# EMPLOYMENT TRIBUNALS

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| **Claimant:** | **Mrs T Dilibe** | |
| **Respondent:** | **Woodhaze Limited t/a Window to the Womb (Swansea) and others** | |
| **Heard at:** | **Cardiff** | **On: 17 to 21 April and 24 April 2023 (hearing); 25 and 26 April 2023 (in chambers)** |
| **Before:** | **Employment Judge C Sharp** | |
| **Members:** | **Ms Y Neves**<br>**Ms G Rees** | |

**Representation:**
Claimant: Ms K Balmer (Counsel)
Respondent: Mr N Henry (Representative)

# RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. The Claimant's claims of harassment related to race against the First and Second Respondents are well founded in respect of the following allegations and compensation will be determined at a later remedy hearing:

    a. on numerous occasions between March and December 2021, the Claimant was required to carry out cleaning duties which were not part of her duties and were inconsistent with her status as a professional sonographer, including being required to vacuum the whole of the Clinic or to mop the floor of the scanning room;

    b. on various occasions between March and December 2021, the Claimant was spoken to in a threatening manner by the Respondents [the Tribunal finds that the staff and directors of the First Respondent

and the Second Respondent personally did this] and it was made clear to her that if she did not do as she was instructed in relation to cleaning that she would be dismissed, her immigration sponsorship would end [the rest of this allegation was not found and is not set out];

c. at a meeting on 8 November 2021, the Respondents raising further unfounded concerns about the Claimant's performance and other matters, including her allegedly bad 'attitude' and body odour.

2. The remaining allegations of harassment relating to race are not well founded and are dismissed.

3. The Claimant's claim of direct race discrimination against the First and Second Respondent are well founded in relation to the following allegations and compensation will be determined at a later remedy hearing:

a. at a meeting on 8 September 2021, the Respondents raising unfounded concerns about the Claimant's performance and telling her that she had a bad 'attitude' for being disobedient and unfairly extended the Claimant's probationary period until 19 December 2021;

b. at a meeting on 17 November 2021 [The Tribunal finds that this happened on 8 November 2021], the First and Second Respondents raising further unfounded concerns about the Claimant's performance and other matters, including her bad 'attitude' and body odour and, on that basis, improperly, unfairly and in breach of contract, extended the Claimant's probationary period again until 19 March 2022;

c. between March and December 2021, the Respondents rostered the Claimant unreasonably, for example putting her on 13 days' work in a row or similar and only allowed her to take 6 days holiday on days decided by the First Respondent [the rest of the allegation was not found by the Tribunal];

d. on 7 December 2021, the Claimant was constructively dismissed by the First Respondent. The Tribunal finds that the notice period was wrongfully reduced by the First Respondent acting through the Second Respondent by summarily dismissing the Claimant on 27 December 2021.

4. The remaining allegations of direct race discrimination are not well founded and are dismissed.

5. The Claimant's claims of victimisation are not well founded and are dismissed.

6. The Claimant's claims against the Third Respondent of harassment relating to race and/or direct race discrimination are not well founded and are dismissed.

7. The Claimant's claim of unauthorised deduction from wages is well founded and compensation will be determined at a later remedy hearing.

8. The Claimant's claim of unpaid accrued annual leave is well founded and compensation will be determined at a later remedy hearing.

9. A Remedy Hearing will be listed if the parties have not settled the matter by agreement within 28 days of promulgation of this Judgment.

# REASONS

## Background

1. Woodhaze Limited trading as Window to the Womb (Swansea) (the First Respondent) is a franchise of the Window to the Womb group, and is owned by its Directors, Mr Anthony Woodcock (the Second Respondent) and Ms Juliet Luporini. Mr Anthony Harrison, who orally described himself as the managing partner of the Windows to the Womb group, but in his witness statement described himself as a Partner/Director and Shareholder of Window to the Womb (Franchise) Limited (the Franchisor), is the Third Respondent. Window to the Womb (Franchise) Limited sells franchises to franchisees, such as the First Respondent, enabling them to trade as Window to the Womb in their local area; in this case, Swansea.

2. The First Respondent is a business that specialises in private scans of pregnant women, including early scans and wellbeing and gender scans. While the Respondent stated that its principal interest is the wellbeing of both mother and baby, it was clear from the evidence before the Tribunal that in essence the First Respondent viewed itself an entertainment/social scanning business. Many references were made to being a "*customer service"* business during the course of oral evidence; it enabled expectant mothers to bring partners, family and friends to see the baby, with the hope/expectation that they will purchase images, videos and products such as teddy bears relating to the baby.

3. The scans must be carried out by a qualified registered sonographer, but the wider team included a receptionist and scan assistants, who were not professionally qualified staff, but were expected to have experience and skills in customer service. The Respondent originally traded for several years using contractor/locum sonographers; these were individuals contracted to attend work for the First Respondent to undertake scans on a freelance basis and for which they received an hourly rate of approximately £45 to £50 per hour.

4. In 2020, the First Respondent through its directors decided to employ a full-time qualified sonographer. It was accepted that having heard how successful other franchisees had been in recruiting from abroad, particularly from Nigeria as the qualifications of its sonographers are close to the qualifications required in the UK, it decided to seek to hire a full-time sonographer from Nigeria. This led to the appointment of the Claimant, Mrs Tina Dilibe, a qualified Nigerian black African sonographer; her employment commenced on 19 March 2021.

5. The Claimant handed in her resignation on 7 December 2021, complaining of *"unfavourable working conditions which I am no longer able to cope with".* While from the statements of case, there appeared to be no dispute that the effective date of termination was 26 December 2021, but during the course of the hearing, it became clear that there was a dispute about the effective date of termination. The Claimant asserted that she was constructively unfairly dismissed, and she had accepted the repudiation of the contract by the First Respondent by resigning on 7 December 2021, giving one month's notice. The Claimant further asserted that the First Respondent summarily dismissed her on or around 27 December 2021. The Respondents did not accept that she was summarily dismissed, and asserted that the Claimant chose not to attend work. The Claimant did not have 2 years' service that enabled her to bring a claim of ordinary constructive unfair dismissal under s95 of the Employment Rights Act 1996; however, her dismissal was considered as part of her discrimination claim.

6. The parties went through ACAS Early Conciliation; the dates in respect of the First and Second Respondent are between 20 January 2022 and 8 February 2022; the dates in respect of the Third Respondent are 26 January 2022 and 23 February 2022. The Claimant presented a complaint to the Employment Tribunal on 11 March 2022, making the following claims:

   (a) Harassment relating to race under s26 Equality Act 2010 ("EqA") against all three Respondents;
   (b) Direct race discrimination under s13 EqA against all three Respondents;
   (c) Victimisation under s27 EqA against the First and Second Respondents;
   (d) Unlawful deduction from wages/failure to pay accrued untaken holiday pay under s13 Employment Rights Act 1996 ("ERA") against the First Respondent.

## Issues/Final Hearing

7. Due to the reduction of time allotted for the final hearing, it was with the agreement of the parties that the hearing was converted to liability only. The hearing took place over 8 days and the Tribunal gave permission for the Claimant to call one additional witness, Ms Elaine Brooks and to adduce further evidence, such as the clinical protocol for sonographers to follow during

ultrasound scans, which had not been disclosed to her by the Respondents. Both parties were permitted to rely on exhibits attached to various witness statements not within the bundle. Oral reasons were given at the time.

8. In addition, on day 3 (19 April 2023), the Respondents sought to make an application seeking a determination of particular factual matters and a strike out of certain discrimination allegations, the victimisation claim, the wages claim and unpaid annual leave claim. After hearing oral representations as to whether the application should be heard, the Tribunal refused and gave oral reasons at the time.

9. On the same day, there was also an application by the Claimant to adduce additional evidence (notes by Ms Brooks regarding her recent call with Ms Clewes); this was adduced without objection. The Claimant on day 4 was also permitted without objection to adduce an annual leave application by the Claimant on 28 November 2021 due to its late disclosure by the Respondents during the course of the hearing.

10. The Tribunal was provided with a hearing bundle of 617 pages, additional documents. References to the hearing bundle are in square brackets. References to other documents adduced during the course of the hearing are made by a description of such documents. The Tribunal heard orally from the following witnesses:

    a) The Claimant;
    b) Ms Laura Jenkins, a "*locum*" or "*contractor*" sonographer for the First Respondent on six or seven occasions between 2016-2018;
    c) Mr Prosper Ede, the Claimant's husband;
    d) Ms Jeanette Clewes, a sonographer and a clinical lead for the franchise group Windows to the World (Franchise) Ltd;
    e) Ms Anne Walton, a sonographer and a clinical lead for the franchise group Windows to the World (Franchise) Ltd;
    f) Ms Elaine Brooks, sonographer and official at the Society of Radiographers;
    g) Ms Juliet Luporini, director of the First Respondent;
    h) Mr Anthony Woodcock, the Second Respondent and director of the First Respondent;
    i) Ms Sophie Cartwright, scan assistant, deputy manager and later manager of the First Respondent's clinic in Swansea;
    j) Ms Sofia Luporini-Lewis, scan assistant and daughter of Ms Luporini;
    k) Mr Anthony Harrison, Third Respondent and director of Windows to the Womb (Franchise) Ltd.

11. Mr Henry on behalf of the Respondents at the outset of the hearing sought to make the Tribunal "*aware*" of potential issues arising from health that might affect its perception of the Second Respondent. No specific reasonable adjustments were sought. Mr Henry declined to adduce any medical evidence on the basis that the Claimant and/or her representatives could not be trusted with the evidence. The Tribunal found that there was no basis for such an assertion before it and it refused to consider evidence not shown to the other side. It was content, as was Ms Balmer appearing on behalf of the Claimant, to bear in mind that some of the Second Respondent's reactions might not be wholly appropriate, but it remained open to it to weigh his evidence as it saw fit. Breaks were offered to the Second Respondent during the course of his evidence. The Tribunal considered that Ms Balmer cross-examined the Second Respondent wholly appropriately, and while the Second Respondent at points had to be asked to settle down and answer the question, no inferences were drawn from his reaction to cross-examination. However, as this Judgment will explain later, his evidence was not accepted in full by the Tribunal and was found to be untruthful in parts.

12. The Tribunal did not hear oral evidence from Ms Lagene Johnson-McKenzie, a full-time sonographer in the Bristol franchise of Windows to the Womb (and locum sonographer for the First Respondent in Swansea) as her evidence was unchallenged.

13. The Tribunal did not hear oral evidence from Bethan Lowri Harrison, a radiographer who undertook locum sonography for the First Respondent between 2019 and 2022. It was told that Ms Harrison was unable to attend due to family health issues and bereavements, and the Respondents did not seek to adduce evidence in support of this assertion, despite the invitation of the Tribunal and the objection to Ms Harrison's evidence (and her exhibits produced outside of the usual disclosure process) made by the Claimant's representative.

14. Ms Harrison's evidence was that she was happy to do general cleaning, but she was never required to do so by the First Respondent as she was a locum/sub-contractor; this was not in dispute, though the race of Ms Harrison was unknown. The evidence given (hearsay criticism of the Claimant) was given no weight by the Tribunal, as was Ms Harrison's direct criticism of the Claimant as she had not attended for cross-examination - the clinical leads were best placed to assess her work as it was their role and they were likely to be more objective in the Tribunal's view. The Tribunal was also concerned about the allegedly contemporaneous note of training carried out by Ms Harrison with the Claimant exhibited to her statement; it was dated 14 March

2021. The Claimant was neither employed or in the UK at that date. The Tribunal considered that this note should be given no weight at all and was evidence that the First and Second Respondents were not being transparent or honest about whether documents were accurate or contemporaneous.

15. The agreed list of issues before the Tribunal were:

**A. Direct Race Discrimination**

Jurisdiction

1. Did any of the acts of direct discrimination relied upon by the Claimant occur more than three months before the date on which the Claimant submitted her claim to an Employment Tribunal (extended, as necessary, by ACAS conciliation)?

2. If so, do any such acts form part of "conduct extending over a period" for the purposes of section 123(3) of EqA 2010, and was the claim brought within three months of the end of that period (extended, as necessary, by ACAS conciliation); and

3. If not, should time be extended to “such other period as the employment tribunal thinks just and equitable” under section 123(1)(b) of EqA 2010?

Protected Characteristic

4. The Claimant is a black woman of Nigerian nationality. She considers her race to be ‘Black African’ for the purposes of section 9 of the EqA 2010.

Less favourable treatment

5. Did the following acts or omissions occur:

   i. on numerous occasions between March and December 2021, the Claimant being required to carry out cleaning duties which were not part of her duties and were inconsistent with her status as a professional sonographer, including being required to vacuum the whole of the Clinic or to mop the floor of the scanning room and/or **[§12-21 & 67(i) of PoC]**;

   ii. on various occasions between March and December 2021, the Claimant being spoken to in a threatening manner by the

Respondents and it being made clear to her that if she did not do as she was instructed in relation to cleaning that she would be dismissed, her immigration sponsorship would end and the First and Third Respondents would use their Home Office connections to have her deported within 30 days **[§21, 46 & 67(ii) of PoC]**;

iii. at a meeting on 8 September 2021, the Respondents raising unfounded concerns about the Claimant's performance and telling her that she had a bad 'attitude' for being disobedient and unfairly extending the Claimant's probationary period until 19 December 2021 **[§36-39 & 67(iii) of PoC]**;

iv. at a meeting on 8 November 2021, the Respondents raising further unfounded concerns about the Claimant's performance and other matters, including her allegedly bad 'attitude' and body odour **[§40-47 & 67(iv) of PoC]**;

v. at a meeting on 10 November 2021 the First and Third Respondents informing the Claimant that if she did not do what she was told regarding cleaning the Clinic, the Respondents would contact the Home Office, and she would be deported in 30 days **[§21, 46 & & 67(v) of PoC]**;

vi. at a meeting on 17 November 2021, the First and Second Respondents raising further unfounded concerns about the Claimant's performance and other matters, including her bad 'attitude' and body odour and, on that basis, improperly, unfairly and in breach of contract, extending the Claimant's probationary period again until 19 March 2022 **[§48-53 & 67(vi) of PoC]**;

vii. between March and December 2021, the Respondents rostering the Claimant unreasonably, for example putting her on 13 days' work in a row or similar and only allowing her to take 6 days holiday on days decided by the First Respondent. Then, in late November 2021, refusing her request to take holiday during December 2021 **[§55-57, 60 & 67(vii) of PoC]**;

viii. on 7 December 2021, the First Respondent dismissing the Claimant. The Claimant's primary case is that she was constructively dismissed by the First Respondent. The Claimant says that she resigned in response to the Respondents' conduct at paragraphs (i)-(vii) above which, individually or collectively amounted to a repudiatory breach of the implied term of trust and confidence between employer and employee, and that by her letter dated 7 December 2021, the Claimant accepted such breach and resigned on the basis that she had been constructively

dismissed under section 95(1)(c) of ERA 1996 **[§72 of PoC]**. Alternatively, if the Claimant is not found to have been constructively dismissed on 7 December, it is averred that she was actually summarily dismissed on or after 26 December 2021 when the Respondent ceased paying her **[§ 65 & 73 PoC]**;

ix. on 8 December 2021, one day following her resignation, the Respondents demanding that the Claimant repay her recruitment costs in full and requiring this sum to be repaid within less than 24 hours of the demand **[§67(viii) of PoC]**;

x. in December 2021 and thereafter the Respondents sending the Claimant aggressive and intimidating communications about payments alleged to be owed by her, and "invoices" for amounts said to be owed by her to the First Respondent for recruitment costs, training costs and other sums **[§63(a) & 67(ix) of PoC]**;

xi. on 28 December 2021, the First Respondent deducting the Claimant's entire salary for December 2021, in circumstances where there had been no prior agreement by her to any such deduction, and ceasing her pay with effect from 26 December 2022 **[§63(b) & 67(x) of PoC]**;

xii. on or shortly after 27 and 28 December 2021, the Respondents unreasonably treating the Claimant's sickness absence as unauthorised absence and unreasonably terminating her employment without investigation or notice (despite the fact that she had notified the First Respondent by text that she was unwell) because she had allegedly not followed the First Respondent's formal sickness notification policy **[§63(c) & 67(xi) of PoC]**;

xiii. on 15 December 2021, the Respondents altering the December 2021 roster after the Claimant's resignation and requiring her to work 29 December 2021, which had originally been rostered as a rest day **[§63(d) & 67(xii) of PoC]**;

xiv. on 28 December 2021, the Respondents failing to pay the Claimant for accrued but untaken holiday **[§63(e) & 67(xiii) of PoC]**; and

xv. failing to permit the Claimant to take and be paid for holiday between 30 December 2021 and 7 January 2022 **[§67(xiv) of PoC]**.

6. If so, by any of the above conduct, did the Respondents treat the Claimant less favourably than they treated or would treat a comparator

in materially similar circumstances? The Claimant relies upon the following actual comparators: Olive Thomas and Lowri Bethan Harrison. Further or alternatively the Claimant relies upon a hypothetical White British comparator who was engaged in the same role as a sonographer with the same experience and training as the Claimant.

Reason for less favourable treatment

7. If so, was any such less favourable treatment because of race (as that term is used in Section 9 EqA 2010? [Note: Third Respondent considers this provision should refer to "the Claimant's race".]

Agency

8. Was the Third Respondent acting as an agent of the First Respondent at the meeting on 10 November 2021 referred to in para 6 v. above?

**B. Race Related Harassment**

Jurisdiction

9. Did any of the acts of race related harassment relied upon by the Claimant occur more than three months before the date on which the Claimant submitted her claim to an Employment Tribunal (extended, as necessary, by ACAS conciliation)?

10. If so, do any such acts form part of "conduct extending over a period" for the purposes of section 123(3) of EqA 2010, and was the claim brought within three months of the end of that period (extended, as necessary, by ACAS conciliation); and
11. If not, should time be extended to "such other period as the employment tribunal thinks just and equitable" under section 123(1)(b) of EqA 2010?

Unwanted Conduct

12. Did any or all of the alleged acts or omissions at paragraphs 6(i)-(xv) take place [§70 PoC]?

13. If so, did any of those acts or omissions amount to unwanted conduct?

Required Purpose or Effect

14. If so, did that unwanted conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading,

humiliating and offensive environment for the Claimant, taking into account:

i. the Claimant's perception;

ii. the other circumstances of the case; and

iii. whether it is objectively reasonable for the conduct to have that effect?

Related to Race

15. If so, was the conduct related to race (as that term is used in Section 9 EqA 2010? [Note: Third Respondent considers this provision should refer to "the Claimant's race".]

**C. Victimisation**

Protected Acts

16. Did the Claimant do a protected act under s 27 EqA 2010 by:

i. on 23 December 2021, the Claimant's Union Representative's letter to the First Respondent **[§62, 64 & 75, 76 of PoC]**. The Claimant avers that this letter alleged (whether express or not) race discrimination and fell within section 27(2)(d) of EqA 2010; or

ii. on 23 December 2021, the Claimant's Union Representative's letter to the Third Respondent **[§62, 64 & 75, 76 of PoC]**. The Claimant avers that this letter alleged (whether express or not) race discrimination and fell within section 27(2)(d) of EqA 2010;

iii. on 12 January 2022, the Claimant's solicitor Valemus Law's letter to the Respondents **[§63 & 75, 76 of PoC]**. The Claimant avers that this letter alleged (whether express or not) race discrimination and fell within section 27(2)(d) of EqA 2010.

Allegations

17. Did the following alleged acts or omissions by the First and/or Second Respondent occur:

i. after 23 December 2021, the Respondents sending the Claimant increasingly aggressive and intimidating communications about payments alleged to be owed by her, and "invoices" for amounts

said to be owed by her to the First Respondent for recruitment costs, training costs and other sums **[§64(a) & 76(i) of PoC]**;

ii. on 28 December 2021, the Respondents deducting the Claimant's entire salary for December 2021, in circumstances where there had been no prior agreement by her to any such deduction, and ceasing her pay with effect from 26 December 2021 **[§64(b), 64(e) & 76(ii) of PoC]**;

iii. by ceasing to pay the Claimant from 26 December 2021 (if the Claimant was not already constructively dismissed) by dismissing the Claimant **[§64(b), 64(e) & 76(ii) of PoC]**;

iv. on or shortly after 27 and 28 December 2021, the Respondents unreasonably treating the Claimant's sickness absence as unauthorised absence and unreasonably terminating her employment without investigation or notice, despite the fact that she had notified the First Respondent by text that she was unwell **[§64(c) & 76(iii) of PoC]**;

v. on 28 December 2021, the Respondents failing to pay the Claimant for accrued but untaken holiday **[§64(e) & 76(v) of PoC]**;

vi. the Respondents failing to permit the Claimant to take and be paid for holiday between 30 December 2021 and 7 January 2022 **[§76(vi) of PoC]**; and

vii. from 23 December 2021 onwards, the Respondents ignoring the repeated requests of the Claimant's union representative and the Claimant's solicitor to correspond with them (as the Claimant's duly appointed representatives) rather than the Claimant, causing her alarm and distress **[§76(vii) of PoC]**.

18. If so, by those acts, was the Claimant subjected to a detriment(s) by the First and/or Second Respondent?

<u>The Reason Why</u>

19. If so, was any such treatment because the Claimant had done a protected act?

**D. Unlawful Deduction from Wages**

20. Did the First Respondent make deductions from the Claimant's salary for December 2021 and in respect of her holiday pay on her departure from the First Respondent?

21. If so, were any such deductions unlawful contrary to sections 3 and/or 23 of ERA 1996?

**E. Holiday Pay**

22. Is the Claimant owed any outstanding holiday pay by the First Respondent? The Claimant alleges that that she is owed holiday pay up to 26 December 2021 (her last working day) which has not been paid either at all or in full by the First Respondent, as detailed at **[§78-79 of PoC]**.

## Law

16. The Tribunal was assisted by Ms Balmer, who appeared on behalf of the Claimant, providing written submissions, including a summary of most of the relevant principles of law. During his oral submissions, Mr Henry who appeared on behalf of the Respondents, did not dispute any of the principles set out within Ms Balmer's summary, though understandably he emphasised different points within those precedents and set out his clients' view as to how the principles should be considered by the Tribunal.

17. The Tribunal has set out below the key legal principles as summarised by Ms Balmer, but it has removed the elements that were not in the end of any relevance to the claims as determined by the Tribunal (for example, agency) and added parts which it considered should be included (e.g. the principle that if a constructive dismissal is established, the Respondents cannot enforce the contract it repudiated through its own conduct).

18. Under s212 EqA, if an alleged act is harassment, it cannot be any other head of discrimination. When the same act is asserted as being either harassment or direct race discrimination, the Tribunal should consider the harassment claim first.

19. The Tribunal reminded itself that it is necessary to identify which individual carried out any established discriminatory act and their motivation (Reynolds v CLFIS (UK) Ltd [2015] ICR 1010). It may need to consider whether decisions were based on "*tainted*" information motived by discriminatory views; in any event, the Tribunal must name those responsible for acts complained of by the Claimant, even if they are not named Respondents. The precedent of *Reynolds* was summarised by Kerr J in Commissioner of Police of the Metropolis v Denby UKEAT/0314/16 at paragraph 52:

*"The ratio of CLFIS is simple: where the case is not one of inherently discriminatory treatment or of joint decision making by more than one person acting with discriminatory motivation, only a participant in the decision acting*

*with discriminatory motivation is liable; an innocent agent acting without discriminatory motivation is not..."*

*Harassment*

20. There are three parts to the legal test for harassment in section 26 of EqA. As held in Richmond Pharmacology v Dhaliwal [2009] ICR 724, at 727G-728A, the claimant needs to show that:

    (i) the Respondents engaged in unwanted conduct;
    (ii) such conduct had either the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her; and
    (iii) such conduct was related to her protected characteristic (i.e. race).

21. The term "*unwanted conduct*" is not defined in EqA. Whether conduct is unwanted is a question of fact on the evidence before the Tribunal.

22. In deciding whether or not conduct has the effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating environment for them, the Tribunal should take into account the factors set out in section 26(4) EqA, namely:

    (i) The claimant's perception of events;
    (ii) the other circumstances of the case; and
    (iii) whether it is reasonable for the conduct to have that effect.

23. In order to amount to unlawful harassment under s26 EqA, the conduct must be "*related to*" the claimant's protected characteristic of race. The term "*related to*" is a broad one and can encompass conduct done on the grounds of race and also wider conduct associated with race: Bakkali v Greater Manchester (South) t/a Stage Coach Manchester [2018] IRLR 906. There is no requirement to consider a comparator (hypothetical or real) on a harassment claim under s26.

*Direct Race Discrimination*

24. The Tribunal should apply the test for direct discrimination as set out in s13 of EqA:

    *"(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."*

25. The comparison that the Tribunal must make under s13 is set out within s23 (1):

*"On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case."*

26. The definition of race in s9(1) of EqA includes colour, nationality and ethnic or national origins. In this case, the Claimant relies on her race or ethnicity, being black African. Both parties acknowledge that if the Respondent is arguing that any treatment of the Claimant of which she complains was due to her immigration status, being on Tier 2 visa, rather than her race, discrimination against a person solely on the grounds of their immigration status is not race discrimination: Onu v Akwiwu and Taiwo v Olaigbe [2016] IRLR 719. That is because immigration status does not equate to nationality. However, it will be a matter of fact in any given case whether the reason for any less favourable treatment is solely immigration status or also race.

27. The Tribunal should establish whether the Claimant has been treated less favourably by the Respondents than a comparator was or would have been treated in the same or materially similar circumstances: Chapman v Simon [1994] IRLR 124. Accordingly, the Tribunal should first construct the correct hypothetical comparator and then consider whether there was any less favourable treatment.

28. The Claimant is now relying on a hypothetical comparator and proposes a white Australian sonographer on a Tier 2 visa. Her case is that if the Tribunal believes that a non-black African sonographer on a Tier 2 visa would have been treated more favourably than her, the reason for any such less favourable treatment would not be immigration status but race.

29. The Tribunal should then go on to consider the reason for any less favourable treatment. The "*reason why*" is essentially a question of causation; what was the cause of any less favourable treatment; why did the respondent act as it did? This will turn on the state of mind of the relevant decision maker: Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830 at 833.

30. The Tribunal would add that the case of Nagarajan v London Regional Transport [1999] IRLR 572 confirmed that a finding of direct discrimination does not require that the discriminator is consciously motivated in treating the complainant less favourably. It was sufficient to support a finding of discrimination if it could properly be inferred from the available evidence that, regardless of the discriminator's motive or intention, a significant cause of his decision to treat the complainant less favourably was that person's protected characteristic. Conscious or subconscious influence due to the existence of a protected characteristic is enough to render the act discriminatory if it was a significant influence.

31. It is important for the Tribunal to bear in mind how difficult it can be for a claimant to produce evidence of discrimination. As the EAT stated in Piperdy v UBM Parker Glass (unreported, 14.11.78), as cited in Owen & Briggs v James [1981] ICR 377 at [383]:

*"It has frequently been said that it is difficult for an applicant to show that there has been discrimination even when it has occurred. Evidence of actual discrimination is difficult to find, and admissions of discrimination are likely to be even rarer. It is the job of the Tribunal, not just to accept the denial of discrimination and not just to accept the reasons which are put forward by an employer without question, but to see whether behind what is said there has been, in truth, discrimination of the kind which the Act now makes unlawful. This really is not an easy task. It does require careful consideration of the relevant material."*

32. For this reason, the EqA contains a two-stage burden of proof in s136. That provision states that, if the Claimant proves facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer's actions were done because of race, the burden will then shift to the employer to disprove discrimination. At this second stage, the employer must show that their actions were "*in no sense whatsoever*" connected to race: Igen Ltd v Wong [2005] EWCA Civ 142 and Madarassy v Nomura International plc [2007] IRLR 246. The Tribunal need not take an overly mechanistic approach to the burden of proof if it is clear that there is or is not discrimination on the facts: Laing v Manchester City Council [2006] IRLR 748. The Tribunal would add (as did Mr Henry for the Respondent) that *Madarassy* confirms that to establish a *prima facie* case of discrimination, there needs to be something more than a set of circumstances where the tribunal "*could*" conclude discrimination – mere differences in status or treatment is not sufficient.

*Victimisation*

33. The Tribunal noted the victimisation provisions in s27 of EqA. The meaning of a protected act is set out in s27(2) of EqA. Pursuant to s27(2), a protected act includes "*making an allegation (whether or not express*)" that another person has breached the EqA 2010. Two points are relevant to note.

34. Firstly, a claimant does not need to actually use the word discrimination or to refer to the EqA to make a protected disclosure. It will suffice if the Claimant alleges that things have been done which would be a breach of EqA but does not say that those things are contrary to the Act: Waters v Metropolitan Police Comr [1997] ICR 1073, CA, per Waite LJ at 1097:

*"The allegation relied on need not state explicitly that an act of discrimination has occurred – that is clear from the words in brackets in s 4(1)(d). All that is*

*required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination...."*

35. Secondly, a claimant does not need to use the word "*race"* in order to give rise to an implied allegation of race discrimination if it may be inferred from the facts mentioned: Durrani v London Borough of Ealing UKEAT/0454/2012 (10 April 2013, unreported) at [22]:

*"I would accept that it is not necessary that the complaint referred to race using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies."*

36. The word "*detriment*" is not defined in any meaningful way in EqA. The test is "*whether the treatment is of such a kind that a reasonable worker would, or might take the view that in all the circumstances it was to her detriment":* Warburton v The Chief Constable of Northamptonshire Police [2022] EAT 42 at [50]. This is a question of fact.

37. The reason why a claimant was subjected to any given detriment is, again, essentially a question of causation; what was the cause of any detrimental treatment; why did the respondent act as it did? This will be a question of fact in each case.

38. Again, the two-stage burden of proof in section 136 EqA 2010 applies. Where the claimant adduces a *prima facie* case of victimisation, the burden shifts to the Respondents to prove that their actions were in no sense whatsoever connected with race: *Igen v Wong* and *Madarassy*.

*Time*

39. s123 of EqA sets out the primary time limit for claims under the Act, which is three months from the date of the act complained of. However, that is subject to the following.

40. s123(3)(a) EqA states that conduct extending over a period is to be treated as done at the end of the period. The test for a "*continuing act*" was set out in Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 at paragraph 52 of the judgment. The question is whether there is an act extending over a period as distinct from a succession of unconnected or isolated specific acts. In this case, the Claimant will argue that there was a continuing act from March to December 2021 when she resigned; the Respondents disagree. If the Claimant is right, all of the potentially out of time allegations have been brought to the Tribunal in time; if not, she will need to seek an extension of the time limit.

41. Even if a claim is *prima facie* out of time, the Tribunal has a general discretion to extend time under section 123(1)(b) EqA to "*such other period as the employment tribunal thinks just and equitable*". In exercising the "*just and equitable*" discretion, tribunals are encouraged to consider all the circumstances of the case including, but not limited to, the factors set out in section 33 of the Limitation Act 1988: Adedji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23 at paragraphs 38-39 of the judgment. Relevant factors include the length of, and reasons for, any delay and the extent of any prejudice to the respondent by the extension of time. In the event that any claims are held to be out of time, the claimant invited the Tribunal to extend time on just and equitable grounds. The Claimant has explained her reasons for not bringing a claim sooner in her statement, including the vulnerability of her employment and visa status, as well as a lack of knowledge of her rights. The Respondents have not argued that they suffer a prejudice if time is extended; their position is that time should not be extended as time limits exist for a reason (Robertson v Bexley Community Centre (t/a Leisure Link) [2003] EWCA Civ 576).

*Effect of a Constructive Dismissal on the ability to enforce a contractual term/Unlawful Deductions from Wages/Unpaid annual leave*

42. The right not to suffer unlawful deductions is set out in s13 and 14 of the ERA. In this case, the key issue is whether the Respondents had the right to deduct a sum allegedly owed by the Claimant in reliance on a repayment clause in her contract. The Claimant says that the repayment clause is an unenforceable penalty clause imposed oppressively, along with a general deductions clause, in circumstances where the parties' relative bargaining power was wholly unequal. Alternatively, the Claimant says that the clause was unenforceable because of a repudiatory breach of the contract by the Respondents in constructively dismissing her.

43. The Tribunal would add that it is a general rule of contract law that a party who has acted in breach of contract cannot rely on the terms of that contract to their own advantage (examples are generally found when considering restrictive covenants e.g. General Billposting Co Ltd v Atkinson 1909 AC 118 HL). According to the principles set out in *General Billposting Co Ltd v Atkinson*, where a contract is terminated as a result of a repudiatory breach by the employer, the employee is released from their obligations under the contract.

44. However, the First and Second Respondents argue in the alternative that the Claimant confirmed in writing her agreement to the deductions in an email of 18 December 2021 [553]. This would allow the deductions under s14(4)(b) of the Act.

*Evidence*

45. Ms Balmer set out in her written submissions various judgments on the issue of how to consider oral evidence. The Tribunal would not dispute any of the observations made by the senior courts in those authorities (nor did Mr Henry on behalf of the Respondents). However, it considered the case of Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 Comm to be the leading guidance on this subject at paragraph 22 of the Judgment:

*"22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*

46. The Tribunal accepted in relation to the evidence put forward by the Respondents that:

    i. A tribunal may draw adverse inferences from the fact that documentary evidence that might have undermined a party's case has not been adduced – see Arden LJ in Wetton v Ahmed [2011] EWCA Civ 610 at paragraph 14.
    ii. A tribunal may also draw adverse inferences from the fact that a relevant witness who might have been called has not been called to give evidence about a relevant matter (Hannah and Hodgson v HMRC [2021] UKUT 0022 at paragraphs 171 – 172).

**Witnesses/Evidence**

47. This case was unusual in that it was submitted by the Claimant that not all of the allegedly contemporaneous documents could necessarily be trusted to be contemporaneous (see for example the exhibit referred to at paragraph 14 above); it was also asserted at various points by the Respondents' witnesses that the contemporaneous documents did not say what they appeared on the face of them to state (for example, the probation review form in November 2021 discussed later in this Judgment). Ms Balmer relied upon the *Gestmin* principle and submitted this was a case where the principle needed to be adjusted. Ms Balmer's argument was that if a contemporaneous document was accepted by

the Claimant as accurate, or was at least shown to have been seen by her at the time of the events (though the Claimant argued that she was forced into signing some of the documents), it was appropriate for the Tribunal to rely upon such documentary evidence as the best evidence of what actually happened in meetings and conversations. Ms Balmer went on to submit that if a document was not accepted by the Claimant as contemporaneous, the Tribunal should be cautious about how much weight to place upon it, particularly in circumstances where the Respondents allegedly have failed to properly disclose all relevant documents to the Claimant in the usual process before a Final Hearing.

48. The Tribunal accepts the *Gestmin* principle. Oral evidence should be viewed as assisting the Tribunal regarding the personality, motivations and working practices of a witness, rather than being a wholly accurate recall of what a witness says occurred (as witnesses can be honest and wrong, particularly as time has passed).

49. The Tribunal approached the documentary evidence and the Respondents' evidence as a whole with some caution. This was because many of the Respondents' witnesses were found to be, as Ms Balmer submitted, unsatisfactory witnesses in many respects. It is normal for a number of witnesses not to entirely agree with each other on various points; memories may reasonably differ, and perspectives may be different, depending on the role of the individual. However, it was notable how often the Respondents' witnesses disagreed on key points, such as the reasons why the Claimant's probation was extended on two occasions, the meaning of the phrase "*clinic staff",* and the cleaning undertaken by the Claimant (the evidence initially was that she had never been required to clean outside of the scan room, and then developed into accepting that she had in limited circumstances). The Medical Director [288], the Second Respondent, claimed implausibly to have never heard of clinical protocols, despite being a former radiologist, and gave evidence found to be untruthful.

50. The reliability of the First and Second Respondents' evidence was called into question by their failure to adduce relevant documents such as the ultrasound clinical protocol for sonographers or failing to provide evidence supporting many of the assertions made in their witness statements (for example, no full time sonographer from any clinic at Window to the Womb was called by the Respondents who confirmed that they had at times been asked to carry out general cleaning in either the scan room or outside of the scan room; there was no objective contemporaneous evidence of all the complaints that the Respondents now makes regarding the Claimant). Documents were disclosed by several of the Respondents' witnesses as exhibits to their statements, denying the Claimant any opportunity to deal with them in her statement. The Tribunal concluded that this was a rare case where it may be appropriate to

draw adverse inferences against the Respondents due to the failure to disclose or adduce relevant evidence.

51. In contrast, the Claimant, described by Ms Balmer as "*not the best witness*" was careful to ensure that at every point in her witness statement where she made an assertion, she referred to the evidence that supported what she had said. As Ms Balmer pointed out in her submissions, even when the Claimant's account appeared to be unsupported by contemporaneous documentation or inconsistent, during the cross-examination of the Respondents' witnesses, the Claimant's account was repeatedly shown to be correct. Examples of this included evidence that it was not the role of a sonographer to carry out general cleaning, and the evidence regarding the rotas which the Respondents had repeatedly asserted had been provided to the Claimant in advance but during Tribunal questions to Ms Cartwright, it became clear that the rotas provided in terms of the times of shifts had not been prepared in advance but were completed each day as it happened. The latter example was particularly striking, as the First and Second Respondents had persistently attempted to give the impression that the Claimant's assertion that she did not know what time she was due to start work until either the night before or the day itself to be incorrect.

52. While the Tribunal did not wholly accept the entirety of the Claimant's account, where it did not accept the Claimant's account, it was satisfied that this was because either the Claimant made a mistake about dates and mis-remembered the events of one meeting (8 November 2021) as being the events of another meeting she honestly but inaccurately believed had occurred (17 November 2021); or was not able to show to the level of the shifting burden of proof that what she said happened was said by the Third Respondent in the meeting of 10 November actually took place. The Tribunal did not think that the Claimant had been dishonest on this topic, but was honestly mistaken; the Tribunal preferred the evidence of the Third Respondent for reasons outlined later in this Judgment.

53. In contrast, several of the Respondents' witnesses have been found by the Tribunal to have given untruthful evidence or attempted to mislead the Tribunal as to the truth of what really happened. Principally this was by the Second Respondent, Ms Luporini, and Ms Cartwright. The Judgment sets out why it has found this later in this Judgment. The Tribunal largely accepted the evidence given by Ms Walton and Ms Clewes, and entirely accepted the evidence of Ms Johnson-McKenzie who was not required to give evidence as there was no dispute regarding her evidence.

54. The Tribunal understood that Bethan Lowri Harrison was unable to attend the hearing due to personal family matters (of which evidence was not provided), but it was not willing to place weight on her evidence where it was not accepted

by the Claimant or was not consistent with the contemporaneous evidence that the Tribunal has found to be accurate.

55. There was a particular point that arose regarding comments made by Ms Clewes during a conversation with Elaine Brooks, an officer of the Society of Radiographers on a Teams video conference call on 3 April 2023. Ms Brooks gave evidence (supported by her contemporaneous notes), and Ms Clewes accepted under cross-examination that during this conversation she had made the following statements:

    (a) "*you have to be careful, these Africans tell lies*";

    (b) "*these Africans all have hygiene problems, it is a real problem for us to deal with*"; and

    (c) *"[the Claimant] was just asked to hoover round the clinic and keep the area clean. I don't think it's unreasonable for a permanent member of staff. If someone is just doing adhoc work, we would not expect it".*

56. Ms Clewes accepted repeatedly under cross-examination that she had said these things. During re-examination, she then (and it is noteworthy that there had been a break in the interim) attempted to assert that she was not talking about all Africans, but two specific Africans who were the reason for Ms Brooks' call. Ms Clewes wholly undermined this assertion when she then said, in response to a question of clarification from the Tribunal, that the story she had just told about why she regarded her "*fingers had been bitten*" and had caused her to make such comments in fact related to a wholly different African individual (in other words, not the Claimant or the two Africans represented by Ms Brooks). The Tribunal found that Ms Clewes made these comments as alleged, and they were in reference to all Black Africans.

57. The Tribunal wishes to place on record that these comments are racist. The repetition of them by Ms Clewes at the final hearing, while honest, was astonishing in the sense that it was apparent to the Tribunal that Ms Clewes could see nothing wrong with these views or her expression of these views. The Tribunal understands that Ms Clewes is a registered regulated sonographer, and it anticipates that this Judgment setting out what Ms Clewes said may well be referred to her regulator to consider to whether such views is compatible with registration. However, the Tribunal reminded itself that Ms Clewes was the joint Clinical Lead for the entire Window to the Womb group; she was not an employee of the First Respondent. The evidence shows that Ms Clewes had no involvement in any of the acts complained of by the Claimant. To the contrary, the evidence shows that Ms Clewes had no clinical concerns and made no complaint in respect of the Claimant.

58. The matter in which Ms Clewes' racist language could be relevant to the issues before the Tribunal was whether the Third Respondent, based at Head Office for the group, was likely to have said what the Claimant alleges he said on 10 November 2021. Ms Clewes under cross-examination said that she had discussed her views with the Third Respondent and he agreed with them; the Third Respondent vehemently denied this under cross-examination. The only other matter where Ms Clewes' comments may have been relevance was regarding her view that requiring a sonographer to do general cleaning was not unreasonable if she was a permanent member of staff; this view was reflected though in the evidence of several of the Respondents' witnesses, including the Third Respondent himself.

59. In light of these evidential issues, the Tribunal proceeded with great care when considering the allegedly contemporaneous documents before it by the Respondents; it also proceeded on the basis that broadly when there was a dispute in evidence between that of the Second Respondent, Ms Luporini, Ms Cartwright and the Claimant, it preferred the evidence of the Claimant unless the contemporaneous evidence (which was accepted as such) conflicted with her account. The evidence of Ms Luporini-Lewis was found by the Tribunal to be of less assistance in general as she was not a qualified sonographer, was not present at all times when the Claimant was working, and was the daughter of Ms Luporini.

## Findings of Fact

60. On or around 21 August 2020, the Claimant made contact with an agency known as Permhire about being a sponsored sonographer on a tier 2 visa in the UK. It is evident from an email between the Claimant and Permhire [256] that the discussion was about her working for "*our client*" who has "*37 centres across the UK";* the "*client*" was the wider Window to the Womb Group, not the First Respondent which only had one clinic. On the same day, [242] is an email from the agent to the Second Respondent and Ms Luporini which said that "*Jeanette has asked that I submit this candidate to you*". The Tribunal drew the inference that Jeanette worked for the franchisor, and may be Ms Clewes, and decided to assign the Claimant's potential application to the Swansea clinic operated by the First Respondent. In a document completed with the agent [256], the Claimant indicated that she was expecting a notice period of about 2-3 months. There was nothing in that document about paying a penalty clause should she leave her proposed employment early, but the Claimant confirmed that she understood that if she was sponsored under a tier 2 visa, it would be part of her contract that she would have to pay some money if she left the employment early. Both parties agree that the Claimant expected to work in her role for at least 3 years.

61. The Claimant went through a series of interviews conducted with the clinical leads, Ms Walton and Ms Clewes. On 18 September 2020, the Second

Respondent on behalf of the First Respondent issued a formal offer of employment to the Claimant. This document [265] was a standard offer letter, and critical points included that the Claimant would be employed as a sonographer in Swansea on a full-time contract and her working pattern would be "*full time and split shifts to include evenings and weekends. Generally 5 out of 7 days a week*." There was nothing in the offer about the Claimant having to pay a penalty if she left the employ of the First Respondent. The Claimant accepted the offer on 21 September 2020 [267] and the First Respondent then went through the sponsorship application to the Home Office to enable the Claimant to enter the UK and be its employee.

62. The Claimant's work visa was issued on 23 February 2021 [279], and the Claimant and Ms Luporini began the process of arranging her arrival in the UK and finding suitable accommodation. The Claimant only received what the parties have described as the contract of employment (it is the statement of main terms of employment) [314] in an email from the Second Respondent on 16 March 2021. The Claimant responded in less than an hour, accepting the terms. A signed copy was not before the Tribunal but there was no suggestion by either party that this was not the contract that the parties agreed.

63. Within the statement of employment particulars, [100 – 107] the key points in the view of the Tribunal were:

    *(a) Job title – you are employed as sonographer. The company reserves the right to require you to perform other duties from time to time, which may include work in other departments, and it is a condition of your employment that you are prepared to do this.*
    *(b) Commencement date – your employment with the Company under this contract will commence 19 March 2021*
    *(c) Probation period – the first six months of your employment are served as a probationary period. During this period, your work performance and general suitability will be assessed. Receipt of written confirmation will signify that your probationary period has been successfully passed. However, if your work performance is not up to the required standard, or you are considered to be generally unsuitable, we may either extend your probationary period or terminate your employment at any time. We reserve the right not to apply our full capability and disciplinary procedures during your probationary period.*
    *(d) Termination of employment – [*Tribunal comment - this term includes a penalty clause] *Should the employee be in breach of this contract or give notice to resign from the employment for the first 3 years of employment, the employee will be required to pay the company compensation for the upfront recruitment cost of £7,967.00 which would apply on a sliding scale.*
    *(e) Hours of work – your normal hours of work are 37 per week, Monday to Sunday and are variable in accordance with the rota, which will be*

*notified to you on a monthly basis. You are not expected to work for more than 11 hours on any given day, or more than 10 days in a two-week period nor outside the hours of 8.45am and 11.00pm.*

*(f) Sickness absence – we appreciate that, from time to time, you may be unable to attend work due to sickness. Payment for periods of absence from work due to any sickness you may have is detailed below. The conditions relating to and the procedure you must follow in the event of periods of absence from work due to sickness are set out in the employee handbook.*

*(g) Notice – you are required to give the company 6 months' notice to terminate your employment from your employment commencement date. You are entitled to receive the following periods of notice from the Company:*

- *During your probationary period – 1 week*
- *After the successful completion of your probationary period – 3 months.*
- *By mutual agreement, these notice periods may be waived.*

64. When the Claimant was sent this contract before arriving in the UK, the handbook was not attached according to the email sending it [313]. The Claimant's evidence was that she had never seen the employee handbook while in employment with the First Respondent. The Tribunal accepted this evidence from the Claimant as there was no evidence before it demonstrating that the Claimant received the handbook, and the Claimant did not even have a work email address; she had to use her own personal email address for work emails. It was therefore unlikely that she had access to the handbook through any intranet provision (as the Claimant explained in paragraph 336 of her statement). Ms Luporini at paragraph 130 of her witness statement said that the Claimant was given a copy of the handbook, but did not say who by. Ms Luporini also asserted that the Claimant signed a document to say she had received it; there was no reference to where the Claimant's signed receipt of the handbook was in the bundle. The other Respondent witnesses were silent on the matter. The Tribunal could not locate any signed document by the Claimant confirming receipt of the handbook, and considered this an example of the First and Second Respondents asserting that they had documents but not producing them. It preferred the evidence of the Claimant.

65. The Claimant's evidence was that she signed the statement of employment particulars (contract) as she was about to leave for the UK. While she was concerned about the penalty clause, particularly given the large amount that not previously been notified to her, she considered that she had little option but to accept. The Respondents' witnesses accepted that the Claimant was not told the amount that she would be expected to repay until a few days before her arrival at work, but they asserted that this was because they were not told by the agency until about that time of its costs, and did not know the Claimant's start date until on or around 16 March 2021. The Tribunal considers it unlikely

that any competent business would not know roughly the likely costs of the agent until the transaction was near completion. It also considers it notable that the Claimant was not told of the size of the penalty clause until literally 2 days before she was due to leave Nigeria, by which point she would have resigned from her job and given notice for her home.

66. The Tribunal also observed that the handbook stated that the franchisor's probationary period is 3 months [112], but the Claimant was held to six months. Given the unequal bargaining position between the parties, and what happened to the Claimant in relation to her probation period and the consequential effect on the First Respondent's ability to give her notice, the Tribunal concluded that there were grounds for concern at the outset of the employment relationship about how the Claimant was being treated by the First and Second Respondents. The Claimant was a vulnerable person being brought to the UK to work for the First Respondent, and it was only after all the arrangements were put in place for her to leave Nigeria that she was told key information about the penalty clause; the Tribunal accepted that this put the Claimant in a very difficult position.

67. In addition, no explanation has ever been given by the First and Second Respondents why, if the standard probation period is three months, the Claimant was required to agree a six-month period, meaning her employment could be terminated by the First Respondent with one week's notice. This placed the Claimant into even more of a vulnerable position, particularly as the penalty clause was drafted to say if the Claimant breached the contract (for example, by misconduct) she would have to pay the sum.

68. The First and Second Respondents' witnesses talked about the First Respondent taking a "*massive risk*" by employing the Claimant; as the cross-examinations and evidence showed, it was the Claimant who was taking all the risks in the judgment of the Tribunal. She was at risk of losing her job and sponsorship into the UK on one week's notice while on probation, and if this happened, the First Respondent would in all likelihood enforce the penalty clause. The Claimant understood this, and the Tribunal finds that the First Respondent, Second Respondent and Ms Luporini also understood the effect of these terms on the Claimant. They accepted the points when put to them under cross-examination, and are educated professionals capable of understanding the documents that they required the Claimant to agree. As a result, from the start of the employment relationship, all involved understood that the standard unequal relationship between employer and employee was further unbalanced by the probation and penalty clauses, and the Claimant was in a more vulnerable position than an employee not on a tier 2 visa.

69. The Claimant arrived in the UK on or around 18 March 2021 and commenced her employment the next day; however, due to COVID Regulations she was isolated and undertook online training during this period from home (see as an

example the e-learning on Communicating Bad/Unexpected News dated 24 March 2021 [338]).

70. The Claimant settled into her new home in Swansea, and underwent induction training in Leeds on 7 and 8 April 2021. Both the clinical leads, Ms Walton and Ms Clewes made a record of this induction training [351], and recorded contemporaneously that during the training "*Tina was good, warm and caring on communicating the difficult news outcomes. She clearly wants to do this right*" and that "*Tina is very easy to work with and have open discussion*", and there were no real concerns. Ms Walton is a Registered Nurse and is the clinical lead in respect of non-sonographer matters, while Ms Clewes is the Director of Ultrasound and the clinical lead for sonographer matters. There was no dispute by any of the parties that both clinical leads were best placed to judge the professional work and standards of the Claimant.

71. The Claimant underwent in-house training with the assistance of the "*locum*" sonographers who attended the clinic, and underwent review of her scanning by Ms Clewes. The Claimant was signed off as able to work independently on 9 May 2021 by Ms Clewes. However, it was made clear that training would need to be continuously carried out, including peer assessments; there is no suggestion that this was not standard for all sonographers (as it is for many professions).

72. Within the hearing bundle is a series of monthly team meeting agendas/minutes, which record the Claimant as being present at such meetings. The Claimant's evidence was that with the exception of July 2021, this was not correct. The Claimant's evidence was that she was not aware of such meetings and so did not attend them; July was attended as it was part of Ms Walton's visit to the clinic. The minutes appear to record lengthy meetings, for example [410] the May meeting appears to be an hour and a half. Nothing of any real import turned on whether the Claimant did attend; the First and Second Respondents admit the Claimant was not told in those meetings about body odour issues. The issue about annual leave was determined by the Tribunal without any need to determine whether the Claimant attended.

73. The Claimant also said that she was not given rotas in advance and that the documents put in the bundle by the Respondent were not rotas that she was given. It became apparent in the course of Ms Cartwright's evidence (the clinic manager) that the Claimant's account of the rotas was true. Ms Cartwright confirmed that the times in the rotas were written in during the course of the day to record the operating times. This was further confirmed by the texts put before the Tribunal (both as a separate document and in the exhibits to the Claimant's statement – no explanation was given why the same texts were not disclosed by the First and Second Respondents) that the Claimant did not know her start time until either the night before or the morning itself. Ms Cartwright's

evidence was that this was the same for all the staff, but there was no evidence to support this assertion.

74. The Tribunal's finding was that the rotas put before it within the bundle were not documents that properly notified the Claimant on a monthly basis of the start and end times of her shifts for the Respondent. The parties accept, including Ms Cartwright, that late bookings could be made (and were made) that changed the timings of the Claimant's work hours. In the judgment of the Tribunal what this showed was that the Respondents' witnesses and evidence had to be treated with consideration caution as what they asserted was either later found not to be correct (e.g. the rotas) or unsupported by any evidence or surrounded with concerns about failure to disclose evidence that undermined the Respondents' case. As a result, the Tribunal was not prepared to rely on the minutes of the team minutes as evidence that the Claimant attended such meetings.

75. Another issue raised by the rotas was connected to the Claimant's evidence that she was required to work when she had expected not to work and was required to stay near the clinic or within it at times when she was marked as working a split shift in case of a late-booked appointment. The impact of this was that the Claimant could not return home or use the time as she wished. Given the misleading of the Tribunal on the subject of the rotas by the First Respondent's witnesses (that they were not prepared in advance telling the Claimant what time to attend work), the Tribunal concluded that it would prefer the Claimant's evidence in this regard. It was also consistent with the wider evidence about her treatment at the hands of the First and Second Respondents, such as choosing for her when she could take leave, requiring her to work long periods of time without a rest day, expecting her to work more than five days a week despite the contents of the offer letter and statements of employment particulars, and requiring her to undertake general cleaning. The Claimant was seen as a tool of the First Respondent, rather than a professional person who was entitled to do things other than work at the behest of the First and Second Respondents.

76. Returning to the matter of how the Claimant was performing in the workplace, she was throughout her employment the only full-time sonographer at the Swansea clinic, but she was not the only sonographer; locum sonographers still worked for the First Respondent. The reason why the Tribunal made this point was that copies of a few emails or messages complaining about scans were put in the hearing bundle, but the sonographer was not named (see for example [420]). The Tribunal therefore treated such unnamed reviews with caution. It noted for example that the Claimant worked a half day according to the June rota [414] on 16 June and the complaint at [420] complains about the scan carried out on that day. However, [414] does not tell the Tribunal whether any other sonographers were covering the other half day. There were very positive reviews naming the Claimant within the hearing bundle (for example

[432]); there was no evidence in the evidence of repeated or sustained serious complaints about the Claimant.

77. On the contrary, there is sustained evidence that the Claimant was competent and good at her job. A concern was raised with Ms Clewes on 21 July 2021 about an issue regarding a heartbeat, and Ms Clewes said there was nothing to be concerned about, which was consistent with the Claimant's position [436]. There was a review of the Claimant's progress on 8 June 2021 by the Second Respondent and Ms Luporini [416] and the Claimant was described as "*doing very well with her scanning and has passed all assessments so far*." The trigger for this meeting appears to have been the Claimant being required to work 9 days in a row without a whole day off, which the Respondent said was due to one locum sonographer resigning with immediate effect and the other being on holiday. There is no dispute that the Claimant was originally rota'd to work 13 days in a row, and that this did not happen because the Claimant complained.

78. A further picture of how well the Claimant was doing was confirmed by the notes of Ms Walton who attended for a clinic visit on 26 and 27 July 2021. There has been no suggestion that Ms Walton had any reason to lie or mis-record what she wrote at [446], which was "*there have been no concerns about her* [the Claimant] *scanning ability and she does listen to feedback*". There is a reference to "*some difficulties with her integrating into the team, accepting critique and having problems with energy levels*". The Tribunal will return to this issue later.

79. The Claimant's competence was confirmed again by a letter that the Second Respondent and Ms Luporini sent to her [468] on 11 August 2021. Within that letter it says "*we as a company are generally pleased with your progress and technical performance since joining us in March of this year…".* However, the letter set out issues regarding the Claimant's "*attitude*". This centred on a meeting with Ms Cartwright on 21 July. The Claimant was not interviewed about this meeting and the letter was issued on the basis of what Ms Cartwright had reported. The failure to investigate was wholly unexplained. The letter asked that conversations were conducted in a professional tone and recorded that since Ms Walton's visit, the Claimant was working well with Ms Cartwright. It criticised the Claimant for allegedly making a comment about who would scan if she broke her wrist. The letter in the view of the Tribunal confirmed that the Claimant was competent, but there were growing signs of tension between her and the First Respondent's staff. It also shows that the First Respondent chose not to investigate, but simply rely on what Ms Cartwright told Ms Luporini.

80. While slightly out of order in terms of time, this would be a sensible juncture to deal with the events of 21 July 2021 as it is at the heart of the various references to conflict between the Claimant and Ms Cartwright. On this date, the Claimant was working with Ms Cartwright and two scan assistants, including Ms Luporini-Lewis, and undertook a gender and wellbeing scan. The Claimant asked the

customer to go for a short walk to get the foetus in a better position. According to both, Ms Luporini-Lewis told the Claimant that the foetal heartbeat was abnormal. The Claimant's evidence was that Ms Luporini-Lewis wanted the customer to be told this; Ms Luporini-Lewis' evidence was that she thought it should be referred to the clinical lead. The Claimant's evidence was that she explained her professional view was that it was not certain that there was a heart abnormality and it was very common for babies to have a temporary erratic heartbeat; this is not set out in Ms Luporini's account but, as this advice was confirmed later by Ms Clewes the clinical lead [436] as correct, the Tribunal considered it more likely than not the Claimant did say this to explain why there was no concern to raise with the clinical lead or the customer. Ms Luporini-Lewis was not medically qualified, but in her cross-examination asserted that she was in a position to judge the performance of the Claimant. The Tribunal disagreed.

81. After the scan, there was a conversation between the Claimant and Ms Cartwright; Ms Cartwright wanted Ms Clewes to review the irregular heartbeat issue. There appears to have been a dispute about what images were to be sent to Ms Clewes; Ms Cartwright apparently wanted to only send some, and the Claimant said that all of the images should be sent, including both pre and post walk images. Ultimately it appears Ms Clewes had all the images and her advice agreed with the Claimant's. The Claimant's evidence was she felt that as the professional sonographer, Ms Cartwright who was not medically qualified should not have sought to override her and was dismissive of her expertise. The Claimant thought that this was because she was a black African from Nigeria and not seen as a professional by Ms Cartwright.

82. At the end of the day, there was a meeting between Ms Cartwright and the Claimant. The Claimant says that Ms Cartwright asserted that she did not like the Claimant's "*attitude*" and was unhappy about the Claimant disagreeing with her or not following her directions. The Claimant says that Ms Cartwright also said she was not happy about the Claimant refusing to do general cleaning around the clinic, including vacuuming, and that she was nicer to a Director.

83. Ms Cartwright's account is set out both in the witness statement and in a document that she alleges is contemporaneous [437]. Ms Cartwright recorded the issue with this particular patient, but said that the Claimant did not want to send the video to Ms Clewes and her feeling was that the customer had left the clinic feeling un-reassured. In the note she asserts that if "*the protocol had been followed",* the clinical lead could have explained why the baby's heartbeat sounded irregular. It was not entirely clear what protocol is referred to in this document. It then recorded Ms Cartwright asking the Claimant to call Ms Clewes to be on the safe side (which is consistent with the Claimant's evidence), but she was unable to reach Ms Clewes on her phone. A text message was then sent where the Ms Clewes did view the scan video and

confirmed that it was "*very usual for babies to have temporary erratic foetal heartbeat. I am not concerned*".

84. There is no evidence of the customer being contacted, which is odd given it was for the customer Ms Cartwright claimed that she wanted to obtain reassurance. There was no record of Ms Clewes being told that the Claimant had not reassured the patient, and the Tribunal considered it more likely than not that the Claimant had communicated appropriately with the customer; otherwise, Ms Cartwright would have contacted them later to provide Ms Clewes' reassurance. Indeed, the quality management policy would have required an assessment of the Claimant's communication if she had made such a failure as Ms Cartwright and Ms Luporini-Lewis asserted had been made at the hearing.

85. Ms Luporini-Lewis appeared to have made a contemporaneous account of this matter [438]. The Tribunal questioned whether it was indeed contemporaneous as it opens *"[ ] a third occasion where protocol was not followed*". This document appeared to be part of a larger document setting out when the Claimant allegedly had not followed "*protocol*". This document was not explained to the Tribunal and the entirety of the document was not been made available. The Tribunal was not inclined to rely on this document as a contemporaneous account of what happened.

86. Ms Cartwright produced a note, again allegedly meant to be contemporaneous, of her conversation at the end of the day with the Claimant on 21 July 2021 [439]. It did record that Ms Cartwright said that there was a "*change in attitude*" when the Claimant was asked to call Ms Clewes, and Ms Cartwright appeared to be unhappy about being described by the Claimant as "*mean*". The note also recorded that the Claimant had rolled her eyes in the scan room in front of a customer on 20 July and that the Claimant seemed to rush for the bus after work. This appeared to be criticism of the Claimant. The Claimant was recorded as saying that if she broke her wrist scanning then who was going to scan, but she would not agree the gender of a baby with a scan assistant if she was not satisfied in her professional view. There is nothing in this document about cleaning.

87. It is worth noting that by 26 July 2021 Ms Luporini and Ms Cartwright told Ms Walton that there were no concerns about the Claimant's scanning ability and that she listened to feedback [446]; there was nothing of concern in the document produced by Ms Walton in relation to the Claimant and her performance. The other relevant point is that in the Ultrasound Scanning Clinical Protocol, it is recorded that "*slow/fast foetal heartbeat should not be noted as there is currently no intervention possible and will cause unnecessary distress and that the Claimant must use her professional experience alongside NICE and local guidelines to decide where a second opinion is required*" (page

9 of the Protocol). At a scan, it is the medical professional's opinion that matters, not that of unqualified staff.

88. Intriguingly, this Protocol, of which the Medical Director the Second Respondent said that he had not only never read but he had never heard of a clinical protocol, appeared to be more likely than not to be the protocol to which Ms Cartwright and Ms Luporini-Lewis were referring to when criticising the Claimant on 21 July and in relation to other matters. It is the only protocol with which the Tribunal has been provided. On a close examination, when dealing with foetal and gender scans, the protocol says at page 12 "*customers will present with a full bladder for wellbeing and gender scans but should have empty bladders for later gestation scans*". This is relevant because the Claimant was criticised for at points asking pregnant women to empty their full bladders. There was nothing further in this document about heartbeats, and it was clear from the response of Ms Clewes [436] that there was absolutely no concern if an erratic foetal heartbeat occurred in the opinion of the medical professionals (as opposed to the scan assistant or manager); the Claimant was best placed to judge what to say to the customer. The Claimant's statement at paragraph 139 confirmed that by the end of the patient's appointment, the Doppler had been used several times and the heartbeat sounded normal each time. There was no evidence on which the Claimant's account could be challenged as neither Ms Cartwright nor Ms Luporini-Lewis are not qualified, while Ms Clewes was not present but had no concerns at all when the matter was reported to her.

89. Ms Cartwright's statement and credibility was undermined by elements of her witness statement. She asserted at paragraph 22 that "*I would regularly help and advise locum sonographers. That is the structure of the business…".* The consistent and accepted evidence is that it was the clinical leads who trained and advised sonographers, not non-medically qualified members of staff. Again in paragraph 22, Ms Cartwright asserted that Ms Walton attended the clinic for two training days in July 2021 to work on communication, but Ms Walton's clear and consistent evidence was that this was a routine visit. The documentation also shows that more than just communication was reviewed at this visit. Ms Cartwright also said at paragraph 41 in the aftermath of the events of 21 July 2021 that "*any attempt to have a professional meeting or discussion with Tina regarding work was met with a complete disregard for my position*", but by 27 July 2021 the contemporaneous evidence was that all was well and Ms Walton believed that the "*conflict*" had been resolved.

90. On 11 August 2021, the Claimant had a zoom meeting with Ms Walton and Ms Cartwright. Ms Walton recorded that it was "*discussed how well Tina is scanning and detecting any concerns*" and that any "*conflict*" between the Claimant and Ms Cartwright had been resolved. Ms Walton made the comment that "*finally I reiterated to Tina that when she arrived she had a spark and that as it faded she wasn't as positive as is required in the workplace but when I*

*met with her I saw the spark reignited*." It was the Claimant's case in essence that her spark potentially had reduced due to the treatment of which she complains at the hands of the First Respondent's staff and the Second Respondent; it was notable that when the Claimant was dealing with someone who treated her with respect as a professional, she was viewed in a positive manner. Ms Walton also recorded that "*Swansea clinic have good scan assistants and sonographer and the team worked well today*".

91. At some point before 15 August 2021, it appears that Ms Clewes, the clinical lead that the parties and the Tribunal accept was best placed to review the work of sonographers, was asked to look at allegedly poor images produced by the Claimant. The First Respondent says it sent over 100 images, though it was accepted by Ms Luporini in her re-examination that not all of those 100 images would have been poor; the whole set of images were sent of a particular scan to ensure that Ms Clewes had the full picture when judging the allegedly poor quality images.

92. Her email in response on 15 August 2021 [485] saw Ms Clewes advising that the settings seemed correct and the focussing was also correct. She made the point that "*it is quite a skill to obtain a full length view of the baby in profile and Tina needs a bit of guidance in how to do this. It often requires a very steep angle of the probe in relation to the lady's skin surface… it does take time to develop the skill of producing images that look like a baby. Performing NT scanning develops this skill but Tina is not doing those scans. Would it be worthwhile having Tina spend a little time with Lowri to achieve this? Ask Lowri to specifically help her to produce customer friendly images of babies."*

93. The conclusion that the Tribunal drew from this email was that there was nothing clinically wrong in what the Claimant has done. This was consistent with the repeated evidence that the Tribunal heard that the Claimant was clinically competent but regrettably it was not always possible to get an image of the type that the customer would like e.g. due to position of baby, weight of mother. In terms of clinical competence, there was no criticism of the Claimant in Ms Clewes' email or at any point by her. At the highest, Ms Clewes' email showed some disappointment that some of the Claimant's screenshots (which witnesses accepted could be replaced with other screenshots taken from the scan video produced by the Claimant) were not ideal for a business which regarded as a critical part of its business as being the sale of photos and products of "*customer friendly images of babies*".

94. The Claimant (not the First or Second Respondent) asked Ms Clewes to arrange a zoom call meeting for more training on 27 August 2021, which was arranged. The record produced by Miss Clewes [500] recorded it as a "*call at Tina's request for CPD purposes*." It was not a session that was anything other than standard training for a sonographer, as shown by the contents of Ms Clewes' record and her reference to CPD. Ms Clewes recorded she had asked

if either of the locum sonographers had taken the Claimant's hand to demonstrate how to angle around the baby's face in order to obtain the profile view "*which is much appreciated by patients*". It transpired that neither of the locum sonographers had done this; therefore Ms Clewes suggested that one could be asked to assist. Her notes also recorded that "*Tina was very receptive to all critique, informed me that she is very happy and loves her job and promised to improve her 2D imaging going forward*.".

95. The next event, which happened without any notice, was on 8 September 2021, when the Second Respondent on behalf of the First Respondent gave a letter to the Claimant [501]. It extended her probation until 19 December 2021. Within the letter, the Second Respondent said that *"we are happy to tell you that we are satisfied with your 3D and 4D technical ability and scan timings generally are much improved. First scans are going well and improvements have been made regarding giving bad news to customers."* He also remarked that the Claimant had made "*a real effort"* to improve her attitude. However, probation was extended on the basis that the Claimant's 2D scanning was not of the correct quality and *"has or will lead to a reduction of returning 3D and 4D customers".* He complained that the Claimant still sometimes appeared to be negative and uncommunicative with team members.

96. There were issues with this letter in the view of the Tribunal. The First and Second Respondent took no account of the repeated views of those best placed to review the work of the Claimant, namely the two clinical leads, that the Claimant was good and competent. The clinical leads did not criticise her and the issues which they reviewed with her included an observation that the locum sonographers should assist the Claimant by showing her the angle to get the "*customer friendly image*" ardently desired by the First and Second Respondents. All the Respondents' witnesses agreed that neither clinical lead was consulted about the extension of the Claimant's probation.

97. All the relevant witnesses agreed that it was very odd to suggest that the Claimant's 2D scanning was poor but to say that her 3D and 4D scanning was good – this was because 3D and 4D scans are based on 2D scanning (their unchallenged evidence was that 3D and 4D scans cannot be good if the 2D scanning is poor). There was no evidence before this Tribunal that there was a real or serious concern about the Claimant's 2D scanning. The Second Respondent, Ms Luporini and Ms Cartwright were not sonographers and in no position to judge the professional skills of the Claimant compared to the clinical leads. It was accepted that if the Claimant had taken a screenshot that was not ideal for pictures or products to be sold, it was easy enough to go back to the video and pick a different image to offer the customer. It was not the sonographer's role to sell products to the customer; their role was to scan the baby and report on its health. The Claimant at the meeting where her probation was extended referred the First and Second Respondents to voluminous evidence of her clinical competency; the decision was not reconsidered.

Indeed, the decision had already been made as shown by the drafting of the letter in advance.

98. The Tribunal noted other issues with the September probation extension letter. The letter said "*we will set in place a programme of further training for you*", but no training was provided. There was no review or re-assessment of the Claimant after 12 June 2021 by the clinical leads, despite the First and Second Respondent being able to obtain such a review. The reference to the Claimant's attitude appeared to be wholly aimed at internal communication as it refers to other team members, not patients.

99. The Tribunal reminded itself that there was a quality management policy [190], which confirmed that complaints about a sonographer that were serious must be reviewed by the clinical lead and result in a re-assessment of their performance. If there was a complaint about style and communication, then an additional customer care assessment should have been completed. None of that happened in relation to the Claimant and the extension of her probation in September 2021. There was no dispute that the job of the clinical leads as shown by their job description [194] includes the training, validation and ensuring the competence of sonographers. Ms Cartwright asserted that she, an unqualified non-medical professional, was in a position to assess the Claimant's work, particularly in respect of communication. This was despite the fact that the evidence before the Tribunal demonstrated repeatedly that it was the clinical leads who trained and assessed sonographers regarding communication with patients.

100. The Tribunal found that the September extension of the Claimant's probation was not fairly carried out, was not based on adequate evidence of any professional concerns, and it was more likely than not that the reason the letter was sent (and probation extended) was for reasons not within the letter. Its later findings will set out what the Tribunal finds was the reason for extending the Claimant's probation.

101. There was a meeting on 8 September 2021 between the Claimant, the Second Respondent, Ms Luporini and Ms Cartwright where she was handed the letter extending her probation. The parties agreed that the Claimant was told that her 2D imaging was insufficient. The Claimant asserted that the Second Respondent said she had been disobedient by refusing to do general cleaning; her evidence was this was the real reason why her probation was extended. The Second Respondent's evidence was that he told the Claimant her 2D imaging was so poor "*the images were barely recognisable*" (paragraph 30) and was silent about any other issue. He also thought the meeting took place on 9 September, but nothing critical turns on this. Ms Luporini's evidence was that the meeting was on 9 September and 2D imaging was discussed. No other topic was mentioned. Ms Cartwright's evidence was succinct – she thought the meeting was on 9 September and said 2D imaging was discussed.

102. What was striking was that all the Respondent witnesses only talked about 2D imaging being discussed at the meeting. The probation extension letter (dated 8 September 2021) [501] gave more reasons for the extension of the Claimant's probation – 2D training (described as an urgent issue), the Claimant's negativity, and communication with the team. That meant that either the Respondent's account of the meeting was not accurate or reasons for the probation extension were not fully discussed. In addition, if the Respondent witnesses were right, the letter pre-dated any discussion with the Claimant and showed that the decision was made to extend her probation beforehand as the Claimant alleged. On all accounts, the Claimant's body odour was not raised, which made little sense if it was so bad as alleged.

103. The Tribunal did not accept the Second Respondent's claim that the 2D images were so poor, they were barely recognisable. The clinical leads had no concerns about what they had been and had not been consulted about the probation extension. If the images were as bad as the Second Respondent claimed, the quality management policy would have been activated and the "*urgent*" training delivered (which it was not). The Tribunal found that the Second Respondent's evidence on this point was untruthful, as were the other witnesses Ms Luporini and Ms Cartwright. It preferred the evidence of the Claimant, and found that she was described as disobedient for refusing to carry out general cleaning. It was this to which the comments about the Claimant's negativity and communication with the team referred to within the September probation extension letter.

104. Continuing the change of events, Ms Cartwright emailed concerns about the Claimant to Ms Walton and Ms Clewes and copying in the Second Respondent [512] on 19 October 2021. It also included a suggestion that there was a smell of body odour most days in the clinic/scan room. It did not outright blame the Claimant for this but the whole email is about the Claimant and the natural inference is that she was complaining about the Claimant's smell. Ms Cartwright made no mention of the unchallenged phenomenon that the various chemicals and gels used in the scan room can produce a smell. There was also a file note of concerns that seemed to have been compiled by Ms Cartwright and others [515]. There were questions about the contemporaneous nature of this document and whether it was written as it went. It also left out certain key events of which the Respondent later complains, including 21 July 2021. The Tribunal approached this document with considerable caution.

105. The next major event was 8 November 2021. A probation review form was produced to the Tribunal [533 onwards]. The First and Second Respondents asserted at the hearing that there should have been a second form that recorded the meeting as they claimed it was conducted in two parts, one formal and one informal. They claimed the form only recorded one part of the meeting. The Tribunal did not accept this assertion; it does not reflect the later letter

about the meeting. It accepted that some parts of the meeting might have been more formal than others, but there was only one meeting.

106. At [535], the form records that the Claimant needs to improve on her following areas:

> *(1) Attitude insubordination towards other staff, in particular her manager*
> *(2) Tina has refused to vacuum the scan room and that "Tina today at the meeting outright refused a request of Tony Woodcock (Director) to clean (not just vacuum) in other part of the clinic apart from the scan room stating that it is not her responsibility."*
> *(3) Body odour.*

107. The next page [536] had a section saying if probation was to be extended, it must summarise the improvement required and any immediate training needs below. This section focussed on cleaning and recorded *"she [the Claimant] then refused to engage in cleaning activities with other members of staff in the general clinic and stated that she was only prepared to clean in the scan room but that she will not vacuum in there*". It also recorded that the Claimant did not accept that she had a body odour problem. There was a reference to moving on to a formal meeting but there were no records of such a meeting.

108. The parties agree that on 17 November 2021, the Claimant was given another extension of her probation period letter [537]. The letter stated that the Claimant's probation was to be further extended to 19 March 2022 because of the poor standard of her 2D imaging and three conduct issues; namely personal hygiene, her negative attitude to authority and her refusal to carry out certain cleaning duties.

109. Again, it was accepted that the clinical leads were not consulted on the issue of 2D imaging or any aspect of the Claimant's performance or role before the probation period was extended for a second time. It was therefore wholly unclear on what basis the First Respondent, Ms Cartwright, the Second Respondent or Ms Luporini considered they were in a position to judge the Claimant's standard of professional work.

110. It was accepted by the First and Second Respondents that the first time the Claimant had been told that she had a body odour issue was 8 November 2021. There was no evidence before the Tribunal of any investigation as to why there was an issue regarding smell affecting the only full-time sonographer (the person who spent the most time in the scan room). This was despite the acceptance that scan rooms, due to the various gels and chemicals in a small confined space, can have an issue with smell. The Claimant had been given no opportunity to put matters right in respect of any allegation of body odour before the probation review meeting of 8 November 2021. The Claimant's account was that she tried on 8 November 2021 to explain that the turning-off

of the air-conditioning in August 2021 was potentially part of the issue; as the First and Second Respondents did not investigate, it was unknown if this was be part of the issue.

111. It was also noteworthy that the Respondents' witnesses, namely Ms Luporini-Lewis at paragraph 23 of her statement, gave evidence that the Claimant's smell was so pungent that people could barely be in the room with her. The Tribunal did not consider Ms Luporini-Lewis to be independent, given her mother's involvement, and it did not consider this evidence to be credible. No other witness made such an extraordinary statement about the Claimant, and it was undermined by a review by a customer on 31 August 2021 [432]. This review, by an independent person at a time when one might reasonably expect that body odour issues might be at their worst due to the summer, made no reference at all to the Claimant smelling.

112. The Tribunal expressly found that the allegations about the Claimant's body odour being so offensive that it affected the business and people could barely stand to be in the room with her were not true. It accepted that there may have been a milder issue, but as no investigation was carried out as to whether it was connected to the chemicals in the scan room or as the Claimant points out, possibly due to the absence of air-conditioning or products used by Black Africans for their hair which may be unfamiliar to the non-Black African workforce at the First Respondent, the Tribunal was in no position to make any further findings. It was though in a position to consider whether the issue of smell was raised to humiliate the Claimant and force her to undertake the general cleaning, which the evidence shows was the real focus of the meeting in November 2021.

113. Turning to the matter of the Claimant's allegations about what the Second Respondent allegedly said in the meeting of 8 November 2021, the Claimant, the Second Respondent and Ms Luporini gave differing accounts. The Tribunal preferred the Claimant's account. It was plausible, consistent with the contemporaneous evidence and the facts found, and the Claimant was found to be a more reliable witness than Ms Luporini and the Second Respondent. In addition, the attempts by the Respondents' witnesses to mislead the Tribunal or avoid disclosing relevant evidence were factors why the Tribunal preferred the Claimant's account in the majority of the disputed issues.

114. The Tribunal found that it was more likely than not that the Second Respondent accused the Claimant of being disobedient (as he did in September 2021) for refusing to vacuum floors, and the Claimant was threatened with either an extension of her probation period or dismissal if she continued to refuse to carry out duties that were not a part of a sonographer's role i.e. general cleaning. This was consistent with the contents of the probation form itself and the implication that the Claimant was insubordinate or disobedient if she refused instructions from a director, regardless of whether

the directed work was appropriate to her role or a reasonable request. It followed the dispute with Ms Morgan (see paragraphs 150-154 of the Judgment below) and the discussion with Ms Cartwright in October/early November 2021 where the Claimant was being required to carry out general cleaning in and outside of the scan room. This was on top of the first extension of her probation, done without any process/investigation/consultation, on flimsy grounds not based on anything other than the opinion of non-qualified individuals, and the likelihood that the First and Second Respondent by this point had decided to extend the probation a second time, again on flimsy grounds. The focus of the First and Second Respondents by this stage was on making the Claimant do general cleaning; her refusals were perceived as insubordination and disobedience by the First and Second Respondents, Ms Luporini and Ms Cartwright amongst others.

115. The Tribunal further found that as the Claimant asserted, the Second Respondent did tell her that she had to do cleaning because the Claimant was under sponsorship and he would decide what the role of a sonographer was as the basis that it preferred the Claimant's account when there was a dispute with the evidence of the Second Respondent and the contents of the probation review form. The Tribunal also found that the natural inference from this comment was two-fold – first, that the Claimant, if she did not comply and do general cleaning, faced revocation of her sponsorship; and second, that it did not matter what the Claimant's role officially was as she would be required to undertake any task chosen by the Second Respondent because she was a sponsored employee. The Tribunal found that it was more likely than not that the Second Respondent did threaten the Claimant with dismissal or extension of her probation period if she did not change her position immediately regarding cleaning. This was effectively what the probation review form said; at its core, it was mainly focussed on general cleaning by the Claimant.

116. The Tribunal further found that the raising of the issue of body odour for the first time in a probation review meeting was inappropriate. It had never been put to the Claimant before, and should have been a matter discussed carefully and investigated (for example, to address whether the air-conditioning was relevant). Despite this, only two days later the Managing Partner of Window to the Womb Group was told by the Second Respondent and Ms Luporini that the Claimant smelt and was asked to raise the issue with her. Given that the Third Respondent was not an employee or part of the First Respondent's organisation, for the senior leader in the wider business in which the Claimant was practising to be asked to raise such a delicate issue that had been raised only two days previously, was unreasonable, inappropriate and humiliating for the Claimant.

117. The letter of 17 November 2021 was also the first written express allegation that the Claimant was in some way responsible for cleaning duties and was failing to carry them out. The clinical leads accepted under cross-examination

that they did not consider there to be any reason for the Claimant's probation to be extended from a clinical point of view. Further, it was noteworthy how the clinical leads did not think that the Claimant's probation had been extended for any reason relating to her professional performance (in their oral evidence). While the Tribunal took into account that the clinical leads were based at the Swansea clinic, it found it striking that the two people best placed in the business, whose job description was to train and review the competence of sonographers, had no issues with the Claimant's work. It concluded that the Claimant's extension had nothing to do with her clinical duties.

118. The Claimant's case was that there was a separate meeting on 17 November 2021 where she was given the letter extending her probation for a second time. The Tribunal did not accept that this is proven, and considered it more likely than not that the Claimant mis-remembered the existence of a meeting. The account of the First Respondent's witnesses (Ms Luporini and the Second Respondent) is plausible, particular as in some ways it undermined its case, though oddly Ms Cartwright who allegedly handed the letter over was silent about it in her statement. Their account was that the letter extending the Claimant's probation (dated 16 November 2021) was handed to her at the end of the working day and there was no meeting. The WhatsApp message from the Claimant to her husband Mr Ede [538] was timed 17.57, which was consistent with the Respondents' account (though the Tribunal allowed for the possibility that the Claimant did not message her husband immediately). If the First Respondent's account is correct, it chose to not further discuss the extension of the Claimant's probation, despite the points made in that meeting as shown by the probation extension form, and proceeded to extend the probation. This was despite the fact that the probation was not due to end for about a month so there was time for further discussion or to allow the Claimant to address the points raised. This failure in the view of the Tribunal supported the general tenor of the Claimant's case, not the First Respondent's.

119. The Claimant's account of 17 November 2021 was set out in paragraphs 270 - 285 of her witness statement. It said that she attended a meeting with Ms Luporini, the Second Respondent and Ms Cartwright and was given the probation extension letter dated 16 November 2021. The Claimant said that in this meeting general cleaning was discussed and the threat made to dismiss her if she did not undertake it, that she was told she no longer had a body odour issue and she had to be obedient. With the exception of the confirmation that body odour was no longer an issue and the handing over of the letter, the Claimant's account of what happened on 17 November is very similar to 8 November.

120. Given the Claimant's point about the comments made about body odour were meant to humiliate her and was part of the campaign to make her undertaken general cleaning and be obedient, it was odd that the probation letter referred to this issue, even allowing for it being pre-drafted. As the

Tribunal also has explained, the fact that the probation was extended for a second time without investigation was a critical event; it had already found that on 8 November 2021 the Claimant was threatened by the First and Second Respondent with termination or extension of her probation and instructed to undertake general cleaning in the clinic. Little was added to either case as to whether there was actually a meeting on 17 November 2023.

121. The Tribunal concluded that it was more likely than not that the Claimant has mis-remembered what happened, and the contemporaneous evidence supported a view that before 17 November 2021, the First Respondent decided to extend the Claimant's probation again, drafted a letter to that effect and it was handed to the Claimant on 17 November 2021 at the end of her shift. It was not persuaded that the Claimant attended a meeting with no purpose on that date where much of the same conversation held on 8 November 2021 happened again.

122. The next event of note was that the Claimant attempted to take some annual leave. It was accepted that throughout her employment, the Claimant had not taken any annual leave of her own choice. The Claimant had been required to work most of the bank holidays, and was told with about a week's notice that she could take 6 days off from 31 October 2021; she was not asked or consulted. The background to this period of leave was that the Claimant had complained that she was having to work many days without a rest day (the Respondent agreed that she had to work at least 9 days in a row on more than one occasion, and further that the Claimant was regularly working 12 days in 14 for which no extra pay may not have been paid as the amount the Claimant received was unvaried from June 2021).

123. The Claimant on 19 November 2021 [539] sought to take 22 days leave from 12 December to 31 December 2021. The application was refused. She was told by the Second Respondent that she was seeking too much leave and that she had to complete a form. A loose document adduced as evidence during the course of the hearing demonstrated that the Claimant tried again to take annual leave using a holiday form on 28 November 2021. She sought 9 days' leave to start on 12 December 2021. Again, this was refused. The First Respondent's position was that as confirmed in the handbook [114] a holiday form had to be completed, and that annual leave between November and December was not normally permitted as it "*is the company's busiest time of year, but it can be granted at the discretion of the director*". The handbook also said that four weeks' notice is required for a holiday of a week or more. This left the Claimant in the position that she was not going to be able to take her annual leave within the holiday year, but Ms Luporini confirmed on 3 December 2021 [543] that holiday could be carried over, but that at least a month and preferably two months' notice was required. The Claimant did not make any further leave requests.

124. The next event was that the Claimant resigned giving one month's notice on 7 December 2021 [546–547]. She complained that this was due to *"unfavourable working conditions which I am no longer able to cope with*", and that she wanted to take her 9 days' remaining leave from 30 December until the expiry of her notice. It is worth noting that the Claimant had been told she could only have 9 days leave by the Second Respondent on 24 November 2021 (though he also added she had 4 days in lieu due to working bank holidays) but then accepted that the Claimant was entitled to 14 days as a part of these proceedings. It would therefore appear that the Claimant was misled as to the amount of leave she could take.

125. It is fair to say that the resignation of the Claimant was not taken well by the First and Second Respondents. The Tribunal heard much about how sonographers were valuable resources; the Third Respondent in his oral evidence implied that they were treasured. This was logical given that without a qualified sonographer, the business simply did not exist and locum/contract sonographers were much more expensive than a salaried employed sonographer. The Tribunal was told that this should be carefully considered as it was illogical in the circumstances for the Respondents to mistreat a sonographer.

126. However, it was plain from the response to the resignation that the First and Second Respondents believed they were able to refuse to accept the Claimant's resignation [549] and in a series of emails and in a meeting on 14 December 2021, attempted to in the judgment of the Tribunal intimidate the Claimant into staying in its employ with references to the penalty clause. A rather obvious point that the Tribunal considered was that if the Claimant was such a poor employee that the First Respondent was justified in extending her probation on two occasions (leaving her vulnerable to being dismissed with one week's notice), why did the First and Second Respondents act in the way they did? The Tribunal concluded that it was further evidence that the Claimant was not a poorly performing employee, despite the assertions of the First and Second Respondents to the contrary when extending her probation. The Tribunal has found that the reason for those extensions was not the Claimant's performance.

127. The Second Respondent on behalf of the First Respondent demanded that the Claimant paid £5975.25 by 5.00pm on 16 December 2021, thereby giving the Claimant less than 24 hours to pay a significant sum that was approximately twice her net monthly earnings. In the email, he demanded that the Claimant reconsidered her position regarding notice. Matters worsened. The Claimant was then presented with further invoices. The Second Respondent chased the Claimant 21 minutes after its initial deadline to pay expired demanding payment. The invoices said that failure to make payment could result in *"immediate Court action"* in red. The Claimant's response was sent on 18 December 2021 where she said "*I wanted to "discuss the peaceful negotiation*

*of the upfront recruitment payment process*". The Claimant proposed that she paid a £1,500.00 deposit and then £300 per month to clear the debt. She explained that she could not pay the debt in full as she did not have the money, but she intended to obtain a guarantor residing in the UK as security. She reiterated, as originally stated in her resignation letter, that her last working day would be 29 December 2021 and that "*please, I expect the payment of my accrued annual leave, bank holiday entitlements for 27 and 28 December 2021 (as I have been placed on duty those bank holidays in the December rota given to me) and my salary worked for within this period to enable me to make up the total amount for the deposit."* [553].

128. This email was important as it became the subject of a submission by Mr Henry that it was a written agreement as required under s13 of the ERA to deduct the whole of the Claimant's December pay (which was not pleaded). The Tribunal disagreed with this analysis. It was plain on the wording of what the Claimant said that she required the entirety of her pay to be paid, but she would then use part of it (up to £1,500.00) to pay a deposit towards the penalty clause. This email did not constitute written agreement to deduct the whole of the Claimant's pay. Such a written agreement should be unambiguous.

129. There was then a dispute about whether the Claimant was actually going to work on 29 December 2021. While the Claimant described it as her last working day in her resignation letter, it was agreed that on the rota she was given for December that it was a rest day (as she was required to work the bank holidays). Without consultation, the Respondent chose to change the rota and required the Claimant to attend work on 29 December to carry out the work that would have been undertaken on 30 and 31 December (and avoid booking a locum sonographer). The Claimant made it clear that she did not agree to this change and ultimately the Second Respondent was forced to accept that the Claimant was not going to attend work on 29 December. In an email of 19 December 2021, he asserted that the Claimant's notice period was only 20 days up to 28 December 2021, ignoring that the Claimant had said in her resignation letter that she wanted to take leave from 30 December onwards until the end of her notice [555].

130. The Second Respondent sent a series of emails demanding that the Claimant provided a guarantor, despite the fact that the First Respondent had not expressly agreed to the Claimant's payment proposal. On 29 December 2021, the Second Respondent emailed the Claimant [565] an amended invoice demonstrating that the First Respondent had taken the entirety of her December pay and holiday pay to reduce the money it claimed that it was owed under the penalty clause. The Second Respondent then followed this up on 6 January 2022 by emailing the Claimant another invoice [573] demanding payment of arranging cover for the Claimant's work up to 8 March 2022, including travel and accommodation for the locum sonographer. The Second Respondent on behalf of the First Respondent also attempted to claim for the

Claimant's training and travel costs while employed. In total the sum of £9,859.84 was sought. There was no contractual basis and no written agreement justifying these additional costs that is sought from the Claimant. It appears because the First and Second Respondent considered that the Claimant had breached her contract by not giving sufficient notice, they were entitled to try and claim a wide variety of costs.

131. Going back in time a little, another key event was 23 December 2021 where the Society of Radiographers, effectively a union or trade association representing radiographers in the UK (but also covering sonographers) wrote to all three Respondents. The officer representing the Claimant posed a number of questions about the treatment of the Claimant and enquiring whether all employees were treated the same way or just sponsored employees who had come in under a visa. In each of the letters, the Society of Radiographers asserted that "*Miss Dilibe was subject to threats of deportation and revoking of her sponsorship if she did not do as she was told, managers demanding she do as she is told as she is under sponsorship. She has been left with no option but to resign under these conditions of work*".

132. There were two responses to these letters by the Second Respondent, both of which were sent direct to the Claimant, and not to the officer from the Society of Radiographers. One response was sent on 28 December 2021 and asserted that the Claimant had been required without consultation to work on 29 December "*due to the needs of the business*". [563] There was a second response on 6 January 2022 [577] where the Second Respondent said "*we resent the implication that you were singled out*". The response also denied entirely that the Claimant was subjected to threats but said that she was always aware that if her employment was cancelled for any reason, then the sponsorship would be legally withdrawn. It added "*we did this because as we informed you at the time, we have a legal duty to inform the Home Office of any and all changes in your employment…. This we have now done and the law will be enforced as appropriate*".

133. The Claimant also instructed a solicitor who notified the Respondents of their involvement on 7 January 2022. The Claimant commenced a new role at Leeds Teaching Hospitals NHS Trust on 17 January 2022 [582].

134. On 12 January 2022, several things occurred. Firstly at 9.55am the Second Respondent emailed the Claimant directly (again ignoring her solicitor who had made it clear that all correspondence was to be sent to her) demanding payment, but acknowledging that it would be *"reasonable for us to have constructive discussions*". The Claimant responded at 12:51pm reiterating that the Respondents had been told repeatedly to deal with either the Society of Radiographers or the Claimant's solicitor and was to no longer contact the Claimant. At 1.33pm, a lengthy letter was emailed to the Second Respondent

setting out in detail the Claimant's claims of race discrimination against all three Respondents, amongst other matters [588].

135. The last communication of note was an invitation to a grievance hearing by the First Respondent sent to the Claimant, and copied to her solicitor, on 18 January 2022 [597].

136. There were other events that this Judgment must set out. They have been dealt with separately in order to avoid confusing the reader with an overly complex chronology. The events centre on October and November 2021, and the Tribunal will deal first with the meeting at the core of the claim against the Third Respondent.

137. On 10 November 2021, the Third Respondent, the "*Managing Partner*", Director and Shareholder of the franchisor Window to the Womb (Franchise) Limited visited the Swansea clinic of the First Respondent. The Third Respondent's evidence said it was part of his practice to visit franchisees from time to time to ensure everything is in order, he had a meeting with a developer in the area, and it was convenient to him to visit on 10 November 2021. The Claimant asserted that the Third Respondent was asked to attend the clinic to discipline her and to tell her that she had to do all the general cleaning on site. She asserted that the Second Respondent or Ms Luporini asked the Third Respondent to come following the probation review meeting of 8 November 2021, where the Claimant said she was accused of being "*disobedient*".

138. The Tribunal did not find the Claimant's speculation (as there was no evidence) for the reason for the Third Respondent's visit to be correct. In the industrial knowledge of the Tribunal, it is not unusual for CEO's or senior leaders in a business that are scattered over many locations in the UK to do tours to check in with sites and take the temperature of the business. The Third Respondent's evidence in this regard was viewed as plausible and credible by the Tribunal. The Tribunal considered it less likely that someone of the seniority of the Third Respondent would be asked by a small clinic in the Window to the Womb empire to come out of his way to West Wales, visit and "*discipline*" a sonographer. Indeed, the Claimant confirmed that the Third Respondent had a tendency to visit clinics by her account at paragraph 258 of her witness statement that he had previously visited, and she had had a brief conversation of a few minutes with him.

139. The Claimant's case was that during her meeting with the Third Respondent, Ms Cartwright and Ms Luporini, the Third Respondent discussed generally with the Claimant why she joined Window to the Womb, and about the role of sonographer. This was not disputed. The Third Respondent according to the Claimant then said that he wanted to discuss certain issues. The Claimant asserted that the Third Respondent said that he had been told that she was "*difficult*" and had "*a bad attitude*", and that she had refused to

carry out certain general cleaning duties as instructed by the manager. However, the Claimant then said that he did not use the words "*general cleaning*", but this was what she had understood to be the issue to which the Third Respondent was referring. The Claimant also said that the Third Respondent said that Ms Luporini had told him that she had "*bad body odour*". Her evidence was that he prevented the Claimant from speaking and said that she had to carry out whatever cleaning duties the managers had told her to do, and if she disobeyed, he would withdraw his sponsorship from her with the Home Office. The Claimant said that the Third Respondent asserted "*he had connections at the Home Office*" and would make sure that she was "*deported back to Nigeria within 30 days*". The Respondents' witnesses deny completely this account.

140. The Third Respondent's evidence in his witness statement, and confirmed in his oral cross-examination, was that sonographers are a very valuable resource. This is plausible and credible as without sonographers, Window to the Womb does not have a business. The Third Respondent's evidence was that Ms Luporini and the Second Respondent said that they had been having some issues with the Claimant and asked him to speak to her informally. It is not clear how the Second Respondent made this request as he was not present at the clinic on 10 November (he was not at the meeting), and Ms Luporini did not mention the Second Respondent in her evidence. The Third Respondent's evidence was that he did not see an issue with this request as it was not unusual.

141. The issues regarding the Claimant that the Third Respondent said that he was told about were challenges with the Claimant's diagnostic 2D imaging, body odour, and general cleaning of the scan room. The Third Respondent asserted at paragraph 13 of his witness statement that "*it is standard practice that all of our sonographers take ownership of cleaning the scan room and the associated equipment*". This is in contradiction to the Ultrasound Clinical Protocol, and the evidence of the sonographers who either gave evidence to the Tribunal or whose evidence was accepted by the parties such as Ms Johnson-McKenzie. The Tribunal did not accept that it was standard practice for the sonographers to do general cleaning, but it accepted that the protocol confirms that the sonographer was responsible for ensuring it had been done. However, this was not the interpretation it could put on these words in the Third Respondent's witness statement as he added "*it was concerning to hear that Tina was not cleaning the scan room after use to the required standard*." Evidently, the Third Respondent was of the opinion that sonographers should do general cleaning in the scan room, not simply check that it had been done.

142. The Third Respondent, in contradiction to the Claimant's account, said that he did talk to her about challenges with 2D imaging and asked if she was benefitting from the support being provided, to which she agreed (paragraph 15 of his witness statement). This is in conflict with his oral evidence where the

Third Respondent said that the Claimant had said nothing at all, which had concerned him. The Claimant's evidence was that this topic was not discussed at all. The Third Respondent's evidence was that he did say there had been several patient complaints about her body odour (though there is no evidence at all before the Tribunal of any such complaint), and at paragraph 17 of his statement he observed that the Claimant did not respond to his comments on this point. The Third Respondent then confirmed in paragraph 18, that there was an issue about "*ownership of cleaning the scan room*". He recorded here that the Claimant did not respond. It therefore appeared to be agreed that the Claimant said very little in the meeting, and that while the phrase "*general cleaning*" was not said, the Third Respondent did tell her that the sonographer was responsible for ensuring that the scan room had been cleaned, and she was meant to do the general cleaning herself.

143. The Third Respondent's evidence was that *"at no point did I reference Tina's visa".* He made the point that visas are dealt with by the franchisees, and were nothing to do with him. The Tribunal accepted that this is factually correct, and would have been known to the Claimant as she knew it was the First Respondent who was her employer and sponsor, not the Third Respondent.

144. In cross-examination, the Third Respondent vehemently denied making the comments that he had connections at the Home Office and could have the Claimant deported within 30 days. He was clear that this was nonsense, ridiculous, and outrageous.

145. The only other evidence before the Tribunal that can assist about the meeting on 10 November 2021 is from Ms Luporini and Ms Cartwright. Their evidence agrees with the Third Respondent's. Ms Luporini explains that the Third Respondent was in the area because he had a meeting with a developer who lived in the area. The only other surrounding evidence is that in letters from the Society of Radiographers and solicitors through which the Claimant asserted that she was threatened her in the manner, but the Third Respondent was not named as an individual who made such threats in the Society of Radiographer letters (he was in the solicitors' letter of 12 January 2022). These letters were not contemporaneous.

146. The Tribunal found that the Claimant had not persuaded it that the Third Respondent made these comments. It understood the Claimant's point that she changed her visa, as did her husband to become priority visa applications, but this was not enough to prefer her account, given the findings made about the threats made by the Second Respondent. The Claimant's unchallenged evidence is she made the application on 12 November 2021 and her husband made the application on 14 November 2021. By this point, the Tribunal found that the Claimant's probation had been extended once in September 2021 and she had attended a probation review meeting on 8 November 2021. While the decision had not been communicated yet, the Claimant had reasonable

grounds to be concerned about what the First and Second Respondent were going to do in relation to her job. In addition, the Claimant was in a situation where she could be dismissed with one week's notice, and the Second Respondent had said on 8 November 2021 that he could revoke her sponsorship if she did not carry out general cleaning of the whole clinic.

147. The Claimant's change of position in terms of paying additional money to expedite her visa may not have had any connection to the Third Respondent's visit at all. It was more likely than not that the Second Respondent's threats and the clear risk that the Claimant might lose her job triggered the applications. However, as it was clear that the Third Respondent told the Claimant she had to do general cleaning in the scan room, something that the Claimant reasonably considered to be menial work not befitting her status as a qualified sonographer and a clear flashpoint of regular disagreements with the First and Second Respondents, to this extent the Tribunal was willing to accept there could be a connection between his visit and the application for a priority visa by the Claimant and her husband. The Tribunal though considers it also relevant the likelihood that the Claimant was in the process of obtaining a new job in the NHS (she started the role in January 2022). The application for priority visas had several causes in the view of the Tribunal.

148. The Tribunal had found earlier that it was more likely than not the Claimant has mis-remembered some of the events she said happened on 17 November, and they actually happened on 8 November. It was possible that something similar happened in relation to the meeting with the Third Respondent. While the Tribunal bore in mind Ms Clewes' evidence that she had discussed her racist views with the Third Respondent at Head Office and he had agreed with them, his evidence unequivocally was that this was not correct. It appeared to the Tribunal that the first the Third Respondent had heard of these comments by Ms Clewes was when he had attended the Tribunal to give evidence. The Tribunal considered Ms Clewes' views to be so extraordinary, it was not plausible that the Third Respondent was aware of them, agreed with them, and then chose to defend the claim against him. It did not find it proved that the Third Respondent shared the same views; Ms Clewes' evidence was not preferred on this topic as she seemed to be unaware of what she was asserting against the Third Respondent. The Tribunal was not confident at that point Ms Clewes really understood the import of what she was saying.

149. The Tribunal had already found the Third Respondent's account as to why he was at the clinic credible and plausible. It has found that all parties knew the Third Respondent was not the sponsor of the Claimant. In contrast, the Second Respondent was a director of the Claimant's sponsor and had been found to have made comments similar to that alleged against the Third Respondent. There is no explanation why the Third Respondent, an experienced businessman, would choose to make such unsubstantiated threats and deny them at the hearing, but freely admit that the Claimant was required to do

general cleaning, a core part of her claim against the First Respondent. Without any criticism of the Claimant, the Tribunal preferred the Third Respondent's account of what happened on 10 November 2021 on the issue as to whether he said he had contacts at the Home Office and could get her deported. The Claimant did not discharge the burden of proof to satisfy the Tribunal.

150. Another event that the Tribunal considered was subject to a dispute in terms of dates but very little else. The Claimant's evidence (clarified at the hearing) was that on 6 November 2021, there was an incident in which she was accused of being disobedient by Lani Morgan, one of the clinic supervisors, for refusing to comply with a direction to carry out general cleaning in the scan room. There was a dispute about whether the Claimant should vacuum the floor, as she was complaining that her shoulders hurt. The Claimant said that a scan assistant had offered to help her, but Ms Morgan refused to allow it.

151. The First Respondent's case is that this relates to cleaning in October 2021. Ms Luporini's account is that this dispute with Ms Morgan occurred at the end of October 2021 (but she did not witness it). Ms Luporini asserted that the Claimant had refused to undertake medical cleaning (which all accepted was part of her role) and that the Claimant had been aggressive towards Ms Morgan in the presence of the scan assistant. Neither Ms Morgan nor the scan assistant gave evidence to this Tribunal.

152. Ms Cartwright also failed to be present at this event, but gave evidence about it. She asserted that it happened on 23 October 2021 and she spoke to the Claimant on 25 October 2021 about it. Ms Cartwright said she suggested to the Claimant that if she was unable to deal with the general cleaning of the scan room, it would be appreciated if she assisted with general cleaning outside of the scan room as lighter duties. Ms Cartwright's evidence was the Claimant laughed in her face; the Claimant denied this and it was not put to her in cross-examination.

153. Ms Luporini accepted in cross-examination that in October 2021 the Claimant was "*requested*" to undertake general cleaning <u>outside</u> of the scan room, in contradiction to the denial in the Grounds of Resistance that the Claimant had been required or asked to do general cleaning. By the end of the hearing, the First and Second Respondents accepted that the Claimant was required to do medical cleaning (which the Claimant said was part of her role), general cleaning in the scan room, and had been asked to do general cleaning in the clinic at least once. The dispute had moved to whether the Claimant had been required to do more, and the extent of the cleaning that she had undertaken.

154. The Tribunal considered that there was very little of any importance as to whether the dispute about cleaning happened at the end of October or early November 2021. The parties agree that there was a dispute between the

Claimant and Ms Morgan as to the general cleaning that the Claimant was expected to carry out, and the dispute arose before 8 November 2021 (when the probation review meeting occurred). It was evident to the Tribunal that the Claimant was required from the start of her employment to undertake general cleaning of the scan room as both parties accepted, and she had done so with no or little complaint until July 2021. It was also evident that even at the hearing, despite having been shown evidence of the professional nature of a sonographer's role, the Respondents' witnesses, with the exception of the clinical leads, could not see why it could be inappropriate to require a medical professional to do general cleaning in the scan room. This was despite the clear and unchallenged evidence of Ms Johnson-McKenzie who confirmed that as an employed sonographer in the Bristol clinic, she was not required to carry out such cleaning.

155. The Respondents' witnesses were forced during cross-examination to admit that the Claimant was required to carry out general cleaning outside of the scan room; they and Mr Henry sought to minimise this reality. Yet it was evident from the contents of the November probation review meeting form prepared by the First and Second Respondents that the Claimant was expressly told she had to carry out general cleaning in the whole of the clinic. It was her refusal to do so as time passed, and she became more confident both in her role and her life in the UK, to carry out general cleaning that led to the increased demands that the Claimant cleaned, and punishment when she refused.

156. Another matter before the Tribunal was about a meeting between the Claimant, the Second Respondent and Ms Luporini on 8 June 2021 where she complained about being expected to work without rest days for long periods. The Tribunal preferred the account of the Claimant, given the general inability to place much weight on the evidence of the Respondents' witnesses due to their inconsistent, incorrect or unreliable accounts and the failure to disclose relevant documents from which the Tribunal drew an adverse inference. It found that the Claimant was told that the First Respondent had *"paid a lot of money for sponsorship"* of her and that she was "*here to work*". This was consistent with the wider evidence about the attitude of the First and Second Respondent to the Claimant. The Second Respondent was found to have referred to the sponsorship of the Claimant in the meeting of 8 November 2021. The reaction of the Second Respondent to the Claimant's resignation demonstrated his view that she had cost them money and should not leave their employ, despite the repeated extension of her probation. The repeated insistence that a fully qualified medical professional carried out general cleaning (carried out by others before her appointment and never by any other sonographer, other than Black Africans in the wider group business) and the failure to properly notify her of her working hours in a formal rota provided in good time in advance demonstrated an attitude that the Claimant was subservient. Combined with rostering that required the Claimant to work a

significant number of days without a proper rest day demonstrated sufficiently the view of the First and Second Respondents' that the Claimant was in the UK to work. There was no regard to her professional status as a sonographer.

157. From the comments that the Tribunal has found were made on 8 June and 8 November 2021 by the Second Respondent, and due to the wider treatment of the Claimant it concluded there was more to this case than a "*mere difference*" between her and the locum sonographers. Ms Johnson-McKenzie's unchallenged evidence showed that employed sonographers in Bristol were not expected to undertake general cleaning. It was only the Claimant who was, and it was the Claimant who was subjected to comments that she was "here to work" and a sponsored employee.

158. The Claimant asserted that she did at least one hour of general cleaning a day. The difficulty was that for this allegation, there was only the Claimant's word for it. The Tribunal heard evidence repeatedly that the practice was for staff to leave at the same time. Indeed, at some points Ms Cartwright gave the Claimant a lift home. The account of the dispute with Ms Morgan in late October/early November 2021 on both sides talked about other staff members being present and either cleaning or offering to clean. The Tribunal considered that it did not need to make a finding that only the Claimant ever cleaned or that she cleaned for a particular period of time. This was because it was accepted (and the evidence overwhelmingly showed) that the Claimant was required to do general cleaning in the scan room, and was required to clean outside (see the Second Respondent's comments on 8 November 2021 and the probation review form or the events of late October/early November with Ms Morgan and Ms Cartwright). It was also striking that when the Claimant started to resist, this was when she was criticised, subjected to unsubstantiated allegations, and action taken against her, such as the extension of her probation twice. The Tribunal considered this resistance by the Claimant to be more likely than not the reason why action was taken against her.

159. There was an additional matter that the Tribunal must address; this was about the attitude of the First Respondent and its directors and staff to black Africans. Ms Luporini admitted that she had heard that Nigerian sonographers were viewed as a good way forward in terms of recruiting sonographers to work in the business through the network of franchisee of the Window to the Womb group. The Tribunal did not find that Ms Luporini believed as a result of such discussions she or the Respondents could sponsor black Africans to be used and abused as they saw fit; there was no evidence to support such a finding and the explanation as to why Nigeria was particularly helpful as a source of labour was logical (the qualifications are similar to the UK).

160. Nor did the Tribunal find that the Second Respondent or any member of the First Respondent's staff (including Ms Luporini) had knowledge of the matters set out by the black African sonographers in the WhatsApp group [602-604]

about their treatment in franchise of Windows to the Womb, which includes being required to do cleaning (where the messages record an instruction from management to black African sonographers to keep general cleaning secret in case the Society of Radiographers found out). The First and Second Respondent were not involved in how other franchises treat their staff and could not be assumed to know that.

161. However, the Tribunal found that the evidence before it about wider employment practices of franchisees of Windows to the Womb could not be simply given no weight. The Tribunal bore in mind the useful warning made by Ms Balmer in her written submissions that race discrimination is rarely overt. People do not put in writing things such as "*hire a black African, you can treat them like slaves and make them do all the menial task*s". It is simply not a plausible or likely event. The First Respondent could not be held to share the mindset necessarily of other franchisees. The WhatsApp group evidence as to how black Africans are treated could not be fully tested as the writers are unknown and did not give evidence.

162. However, it is a concern that several black African sonographers in that group reported being treated in the same way as the Claimant, while non-black African sonographers gave evidence to the Tribunal that they had not (including witnesses called by the Respondents, such as Ms Johnson-McKenzie). There was unchallenged evidence from Ms Brooks that black Africans are bringing race discrimination claims against various Window to the Womb franchisees in respect of their treatment. Ms Clewes' racist comments speak for themselves. The Respondents did not call any evidence from a black African telling the Tribunal about their treatment in the employ of the Respondents or the wider Window to the Womb group; the evidence adduced showed that the Claimant's experience was not mirrored by others who were not black African.

163. It was to the wider Group that the Claimant applied for a job in the UK, not the First Respondent. There is evidence that Window to the Womb group has been involved in at least the initial stages of recruitment of sonographers from Nigeria (see the recruitment of the Claimant). There was evidence of a troubling pattern of behaviour, within which the First and Second Respondent's conduct towards the Claimant fitted – that sonographers could be hired from Nigeria, forced to carry menial tasks inconsistent with their professional status that non-sponsored employees and locums are not expected to carry out, and resistance was not well-received.

164. When the comments that the Tribunal has found were made to the Claimant were reviewed, together with the requirement that she undertook general cleaning not only of the scan room but the general clinic, the hours she was expected to work, the Respondent's belief that if she was not actually scanning (but was in the clinic ready for work) she was not undertaking work (as shown by its analysis of appointment times to claim the Claimant was not justified in

complaining about her work hours), and the comments made to her by the Second Respondent, the overall picture in the view of the Tribunal led to the conclusion that the burden of proof had shifted; it was for the First and Second Respondents to explain why none of these matters were either because of the Claimant's race or related to her race. The Respondents failed to do that. However, the shifting of the burden of proof still required the Claimant to prove the factual allegations made, and it would only shift for some of the allegations made for the reasons set out below (in other words, where the reason why something was done was clear and the shifting burden of proof was not required).

165. Instead, the Tribunal has been presented with partial evidence, was aware of attempts not to disclose all of the evidence (for example the ultrasound scanning protocol), unconvincing attempts to try and explain why documents which are inconvenient for the Respondents should not be relied upon, and attempts made to assert that the documents were contemporaneous when on the face of them there were questions to be asked as to whether that was true. All lead the Tribunal to consider that it was likely that the First and Second Respondents acted in such a way because they did not treat the Claimant in the same manner that they would have treated a white British employed sonographer, or a white Australian employed sonographer on a tier two visa. The Tribunal reached the conclusion that the First and Second Respondents (and Ms Luporini) were relying on the fact that that Claimant was alone in the UK for parts of her employment and vulnerable to enable them to bully her into undertaking general cleaning at the clinic.

Conclusions

166. The Tribunal will deal with the 15 allegations of harassment and direct race discrimination together as each allegation has been pleaded as harassment and in the alternative direct race discrimination. It will then deal with the remaining claims individually.

***Harassment/Direct Race Discrimination***

*Allegation 1: On numerous occasions between March and December 2021, the Claimant being required to carry out cleaning duties which were not part of her duties and were inconsistent with her status as a professional sonographer, including being required to vacuum the whole of the Clinic or to mop the floor of the scanning room.*

167. The Tribunal has already found that the Claimant was employed as a sonographer, and a sonographer is a medical professional role. As shown by the Ultrasound Clinical Protocol, the sonographer was responsible for ensuring that the scan room was cleaned by clinic staff. This did not require the sonographer to clean; merely to ensure that the scan room was clean. There

was never any dispute that it was the responsibility of the sonographer to undertake medical cleaning e.g. clean the ultrasound equipment, couch. Any other cleaning that was not medical cleaning has been referred to in this Tribunal as general cleaning.

168. In addition, the evidence of the Second Respondent and Ms Walton (an author of the clinical protocol) was when there is a reference to "*clinic staff*", this meant the staff in the clinic apart from the sonographer. The attempts by the Second Respondent to claim that he did not know what a clinical protocol was, despite being a former radiographer and the Medical Director of the First Respondent, was not accepted by the Tribunal; this was wholly implausible. Further, the attempts by the various Respondent witnesses based at the Swansea clinic to assert that they had never seen this protocol were not accepted by the Tribunal; the Second Respondent expected that Ms Luporini would have read it (her evidence was that she had not); Ms Cartwright who put a great emphasis on her status as clinic manager and her ability to "*help and advise*" the qualified sonographers said she had never read it. The clinical protocol was the Bible for the sonographer to follow; if the sonographer did not act as required by the protocol, it could lead to serious consequences both for patients and for the sonographer. It did not require sonographers to undertake general cleaning; that is the job of the clinic staff.

169. The Tribunal found that it was not part of the role of the sonographer to undertake general cleaning. The clause in the statement of employment particulars that said that the Claimant could be required to undertake other duties was subject to an implied term that such requests will be "*reasonable*". The same applied to the term in the staff handbook at [112] that required flexibility to be given by staff members for their role. There was no evidence that the Claimant saw the handbook when she was employed. Indeed, the evidence was to the contrary; when she wanted to take annual leave she did not know she had to fill in a form as required by the handbook. When the Claimant wanted to notify the Respondents that she was sick, she sent a text (the handbook required a call). The Tribunal considers it unlikely that a Claimant who throughout the hearing bundle has been shown to be a conscientious and diligent individual would have simply overlooked such matters if she had seen the handbook. In any event, a job flexibility clause still required reasonable application by an employer.

170. The Respondents agreed with the Claimant that she was required to undertake medical cleaning and that she did so (while there were attempts later in the evidence to suggest that the Claimant had not always carried out the medical cleaning, the Tribunal did not accept this evidence from the Respondents. The Tribunal considers given the regular attempts to punish the Claimant for not doing general cleaning, it considers it unlikely that her failing to carry out important infection control matters such as medical cleaning would not have passed unremarked and unrecorded). All the witnesses agreed that a

sonographer was not a cleaner. This was a matter of pure logic; why would anyone employ a qualified medical professional to act as a cleaner? However, this logic did not explain why the First and Second Respondents required a sonographer to do general cleaning.

171. The parties all agreed that the Claimant should not have been required to carry out general cleaning outside of the scan room, but the Tribunal found as a matter of fact that she was so required on more than one occasion by the First and Second Respondents (the dispute with Ms Morgan and the meeting of 8 November 2021 are examples). The parties agreed that the Claimant did carry out general cleaning in the scan room from the outset of her employment, and this included her being asked to mop and vacuum the floor. The Tribunal found that this was outside the job role of a sonographer. Ms Walton's evidence was that it was not part of a sonographer's role to carry out general cleaning in the scan room. The locum sonographers were agreed not to carry out general cleaning in the scan room. Ms Johnson-McKenzie, a full-time sonographer in Bristol, made it clear that she did not clean the scan room, mop the floor, vacuum, or clean outside of the scan room. While the Tribunal had not had the benefit of meeting Ms Johnson-McKenzie, paragraph 15 of her statement suggests that she is not white, but it was not asserted that she is a black African individual.

172. Ms Johnson-McKenzie's evidence in particular undermined the Respondents' position before the Tribunal that sonographers should do general cleaning in the scan room; its own witness who was the only other full time sonographer employed in the Window to the Womb Group called to give evidence to the Tribunal did not agree that this was part of a sonographer's role (nor did the clinical leads). The evidence showed that there was nothing to support any finding that a non-black African sonographer has ever been asked to undertake general cleaning in the Swansea clinic or as part of the wider Window to the Womb Group. As Ms Balmer made the point, it would have been easy for the wider group to call such an individual; the Respondents did not. The Tribunal appreciated that the First Respondent could not call any previous employed sonographer in its employ as the Claimant was the first, but the wider group could have done so.

173. The WhatsApp messages from the black African sonographer group for the Window to the Womb group in the view of the Tribunal demonstrate that black African sonographers are required to carry out general cleaning duties. The Claimant gave sworn evidence that they are black African sonographers. The language within the texts in the view of the Tribunal appear consistent with the language of those for whom English is not their first language and may be of black African origin. [602-604] demonstrate that they were told to clean and at least one was told to keep it quiet as the Society of Radiographers had found out and was raising complaints.

174. The evidence before the Tribunal showed that it was only black African sonographers who were expected to carry out general cleaning in the wider Window to the Womb group; the other sonographers (whether employed or locum) did not. Suspicions were further raised by the desperate efforts of the First and Second Respondents and their witnesses to assert that the November probation review notes [535-536] did not say what they clearly said; in other words that the Second Respondent required the Claimant to carry out general cleaning outside of the scan room and her probation was to be extended if she did not. This is confirmed by the probation extension letter of November itself. The Claimant was required to do general cleaning outside of the clinic, and because she did not, her probation was extended. None of the other reasons given for the probation extension has been found to be credible.

175. The evidence before the Tribunal showed that prior to the arrival of the Claimant, the only black African sonographer employed by the First Respondent, sonographers did not carry out general cleaning. This work was done by the scan assistants. In late July 2021, Ms Walton visited and there was a discussion about infection control. The Respondent throughout sought to link cleaning to infection control, and it is therefore not implausible that the Claimant is correct when she asserted that Ms Walton told her that sonographers did medical cleaning. All agree that this is part of the sonographer's role.

176. It is notable that matters were clearly coming to a head in late July 2021, as the Claimant was starting to resist carrying out general cleaning and being undermined in her professional role by Ms Cartwright and Ms Luporini-Lewis, who considered themselves better able than a qualified sonographer to decide whether the job was being carried out properly and made no acknowledgment that the clinical lead wholly supported the advice given by the Claimant to the customer on 21 July 2021. The Tribunal has already said when there is a conflict between the Claimant and Ms Cartwright, Ms Luporini-Lewis or most of the other witnesses called by the Respondents, it preferred the Claimant's account, which is generally supported by the contemporaneous evidence that is reliable.

177. It has been found that the Claimant was required from the outset of her employment to carry out general cleaning, both inside and outside of the scan room. The increasing disputes with the Claimant were either about the subject of cleaning or appear to be raised in order to put the Claimant under pressure to continue to clean. The Claimant was repeatedly required to carry out menial tasks that were not part of a sonographer's role. The Tribunal had no difficulty in identifying this as unwanted conduct carried out by Ms Luporini, Ms Cartwright and the Second Respondent on behalf of the First Respondent. The Claimant raised complaints about this conduct and refused more than once to carry out the general cleaning, which resulted in criticism and the extension of her probation in unusual circumstances.

178. The Tribunal did not consider that the purpose of this conduct was to violate the Claimant's dignity or to create the prescribed environment. The reality was that the Claimant was viewed by the First and Second Respondents as labour who had been imported from Nigeria and was here to work, and could be required to carry out the cleaning and save other staff such effort. It was undoubted that such conduct had the effect of violating the Claimant's dignity and creating a humiliating, offensive and degrading environment for her. She is a professional sonographer. The Claimant was required to carry out delicate scans looking at and advising worried pregnant women about their babies. Yet she was treated as someone who could be forced to mop and vacuum floors, when there were three other individuals in the clinic whose role was to support the sonographer and the clinic who used to do such cleaning before the Claimant's arrival. The Claimant was required to carry out work that no other sonographer was required to do.

179. The Tribunal concluded that this conduct related to the Claimant's race. The references to her sponsorship, which were not merely a reference to her immigration status, but was a reference that she was Nigerian, and perceived as someone who could be required to carry out menial tasks as she could be threatened with termination of her sponsorship, was an indicator. The treatment complained of by black African sonographers, while not undertaken by the First and Second Respondents, indicates that within the wider Window to the Womb group there was an issue about how black Africans were viewed (and that was before the Tribunal considers the racism of Ms Clewes). The fact that the Claimant was repeatedly pressured to carry out general cleaning duties and reminded that she was "*here to work*" was sufficient to discharge the burden of proof, and to require the First and Second Respondent to prove that there was no connection to the Claimant's race. They have wholly failed to do so.

180. If the Tribunal is wrong in its finding that both the First and Second Respondent have harassed the Claimant on the grounds of her race in relation to allegation 1, it would have found that she had been subjected to direct race discrimination. The Tribunal does not consider that a white Australian sonographer on a Tier 2 visa would have been treated in this way by the First or Second Respondent and the clinic staff. There is no perception that Australians are in some way inferior and menial and "*here to work*", could be easily returned home, and no grounds on which such a perception could be based. The Tribunal would have found that the Claimant had been subjected to less favourable treatment because of her race as a black African by the First and Second Respondents, Ms Cartwright, and Ms Luporini.

*Allegation 2 - On various occasions between March and December 2021, the Claimant being spoken to in a threatening manner by the Respondents and it being made clear to her that if she did not do as she was instructed in relation to cleaning that she would be dismissed, her immigration sponsorship would end and the First*

*and Third Respondents would use their Home Office connections to have her deported within 30 days*

181. The Tribunal has already found that the Claimant was repeatedly required to undertake general cleaning by the First and Second Respondent. It found that it preferred the Claimant's account about what the Second Respondent said to her in June and November 2021. It was evident from the second extension of her probation in November 2021 that one of the grounds relied upon by the First Respondent was the Claimant's "*attitude*" towards cleaning, despite there being no evidence that is supported by documentary evidence on which the Tribunal is willing to rely that the Claimant had not been carrying out medical cleaning (which is part of the role of a sonographer). Indeed, cleaning was the main ground in the view of the Tribunal, given its focus in the probation review form and being the only substantiated issue (as the Claimant accepted that she was resisting doing general cleaning).

182. The Tribunal bore in mind the extension of the Claimant's probation on two occasions was undertaken unreasonably (there was no investigation that supported the conclusions that the First and Second Respondents to extend probation either time, Ms Luporini and Ms Cartwright had no basis on which to find that the Claimant's imaging was in any way poor as they were not medically qualified and the clinical leads were not consulted about this finding, the reasons given for the probation extensions were not supported by sufficient evidence, a reasonable employer would not regard it as reasonable to extend early the Claimant's probation again in November when there was approximately a month to go without giving an explanation or to do so swiftly after the probation review meeting giving the Claimant no real time to "improve").

183. The Tribunal considered the September extension letter [501] which stated that the Claimant's probation was extended due to issues with 2D imaging and attitude. The Tribunal has already explained why it put no weight on the allegation that the Claimant's 2D imaging was poor. The attitude allegation in all the surrounding circumstances appears to be centre on cleaning. If, for example the Claimant had an attitude towards patients, there was no explanation why proper contemporaneous statements were not taken from the staff who witnessed it or the patient, and those statements put to the Claimant and should have then been asked for an explanation. The answer of the First Respondent may have been that the statement of employment particulars allowed it not to carry out a full disciplinary procedure when someone is on probation, but this was not argued before this Tribunal.

184. The Tribunal looked at the November extension letter [537], which again recorded the issue of 2D scanning and raised three attitudinal issues regarding the Claimant, including cleaning. In the probation review form, the Claimant was accused of "*insubordination*". Given that the Claimant was the only

qualified member of staff, such a word implied that the Claimant was somehow beneath the other staff, rather than a professional with important obligations to mothers and babies. The letter also expressly mentioned the possibility of termination of employment; such a warning is necessary if termination is in prospect. The Tribunal has already concluded that it was more likely than not that the Second Respondent did threaten to dismiss the Claimant; this is consistent with the reference to termination in the letter extending probation in November. The Second Respondent's witness statement was silent on this matter and the Tribunal has found that he had not told the truth when he asserted that he had not told the Claimant to clean (the contents of the probation review form show unambiguously that this happened). The Tribunal preferred the Claimant's evidence regarding the meeting on 8 November.

185. Taking into account what the Second Respondent was found to have said, the contents of the probation letter extension of November, and the probation review form, the Tribunal concluded that what the First and Second Respondent were most upset about was the Claimant's refusal to carry out general cleaning, both inside and outside of the scan room. The Tribunal also accepted the Claimant's account that she was told that she was sponsored and here to work in June 2021 by the Second Respondent, which it accepted was further evidence of threatening behaviour by the First and Second Respondent towards the Claimant.

186. This allegation also mentioned the Third Respondent and in particular the alleged comments that he was alleged to have made on 10 November 2021. The Tribunal has not found that the Third Respondent said he had contacts at the Home Office and would ensure the Claimant's deportation. The Tribunal concluded that his comments about following management instructions and the Claimant's alleged body odour was not sufficient to constitute threatening behaviour. The allegation was therefore only considered in respect of the First and Second Respondent's behaviour.

187. Was the behaviour of the First and Second Respondents in insisting the Claimant carried out general cleaning, making references to her potential dismissal, that she was sponsored and was in the UK to work from June through to November 2021 unwanted conduct? The Tribunal found that it was, but it could not identify any threatening behaviour before 8 June 2021.

188. The Tribunal did not find that the purpose of such conduct was to violate the Claimant's dignity or create the prescribed environment but was in truth meant to get her to do the general cleaning without complaint. The Tribunal found though that the conduct did have the effect of violating the Claimant's dignity, both in the way that it was done (in November making unsupported assertions that the Claimant smelled and repeatedly referring to her sponsorship) and by humiliating and degrading the Claimant by requiring her to carry out general cleaning tasks not appropriate for a professional qualified sonographer and

which the First and Second Respondents should have known were not appropriate (as shown by the evidence that no other sonographer who was not black African was asked to carry out such cleaning). It was objectively reasonable for such conduct to have the effect described by the Claimant and the Tribunal accepted her evidence that it did have that effect.

189. Did this conduct relate to race, particularly the Claimant's race which is black African? The Tribunal referred to its previous findings for Allegation 1 and further noted that the reference to "*sponsorship*" was about immigration status, but not wholly. All that is required is for there to be a relationship to race, and the Claimant required sponsorship as she is a black African Nigerian. The unchallenged evidence was that Ms Luporini and the Second Respondent made references to "*cultural shock*" to the Claimant in the meeting on 8 June 2021 (where the Claimant pointed out the excessive working hours she was required to work, which the Respondents' witness agreed happened but explained was due to a shortage of locum sonographers). The Tribunal reminded itself that racism is rarely overt. Taking all the evidence it heard into account, the Tribunal was satisfied that the conduct related to the Claimant's race in that there was a perception on the part of the First and Second Respondent that black Africans "*imported*" into the UK were here to work, could be used to do menial tasks and save other staff the work, and were insubordinate or disobedient if they challenged their treatment. These attitudes were held by the two directors of the First Respondent, Ms Luporini and the Second Respondent.

190. In the alternative, if the Tribunal is incorrect regarding its findings on harassment, it would have found that it was less favourable conduct because of the Claimant's race. The Tribunal did not consider that a white Australian on a Tier 2 visa would have been treated in the same way as the Claimant was treated. It considered it less likely that a such a comparator would have been referred to as disobedient or been subjected to comments that if they did not comply, they may have to return home. The Tribunal found that both the First and Second Respondents racially discriminated against the Claimant by way of harassment, but in the alternative by way of direct race discrimination.

*Allegation 3 - At a meeting on 8 September 2021, the Respondents raising unfounded concerns about the Claimant's performance and telling her that she had a bad 'attitude' for being disobedient and unfairly extending the Claimant's probationary period until 19 December 2021*

191. The Tribunal had no hesitation in finding that the First and Second Respondents did raise unfounded concerns about the Claimant's performance, both in September and November 2021. Ms Luporini and Ms Cartwright also raised unfounded concerns that they were not qualified to judge and without the support of the clinical leads. The fact that the clinical leads were not consulted about whether any issue with the Claimant's professional work

warranted the extension of probation was in itself enough to establish a lack of foundation for the allegations against the Claimant regarding her scanning and 2D images in particular. The evidence before the Tribunal that the clinical leads repeatedly gave that they had no concerns about the Claimant, that the quality management policy required the raising of serious concerns to be dealt with by the Clinical Leads (which never happened in the Claimant's case; the sending of the approximate 100 images in August 2021 was not a serious professional concern, but more about shots of babies that could be sold), and the evidence heard that the clinical leads did not consider an extension of probation to be appropriate was sufficient in the Tribunal's view to show the concerns were unfounded.

192. It is also worth remembering that the Claimant was not warned of any risk of extension of her probation in the letter sent to her on 11 August [468] by the First Respondent; it did say that there would be a meeting to meet and discuss the performance points on 1 September, but this did not happen. The Tribunal considered this an indication that this was because the concerns were unfounded and there was an ulterior motive behind the allegations; to get the Claimant to comply and undertake general cleaning without complaint. Instead, what did happen was that the First and Second Respondents, particularly the Second Respondent, chose to draft the letter extending the Claimant's probation and hand it to her on 8 September 2021, indicating it had already decided to extend her probation, regardless of whatever she said at the meeting [499].

193. The attitude issues raised were not supported by any objective evidence, and were at their highest of a minor and insignificant nature. The fact that customers were content with the Claimant's performance was demonstrated by the reviews put before the Tribunal [432]. There were no complaints naming the Claimant before the Tribunal from patients.

194. The Claimant's account at paragraph 199 of her statement was preferred by the Tribunal. The Claimant's account was that without any notice she was called into a meeting with three people on her own and not invited to bring anyone to support her. The Second Respondent, Ms Luporini and Ms Cartwright made a series of accusations against her and extended her probation, despite the positive feedback from the clinical leads. No formal reassessment or customer care assessment had been undertaken as required by the quality management policy, and there was no peer review assessment by a peer sonographer at that time. The Tribunal also accepted the Claimant's evidence that at this meeting the Second Respondent complained that the Claimant had been "*disobedient*" in not doing general cleaning. This was consistent with his later description as insubordinate for raising concerns with her Line Manager about being asked to do general cleaning in November and the comments he made in June. The Tribunal has already explained why it

generally preferred the Claimant's evidence and had found the Second Respondent to have been untruthful in parts of his evidence.

195. The Tribunal found that the truth was that the Claimant was being punished in September because she was not undertaking general cleaning in the way that the First and Second Respondents, Ms Luporini and Ms Cartwright wanted her to, given their perception that they had effectively "*bought*" the Claimant and she was here to work. In the circumstances of this case, the Tribunal concludes that a reasonable employer would not have extended the Claimant's probation, and it was unreasonable for the First Respondent to do so in the way that it chose to do so and for the reasons it gave. The Tribunal found that this constituted unwanted conduct, but its purpose was to make the Claimant stop complaining and clean. It acknowledged that it was more likely than not only the two directors decided to extend the Claimant's probation (Ms Luporini and the Second Respondent), rather than Ms Cartwright who was not a director; however, the evidence showed that Ms Cartwright was firmly of the view that the Claimant should do as she instructed and carry out general cleaning, and did not dispute that the Claimant had been brought into the UK to undertake whatever work was required.

196. The Tribunal found however that the Claimant had not demonstrated that this conduct had the proscribed effect. In her witness statement at paragraph 216, she simply described herself as "*anxious and upset*" but said little more. The words "*violation of dignity or creating an intimidating, offensive, humiliating or degrading environment*" have a real meaning that must be given their true weight but there was nothing in the Claimant's statement addressing this. The Tribunal found therefore that the Claimant has not shown that the conduct had had the effect required to succeed in a harassment claim, even though the Tribunal would accept that objectively such conduct would be likely to create the proscribed environment.

197. The Tribunal therefore considered the alternative claim of direct race discrimination. It was satisfied that the Claimant was subjected to less favourable treatment that the hypothetical comparator, namely a white Australian on a Tier 2 visa, would not have suffered. At its heart, this was an issue about the Claimant, general cleaning, and the perception that as a black African who sponsored by the First Respondent, she was in the UK to undertake any work that it chose to require her to do. There was not a single example of a non-black African sonographer being asked to carry out general cleaning, either by the First Respondent or the wider Window to the Womb group. The Tribunal was satisfied that this was more than a mere difference in treatment and the Claimant had satisfied the burden of proof. The First and Second Respondents in contrast have not shown that they did not breach the Equality Act 2010. It found that both the First Respondent (through Ms Luporini, Ms Cartwright and the Second Respondent) and Second Respondent in his

own right directly discriminated against the Claimant on the grounds of her race by acting as alleged and found by the Tribunal.

*Allegation 4 - At a meeting on 8 November 2021, the Respondents raising further unfounded concerns about the Claimant's performance and other matters, including her allegedly bad 'attitude' and body odour*

198. The Tribunal's findings in relation to Allegation 3 above applied here with equal force. There was no foundation for the allegations regarding the Claimant's performance, and the Tribunal was wholly satisfied that the allegations regarding the Claimant's attitude are "*trumped up*". As the probation form and letters showed [535/537], the extension was really about general cleaning and the Claimant's refusal/resistance to do it. It was not explained why the probation review meeting had to take place over a month before the probation ended if time was not to be given for the Claimant to address the concerns raised (as shown by the decision to extend the probation shortly after the meeting). The Claimant was subjected to comments about her body odour, but there was no evidence put forward to support this on which the Tribunal can place any weight; the customer reviews made no reference, the Respondents' witnesses made exaggerated claims that the smell was so pungent they could barely bear to be in the room (which if true was likely to have led to the Claimant being spoken to at a much earlier date), no independent investigation to see whether it was the Claimant who was responsible for the smell or the chemicals being used in the confined space/the shout-down of the air conditioning. The mention of the Claimant's body odour was done in a humiliating manner, and it is worth bearing in mind that the Claimant was alone with three people in the room being subjected to unfounded allegations about her professional performance, trumped-up charges about her attitude which really was about her refusal to carry out general cleaning, and being told that she smelled.

199. The Tribunal had no difficulty establishing this was unwanted conduct, but again finds that the purpose was to make the Claimant comply, stop complaining and carry out general cleaning (which indeed was what happened). The Claimant in her witness statement from paragraph 240 through to 249 in her witness statement talked about the effect that this behaviour had on her. It was clear that she found the suggestion that she smelled particularly offensive; she explained that she felt that it may potentially have a connection to the products used by black Africans that can be unfamiliar to white people (for example on their hair). It was undoubtedly the inclusion of comments about her smell that has caused the Claimant the most distress, which the Tribunal considered to be both subjectively and objectively reasonable (it had already found the comments about her professional performance to objectively be reasonable to create the proscribed environment due to the lack of evidence but had no evidence that the Claimant had suffered

– see allegation 3 above). The Tribunal was satisfied that the addition of these comments about her odour resulted in the Claimant suffering both a violation of her dignity was violated and the creation of a humiliating, degrading and offensive environment for her.

200. Was there a connection to race? Despite Ms Clewes' racist comments that Africans smell, she had no involvement in the Claimant's extended probation and therefore the Tribunal cannot draw a line linking Ms Clewes' beliefs to the conduct of which the Claimant complains. At its highest, the existence of such beliefs might have indicated why no investigation was carried out by the First Respondent and its management, but the Tribunal cannot affix the First or Second Respondent with Ms Clewes' beliefs. What the Tribunal has found is that the First Respondent, the Second Respondent and Ms Cartwright were of the view that it was the Claimant, a black African employed under a sponsorship visa who should carry out general cleaning, regardless of the fact that she was a qualified sonographer and other sonographers were not required to undertaken general cleaning as part of their role as a sonographer. The lack of investigation, particularly in relation to the allegation of body odour, was indicative of a negative view regarding her (and potentially her race) as it meant that the Claimant's observations about the lack of air-conditioning and the known issues about chemicals in the room/products used by black African community were never addressed. It was simply alleged that it must have been the Claimant that smelt. While allowing for the point made in *Madarassy* that a mere difference in treatment and race is not enough to establish discrimination, the Tribunal was satisfied that there was enough for the burden of proof to shift and to require the First and Second Respondents to show that the Claimant's race in no way had any involvement in its decision to act as it had in raising unfounded and uninvestigated concerns and complaining of her body odour. They failed to do that.

201. The Tribunal therefore found that the First (through Ms Luporini, Ms Cartwright and the Second Respondent) and Second Respondent racially harassed the Claimant as alleged. In case that the Tribunal is incorrect, it would have found that this was less favourable treatment (an employee would have reasonably considered such treatment to be to their disadvantage and would not have an unreasonable sense of grievance) and the Claimant had been subjected to direct race discrimination in a manner that a white Australian in the same material circumstances would not have been treated. This would have been due to the views of the First and Second Respondent that the Claimant had been brought over from Nigeria in order to work as it required (and when it required).

*Allegation 5 - At a meeting on 10 November 2021 the First and Third Respondents informing the Claimant that if she did not do what she was told*

*regarding cleaning the Clinic, the Respondents would contact the Home Office, and she would be deported in 30 days*

202. The Tribunal has already found that it did not accept that the Third Respondent had said that he would contact the Home Office and ensure the Claimant's deportation in 30 days. This meant that this allegation had not been factually proved to have occurred.

*Allegation 6 - At a meeting on 17 November 2021, the First and Second Respondents raising further unfounded concerns about the Claimant's performance and other matters, including her bad 'attitude' and body odour and, on that basis, improperly, unfairly and in breach of contract, extending the Claimant's probationary period again until 19 March 2022.*

203. The Tribunal had already found that there was no meeting on 17 November 2021, but it accepted that on 8 November 2021 the Claimant was subjected to unfounded concerns about her performance, her attitude and body odour. It found that the November probation extension letter was handed to the Claimant on 17 November by Ms Cartwright at the end of her shift [538]. The Tribunal found that the extension of the probation actioned on 17 November 2021 was wholly unfair and unreasonable (though again it acknowledges that the decision makers in extending probation was more likely than not to be Ms Luporini and the Second Respondent, the directors). The Tribunal has already addressed why the concerns were unfounded.

204. The Tribunal found that the extension of the Claimant's probation in November 2021 was unwanted conduct, but remained of the view that the purpose was to make the Claimant stop complaining and undertake general cleaning. The Tribunal noted though that the Claimant's evidence focussed on how the Second Respondent allegedly handed over the letter (which has not been found to have happened by the Tribunal as there was no meeting on 17 November). It had no evidence before it that demonstrated the Claimant felt that her dignity had been violated or that she felt the proscribed environment had been created by the extension of her probation. This meant that the harassment claim could not succeed.

205. Turning to the alternative claim for direct race discrimination, the Tribunal was satisfied that this was less favourable treatment to which the hypothetical comparator would not have been subjected, for the same reasons given regarding the September extension and the other previous findings. The Claimant had been brought over from Nigeria to the UK at the behest of the First Respondent, it and its staff viewed her as someone that they could control and require to undertake tasks that were not part of the tasks of a professional sonographer, and would not have treated a white Australian in the same way, let alone a white British employee. The Tribunal found that the First and

Second Respondents directly racially discriminated against the Claimant in extending her probation (as did Ms Luporini who was party to the decision).

*Allegation 7 - Between March and December 2021, the Respondents rostering the Claimant unreasonably, for example putting her on 13 days' work in a row or similar and only allowing her to take 6 days holiday on days decided by the First Respondent. Then, in late November 2021, refusing her request to take holiday during December 2021*

206. The Tribunal acknowledged that the Claimant did not ultimately work 13 days in a row as originally rostered, but was because she complained. The parties all agreed that she was regularly required to work 12 days out of 14. However, both the statement of employment particulars and the offer letter said that she would be working 5 days a week, and there was no challenge to the Claimant's evidence that she never received any additional pay for working on more days (potentially due to the First Respondent's assertion that she worked split shifts). The Tribunal found that such rostering, given the offer letter and statement of employment particulars, was unreasonable behaviour as alleged.

207. The Tribunal also found that despite the First Respondent's repeated assertions to the contrary, as confirmed by Ms Cartwright under re-examination, the Claimant was not provided a monthly rota in advance with the times and dates that she was expected to work. At most, she would be given an indication of the days she was expected to work, and it would not be until the night before or the day itself that she would be told the start time as shown by the texts within the hearing bundle between Ms Cartwright and the Claimant. The Tribunal considered that to be unreasonable and an indication that the Claimant's account was correct – she was not really working split shifts but she was attending work with little notice of the start time and expected to wait until the First Respondent's staff decided that the shift had ended (after the last appointment, which could be booked at short notice, had been done and the cleaning completed). In such circumstances, the Tribunal accepted the Claimant's evidence that she was not able to go far from the clinic. The First Respondent called no witness to confirm that they saw the Claimant enjoying leisure or social activities in the middle of a split shift; the challenge at cross-examination was perfunctory.

208. However, the Tribunal's view in relation to annual leave was different to the Claimant's. The evidence showed that she had 6 days holiday imposed upon her from 31 October 2021. There was no conversation or agreement. It happened because the Claimant pointed out how exhausted she was as she had been given insufficient rest days, and it was convenient to the First Respondent for the Claimant to take leave at that point. Employers do have the right to require employees to take leave, and the Claimant did not complain

of this; she merely pointed out the context of this leave period and that she had not applied for it.

209. The Tribunal also observed that there appeared to be a general implication in the evidence of the Respondents' witnesses that the Claimant was only working when she was actually scanning a pregnant woman. There appeared to be little acknowledgment that she would be working when she was ready and available for work in the clinic at the requirement of the First Respondent. It was not the Claimant's fault if there were insufficient appointments for example on a particular day for her to scan all day long. Training activities also constituted work, despite the Second Respondent's unreasonable attempt to bill the Claimant for this at the end of the employment relationship. That said, the Tribunal did not draw an inference from this perceived view of the Claimant and what constituted work.

210. The Claimant applied for further leave on 19 November 2021 [539] and sought 22 days leave between 12 December and 31 December 2021. The Tribunal considered that this application was reasonably refused. Any reasonable employer would be concerned about somebody seeking 22 days off in a row at any time of year (and this conclusion was supported by the handbook, though the Tribunal found that the Claimant had not seen it while employed). The lack of notice would also be a difficulty for most employers, and given that customers booked appointments needing a sonographer to be present, the Tribunal accepted sufficient notice in the First Respondent's case for leave of such length would be at least one month.

211. The Claimant then applied on 28 November 2021 using the correct form [loose document provided during the course of the hearing] to take 9 days in the similar time period. This would have resulted in less than 2 weeks' notice of the Claimant taking 9 days off at the busiest time of year (according to the handbook – this point was not challenged). Again, the Tribunal did not consider the refusal of this application to be unreasonable, particularly as despite the contents of the handbook, the First Respondent [543] through Ms Luporini told the Claimant that the leave could be carried over to the next year; it was not lost. It was reasonable for the First Respondent to refuse the Claimant's annual leave requests in the judgment of the Tribunal.

212. Was the rostering of the Claimant unwanted conduct? The Claimant repeatedly complained of being tired according to the evidence of both parties (and the Respondents criticised the Claimant for this), which demonstrated that it was unwanted conduct. However, the Tribunal did not consider that the allegation fitted properly into the framework of harassment; in its view, the allegation better fitted within the framework for direct race discrimination. The purpose and effect questions were not well suited to an analysis as to why the

Claimant had so few rest days, despite the contents of her statement of employment particulars and offer letter.

213. There was unchallenged evidence in the payslips that the Claimant did not receive any extra money despite having less rest days (presumably because overall her hours did not increase). This was an indication in the Tribunal's view that the lack of a rest day was seen as unimportant for the Claimant, despite being a sonographer carrying out an important role and being a valuable commodity. It was in the view of the Tribunal less favourable treatment (having to get up and leave your home, rather than spend the day as you pleased, was likely to be seen as a disadvantage and is a reasonable grievance). and the Tribunal did not think that the hypothetical comparator, namely the white Australian on a Tier 2 visa would have been treated in the same way for the reasons previously given.

214. This finding arose from the lack of evidence of any non-black African sonographer being required to work such hours or patterns, the expectation by the First and Second Respondents that the Claimant was "*here to work*" as she had been sponsored by them, the attempts by these Respondents to mis-represent the evidence about the Claimant's working patterns/rotas and the number of holiday requests made by the Claimant (the second application in November was not disclosed by the Respondents until during the course of the hearing, and no explanation was given why it was not disclosed earlier). There was sufficient evidence to shift the burden of proof; and the First and Second Respondents did not show that they had acted because of a reason other than the Claimant was a black African who had been brought over to work as they saw fit. The Tribunal is persuaded that the First Respondent has directly racially discriminated against the Claimant on this issue, through the decisions made by the Second Respondent, Ms Luporini and Ms Cartwright. The first two knew and approved of the rostering of the Claimant, while Ms Cartwright created the rotas.

*Allegation 8 - On 7 December 2021, the First Respondent dismissing the Claimant. The Claimant's primary case is that she was constructively dismissed by the First Respondent. The Claimant says that she resigned in response to the Respondents' conduct at paragraphs (i)-(vii) above which, individually or collectively amounted to a repudiatory breach of the implied term of trust and confidence between employer and employee, and that by her letter dated 7 December 2021, the Claimant accepted such breach and resigned on the basis that she had been constructively dismissed under section 95(1)(c) of ERA 1996. Alternatively, if the Claimant is not found to have been constructively dismissed on 7 December, it is averred that she was actually summarily dismissed on or after 26 December 2021 when the Respondent ceased paying her*

215. This is in essence a constructive unfair dismissal claim, though the Claimant does not have sufficient service. However, as it has been argued all of the breaches of contract relied upon by the Claimant (allegations 1-7) are either because of or relate to her race, she is able to raise the claim as a claim of direct race discrimination. This means that the Tribunal must apply the law on constructive unfair dismissal to consider if such a dismissal took place, and if so, because of the Claimant's race.

216. The Tribunal found that allegations 1-7 were acts of race discrimination (though there were elements of her case that were not upheld). It also found that the First Respondent acted in such a way that constituted a fundamental breach of contract and demonstrated that it had no intention of abiding by the implied mutual duty of trust and confidence towards the Claimant. The Claimant was entitled to accept the repudiation of the contract by the First Respondent; the giving of notice did not change the acceptance of the breach by the Claimant through her resignation on 7 December 2021 as employees are entitled to find another job to ensure they can pay their bills (and in the Claimant's case, she was on a visa). The Tribunal did not consider that the Claimant delayed unduly or affirmed any breach of contract (and no such argument was made).

217. However, the effective date of termination was not 7 December 2021. If events had not overtaken, the Claimant's effective date of termination would have been 7 January 2022. The Tribunal will set out later why it has found that due to the First and Second Respondent's conduct, the effective date of termination in reality was 27 December 2021.

218. As a result of the finding that the Claimant was constructively dismissed, the Tribunal found that the Claimant was less favourably treated when compared to the hypothetical comparator and the direct race discrimination claim is well founded and upheld. The breaches of contract were all acts of race discrimination. There was also a related conclusion as a result of the constructive dismissal of the Claimant. In circumstances where an employee is constructively unfairly dismissed, the contract of employment between them and the employer is no longer enforceable by the employer. This means any contractual term relied upon by the First Respondent to justify a deduction of the Claimant's wages and unpaid accrued annual leave must fail under s13 of the ERA.

*Allegation 9 - On 8 December 2021, one day following her resignation, the Respondents demanding that the Claimant repay her recruitment costs in full and requiring this sum to be repaid within less than 24 hours of the demand*

219. There is no dispute that on 15 December [549] the Claimant was emailed by the Second Respondent an invoice for £5,975.25 and required to pay it in full in less than 24 hours. The allegation asserted that a similar request was

made on 8 December 2021. There was no evidence to this effect in the Claimant's statement. The allegation has not been amended to reflect this. Technically, the Claimant has provided no evidence that on 8 December 2021 such a demand was made, and therefore the allegation was not proven as alleged. However, the Tribunal was willing to consider the matter on the basis of the email of 15 December 2021 as the following allegation does also cover these events.

220. Mr Henry submitted that it was standard industry practice to make such demands and to threaten immediate legal action if not paid. Mr Henry was given an opportunity by the Tribunal to specify what evidence was before the Tribunal of this "*standard industry practice";* no further submission was made on the point. The Tribunal found that it was not standard industry practice to demand thousands of pounds to be paid in less than 24 hours, or to threaten immediate legal action if the threat was not complied with.

221. However, the Tribunal did accept the evidence it heard that the resignation of the Claimant placed the First Respondent in a very difficult position. As the Third Respondent explained, sonographers were a key resource. As the Second Respondent said, there was no business without a sonographer. The Tribunal accepted that the First and Second Respondent were desperate when the Claimant resigned and gave short notice of her intention to leave. This was despite the finding that her resignation was due to their acts of race discrimination/breaches of contract.

222. Were the demands for almost immediate repayment unwanted conduct? The Tribunal found that it was – no-one would wish to be faced with such demands. What was the purpose of such conduct by the First and Second Respondents? The Tribunal found that it was a panic reaction (as the business needed a sonographer), and a desire to recover what they perceived as their financial losses due to the Claimant's departure. It was also evident from the emails and the unchallenged accounts of the meeting that took place with the Claimant on 14 December 2021, what the First and Second Respondents were hoping to do was to intimidate the Claimant into agreeing to stay for longer. No open and transparent offer about the penalty clause was made by these Respondents to enable the Claimant to further consider her options. At this point, neither party had realised the effect of the repudiatory behaviour by the First Respondent and its acceptance by the Claimant through her resignation on its ability to enforce the penalty clause. The purpose was not to violate the Claimant's dignity or to create the proscribed environment.

223. However, the Claimant failed to adduce any evidence that there was any violation of her dignity or a creation of a prescribed environment as a result of this conduct. In addition, the Tribunal was not persuaded that there was any connection to the Claimant's race. The First and Second Respondents had

acted as they did because they believed the penalty clause to be enforceable, they were hoping to intimidate the Claimant into staying longer, and they wanted to recover its losses. Race was not a factor.

224. In the alternative, the Tribunal considered whether the direct race discrimination claim was well founded, and concluded that it was not. This was on the basis that it could find no evidence on which it could determine that that hypothetical comparator would not have been treated in the same way because the same motivations for the First and Second Respondent would have existed.

*Allegation 10 - In December 2021 and thereafter the Respondents sending the Claimant aggressive and intimidating communications about payments alleged to be owed by her, and "invoices" for amounts said to be owed by her to the First Respondent for recruitment costs, training costs and other sums.*

225. The Tribunal concluded that the Claimant had not demonstrated that the undoubtedly aggressive and intimidating demands for payment was harassment or direct discrimination for the reasons outlined in Allegation 9 above. There is no evidence on which the Tribunal could find that the conduct related to her race or was because of race.

*Allegation 11 - On 28 December 2021, the First Respondent deducting the Claimant's entire salary for December 2021, in circumstances where there had been no prior agreement by her to any such deduction, and ceasing her pay with effect from 26 December 2022.*

226. There was no dispute that the First Respondent deducted the entirety of the Claimant's salary for December 2021 and all of the annual leave it accepted she had accrued and not taken. The Tribunal has already found that the First Respondent was not entitled to do so contractually (due to the constructive dismissal) and that there was no written agreement entitling the First Respondent to make the deductions either.

227. The Tribunal accepted that this was unwanted conduct, as demonstrated by the Claimant's request that the entirety of her pay was paid [553]. The Tribunal however found that the purpose was not to violate the Claimant's dignity or create the prescribed environment. The First Respondent (through the Second Respondent) did it because it wanted to take as much money as it could from the Claimant to reduce its perceived losses. The Claimant by this point had already left its employ. There was also no evidence that this action had the effect of violating the Claimant's dignity or creating the prescribed environment. This meant that the harassment claim must fail.

228. In relation to the direct race discrimination claim, the Tribunal had no evidence on which to make a finding that the hypothetical comparator would

not have been treated in the same way. The hypothetical comparator would have been on a Tier 2 visa and similar costs were likely to have been accrued. The First Respondent's directors clearly felt very aggrieved that they were now without a sonographer, and the Tribunal considers it likely that the hypothetical comparator would have been treated in the same way. This means that the claim for direct race discrimination is not well founded.

*Allegation 12 - On or shortly after 27 and 28 December 2021, the Respondents unreasonably treating the Claimant's sickness absence as unauthorised absence and unreasonably terminating her employment without investigation or notice (despite the fact that she had notified the First Respondent by text that she was unwell) because she had allegedly not followed the First Respondent's formal sickness notification policy*

229. The Claimant texted Ms Luporini on 26 December 2021, saying that she was feeling unwell and would not be able to work 27 and 28 December [561]. There was no explanation in the texts as to what was wrong with the Claimant, how she felt unwell, or how she knew that she would not be able to work the next two days. It was evident from the handbook that this text did not comply with the sickness policy, which required a telephone call and an explanation as to what was wrong, a practice is a standard industrial practice in the experience of the Tribunal. In the context of what had been going on between the parties (the Claimant's short notice resignation, her several attempts to get annual leave, the fact that she firmly refused to work 29 December as it had been rota'd as a rest day), it was understandable why the First and Second Respondent were suspicious of this development. The Tribunal found that it was reasonable for the Claimant's text to be viewed with suspicion and initially treated as unauthorised, despite the Claimant not having been provided with the sickness policy.

230. Where the First and Second Respondent went wrong in the Tribunal's view was in the response to the Claimant's text. On 27 December, the Second Respondent emailed the Claimant telling her that she had not complied with the sickness policy and added that she had not given a reason for the illness. He did not provide her with a copy of that policy or give the Claimant any opportunity to comply with the policy. Instead, the Second Respondent said "*Please can you give us a time and day for the return of our company property, all documentation, uniforms and all other property*.". The email could reasonably be read by the recipient as a dismissal.

231. The Claimant was told that she had contravened a policy which she was not shown, she was given no opportunity to respond, the Second Respondent demanded that she returned everything, which meant that she would not therefore be able to return to work, should she unexpectedly recover the next day. The Tribunal concluded that this email [562] was a summary dismissal of the Claimant without any investigation or giving her any opportunity to comply

with the sickness policy. The Tribunal considered this to be unreasonable in the circumstances as it gave the Claimant no opportunity to comply with the sickness policy or to explain. As a result, the email was a summary dismissal of the Claimant, bringing the Claimant's notice to an early end. The effective date of termination was 27 December 2021 (on the basis that emails are likely to have been received within minutes of being sent) in the judgment of the Tribunal.

232. Was this unwanted conduct? In the Tribunal's view, it was. The Claimant communicated that she was not well and was on sick leave; despite the fact that a text was not sufficient and the lack of explanation, a reasonable employer would have given the Claimant an opportunity (if only for a few hours) to comply and explain what was wrong with her. It was unreasonable for the First (through the Second Respondent) and Second Respondents to proceed to dismiss the Claimant without any investigation or hearing what the Claimant had to say. That was unwanted conduct.

233. However, the Tribunal was not persuaded that the purpose was to violate the Claimant's dignity or create the proscribed environment, and was not satisfied that there was evidence that it had had that effect. There was no evidence from which the Tribunal could find a relationship with the Claimant's race. This means that the harassment claim is not well founded.

234. Similar logic applies to the direct race discrimination. There was no evidence or basis on which the Tribunal was willing to find that the hypothetical comparator would have been treated any differently. At this point, the relationship had clearly got into very difficult waters. The Claimant had resigned with short notice, complaining of the working conditions to which she had been subjected, the First and Second Respondent's attempts to intimidate her into staying for longer had failed, the Second Respondent was repeatedly demanding that the Claimant paid a very large amount of money within very little time, and there had been an argument about whether the Claimant should be expected to work on a rest day. The Tribunal concluded that it was more likely than not that the hypothetical comparator would have been treated in the same way in those circumstances. This meant that the direct race discrimination claim is not well founded.

*Allegation 13 - On 15 December 2021, the Respondents altering the December 2021 roster after the Claimant's resignation and requiring her to work 29 December 2021, which had originally been rostered as a rest day*

235. There was no dispute that the First Respondent did change the December rota after the Claimant resigned and required her to work on 29 December 2021, which had originally been rostered as a rest day for the Claimant. The First Respondent before the Tribunal had sought to argue that the Claimant had asked to work that day by saying in her resignation letter [547] that her

last working day would be 29 December 2021. The letter also showed that the Claimant had resigned with one month's notice, but wanted to take her holiday leave during the notice period from 30 December onwards.

236. The Tribunal was not persuaded that the First Respondent reasonably thought that the Claimant wanted to work on her rest day. The phrase "*last working day*" is one that can be interpreted in different ways, and the Claimant was not a native English speaker. In any event, the evidence undermined the Respondents' account to the Tribunal. The Second Respondent in an email to the Claimant on 28 December [563] told her that the rota changed due to the needs of the business. There was nothing said about the Claimant asking to work on this date. In fairness, the Tribunal noted another email on 18 December 2021,where the Second Respondent emailed the Claimant [555] saying that he was not completely clear what was the last working shift the Claimant would be, as he thought the Claimant was saying it would be 29 December due to her letter, but a manager had been told it was 28 December. The Claimant responded telling him to look at the rota, and the First Respondent accepted that it was seeking to change the rota. The matter appeared to be resolved on or around 19 December 2021 when the First and Second Respondents accepted the Claimant was not going to work on her rest day.

237. The rota itself does confirm that the Claimant was never meant to be working on 29 December [541], and there was no evidence that the Claimant was ever consulted about the proposed change; on the contrary, it was accepted that she was not consulted. It was clear from the evidence and Respondents' witnesses that what they were seeking to achieve was to move the appointments booked for 30 and 31 December to 29 December and make the Claimant work it in order to avoid having to book a locum sonographer.

238. The Tribunal was persuaded that the attempt to change the rota was unwanted conduct, but was not persuaded that the purpose was to violate the Claimant's dignity or to create the prescribed environment. What was happening was the First Respondent was trying to deal with the short notice situation and as was consistent with its general pattern of treating the Claimant as someone who could just be ordered to change her plans without consultation, it wanted to move the later appointments to the last day of her employment with no reference to the fact that it was a rest day.

239. The Tribunal did not have any evidence that the unwanted conduct had the proscribed effect or violated the Claimant's dignity. It was therefore not persuaded that the harassment claim was well founded. The Tribunal also considered that the hypothetical comparator would have been treated in the same way, given the wider circumstances and the hope that the scans booked in for 30 and 31 December could be undertaken on 29 December without

incurring further costs. This meant that the direct race discrimination claim also was not well founded.

*Allegation 14 - On 28 December 2021, the Respondents failing to pay the Claimant for accrued but untaken holiday*

240. The Tribunal has found that this was neither harassment or direct race discrimination and referred to its findings under Allegation 11.

*Allegation 15 - Failing to permit the Claimant to take and be paid for holiday between 30 December 2021 and 7 January 2022*

241. There was no evidence that the Claimant was told that she could not take holiday between 30 December 2021 and 7 January 2022. The First Respondent accepted that the Claimant was not coming in after 29 December 2021 in light of her resignation and refusal to lose her rest day (which changed her last day in work to 28 December 2021). The allegation failed in terms of "*failing to permit*". The Claimant was summarily dismissed on 27 December 2021, but this was not in order to stop her taking leave. It is correct that the Claimant did not receive payment for this holiday, but for the reasons outlined under Allegations 11 and 14, the Tribunal is not persuaded that this was either harassment related to race or direct race discrimination. The First and Second Respondents wanted to claw back what it could from the Clamant, and did not understand that there was no contractual or lawful basis on which to do so. There was no connection to the Claimant's race.

**Time limits**

242. The First and Second Respondents argue the Claimant is out of time to bring some of the claims before the Tribunal. The Tribunal has considered the ACAS Early Conciliation dates and date of presentation of the claim to the Employment Tribunal, and has concluded that the earliest date that is in time is 23 November 2021.

243. The Tribunal then considered the allegations that have been upheld:

a. Allegation 1 was a continuing act ending in December 2021, and therefore is in time.
b. Allegation 2 concluded on 8 November 2021 (no allegation was made of similar conduct in the meeting on 14 December 2021) and therefore is out of time if viewed in isolation.
c. Allegation 3 is also out of time if viewed in isolation as it related to 8 September 2021.
d. Allegation 4 is out of time if viewed in isolation as it related to 8 November 2021.

e. Allegation 6 is out of time if viewed in isolation as it has been found to relate to the extension of the Claimant's probationary period on 17 November 2021.
f. Allegation 7 was a continuing act in relation to the annual leave issue, but this was not upheld. In relation to the rota complaint, the November rota [521] showed the Claimant working 9 days out of 10, while the rota at [522] showed the same. Taking a range of dates from 20 November 2021, the Claimant was shown to have worked 11 days with one rest day up to 2 December 2021. The Tribunal was satisfied that the rota complaint was a continuing act from the start of employment until 2 December 2021. That meant that this allegation is in time.
g. Allegation 8 is relates to the constructive dismissal on 7 December 2021, and therefore is in time.

244. In relation to the allegations complained of that may be out of time (allegations 2,3,4 and 6), the Tribunal considered that the matter required a wider perspective. For example, it would have been difficult to properly deal with Allegation 8, which is in time, without considering the earlier allegations before the Tribunal - it would not be able to do so fairly if the earlier allegations were excluded from consideration. It concluded that all the acts were a continuing act as all contributed to the contractive dismissal (as per *Hendricks*), and involved a pattern on ongoing behaviour towards the Claimant that ended with her resignation. The Tribunal's primary conclusion was that all the allegations form part of a continuing act stretching from 7 December 2021 back to 8 June 2021 when the comment was made to the Claimant that she was "*here to work*" by the Second Respondent.

245. In case the Tribunal is wrong in that conclusion, it considered expressly the extension of time point. While time limits are there for a reason, there was no prejudice to the Respondents in having to deal with matters that were relatively closely linked in time and formed part of a pattern of behaviour. The prejudice the Claimant would suffer if time was extended was obvious; she would not be able to enforce her legal rights for claims established before the Tribunal.

246. As Ms Balmer submitted, the Claimant was a vulnerable employee who reasonably did not have an understanding of her employment rights in the UK. Once she sought advice from the Society of Radiographers, the Claimant was in a much better position to enforce such rights. It was in the judgment of the Tribunal just and equitable to extend time for any allegation found to be brought too late to the Tribunal.

## Victimisation

247. The Tribunal considered whether the three alleged protected acts are such, though it noted that there was no real dispute that the third protected act was a protected act under s27 of the EqA.

*Protected Act 1 - 23 December 2021 – letter from Claimant's Union Representative to the First Respondent which the Tribunal understands to be in exactly the same words as the copy of the letter before it at [559] addressed to the Second Respondent*

248. Mr Henry submitted that as there was no mention of the word "*discrimination*" or the EqA, this letter was not a protected act. The Tribunal disagreed. It considered the helpful legal submissions by Ms Balmer, which reminded it of the *Durrani* case. The Tribunal relied on a key part of that Judgment to which Ms Balmer referred:

"*I would accept that it is not necessary that the complaint referred to race using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the act applies*" [the Tribunal has underlined the word potentially]

The Tribunal considered that the references to "*sponsored*" in the letter from the Society of Radiographers potentially referred to race. The matter was made clearer due to the paragraph that said: "*Mrs Dilibe was subjected to threats of deportation and revoking of her sponsorship if she did not do as she was told, managers demanding she "do as she's told if she is under sponsorship*. *She has been left with no option but to resign under these conditions of work.".* In the view of the Tribunal, this paragraph in particular made it clear that the Society of Radiographers was saying that there had been discriminatory conduct that potentially referred to race.

249. The Second Respondent in his Response to the letter sent to him by the Society of Radiographers [578] asserted that he resented the implication that the Claimant had been singled out. In the Tribunal's view, a reasonable person would consider both what the Society of Radiographers had said and the Second Respondent's response as indicating that potentially there was a race discrimination claim being asserted and that the Second Respondent understood that. The Tribunal found that this act was protected.

*Protected Act 2 – a similar letter sent to the Third Respondent as above [page 82 of the witness statement bundle]*

250. For the reasons set out in relation to the first protected act, the Tribunal found that this was also protected. The Third Respondent's

evidence was that he did not receive this letter as it was sent to the accountants during COVID times where delivery of post and forward transmission was disrupted. The Tribunal was willing to accept this evidence, but it does not change from the fact that it was sent. The relevance of whether the Third Respondent had in fact seen it only came into play if there was an allegation against the Third Respondent that he had personally done something as a result. This was a protected act.

*Protected Act 3 – a letter from the Claimant's solicitors dated 12 January 2022*

251. The third protected act was plainly protected under the provisions of the Equality Act [588]. It was a lengthy letter from the solicitor setting out in detail various discrimination claims being asserted against the three Respondents.

*Allegations of victimisation*

252. The 7 allegations were against the First and Second Respondents only. The Third Respondent did not action with any of the detriments alleged.

*Allegation 1 - after 23 December 2021, the Respondents sending the Claimant increasingly aggressive and intimidating communications about payments alleged to be owed by her, and "invoices" for amounts said to be owed by her to the First Respondent for recruitment costs, training costs and other sums*

253. The Tribunal was not persuaded that the First and Second Respondents' increasingly aggressive and intimidating communications about payments (which have already been found to have happened) were because of either protected act 1 or 2. Such attempts had begun before 23 December 2021. It was correct that the numbers increased over time, but the Tribunal was not persuaded that this had any connection to the protected acts but rather that the First and Second Respondents were "*hell bent*" on recovering some of its perceived losses from the Claimant and they realised that it was going to be difficult to recover the money without the Claimant's voluntary participation in the absence of a guarantor.

*Allegation 2 - on 28 December 2021, the Respondents deducting the Claimant's entire salary for December 2021, in circumstances where there had been no prior agreement by her to any such deduction, and ceasing her pay with effect from 26 December 2021*

254. The Tribunal's findings in respect of Allegation 1 (victimisation) apply with equal force here. While the deduction took place after protected acts 1 and 2, the Tribunal was not persuaded that the First and Second Respondent did this because of the protected acts, but rather because they

were determined to recover as much as they could from the Claimant while they had the power to do so.

*Allegation 3 - by ceasing to pay the Claimant from 26 December 2021 (if the Claimant was not already constructively dismissed) by dismissing the Claimant*

255. The findings for Allegation 2 (victimisation) apply with equal force here.

*Allegation 4 - on or shortly after 27 and 28 December 2021, the Respondents unreasonably treating the Claimant's sickness absence as unauthorised absence and unreasonably terminating her employment without investigation or notice, despite the fact that she had notified the First Respondent by text that she was unwell*

256. The Tribunal's finding in relation to this point under the race discrimination claims applied here. The Tribunal was not persuaded that the protected act had any bearing on the First and Second Respondents' decision to treat the Claimant's sickness absence as unauthorised or by terminating her employment. The reality is that by then they had clearly had enough of the Claimant not complying with their demands.

*Allegation 5 - on 28 December 2021, the Respondents failing to pay the Claimant for accrued but untaken holiday*

257. The same findings that apply to Allegation 2 (victimisation) apply with equal force here. The Respondents wanted the Claimant's money, and there was no evidence from which to find this was influenced by protected acts 1 and 2.

*Allegation 6 - the Respondents failing to permit the Claimant to take and be paid for holiday between 30 December 2021 and 7 January 2022*

258. This is effectively the same as Allegation 5 (victimisation), and the Tribunal's findings apply here.

*Allegation 7 - from 23 December 2021 onwards, the Respondents ignoring the repeated requests of the Claimant's union representative and the Claimant's solicitor to correspond with them (as the Claimant's duly appointed representatives) rather than the Claimant, causing her alarm and distress*

259. It was correct that the First and Second Respondents failed to comply with the repeated requests of the Claimant, the Claimant's Union Representative and her Solicitor to correspond only with them. However, until 27 December 2021, the Claimant was still the employee of the First Respondent. When dealing with grievances or seeking payment of money

under an employment contract, it is not uncommon for the employer to insist on dealing with the employee.

260. The third protected act could not in the view of the Tribunal have had any influence on the First and Second Respondents' decision to act in this regard with the exception on one matter (paragraphs 262 – 264 below). As is set out above, the third protected act was not sent until 1:33pm on 12 January [586]. The last contact with the Claimant directly (with the exception of the grievance invitation) was earlier that morning at 9:55am [585], which was before protected act 3 was sent. The Claimant in response made it clear that the Respondents should not send any further communications "*regarding the matter*" as she was represented, but did not define what she meant or to which issue she referred by this phrase.

261. When responding to the letters of the Society of Radiographers, who made it clear that all correspondence about the matters it had raised should be dealt with by it, the Second Respondent chose to respond to the Claimant, citing GDPR. It was not explained why GDPR required the Second Respondent to ignore a Union Representative; this is not a correct understanding of GDPR. The Second Respondent did mention advice was being sought from Croner (though none of it was disclosed); the Tribunal was aware that Croner representing all the Respondents at the hearing, and there were points where the First and Second Respondent claimed that they have acted as advised. While the advice has not been disclosed, it cannot be assumed that the failure to correspond with the union was related to the protected acts.

262. The only other correspondence that went direct to the Claimant was copied to the Solicitor and was an invitation to a grievance hearing sent on 18 January 2022 [597]. There was no explanation as to why the First and Second Respondent decided to action the grievance procedure when this was not sought by the Claimant or her Solicitor.

263. The Tribunal accepted that a reasonable employee would consider it to their disadvantage that the First and Second Respondents were continuing to write to them directly, rather than their appointed representatives. However, the Claimant did not satisfy the burden of proof to show that the reason that the First and Second Respondents acted in this way was because of the protected acts. The Tribunal noted that in the written submissions from the Claimant, it was asserted that this particular act was an act of harassment or race discrimination, but this was not set out as such in the agreed List of Issues or in paragraph 67, 70 or 71 of the Grounds of Complaint. It was pleaded purely as a victimisation allegation in paragraph 76 of the Grounds of Complaint. The Tribunal does not consider that it can deal with this allegation as discrimination.

264. Stepping back, the Tribunal concluded that the burden of proof had not shifted, and the Claimant had not shown that the First and Second Respondents behaviour was motivated by the protected acts. The evidence and the history of the Claimant's relationship shows that the First and Second Respondents often acted in a high handed manner without consideration for the Claimant, but the Tribunal considered that the First and Second Respondents would have continued to write to the Claimant in the way that it did, whether or not the protected acts had been made.

## Wages/unpaid annual leave

265. As previously explained when dealing with the constructive dismissal, the First Respondent is not able to enforce any contractual term enabling it to deduct the Claimant's pay and holiday pay. Mr Henry argued that the Claimant's email of 18 December 2021 in response to the attempts of the First and Second Respondents to get her to pay them money [553] constituted such a written agreement as required under s13 of the ERA. The Tribunal has already found that this email was not such an agreement. Therefore, the Claimant's claim for unpaid wages and annual leave is well founded against the First Respondent.

## Remedy hearing

266. As a result of the above judgment, a remedy hearing will be required unless the parties can resolve the issue of compensation without further assistance from the Tribunal. The parties are required to update the Tribunal office as to whether a remedy hearing will be required within 28 days of promulgation of this Judgment.

Employment Judge C Sharp
Dated: 23 May 2023

JUDGMENT SENT TO THE PARTIES ON 24 May 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche