Case Numbers: 3202319/2018
3200668/2019 & 3202625/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Manu-Gyamfi**

Respondent: **Barts Health NHS Trust**

Heard at: **East London Hearing Centre**

On: **7, 8, 9, and 10 January 2020 and 6, 7 and 8 January 2021**

Before: **Employment Judge A Ross**
Members: **Ms M long**
Mrs S Jeary

Representation
Claimant: Mr. Manu-Gyamfi, husband and lay representative
Respondent: Mr. D. Patel, Counsel

JUDGMENT

The Judgment of the Tribunal is that:-

Under Claims 3202319/2018 and 3200668/2019:

1. The following complaints are dismissed:

   1.1. Direct race discrimination pursuant to section 13 Equality Act 2010 ("EQA");
   1.2. Harassment pursuant to section 26 EQA;
   1.3. Victimisation pursuant to section 27 EQA.

2. The Respondent made an unlawful deduction from the Claimant's wages by non-payment of wages for 11 October 2018.

3. The remaining complaints of unlawful deduction from wages are dismissed.

Under Claim 3202625/2019:

4. The complaint of constructive unfair dismissal is dismissed.

REASONS

Claims & procedural history

1. The Claimant was employed by the Respondent as a midwife between 2 November 2009 until her resignation on 27 August 2019, effective on 20 September 2019. By three Claims, the Claimant brought the following complaints:

1.1. By Claims 3202319/18 and 3200668/19, presented on 9 November 2018 and 22 March 2019 after periods of required Early Conciliation, the Claimant brought complaints of direct race discrimination under section 13 Equality Act 2010 ("EQA"), harassment related to race under section 26 EQA, and victimisation under section 27 EQA. In addition, the Claimant complained of unlawful deduction from wages for September and October 2018.

1.2. By a third Claim, 3202625/19, presented on 19 November 2019 after early conciliation on 17 October 2019, the Claimant claimed constructive unfair dismissal contrary to sections 94 and 98 Employment Rights Act 1996 ("ERA").

2. The first two claims were listed for a full merits hearing in January 2020. On 10 January 2020, on the fourth day of that hearing, the Tribunal learned that the Claimant had issued a third claim, alleging constructive unfair dismissal. For reasons given at the time, the Tribunal determined that it would further the overriding objective for the same Tribunal to determine all three claims; the background facts relevant to the third Claim included the primary facts to be determined in the first and second Claims, and key evidence in the third Claim would come from two witnesses involved in the first two Claims (the Claimant and Simon Steward). The Claimant's third Claim was joined to be heard with the existing two Claims prior to the hearing of submissions about those two claims, with the Tribunal deciding that it would be fairer to hear the submissions after the evidence was completed in all three Claims. Neither party suggested that this course of action was unfair or in any way prejudicial.

3. The joined claims were listed for a further three days of final hearing to start on 26 March 2020. On 24 March 2020 the parties were notified that in accordance with the Presidential Guidance on the conduct of proceedings during the Covid-19 pandemic this was no longer possible.

4. A Preliminary Hearing took place by telephone on 3 June 2020 in order to clarify the issues in the third Claim and to re-list the Claims. In addition, the Claimant made an amendment application, which (with the agreement of the parties) Employment Judge Ross considered on the papers when a draft amendment was filed; this application was dismissed for the written reasons provided.

5. Unfortunately, due to the fact that there was limited resource for hearings to take place at that time and due to administrative oversight by the Tribunal (both the result of the Covid-19 pandemic), the joined Claims were not listed as provided for at the Preliminary Hearing on 3 June 2020. As a result, a further telephone Preliminary Hearing took place on 10 November 2020. The dates to avoid of the parties were taken into

account and the Claim was re-listed for 6, 7 and 8 January 2021. The hearing took place and Judgment was reserved. All the afternoon of 7 January and all of 8 January 2021 were used for deliberations by the Tribunal.

6. The issues in the first two Claims were set out in an agreed list of issues, which was amended during the first part of the final merits hearing (on the draft signed by Mr. Manu-Gyamfi and Mr. Patel).

7. A final agreed list of issues was filed by the parties in advance of the second part of the hearing; and this list included all Claims and issues. This list is set out in Appendix A to this Judgment.

The Evidence

8. There was an agreed bundle of documents for the first part of the final merits hearing, involving the first two claims, which ran from pages 1-848 (over two lever arch files). There was an agreed supplemental bundle used for the third Claim (p.1 – 151). The page references in this set of Reasons refer to pages in the main bundle, save where there are page references for the supplemental bundle which have the pre-fix "SB" next to them.

9. During the first part of the hearing in January 2020, the Tribunal pre-read the witness statements and then heard oral evidence from the following witnesses:

9.1. The Claimant;

9.2. Mattie Boateng, Community Midwifery Team Leader;

9.3. Jacqueline Gabriel-King, Senior Midwifery Manager;

9.4. Deborah Goldsmith (who is referred to by her maiden name, Debbie Twyman, in various documents), Head of Midwifery;

9.5. Christopher Pinch, Workforce and Professional Development Lead Nurse;

9.6. Ghislaine Stephension, Associate Director of Nursing for Children;

9.7. Simon Steward, Assistant Director of People at Whipps Cross Hospital (at the relevant dates within the first two Claims, and from October 2020, Director of People).

10. In addition, the Tribunal read documents that they were referred to in evidence and the documents referred to in the Claimant's Reading List (handwritten and provided at the suggestion of the Tribunal on 7 January 2020).

11. During the second part of the hearing commencing on 6 January 2021, the Tribunal pre-read witness statements and then heard oral evidence from the following witnesses:

11.1. The Claimant;

11.2. Laima Mukasa, Practice Development Midwife at Newham University Hospital (at the relevant dates);

11.3. Simon Steward.

12. The Claimant and Mr. Steward had made second witness statements for the second part of the hearing Claim 3202625/2019.

Findings of Fact

13. The Claimant is of black African ethnicity. Her case includes that she was subject to less favourable treatment because of her race, with the emphasis of her case being that this was because she was black.

2012 Grievance

14. The Claimant raised a grievance against another midwife, in 2012 (pp 204-205), which began:

> "*My grievance is against my line manager for treating me unfairly and in my view singling me out for reasons not known to me*."

The grievance did not refer to race discrimination, nor to any form of discrimination nor to the Equality Act 2010, which was admitted by the Claimant during cross-examination.

15. The Tribunal found that Ms. Gabriel-King's and DG's treatment of the Claimant in 2017 and 2018 had nothing to do with this grievance in 2012.

16. In cross-examination, the Claimant accepted that this grievance was not connected to Ms Gabriel-King decision to place her on a developmental plan in October 2016, nor that this grievance was connected with Ms. Goldsmith's decision to confirm that the Claimant should be placed on a developmental plan in April 2017.

March 2016 – Oct 2016, the Respondent received verbal complaints from service users relating to the Claimant

17. At all relevant times, Mattie Boateng was the team leader for the team in which the Claimant worked. Mattie Boateng had a good personal and professional relationship with her. Ms. Boateng had known her for some years before the Claimant became midwife and had advised her how to commence applications to become a midwife. Ms Boateng acted as her mentor when the Claimant did community placements during her training. Ms Boateng had good relationship with her until the Claimant's sickness absence in August 2016.

18. Ms. Boateng described herself as black British, and of the same ethnicity as the Claimant: see, for example, her interview with Mr. Pinch.

19. The Tribunal accepted Ms. Boateng's evidence as honest and reliable; it was never suggested that she was not telling the truth. We found that her evidence was largely corroborated by the relevant documentary evidence before us. For example, she gave detailed evidence to explain why some women who made a verbal complaint against

the Claimant did not want to put it in writing, and how the policy of the Respondent was to try to defuse complaints at a local level. Moreover, during cross-examination, it was not put to Ms Boateng that she had not consulted the notes of service users who had complained about the Claimant (whether in March 2016 or at all) because of the Claimant's race or colour.

20. In respect of issue 2.1(iv), Mr. Manu-Gyamfi did not challenge Mattie Boateng's evidence that she had used the informal level of the Capability Procedure, nor that paragraph 1.3 of that procedure stated (at p.174) that there was no requirement to involve Human Resources in an informal capability meeting. He did not put to her in cross-examination that she acted as she did because the Claimant was black.

21. As we explain below, the Tribunal found no evidence to support the allegation of direct race discrimination by Ms Boateng. Moreover, the documentary evidence supported Ms Boateng's account of her reasons for acting as she did.

22. In March 2016, Ms Boateng received information that two separate verbal complaints had been made by service users, NA and TB; the complaints were received on 18 and 21 March 2016 respectively. Ms Boateng spoke to both complainants by telephone and took details of the complaints. In respect of TB's complaint, Ms Boateng telephoned the Claimant immediately and told her of the complaint. Initially, the Claimant refuted everything that TB had said, but, on being told of the antenatal history of pre-eclampsia, then admitted she had not checked the Claimant's blood pressure, and admitted that she had not read the antenatal and postnatal summary. Ms Boateng questioned the Claimant as to how she was able to determine TB's post-natal care plan, but she did not respond.

23. Ms. Boateng gave detailed and careful evidence in cross-examination in respect of each of the complaints received and why she accepted that they were genuine. For example, she emphasised that it was the understanding of the individual woman, and their perception of what had occurred, that mattered. We accepted Ms. Boateng's oral evidence that on post-natal visits, the whole purpose was to plan to provide care, which could not be done unless the history was asked for; the service user TB had said it was a very brief visit.

24. The Tribunal found that the summary of the complaints set out in email dated 27 March 2016 (p.218) from Ms Boateng to her line manager, Ms. Gabriel-King, was an accurate record of the complaints made by NA and TB, because this was sent by Ms Boateng shortly after those complaints were collected and because Ms. Boateng had made notes of TB's complaint at the time she spoke to her, and because, in answer to the Tribunal's questions, Ms. Boateng could describe the note-making process, to ensure she put the complaint in the words of the woman concerned. This email records that the complaints were made on 18 March and 21 March 2016.

25. Both TB and NA informed Mattie Boateng that they did not want to be seen by the Claimant anymore.

26. On 30.3.16, the Claimant had a meeting with Ms Boateng about the complaints. We accepted Ms Boateng's evidence about that meeting.

27. On 10 April 2016, Ms Boateng sent an email (p.220) to the Claimant, setting out what been discussed at the meeting on 30 March. The email was copied to Ms Gabriel-King, who had been informed by Ms Boateng of the complaints.

28. The Tribunal preferred Ms. Boateng's evidence and found that email at p.220 accurately recorded what the Claimant admitted and what she did not admit at that meeting, because there is no email response from the Claimant stating the email of 10 April 2016 is incorrect, nor is there any reason why the Claimant did not receive that email on the date when it was sent (and not in January 2017 on her return from sickness absence). We found that the Claimant did receive this email when it was sent; Ms Boateng stated that it did not bounce back to her and we could see no evidence to explain why she would not have received it.

29. After the meeting, Ms Boateng apologised to both NA and TB in an attempt to head off a more formal complaint, and because she was concerned that the team's reputation could be affected.

30. The Tribunal found that the Claimant, in her evidence to the Tribunal, showed very little insight into what she had done nor how serious the consequences might have been. She denied making the admissions recorded in the email of 10 April 2016.

31. Mattie Boateng did not refuse to look at the notes of TB and NA taken by the Claimant at the relevant visits on about 16 March 2016; and there was no need for Ms. Boateng to consider the notes of each of the two complainants before meeting the Claimant on 30 March 2016. Apart from our finding that Ms Boateng was a reliable witness, we reached these findings for the following reasons:

31.1. As the Claimant accepted in cross-examination, she did not ask Ms Boateng to look at the notes of the visits at any point in March 2016. The Claimant's evidence was that at the meeting on 30 March 2016, she had requested written allegations from the complainants, but was told by Ms Boateng that the service users did not want to put their complaints in writing.

31.2. The Claimant was an unreliable witness for the following reasons:

31.2.1. Her evidence differed from the particulars in issue 2.1.i.a. The Claimant's oral evidence in cross-examination was that Ms. Boateng and Ms. Gabriel-King had refused to look at these client notes in October 2016, when the Claimant considered that the March 2016 complaints had been resurrected when the breach of confidentiality complaint was made.

31.2.2. The Claimant relied in oral evidence on an email from herself making a request for notes in October 2016, but there was no copy of such an email in the bundle, and we found that no such email existed, or it would have been disclosed by either party.

31.2.3. We found that the Claimant did admit the matters referred to in the email at p.220, which she denied in evidence before us: see below.

31.3. Some of the particulars of the complaints provided by NA and TB were admitted by the Claimant, such as the admission in the telephone call after the complaint from TB had been received, when the Claimant admitted she had not checked the Claimant's blood pressure, and admitted that she had not read the antenatal and postnatal summary.

31.4. A number of matters complained of by NA and TB would not have been in the notes. In respect of TB, the Tribunal found that one of the most serious complaints was that the Claimant had not checked her blood pressure despite the service user's antenatal history of pre-eclampsia; but the Claimant accepted that she had not done this. In her cross-examination, the Claimant attempted to deflect blame onto others for this omission, including TB herself, whom she stated did not raise the issue of her blood pressure. We accepted Ms. Boateng's account of events: TB had told Ms. Boateng that the Claimant did not read her discharge summary, not that she did not have it on file.

31.5. Further, some of the complaints were about matters of her attitude or approach, which would not be found in notes. In respect of NA's complaint, the complaints included the absence of an introduction and no eye contact with NA.

31.6. There was other evidence from Ms. Boateng that some allegations were true (such as failure to issue the MAT B1 form and lack of evidence of relevant antenatal class discussions).

32. Furthermore, the Claimant produced no evidence, whether direct evidence nor evidence of primary facts from which it could be inferred, that a white midwife in her position, facing those two sets of complaints and in those circumstances, would have been treated any differently. On the contrary, the evidence of Mattie Boateng, and the fact that she was also of black African ethnicity, led to the inference that any white British comparator would have been treated in the same way.

33. In cross-examination, the Claimant said that she did not have evidence that the treatment was based on her race, but that this was how she felt as the process had gone on; she had retrospectively looked back over events and thought that there must be discrimination.

34. The Tribunal found the Claimant's evidence as to the reason for her treatment by Ms Boateng to be a subjective assertion, formed after the event and by not taking into account the evidence that Ms Boateng had before her, and which lacked any insight into what she had done. For example, Ms Boateng knew that TB (who was post-natal) had had a copy of her discharge summary when seen by the Claimant on the relevant date, and that the Claimant could have read it with her or asked TB about her history (which would have revealed the history of pre-eclampsia). The Tribunal accepted Ms Boateng's evidence that the purpose of the post-natal visit was to plan and to provide care; and unless the Claimant considered TB's history, it would not be possible to plan or provide any necessary post-natal care. Ms Boateng believed that a midwife should have wanted to know why the service user had the baby at 32 weeks; the baby had been in neo-natal

intensive care. Ms Boateng's evidence was that TB had complained that it was a very brief visit.

35. The Claimant's lack of insight into what she had done in respect of NA and TB, and her failure to take responsibility for it, is highlighted by her evidence about the meeting on 30 March 2016. Apart from denying making the admissions recorded in the email on 10 April 2016, the Claimant's evidence was that the incidents in March 2016 had been completely resolved, only to be resurrected unfairly in January 2017. This is inaccurate. The email at 10 April 2016 ends as follows: "*No action will be taken at this stage*…." We find that the Claimant was warned by Ms Boateng that further complaints may lead to more formal action. The Claimant was, after all, an experienced midwife and would have known this in any event.

36. The Claimant alleged that it was an act of direct race discrimination for Ms. Boateng not to have a Human Resources representative present at the meeting on 30 March 2016 (issue 2.1.iv). It was admitted by the Respondent that no HR representative was present at that meeting. However, the Tribunal found that this was in accordance with the Respondent's capability policy, which requires an informal process initially with no involvement from HR: see p.173-174. The meeting with Ms. Boateng on 30 March 2016 was an informal one-to-one meeting, the purpose of which was to notify her of the complaints and to encourage the Claimant to take any action necessary to correct her practice. This meeting was not a sanction of any sort; and the absence of a HR representative had nothing to do with the race or colour of the Claimant.

Additional complaints received after March 2016

37. On 17 August 2016, a verbal complaint was received by Ms Boateng from TM. This was recorded by Ms. Boateng in a note of the complaint (at p.223) as "Complaint 1".

38. On 18 August 2016, a further verbal complaint was received from FT, recorded by Ms Boateng at p222 as "Complaint 2".

39. In respect of Complaint 1, TM provided further particulars in a written complaint on 27 August 2016: see email p.234.

40. TM had made a breach of confidentiality complaint. TM was upset because she had found blood test results for six other pregnant women within her notes. TM also made complaints which rested on her perception of the Claimant's attitude ("*not pleasant*"), her omissions (such as by not explaining the fundal measurements), and her poor performance in a parentcraft session.

41. Prior to the incident leading to Complaint 1, complaints of breach of confidentiality had been raised and discussed in the Community Midwives meetings. All such breaches of confidentiality were escalated to the line manager for the Community Midwives, Ms. Gabriel-King (who was Senior Midwifery Manager), due to the seriousness of them.

42. Having received Complaint 1, the complaints were brought to the attention of Ms. Gabriel-King by Ms. Boateng. Complaint 2 from FT was then received, so this was included in the report to Ms. Gabriel-King.

43. The Tribunal found that Ms Boateng would have taken the same steps whatever the race or colour of the midwife facing these two additional complaints. We accepted her evidence that she did not tell the Claimant that she was being used as an example; this allegation was not raised by the Claimant until it was made in her email to Debbie Goldsmith (formerly Debbie Twyman) in January 2017 and it was not particularised in that correspondence.

44. In answer to a question from the Tribunal, the Claimant accepted in her oral evidence during the first part of the hearing, that all the service user complaints relied upon by the Respondent were made, but alleged that they were contradicted by documents and that she did not trust all the allegations. Furthermore, Mr. Manu-Gyamfi, for the Claimant, accepted (when asked by the Tribunal on 8 January 2020) that the complaints recorded by Mattie Boateng in her email of 10 April 2016 were made. He suggested that the notes showed that the complainants were not telling the truth, without explaining why they would lie. This was consistent with the Claimant's case (such as in the email of 7 June 2018 p597 which described the complaints as lies, but with no explanation as to why the complainants would lie). By the second part of the hearing, the Claimant's evidence about the veracity of the complainants was hardened to allege that they were false. The Tribunal found that it was reasonable and necessary for the Respondent's managers to consider that this number of complaints made by these service users, in a period of about five months, were genuine; there was no reason for them to lie, nor any was there evidence that the service users had either lied, nor that they had colluded with each other.

Meeting 18 August 2016

45. As a result of four complaints about the Claimant in five months, Ms. Gabriel-King met with the Claimant informally on 18 August 2016 to raise these complaints with her. Ms. Boateng was also present.

46. Ms. Gabriel-King had also asked Ms. Boateng to telephone TM and FT ahead of the meeting to apologise. FT agreed for the matter to be dealt with informally. TM was still unhappy, which the Tribunal found was probably because she had seen the Claimant several times and been unhappy with her performance. TM was undecided as to how to proceed, and wanted to take time to consider whether she wished her complaint to be addressed formally.

47. Ms. Gabriel-King then telephoned TM before the meeting on 18 August, to apologise and to gather more information. In that call, TM was adamant that she last saw the Claimant for her appointment and had checked her notes before that and had not seen the blood results before, although she could not 100% sure that the Claimant was to blame. Ms. Gabriel-King assured her that the breach of confidentiality would be investigated. TM also complained about the two appointments and one antenatal class that she had had with the Claimant.

48. At the meeting on 18 August 2016, the Claimant was notified of the complaints.

49. The Claimant accepted that she had seen TM on the date alleged, but denied that she was at fault for the breach of confidentiality and denied most of TM's complaints, displaying irritation. Although it was TM's word against the Claimant's word, Ms. Gabriel-King had spoken to TM twice and TM had been adamant that she found the blood results

after the Claimant's visit and was sure of this because she read her records immediately after each appointment, albeit she could not be 100% sure the Claimant was to blame. Ms. Gabriel-King spoke to the only other midwife involved who thought that she was not responsible for the breach. Ms. Gabriel-King recognised the number of complaints and their similarities. She was concerned about the repeated complaints and the substance of them.

50. Ms. Gabriel-King asked the Claimant to provide a statement, because she believed that a more formal complaint may arrive, and proposed that the Claimant shadow the team leader in order to reflect and work out what could be the problem.

51. On 8 September 2016, the Claimant provided a statement (see pp224-225). The statement demonstrated that the Claimant refused to even consider that she was responsible for the complaints against her. Again, the Claimant sought to shift the blame, claiming that TM was unhappy due to the fact that there was confusion over her appointment time, with the Claimant in effect being double-booked, causing TM to have to wait longer than usual. The Claimant's statement also suggested that the two complainants may have colluded against her, even though there was no objective evidence to support such an allegation, except that they lived on the same road.

52. Ms. Gabriel-King believed that the statement showed that the Claimant lacked insight into her actions, because the breach of confidentiality was just one issue complained of; for example, the parentcraft session had been a disaster, and the complaint was also about the Claimant's attitude and communication skills.

53. In respect of the breach of confidentiality, only two midwives could have been responsible (the Claimant and one other), and Ms. Gabriel-King had spoken to both and to TM, who was sure that the notes were not there before she had been seen by the Claimant on 15 August 2016. Ms. Gabriel-King understood that the midwife leaving the wrong blood test results in TM's notes would not realise that they had done so; it would not be done deliberately. However, her concern was that the Claimant lacked the insight to see that there was a possibility that she was responsible, or that there may be a need to take steps to reduce the risk in future. Ms. Gabriel-King was concerned that the Claimant had alleged collusion, and personalised the situation, rather than reflecting on the professional responsibility to acknowledge complaints and the Claimant was failing to reflect on the fact that two other women had complained about her practice in March 2016.

54. On 27 September 2016, a formal written complaint was sent via the Patient Advisory Service from TM. The complaint named the Claimant and went into further detail. Ms. Gabriel-King asked the Claimant for a further statement, which the Claimant was unhappy with, complaining that Ms. Gabriel-King was putting her under further stress.

55. In a Team Leaders meeting, the complaint of TM was discussed. The team leaders were not surprised and informed Ms. Gabriel-King that they had regular informal complaints about the Claimant; but that they just kept moving the service users who complained to other midwives. Ms. Gabriel-King checked the records and found complaints recorded in 2012.

56. We found that Ms. Gabriel-King wanted to confront the continuing pattern of failings in performance, not to focus on the past, so that the Claimant's practice would be improved going forward.

57. On 20 October 2016, Ms. Gabriel-King met the Claimant again to discuss the complaints raised by service users about her. We find that a summary of what was discussed is contained within her email to the Claimant at p.233. The email explained that Ms. Gabriel-King's investigation had revealed poor practice by the Claimant, explaining that team leaders had received several complaints from clients; and that for these reasons, the Claimant should reflect on her practice. The email explained that this was a supportive measure, to prevent the Claimant being referred to the Nursing and Midwifery Council in future.

58. This email is direct in style; it made clear what was required of the Claimant. Whilst the Claimant may have found that this was too direct, the Tribunal found that this was a professional letter from a senior manager giving the Claimant direction as to what was required to improve her practice.

59. In the email of 20 October 2016, Ms. Gabriel-King set out a six point developmental plan and explained that evidence that the above had been completed was required in order for the Claimant to return to normal duties. Ms. Gabriel-King explained that she would write the programme based on that plan on her return (because she was due to go on annual leave from 24 October to 7 November 2016).

60. Although the Claimant's case on issue 2.1.i was that Ms. Gabriel-King refused to look at the evidence in the form of the notes of the clients (by which the Claimant and other witnesses meant the service users) who complained, this allegation was not put to Ms. Gabriel-King in cross-examination. The Tribunal found no evidence of any such refusal; and had such a refusal been made, the Tribunal were satisfied that this would have been recorded in writing by the Claimant at or shortly after the relevant time, such as in her correspondence with Ms. Goldsmith in January 2017 or in her grievance of 3 February 2017.

61. The Claimant commenced a period of sickness absence from 23 October 2016.

62. Whilst on sick leave, a further complaint was received about the Claimant from another service user, with the complaint being that she had been given the wrong information about pelvic floor exercises.

63. The Claimant was due to return to work on or about 9 January 2017. On 4 January 2017, Ms. Gabriel-King discussed the Claimant's case with the Practice Development Midwife, Kade Mondeh, seeking advice on how to provide support to a midwife in this situation, because there were so many areas raised by the complaints that she had found it difficult to put a detailed plan together. This discussion was followed up with an email (p.239) recording the discussion. From that email, it is clear that the developmental plan was to address the issues raised by the complaints and the meeting with the Claimant, including communication, customer care, reflection, knowledge, parentcraft support, team leader support, and managing stress. The plan was sent to HR for their feedback.

64. In cross-examination, it was put to Ms. Gabriel-King that the developmental plan did not relate to the complaints other than breach of confidentiality. We accepted the explanation provided by Ms. Gabriel-King which showed how the plan related to all the complaints. For example, p.688 raised the question of pre-eclampsia and how the midwife should consider identifying risk factors in clinic. Ms. Gabriel-King was candid enough to admit that the developmental plan contained one minor error in reflecting the complaints; it was never suggested in cross-examination that this was a deliberate act caused by her.

65. In order to discuss the developmental plan, Ms. Gabriel-King attempted to meet with the Claimant. However, by an email of 12 January 2017, the Claimant refused to accept the outcome of the investigation by Ms. Gabriel-King or the development plan.

66. The Claimant made no attempt to discuss the plan with her supervisor nor to contribute to the plan in any way, and failed to engage with the process at all. We accepted the evidence of Ms. Gabriel-King that the Claimant had not requested the client notes at this point in time.

67. The Claimant was then absent from work due to sickness from January 2017 for a further three months.

Was the imposition of the developmental plan less favourable treatment because of race?

68. The agreed revised list of issues refers to the "developmental plan", whereas the Respondent's witness sometimes refer to a "development plan". We found that both were referring to the same document and the difference in spelling was irrelevant.

69. The Claimant's case (revised issue 2.1ii) was that in October 2016, Ms. Gabriel-King did not follow the capability policy which was used to impose the developmental plan; in particular, the Claimant's case was that she was never told that the Capability process was being applied. In addition, the Claimant's case (issue 2.1iii) was that there had been five incidents of breach of confidentiality by midwives by October 2016, but Ms. Gabriel-King imposed a punishment (in the form of the developmental plan) only on the Claimant. The Claimant contended that the decision to impose the developmental plan was a punishment and that this treatment was because of her race.

70. The Tribunal found Ms. Gabriel-King's evidence in general to be credible and factually accurate. In particular, the Tribunal found her evidence on the reasons why she decided to impose the developmental plan on the Claimant to be honest and reliable, being corroborated by the documentary evidence and, to a large extent, by the evidence of Ms. Boateng and Ms. Goldsmith.

71. In the circumstances, the Tribunal found that the decision to impose the developmental plan was not any form of punishment for breach of confidentiality, nor did it amount to less favourable treatment of the Claimant. We reached these findings for the following reasons:

71.1. The Tribunal found that any midwife employed by the Respondent who had received the same number and type of complaints would have been treated in the same way. It was very unusual for a midwife to have received four complaints in five months. Breach of confidentiality was only one of a number of complaints. Moreover, Ms. Gabriel-King had evidence

that complaints about the Claimant's performance had been received over a period of years, and had not been addressed.

71.2. The areas for development identified by Ms. Gabriel-King did not focus solely on the breach of confidentiality; only one of the areas for development proposed by Ms. Gabriel-King related to the breach of confidentiality.

71.3. Ms. Gabriel-King had evidence that the Claimant had failed in her performance in various respects, and some of those failings could potentially have had serious consequences. The Respondent owed a duty of care to the women who had complained and to future service users. In those circumstances, it was almost inevitable that, because there had been complaints from a number of service users about failings by the Claimant, the Respondent, an NHS Trust, was required to take action to attempt to prevent any such incidents occurring again.

71.4. In cross-examination, Ms. Gabriel-King explained how a new Parent Education Head was employed in July 2016; Ms. Gabriel-King wanted to get that lead person to support the Claimant. This was not any form of punishment but a sensible step to try to assure the quality of performance of the Claimant in respect of her Parent Education sessions.

72. The Tribunal found that the decision to impose this developmental plan had nothing to do with the Claimant's race. Ms. Gabriel-King acted in this way so as to support the Claimant in her practice in the light of the complaints. Moreover, the decision to make this plan was justified from the evidence before her: Ms. Gabriel-King decided that the measures were necessary to ensure proper, safe and professional care of patients going forward. From her oral evidence, we accepted that she believed that the Claimant's conduct and attitude could potentially put service users at risk, and that the role of the Respondent was to avoid potential risks. In particular, she explained that (in a case where the woman was post-natal) it was essential to read the discharge summary to fulfil the midwife's role, and that without it, things would be missed.

73. In addition, from Ms. Gabriel-King's oral evidence, we found that midwifery was constantly improving; and one improvement was to recognise that women were partners in their care, not passive recipients. Women wanted to discuss matters with their midwife to improve their understanding so they were not left in the dark. It was important for the midwife to build a relationship with a service user in a relatively short time, so that they would give relevant information or ask relevant questions.

74. In addition, the Tribunal accepted the evidence of Ms. Gabriel-King at paragraph 29 of her witness statement, which explained that the imposition of the developmental plan was due to the Claimant's attitude to her work and her lack of insight. In cross-examination, she explained that the formation of the developmental plan was not personal, and that as a professional, complaints should be taken on board and treated as feedback. We accepted this evidence. Moreover, there were additional background facts: other midwives, both black and white, had been asked to reflect on their practice after other complaints and incidents, and had agreed to develop themselves, so as to learn from their mistakes; the Better Births Strategy showed women were partners in care; and there was a duty of candour when errors were made.

75. In seeking to prove direct race discrimination, the Claimant relied in evidence on an email sent in October 2016 to all community midwives which referred to five breaches of confidentiality. She alleged that she had been treated less favourably than the other four midwives responsible for such breaches. However, the Claimant was unable to explain whether any of the alleged comparators had received the same number of complaints as the Claimant, or any other complaints, over the same length of time (that is, four complaints over five months, March - August 2016, with a fifth in October 2016). Indeed, from the evidence that we heard, for a midwife to receive so many complaints over such a short period had not happened before. Moreover, the Claimant could give no rational evidence to explain why she alleged that the imposition of the developmental plan was race discrimination. In evidence, she said that she believed that she was punished for the breach of confidentiality, because she was black, rather than because she was black African. She was unable to explain why one of the four comparators responsible for a breach of confidentiality was black but had not been punished.

76. From all the evidence, no inference could be drawn that the Claimant was treated less favourably by Ms. Gabriel-King, by the imposition of the developmental plan, because of her race. On the contrary, the Tribunal was able to reach positive findings of fact that the treatment of the Claimant by Ms. Gabriel-King was due entirely to complaints about her attitude to service users, the admitted or proven failings in her performance, and her lack of insight following those complaints.

77. In considering issue 2.1.ii, the Tribunal considered the Respondent's Capability procedure at p.170-178, particularly the informal stage at pp173-174. Although Ms. Gabriel-King did not follow Stage 1 of the Capability procedure in every technical respect, we are satisfied that she followed the spirit and substance of the procedure. Although the informal stage, Stage 1, of the Capability Policy did not mention the possible use of a "developmental plan", it did refer to the use of a "Performance Action Plan" (see paragraph 1.4, p.174) and we can see no difference in substance between these two names. In effect, the meeting on 20 October 2016 was an Informal Capability Meeting as referred to at paragraph 1.3 of the Policy, even if the meeting was not described as such to the Claimant; and, at the meeting, the line manager discussed the complaints received and the meeting did focus on achieving an improvement in the performance of the Claimant.

78. The developmental plan was not agreed, whereas Stage 1 of the policy refers to an agreed Capability Action Plan; but the Tribunal found that the lack of agreement was consistent with circumstances in which the Claimant refused to accept that she was responsible in any way for performance failings identified by the complainants.

79. Moreover, having seen Ms. Gabriel-King in evidence, the Tribunal formed the view that she was a practically-minded, senior midwife, whose primary concern was to try to correct weaknesses in the Claimant's performance and to ensure safe and professional delivery of midwifery services by her team. It was likely, in the absence of HR advice at that informal stage of the capability process, that she did not know the precise wording of the policy, but worked on the basis of her practical understanding of the terms of it.

80. The Claimant complained that Ms. Gabriel-King failed to have a HR representative present, but the Tribunal found that her case with Ms. Gabriel-King was being dealt with at the informal stage of the Capability policy. Ms. Gabriel-King was not required to have a

HR representative present at the meeting. The Tribunal were convinced that Ms. Gabriel-King would not have had a HR representative present, nor referred to one before the meeting on 18 August 2016 nor before her email of 20 October 2016, in the case of a white British hypothetical comparator.

81. In respect of issue 6.2 (victimisation because of the 2012 grievance), the Tribunal found that there was no connection at all between the decision to place the Claimant on a developmental plan and the grievance in 2012 for various reasons. Firstly, in cross-examination, the Claimant accepted that the grievance in 2012 was not connected to Ms. Gabriel-King's decision to place her on a developmental plan in October 2016; secondly, Ms. Gabriel-King did not work for the Respondent in 2012, and did not know of the 2012 grievance until preparing for these Tribunal proceedings.

Events after the Claimant's return to work, 9 January 2017

82. The Claimant refused to meet with Ms. Boateng or Ms. Gabriel-King for her return to work meeting on 9 January 2017. This meeting took place with Ms. Goldsmith at the request of Ms. Gabriel-King. The substance of the discussion at this meeting is contained in the letter from Ms Goldsmith to the Claimant dated 26 January 2017 (p.256-258). At the meeting, the Claimant stated that she went absent sick after the meeting with Ms. Gabriel-King and Ms. Boateng on 20 October 2016, because she disagreed with the handling of the meeting and the comments in the complaints. The five complaints from the service users were discussed, but the Claimant complained that the complaints had not all been shared with her. We found that although the Claimant had not received the fifth complaint received after she went on sickness absence, she knew the substance of the other four complaints.

83. Ms. Gabriel-King asked the Claimant to attend a meeting to discuss the developmental plan. By email of 12 January 2017, Ms. Gabriel-King referred the Claimant's case to Deborah Goldsmith, Head of Midwifery, to take over management of the capability issues. The Claimant had failed to engage with the developmental plan nor with Ms. Gabriel-King, despite several attempts to contact her. The plan had been due to commence on 9 January 2017.

84. On 16 January 2017, Ms. Goldsmith was informed that the Claimant had attended the booking clinic for duty, whereas the developmental plan stated that she should have been observing a parent craft session. Ms. Goldsmith met the Claimant to ask why she had not attended the session. The Claimant stated that she would not complete the developmental plan and that she thought it was not needed, and the complaints of service users were not accurate. Ms. Goldsmith informed her that failure to complete the programme would not be taken lightly, that the developmental plan was a supportive measure, which should not be seen as a punishment. The Claimant refused to complete the plan again. Ms. Goldsmith advised the Claimant that refusal would be seen as failure to follow a reasonable management instruction. Ms. Goldsmith saw a refusal to follow this instruction as a very serious matter and a potential patient-safety issue.

85. A further meeting was then arranged to meet with the Claimant on 18 January 2017 to discuss the developmental plan. The Claimant was accompanied by a colleague, and a HR advisor was present. The meeting took place as described in paragraphs 10-11 of Ms. Goldsmith's statement. In summary, it was explained to the Claimant that the Trust had a duty of care to patients, which required them to act on issues raised by them; and it

was further explained that her failure to undertake the developmental plan could lead to suspension or temporary redeployment and/or formal steps under the Performance and Capability Policy.

86. A letter dated 18 January 2017 (p.255) was sent after the meeting. The Claimant admitted in cross-examination that Ms. Goldsmith had communicated to her over their meetings what was stated at the third paragraph of that letter, which in essence stated that the developmental plan was a supportive measure for the Claimant, to protect her from further allegations, and to assure the Trust that she could deliver safe and professional standards of care. The letter also made clear that the issue of the developmental plan was introduced at the informal stage of the Capability Procedure.

87. Despite the explanations, the Claimant refused to accept the plan. In cross-examination, the Claimant stated that she believed that if she followed the plan, it was detrimental to her career and part of a process so that she could be dismissed in future. The Tribunal found that this explanation was not supported by objective evidence and none was provided by the Claimant.

88. The Claimant was informed that she would not be permitted to continue working in the community whilst the process was in progress, and that she would be temporarily re-deployed; and this was to the ante-natal clinic to best suit her working hours.

89. The Claimant emailed Ms. Goldsmith later on 18 January. This letter (p252-253) stated that the Claimant could "*not accept the proposal*" to move to the Antenatal Clinic and contained various allegations, including that the Respondent's managers had acted unlawfully. The Tribunal found that there had not been a "proposal", but an instruction that the Claimant move to work in the Antenatal Clinic on a temporary basis.

90. Ms. Goldsmith responded by advising the Claimant, by the letter dated 18 January 2017, to attend the Antenatal Clinic at 9am on 19 January 2017: see p.254. The letter pointed out that this temporary redeployment did not affect the Claimant's pay.

91. The Claimant reported that she was unwell and was absent sick from 19 January 2017.

92. On 26 January 2017, Ms. Goldsmith wrote to the Claimant informing her that whilst on sick leave her sickness would be managed under the Sickness Absence Policy and the management of her performance would be put on hold until she returned to work (p256-258).

Alleged refusal by Mr. Steward to resolve the Claimant's Grievance on 3 February 2017

93. By letter dated 3 February 2017 (at p259-262), the Claimant submitted a formal grievance to Simon Steward. The complaints were that:

93.1. The Trust had failed to follow its own Capability policy and procedure, including the insistence that the Claimant be put on a developmental plan, based on information that she had not been able to challenge.

93.2. The outcome was pre-determined to ensure that she was put on such a plan and "*presumably from there managed out of the Trust*". It alleged her line

manager had said she should be used as an example; and that Ms. Goldsmith stated that this should amount to a disciplinary issue.

93.3. No evidence had been provided of the allegations, nor further details of the investigation carried out.

93.4. During a period of stress-related sickness absence, little support was provided to allow her to return to work; and instead further allegations were made.

93.5. Due to the above, the Trust had significantly undermined the trust and confidence that should exist in the employment relationship, by appearing to be determined to undermine her position.

94. The letter concluded with a statement of the outcome required, which was that she could return to her role of community midwife, and shadow another midwife, with no requirement to go through the developmental plan.

95. The grievance letter did not allege that the Claimant had suffered discrimination because of her race or colour, nor did it make any reference to the EQA 2010. In cross-examination, the Claimant stated that the grievance was not about race discrimination; but that she felt that she had been treated unfairly and she wanted an independent person to look at the case. The Claimant's oral evidence was that she did not consider race discrimination until, in her view, the Respondent continued to refuse to look at the evidence, reported her to her professional body, the Nursing and Midwifery Council ("NMC"), and then its own investigation stated that it only partially upheld the allegations. (In fact, as we explain below, an investigation report concluded that the Claimant had unreasonably refused to comply with a management instruction, and it was this disciplinary allegation that was partially upheld, in contrast to the complaints from the service-users).

96. The grievance letter was acknowledged by Mr. Steward on 6 February 2017. We found that he forwarded it to the Director of Nursing and Governance, Zebina Ratansi, for her to consider. On 10 March 2017, Mr. Steward informed the Claimant that the Director of Nursing had received it, and would like to meet her (see p.283). A date for a meeting in April 2017 was made but then cancelled. We infer that a meeting with Ms. Ratansi did not take place because the Claimant did not return to work until 28 April 2017. In any event, the Tribunal found that Mr. Steward did not refuse to resolve the Claimant's grievance on 3 February 2017.

97. The Claimant's case, at issue 2.1.i.c, was that Mr. Steward refused to look at the evidence, in the form of the notes of the service users who had complained. It was not particularised in the Claim nor in the list of issues nor in oral evidence whether this referred only to the complaints made in March 2016 or all the complaints.

98. The Tribunal accepted Mr. Steward's evidence (at paragraph 43a of his witness statement) that he did not refuse to look at the evidence in the clients' notes which the Claimant relied upon as contradicting the complaints. He explained that he was not involved at the time of the complaints, and he did not look at the notes until he attended the meeting on 9 June 2017 with the Claimant and Ms. Goldsmith, when the documents were looked at.

99. In any event, in cross-examination, the Claimant accepted that Mr. Steward had not refused to look at any evidence (such as the notes of service users) in February 2017. Indeed, from her evidence, issue 2.1.i.c was not part of her case.

Return to work, 28 April 2017

100. The Claimant remained on sickness absence until 7 April 2017 and then took a period of annual leave, returning to work on 28 April 2017. Ms. Goldsmith conducted the Claimant's return to work interview on the same date. Ms. Goldsmith arranged for Ms. Gabriel-King to join the meeting so that they could discuss the developmental plan.

101. The matters discussed at the meeting are set out in the letter sent to the Claimant after the return to work meeting: see p.288. At the meeting, Ms. Goldsmith reminded the Claimant that she had previously refused to comply with a reasonable management request to undertake the developmental plan, that she had previously been warned that if she continued to refuse to do the plan she would be formally managed under the Respondent's Capability Policy, and that she had been advised that an investigation under the Capability Policy would commence on her return from sick absence.

102. Despite this, although she had confirmed that she was happy to be back at work, the Claimant refused to undertake the plan. The Claimant was informed that the refusal would be seen as a failure to follow a reasonable management instruction. Ms. Goldsmith advised the Claimant of the seriousness of not undertaking the developmental plan; in evidence before us, she explained that the refusal was serious and was a potential patient safety issue.

103. Despite the explanations and warnings, the Claimant refused to undertake the developmental plan. As a result of her refusal, Ms. Goldsmith decided to suspend her on full pay. We accepted Ms. Goldsmith's oral evidence that she had taken advice from HR about one week before this meeting about what should be done if the Claimant refused to undertake the developmental plan. We found that Ms. Goldsmith did not move to an undefined formal stage of the Capability Policy, as alleged in issue 5.1.i, and the Claimant did not allege or put to any witness a provision of the Policy that was allegedly not followed. Ms. Goldsmith was warning the Claimant that formal action would follow if she continued to refuse to comply with a reasonable management instruction; and the Claimant refused to comply. Although the letter referred to only the Capability Policy, the Claimant's suspension was the result of Ms. Goldsmith honestly believing that the Claimant was guilty of misconduct, because of that refusal. We found that, in the circumstances before Ms. Goldsmith, any midwife would have been treated in the same way as the Claimant at that meeting.

104. In respect of issue 2.1.vi, Ms. Goldsmith admitted that she had failed to contact the Claimant within 2 weeks of her suspension. It was admitted that this was a breach of its Disciplinary Policy. However, we accepted that this failure was nothing to do with the Claimant's race or colour: it was because of the cyber attack (causing the Respondent's email server being down for an extended period) referred to at paragraph 20 of Ms. Goldsmith's witness statement and pressure of work on her as Head of Service. Ms. Goldsmith emailed the Claimant almost as soon as she had access to her Trust account, on 31 May 2017 (p.310), to explain the reason for her delay, and to confirm that the Trust had commissioned Christopher Pincher to undertake the investigation.

105. Having reviewed all the evidence, and reached the findings of fact set out above, the Tribunal found that there was no evidence to suggest that Ms. Goldsmith had suspended the Claimant, or treated her in any other way, because of her race or colour. We accepted her written and oral evidence explaining why the complaints raised serious concerns and potential patient-safety issues and the reasons why these needed to be addressed in a developmental plan. There was no dispute that the Claimant refused to accept or undertake the developmental plan.

106. In respect of the allegation of victimisation at issue 6.2, we found that the Respondent's action in requiring the Claimant to undertake the developmental plan had nothing to do with the grievance of 3 February 2017. This was initially accepted by the Claimant in cross-examination, only for her to appear to go back on this, repeating that the grievance in 2017 was not dealt with. We found that the reasons for requiring the Claimant to undertake the developmental plan were those explained by the Respondent's witnesses and summarised above.

107. Furthermore, in respect of issue 6.2, the Claimant admitted that the decision to suspend had nothing to do with her grievance in 2012. The Claimant's evidence in cross-examination was uncertain as to what matters at issue 5.1 were caused by the grievance in 2012, and she could not explain why there was any connection between the grievance in 2012 and that alleged conduct. Attempted clarification by the Tribunal produced an assertion that the 2012 grievance caused those matters but without any particulars to explain why.

Commissioning of investigation report from Mr. Pinch

108. On 4 May 2017, Ms Goldsmith requested Christopher Pinch, a Senior Nurse at Whipps Cross Hospital, to investigate the Claimant under the Disciplinary Policy, requiring a report by 5 June 2017. The terms of reference are set out at p360-361. The terms of reference did not include investigation of the Claimant's grievance of 3 February 2017.

109. Due to a cyber attack on the Respondent (and other NHS Trusts nationally), Ms. Goldsmith emailed the terms of reference to Mr. Pinch again on 2 June 2017, with the deadline being revised to 19 June 2017.

Referral of the Claimant to the NMC, 9 May 2017

110. It was accepted by the Respondent that Ms. Goldsmith had threatened the Claimant at the meeting on 28 April 2017 that she would be referred to the NMC if she failed to accept the developmental plan.

111. Following advice from the NMC helpline, taken about one week before the referral, and after the Claimant's refusals at the return to work meeting, Ms. Goldsmith decided to make a referral to the NMC for it to consider whether the Claimant had breached its Code of Conduct. In addition, Ms. Goldsmith consulted colleagues from across London, because she had never had an employee who refused to undertake a developmental plan.

112. A referral was made on 8 May 2017. We accepted found as facts the matters stated in Ms. Goldsmith's evidence at paragraphs 23-25 of her witness statement.

113. There was no evidence that the decision of Ms. Goldsmith to refer the Claimant to the NMC was related to her race or connected to the alleged protected acts. All the primary facts set out above led to the Tribunal to conclude that the referral to the NMC was made for the reasons explained by Ms. Goldsmith, who was a credible and reliable witness. In cross-examination and in answer to the Tribunal's questions, she explained in detail why the Claimant was referred to the NMC. The Claimant's case was different to other referrals that she had made to the NMC; Ms. Goldsmith believed that a lot of the matters were about attitude and behaviours, that these were just as important as clinical skills. She believed that the Claimant lacked insight and could not see that certain complaints were about the perception of the women about their treatment. Moreover, Ms. Goldsmith made the referral in the presence of Ms. Gabriel-King, who is herself black.

114. The Tribunal inferred that any community midwife who had refused to accept this developmental plan in the same material circumstances would have been treated in exactly the same way.

115. In the circumstances, the Tribunal understood why Ms. Goldsmith was unhappy about the allegations of race discrimination made against her, because they lacked any basis in fact. Indeed, prior to these proceedings, the Claimant had not alleged that the referral to the NMC was an act of race discrimination.

116. The Tribunal found that the evidence about the NMC's decision on the referral was largely irrelevant to the issues in this case. We include the following findings so that the parties – particularly the Claimant – understand why the NMC decision was not materially relevant to the issues in this case.

117. The NMC is the professional body which regulates the nursing and midwifery professions, and upholds fitness to practice standards for Nurses and Midwives. The NMC was considering whether there was reasonable prospect of a finding that the Claimant's fitness to practice was currently impaired; it was not considering whether the Claimant's refusal to undertake the developmental plan amounted to a breach of its standards nor whether it amounted to misconduct. However, the NMC did not determine any conflicts of evidence and did not determine whether the events stated in the complaints occurred, as it recognised in its decision letter of 28 June 2018 (see p.599ff). The NMC noted that any difficulties in the employment relationship were not matters for the regulator: see p.602.

Meeting of 9 June 2017

118. On 1 June 2017, the Claimant emailed Ms. Goldsmith seeking more information about the complaints, and copying in Mr. Steward. Ms. Goldsmith emailed the Claimant to emphasise the reason for referring her to the NMC and that the decision to suspend had been made after taking HR advice and advice from the Director of Nursing (see p572). The Claimant did not accept these reasons. On the advice of Mr. Steward, by email on 7 June 2017 (p.569) Ms. Goldsmith proposed a meeting to discuss matters further at an informal meeting on 9 June 2017.

119. The Claimant agreed to the meeting but requested that her husband be allowed to represent her and argued that any meeting from then on would be formal.

120. The invitation email makes no reference to the meeting of 9 June 2017 being arranged to consider the Claimant's grievance of 3 February 2017. The email from Ms. Goldsmith includes:

"*To confirm that this is an informal meeting with you and not part of any investigation, therefore you do not need to have representation.*"

121. However, in the course of the email correspondence that preceded the invitation email, Ms. Goldsmith explained (email 5 June p.570) that it would be better to meet so that the Claimant's questions could be addressed; and in response, the Claimant stated that a meeting was appropriate, but she considered that the February 2017 grievance was the perfect opportunity to deal with the issues.

122. At the meeting of 9 June 2017, the midwifery notes of service users who had complained were provided to the Claimant. In addition, in her oral evidence, the Claimant accepted that she raised her grievance at the meeting, in the context of a complaint that it had not been dealt with, but denied that it had been discussed nor that there had been any informal resolution of it at the meeting.

123. On the evidence that we heard, this meeting reached no conclusions of any sort on the grievance. At the end, Mr. Steward and Ms. Goldsmith decided that the Claimant would have the chance to put her side of events to Mr. Pinch in his investigation.

124. In cross-examination, Mr. Steward admitted that the Respondent had treated the Claimant unfairly by not dealing with her grievance. He accepted that the Claimant was not informed that the meeting would deal with the grievance. He explained that he had attempted to deal with it, by giving it an "airing" and dealing with the points at this meeting, including the veracity of the complainants and whether a developmental plan was appropriate. In advance, he had said that the meeting would deal with outstanding issues. But that there was no agreement that it counted as the informal part of the grievance procedure. The meeting had been long and covered a lot of ground, but it had not resolved the grievance.

125. Mr. Steward stated, at paragraph 8 of his witness statement, that his understanding had been that any grievance that the Claimant had could be dealt with by Mr. Pinch as part of his investigation. By this, he meant that she could raise whether the complaints were true or not with Mr. Pinch. We found that this understanding was mistaken; and it was not consistent with the letter and terms of reference sent to Mr. Pinch on 2 June 2017.

126. The Tribunal found that had the grievance been heard, it would have made no difference to the outcome of events. The Claimant was implacably opposed to any form of developmental plan up to and including the hearing of these Claims.

127. In addition, at the meeting of 9 June 2017, Ms. Goldsmith was informed that the Claimant would be travelling abroad due to a bereavement in the family. There was discussion about annual leave and compassionate leave. We accepted Ms. Goldsmith's oral and candid evidence in cross-examination admitting that she did agree to the Claimant taking leave at that meeting, and that the investigation was delayed. The Tribunal found that at this meeting the Claimant had sought permission to go on annual

leave, which was in contrast to her failure to seek permission in August 2018, as we explain below.

The disciplinary investigation report by Mr. Pinch

128. There was a delay in the completion of the report by Mr. Pinch. This was due to various matters, which are explained in his witness statement and in the report (at p.343), including that, shortly after he received the letter of referral, the Claimant was out of the country for personal reasons, until July 2018. The interview with the Claimant took place on 7 July 2018.

129. The report (p.339 – 355 plus appendices) was sent to the Claimant by Ms. Goldsmith on 13 February 2018.

130. The report of Mr. Pinch contained a Summary of its findings (p.354-355). In summary, these included that:

130.1. There was a complex interplay of relationships between the Claimant and her line management team; there was a link between poor relationships and periods of change or flux in the Claimant's environment.

130.2. The developmental plan was robust and supportive of the Claimant. It could used as a milestone to show competence and as an aid to further development.

130.3. This was overshadowed by the Claimant's belief that she was being penalised and treated inconsistently to other midwives.

130.4. There was no evidence of victimisation.

130.5. There had been "*more pronounced management involvement than [the Claimant] has previously experienced which has been perceived negatively*" by the Claimant.

130.6. One of the predominant driving forces in the Claimant's refusal to undertake the plan was her belief that she was competent and that it was not necessary. This demonstrated a disconnect between her self-awareness and that of her management whose role is to maintain all aspects of care quality and governance and to ensure satisfactory performance by team members.

130.7. It was unreasonable for the Claimant to assume complete competence and to "*devolve responsibility to address concerns as they arise*…".

130.8. It was unreasonable for the Claimant to refuse to participate in the plan.

131. We accepted Mr. Pinch's evidence that the Claimant's interview with him demonstrated that she felt that by undertaking the developmental plan she would be admitting guilt and make herself vulnerable to dismissal.

132. At issue 5.1.iv, the Claimant complained that Mr. Pinch's report was "*flawed and biased*". The particulars included that Mr. Pinch failed to mention or acknowledge her

grievance. It was accepted by the Respondent that the report failed to address the Claimant's grievance.

133. However, the Tribunal found that Mr. Pinch was not commissioned to investigate the grievance, evidenced by the referral letter and his introduction in the report. Indeed, he was not aware of the grievance during his investigation. The grievance was not mentioned in the referral letter of 2 June 2017, and there was no mention of the grievance by the Claimant during her interview (pp366-380), save that, in the last line of it, the Claimant said "*Just to also add I feel my grievance appeal has been ignored*". This reference to the grievance appeal (p.380) and the reference to the grievance at the end of p.378 were added to the minutes by the Claimant's husband when the minutes were reviewed after the meeting; these revisions were not accepted by Mr. Pinch as correct, corroborated by the text in the box at p.380. Mr. Pinch's evidence was clear and unshaken in cross-examination: the grievance was not discussed at the investigation meeting.

134. The Claimant also complained that Mr. Pinch failed to mention her 2016 Performance Development Review ("PDR"), completed in July 2016, which showed that he lacked impartiality and was motivated against her.

135. The Tribunal found no evidence that the failure of the report to mention the 2016 PDR was related to the Claimant's race or colour, nor to either of the alleged protected acts. There was no need for Mr. Pinch to consider her 2016 PDR in his report, particularly given the terms of reference for the investigation, and in circumstances where the Claimant did not provide him with a copy of it.

136. At its highest, the Claimant's evidence was that she had raised the matter of her PDR by telling Mr. Pinch that her appraisal had said that she had good communication skills, and any such communication issues as referred to by the complainants should have been referred to in that grievance; but the Tribunal concluded that no inference could be drawn from this evidence that the reason for not considering the PDR related to her race, particularly where the PDR had been completed in July 2016 (that is, before the three complaints made later in 2016) and given the terms of reference for his investigation. As he explained, it was not essential to what he was investigating.

137. The evidence before the Tribunal did not lead to an inference that Mr. Pinch was biased in any way. The documentary evidence led to the inference that he was impartial. On the evidence that he collected, the report reached conclusions which were consistent with the evidence he had collected and fully explained. The report was measured: it took account of the points raised by the Claimant, explained why she had acted as she had following the complaints and also explained how the complaints could have been handled better by the Respondent's managers. It was understandable, in not inevitable, that in the course of writing the report, he would have to state his opinion on whether the developmental plan was appropriate and what caused the Claimant to fail to complete the developmental plan (because that would be relevant to the allegation of failure to follow a reasonable instruction). He believed that it is universal across healthcare that professionals undertake ongoing development; he found that the plan was reasonable, and that the Claimant could achieve all set out in the plan, but it was a case of her not engaging with it.

138. In addition, prior to Mr. Pinch being commissioned to investigate, Ms. Goldsmith had sought someone who had had no interaction with her team, and who would be independent. His name had been put forward to her.

139. Although the Claimant did inform Mr. Pinch in her interview of two employees that he could contact (at p.380), in oral evidence before the Tribunal, she accepted that they had not been involved in discussions about the developmental plan and that they were just character witnesses. The Tribunal found that Mr. Pinch had not asked for any number or type of witnesses, but only for names of those employees who the Claimant would like him to speak to who might help her case. In response to a question from the Tribunal, the Claimant accepted that Mr. Pinch had not asked for character witnesses, but that was her impression at the time.

140. We accepted Mr. Pinch's explanation in cross-examination as to why he did not contact the two witnesses mentioned by the Claimant. One was a midwifery assistant; one was a diabetic midwife. He did not consider the evidence of either would have any effect on the investigation, because they had a different type of relationship with the Claimant.

141. In any event, in the circumstances, if the failure to contact the named character witnesses was unwanted conduct, it was not reasonable for it to have the proscribed effect on the Claimant.

142. We accepted Ms. Goldsmith's evidence that she had not seen the Claimant's grievance of 3 February 2017 by the time that the report was completed by Mr. Pinch, which was corroborated by her email letter of 13 February 2018 at p.527.

Disciplinary Hearing, 21 February 2018

143. A disciplinary hearing was arranged to investigate the circumstances surrounding the Claimant's refusal to undertake a developmental plan put in place after five complaints were received about the Claimant in less than one year.

144. The disciplinary hearing was chaired by Ghislaine Stephenson, Associate Director of Nursing and her role included responsibility to implement the Respondent's objectives of improving care and experience for patients and for assuring professional standards and practice in all aspects of nursing. Before the disciplinary hearing, Ms. Stephenson had no knowledge of or dealings with the Claimant. The hearing panel ("the Panel") also included Mark Elliott, Senior Nurse, and O'Mega Augustus, HR Manager. There was no evidence that any of the Panel had had prior involvement with the Claimant and the developmental plan.

145. At the hearing, Mr. Pinch presented his report. He was questioned about it by the Claimant and the Panel.

146. The Panel concluded that the investigation was thorough and accepted its findings. The Panel found that one of the key findings was that the framing of the developmental plan and explanation of the capability process could have been much improved and that the management style may have benefitted from being tailored, coupled with an awareness of the Claimant and how her personal reactions and communication style had shaped this approach.

147. After Mr. Pinch had given his evidence, the Claimant had an opportunity to respond to the findings in the report. She made the following key points:

147.1. She was not satisfied that the management team, in the handling of the five complaints, investigated these appropriately and it did not take into account the evidence that she presented.

147.2. She had submitted a grievance on 3 February 2017 which had not yet been responded to.

148. The Claimant was then asked questions by Mr. Pinch and the Panel. The parties were then given the opportunity to sum up their cases.

149. The Panel decided not to give its decision that day, but to invite the Claimant to provide further information including about how management had dealt with her case.

150. On 2 March 2018, the Claimant was informed by Ms. Stephenson that the Panel was still in the process of reaching a decision, and had requested additional documents (see p566-568). The letter requested documents from the Claimant including all evidence presented in response to the complaints against her and documentary evidence of the grievance made. The documents were received from the Claimant on 3 March 2018, but Ms. Stephenson still did not have a copy of the grievance sent to Ms. Ratansi in February 2017.

151. An outcome meeting took place on 19 April 2018. The outcome is summarised in the decision letter of 20 April 2018 (p578). In summary, the Panel decided:

151.1. The Panel accepted the Claimant had the right to raise concerns on how the developmental plan was created, and some of its content, because she was not satisfied on how management had investigated the complaints received between March and October 2016.

151.2. The Panel recommended that the complaints were re-reviewed and the process of this should include a meeting between the Claimant and a senior member of staff from outside the Service who could be impartial when reviewing the complaints and any mitigation put forward. The review should be completed by 24 May 2018. Following the review, a further meeting should take place between the Claimant, her line manager and the impartial review member in order to agree learning outcomes.

151.3. These learning outcomes should then form the basis of an overall development plan in response to the complaints received in 2016.

151.4. In respect of the outstanding grievance, the Claimant was informed that an informal meeting had taken place on 9 June 2017 with the Associate Director of People (Simon Steward). This should be followed up with HR if the Claimant had concerns regarding the outstanding grievance.

151.5. With the mitigation provided, the allegation against the Claimant was partially upheld. Any further refusal, once the above recommendation was followed, would be considered gross misconduct, constituting a serious

breach of the professional code of practice and failure to follow a reasonable management instruction.

152. In addition, the decision letter stated:

"*You have the right to appeal against the panel's decision*."

153. We found as a fact that the paragraph containing this sentence was included because, although there was no sanction applied, Ms. Stephenson had used the standard template outcome letter which included this line. In oral evidence, she confirmed that the Claimant had no right to appeal because no formal sanction was applied. Leaving this line in the letter was a simple error.

154. In further email correspondence of 20 April 2018, the Claimant sought further information and raised a series of questions. The Claimant asked which allegations had been upheld, and which had not been upheld.

155. By an email response of 24 April 2018 (p584-585), Ms. Stephenson explained that the purpose of the hearing was to determine the allegation set out above (at paragraph 143), and that this was partially upheld. She relied on the NMC Code which provided that all complaints should be used as a form of feedback and an opportunity for reflection and learning to improve practice.

156. In cross-examination, Ms. Stephenson expanded on what this part of the outcome letter ("…*we find the allegation against you partially upheld*…") meant. The Panel had considered that it was important for the Claimant to have confidence in the investigation, and she had no confidence in the original investigation into the complaints. The Panel wanted to be fair to the Claimant, who was raising additional mitigation. However, Ms. Stephenson went on to explain that, after five complaints over a period of months, some kind of developmental plan would be required, even if there were differences from the original plan drawn up.

157. During cross-examination in the first part of the hearing in January 2020, it became clear that the Claimant perceived that this part of the letter ("…*we find the allegation against you partially upheld*…") to refer to the individual complaints of the service users and wanted to know which were upheld. This misunderstanding is also apparent in paragraph 3 of the Claimant's second witness statement. We found that the letter at p.579 referred to the single allegation set out at p.577 – specifically the refusal to undertake the developmental plan, not the complaints made by the service users.

158. Ms. Stephenson also responded to the complaint that the outcome letter did not record that Mr. Steward had told Ms. Stephenson that he had resolved the grievance, which was untrue; and the decision letter stated that the Claimant should follow this up with Mr. Steward, but she had been told at the hearing that he would respond to the Claimant. Ms. Stephenson replied that she had raised the Claimant's concerns with him, but it was not the responsibility of the Panel to act as mediator between the Claimant and Mr. Steward.

159. At the time of reaching the decision set out in the outcome letter, Ms. Stephenson did not know that the Claimant had complained in any form that she had suffered any treatment because of her race or colour. There was no evidence before us that any

member of the Panel knew of any such complaint. As we have explained above, there was no such complaint in the grievance of 3 February 2017.

160. In issue 5.1.v, the Claimant's case was that the Respondent maintained a capability sanction in the outcome letter issued to the Claimant on 20 April 2018 and that this was unwanted conduct related to her race or colour.

161. The Tribunal considered all the primary facts relevant to this issue.

162. The Tribunal found that the measures recommended in the outcome letter did not amount to the imposition of a "sanction" because:

162.1. The decision letter recommended that the complaints were re-reviewed by an impartial senior member of staff, with input from the Claimant. This could not amount to any form of punishment or detriment.

162.2. Following the complaint review, there would be a further meeting to agree learning outcomes, again with the input of the Claimant as well as the line manager and impartial staff member. In the experience of the Tribunal, it did not follow that, because the Claimant could not accept that she had failed in any way, the review of the complaints would not produce learning points.

162.3. The learning outcomes were to form the basis of an overall developmental plan in response to the 2016 complaints. In this case, and in view of the nature and number of complaints and the nature of the midwife service in issue, the Tribunal did not consider that the developmental plan proposed, after consultation and input from the Claimant, would be any form of sanction but only a justified step in performance management to ensure that the objectives of safe and good quality care were upheld.

162.4. Mr. Pinch found that the Claimant lacked insight and viewed the developmental plan as punitive and a finding of guilt: see p.351 (p.13 report). The Tribunal agreed with that analysis; the Claimant lacked insight in various respects, and remained blinkered by her belief that any developmental plan was a punishment, despite five complaints about her in just over 6 months.

162.5. The NMC Code 24.2, which applied to the Claimant, provided "*use all complaints as a form of feedback and an opportunity for reflection and learning to improve practice*".

163. Furthermore, the Tribunal concluded that the outcome decision of 20 April 2018 was not related to the colour or race of the Claimant in any way, nor to either of the alleged protected acts. We reached these conclusions for several reasons:

163.1. We found no evidence that the decision reached by the Panel was related to the Claimant's race. We accepted the evidence of Ms. Stephenson as credible and reliable on this issue because she was able to explain, by referring to the evidence, why the decision in respect of the

recommendations for a re-review and fresh developmental plan were reached.

163.2. The Panel was a panel of two professionals, supported by a HR manager. In that context, we considered that the risk of conscious bias would have been removed, and the risk of unconscious bias substantially reduced.

163.3. The Claimant did not allege at any point in the disciplinary hearing that she had been treated less favourably because of her race or her colour, whether by managers or during the disciplinary process.

163.4. In the experience of the Tribunal, the outcome of the disciplinary hearing was relatively lenient on the evidence and in the circumstances of this case. The Tribunal concluded that the Claimant had failed to follow a reasonable management instruction, without any reasonable excuse.

7 June 2018: Alleged refusal by Mr. Steward to give the Claimant a right of appeal

164. The Claimant sent a letter of appeal to Mr. Steward.

165. On 22 May 2018, Mr. Steward wrote to the Claimant and advised her that, because no formal sanction had been imposed, there was nothing to appeal, and no entitlement to an appeal hearing; he proposed consideration of how the Claimant could return to work.

166. The Claimant and Mr. Steward agreed to meet on 6 June 2018 to discuss the result of the disciplinary hearing, respond to the Claimant's questions and address a proposed return to work.

167. At the meeting, the subject of the Claimant's grievance was discussed. Mr. Steward informed the Claimant that he considered the meeting on 9 June 2017 to have resolved the grievance.

168. After the meeting, on 7 June 2018, Mr. Steward sent an email (p.596) confirming to the Claimant that she had no right of appeal, because no sanction had been issued. This confirmed that the independent review of how the five complaints from service users were handled had begun.

169. The Tribunal found that the reason that Mr. Steward decided that the Claimant had no right of appeal (evidenced by the letter of 7 June 2018) had nothing to do with the Claimant's colour or race and nothing to do with fact that she had raised a grievance in 2012 and on 3 February 2017.

170. Mr. Steward honestly believed that the Claimant had no entitlement to appeal, because no formal sanction was imposed. We found that Mr. Steward's genuine belief that there was no right of appeal was based on non-discriminatory grounds, specifically the terms of the Disciplinary Policy, which only allows for an appeal against a formal sanction: see p.137, section 8.1, which provides: "*All employees have the right to appeal against any formal sanction applied under this policy*."

171. Moreover, a decision that an employee should follow a developmental plan is not referred to as a sanction anywhere in the Disciplinary Policy. In any event, we found that the developmental plan which formed part of the recommendations of the Panel in this case, which would be formed after an independent review and after consultation with and input from the Claimant, could not amount to a sanction on the Claimant.

172. In addition, the email from Mr. Steward of 7 June 2018 stated:

> *"With regards to the grievance, you acknowledged that we met and discussed [sic] at length last year and considered all the issues that were concerning you both at that time about the management of the process. This was an informal meeting with no written outcome. The meeting ended amicably and at no point since have you indicated that any grievance issue was outstanding or you had a complaint in regards to this. What we agreed at the conclusion of that meeting was that a formal investigation would follow and this is what happened. It is clear following our meeting yesterday that you do not believe this dealt with your complaint, so I will go over any notes that exist and provide any further relevant information so you have a written record."*

173. In response (p.597), the Claimant stated that it was untrue to state that she had acknowledged that the grievance was resolved and that they had complained about the grievance not being addressed on several occasions. Also, she complained that minutes taken at the meeting on 9 June 2017 had not been provided.

Admitted deductions from salary made in January to March 2019 (in respect of August 2018 salary)

174. In July 2018, Mr. Steward exchanged emails with the Claimant about a return to work. On 13 July 2018, he stated that the independent review was taking place and asked for dates when she could meet in the following week (p.627). On 16 July 2018 (email at 0917), he stated that the Trust would like the Claimant to return to work. Mr. Steward genuinely believed that from this date, the Claimant was required to attend work. The Claimant must have realised on receipt of this that her suspension had been lifted.

175. The Claimant's response requested information about the capacity in which she was to return to work. In response, Mr. Steward explained that the details would be covered at the return to work meeting, but she would not be returning initially as an unsupervised midwife due to the length of time that she had been out of practice, the need for re-orientation/re-induction to work and objective setting (see p636).

176. In cross-examination, the Claimant stated that she was requesting an "*official letter*" that suspension was lifted and admitted that she did not provide dates of availability. The Tribunal found that this demonstrated that the Claimant was being unreasonable in her approach to a perfectly reasonable management requirement that she attend work after the conclusion of the disciplinary hearing.

177. In addition, in the course of correspondence, Mr. Steward explained that the Respondent requested a change of representative because employees of the Respondent had perceptions of certain communication from Mr. Manu-Gyamfi.

178. From about this time, the Claimant was represented by solicitors. The Claimant did not inform Mr. Steward to correspond only with her solicitors. On 19 July 2018, the Claimant's solicitor asked when the Claimant's suspension would be lifted. Mr. Steward replied pointing out that he was waiting for the Claimant to give him availability for a return to work meeting and asking him to encourage the Claimant to contact him with availability.

179. Having not heard from the Claimant, Mr. Steward emailed her on 20 July, asking that she keep 27 July 2018 free for a meeting (p.640). No meeting was in fact arranged on that date.

180. Having not heard from the Claimant, on 3 August 2018, Mr. Steward invited the Claimant to a return to work meeting on 6 August 2018. It was expressly stated in that email, if not apparent from the earlier correspondence of 19 July (to her solicitor) and 20 July 2018 (to the Claimant), that the Respondent had lifted the suspension and that the Claimant was required to return to work.

181. However, the Claimant responded by email stating that her solicitor was waiting to be told when the suspension would be lifted. Mr. Steward regarded this response as deliberately obstructive; and the Tribunal found that this response was obstructive, because it was obvious by this stage (after the disciplinary outcome) and from the correspondence, that the Respondent wanted her to return to work.

182. The Claimant failed to attend the return to work meeting on 6 August 2018. In cross-examination, the Claimant gave various reasons for this, stating that it was because she was on anti-depressants for stress, and that she had only found out about it on the evening of 3 August, and did not have time to prepare, and she wanted an official letter to say when and why suspension was listed. The Tribunal rejected all of those explanations, finding that the Claimant had no reason not to attend save for her unreasonable refusal to comply with the instruction, because she was unhappy with the disciplinary hearing outcome which required her to undertake some form of developmental plan.

183. On 7 August 2018, Mr. Steward informed her that she had failed to attend two meetings and not provided any explanation; he informed her that a third meeting would take place on 8 August 2018, with Elizabeth Torks-Jones. The email also stated that the Claimant was absent without permission, because she had failed to comply with two reasonable management requests and failed to attend work, and that such absence was unpaid.

184. On 7 August, the Claimant's solicitor thanked Mr. Steward for confirming that the suspension was lifted and stated that the Claimant was travelling abroad on 9 August; he requested that the meeting be postponed to September 2018. Mr. Steward was surprised by this, and asked whether this was a planned holiday or emergency. The solicitor subsequently confirmed that it was a planned holiday.

185. The Respondent has a written annual leave policy, which sets out the duties of employees when booking annual leave and requires permission being granted at a local level. Mr. Steward asked the Claimant directly whether the plan to travel abroad on holiday was agreed, and if so, by whom; he explained that the Claimant had never informed him over the past weeks that she was going away, and he was surprised, because this would affect her return to work. He maintained that she should still be able

to attend the meeting on 8 August by rearranging appointments for that day. The Claimant did not respond to that email, nor to a further email sent on 9 August.

186. In cross-examination, the Claimant alleged that she had stopped reading emails from the Respondent due to stress. She never informed the Respondent of this at any time. Mr. Steward did not receive a Notice of Acting from the solicitors, or a request that he should only correspond with them. We find that the Claimant chose to not to read the emails from Mr. Steward; there was no documentary evidence that she had "*blocked them*", and there was no evidence that they had bounced back to him. In any event, the Claimant required permission to be absent from work, unless absent for sickness or emergency; a personal decision not to read correspondence from a HR manager is quite different from obtaining permission to be absent.

187. On 24 August 2018, Mr. Steward wrote again to the Claimant asking that she contact Ms. Torks-Jones to arrange a return to work meeting.

188. Subsequently, Mr. Steward found that the Claimant had not asked for permission to take holiday, either in accordance with the Trust's annual leave policy or in any other way. The Claimant's managers instructed Payroll to withhold that part of her salary which related to her absence without permission. However, this message was received too late for the August Payroll and the Claimant was paid in full for that month.

189. On 10 December 2018, by letter from Payroll, the Respondent informed the Claimant that she had been overpaid for August (due to holiday taken without permission) and that the Trust would recover the sum paid in accordance with the Overpayments Procedure: see p.732. The salary paid in August 2018 was recovered by equal deductions from her salary over January, February and March 2019.

190. The Tribunal found that the decision to recover the August 2018 salary had nothing to do with the Claimant's race and nothing to do with the grievances of 2012 or 2017. The Claimant's managers and Mr. Steward genuinely believed that the Claimant had been overpaid because she had gone on holiday without permission, and was therefore absent without leave. The Tribunal found that the Claimant's evidence about the holiday, and the surrounding events, was unreliable. In particular, the Claim form stated that the absence was due to a family emergency; but the Tribunal found that the absence was because of a planned holiday, which was taken without permission. The Claimant accepted that, in June 2017, she had informed HR that she was due to take annual leave, and that no objection had been raised; and on 28 April 2019, she told Ms. Mukasa that she had planned holiday in August 2019. We found that this showed that the Claimant knew the importance of seeking authorisation for holiday over the holiday period of July and August.

191. The recovery of overpayment was made under the Respondent's Salary Overpayments Recovery Procedure (at pp 115-125). The mode of recovery was spread over three months, in accordance with section 5.3 of the Procedure (deductions limited to 1/3 of the monthly salary).

192. The decision on the mode of recovery over 3 months was made by the Payroll function of the Respondent.

193. The Claimant alleged that she appealed the Payroll decision on receipt of the letter informing her of the recovery. There was no documentary evidence to support this despite the Claimant producing all other correspondence from this time.

194. If such an application was made by the Claimant, it demonstrates to the Tribunal that she requested that the overpayment should be spread over a longer period because she accepted that there had been an overpayment.

195. In any event, the Tribunal found no evidence that the Payroll function would know of the 2012 or 2017 grievances. In the experience of the Tribunal, and on the evidence before us, Payroll did not know any of the background to the application for recovery. Payroll acted entirely independently of the Claimant's managers.

Return to work meeting and unpaid wages September – November 2018

196. The Claimant did not respond to Mr. Steward, nor contact any manager, after his email of 24 August 2018. As a result, he chased a response on 24 September asking for the Claimant to provide reasons to explain why she had not reported her absence. A deadline of 28 September 2018 was given, with the warning that failing a response, the Respondent would conclude an investigation into the matter without her input (see p.655).

197. An instruction was sent to Payroll that the Claimant should not be paid her monthly salary for September 2018. This was sent because Mr. Steward and her managers considered that she was absent without permission.

198. At the end of 28 September 2018, the Claimant's solicitors sent an email querying why the Claimant had not been paid for September 2018, but this did not provide any reasons why the Claimant remained absent from work. Mr. Steward explained in reply that the Claimant had taken unauthorised annual leave and was considered absent without permission, and that she had failed to engage with a return to work and failed to attend meetings to further that aim. Mr. Steward explained that the Claimant would receive no pay until such time as she presented herself for work. He copied the Claimant directly, because he was concerned that she may not be receiving all correspondence because the solicitor's email had only been copied to Mr. Manu-Gyamfi.

199. The Claimant's solicitor alleged that the Mr. Steward had failed follow the Respondent's policy by failing to give 7 days' notice of a return to work meeting, and alleged that the Claimant should not be contacted directly by her email, because she had not given her permission. The Claimant's solicitor suggested that Mr. Steward had never confirmed to the Claimant that her suspension had been lifted.

200. Before responding in full, Mr. Steward offered a meeting with the Claimant on 8 or 9 October. The Claimant's solicitor said that the Claimant was unwilling to attend on those dates, but that she was willing to attend on 11 October 2018.

201. Mr. Steward responded substantively to the Claimant's solicitor on 10 October 2018. The substance of this response includes:

a) The Claimant was well aware of the way in which annual leave was requested. As a long-standing employee, she knew that she had to book holiday. If in any doubt, she could have sought guidance.

b) Any doubt that suspension was ongoing was dispelled by emails of 3 and 6 August.

c) There was no procedural requirement to give an employee 7 days' notice of a return to work meeting; and in any event, the Claimant had been given 7 days notice of the first meeting, but did not attend.

202. The Claimant met with Ms. Torks-Jones on 11 October 2018. Ms. Torks-Jones wrote to inform Mr. Steward that she agreed that the Claimant could see Occupational Health ("OH") given the time that she had been away from work, and she made a referral (which led to an OH consultation on 28 October 2018). Ms. Torks-Jones also informed Mr. Steward that the Claimant had said that she was not going to engage with the developmental plan, even if that meant the disciplinary process had to start all over again. There was no discussion about the Claimant's pay at that meeting.

203. Ms. Torks-Jones did not suggest in that correspondence that she had agreed that the Claimant could remain absent whilst OH completed its assessment: see her email of 11 October 2018 to Mr. Steward, in which it was recorded that the Claimant refused to attend the mandatory study week (which took place the following week) before the OH appointment, and refused to undertake any developmental plan. We found that there was no reason for Ms. Torks-Jones to agree that the Claimant did not need to attend work, and the Claimant gave no evidence in her witness statement of such an agreement. If such an agreement had been reached, in the circumstances, we would have expected Ms. Torks-Jones to put this in writing, in the email to Mr. Steward on 11 October 2018. All the evidence from that meeting demonstrated that the Claimant was not willing and ready to work in accordance with the instruction from the Respondent's managers at Whipps Cross Hospital.

204. Mr. Steward exchanged correspondence with the Claimant's solicitors over 12-15 October 2018 (at pages 703-704). The solicitors were informed that the Claimant would not be paid whilst she remained absent without permission. This was followed by an email dated 22 October 2018 from Mr. Steward asking when the Claimant would be returning to work. The Claimant alleged, via her solicitor, that it had been agreed with Ms. Torks-Jones that she would not have to return to work until a report from OH was provided. Mr. Steward believed that Ms. Torks-Jones had not agreed to this.

205. The Tribunal found that Mr. Steward's actions had nothing to do with the colour or race of the Claimant, and were unrelated to the grievances in 2012 and on 3 February 2017. He was acting solely in the genuine belief that the Claimant was absent from work without permission for the whole of August, September, and October 2018. His oral evidence was corroborated by the correspondence at this time.

206. The Tribunal found, from the above facts, that there were reasonable grounds for this belief. On the evidence before us, we found that the Claimant had no permission or reasonable excuse to be absent from around 18 July 2018 until she was absent through sickness from 2 November 2018 (excluding 11 October). The Claimant accepted, in response to a question from the Tribunal, that she had seen the relevant policy at p.104 before. Therefore, we found that her pay for September or October 2018 (save for 11 October 2018) was not properly payable at the time when it normally was paid.

207. At the time of the return to work meeting on 11 October 2018, the Claimant had no Fit Note to cover the period when salary was unpaid. The Claimant produced no Fit Note or medical evidence to the Respondent to evidence that she was absent because of sickness during August, September and the rest of October 2018. The Claimant had no permission to be absent over those dates.

208. However, the Tribunal found that the Claimant was not absent on 11 October 2018; this is apparent because she attended a return to work meeting, at which she was referred to Occupational Health. The Claimant did not give evidence that she was unfit to attend work between August and the end of October 2018. From the evidence that we heard, there was no good reason why she could not return to work after the return to work meeting on 11 October 2018, even if she had been referred to Occupational Health. After all, she was not going to return to the role of unsupervised community midwife. In the experience of the Tribunal, an employee may return to work, or continue to work, with an OH referral being made.

209. The Tribunal were satisfied that any employee who behaved as the Claimant had done in the circumstances of this case would have been treated in the same way by Mr. Steward, by stopping pay to reflect that they were absent without permission over August, September and October 2018. The correspondence at the time suggested that Mr. Steward had lost patience with the Claimant, her refusal to return to work before the meeting on 11 October, and her implacable opposition to a return to work and the developmental plan at that meeting and in the period after this until the Fit Note was received in November 2018. For this reason, he overlooked the fact that she had returned to work for one day on 11 October 2018. Any midwife acting as the Claimant had done would have been treated in the same way.

210. The Tribunal were surprised that a midwife with the Claimant's professional qualification and experience behaved in the way that she had done, by avoiding a return to work and remaining absent without permission, particularly after a fair disciplinary hearing which led to no formal sanction at all, despite evidence that she had refused to comply with a management instruction.

211. From all the circumstances, the Tribunal inferred that the Claimant behaved in this way because she lacked insight, and was blinkered by her belief that any developmental plan was a sanction. We found that she was determined not to undertake any developmental plan or any duties other than that of unsupervised community midwife, and sought to avoid doing so by refusal to return to work.

212. On 2 November 2018, the Claimant informed the Respondent that she was unfit to attend work. Mr. Steward recorded her absence from this date as sickness absence. However, by an oversight, this information was not provided to Payroll before the cut-off date for November. This meant that the Claimant was not paid at the end of November 2018. This was recognised in an email (p721) from the Respondent's Chief Executive, who agreed that an Emergency Payment would be made. We find that this salary was paid, albeit late.

Stage 2 Sickness Absence Meeting 21 January 2019

213. A Stage 2 Sickness Absence meeting took place on 21 January 2019. The meeting was chaired by Ms. Torks-Jones, Interim Senior Midwifery Manager, because the Claimant would not meet with Ms. Boateng or Ms. Gabriel-King. The notes are at pp 741-743.

214. In her oral evidence, Ms. Goldsmith had requested that Ms. Torks-Jones inform the Claimant would need to complete the developmental plan if fit to work. This was not because of the Claimant's race or colour, but because it had always been the intention that the Claimant would undertake a developmental plan to ensure that the Claimant could provide safe care to women and neonatal children.

215. We found that, as explained by Ms. Goldsmith, that this was all part of following the informal part of the Capability Policy.

216. In cross-examination, it was put to Ms. Goldsmith that the re-review of the complaints and their handling never took place. We accepted her evidence: the Respondent had instructed someone independent to review the complaints. The decision on this re-review was that the Claimant's managers had followed the proper process, but that the Claimant should have been included in the formation of the developmental plan. Ms. Goldsmith was vague about whether a revised plan had been made; she thought a tweaked version of the original plan had been produced. On balance, we found that there was no revised developmental plan produced, because if this had been done, we were satisfied that it would have been disclosed and in the bundle. It was likely that it had not been possible to draw up any revised plan due to the absence and lack of input from the Claimant. The Claimant had been absent without leave, then absent sick, and then refused to return to work at Whipps Cross Hospital. The absence of a revised plan did not mean that the original developmental plan was not appropriate at the time that it was formed, nor that it was not fit for purpose.

217. The Claimant requested redeployment supported by the recommendation from the Occupational Health physician. At the meeting, the Claimant explained her state of health but that there was no medical obstacle to her return to work, provided she could be found a role at another site. It was explained to her that she was required to undertake a developmental plan because she had not been in practice for 2 years. She was asked whether, if redeployed, the requirement to undertake a developmental plan was the only thing preventing her from coming back to work. The Claimant stated that it was. The Claimant refused to return to work in any other capacity. In the conclusion of this meeting, the Claimant was told that she could not return to work unless she completed a developmental plan.

218. In cross-examination, the Claimant did not dispute the notes of the meeting, but claimed that they showed that she was forced to accept a developmental plan. The Tribunal found that, contrary to the Claimant's assertions in cross-examination, the Sickness Absence procedure was not used to force the Claimant to accept a developmental plan, and, as a matter of fact, she refused to accept such a plan. Her response in this meeting explains why the developmental plan was not produced and discussed with her: there was simply no point in doing so given her implacable opposition to undertaking any developmental plan.

219. The Tribunal found that the reasons why the Claimant's managers wished her to complete a developmental plan were the same at this meeting as at the earlier points in

time explained above. The proposal of a developmental plan at this meeting had nothing to do with the Claimant's race or colour.

220. By a decision letter dated 28 March 2019 (at p.747ff) from Mr. Steward, the Respondent agreed for the Claimant to be transferred to Newham University Hospital ("NUH") as a Band 6 midwife. The letter included conditions required for the transfer of her workplace:

> "*The terms of this move are that you would be required to complete a comprehensive re-induction to work programme. This would include competencies that had been previously outlined in the development plan, though you would not be required to complete a separate document of that name*."

221. The Tribunal saw this form of words as a compromise, designed to address the Claimant's belief that a developmental plan was a form of sanction and her manager's concerns about her competencies and the potential service user safety implications if certain matters were not addressed.

222. We accepted Mr. Steward's evidence that, in broad terms, at NUH, the Claimant had to undertake a "*comprehensive reinduction to work programme*" which included the competencies highlighted in the developmental plan. The form of words used in the letter was designed to resolve the obstacle formed by the Claimant's refusal to accept any document called a "developmental plan".

223. The Heads of Midwifery at the two hospitals, Ms. Goldsmith and Ms. Rowland, had agreed between themselves the terms of the Claimant's redeployment to NUH. From the oral and documentary evidence, including that from Mr. Steward, they agreed that the comprehensive reinduction would include those competencies identified in the developmental plan. The terms included that the responsibility for the Claimant's salary would not transfer until she had completed her reinduction and the plan to address the competencies, which we inferred (from the email at p.60SB) was estimated by the Midwifery Heads to be three months; Mr. Steward was not told about these particular arrangements, which is why they were not set out in the outcome letter to the Claimant of 28 March 2019.

224. The decision letter did not state that the Claimant would be part of the Community Midwifery team at NUH. The inference we draw from the facts we found is that this was because her precise role in the team at NUH was to be decided by Ms. Rowland after she had completed her reinduction programme; the completion of this programme could not be taken for granted because the Claimant had refused to undertake the developmental plan whilst working at Whipps Cross Hospital and Ms. Goldsmith had told Ms. Rowland that the Claimant would object to it.

The Claimant's transfer to Newham University Hospital

225. The Claimant returned to work on 8 April 2019 at NUH. Contrary to her evidence (paragraph 5 of her second statement), prior to starting work at NUH, at no point was the Claimant informed that the decision that she should undertake a developmental plan had been reversed. The decision of the disciplinary hearing was that some form of developmental plan would be put in place: see above.

226. We found that the Claimant must have realised that by her agreement to transfer to Newham Hospital, she was also agreeing to the matters set out in the decision letter at p.747ff. Therefore, the Claimant knew that she would have to undertake a re-induction to work programme which would include those competencies identified in the developmental plan.

227. The Tribunal found that it was usual for a member of clinical staff who had been out of practice for some time to undertake a re-induction to work programme. As Mr. Steward explained, this was because there may be new equipment, drugs or ways of working.

228. The Respondent did not have a generic return to practice plan dealing with the situation where a midwife had been absent from work for a long period. The Claimant had not been practising as a midwife for about two years when she returned to work at NUH.

Alleged decision not to formally transfer the Claimant to NUH: issue 8.5

229. On 14 May 2019, Mr. Steward received an email from the Respondent's Chief Executive forwarding an email from Mr. Manu-Gyamfi alleging that Mr. Steward had not completed formalities to allow a "*smooth and stress-free transition*" of the Claimant's employment to NUH because she had contacted Payroll and been told that they had no information about her move, so there was no provision to ensure that she was paid the correct London weighting, and that she was not on the Newham "system" so she could not have a normal shift nor access to the system to plan for holidays (see p.59 SB). (We note that there was no complaint in that email that the Claimant was not part of the NUH team of midwives, which, given the history of correspondence from the Claimant and Mr. Manu-Gyamfi over the course of the events leading to these Claims, we would have expected, if that was a genuine concern of the Claimant at that time).

230. In response, on 14 May 2019, Mr. Steward emailed Lucy Walker to ask if the NUH midwifery team could complete a change form for the Claimant to move her to their team. He understood that NUH staff were paid the same London Weighting as staff at Whipps Cross Hospital.

231. Ms. Walker responded (p.60 SB) that the Claimant was on a "*3 months Work Programme*" and would remain on the Whipps Cross Budget, and that this was agreed with Gloria (which we find meant Ms. Rowland). She confirmed that there was no difference in the Claimant's pay, but that she may incur travel costs. Ms. Walker also stated that she would check with the Professional Development Midwife about leave, because she expected the Claimant to book leave linking in the PDM and the "Training Programme". She also said that she would check with E-roster how the leave situation could be resolved.

232. The Tribunal found that Mr. Steward had done what he needed to for the Claimant to be re-deployed to NUH. He did not know about the pay arrangement, evidenced by his response at p.60 SB.

233. The Tribunal accepted Mr. Steward's oral evidence. After the Claimant transferred to work at NUH, the HR managers at NUH were responsible for her because

she was an employee working in the part of the Trust that they were responsible for. In those circumstances, it was not Mr. Steward's job to correspond with the Claimant. Moreover, he did not have any power to sign for a financial commitment held by a different budget holder at NUH. We found that the outcome letter to the Claimant included all the information that the Claimant needed to know to enable her role to transfer in substance to NUH. In particular, she was told that she should report to Gloria Rowland.

234. We found that the Claimant had, as a matter of fact and substance, transferred to work at NUH from 8 April 2019. The formal paperwork required to move responsibility for her salary to the budget-holder of the Midwifery Team at NUH was not completed prior to her resignation. Although we heard no direct evidence about the reasons for this, we inferred that, on balance, this was because the Claimant had not had her reinduction or "orientation" programme formally signed off by the date of her resignation.

235. The fact that the Change Form had not been completed was not a detriment to the Claimant; it had no effect on her pay or conditions nor did it affect her role as part of the Midwifery Team at NUH.

236. There was ample, detailed, oral and documentary evidence before us which demonstrated that the Claimant was embedded in the NUH Midwifery Team from 8 April 2019 onwards. Moreover, having seen the Claimant in evidence, and read correspondence by her and Mr. Manu-Gyamfi complaining of several matters over a long period, we are certain that she would have made a written complaint during her employment working at NUH if she had not felt part of the NUH Midwifery Team. From the absence of such written complaint, and from the documentary evidence (especially the notes of the meetings on 3 May and 23 May 2019 referred to below), we are sure that the Claimant was part of the Team at NUH from around 8 April 2019 onwards.

Events on 8 April 2019 & issues 8.1 to 8.3

237. On 8 April 2019, the Claimant returned to work. She attended at NUH and went to see Ms. Rowland. In cross-examination, the Claimant explained that she was seen in Ms. Rowland's office, and she explained what had led to her transfer. Ms. Rowland rang Ms. Goldsmith in her presence and received information about the matters leading to the transfer. After this Ms. Rowland showed the Claimant the developmental plan prepared by Whipps Cross Hospital and stated that the Claimant would have to do the competencies on that plan. The Claimant refused to undertake the plan, and explained her objections.

238. Ms. Rowland then informed her that Ms. Goldsmith had told her that the Claimant would object. At that point, she informed the Claimant that Laima Mukasa, would help her with development and training, because she was Practice Development Midwife at NUH, and that Wendy Olayiwola, Senior Midwifery Manager, was her line manager. Ms. Rowland called Ms. Mukasa to the office.

239. We preferred the evidence of Ms. Mukasa over that of the Claimant wherever there was a conflict of fact between their evidence. Ms. Mukasa gave clear and compelling evidence which was consistent with the documentation. We found that Ms. Rowland explained to Ms Mukasa that the Claimant would need a support pack and then the Claimant went with Ms. Mukasa to her office. Ms. Rowland did not explain anything about the Claimant's history to Ms. Mukasa, who knew nothing about the developmental plan prepared by Whipps Cross nor about the patient complaints.

240. At their meeting on 8 April 2019, Ms. Mukasa listened to the Claimant, who briefly explained her history from Whipps Cross. The Claimant made it clear that she did not want to work in the Community Team anymore. To accommodate this, the Claimant was going to be working in the inpatient area, which meant that Ms. Mukasa had to ensure that she was up-to-date with clinical skills for inpatient areas, including cannulation, suturing, and foetal monitoring interpretation.

241. In cross-examination, it was put to Ms. Mukasa that the Respondent had stopped the Claimant from working in the community; Ms. Mukasa was very clear that this was not correct and we had no hesitation in accepting her evidence, not least because the Claimant never complained about not working in the community.

242. There was no specific re-induction pack for midwives returning from long-term absence from work; the Claimant was the first midwife returning from long-term absence that Ms. Mukasa had dealt with. Ms. Mukasa used the NUH Preceptorship Programme template as the starting point for the programme that the Claimant was required to undertake at NUH, because that was the only template available which included reference to the competencies which she understood were required to be addressed.

243. The Preceptorship Programme pack is designed for newly qualified midwives, but at their meeting on 8 April 2019, Ms. Mukasa and the Claimant went through the competencies and agreed which were required. This resulted in the final version of the pack that the Claimant had to complete being about 70 pages long; the Preceptor pack in full is over 100 pages. The reduction in the size of the pack reflected that it was accepted that the Claimant did not have to address all competencies a newly qualified midwife would do. At that time, Ms. Mukasa was working on the basis of what the Claimant alone had told her; she worked on the basis that the Claimant had not been at work for two years and had worked in the community for a long time. Therefore, Ms. Mukasa's focus was on in-patient areas (such as post-natal and antenatal), which is reflected in the pack disclosed by the Claimant on 7 January 2021 (pp82 to 151SB). We found that Ms. Mukasa's evidence was supported by the documentary evidence. In contrast, the documentary evidence tended to show that the Claimant was an unreliable witness; in her oral evidence, she stated that she had completed the pack, but it was obvious from the pack retained by her (pp82-151SB) that certain competencies had not been signed off as evidenced.

244. The Claimant has alleged that she was required to complete a "Preceptor pack" for newly qualified midwives instead of a "normal" re-induction pack on her return to work. However, the programme that the Claimant was to complete was tailored to her individual needs; it was not the same pack or programme that newly qualified midwives had to complete.

245. The skills and experience were the same for every midwife regardless of grade. It was therefore practical for Ms. Mukasa to use the Preceptorship pack as the starting point. We accepted Ms. Mukasa's oral evidence that the word "preceptor" had been left on the front sheet of the plan and in other parts of the plan (such as the footer) but other parts were corrected by hand. We accepted that this was not deliberate; it was the product of the fact that Ms. Mukasa was working from a template and that she had limited time to work on the plan on 8 April 2019, because it was a mandatory training day.

246. The plan was not given to the Claimant until a few days after 8 April 2019.

247. At paragraph 4 of her statement, Ms Mukasa referred to the plan that she gave to the Claimant as a "development pack"; in cross-examination, she stated that this was not the title that she had given it and referred to p.84 SB, where she had described it as the "Orientation programme" which the Claimant was expected to complete within 12 weeks. The fact that she had not described it by a precise label in her witness statement reflected the fact that, because the plan or pack prepared for the Claimant was exceptional, NUH had no specific title for it, which explained why on 3 May 2019, Ms. Olayiwola referred to it as a "Supporting Programme" and why Ms. Walker (HR at NUH) described it as a "Work Programme" or "Training Programme".

248. Moreover, we found that this pack or programme was made with the benefit of the Claimant's input and that it was designed to support her in her development, so she could meet her specific needs when working as a midwife at NUH. In her oral evidence, the Claimant accepted, in answer to a question from the Employment Tribunal, that although it was not agreed to be called a "Supporting Programme", it was a plan that provided support for her.

249. We found that the reason that the front sheet of the Claimant's plan stated "Preceptorship Programme" was an oversight by Ms. Mukasa. This and the remaining references to the Preceptorship Programme were not matters of substance; the Claimant had agreed the competencies to be addressed and knew that the plan was to support her. The actions of Ms. Mukasa were not done with the aim of embarrassing or humiliating the Claimant; and she did not leave the title of Preceptorship Programme on the front sheet because Ms. Rowland had directed this. There was no evidence support such serious allegations; on 8 April 2019, Ms. Mukasa knew nothing of the Claimant's work history save for what the Claimant told her, which was an incomplete history.

250. In any event, on 8 April 2019, the Claimant agreed with Ms. Mukasa on each of the competencies within the "Orientation programme" at p.82-151SB that Ms. Mukasa put together, as explained in oral evidence by Ms. Mukasa. The oral evidence of Ms. Mukasa is corroborated by an email (p.57 SB) of 14 May 2019 from Lucy Walker, HR Business Partner, to Mr. Steward:

> "*I have spoken to Gloria this morning who has advised me that CMG has agreed to the development plan, but for my own assurance I have asked for a copy to know that it addresses the issues and the young lady is being supported*."

251. The Orientation programme or plan at pp82-151 SB was not calculated or likely to destroy the relationship of trust and confidence; the Claimant knew that it was designed to support her practice.

252. The plan offered the Claimant the opportunity to work a three months period as a supernumerary, rotating around different clinical, inpatient areas. The Claimant accepted the opportunity, evidenced by the fact that she made no complaint about working in this way.

253. After these rotations, the Claimant chose to remain on the Labour Ward for the rest of the development period of 3 months.

Meeting between the Claimant and Ms Olayiwola 3 May 2019

254. On 3 May 2019, the Claimant had a meeting with Ms. Olayiwola evidenced by the note at p.48 SB. The note is a one page summary, not a set of minutes. This note demonstrates that the Claimant did accept the "Orientation programme" prepared by Ms. Mukasa and that she raised no concerns about her role. The Claimant was encouraged to continue to work closely with Ms. Mukasa and to bring any concerns to Ms. Olayiwola. The Tribunal found that there was no written complaint or concern made by the Claimant to Ms. Olayiwola, which was inconsistent with the Claimant's evidence and her multiple complaints at Whipps Cross Hospital.

Meeting 23 May 2019; issue 8.4

255. A meeting between the Claimant, Ms. Olayiwola and Ms. Mukasa took place on 23 May 2019. A note of this meeting is at p.49 SB. Again, this note was a summary of the meeting, not a set of minutes. However, it was clear from this note, which was signed by the Claimant, that:

255.1. The Claimant was back in practice, enjoying her rotations, and happy in the Maternity Unit.

255.2. A "Supporting Programme" was discussed. This was done with the purpose of ensuring that she felt comfortable and confident in her role.

255.3. Morale and operational issues were discussed.

255.4. The Claimant was on track to complete the pack.

255.5. Additional objectives were added as an addendum to support specific learning needs.

255.6. No concerns about her performance had been raised.

256. Prior to this meeting, Ms. Mukasa was informed by Ms. Rowland about the developmental plan that the Claimant had refused to complete and the reasons why the developmental plan had been formed. Although we did not hear from Ms. Rowland, we inferred from the email of Ms Walker to Mr Steward that she was prompted to do this by Ms. Walker who asked for a copy of the plan that the Claimant was required to complete at NUH to ensure that it addressed all the relevant issues.

257. As a result of Ms. Mukasa learning the full reasons for the Claimant's transfer to NUH, she prepared the Addendum to the "Orientation programme", which was headed "Individualised Action Plan" (pp51-52). This included the competencies which had been part of the developmental plan which her former managers at Whipps Cross Hospital had required the Claimant to undertake. For example, it included "Good Communication Skills – engaging with women", which the Claimant was able to demonstrate by asking women to fill out the Friends and Family Test ("FTT") Card after each "care episode".

258. Moreover, we accepted the oral evidence of Ms. Mukasa about this meeting. At the meeting, the Claimant realised that the additional competencies contained in the Action Plan were from the developmental plan drawn up by managers at Whipps Cross

Hospital; the Claimant was unhappy about this. Her concerns were discussed at the meeting; Ms. Mukasa encouraged her to accept the Action Plan Addendum, by explaining that if the competencies within it were signed off, it would show she had those competencies.

259. In her oral evidence, the Claimant admitted that the Action Plan included objectives in the developmental plan produced by Whipps Cross Hospital following the client complaints, but initially stated that she did not agree to them.

260. However, the Tribunal found that the Claimant accepted the Addendum to the Orientation, including the Action Plan, evidenced by the fact that the note (p.49) was signed by all those present at the meeting. In cross-examination, the Claimant said that she objected to it, but then explained that Ms. Olayiwola told her that she had to do; the Claimant's evidence was that she wanted to get on with her career, so she went along with it and agreed to do it.

261. The Claimant's agreement to the Individualised Action Plan at pp51-52 is further evidenced by the fact that the Claimant did get most of the additional competencies signed off without complaint. For example, the Claimant did get the FTT cards completed. This competency within the plan was signed off as achieved on 10 June 2019. A further competency was "Maintaining Confidentiality – keeping the notes secure, ensuring that clients' details are discussed only on need to know basis"; this could be demonstrated by completing the Information Governance Module on the e-learning system. This was signed as achieved on 23 May 2019 by Ms. Mukasa (p.52).

262. Indeed, the fact that the Claimant pursued those objectives and had the respective competency sections signed off by managers indicated that she accepted the Addendum to the pack and the objectives within each competency area. There was no evidence that she worked on under protest.

263. There was no evidence that the Claimant's trust or confidence in the Respondent was adversely affected by the addition of the Addendum competencies on 23 May 2019, not least because these were added with the agreement of the Claimant.

Issue 8.3: Requirement to have competencies authorised and signed off by junior colleagues

264. The Claimant's case was, according to issue 8.3, that she had to seek "authorisation and signatures of colleagues far junior" in order to demonstrate compliance with the Orientation programme prepared by Ms. Mukasa.

265. We found that, although the Claimant could choose who signed off the competency areas within the programme and that any Band 6 midwife could sign off, it was likely that as she rotated between inpatient areas of the Maternity Team, her allocated midwife in each area was in the best position to sign off her programme competencies relevant to that area.

266. Of the six employees who had signed her Orientation programme, almost all were more senior and/or more experienced in that area than the Claimant. One person (a matron) who signed off one competency in the programme was younger than the Claimant, but in the circumstances, this was inevitable, given that the Claimant had

approached them because they had witnessed the competency, the Claimant had no recent inpatient experience whereas they had recent experience in that area, and they had assisted her by signing off the competency. Those who signed off the competencies were not "authorising" any action; each signatory was, in effect, a witness to the Claimant displaying the relevant competency for which they signed.

Issue 8.7: Failure to give access to the system for booking annual leave

267. The Respondent admitted that the Claimant did not have access to the E-Health system for booking annual leave at NUH. However, it disputed that this was a breach of the implied term of mutual trust and confidence.

268. The Claimant admitted (at paragraph 10 of her second statement) that she did take annual leave whilst working at NUH. The Claimant's real complaint appears to be that she had to tell her line manager when she was going on annual leave, in order to have authority to go on annual leave.

269. The Tribunal found that the Claimant could request annual leave by oral or written request and her manager giving her authority to do so. This complied with the method set out in the terms of her employment: see p.103.

270. In oral evidence, the Claimant said that on the first day at NUH, she had informed Ms. Mukasa of her holiday dates, because she knew the importance of the Respondent having sufficient staff numbers to cover the work over the July and August holiday period. This request was granted; Ms. Mukasa informed her that she would note the dates and said that the Claimant could put it on the system, when she was transferred onto it.

271. The Claimant took this holiday without complaint from the Respondent. There was no evidence that any holiday request at NUH was refused; indeed, her evidence was that no one recorded if she attended work or not.

272. There was no evidence that the Respondent had conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Indeed, in practical terms it was more convenient, for the Claimant to apply for holiday orally from her manager; and the Claimant took her holiday in August 2019. The Claimant admitted that it was not difficult to apply for holiday as she had done.

273. In any event, the Respondent had reasonable cause for the Claimant not being added onto the NUH E-health system. Until her Orientation programme was signed off, she was a supernumerary, and the Change Form and other steps required to move her salary across to NUH had not been taken. Given that the Claimant had refused to complete the developmental plan at Whipps Cross and given that she had not yet completed the Orientation programme that she had agreed with Ms. Mukasa, it was reasonable for the Claimant's new management not to have completed all steps to add her to the E-Health system before her resignation.

Issue 8.6 Was the Claimant prevented from being part of the duty roster, from working weekends or from working unsocial hours?

274. In her oral evidence, the Claimant complained that at Whipps Cross Hospital she had worked Monday to Friday, 9-5pm, and every other weekend. She did not give evidence that she earned more money for the weekends worked than weekdays, nor how much more. The inference we drew from her evidence was that she earned at least some additional increment to her pay for the weekend work. She complained before us that she was not rostered to work at weekends at NUH.

275. As explained by Ms. Mukasa in evidence, all staff including midwives who are completing developmental plans have to work Monday to Friday, because of the lack of support available at weekends. For this reason, even though the Claimant was not completing a document entitled "developmental plan", she worked Monday to Friday at NUH. There was reasonable and probable cause for this arrangement, with the objective of the support being available for the Claimant.

276. The Tribunal found that the Claimant did not object to this practice being applied in her case. She did not request to work weekends nor to work any unsocial hours. We found that this arrangement did not disadvantage the Claimant, and it did not mean that she was not part of the NUH team of midwives.

277. Moreover, we accepted the evidence of Ms. Mukasa: the Claimant chose to work the hours that she did in order to save commuting time and parking costs; and the Claimant could have applied to work additional shifts as a "bank" midwife. This was organised by a separate company employer and these shifts were paid weekly. Had she done so, it was likely that she would have been able to work shifts outside the Monday to Friday hours worked by her.

278. The Tribunal found that any experienced midwife who had been on long-term absence would have been required to work Monday to Friday until the Orientation programme was completed. The Claimant could give no evidence about any other midwife in her position; and we found that newly qualified midwives were not in the same position as the Claimant.

Issue 8.8: Being required to introduce herself when working with a new Labour Ward manager

279. The Claimant complained that no one knew she was due to return to work after holiday, and so she had to introduce herself to the labour ward manager on duty in front of other staff, which she found embarrassing. In her oral evidence, she stated: "*each day I have to explain why I'm there and my purpose, this happened on a regular basis in the Labour Ward*"

280. When the Claimant was relatively new to NUH, it was reasonable for a ward manager/co-ordinator to ask the Claimant to introduce herself. This was part of the Respondent's policy of the "My name is …" initiative, to remind healthcare staff about the importance of introducing themselves to others, evidenced in the Orientation programme: see p. 85 SB. We found that any employee who started work at NUH (whether having transferred across from another site or not) would have been asked to introduce themselves. In her cross-examination, the Claimant admitted that this was "*not wrong in the sense I was coming on the ward, put there to work*".

281. Moreover, we found that the Claimant's evidence was inaccurate and an exaggeration of the number of times that she had had to introduce herself. The Claimant worked roughly the same pattern Monday to Friday, working 3 long days for 3 weeks, then 4 long days on the fourth week, so it would not take long for all the relevant Ward co-ordinators or managers to know her name and her status. We accepted the evidence of Ms. Mukasa that there were around 7 such Ward managers/co-ordinators. Furthermore, in answer to a question from the Tribunal, the Claimant said that this was for 1-2 weeks in each stage of the rotation, although it was almost always the same person in charge over that period.

282. Additionally, the Claimant accepted that she remained on the Labour Ward from May 2019 until she resigned in August 2019. Therefore, we found that the last such introduction was probably in May 2019, long before her resignation.

Was the Claimant's Orientation programme completed?

283. It was intended by the Claimant and her managers that her programme would be signed off as completed, including the Addendum, at a further meeting with Ms. Mukasa and Ms. Olayiwola.

284. The Claimant did not complete the Orientation programme pack. We rejected her oral evidence on this issue and preferred the evidence of Ms. Mukasa, which was corroborated by the Claimant's copy of the "Orientation programme" at p.82 – 151 SB.

285. At some point in the Summer of 2019, Ms. Mukasa did ask the Claimant, in a short meeting in passing at the workplace, whether the competencies were all signed off, but the programme was not completed. There had been no need for Mukasa to arrange a meeting with the Claimant prior to this, because on 23 May 2019, the Claimant was doing well in getting her competencies signed off.

286. The Claimant stated in oral evidence that in July 2019: she told Ms Olayiwola before she went on annual leave that the pack was complete; Ms. Olayiwola said that she would arrange a meeting but failed to do so; and that she later sought Ms.Olayiwola to ask her to sign off the programme, but found that she was on annual leave; the Claimant then went on annual leave, and found that Ms. Olayiwola was still on leave, which was why the programme was never signed off as complete.

287. The Tribunal found all this evidence about the Claimant's actions and what was said to her unreliable, because:

287.1. Looking at the document produced by the Claimant at p.82-151SB and hearing the evidence of Ms. Mukasa, the programme was not completed.

287.2. The Claimant admitted in evidence that she did not tell Ms. Mukasa that the programme was completed, which is inconsistent with the fact that the Claimant knew that she was the Practice Development Midwife and had prepared the Orientation programme.

287.3. Moreover, if the Claimant wanted such a meeting, it was inconsistent that she did not email Ms. Mukasa about it, not least because she was responsible for drawing up the Orientation programme with the Claimant.

Issue 8.10 Alleged Demotion; Alleged plan to force the Claimant to leave her employment

288. The Claimant was not demoted whilst working at NUH.

289. In her oral evidence, the Claimant relied upon the matters at issues 8.1 to 8.9 as showing that she had been demoted. The Tribunal found none of those matters proved.

290. In any event, the Claimant's complaint that she had been demoted demonstrated, again, her lack of insight about her practice as a midwife. She had not been working as a midwife for two years by the time she returned to work at NUH. Any midwife in her position would have been required to undergo a re-induction process, and received a similar Orientation programme, tailored to their needs. It was reasonable for her new managers to want the Orientation programme completed before the Change Form and related administrative matters were dealt with in the context of her case, where, prior to her redeployment, she had been absent from work for a long period and had refused to address concerns raised in a series of complaints from service users by undertaking a developmental plan.

291. The Claimant accepted the Orientation programme produced by Ms. Mukasa and knew why she was required to complete it. She knew that it would, inevitably, require a different way of working for her, given that she had spent several years as a community midwife and had no recent experience in inpatient areas; the programme required rotation around the areas of work done by Midwife team. Moreover, in circumstances where there was such a programme, it was inevitable that the Claimant would need to get the competency areas signed off by other midwives.

292. Furthermore, the Claimant had known from the outcome of the disciplinary hearing and the subsequent sickness absence meetings that she would have to accept some development areas in a plan or programme, which she accepted by accepting the Addendum to the Orientation programme.

293. The Claimant's evidence in her second statement includes the serious allegation that there was a "*calculated plan*" to make life so difficult for her that she would be forced to leave her employment with the Respondent. We found that there was no such plan or intention.

294. The Tribunal found that the Claimant did feel welcome at NUH. This is apparent from the notes of the meetings of 3 May and 23 May 2019 (at p.47 and p.49). We found that she did not complain about any such plan nor about any demotion; and we are certain, given the documentary evidence reviewed in these Claims, that had the Claimant felt either forced out or demoted, this would have been set out in writing, on various occasions.

What was the cause of the resignation? Was it the job offer for the midwife role as Community Mental Health midwife at North Middlesex Hospital?

295. It was admitted by the parties that the Claimant resigned on 27 August 2019, which took effect on 20 September 2019, and that she started new employment with North Middlesex University Hospital, effective from 3 September 2019.

296. The Claimant contended that she resigned because of a breach or breaches of the implied term of trust and confidence. She relied on each of the matters set out in issue 8 of the List of Issues as an individual breach, or taken cumulatively, as a breach of the implied term.

297. The Tribunal rejected the Claimant's evidence about the reason for her resignation, which we found unreliable. We found that the Claimant resigned because of the job offer from North Middlesex Hospital, not because of any breach of an express or implied term.

298. The Claimant stated in oral evidence that there was a meeting on 8 June 2019, after the Labour Ward Manager had been informed that the Claimant had an outstanding Tribunal Claim, and that there had been a meeting involving Ms. Rowland, Ms. Olayiwola and Ms Mukasa at which she had complained about a number of matters including that she had not been transferred over to NUH. She alleged that Ms. Rowland then told her that she was staying on the Labour Ward, because she knew that she did not want to work there. The Claimant then went home and applied for the role at North Middlesex Hospital, which she was subsequently offered.

299. The Tribunal rejected this account of events for the following reasons:

299.1. Ms. Mukasa's evidence was compelling: there was no such meeting.

299.2. This oral evidence was corroborated by the fact that the meeting was not mentioned in the Claimant's Claim nor in her second witness statement which led to an inference that no such meeting took place.

299.3. The Claimant had made no complaint prior to this alleged meeting about working in the Labour Ward. We accept that she did not feel confident or safe working in the Labour Ward, that this probably provided a source of stress for her, and that she would prefer to move roles. But this is not evidence of a breach of the implied term of trust and confidence by the employer.

299.4. The Tribunal found that the Claimant had been looking for alternative midwife roles from at least November 2018, evidenced by the first Claim form (bullet point 3 at p.21).

299.5. The end of the Claimant's notice period was just one working day before the Claimant began her new role.

Additional findings in respect of the timing of the presentation of the First and Second Claims

300. In summary, the Claimant stated in oral evidence that she did not consider bringing her complaints to the Tribunal until it became clear that the Respondent would not accept anything; and that she had tried everything, through making a grievance, contacting the Board of Directors and her MP. She wanted an independent person to look at the allegations.

301. Having considered the evidence, especially the Claimant's evidence in cross-examination, the Tribunal found the following facts:

301.1. Claim 3202319 related to complaints involving four employees of the Respondent (Ms. Boateng; Ms. Gabriel-King, Ms. Goldsmith, Mr. Steward).

301.2. The second Claim 3200668 involved complaints against a number of other employees (Mr. Steward, Mr. Pinch, Ms. Stephenson, Ms. Torks-Jones).

301.3. There was no evidence that any of the employees set out above had acted in concert against the Claimant, nor that there was a policy or plan to punish or remove her from her role.

301.4. All the complaints in Claim 3200668/19 (save for that relating to the 21 January 2018 meeting at issue 5.1vii and the decision to recover the overpayment) could have been included in the first claim, given the dates on which the acts occurred.

301.5. Contrary to her evidence, the Claimant had intended to pursue the Respondent in a court or Tribunal from well before the point that her pay had been stopped in September 2018, given the reasons provided to her for the developmental plan and how she felt she had been mistreated. In particular:

(a) This was demonstrated by her email of 12 January 2017, p.244, which warns of legal action unless the complaints of the service users were reviewed.

(b) The Claimant and her husband sought legal advice from December 2016, evidenced by the email of 7 June 2108 (p.597). She had sought advice from 3 firms of solicitors between December 2017 and 7 June 2018.

(c) Her grievance of 3 February 2017 was written with the assistance of solicitors (although she stated that she was not considering Tribunal proceedings at that time but had sought advice on how to handle the grievance);

(d) By 7 June 2018, she had contacted solicitors again, with a view to bringing a Claim against the Respondent, not simply for them to take over correspondence: see email of 7 June 2018 at p.597 and the email of 19 July 2018, p.634, which refers to the solicitor assisting the Claimant "*from here on in*" which we found to be a reference to the pursuit of legal proceedings. These emails were significant because they were sent after the disciplinary hearing outcome had been provided to her, even though this outcome did provide for an independent review: see the email of 7 June, p.597.

301.6. The Claimant consulted ACAS on 15 October 2018 in respect of the 2018 Claim.

301.7. There was about a two month delay between the Respondent's decision to stop the Claimant's pay made in early August 2018 and her contact with ACAS. However, the first non-payment of salary was not until 28 September 2018, with a second non-payment on 27 October 2018.

302. Furthermore, the Tribunal found that at the Preliminary Hearing on 18 February 2019 (p.58), which dealt with the first claim, further allegations were raised by the Claimant and the Employment Judge suggested that the Claimant issue a second Claim. Despite this, a second Claim 3200668/19 was not issued until 22 March 2019. In cross-examination, the Claimant stated that it was not a delay, and that she had not been in a rush to put in the Claim; she did not think that it was an issue, because she had put the Claim in within 3 months (which we inferred was a reference to 3 months from the Preliminary Hearing). Although this appeared to be a mistake of law by the Claimant, by this stage, she had sought legal advice on several occasions and knew of the Tribunal, how to present Claims and how to find out about presentation of Claims. We found that there was no reasonable excuse provided for not presenting this Claim at an earlier date, within about 2 weeks of the preliminary Hearing.

The Law

Direct Discrimination

303. Section 13 Equality Act 2010 ("EQA") provides:
"A person (A) treats another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

304. The required comparison must be by reference to circumstances. Section 23(1) EQA provides:

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

305. Courts and Tribunals have emphasised that in cases where there is no actual comparator, or where there is a dispute about whether a comparator is an appropriate comparator, tribunals should focus on why the claimant was treated in the way that he or she was treated. Was it because of a protected characteristic?

306. In Shamoon v Chief Constable of RUC [2003] ICR 337, Lord Nicholls explained that "the less favourable treatment question" and "the reason why question" are "intertwined" and "essentially a single question": see para 8. At paragraphs 9-11, Lord Nicholls gave guidance as to how an employment tribunal may approach a complaint of direct discrimination and explained that it was sometimes unnecessary to identify a comparator:

> "…*employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding*

whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

307. Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential - see at paragraphs 35–37.

308. Mummery LJ in Aylott v Stockton on Tees BC [2010] IRLR 94 (at paragraph 41) held:

"*There is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others?"*.

Causation in direct discrimination cases

309. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason: see the observations of Lord Nicholls in Nagarajan v London Regional Transport [1999] ICR 877 as explained by Peter Gibson LJ in Igen v Wong [2005] ICR 931, paragraph 37.

Harassment

310. Section 26 provides, where relevant:

"(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

311. Paragraph 7.9 of the Code states that "related to" in section 26(1)(a) should be given "a broad meaning in that the conduct does not have to be because of the protected characteristic".

312. The Code continues that "related to" includes a situation where the conduct is related to the worker's own protected characteristic, or where there is any connection with a protected characteristic.

313. In respect of the proper application of section 26(1)(b) and (4), which deal with the proscribed consequences of the unwanted conduct, we considered Dhaliwal v Richmond Pharmacology [2009] IRLR 336. Although that was a case decided before the Equality Act 2010, the provisions in issue were at section 3A Race Relations Act 1976, and were similar to those in section 26. We find it helpful to set out the following extracts of the judgment of Underhill J(P):

> "14 Secondly, it is important to note the formal breakdown of "element (2)" into two alternative bases of liability – "purpose" and "effect". That means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose; and, conversely, that he may be liable if he acted for the purposes of producing the proscribed consequences but did not in fact do so (or in any event has not been shown to have done so). It might be thought that successful claims of the latter kind will be rare, since in a case where the respondent has intended to bring about the proscribed consequences, and his conduct has had a sufficient impact on the claimant for her to bring proceedings, it would be prima facie surprising if the tribunal were not to find that those consequences had occurred. For that reason we suspect that in most cases the primary focus will be on the effect of the unwanted conduct rather than on the respondent's purpose (though that does not necessarily exclude consideration of the respondent's mental processes because of "element (3)" as discussed below).
>
> 15 Thirdly, although the proviso in subsection (2) is rather clumsily expressed, its broad thrust seems to us to be clear. A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. … The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a "subjective" element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt. See also our observations at para 22 below.
>
> …

22 On that basis we cannot accept Mr Majumdar's submission that Dr Lorch's remark could not reasonably have been perceived as a violation of the claimant's dignity. We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase..."

314. Paragraph 15 above is authority for the proposition that the criterion in section 26(4) EA were overall objective criterion. The Tribunal found that, applying Dhaliwal and the reasoning of Underhill J, this was a correct interpretation of the law.

315. The Tribunal considered Paragraph 22 of Dhaliwal, and Paragraph 13 of Grant v HM Land Registry [2011] IRLR 751.

316. We directed ourselves that not every unwanted comment or act related to a protected characteristic may violate a person's dignity or create an offensive atmosphere. We considered that, at least as a matter of practice rather than law, more than in other areas of discrimination law, context is everything in cases where harassment is alleged. Put shortly, the context in which words are used or acts occur is relevant to their effect.

Discrimination by Victimisation

317. Section 27 provides, where relevant:

"*A person (A) victimises another person (B) if A subjects B to a detriment because –*

(a) B does a protected act, or

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

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

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

318. The detriment must be "because of" the protected act, but this is not a "but for" test: see Bailey v Chief Constable of Greater Manchester [2017] EWCA Civ. 425. Although motivation is not required, the necessary link in the mind of the discriminator between the doing of the acts and the less favourable treatment must be shown to exist: see R (E) v Governing Body of JFS [2009] 1 AER 319, approving Nagarajan v London

Regional Transport [1999] IRLR 572 on this point.

319. If the Tribunal is satisfied that the protected act is one of the effective reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason.

320. The proper test as to whether a detriment has been suffered is set out in Shamoon, above.

Burden of proof in discrimination cases

321. We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in Igen v Wong [2005] EWCA Civ 142, Madarassy v Nomura [2007] ICR 867, and Efobi v Royal Mail Group [2019] ICR 750.

322. In Efobi, at paragraph 10, Elias LJ explained the correct approach to the burden of proof for a discrimination complaint:

> "The authorities demonstrate that there is a two-stage process. First, the burden is on the employee to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal must leave out of account the employer's explanation for the treatment. If that burden is discharged, the onus shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the tribunal that it was not tainted by a relevant proscribed characteristic. If he does not discharge that burden, the tribunal must find the case proved."

323. The burden of proof is not shifted simply by showing that the claimant has suffered a difference in treatment or detrimental treatment and that he has a protected characteristic or has done a protected act: Madarassy at paras 56-58 (followed in Efobi).

324. However, it is important not to make too much of the role of the burden of proof provisions at section 136. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they do not apply where, as in this case, the tribunal is in a position to make positive findings on the evidence one way or the other: Hewage v Grampian Health Board [2013] UKSC 37.

325. In Igen v Wong, at paragraph (11) of the Appendix, it is pointed out that, if the burden of proof shifts, it is necessary for an employer to prove that the treatment was in no sense whatsoever on the grounds of the protected characteristic, because "no discrimination whatsoever" is compatible with the Burden of Proof Directive. The guidance in Igen v Wong was approved by the Supreme Court in Hewage v Grampian Health Board.

Jurisdiction: Time Limits

326. Section 123 EA 2010 provides so far as relevant that:

> "(1) … proceedings on a complaint … may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or

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

…."

327. A distinction is to be drawn between a single act (which may have continuing consequences) and a continuing act arising from a policy, rule, scheme or practice operated over time: *Barclays Bank v Kapur* [1991] ICR 208.

328. Tribunals should not take too literal an approach to the question of what amounts to a continuing act by focusing on whether the concepts of policy, rule, scheme or practice fit the facts of the particular case. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." Instead, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs in which female officers were treated less favourably: Hendricks v Commissioner of Police for Metropolis (2003) ICR 530 at paragraph 54.

329. The exercise of the power to extend time is the exception, not the rule. The Tribunal cannot extend time unless C convinces the ET that it is just and equitable to do so: see Robertson v Bexley Community Centre [2003] IRLR 434 at para 25.

330. The principles to be applied in the application of section 123 EA 2010 are as follows:

330.1. The ET's discretion to extend time under the "just and equitable" test is the widest possible discretion: Abertawe Bro Morgannwg University Local Health Board v Morgan, paragraph 17.

330.2. Unlike section 33 Limitation Act 1980, section 123(1) EA 2010 does not specify any list of factors to which the Tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a Tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the Tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Adedeji v Birmingham Hospital NHS Foundation Trust [2021] EWCA Civ 23:

"The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) [Equality Act] is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular, "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

330.3. There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, nor that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal must have regard. If a claimant gives no direct evidence about why she did not bring her claims sooner a Tribunal is not obliged to infer that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended: Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraph 25.

330.4. Factors which are almost always relevant to consider when exercising any discretion whether to extend time are:

(a) the length of, and reasons for, the delay and

(b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

See Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraph 19.

Constructive Dismissal

331. Section 95(1)(c) ERA provides that there is a dismissal when the employee terminates the contract with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

332. The burden was on the employee to prove the following:

(i) That there was a fundamental breach of contract on the part of the employer;

(ii) That the employer's breach caused the employee to resign;

(iii) The employee did not affirm the contract and lose the right to resign and claim constructive dismissal.

333. The propositions of law which can be derived from the authorities concerning constructive unfair dismissal are as follows:

333.1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavation Limited v Sharp*.

333.2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: see *Malik v Bank of*

Credit and Commerce International [1998] AC20 34h-35d and 45c-46e.

333.3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Browne-Wilkinson J in *Woods v Wm Car services (Peterborough) Limited* [1981] ICR 666 at 672a; *Morrow v Safeway Stores* [2002] IRLR 9. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

333.4. The test of whether there has been a breach of the implied term of trust and confidence is objective as Lord Nicholls said in *Malik* at page 35c. The conduct relied as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

333.5. A breach occurs when the proscribed conduct takes place: see *Malik*.

333.6. Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach; but it is not a legal requirement: see *Bournemouth University v Buckland* [2010] ICR 908 at para 28.

333.7. In terms of causation, the Claimant must show that she resigned in response to this breach, not for some other reason. But the breach need only be an effective cause, not the sole or primary cause, of the resignation.

334. In Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR, the Court of Appeal approved the guidance given in Waltham Forest LBC v Omilaju (at paragraph 15-16). Reading those authorities, the following comprehensive guidance is given on the "last straw" doctrine:

334.1. The repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: Lewis v Motorworld Garages Ltd [1986] ICR 157, per Neill LJ (p 167C).

334.2. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (Glidewell LJ at p 169F)

334.3. Although the final straw may be relatively insignificant, it must not be trivial.

334.4. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied

term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

334.5. The final straw need not be characterised as 'unreasonable' or 'blameworthy' conduct, even if it usually will be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy.

334.6. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality referred to.

334.7. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

334.8. If an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign, soldiers on and affirms the contract, he cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

334.9. The issue of affirmation may arise in the context of a cumulative breach because in many such cases the employer's conduct will have crossed the *Malik* threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the *Malik* term.

334.10. Even when correctly used in the context of a cumulative breach, there are two theoretically distinct legal effects to which the "last straw" label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the Malik threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so.

334.11. The affirmation point discussed in Omilaju will not arise in every

cumulative breach case. "There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect)." (per Underhill LJ).

335. We note that a breach of trust and confidence has two limbs:

335.1. the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee and
335.2. that there be no reasonable or proper cause for the conduct.

Submissions

336. We heard submissions on all three Claims together on 7 January 2021. The parties had prepared written submissions, presented on the final morning of the hearing in January 2020. These were expanded upon by 7 January 2021. Counsel for the Respondent and Mr. Manu-Gyamfi made oral submissions developing their arguments.

337. The Tribunal took into account each and every submission, even if each submission is not referred to below.

Conclusions

338. We have applied our findings of fact and the law set out above to the agreed list of issues. The fact that we do not refer to each and every piece of evidence, or submission, is not evidence that they were not taken into account. We considered all that we read and heard. It is worth noting that in this case the Bundle and Supplemental Bundle extended to about 1000 pages and there were over 100 pages of witness statements and submissions.

339. As should be apparent from our findings of fact, the Tribunal did not find the Claimant to be a reliable witness. Moreover, there were three key features of her evidence which meant that she was unable to recall matters in an objective and reliable way:

339.1. The Claimant believed that the requirement to undertake a developmental plan was a form of disciplinary sanction, which would be used to bring an end to her career. The Tribunal concluded that there was no rational basis for this belief.

339.2. Several pieces of evidence showed that she was unable to accept any criticism of her capability, however well-supported by evidence from service users (who had no reason not to be honest when complaining) or by explanation from her managers. The evidence showed that the Claimant lacked insight about her performance and about whether she had any shortcomings in the competencies necessary to carry out the

community midwife role. Her second witness statement (paragraph 2) includes the bold allegation that there was clear evidence (alleged to be in the form of medical notes) that the allegations by the complainants were "false", even though there was no evidence of that; and many of the complaints related to matters of her attitude and approach, and how this was perceived by the women concerned.

339.3. The evidence demonstrated that the Claimant resorted to blaming others when faced with concerns about her capability. She demonstrated that, by her intransigent attitude in refusing to accept the concerns raised by complainants were genuine, with potential patient safety implications, and she was unable to reflect on her own practice.

Issues 4 and 7: Whether the Tribunal has jurisdiction to hear the complaints of discrimination in Claims 3202319/2018 and Claims 3200668/2019

340. We reminded ourselves of the relevant additional findings of facts set out at paragraphs 300 to 302 above. We took into account the case-law referred to by Mr. Patel. We noted the relevant factors mentioned in Keeble v British Coal Corporation; and we reminded ourselves that they did not set out a statutory, tick-box, checklist for the application of section 123(1). The correct approach when considering whether the Claims had been presented within such time as was just and equitable was to take into account all relevant matters. We took into account Mr. Manu-Gyamfi's submission; he argued that the Claimant had done all she could to explore all internal processes before making Claims in the Tribunal, and that "*the issue*" (as he described it) had been going on for over two years.

341. In respect of the 2018 Claim, taking into account the early conciliation provisions and the ACAS Certificate, any act or omission that took place before 16 August 2018 was out of time.

342. The 2018 Claim was presented on 9 November 2018. The Tribunal concluded that there was substantial delay before the presentation of the Claim form, save that the pay complaints at issues 2.1.vii and 3 (unlawful deduction from wages) were presented in time.

343. Directing ourselves to the guidance in Hendricks, we concluded that there was no continuing act which covered all the individual acts alleged in the 2018 Claim because:

343.1. The acts complained of appeared to be isolated, specific acts. We found that the employees alleged to be guilty of discrimination acted as they did on their own initiative, for the reasons that they gave in evidence. There was no continuing state of affairs extending over a period. The result was the same whether the 2018 Claim was considered alone, or considered with the 2019 Claim.

343.2. Several of the complaints were factually distinct from the others. The complaints related to different circumstances, which reflected the fact that the alleged perpetrators were involved in different stages. For example, the complaints at 2.1v, vi and vii (the later complaints of direct

discrimination) were not linked in any particular way to 2.1.i-iv, save that the Claimant was the complainant in each.

344. The Tribunal considered whether, although presented out of time, it would be just and equitable to extend time so that the Tribunal had jurisdiction.

345. We took into account that the Claimant was a litigant in person, and that she had been absent sick for part of this period.

346. However, the Tribunal concluded that it would not be just and equitable to extend time to hear the 2018 Claim. This was for the following reasons:

346.1. The delay was significant in respect of each complaint (except the complaint in respect of non-payment of wages). The first act of discrimination alleged was presented 2 years and 8 months out of time; the last alleged act was presented 1 year and 7 months out of time.

346.2. The lack of a good reason for delay is one relevant factor. On the evidence that we heard, there was no good reason for the delay in issuing the Claim. The Claimant did not give evidence that she was ignorant of the time limit. The Claimant had intended to pursue the Respondent in a court or Tribunal from well before the point that her pay had been stopped in September 2018. She had consulted solicitors in early and mid-2018 and there was no explanation provided as to why solicitors could not be instructed either to draft the Claim or (if she was unclear as to time limits) to advise on when the Claim should be issued. The Claimant was, after all, an experienced midwife used to completing forms and reading information from a variety of sources.

346.3. The Claimant did not act promptly when she knew of the relevant facts giving rise to each complaint with the exception of the non-payment of wages. Indeed, her prompt reaction to the alleged non-payment of wages tended to show that there was no impediment to her presenting a claim at or shortly after the incidents giving rise to allegations of discrimination.

346.4. By the date of the disciplinary hearing outcome delivered in April 2018, the Claimant's complaints about and objections to the development plan had been effectively concluded; there was no prospect of appeal, as explained by Mr. Steward. Moreover, the disciplinary panel was independent in the sense that none of those involved knew of the Claimant before the hearing; and this panel considered the evidence and the investigation report. Therefore, the Claimant's argument that she was waiting for an independent body to look at her case was not accepted.

346.5. Although the Claimant's grievance had not been resolved by 9 November 2018, there was no evidence that this was deliberate, and we made no such inference. In any event, in substance, the key complaints in the Claimant's grievance were determined by the disciplinary hearing outcome, because the panel did not accept that the managers had any ulterior motive for requiring the developmental plan to be undertaken, but

found that the allegation was partially upheld, and decided that some form of developmental plan was required.

346.6. Delay in itself is not, of course, a reason for refusing an extension of time. However, the extent to which the cogency of the evidence is likely to the affected by the delay is highly relevant: see Miller v MOJ UKEAT/0003/15. In this case, we found that the cogency of the evidence was affected in a limited way. For example, Mr. Steward appeared unable to recall exactly what had happened about the grievance and why the meeting of April 2017, which was cancelled, was never re-arranged. We recognised that the midwife witnesses were able to give cogent and detailed evidence of fact.

346.7. The Claimant was absent sick for a relatively short period within the relevant period of delay (16 August to 9 November 2018). Moreover, the Claimant had been on holiday for part of this time and then been absent without leave.

346.8. Although the complaints about non-payment of wages were presented in time, these had no link to the earlier complaints, other than that they related to the Claimant.

346.9. Finally, as we have explained in our findings of fact, the merits of the complaints of discrimination were weak. The balance of prejudice weighs in favour of the Respondent and refusal of an extension.

347. In respect of the 2019 Claim, taking into account the early conciliation provisions and the ACAS Certificate, any act or omission that took place before 20 November 2018 was out of time. The Claim was presented on 22 March 2019. Therefore, only allegations at issues 5.1.vii and 6.3 were presented in time.

348. The Tribunal concluded that there was substantial delay before the presentation of the 2019 Claim form.

349. Directing ourselves to the guidance in Hendricks, again, the Tribunal concluded that there was no continuing act which covered all the individual acts alleged in the 2019 Claim. Our reasons are similar to those applicable to the 2018 Claim; we repeat paragraph 343. In particular: the complaints in the 2019 Claim involved a wider variety of employees than those alleged to be perpetrators in the 2018 Claim; different alleged perpetrators were involved at different stages, and some (such as Mr. Pinch) had nothing to do with the midwife team; there was a substantial difference between the allegations of victimisation which related to two alleged protected acts; and a substantial factual difference between allegation 6.3 and the other allegations.

350. The Tribunal considered whether, although presented out of time, it would be just and equitable to extend time so that the Tribunal had jurisdiction.

351. The Tribunal concluded that it would not be just and equitable to extend time to hear the 2019 Claim. This was for the following reasons:

351.1. The delay was significant in respect of each complaint. The first complaint was presented about 1 year and 7 months out of time; the last of the complaints was presented about 5 months late.

351.2. As explained in Robertson v Bexley Community Centre, the evidential burden of showing that it would be just and equitable to extend time falls on the Claimant; and an extension of time is the exception not the rule. The Claimant produced no evidence of a good reason for the delay in respect of the complaints which were presented out of time. No evidence was presented at all to explain the delay for the period after the presentation of the first Claim on 9 November 2018.

351.3. Furthermore, the evidence pointed towards there been no good reason at all for the delay before the presentation of these complaints. Most of the complaints that were out of time could have been included in the 2018 Claim.

351.4. We repeat paragraphs 346.3 to 346.9 above. In respect of the balance of prejudice, there were features of this Claim that pointed towards the balance of prejudice favouring the Respondent: the Claimant could pursue the complaints that were in time, even if the extension sought was refused; and the victimisation complaints were without any merit, because the Claimant had not done a protected act (see below).

352. The above conclusions mean that the majority of the complaints must be dismissed. In fairness to the parties and the witnesses, and in case we were found to have erred in law in our approach to the issue of jurisdiction, we have set out our conclusions in respect of all the complaints.

Issue 2.1.i, a-c.

353. Ms. Boateng, Ms. Gabriel-King and Mr. Steward did not refuse to look at the notes of the clients who complained about the Claimant. Our reasons are set out at paragraphs 31-35, 60, and 97-99 above.

354. In respect of each of those employees, they acted as they did in respect of these complaints wholly for the non-discriminatory reasons that they gave.

355. There was no evidence to support the Claimant's case that the reason for the treatment was her race, and, specifically, her colour.

Issue 2.1.ii, October 2016

356. Insofar as the Claimant alleged that it was a breach of the policy for both Ms. Gabriel-King and Ms. Boateng to be present at the meeting on 20 October 2016, this was incorrect; no particulars of any breach were provided in this respect.

357. The Capability Policy did not require Ms. Gabriel-King to tell the Claimant that she was using this procedure.

358. Mr. Manu-Gyamfi's submissions included that the Claimant had not been treated in accordance with the Respondent's policies, which was unfair and unequal treatment, which amounted to discrimination. We accepted that Ms. Gabriel-King did not follow the informal stage of the Capability Policy in every respect, as explained at paragraph 77 above. In particular, the developmental plan was not given the correct title, and it was not agreed by the Claimant. There was inadvertent breach in the course of trying to manage the Claimant appropriately.

359. However, we rejected the Claimant's argument that error in the application of a policy was either deliberate and/or an act of race discrimination. Contrary to Mr. Manu-Gyamfi's submissions that the Claimant was unfairly singled out, such as being only one of five who received a sanction for breach of confidentiality, as we have explained above, this was incorrect as a matter of fact. No other midwife had received so many complaints in a matter of months; and the developmental plan was not imposed only because of the confidentiality breach.

360. We were satisfied that a hypothetical comparator would have been treated in exactly the same way as the Claimant by Ms. Gabriel-King. In any event, as explained at paragraph 77, the Claimant could have been in no doubt at the meeting of 20 October 2016 that it was to discuss the complaints and the objective of improving her performance.

361. The Tribunal concluded from the primary facts found that the Claimant had not been treated less favourably.

362. Furthermore, the Tribunal found no evidence that suggested that Ms. Gabriel-King acted as she did because of the Claimant's race or colour. We repeat paragraphs 76-79. In particular, the Claimant relied on the fact that she was black. The Tribunal could not understand from the Claimant's evidence why it was alleged that Ms. Gabriel-King, who is also black, had discriminated against her because of her race.

363. In any event, the outcome of the disciplinary hearing in April 2018 would have had the effect of correcting any flaw in the application of the informal stage of the Capability Policy by Ms. Gabriel-King. It was not alleged that the reason why no revised developmental plan was drawn up by management at Whipps Cross was because of the Claimant's race or colour.

2.1.iii October 2016

364. The Claimant was not subjected to the treatment alleged in this issue. She was not punished by Ms. Gabriel-King at all. Ms. Boateng did not state to the Claimant that she was being made an example of.

365. Moreover, Ms. Gabriel-King, in formulating the developmental plan, did not focus only, or primarily, on the breach of confidentiality.

366. The Tribunal found that any community midwife in the Claimant's role, where a breach of confidentiality had been made by a service user would have had a meeting with Ms. Gabriel-King. Where four complaints had been made by service users, such as were made against the Claimant in March and August 2016, over such a relatively short period, we are convinced that any community midwife would have been treated the same way as the Claimant was treated. We repeat our findings of fact at paragraphs 75-76.

Issue 2.1.iv

367. Both Ms. Gabriel-King and Ms. Boateng did not have a HR representative present at their meetings with the Claimant up to and including October 2016.

368. However, the absence of a HR representative at these informal meetings did not breach the Capability Policy.

369. The lack of a HR representative was not less favourable treatment than a hypothetical comparator would have received.

370. Moreover, this treatment had nothing to do with the Claimant's race or colour. The Tribunal repeats paragraphs 36 and 80 above.

Issue 2.1.v

371. Mr. Steward did not refuse to resolve the Claimant's grievance on 3 February 2017, whether on 3 February 2017 or at any other time. On our findings, he had taken at least some steps to have the grievance determined.

Issue 2.1.vi

372. The Respondent admitted that Ms. Goldsmith failed to contact the Claimant within 2 weeks of her suspension on 28 April 2017, and that this was a breach of the Disciplinary Policy.

373. The Tribunal concluded that there was no evidence that this treatment was because of the Claimant's colour or race. It was for non-discriminatory reasons as explained in paragraphs 104-105 above.

Issue 2.1.vii

374. It is admitted that Mr. Steward decided that the Respondent should not pay the Claimant's salary for the period from the start of August until the end of October 2018. Mr. Manu-Gyamfi submitted that the Claimant's pay was stopped as a means of making her accept the developmental plan. We concluded that this was not the case, and we have explained why the Claimant's pay was stopped in each instance.

375. The Tribunal concluded that a hypothetical comparator would have been treated in the same way as the Claimant. Mr. Steward held an honest belief that the Claimant was absent without permission over this period, and he had objective and non-discriminatory grounds for that belief. Having lost patience with the Claimant due to the circumstances and particularly her attitude at the meeting on 11 October 2018 (her refusal to attend the mandatory training week and refusal to undertake the developmental plan) and her subsequent refusal to return to work, he overlooked that the Claimant had not in fact been absent without permission on 11 October 2018. We repeat paragraph 209 above.

376. In any event, we concluded that this treatment was not because of the Claimant's race. On the face of the evidence, the Claimant was absent without permission (save for 11 October 2018). The Tribunal repeats paragraphs 188-190, 205-211.

377. In respect of the non-payment of salary for 11 October 2018, although the Claimant was not absent on that date, we consider that any hypothetical comparator would have been treated in the same way. Mr. Steward had lost his patience having sought to get the Claimant to return to work since July 2018, as he would have done with any midwife in the same position and in the same material circumstances as the Claimant, having sought to get the Claimant to return to work since July 2018. The deduction on this date was nothing to do with the Claimant's race or colour.

Issue 3.1: Unauthorised deduction from wages

378. As explained at paragraphs 208 - 209 and as set out above, the Respondent made an unlawful deduction from wages in respect of 11 October 2018. The wages for that date should have been paid at the end of that month.

379. The Respondent did not make an unlawful deduction from wages in respect of September nor for the other days of October 2018. The Tribunal accepted the Respondent's submissions on this issue. The Claimant did not show that she was ready, willing and able to work in August to October 2018. On the contrary, we found that she could not meet this test. In particular:

379.1. The Claimant failed to attend work without permission. We inferred that this was because she refused to undertake any form of developmental plan, because this was consistent with much of her oral evidence and numerous pieces of documentary evidence: see paragraph 211 above.

379.2. Despite the fact that Mr. Steward was attempting to meet to discuss her return to work, he was informed that she was leaving on a pre-planned holiday for which she had not sought permission (even though she explained in her oral evidence in the second part of this hearing how important it was to give notice of holidays in July and August).

379.3. After returning from holiday at the start of September 2018, the Claimant made no effort to contact the Respondent, to discuss a return to work (nor did she return to work), until 28 September 2018, when she realised that she had not been paid.

379.4. The Claimant did not confirm that she could attend a return to work meeting for a further week or so. Once the meeting took place, on 11 October, the Claimant refused to attend the mandatory study week, and unreasonably refused to follow any developmental plan: see p682.

379.5. After the return to work meeting, the Claimant refused to return to work, evidenced by correspondence from her solicitors.

Complaints of Harassment

Issues 5.1.i, ii, & 5.1.iii: Complaints arising from meeting 28 April 2017

380. At the meeting on 28 April 2017, Ms. Goldsmith did attempt to make the Claimant undertake a developmental plan.

381. Mr. Patel argued that this conduct was not unwanted, because "unwanted" meant "unwelcome" or "uninvited"; and he relied on Reed v Stedman [1999] IRLR 299, at paragraph 30 and paragraph 7.8 EHRC Code. Whether conduct is unwelcome is a factual issue, which may, in some cases, be difficult to resolve. In this case, however, the Claimant had clearly and repeatedly rejected the conduct of attempting to make her undertake the developmental plan. This conduct was unwanted.

382. It was admitted that the Claimant was suspended at the meeting. In respect of the suspension of the Claimant, however, the Tribunal found that this could not be characterised as uninvited or unwanted; the Claimant was warned that disobeying the instruction to do the plan would be a serious matter.

383. It was admitted that Ms. Goldsmith did threaten to refer the Claimant to the Nursing and Midwifery Council if she refused to accept the developmental plan at the meeting on 28 April 2017. The Tribunal found that this conduct – being told that a referral to the NMC would be made - was not unwanted in the sense of uninvited. The Claimant was being given a warning that a referral would be made unless she complied with the management instruction to undertake the developmental plan.

384. Furthermore, we concluded that the actions of Ms. Goldsmith were not related to the Claimant's race or colour and not done for the proscribed purpose in section 26(1) EQA:

384.1. The requirement to undertake the plan was intended to be a support measure, to protect the Claimant from further allegations, and to ensure the Respondent was providing safe care for its service users. It had nothing to do with her race.

384.2. The suspension of the Claimant was not related to her colour or race. It was because the Claimant had refused to undertake the developmental plan. Ms. Goldsmith genuinely believed, on the reasonable grounds of her implacable refusal to accept the plan over a period of time and at the meeting on 28 April 2017, that the Claimant had refused to obey a reasonable management instruction.

384.3. In respect of the threat to refer to the NMC, we repeat the facts at paragraph 113 above.

385. In any event, accepting, without deciding, that the conduct of Ms. Goldsmith on 28 April 2017 had the effect of violating the Claimant's dignity or creating a hostile, humiliating or offensive environment (which we will refer to as the "proscribed effect"), the Tribunal had no difficulty in concluding that it was not reasonable for the conduct to have this effect on the Claimant because:

385.1. As we have explained, she lacked any insight into her performance and development needs.

385.2. She was over-sensitive to the complaints received and to the development plan, viewing the plan as a sanction. The plan was, in effect, a support tool which would benefit the Claimant.

385.3. Ms. Goldsmith did not act in a way which was contrary to the Capability Policy. Indeed, her action was in line with the Policy: see p.174, para 1.3.

385.4. Ms. Goldsmith had objective grounds to believe that the Claimant had refused to comply with a reasonable management instruction.

385.5. In respect of the threat to refer to the NMC specifically, the Tribunal concluded that the Claimant had been warned that refusal to accept the developmental plan would have serious consequences, and that a referral to the NMC would be made; and the complaints from the service users involved matters which were substantial and potentially affected client safety. In those circumstances, it was not reasonable for the conduct to have the effect proscribed by section 26(1) EQA. It was a reasonable and professional management act to refer the Claimant to the NMC.

386. Mr. Manu-Gyamfi submitted that the investigation into the complaints by Ms. Gabriel-King was inadequate, the NMC had decided the Claimant had no case to answer, the Trust disciplinary itself found that the original decision (presumably to implement a developmental plan) was only partially upheld, and that "*All the medically related issues raised by the patients were proven to be false as they were all done and documented*." The Tribunal concluded that these submissions reflected a strand of the Claimant's case that lies at the heart of each Claim: a refusal to accept that there could have been any failing in her performance or any need for development. The Tribunal found that these submissions further demonstrated the lack of insight of the Claimant. There was no evidence that the service user complaints were "false"; and the simple fact that the NMC found that the Claimant had no case to answer in fitness to practice terms overlooked the context of that finding (fitness to practice rather than the management of the employment relationship), both in terms of the NMC decision and the actions of the Claimant's managers in attempting to support her practice.

Issue 5.1.iv

387. As we have explained at paragraph 132, the report of Mr. Pinch was neither flawed nor did it display bias.

388. The Claimant relied on four pieces of conduct by Mr. Pinch: failure to acknowledge or mention the February 2017 grievance; failure to refer to the 2016 PDR; expressing personal views in the conclusions; failing to contact witnesses that she had requested that he contact.

389. The Tribunal has set out the relevant facts in respect of each of these matters at paragraphs 132 to 141 above.

390. It is clear from those findings, and the evidence of Mr. Pinch as a whole, that his conduct in the preparation of the investigation report was not related to the colour or race of the Claimant.

391. Further, it is apparent that these four pieces of conduct, to the extent that they were proved or admitted, were not done with the proscribed purpose; Mr. Pinch was undertaking part of his professional duties as an independent investigator.

392. In addition, the findings of fact show that it was not reasonable for the conduct of Mr. Pinch to have the proscribed effect. Mr. Pinch gave cogent evidence to explain why he acted as he did. The Claimant was over-sensitive to the complaints made, lack insight and refused to accept that she was not completely competent, and refused to accept that the plan might be a necessary management step where the role of management was to uphold standards of care quality and performance by team members.

Issues 5.1.v – 5.1vi; Disciplinary hearing outcome and no right of appeal

393. The Tribunal found that the outcome of the disciplinary hearing on 20 April 2018 was not a disciplinary sanction. We repeat our findings of fact at paragraph 162 above. The conduct alleged is not proved.

394. In any event, at paragraph 163 above, we have explained why the decision of 20 April 2018 was not related to the race or colour of the Claimant.

395. It was admitted that Mr. Steward did not give the Claimant a right of appeal against the disciplinary outcome.

396. However, we found that this decision was not related to her colour or race; Mr. Steward reached his decision for the reasons set out at paragraphs 169 – 171 above.

Issue 5.1.vii

397. The Claimant alleged that unwanted conduct included that sickness absence procedures were used to force her to accept a developmental plan on 21 January 2019. The Tribunal concluded that the alleged conduct was not proved and that this complaint of harassment was not made out on the face of the findings, for several reasons:

432.1 The Claimant did not accept a developmental plan. This is apparent from the notes of the Stage 2 meeting and the subsequent decision letter. The Claimant's real complaint appeared to be about the conduct of being told that she could not come back to work unless she completed a developmental plan.

432.2 The Tribunal concluded that any community midwife in the Claimant's circumstances, who was refusing to undertake a developmental plan, would have been treated in the same way as the Claimant was treated at this Stage 2 meeting. Informing the Claimant that she could not return to work as a midwife, having been effectively out of practice for 2 years and with complaints about her received from five different women in 2016, was not related to her colour or her race. It was for the reasons set out above, explained by Ms. Goldsmith and Ms. Gabriel-King in evidence: see, for example, paragraphs 72-74, 105, 113 above.

432.3 Even if the conduct had been proved, and proved to be unwanted, it was not done with the proscribed purpose.

432.4 Moreover, it was not reasonable for the conduct to have the proscribed effect on the Claimant. It is important to recognise that the Claimant had effectively been out of practice as a midwife for almost 2 years by the date

of this hearing; and this absence came after several complaints about her had been made by five different women over about seven months in 2016. It was a reasonable and professional management response to require the Claimant to undertake the developmental plan. The question of reasonableness must be viewed in the context that the Respondent was an NHS Trust, which provided midwifery services, and the standards of care and performance were required to be upheld to ensure quality care for and safety of service users.

432.5 Moreover, the developmental plan was a support and learning tool for the benefit of the Claimant, by preventing further complaints, in addition to the objectives of patient safety and effective care of service users.

Issue 6: Victimisation

398. The Claimant relied upon two matters alleged to be protected acts:

433.1. The complaint allegedly made in May 2012 that she was treated unfairly on racial grounds, on the basis that she was singled out by her team leader at the time (Ms. Gould).

433.2. The grievance of 3 February 2017 set out in the findings of fact above.

399. The Tribunal concluded that neither of the above were protected acts, which meant that the victimisation complaints were bound to fail. Our reasons are as follows:

434.1 A written complaint was made by the Claimant in 2012, which is at pp.204-205. This did not refer to race discrimination, nor to any form of discrimination or breach of the Equality Act 2010: see paragraph 14 above.

434.2 In respect of the grievance of 3 February 2017, on its face, it is not a protected act. It does not refer to the EQA directly; and in substance, it makes no allegation of race discrimination. The Claimant's evidence confirmed that the grievance was not a protected act; she stated that the grievance was not about race discrimination: see paragraph 95 above.

400. For the avoidance of doubt, in the findings of fact, we have set out conclusions on the allegations of victimisation. It should be apparent that none of those allegations would have succeeded even if the Claimant could prove that she had done a protected act: see above paragraphs 81, 106-107, 113, 128-141, 162-170.

Issues 8.1 – 8.10: Was there a repudiatory breach of contract?

401. Mr. Manu-Gyamfi alleged that the actions of the Respondent when the Claimant worked at NUH were part of a plan; it did not want her to return to work, and humiliated her, such as by not formally transferring her, not giving her access to the E-health, or roster system, and subjecting her to preceptorship training. The submissions did not identify who, precisely, was responsible for the co-ordination or decision-making in this plan.

402. The Tribunal concluded that there was no repudiatory breach of contract by the Respondent. We have explained our reasons for this finding above in our findings of fact. We repeat the relevant findings of in respect of each sub-issue. In particular:

402.1. In respect of issue 8.1, see paragraphs 237-252 above. Although Ms. Rowland showed the Claimant the developmental plan received from Whipps Cross, the key facts relevant to this issue were that:

(a) A re-induction plan was necessary, for the reasons explained above.

(b) Such a plan was prepared by Ms. Mukasa, and called a "Orientation programme".

(c) This plan or programme was agreed to by the Claimant on 8 April 2019, after her input and without Ms. Mukasa knowing of the former Whipps Cross developmental plan.

402.2. In respect of issue 8.2, the Claimant was not required to complete a Preceptorship Pack, but the "Orientation programme" at pp 82-151 SB: see paragraphs 243 to 245.

402.3. The Orientation programme that the Claimant was required to complete did not require her to seek "authorisation" from any midwife, nor did it require her to get signatures from midwives "*far junior*" to herself. In respect of issue 8.3, see paragraphs 264-266.

402.4. In respect of issue 8.4, the Claimant was given additional competency objectives at the meeting on 23 May 2019. This was not an arbitrary action by her line managers, designed or likely to undermine the relationship of trust and confidence; it was a response to learning about the developmental plan formulated at Whipps Cross and about the Claimant's refusal to undertake it. Critically, the Claimant agreed to undertake these additional competencies, albeit reluctantly, and did act to fulfil these objectives, evidenced by the Action Plan sign offs in the Addendum: see paragraphs 257-263. The Respondent had reasonable cause to act as it did; after the outcome of the disciplinary hearing in April 2018, the Claimant was in no doubt that she would have to address areas for development in her performance. Directing ourselves to Malik, the Claimant failed to prove either part of the test for breach of the implied term of trust and confidence.

402.5. In respect of issue 8.5, the Respondent did formally transfer the Claimant to NUH. The receiving management did not complete all the formal paperwork for this transfer. This was not designed or likely to undermine the relationship of trust; the Claimant was part of the midwifery team at NUH from 8 April 2019, as a matter of substance. There was good reason and proper cause for not completing the Change form or other documents: see paragraphs 229 to 236 above.

402.6. In respect of issue 8.6, the Claimant was undertaking the Orientation programme at NUH. Therefore, she could not work outside Monday to

Friday shifts, and she did not, at that time, want to work in the community as a community midwife. The Claimant was not prevented from working shifts as a bank midwife if she wished to apply for them, which could be at evenings or weekends. The Claimant chose how she would work her hours; she was not forced to work the pattern that she chose: see paragraphs 274 – 278.

402.7. In respect of issue 8.7, the fact that she did not have access to the E-Health system for booking annual leave electronically was not a breach of the implied term of trust and confidence: see paragraphs 267-273.

402.8. In respect of issue 8.8, we set out our reasons why this allegation did not amount to a breach of the implied term relied upon at paragraphs 279 to 282.

402.9. In respect of issue 8.9:

437.9.1 Ms. Mukasa and, we infer, Ms. Olayiwola knew the hours that the Claimant chose to work. The Claimant chose her own hours of work from Monday to Friday, which was a product of the Orientation programme, and worked the same pattern over each four week period (as she accepted in evidence). Therefore, it is an over-generalisation and over-simplification to say that the Respondent's managers did not know when she would be at work.

437.9.2 The Claimant's case, even on her own evidence, does not indicate a breach of the implied term of trust and confidence; she did not allege or explain how her managers acted in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence.

437.9.3 Ward managers or co-ordinators would not know who she was if she had not worked with them before; on her first meeting with such a manager, she agreed that it was reasonable to introduce herself. We found that the evidence did not suggest that the Respondent had taken steps to make the Claimant not feel part of the team, nor was there any evidence of complaint by the Claimant that she was made not to feel part of NUH.

437.9.4 On the evidence, there were several good reasons why agency staff may be booked, as explained by Mr. Steward and Ms. Mukasa (acuity, due to covering long-term absence or holidays amongst them); but, in any event, the presence of agency staff when the Claimant was on the Labour Ward, or working in any other area, was no disadvantage to her at all. We found that the presence of more hands would to be more likely to advantage her, and make the Claimant's job easier during that shift.

402.10. As for issue 8.10, the Claimant was not demoted. There were no particulars of the alleged demotion; and we found that she did not have

to undertake the same programme as a newly qualified midwife: see paragraphs 288 – 294.

Issue 9: Causation of resignation

403. The Claimant was not constructively dismissed. She resigned. We concluded that the reason for the resignation was because she had obtained new employment with North Middlesex University Hospital, for the reasons explained at paragraphs 296 to 299 above.

Issue 10: Affirmation

404. If we are wrong in respect of our conclusions under issues 8 and 9 above, we considered the issue of whether the Claimant had affirmed the contract of employment after the alleged breaches.

405. Having found as a fact that no meeting took place as alleged by the Claimant on or about 8 June 2019, the Tribunal considered whether there was evidence of affirmation of the contract of employment.

406. From the limited particulars provided by the Claimant in evidence, the last evidence of a date of an act of the Respondent alleged to be a breach of contract was the addition of the Addendum and Action Plan on 23 May 2019. The Tribunal decided that, although the Claimant agreed to this, she had done so reluctantly. Therefore, even if the Individualised Action Plan was imposed on her, and she agreed under duress, (which we found was not the case), and if this amounted to a breach of the implied term of trust and confidence, the Tribunal concluded that the Claimant had continued to perform the contract by continuing to undertake the Action Plan and received her pay for June, July and August 2019 before resigning.

407. We concluded that this demonstrated that she had affirmed the contract of employment and lost the right to resign before the time that she did so (27 August 2019).

Summary

408. Each of the Claimant's complaints of direct discrimination, harassment, victimisation and unfair dismissal are dismissed.

409. The complaints of unlawful deduction from wages are dismissed save that the Claimant was deducted pay for 11 October 2018, a date on which she attended work to attend a return to work meeting. Accordingly, there was an unlawful deduction of pay; she is owed her pay for one day, which will need to be paid subject to the statutory reductions for tax and National Insurance. The Tribunal do not intend to list a remedy hearing in the expectation that this figure can be agreed between the parties; if a remedy hearing is required, this should be applied for within 28 days of the promulgation of this Judgment.

410. Finally, the Tribunal would like to commend the parties on the co-operation displayed over the course of this hearing and at the interim stages. Mr. Manu-Gyamfi represented his wife with tenacity, but with a measured approach, remaining courteous throughout; we have no doubt that this was a real assistance to her in putting her case. The fact that the Claimant's claims failed was no reflection on his role as her representative; as every representative discovers, cases are usually determined on the

quality of the evidence and the principles of law applied to the findings of fact made on that evidence.

Employment Judge A Ross
Date: 1 February 2021

APPENDIX A

IN THE EMPLOYMENT TRIBUNAL
(LONDON EAST)

Case No: 3202319/2018,
3200668/2019,
3202625/2019

BETWEEN

MRS CYNTHIA MANU-GYAMFI

Claimant

- and -

BARTS HEALTH NHS TRUST

Respondent

LIST OF ISSUES

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1. The Claimant makes complaints of direct discrimination on the grounds of race and unlawful deductions from wages under case 3202319/2018, and harassment on the grounds of race and victimisation 3200668/2019. These complaints were consolidated by the Employment Tribunal on 13 June 2019. The Claimant has made a further complaint of unfair dismissal under case 3202625/2019, which was consolidated with the other claims by the Employment Tribunal on 10 January 2020. This list of issues addresses all of the above claims, as per the order of 10 January 2020.

3202319/2018

2. Direct Race Discrimination

    2.1. The Claimant is black. She asserts that she was less favourably treated on the grounds of her race in respect of the following.

        i. The following individuals refusal to look at the evidence (notes of clients) that contradicts the allegations:

            a) Ms Matilda Boetang on 16 March 2016

            b) Ms Jacqueline Gabriel in October 2016

            c) Mr Simon Steward in February 2017

        ii. In October 2016 Ms Gabriel - King did not follow the capability policy which was used to decide the developmental plan. In particular, the Claimant was never told that the capability process was being applied.

iii. In October 2016 Ms Gabriel - King decided to punish the Claimant out of 5 incidents of breach of confidentiality allegedly contrary to the evidence.

iv. Ms Gabriel - King and Ms Boetang failing to have a HR representative in any communication or investigation prior to the decision to punish the Claimant (prior to October 2016).

v. Mr Simon Steward refused to resolve the Claimant's grievance on 3 February 2017.

vi. Ms Deborah Twyman did not apply the Respondent's disciplinary procedure by failing to reply within 2 weeks on 28 April 2017.

vii. Mr Simon Steward decision to withhold the Claimant's salary for period August to November 2018.

2.2. The Claimant relies on correspondence from the Respondent sent on 16 October 2016 that states that 5 people have been responsible for incidents of breach of confidentiality, 1 of which was the Claimant. 3 white employees and 1 other black employee were not disciplined but the Claimant was.

2.3. The Claimant relies upon a specific comparator in relation to allegation (iii)**.** The Claimant relies on a hypothetical comparator for all other allegations of less favourable treatment.

3. Unlawful deductions from wages

3.1. Whether the Respondent has made an unauthorised deduction from the Claimant's wages for September and October 2018.

4. Time limits

4.1. Whether the claims have been presented within the relevant statutory time limits.

4.2. The Respondent contends that, in view of the ACAS certificate, any act or omission that took place before 16 August 2018 is out of time.

3200668/2019

5. Harassment related to race

5.1. Did the Respondent engage in unwanted conduct related to the Claimant's race that had the purpose or effect of violating her dignity or creating an intimidating, hostile degrading, humiliating or offensive environment for the Claimant? The Claimant relies upon the following alleged acts:

i. Attempting to subject her to a development plan on 28 April 2017 and in doing so, the Respondent allegedly failed to follow its own policy by jumping to an undefined formal stage of the capability policy.

ii. Suspending her from duty on 28 April 2017 and commencing disciplinary proceedings.

iii. Threatening to refer her to her professional body, the Nursing and Midwifery Council on 28 April 2017 if she refused to accept the proposed development plan.

iv. Making 'flawed and biased' findings in relation to her post-suspension grievance in the report prepared by Mr Christopher Pinch dated 13 November 2017 but sent to the Claimant by email on 13 February 2018 in the respects stated under the sub-hearing 'Trust's Post suspension investigation – by Christopher Pinch'.

v. Maintaining a capability sanction in the letter issued to the Claimant on 20 April 2018.

vi. On 7 June 2018, in an email sent by Mr Simon Steward to the Claimant, not giving her a right to appeal against the decision to maintain the capability sanction

vii. Using the sickness absence procedures to force her to accept a development plan on 21 January 2019.

5.2. Was it reasonable for the conduct to have that effect?

5.3. The Respondent denies the alleged conduct and denies that any conduct was in any event related to the protected characteristic of race.

6. Victimisation

6.1. The Claimant asserts that the following amounted to protected acts:

i. In May 2012 she submitted a complaint of being treated unfairly on racial grounds on the basis that she was singled out by her team leader (Ms Mandy Gould). The Respondent does not admit that the Claimant made this complaint.

ii. On 3 February 2017 she made a grievance complaining about being subjected to a development plan. The Respondent denies having received this complaint and therefore argues that it could not have treated the Claimant less favourably because of it.

6.2. In the alternative to a complaint of harassment, the Claimant contends that the treatment at 5.1 i-vi above is less favourable treatment and done because she did the alleged protected acts. The Respondent denies this.

6.3. In addition the Claimant contends that withholding and/or making a lump sum deduction from her pay in January, February and March 2019 relating to pay in August 2018 occurred because she did a protected act.

7. Time limits

7.1. Whether the claims have been presented within the relevant statutory time limits.

7.2. The Respondent contends that, in view of the ACAS certificate, any act or omission that took place before 20 December 2018 is out of time. This is disputed by the Claimant.

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8. Did the Respondent breach the implied term of mutual trust and confidence by reason of its treatment of the Claimant by all or any of the following?

    8.1. Confronting the Claimant with and/or requiring the Claimant to complete a development plan on her return to work on 8 April 2019?

    8.2. Requiring the Claimant to complete a "preceptorship pack" for newly qualified midwives instead of a "normal re-induction pack" on her return to work after 2 years of absence?

    8.3. Requiring the Claimant to seek authorisation and signatures of colleagues far junior to the Claimant in demonstrating compliance with the development plan?

    8.4. Requiring the Claimant to complete additional assessments part-way through completion of the above development plan?

    8.5. Deciding to not formally transfer the Claimant from Whipps Cross Hospital to Newham Hospital?

    8.6. Preventing the Claimant from being part of the duty roster, from working weekends or from working unsocial hours, meaning that the Claimant was only entitled to basic pay and was thus earning less than she had been earning before?

    8.7. Failing to give the Claimant access to a system for booking annual leave and requiring her to tell the Respondent any time that she wished to go on annual leave? The Respondent accepts that the Claimant did not have access to such a system, but disputes that this amounts to a breach of the implied term.

    8.8. Requiring the Claimant to introduce herself every time she worked with a new labour ward manager?

    8.9. Not knowing when the Claimant was going to be on duty and /or booking agency staff leaving the Claimant to feel that she was not part of the Newham Hospital's plans?

    8.10. The Claimant was made to feel as if she was demoted?

9. If so, was the Claimant's resignation on 27 August 2019 in response to the breach(es)? The Respondent contends that the resignation was because the Claimant had obtained new employment with North Middlesex University Hospital, effective from 23 September 2019. The Claimant contend that her decision to leave the Trust was due to the actions of the Trust detailed above

10. Did the Claimant delay in resigning such that she waived the breach(es) or otherwise affirm the contract and insist upon further performance?

11. If the Claimant was dismissed, has the Respondent shown that the dismissal was for a potentially fair statutory reason under s98 Employment Rights Act 1996? The Respondent relies upon Some Other Substantial Reason.

12. If there was a dismissal and the Respondent had a potentially fair reason for that dismissal, was the dismissal unfair under s.98(4) Employment Rights Act 1996 and outside the reasonable range of responses?

13. If the Respondent did dismiss the Claimant unfairly, did the Claimant's conduct contribute to that dismissal and should the Employment Tribunal take into account the Claimant's contributory fault?

14. Furthermore, if the Claimant was unfairly dismissed, would the Claimant have been dismissed from her employment in any event and should the Employment Tribunal adjust any compensation to reflect that?