocrisy, in that, in relation to another case, she was sensitive about other individuals being copied in. She stated that Ms Gerrie had insisted that she, the claimant, was not good enough to practise as a Band 7 Midwife which was reminiscent of Ms Shand and midwifery managers refusing to refer her to the NMC which formed part of the first Employment Tribunal claim against the respondent. Ms Gerrie this time was using her disability as the reason. The claimant felt that managers were colluding against her just as they had done over a decade ago. She put in a Subject Access Request on 4 February 2020, as she wanted to know what was being sent behind her back which could affect her career.

232. In evidence Ms Gerrie told us that at the long-term sickness review meeting on 10 January 2020, the claimant said that she was due to return to work on 19 February 2020 but would not be initially able to carry out internal examinations or palpations and could only work in ANC to start with. She would eventually be able to assess a woman abdominally and vaginally once her shoulder had fully recovered. At the time she was unable to do so and it was unclear when she would recover enough to engage in that work. She explained to the claimant that the tasks were an important as part of being a Band 7 Midwife. The claimant's response was that she did not want to engage in any work that would jeopardise her recovery and already had one injury following her operation. She stated that she was able to work in BCG but needed to assess that once she returned to work, and said that she had just had an Occupational Health appointment that day, therefore, Ms Gerrie needed to wait for the report to understand the recommendations including a phased return. It was confirmed that a muskulo-skeletal assessment had been scheduled on 11 February 2020.

233. Ms Gerrie was concerned that the claimant was unfit to perform her role as a Midwife and, on the same day, spoke to Ms Stella Roberts, Acting Deputy Head of Midwifery, as Ms Shand was on sick leave. Ms Roberts had enquired about the claimant's case. The claimant was on sick leave along with several midwives. Ms Gerrie explained that the claimant had told her that she could not do any clinical work and she, Ms Gerrie, asked for advice about what to do and how best to support the claimant. She was advised by Ms Roberts to contact Occupational Health and to ascertain what the claimant could and could not do at work. It would appear that Ms Roberts had a similar situation in the past with another employee who had knee problems and who said they could not do any clinical work but then after speaking to Occupational Health, it became apparent that there were certain tasks which they could do than they thought.

234. Following Ms Roberts' advice, Ms Gerrie called Occupational Health to ask whether they had prepared the claimant's report. She was told by the receptionist that they had not and that it might be helpful if the Occupational Health doctor had the claimant's job description. An email was sent at 4.15 on that day by Ms Gerrie together with the claimant's job description and information on her role and duty. She did that because the claimant had been off sick for a very long period of time. From what the claimant told her, she, Ms Gerrie, was concerned that she was unable to undertake the usual duties of a Midwife. Ms Gerrie also wanted to understand clearly what the claimant was able to do as the role of a Midwife is very broad and it may be that she was able to perform some clinical duties but not others. She needed Occupational Health to systematically go through each aspect of the claimant's role to advise on what she was and was not able to do to enable Ms Gerrie to consider any adjustments, or to find a suitable role which would not pose a risk to the claimant's health and safety. She did not ask these questions in the last Occupational Health referral because they only arose in light of the discussion during the long-term sickness absence review meeting which occurred on the same day as the Occupational Health referral. We find that the referral was made because Ms Gerrie was genuinely concerned that the claimant had said that she could not do clinical tasks or be patient facing. Both of these were essential to her role as a registered midwife.

235. Ms Gerrie said that she was aware an hour before she sent her email that Occupational Health had communicated with Ms Guminska providing her with a partially completed report and advised that it would be more beneficial if the claimant was reviewed closer to her return date given that she was undergoing treatments and improvements and they had booked a review on 14 February 2020. Ms Gerrie stated that she did not believe that she had seen the partial report before her email was sent. She then said, "If I had, I would not have sent the email as it does not make sense for me to have done so".

236. The Occupational Health form has a section for a job description to be attached.

237. We find that Ms Gerrie genuinely wanted the claimant to return to work and was most anxious to know the duties she could do as a Midwife and to consider making reasonable adjustments. She had not seen the partially completed Occupational Health report but felt that answers needed to be given to crucial questions in relation to the claimant's duties following what the claimant had said at the long-term sickness review meeting on 10 January 2020. She was not motivated by any ill feelings towards the claimant. She was taking methodical and detailed approach to the duties of the claimant's job and her own as the claimant's line manager. Her email was triggered by the fact that the claimant had said that she was not fit to carry out the role as a Band 7 Midwife. We have come to the conclusion that there was no unfavourable treatment.

238. However, even if Ms Gerrie's conduct in sending the email to Occupational Health was unfavourable treatment and the claimant had suffered a detriment, we would agree with counsel's submissions that it was a proportionate means of achieving a legitimate aim. The aim being to manage employees' sickness absences. A further aim being ensuring patient health and safety and maintaining a safe and productive working environment. The proportionate means would be to engage in providing accurate referrals of employees to Occupational Health for support and management with a view to adhering to relevant standards and codes of conduct. Accordingly, this aspect of the claim of discrimination arising in consequence of disability is not well-founded.

<u>Ms Gerrie's email of 10 January 2020, was unnecessarily copied to various members of staff, paragraph 15e LOI</u>

239. We find that the email was sent to Occupational Health, two individuals from Human Resources, namely Ms Verdi and Mr Dagama, Chief People Officer, Ms Roberts, Ms Guminska and Ms Mannion, Director of Midwifery. The email was sent to them by Ms Gerrie because she was due to leave the Trust on 15 January 2020 and she wanted to ensure that those who might be able to support the claimant following her departure, were up to speed on her situation. She was keen to ensure that the claimant was in a safe and productive working environment and also to ensure that patient health and safety was maintained. All the rota and duties for the claimant would need to be dealt with and planned prior to her return date in order to run the clinic safely and successfully. Ms Gerrie needed to plan ahead for the duties the Trust could be giving to the claimant to undertake, and for staffing levels to be maintained at a safe level if it is in a clinic. She, therefore, did not believe that she copied those individuals in that email unnecessarily. She felt that human resources needed to be aware from an employee relations perspective, and she also felt that the claimant's managers needed to be aware from a management perspective. Ms Guminska was managing the process together with Ms Gerrie. Ms Mannion was the Director of Midwifery, and Ms Roberts was Acting Deputy Head of Midwifery, who had been supporting Ms Gerrie with the claimant's long-term sickness absence and return to work process.

240. Ms Gerrie candidly admitted that she understood now that in writing to those individuals the claimant became upset but she was just trying to ensure that the claimant was going to be fully supported after she left the respondent.

241. We have come to the conclusion that informing human resources and the claimant's managers, was not unfavourable treatment of the claimant. They had a vested interest in knowing about her circumstances and how best to manage her. It did not arise from her disability but from a genuine attempt on Ms Gerrie's part to support her and make sure that she did not fall between the cracks in a large organisation such as the Trust.

242. If we are wrong and the claimant did suffer unfavourable treatment because she was upset at the number of those who were copied in, we accept the respondent's contention that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The aim being to manage employees' sickness absence and provide accurate referrals to Occupational Health, for support and management, with a view to adhering to the relevant standards and codes of conduct, ensuring patient health and safety and maintaining a safe and productive working environment. A proportionate means in achieving the aim would require that information be obtained from human resources and communicated to the employee's managers. This claim is not well founded.

The final part of the discrimination arising in consequence of disability claim, is that, "Ms Gerrie's email of 10 January 2020 was sent to Occupational Health outside of the claimant's knowledge". Paragraph 15f

243. This matter has already been addressed by the Tribunal in its earlier findings and conclusions. Ms Gerrie accepted that she did not copy the claimant into the email. She stated that it was not because she was intentionally trying to communicate with Occupational Health outside of the claimant's knowledge. It was normal practice not to automatically do so. We have made a similar finding in relation to a previous claim and that what Ms Gerrie was doing was complying with accepted practice. It does not arise from the claimant's disability but was in compliance with standard practice. There was no unfavourable treatment.

244. If there was unfavourable treatment in relation to the above conclusion it could be justified for the same reasons. This claim is also not well-founded.

Direct race discrimination – failed to investigate a complaint of race discrimination made on 3 March 2020, paragraph 11a and b LOI

245. On 13 January 2020, Ms Donna Elaine Johnson commenced work at the Trust as Maternity Matron, Hospital In-Patient Services. She is black.

246. As previously stated, on 15 January 2020, Ms Gerrie left her employment with the respondent. On 4 February 2020 the claimant sent to Ms Johnson details of Human Factors Training to take place on 21 February 2020 which was approved by Ms Johnson. Ms Johnson also approved her attendance at Electronic Patient Workshop on 25 February 2020. (619-623)

247. On 12 February 2020, the claimant's annual leave came to an end and she returned to sick leave. (668) Her fit-note dated 12 February 2020, diagnosed her as suffering from stress at work. She was unfit for work from 12 February to 31 March 2020. (649)

248. She was unable to return to work in the BCG clinic on 17 February 2020, as she was on sick leave.

249. On 2 March 2020, Ms Johnson wrote inviting her to attend a Stage 3 Long Term Sickness Absence meeting in view of the fact that she was unable to return to work on 17 February and had submitted a fit-note. The meeting was due to take place on 23 March 2020 at 12:30pm. (669-670)

250. The following day, 3 March 2020, the claimant's representative, Ms Parkes, lodged a formal complaint on behalf of the claimant alleging victimisation, bullying, harassment and discrimination. Ms Parkes dealt with the background of the claimant's case in relation to her disabilities and her employment history. She then set out the details of the claimant's complaint. She asserted that the claimant was working in a hostile work environment in relation to the events which led to her presenting her first claim form against the Trust. Ms Parkes then chronicled events in 2017, 2018, 2019 and 2020. She also asserted that promotion of the claimant was withheld as she had been at that time a Band 7 Midwife for the previous 14 years and for the previous three years she had made significant contributions at the Trust. She set out the claimant's contributions and stated that she was appointed as an Expert Practitioner by NICE. Despite her contributions she had been unsuccessful in obtaining the role of Matron/Quality Assurance Lead, Audit and IT Midwife and Senior Research Nurse, and had not been promoted to a higher salary band. By reference to Occupational Health reports and the long-term sickness review meeting on 10 January 2020, the respondent had poorly managed her disability and sickness absence. Ms Parkes also referred to the Occupational Health report by Dr Sterland and the claimant's attendance for an Occupational Health assessment on 29 January 2020. Ms Gerrie and the line management of the claimant and her disability were accused of treating the claimant less favourably in comparison with her white colleagues and this was in line with the research at the time of BAME nurses and midwives. In closing Ms Parkes wrote the following:

> "In response to her complaint, Ms Bone is seeking the following resolutions:
>
> - Promotion to Band 8A or above
> - Redeployment to one of the following positions:
>   - Freedom to speak up (FTSU) guardian
>   - ANC Vaccination Clinic
>   - Maternity Investigations
>   - Auditing

- Receipt of the outstanding remainder of her December 2019 pay

- Prompt receipt of her employment data as per her recent subject access request

Ms Bone is seriously aggrieved by the circumstances, which are unethical, illegal and have caused her considerable injury to feelings. In addition to concern for herself is her alarm at how this toxic workplace culture is impacting patient care. As such, please be advised that Ms Bone is prepared, once again, to pursue the matter legally should a suitable outcome not be reached.

Thank you for your kind attention and I look forward to your response." (671-681)

251. An invitation to attend a grievance meeting was sent by Ms Justine Powell, Employee Relations Manager, to Ms Parkes in an email dated 11 March 2020. Ms Powell stated that the Trust was happy to agree to Ms Parkes accompanying the claimant at the meeting scheduled to take place on 18 March 2020 at 1.30pm. (688)

252. The meeting went ahead on 18 March. The claimant attended in the company of Ms Parkes. Ms Mannion and Ms Powell also attended on behalf of the Trust. Ms Sharon Bloomfield took notes.

253. In Ms Parkes' notes of the meeting there is no reference to an outcome in relation to promotion.

254. The respondent's grievance policy states that employees are encouraged to raise concerns informally in a supportive atmosphere through discussion between them and their immediate line manager on a one-to-one basis usually within 10 days. (241)

255. Prior to the Covid-19 pandemic, the normal grievance process was that where an employee felt that the grievance had not been resolved at the informal stage, the matter could be dealt with informally, or the employee had not received a response from the Trust within ten days after raising their grievance, they could then invoke the formal stage. The formal stage involve the manager who dealt with the informal stage preparing a management case to explain their decision making. Depending on the nature of the grievance, the matter may have proceed to a formal grievance hearing at which the manager would present the management's case. Alternatively, a formal investigation may be instigated following which either a formal grievance hearing could be convened, or a meeting between a senior manager and the employee to attempt to negotiate a mutually agreeable outcome. (241-242)

256. At the time of the claimant's grievance being dealt with, the respondent was impacted by the Covid-19 pandemic. Its staffing and resourcing were particularly affected. On 1 April 2020, it received a letter from the National Social Partnership Forum advising that all employee relations processes, such as disciplinary, grievance, sickness and capability, should be paused to allow all efforts to be concentrated on the pandemic. The respondent,

therefore, modified its grievance process to focus on informal resolutions and the formal grievance stage of the grievance process, including formal investigations, were temporarily suspended to focus its staff on providing front line support to its patients. This Modified Grievance Process was meant to be a temporary measure but is still used by the Trust. (1016, 260)

257. In the National Social Partnership Forum document under "Disciplinary Matters, Grievances and Other Procedures", it states the following:

> "Employers will pause disciplinary and other employment procedures (for example: sickness and capability triggers) while the crisis lasts, except where the employee requests proceeding as it would otherwise cause additional anxiety, or where they are very serious or urgent.
>
> Where an issue is less serious or not urgent then pragmatic outcomes with agreement of the employee, and after consultation with union representatives, should always be considered. Where outcomes cannot be agreed in this way then processes may resume at a future date, without detriment or processing of either side." (1018)

258. From the respondent's Human Resources Trust Electronics Staff Record Tracker, at the time of the claimant's grievance, we find that 15 other grievances were raised with the Trust between March to August 2020. Twelve of those were dealt with informally and resolved and three were withdrawn by the employee. Of the twelve employees whose grievances were resolved informally, half were white and the others were black 3, Chinese 1, Asian/Indian 1, and unspecified non-white 1. The three employees who withdrew their grievances were white.

259. Ms Mannion had also dealt with a Band 6 Midwife under the Modified Grievance process. (1016)

260. It was explained to the claimant and to Ms Parkes that the Trust had modified its grievance process because of the pandemic and that, temporarily, grievances were not being dealt with formally and formal investigations were not being commissioned.

261. The claimant stated that the discussion at the meeting was detailed. The grievances were not upheld.

262. On 30 March 2020, Ms Parkes wrote to Ms Mannion, copying Ms Powell and Ms Johnson. She disagreed with the positions taken by them and stated that the claimant was seeking a written apology having been racially discriminated again by the Trust; she was seeking promotion to Band 8; a refund of her wages deducted in December 2019; a cessation of the parking allocation fee; reimbursement of parking fees paid; and immediate fulfilment of her subject access request.

263. In addition, Ms Parkes wrote that the claimant wanted clarification of why she had been placed on Stage 3 sickness absence management. She was demanding respect commensurate with her contribution and was defending her legal entitlement to work without being subjected to racially

discriminatory attitudes and practices. Ms Parkes then wrote that if the matter was not resolved the claimant was determined to seek redress through the Employment Tribunal. (702-705)

264. In the respondent's policy on grievance, paragraph 7 on time periods, states:

> "All grievances should be dealt with as soon as is reasonably practical. Employees wishing to raise a grievance should do so within six months of the incident or action giving rise to the grievance otherwise it will be considered out of time."

265. The claimant has referred to the conduct of the grievance hearing and outcome as amounting to direct race discrimination. She asserts that the respondent "failed to investigate a complaint of race discrimination allegedly made on 3 March 2020 (or, in the alternative, failed to adequately investigate it)".

266. The allegation of direct race discrimination covers the period from May 2017 to early 2019. By 3 March 2020, the date of the grievance, more than six months had elapsed since the last act relied on by the claimant. In accordance with the respondent's policy, it was out of time. This was pointed out by Ms Mannion to the claimant during the grievance meeting that the respondent was unable to investigate them as they were raised for the first time in her grievance. There was no evidence that Ms Mannion was aware of her 2004 Tribunal claim. In relation to the claimant's complaint about Ms Olivia Goldsmith, Band 6 Midwife, in relation to electronic patients' records, this incident was discussed during the grievance meeting and Ms Mannion was of the view that the exchange between the claimant and Ms Goldsmith was within the normal parameters of robust exchange of views by professionals in a multi-disciplinary meeting. She considered that mediation between the claimant and Ms Goldsmith would be a possibility in order to promote positive work relationships. The claimant, however, returned to work very briefly in April 2020 before she resigned. There was, therefore, no time to pursue mediation.

267. We find that following the grievance meeting Ms Mannion wrote to the claimant on 25 March 2020, stating the following:

> "Dear Sylvia
>
> Thank you for coming in last week. It was lovely to see you and I am really pleased you will be returning to work from 1 April 2020. I hope you found our discussion reassuring. I am confident that we will be able to work together to address any concerns that you may still have.
>
> As discussed, we have a new Matron in post, Elaine Johnson, and I have requested that she contact you and arrange to introduce herself to you, and discuss the most appropriate way to support your return to work. This will include an appropriate phased return, considering hours and duties. We will also arrange a Basic Life Support and New Born Life Support Assessment as requested by Occupational Health at the first opportunity. We will continue following OH advice, which outlined that you should be able to return to your full role. Until such time, redeployment would not be considered. However, if

> redeployment will be required in the future, due to a long-term health condition, then we would like to start discussing how we can prepare for this.
>
> Initially, I would like to be involved with your one to ones with Elaine so that I can be reassured that the right support has been put in place to allow you a successful return to work. We also agreed that we would explore appropriate development opportunities with you.
>
> You identified the behaviour of Ann Shand is causing concern. I informed you that her role has recently changed and she is not currently in the Trust. You would therefore not come into contact with her in the foreseeable future. However, we agreed that if and when she returned to work, we would consider whether a facilitated meeting would be appropriate. Alternatively, myself, or another senior manager could meet with Ann and talk through the concerns you have raised.
>
> We also talked about Zowie and how the several interactions with her have caused you to feel upset. I acknowledge that what you described would have been upsetting. Zowie is a junior manager and I agreed that we would provide her with the additional management skill support.
>
> I look forward to seeing you back at work and please do not hesitate to speak to me if you have any further concerns." (698-699)

268. In the minutes prepared by Ms Bloomfield who was acting on behalf of the claimant and Ms Parkes, she records the conclusion of the meeting and a number of actions which were agreed. They were to chase the claimant's Subject Access Request; discuss with Ms Guminska her management style, to offer professional support and development; contact the claimant before her return to work on 1 April to arrange a pre-return meeting; pre-return meeting with the claimant, Ms Johnson and Ms Mannion to be arranged; a phased return to work planned; discussion with human resources regarding the docking of the claimant's wage in December 2019; discussion with Ms Virdee regarding her record of the claimant's statements at the absence meeting on 10 January 2020; discussion with Ms Shand upon her return from sick leave; liaise with Occupational Health; explore professional development opportunities for the claimant; check with payroll/health roster regarding the claimant's back pay; and the dissemination of the minutes. There was a special note in respect of other matters to be dealt with concerning the claimant. Ms Mannion had stated that because of the Covid-19 pandemic the former grievance process had to be suspended. (693-694)

269. We find that what Ms Bloomfield had recorded what was agreed by those who attended the grievance meeting including the claimant and Ms Parkes. However, Ms Parkes wrote to Ms Mannion on 30 March 2020, challenging Ms Mannion's letter and what was agreed at the meeting. We have referred to this in our earlier findings of fact above. (701-705)

270. In relation to this aspect of the claimant's direct race discrimination claim, the failure to investigate the complaint of race discrimination or failure to adequately investigate, we have not made findings upon which we could decide that had it been a hypothetical white Midwife Band 7 making a

similar complaint, that that person would have been treated differently and more favourably than the claimant.

271. From the evidence of those who had lodged complaints, we find that the claimant under the modified grievance procedure, was not treated any differently. Further, the initial approach by the respondent was to deal with the grievance informally. This was the approach taken without any objection by either Ms Parkes or by the claimant at the grievance meeting.

272. We have come to the conclusion that the claimant has not established less favourable treatment nor has she established less favourable treatment because of either her race or race. Accordingly, this aspect of her discrimination claim is not well-founded.

Failed to investigate Ms Gerrie and Ms Shand in relation to the claimant's grievance of 3 March 2020, paragraph 11c LOI

273. This is a further claim of direct race discrimination.

274. Ms Gerrie had left her employment with the respondent in January 2020, and Ms Shand was on long-term sick leave by 3 March 2020. Interviews with individuals only take place at the formal stage of the grievance process. The formal stage was not invoked because both parties agreed a list of actions. Further, it was not practicable to interview the two individuals. This had nothing to do with race or the claimant's race.

275. The claimant asserts that had it been a hypothetical white Band 7 Midwife who made a similar complaint, in similar circumstances, Ms Gerrie and Ms Shand and all relevant parties would have been interviewed. We have not made findings from which we could decide that the claimant was treated less favourably because of race as the hypothetical comparator's complaint would have been dealt with in the same way and Ms Gerrie and Ms Shand because of their particular circumstances would not have been interviewed. This claim is not well-founded.

During the grievance meeting on 18 March 2020, and in a letter to the claimant dated 14 April 2020, the respondent failed to investigate what it acknowledged was a culture of workplace bullying and harassment, paragraph 11d, LOI.

276. The claim here is direct race discrimination. Ms Mannion responded to Ms Parkes' letter challenging the outcome of the meeting, in a letter dated 14 April 2020. Ms Mannion disagreed with the views expressed in Ms Parkes' letter and went on the write the following:

> "I did not as the letter states acknowledge a general problem of racially inequitable and discriminatory workplace culture." (711-713)

277. In the notes of the meeting provided by Ms Parkes there is a reference

> "Ms Mannion commented that it would take seven years to effect change regarding new policies and initiatives to tackle bullying, harassment and poor race relations within the Trust." (694)

278. This was not an action point but other information.

279. Then claimant claims that as she complained about harassment and race discrimination, the failure to investigate these issues was direct race discrimination. She relies on a white Band 7 Midwife who is subjected to bullying and harassment because of race and raises a complaint about it. The respondent would have investigated and uphold the white employee's complaint.

280. In evidence, Ms Mannion denied making the statement. She acknowledged that in a national annual NHS staff survey for both Maternity and the wider Trust, some scores indicated that there may have been some issues relating to workplace relationships. This was unsurprising for the NHS and Maternity in particular, as it is a high intensity, high pressure area and is recognised as such. She discussed that the Trust was taking these issues seriously and had commissioned a large mediation project involving a number of midwives, doctors and associated professionals, to try to address these issues to ensure that teams within the Trust worked well together. Unconstructive workplace relationships may have been impacting on patient care. Even if there had been a culture of bullying and harassment, it did not mean that the claimant's allegations that she was being bullied and harassed were automatically true. Such allegations had to be evaluated on a case-by-case basis. It was neither reasonable nor appropriate for the claimant to extrapolate the NHS staff survey findings with her particular grievance.

281. In an email she sent on 27 September 2018, to Ms Jenny Fake, regarding a complaint from a patient about the poor maternity service provided to her, and Ms Fake's response, Ms Mannion acknowledged that in some cases, "there are undertones of a lack of cultural diversity awareness….I am, considering a customer care programme for all staff which includes cultural diversity." (395)

282. There was an investigation into the patient's care and treatment. Ms Mannion suspicions regarding lack of cultural awareness training were not confirmed. In relation to the claimant's case, she was referring to workplace issues between staff following the staff survey. We find that the two cases are unrelated.

283. We have made no finding that either Ms Mannion or the Trust acknowledged that there was a workplace culture of bullying and harassment. The survey did not support such a conclusion as contended by the claimant. This claim of direct race discrimination is not well-founded.

<u>Failed to support the claimant's professional development by failing to hold regular one-to-one meetings, paragraph 11e LOI</u>

284. The claimant was appraised on 21 November 2017, by Ms Kim McGuckin, Matron, and 20 November 2018, by Ms Gerrie. They were very positive appraisals. In the 2017 appraisal she was given the highest score of 5. In her 2018 appraisal, it was noted that she had completed her mandatory training; had undertaken several training courses over the previous twelve

months; key objectives were set for the following year; although she wanted to continue as Clinical Lead in MDAU/ANC, she was prepared to be re-deployed to another role because of health reasons; and was given the highest scores in her appraisal. If Ms Gerrie had been racially motivated towards the claimant because she is a black person, it is difficult to reconcile that assertion with the appraisal she carried out.

285. In her comments box, Ms Gerrie wrote:

> "Sylvia is extremely committed to her work, she often pouts in extra hours tom ensure the service needs are met. She has worked hard on the MSU audit and will now implement this across maternity. We are supporting Sylvia with her health and are excited about the opportunities discussed today to better the service to women such as speed booking and BP monitoring. Sylvia has great experience and innovative ideas." (423-426)

286. The box on what developments she required within the next twelve months was left blank.

287. The claimant was on sick leave when she was due for an appraisal in November 2019.

288. She relies on Ms Gerrie, Ms Shand, Ms Nora Lucey, and Ms Jenny Fake, as comparators, all of whom are white. She alleges that their professional development resulted in promotions. We find that they are not appropriate comparators as they were not employed in either the same or similar role to that of the claimant. In addition, we find that Ms Shand was employed as a Band 7 Matron from 1 September 1992 to 30 September 2007, when she was promoted to a Band 8A Matron. On 9 October 2017, she was promoted to the role of Band 8B Deputy Head of Midwifery. She then went on long-term sick leave and eventually left the Trust on 28 October 2020.

289. Ms Lucey was not promoted and dropped down several bandings. From 1 November 2002, she was substantively employed by the Trust as a Band 8B Consultant Midwife, two bands higher than the claimant and was an expert in clinical practice, consultancy and leadership, practice development and research, and service development, until 30 September 2017. She then moved to a Band 7 Midwife role, and then to Band 6 Community Midwife role on 19 August 2018 until she left the Trust on 31 January 2021.

290. Ms Fake was previously employed by the Trust as a Band 8A Matron. In 2018, she moved down in bands to a Band 7 in a patient experience role and subsequently, in 2019, she moved to Band 7 Quality Assurance Midwifery Lead role. (1281)

291. She left the Trust on 23 June 2020.

292. Ms Gerrie was in a more senior role to the claimant and was her line manager until she left in January 2020.

293. We find that in practice one-to-one meetings did not routinely take place. Ms Elaine Johnson told us, and we find as fact, that she did not have

regular one-to-one meetings with her line manager. The intention was to have an appraisal and informal mini appraisals every 6 months between the employee and their line manager.

294. Up until she went on sick leave, the claimant was favourably appraised.

295. As appraisals did not always follow the policy which was not particular to the claimant, in that respect she was not treated any differently. This claim is not well-founded.

Failed to investigate the claimant's complaint regarding promotion from Band 7 to Band 8, in accordance with clause 13 on Pay Progression in her employment contract and/or in the Agenda for Change Guidelines, paragraph 11f.

296. This issue was raised during the informal process on the 18 March 2020. We rely on our findings and conclusions in respect of paragraphs 11a and 11b above.

297. It was explained to the claimant by Ms Mannion that there was no provision for automatic promotion and that all roles were advertised. The claimant did not apply for a Band 8 position.

298. Clause 13 of her contract of employment reads as follows:-

> "Incremental pay progression for all pay points within each pay band will be conditional on individuals demonstrating that they have the requisite knowledge, skills and competence for their role and that they have demonstrated the required level of performance and delivery during the review period, as determined by the Trust. For people in bands 8c, 8d and 9, pay progression into the last two points in the band is annually earned and only retained if the required level of performance is reached." (163)

299. The claimant relies on a white hypothetical comparator, namely a white Band 7 Midwife who raised a complaint regarding promotion from Band to Band 8. The respondent, she asserts, would have investigated the complaint and/or promote the white comparator.

300. She further asserts that she was employed as a Band 7 Midwife on a salary of £41,373 and was on the last spine on the Band 7 pay band and on the first spine of Band 8 pay band but was classed as a Band 7 Midwife throughout her employment

301. We find that in the NHS Terms and Conditions of Service Handbook 2019, it provides that all roles must be advertised in line with the Trust's policy and procedures and that selection should always be by competition. (211-214)

302. We find that there is no basis for the claimant asserting that she should have been automatically promoted after many years' service within the NHS from a Band 7 Midwife to a Band 8. There was no evidence produced that she had been treated differently or less favourably. This claim of direct race discrimination is also not well-founded.

The respondent failed to ensure that the claimant had equal access to training opportunities compared with many other maternity staff, specifically, (i) it failed to provide the claimant with training opportunities , for example, the Third Trimester Scanning course, and (iv) failed to promote the claimant to a Band 8A, paragraph 11g LOI.

303. In relation to paragraph 11g(i), the claimant compares herself with Ms Nicola Wood, a white Band 6 Midwife, who had been approved to attend the Third Trimester Scanning course whereas the claimant attended using her own efforts and initiative.

304. The evidence given which was not challenged, was that staff would receive their mandatory professional training on a regular basis, including the claimant. Outside of that each member of staff can decide what other training they would require. Once a course or a session has been identified, an application is to their manager. Attendance would depend on spaces available and on costs.

305. The claimant was invited to attend the Flu Vaccination training on 4 September 2018, (404); Breastfeeding Day 2, after she missed the course Vaccination training on 23 April 2019, and successfully reapplied to Ms Gerrie to attend on the next occasion, (496); Resuscitation Drop-in on 6 December 2018, (434), and training sessions approved by Ms Elaine Johnson. The claimant attended the Third Trimester Scanning course after making enquiries and was aware of the limited number of spaces available on it. (1008-1010)

306. We did not hear from Ms Wood but we are satisfied that if a member of staff expressed an interest in relation to a course, they would have to apply. The cost to the Trust would be a factor that is taken into account. Despite limited spaces, she was admitted on to the Third Trimester Scanning course.

307. We have not made findings from which we could decide that the claimant was treated more favourably than Ms Wood. This claim is not well-founded.

308. In relation to paragraph 11g(iv), as already found, any vacant role has to be applied for as part of the respondent's recruitment process. The claimant did not apply for any Band 8 positions and did not discuss with her line manager that she would like to apply for or be considered for such a role. She did not apply for the Band 7 Ward Manager role Ms Guminska, who is of mixed black and white race, successfully applied for which is a step towards a Band 8A role. She was the lead midwife in the ANC and MDAU.

309. The claimant acknowledged in cross-examination that the respondent could not create a role for her. In the light of that it is difficult to understand her claim that the respondent did not promote her to a Band 8A role.

310. There were no findings from which we could decide that the claimant was treated less favourably. Ms Lucey and Ms Fake are not appropriate comparators. This claim is not well-founded.

The respondent subjected the claimant to a detriment by demoting her from Clinical Lead on 7 May 2020, paragraph 39a LOI

311. This claim of victimisation in relation to the alleged demotion of the claimant is directed at Ms Johnson, who is black.

312. On 20 March 2020 Ms Johnson had not heard from the claimant following her invitation to the long-term sickness absence stage 3 meeting scheduled to take place on 23 March 2020. She tried calling the claimant but there was no answer so she left a message asking the claimant to call back. Ms Virdee then contacted Ms Johnson in the morning of 23 March 2020 advising her that the LTS meeting was to be cancelled as the claimant was planning on returning to work from 1 April 2020 and had advised Ms Mannion. Ms Johnson called the claimant to discuss a return to work meeting on her return but there was no answer so she left a voice message asking the claimant to contact her. The claimant later emailed her that afternoon advising that she was due to speak to her doctor and would confirm whether she was cleared to return on 1 April 2020. (697)

313. On 30 March 2020, Ms Parkes sent to Ms Mannion and copying Ms Johnson, a letter in response to the grievance outcome and notes of the grievance meeting together with a fitness for work dated 26 March 2020 signing the claimant off work for one month due to stress at work. (700-705)

314. On 31 March 2020, Ms Johnson wrote to the claimant inviting her to attend a Stage 3 meeting via telephone to take place on 16 April 2020. (706-707)

315. On 3 April 2020, Ms Parkes responded confirming that the claimant was available to attend and provided Ms Johnson with a letter from the claimant's surgeon dated 12 March 2020. (689-690, 708-709)

316. Ms Parkes explained that many aspects of the claimant's grievance, part of which related to management of her sickness including the sickness review meeting on 10 January 2020, remain unresolved. Although the claimant was happy to attend a Stage 3 meeting, the circumstances of how she was to return to work depended on how the respondent managed her complaint.

317. In the surgeon's letter of 12 March 2020, from Mr Michael Stoddart, Shoulder and Elbow Unit, Royal National Orthopaedic Hospital, in relation to the claimant's return to work, stated that she could take a desk-based role but it was inappropriate for her to return to full duties as a midwife as she was still in the post-operative period. The advice was to engage the claimant in a phased return. (689-690)

318. On 16 April 2020 the LTS Stage 3 meeting went ahead via telephone. The claimant explained that her shoulder was not completely healed but was healed enough to return to work. She was not able to carry out certain tasks as stated in her surgeon's letter. A desk role was discussed in either ANC, BCG clinic, or the NIPE clinic. The BCG clinic was not running at that time due to Covid-19 and the claimant needed an update on the systems for the NIPE clinic because she had not done it since 2016. She advised Ms

Johnson that she would be fit to return to work at the end of her current statement of fitness for work and they agreed a phased return to work plan. The claimant agreed to let Ms Johnson know of the days she would like to work.

319. On 19 April 2020, the claimant confirmed that she wanted to start work from 27 April 2020 and would like to work on Monday and Thursday from 8am until 12pm for her first week back. She was happy to work on the ANC reception desk in line with the surgeon's advice that she should be allocated a desk based role. (721)

320. Ms Johnson responded the following day stating that the Trust did not require another midwife to staff the ANC reception desk as staff who were currently working there were unable to work elsewhere in the unit and so could not be redeployed. She was informed that arrangements had been made for her to work within ANC with Ms Angelina Ankomah, Diabetes and Lead midwife, working on Monday and Thursday from week commencing 27 April. The role in ANC was fully desk based, completing paperwork and telephone patient liaison, and helping clear a backlog of work which had accumulated due to the changed criteria for diagnosing gestational diabetes. (720)

321. On 30 April Ms Johnson held a return to work meeting with the claimant during which they discussed the claimant doing non-physical clinical duties within ANC. The claimant mentioned that she was Clinical Lead for ANC, a position given to her in 2016 by Dr Gloria Rowland, Director of Midwifery at the time, who left the respondent in 2018. This information took Ms Johnson by surprise as she was unaware of such a role and believed that Ms Guminska was the temporary Ward Manager of ANC and that there was no other manager or Lead covering ANC. She asked the claimant for confirmation that of her appointment as Clinical Lead as she felt that she may have been misinformed. She explained that the Band 7 Ward Manager role was soon going to be advertised as a substantive post, and invited the claimant to apply. She reassured her that her role within maternity would continue and that she would be supported. (763)

322. On 3 May 2020, the claimant emailed Ms Johnson, expressing disagreement with Ms Johnson's understanding of her role as Clinical Lead she had since 2016. She sent emails from Ms Guminska in which she is referred to as Clinical Lead. (765-771)

323. Ms Johnson made enquiries into the claimant's position as Clinical Lead and spoke to Ms Guminska who said that the claimant did not do all of the duties such a role would involve, such as managing staff sickness absences, rota for staffing, managing the service generally, ensuring equipment is suitable/available and holding meetings with staff. Ms Johnson eventually contacted Recruitment stating what was her understanding of Ms Guminska's role and that she was unaware of the position of Clinical Lead for ANC. She asked for a copy of the claimant's job description and clarification of her position. (777-778)

324. Ms Jackie Dowse, Recruitment Specialist, replied on 5 May 2020, stating that the claimant commenced employment with the respondent as a Band 7 Midwife on 7 November 2016. She was then on secondment from 30 April 2018 to 19 August 2018, as a Band 7 Patient Safety Midwife. She advised Ms Johnson to speak to Ms Virdee, in Employee Relations who advised Ms Johnson that she must rely on the records held by Recruitment.

325. On 7 May 2020, Ms Johnson wrote to the claimant explaining what she had been told by Ms Dowse. She repeated that the documentary evidence supported the role of a Band 7 Midwife. She repeated that Antenatal Services and Clinical, Ward Manger, post was advertised in February 2019. Ms Guminska successfully applied, commencing on 1 March 2019, and that the role would be advertised on a permanent basis. She again encouraged the claimant to apply, attaching the job description for all antenatal services including ANC and MDAU. She then discussed the claimant's return to work and duties. (787-789)

326. On 11 May 2020, Ms Parkes sent Ms Johnson a letter on behalf of the claimant alleging that she had been demoted and that this was the last straw following a series of poor treatment she had endured by the Trust. Due to her demotion she had no alternative but to resign with immediate effect. (792-796)

327. Ms Johnson was concerned and distressed to think that she may have contributed to the claimant expressing the intention to resign and called her but there was no reply. A record was made of her call. (798)

328. We find that Ms Johnson was unaware of the claimant's Clinical Lead role until she read her grievance letter dated 3 March 2020. As a new manager she was trying to find out more about the claimant's assertion that she had the title of Clinical Lead. She was unable to find any documentary evidence in support. Further, she stated that she did not demote the claimant. She was also unaware of the claimant's first tribunal claim until 3 March 2020.

329. In evidence Ms Johnson said that there was no discussion about changing jobs or changing roles and the claimant did not say to her that she was being demoted. She was only trying to establish the contractual position and wanted to ensure that the line management structure was correct and that Ms Guminska was the claimant's line manager. We find that she never stated to the claimant that her role and duties had to change and that she was no longer allowed to undertake the duties she had previously been doing. The only change was that her role had to be adjusted in order to assist in her health and recovery following the surgeon's recommendations.

330. We have come to the conclusion that the claimant was not demoted by Ms Johnson. What Ms Johnson was doing was trying to get to the provenance of the title Clinical Lead as it did not feature in the Trust's management structure and may add to some confusion in Ms Guminska's role of Ward Manager. There was no open selection and recruitment procedure followed in respect of it.

331. Even if we are in error, and there was a demotion, it was not significantly influenced by the fact that from 3 March 2020, Ms Johnson was aware of the claimant's first tribunal claim. Her role was to seek clarification between the role of Ward Manager and what the claimant said was her officially recognised role of Clinical Lead.

332. Even if the protected act was the 3 March 2020 grievance, for the same reason given above there was no demotion and the discussion about Clinical Lead was unrelated to the grievance. It was not significantly influenced by it. This aspect of the victimisation claim is not well-founded.

333. In relation to paragraph 39b LOI, we have concluded that the harassment claims are not well-founded. Therefore, this part of the victimisation claim is also not well-founded.

334. We shall address in greater detail the issue of Clinical Lead below.

Constructive unfair dismissal, paragraphs 5, 6, 7, and 8 LOI.

335. Clause 16 of the claimant's contract of employment, states that:

> "Flexibility
>
> In order that the Trust can respond to changes in the demands on its services, and after consultation and discussion with you and your nominated representative (including consideration of personal circumstances, current skills, abilities and career development), the Trust make changes to your work location, duties and responsibilities that are deemed reasonable in the circumstances. Your rights are summarised in the Trust's Management of Organisational Change Policy available on the Trust's intranet." (163)

336. Clause 41 states:

> "The Trust's procedure enables you to pursue a grievance in a systematic manner without fear of recrimination. Copies are available from Human Resources, your staff-guide representative, or the Trust's intranet." (172)

337. In clause 35 under "Code of Confidentiality", it states that staff have the right to access their records upon application to the appropriate manager. (171)

338. The conversations between the claimant and Dr Rowland appears to have been brief. Firstly, to give the claimant the title of Clinical Lead for MDAU and, secondly, in respect of ANC. This title was not confirmed in writing either by Dr Rowland or Human Resources. The claimant's contract of employment was not varied to reflect this new title in contrast to when she was seconded to Patient Safety Midwife she received a letter confirming her change in role and title. (187)

339. In cross-examination she said that Dr Rowland said to her,

> "I know where to put you, you are going to be clinical lead in MDAU."

340. We find that the conversations between the claimant and Dr Rowland were informal as nothing was later confirmed in writing.

341. The claimant began to wear a badge with Clinical Lead Midwife ANC/MDAU in 2018, after she had finished her Patient Safety Midwife secondment in 2018. She gave the details to be included in her photo identification badge. (276)

342. Ms Guminska referred to her in email correspondence dated 26 April 2019 as "clinical lead for clinic" and on 8 May 2019, as "Clinical Lead for MDAU/ANC". (768, 765)

343. Mr Phil Townsend, Interim Trust Chairman, at the Trust Board meeting dated 6 June 2019, acknowledged the claimant's work by congratulating her and other members of staff. He described her as, "clinical lead for maternity day assessment unit and antenatal clinic at Watford for having the publication, Back to basics: auditing urinalysis in practice, accepted by the National Institute for Health and Care Excellence(NICE)." (532)

344. The claimant was also referred to in a NICE publication as a Specialist commentator and contributor to one of its publications, as "clinical lead midwife ANC/MDAU, West Hertfordshire Hospitals NHS Trust." (799).

345. Ms Gerrie, in relation to correspondence about a chair for the claimant wrote on 7 September 2018, that her role had "changed back to Lead Midwife for Clinic/MDAU." (387)

346. The claimant also signed herself off as Clinical Lead. (518, 523, 545-546)

347. Her contract of employment, however, states that she is a Band 7 Midwife appointed 7 November 2016. (160)

348. As found earlier, the role of Clinical Lead does not appear on the respondent's organisational charts. (186, 952)

349. The claimant was not paid for the role of Clinical Lead only as Band 7 Midwife. She was never ANC Manager as described in her payslips. (879-911)

350. In her 20 November 2018 appraisal she sought confirmation of her role of Clinical Lead ANC/MDAU but this was not followed up. (426)

351. Co-ordinating the rota and dealing with appraisals were in the claimant's job description. (177)

352. The claimant relies on the implied term of mutual trust and confidence. She asserts that the respondent failed to comply with Clause 16, paragraph 6a LOI.

353. We have come to the conclusion that there was no breach of this clause. Ms Johnson was discussing the claimant's work following her return from sick leave and no formal discussions took place about contractual changes,

only possible duties for her to do upon her return to work, taking into account her health. This aspect of her constructive unfair dismissal claim is not well-founded.

354. Failure to comply with Clause 41 by demoting the claimant from Clinical Lead, paragraph 6b LOI.

355. We find that the claimant, if she is right that Dr Rowland wanted her to become Clinical Lead for both ANC and MDAU, the role was not formalised either by Dr Rowland or by Human Resources, and the claimant did not pursue it from 2016. She was then on secondment from April 2017 to August 2018, which was confirmed by letter. She did not, thereafter, asked for confirmation of her role as Clinical Lead. She created the name badge of Clinical Lead on her return to ANC/MDAU in or around August 2018, and described herself as Clinical Lead and also signed herself off as Clinical Lead in correspondence. Others accepted what was on her name badge without questioning it. If her position as Clinical Lead was recognised by the Trust, in the comment box of her 20 November 2018 appraisal, she asked for confirmation of her role as Clinical Lead ANC/MDAU. This is inconsistent with her belief that Dr Rowland as Director of Midwifery, had given her that position. Dr Rowland left the Trust in 2018, yet the claimant did not approach her up until her departure to confirm that that position had been given to her. It must be assumed that Dr Rowland, occupying such a senior position in the Trust, would be aware of the Trust's open recruitment and selection procedure. We have come to the conclusion that it may have been Dr Rowland's intention to consider the claimant for a position of Clinical Lead, but for whatever reason, did not follow it through. The claimant in late August 2018, unilaterally ascribed on to herself the title of Clinical Lead.

356. There was no demotion by Ms Johnson as Clinical Lead was not a position the Trust recognised.

357. Even if there was a demotion, it was not an act of recrimination because the claimant lodged a grievance alleging discriminatory treatment. Ms Johnson was new in post and was trying to establish what were the line management responsibilities, and to identify the ways in which the claimant's health/recuperation could be accommodated. This aspect of the claim is also not well-founded.

358. In paragraph 6c LOI, the claimant claims that the respondent failed to comply with Clause 35 in not fulfilling of her Subject Access Request**.**

359. We were told that the last straw was demoting the claimant. It now appears that this aspect of the claimant's claim is the last straw and we consider it in this context. On 4 February 2020, she emailed Ms Lankshear stating:

> "I am writing to make an official request ie Subject Access Request which I understand to be my legal right and that it has to be fulfilled within 30 days. I am also requesting a copy of the handwritten notes made by Rupinder Virdee when

> we had the HR meeting with Lydia Gerrie and Zowie Guminska on 10 January. I will appreciate having this information as soon as possible." (631)

360. Although the claimant requested a copy of the handwritten notes made at the 10 January meeting, it was not clear what else she was requesting. Ms Lankshear responded the following day informing her that her request had been sent to the respondent's Information Governance team and asked her to clarify what she was asking for, "Is it just the handwritten notes from Rupi or other information you need? If so I need to know the subject, from who and to the emails are from etc." (630)

361. On 9 February 2020, the claimant replied to Ms Lankshear stating that her request was for, "all correspondence from the time I re-joined the Trust which was back in 2016. I understand that this is a big task however, I would really like to have it. This will include Rupi's handwritten notes following our meeting on 10 January. …" (630)

362. It is clear that the claimant was seeking over three years' of her personal data. Her request was forwarded to Mr Chris Port, Deputy Information Governance Manager and Data Protection Officer, on 10 February. He gave evidence before us. We find that on the same day he ran an email search using the claimant's name and the system came up with 24,000 emails over the period in question. He emailed Ms Lankshear informing her of the result of his search and explained that the claimant's request would include every email sent or received by her, including where she was copied in, blind-copied, or on a distribution list. He asked her to check with the claimant if it was possible to limit the search to emails where her name appeared in the subject or the body of the email and/or emails sent to or from particular members of staff. Ms Lankshear communicated Mr Port's request to the claimant who responded by asking for "…all of it." (1013)

363. When he attempted to carry out the original request, the system would crash. He said that a new system was installed in August 2019, and by early 2020, the Trust staff were still unfamiliar with it. On 3 March 2020, he emailed the claimant asking that she should clarify what information she was requesting. He also informed her that of the issues with the new email archive system and that he was waiting assistance from the Trust's technical expert in order to search for the information she had requested. He asked her to clarify which emails she was requesting and whether there was a particular sender or receiver of the emails she was interested in. (682)

364. The claimant did not respond and there was no out of office reply.

365. In response to Ms Justine Powell's email sent on 6 March 2020, for an update on the information the claimant was requesting, Mr Port responded the same day stating that he was waiting for assistance from the respondent's technical expert to assist in the search. Ms Powell again emailed Mr Port on 1 April 2020 informing him that the claimant was chasing up her SAR. Mr Port's response was to call Ms Powell to inform her that he had not received the requisite clarity from the claimant to process her request. (1020)

366. We further find that the Covid 19 Pandemic, had impacted on the Trust. The technical issues with the new email server lasted until late April or early May 2020. The availability of the technical expert was delayed also due to Covid 19. The Trust's ability to process SAR's for both staff and patients in the required timeframe, was affected by the government's requirement that people should work from home, remote access issues, software issues, and documents being located on site and staff not being able to access them.

367. On 27th of August 2020, Ms Nicola Bateman, Information Governance Manager, was contacted by Ms Julie Trotman, Case Officer, at the Information Commissioner's Office, "ICO", by letter, to advise her that the claimant had lodged a complaint. Ms Bateman was informed that she was now required to take appropriate steps to respond to the SAR's request as soon as possible, within 28 days, as the claimant had made the request on 4 February 2020. (1023-1025)

368. Mr Port explained the situation to Ms Bateman, in that the claimant had not responded to his request to narrow down her search as it was too broad. However, on 2 September 2020, they were able to obtain the claimant's contact number from human resources and caused her to discuss precisely what she required. During the conversation she provided Mr Port with details of the specific information she required. She also wanted email/correspondence relating to how she was identified on the Electronic Staff Register compared to her manager's understanding of her role. (1026-1027)

369. In email correspondence she requested an email sent by Ms Gerrie, Maternity Matron Inpatient Services, to occupational health in January 2019. (1031-1032)

370. Following her revised requests, Mr Port was able to narrow down the parameters of the search and identified just under 300 documents. He then analysed and investigated them to identify what was relevant for the claimant and managed to reduce the result to around 13 emails/documents which he emailed to her on 9 September 2020. He explained that he had investigated and printed all those which she had requested and which were relevant to her SAR and would deliver them to human resources ready for her to collect. There were later collected by the claimant in September 2020. (1030)

371. In Mr Port's view, any documents which were not provided to her were because they either did not form part of the scope of her SAR, did not exist, or could not otherwise be located. (500-506, 543, 547-548, 611-612, 765-767, 769, and 773)

372. We further find that Mr Port did not reply to the ICO as it instructed the Trust to reply directly to the claimant. Having explained the steps the Trust had taken, the ICO was satisfied with what it had done and no action was against it.

373. We are satisfied that the respondent did not fail to comply with Clause 35 of the claimant's contract of employment. The real difficulty was that she requested the disclosure of all of her personal data from the commencement of her employment, which covered over three years and, potentially, 24,000 emails. The effects of the Covid-19 pandemic and the requirement to work from home, coupled with the problems with the new email server, made it difficult to comply within the normal timeframe.

374. Mr Port wanted the claimant's request to be narrowed down and this was not achieved until September 2020. Once this had been done the relevant emails were sent to the claimant promptly.

375. The ICO did not find the respondent to be at fault but was satisfied with its explanation. Further, it is not within our remit to substitute ourselves in place of the functions of the ICO. We have to respect its position and decisions.

376. Accordingly, this aspect of the claimant's claim has not been established.

377. In paragraph 6d LOI, the claimant claims that the respondent failed to comply with Clause 41.

378. We have already found and concluded that this allegation had not been established and is not well-founded. The Modified Grievance and Disciplinary procedure was followed taking into account the provisions in the Social Partnership during the Covid-19 pandemic. The informal approach to grievances was to apply with the formal investigation being temporarily suspended while the whole NHS focus on urgent frontline support to patients. While the Partnership Forum statement was dated 1 April 2020, Covid-19 was impacting on the NHS prior to that date affecting staffing and resources. (241, 1017-1019)

379. The meeting lasted about 2 hours during which both the claimant and Ms Parkes discussed with Ms Mannion the concerns in her grievance as acknowledged by Ms Parkes in her 30 March 2020 letter.

380. Having regard to the ethnicity of those who lodged the grievances at the time, the claimant was not treated any differently. (1016)

381. In notes of the meeting held on 18 March 2020, produced by Ms Parkes, there is a list of the matters agreed and action points. However, in Ms Parkes' later letter dated 30 March 2020, she stated that the claimant did not feel that her complaint had been taken seriously and list 6 resolution points. (693, 701-705)

382. In response to Ms Mannion's letter dated 14 April 2020, expressing disappointment that the claimant was unable to return to work as agreed and taking issue with the matters raised in Ms Parkes' letter, Ms Parkes responded on 20 April 2020, repeating what she had written and stating that a number of matters remain unresolved, such as race and disability discrimination, bullying and harassment and the management of her SAR. (711-713, 722-731)

383. We have earlier concluded that the handling of the claimant's grievance was unrelated to her race or to race. The respondent had reasonable and proper cause to treat the claimant's grievance in the way it did at the time given the prevailing, unique features and impact of the Covid-19 pandemic at the time. Its approach was not particular only to the claimant.

384. We have come to the conclusion that there was no breach of the implied term of mutual trust and confidence. The claimant was not constructively dismissed. Accordingly, her constructive unfair dismissal claim is not well-founded.

385. The provisional remedy hearing listed on 18 October 2022, is hereby vacated.

_____

Employment Judge Bedeau

Date: 7 September 2022

Sent to the parties on:

8 September 2022

For the Tribunal Office