



EMPLOYMENT TRIBUNALS

Claimant: Ms O Akinmeji

Respondent: East Kent Hospitals University NHS Foundation Trust

Heard at Ashford

**On: 26-30 September &
3-4 October 2022**

Before: Employment Judge Corrigan
Ms N Christofi
Ms J Saunders

Representation

Claimant: Mr C Adjei, Counsel

Respondent: Mr N Grundy, Counsel

JUDGMENT

1. The Tribunal has found the Respondent did contravene the Equality Act 2010 in respect of allegation 6.18 (direct race discrimination) and victimisation, but not the remaining allegations in the list of issues (with the exception of paragraph 2 below).
2. Although the Respondent did contravene the Equality Act 2010 in respect of allegations 6.5, 6.6 (partial) and 6.7 in the list of issues, those allegations were out of time.

REASONS

Preliminary matters

1. The parties had proceeded on the basis of an amended list of issues and an amended response in reply. The list of issues had introduced a claim of victimisation whereas harassment was not pursued. Neither party objected to the other's amendments. We therefore allowed the amendment to include victimisation and the amended response. There was one further amendment during the hearing to add allegation 6.8, whereas a further allegation against Kathy Carr was withdrawn.
2. A number of other matters mentioned in the witness statement but not in the list of issues were confirmed by the claimant's representative to be background. The Claimant confirmed she was not pursuing personal injury or claims based on the actions of Ms Olagboyega and Ms Knight (save that she did pursue the victimisation claim based on the Trust's response as a whole).
3. The claimant's representative sought to add constructive discriminatory dismissal as this would potentially impact time limits. The respondent objected but we allowed this amendment to the list of issues.
4. The parties agreed that the judgment in respect of time limits extended time for the incident in January 2020 but the question of whether earlier incidents were within time as a continuing act or it would be just and equitable to extend time remains to be determined. I checked the notes in file from the preliminary hearing and these accorded with this understanding.
5. The list of issues was discussed with the parties and amended twice during the hearing. The final list of issues was as follows. The parties should note I have slightly re-ordered the list of allegations to preserve the chronological order.

Claims and issues

Direct race discrimination

6. Did the respondent treat the claimant in the following ways:
 - 6.1 In or around June 2018, Kelly Relf undermining the claimant's work in front of patients and other staff;
 - 6.2 From in or around June 2018 until April 2019, Rachel Heath regularly allocating the heavier/more intense work to the claimant;

- 6.3 From in or around June 2018, Naomi Harrison allocating the heavier workload and high risk patients to the claimant while allocating lesser workloads to white midwives;
- 6.4 From in or around June 2018, Naomi Harrison not permitting the claimant time to complete her notes before being allocated more work;
- 6.5 In or around June 2018 , Fay Chewter persistently asking the claimant not to go near her patients;
- 6.6 Later in 2018 Fay Chewter stating to the claimant that “nobody likes you or wants you here” and “go back to where you came from”;
- 6.7 On 13th December 2018 Fay Chewter telling the claimant that her help was not needed when they worked together at QEQM;
- 6.8 On 19th December 2018 Rachel Heath allocating longer breaks to white colleagues but not black colleagues (including the claimant);
- 6.9 In early 2019, Dr Essex saying to the claimant about a patient “she is not in fucking labour, I assessed her”;
- 6.10 On or around 28th March 2019 Naomi Harrison not allowing a member of staff to stay with the claimant when she was ill at work and went to A & E, in contrast to a white colleague (Rachel Heath) who was previously treated in the workplace and driven home by another colleague;
- 6.11 On or around 3 April 2019 Rachel Heath complaining to more senior management when she assumed the claimant tried to change the workplace allocation to avoid working with her;
- 6.12 On date unknown Dr Essex snapping at the claimant that she was too busy to see a patient because she was on the way to theatre;
- 6.13 On 24 May 2019 Dr Essex failing to review a patient when requested to do so by the claimant and shouting at her “What the fuck do you want me to write down as indication for the c-section!”
- 6.14 On 24 May 2019 Naomi Harrison failing to intervene when Dr Essex verbally assaulted the claimant and used the F word;
- 6.15 Later in 2019 Naomi Harrison refusing the claimant permission to leave early whereas she had previously left early;
- 6.16 In late October 2019, Dr Ciaran Crowe shouting at the claimant that she was the only midwife not capable of keeping contemporaneous notes;
- 6.17 Committing a repudiatory breach of contract of employment by reason of the discriminatory acts or omissions set out in the above paragraphs

which entitled the claimant to resign and regard herself as dismissed (with notice) on 9 December 2019, with the termination date of 2 February 2020;

- 6.18 On 25 January 2020, Kathy Carr stating to staff members “its Kemi’s last day everyone check your bags” and repeating this in the hallway.
7. Was any of the above less favourable treatment in comparison to a white midwife? The claimant relies on a hypothetical comparator save for allegations 6.10 and 6.15 where the claimant relies on Rachel Heath and Naomi Harrison respectively as the actual comparator.
8. Was any of the treatment set out above done “because of” the Claimant’s race.

Victimisation Related to Race (s.27 EqA 2010)

9. The respondent accepts the Claimant did a protected act (ie made allegations of discrimination) as follows:
- 9.1 During her exit interview with Maria Knight on 30 January 2020 and her complaint of race discrimination,
10. Was the Claimant subjected to a detriment in relation to the way in which the Claimant’s complaint was addressed and the alleged failure to treat her allegations of race discrimination seriously?
11. If so, were the above detriments done because the Claimant had undertaken the protected act?

Jurisdiction / Limitation Issues

Are any of the claims before 25 January 2020 out of time?

12. If so, are any of the above claims brought within time, by virtue of conduct extending over a period of time pursuant to section 123(3)(a) of the EqA 2010?
13. Is it just and equitable to extend time for any acts of discrimination pre-dating 25 January 2020?

Hearing

14. The Tribunal heard evidence from the Claimant on her own behalf. The Tribunal heard evidence on the Respondents’ behalf from Ms J Olagboyega (Matron), Ms T Gilmore (Lead Midwife), Ms K Relf (Midwife), Dr J Essex (Consultant), Ms F Chewter (Midwife), Ms R Heath (Senior Midwife), Ms C Bayat (Lead Midwife), Ms K Carr (Midwife), Ms M Knight (Head of People and Culture Investigation Team). The Tribunal also read statements prepared on behalf of Dr C Crowe (Consultant) and Ms N Harrison (Senior Midwife).

15. There was a 313 page bundle. There were some additional documents provided by the respondent during the hearing, without objection from the claimant.
16. The parties made oral submissions and provided written submissions.
17. Based on the evidence heard and the documents before us we found the following facts.

Facts

18. The claimant began working for the respondent as an agency midwife but after a few months was appointed to a permanent position, as a band 6 midwife, starting on 19 March 2018. She has no complaints about how she was treated as an agency midwife and likewise there were no complaints about her behaviour during that time.
19. The claimant worked nights based at William Harvey Hospital. She did additional bank shifts including two shifts at QEQM hospital. There is no dispute that the claimant is a capable and experienced midwife.
20. The claimant is black. The respondent has about 66 midwives on the labour ward and Folkestone ward (postnatal ward). There are also other midwives on the midwife led unit and triage. Of those 66, at the relevant time, only 3 midwives were black, including the claimant. The majority of the midwives were white.
21. There is no dispute that the workplace is a stressful high stakes environment and that the work is very tiring. The respondent is candid that regularly midwives did not get any break over a 12 hour shift. Ms Olagboyega gave evidence that staff frequently “fall out” or report issues to her. We were told such things happen “most days”. She said these are almost always also resolved between the staff.
22. Shortly after she began in the permanent post, on 27 March 2018, the claimant and the two other black midwives were sent by Rachel Heath (Co-ordinating Senior Midwife) to assist on the Folkestone Ward. They noticed that the three black midwives had been chosen rather than any white staff. Whilst on the Folkestone Ward one of the three midwives had an altercation with Claire Bayat, the midwife in charge, about who should do drug rounds/observations. This eventually was one of the incidents that were the subject of a grievance by that midwife alleging race discrimination (but not until January 2019). The Claimant at the time did not consider there had been an act of race discrimination against her, and although she provided a statement in the grievance process, it was in neutral terms. That grievance was not upheld but led to a number of recommendations including unconscious bias training for everyone, the decision maker having concluded there was “some evidence that there may be some unconscious bias on the ward/unit”.

23. The reason they were sent to the Folkestone ward on that occasion was that other midwives had students and were therefore assigned to the births on that shift. There were no other midwives free to send other than the three she had chosen.
24. The respondent's witnesses say that the claimant's behaviour changed after she became permanent, becoming rude and abrupt, some even describe her as aggressive and intimidating (though when pressed they were not able to give examples). The claimant herself accepts her behaviour changed after the event with Kelly Relf described below in June 2018 after which she became more withdrawn and guarded. The first reference to the claimant's change in behaviour in documentation was made by Ms Gilmore in her email dated 21 November 2018 on page 79 of the bundle where she said that she was worried about the claimant as she did not "seem to be as happy as [she] used to be, prior to getting the substantive post". She said the claimant had eluded to issues at work and offered to talk things through with her. The claimant responded confirming she was experiencing issues at work and asking to take up the offer to speak.
25. We find that despite that reference to the change following the substantive post in Ms Gilmore's email there is insufficient evidence to support the change in behaviour being right from the outset. We find it is more likely, and we accept, that it was from when the claimant pinpoints it, and was in response to the events below, after which she says she withdrew and became more guarded.
26. Before turning to the allegations made by the claimant there is some background evidence in respect to the working relationships to address and which the claimant was not fully aware of at the time. A number of midwives including Kelly Relf and Faye Chewter (but not Kathy Carr) felt that the claimant was bullying another midwife Claire Bayat by "fat shaming" her, making comments about her weight and eating. This was something Ms Bayat was particularly sensitive about in the lead up to getting married in August 2018. This was discussed between those midwives and Claire Bayat and they tried to encourage her to report it but she did not wish to. This affected their treatment of the claimant. Ms Relf describes her relationship with the claimant as "frosty" as a result. Ms Chewter says she disliked the claimant as a result.
27. Ms Bayat gave evidence that she believed the claimant was deliberately making comments about her eating and weight to try to get a reaction. She said that she had asked her not to do it a number of times and the Claimant carried on. She says that she then decided to act like it wasn't affecting her. We do not accept this evidence as it is not corroborated by the other midwives who say Ms Bayat had not wanted anything said about it. It is also inconsistent with contemporaneous messages between the Ms Bayat and the claimant (pp 82,135-139) which we find to be a genuine reflection of their relationship at the time (which was positive and friendly). It is not credible that these were a fabricated response to the claimant in order to "stand up to a bully" as Ms Bayat now suggests.
28. The claimant says there was one occasion on 19 December 2018 when she had asked Claire Bayat what she was eating and that later Claire Bayat had told her she had felt the claimant was "fat shaming" her. The claimant said she sincerely

apologised and had reassured her she had not been thinking about her weight. Later in the WhatsApp messages on the same day Ms Bayat said she was not upset about what the claimant had said about food saying instead that she had “a lot on and was super stressed” in what was otherwise a friendly message. The claimant responded with an encouraging message in which she also said she was glad Ms Bayat had not been offended as they had all been joking. Ms Bayat responded “Don’t worry you know I’m the biggest joker”.

29. The messages show there was one more incident with Ms Bayat which was not until October 2019. There was a discussion about parenting during which a comment made by the claimant upset Ms Bayat. The claimant sought to reassure Ms Bayat once she knew she was upset. Ms Bayat also apologised to the claimant. Again there were messages between them following up on this incident. These suggest that Ms Bayat had also interpreted a comment from the claimant as being about her weight and at that point had suggested this was not the first time. The claimant sent a very long message in which she apologised not just for the comment that day but for if she had ever upset her in that way before. She said she had been thinking back over all their banter. She said it would not happen again. In that message she also referred to putting up a tough exterior to avoid letting people’s side comments affect her. She said she knew of them as they filter back to her. The length of the message suggests some significant distress at having learned only then that she had hurt Ms Bayat over a period of time.
30. The reply from Ms Bayat, within 10 minutes, said she was sorry too and said she was oversensitive in relation to weight. She confirmed her friendship to the claimant and said “I want you to know I always have your back when things are said about you at work by others”. She went on to say “I should stop listening to others as I took it as a joke initially until people started talking about it to me saying you were trying to humiliate me. I 100% accept your apology and explanation”. The overall tenor of the message is caring.
31. We find the evidence shows that the claimant made some insensitive comments unwittingly that initially Ms Bayat had not been offended by until others encouraged her to view it as “fat shaming”. Ms Bayat was sensitive to this issue. It was not brought to the claimant’s attention other than the conversations on the days of the messages. Once the claimant realised she had upset Ms Bayat in any way she was very apologetic. She looked back over what she had said in jest and was anxious to say it would never happen again.
32. We were taken to a reference in the claimant’s witness statement, written with the assistance of her solicitors, Thompsons, that was also an example of an unwitting insensitive comment where she said she had asked Ms Bayat what she was eating on 19 December as “she was always eating”. We don’t accept the respondent’s suggestion that this is an example of deliberate “fat shaming”. We doubt the claimant, with assistance of her solicitor, would have intentionally done this in her witness statement. We find instead that it supports our conclusion that on occasion the claimant says comments without realising that are insensitive to Ms Bayat’s sensitivity around this issue.

33. We find however that the evidence on the respondent's side has been exaggerated for these proceedings both in terms of the length of time over which the claimant made such comments and the regularity of these comments, and also in respect of the claimant's intention and the impact on Ms Bayat and their relationship. We note that Ms Relf and Ms Chewter confirm that things improved in 2019, with Ms Chewter confirming she did not witness any comments after about April 2019. The matter was not properly raised with the claimant until October 2019.
34. We also find that the evidence shows that the claimant was a subject of discussion by the group of midwives concerned, which had generated a shared negative attitude towards the claimant and some hostility which she picked up on in their behaviour towards her as outlined below. We find they thereby "ganged up" against the claimant. Ms Bayat in evidence said that the conversations about the claimant also included conversations about her clinical practice, and she said it was in those that she defended the claimant. We note that this appears out of keeping with the more general trend that midwives regularly "fall out" but resolve matters swiftly between themselves and itself suggests there was bullying of the claimant by this group of midwives.
35. Turning now to the factual allegations made by the claimant.
36. The first event the claimant complains about is around June 2018 when Kelly Relf was doing a "fresh eyes" on the claimant's patient. The claimant says Ms Relf told her that the claimant did not know what she was doing as she was using a fetal ECG ST segment analysis (STAN) rather than a CTG. She then said that the claimant should "learn the right way to use the STAN". The claimant explained herself in response to both comments and asked Ms Relf to leave her to manage the patient once she had completed the fresh eyes. She says Ms Relf angrily left the room and returned to the midwives' station where the claimant overheard her discussing the claimant's practice with the other colleagues when she went to get her progress notes.
37. The claimant says that after this incident Ms Relf stopped speaking to the claimant and ignored her, as did those midwives who were friends of Ms Relf. The claimant says the friends were also occasionally aggressive. The claimant says the friends included Rachel Heath, Naomi Harrison, Claire Bayat and Faye Chewter. She also believed this incident was the reason for the way she was treated by Faye Chewter as set out below. The incident was therefore significant to the claimant. We note that all of the other incidents described by the claimant are accepted to have occurred even if there is a different account of it from the respondent's witness.
38. Ms Relf accepts she would have done a fresh eyes review at some point but cannot recollect the incident. She says that the comments were very unprofessional and not something she would have said in front of a woman giving birth. She also accepts she had a "frosty" relationship with the claimant because she was very unhappy with how she believed the claimant was treating Ms Bayat.
39. The claimant says she informed Ms Gilmore about this but not until November 2018. She was referring to it in the email chain between the two (p79), and she spoke to Ms Olayboyega about it when they met in December 2018 (the meeting

which followed the email chain with Ms Gilmore). Ms Gilmore says that she cannot remember the specifics of this but that the Claimant did complain that Ms Relf was rude and Ms Gilmore had to speak to her. Ms Gilmore said that this was not the first time she had done so, as at the time Ms Relf “had an attitude problem and...behaved like a moody teenager”. This undermines Ms Relf’s evidence that she would not speak unprofessionally.

40. For all of the above reasons we accept the claimant’s evidence of this event.
41. We accept that around this time Ms Relf stopped speaking to the claimant and purposely ignored her. Ms Relf herself accepted she was frosty as did others in the group who were friends with Ms Bayat. As explained above we accept that this made the claimant withdraw. This was the group’s response to their perception of the claimant “fat shaming” Ms Bayat, though they said nothing to her at this time.
42. The claimant says that following this she began being allocated heavier workload and high risk patients by Rachel Heath and Naomi Harrison (who she says were friends of Kelly Relf). This is disputed and there is insufficient evidence to support this assertion. The evidence does not show the claimant was consistently assigned the more difficult or high risk patients. The claimant produced one snap shot of the white board which was one moment on one night shift. We accept the respondent’s evidence that it does not show the claimant was given a disproportionately high workload on that occasion, and in any event neither Rachel Heath or Naomi Harrison were in charge on that occasion. The grievance by the black midwife referred to above had made a similar allegation but it was not upheld.
43. We accept the workload was allocated based on the coordinator’s assessment of the patient workload and the skills of the midwives. The claimant was perceived to be good at one to one with patients and not as able to multi task and not always as willing to help others. She also was known to insist on having her breaks. There would be other factors to consider such as who had a student and there was a particular midwife who tended to be assigned still births due to her skills and experience. We accept that the claimant would tend to stay with her patients and not be best placed to know what else was going on. As stated above the work in general is high risk and stressful and complications can arise over a shift.
44. The claimant refers to another doctor joking about which patient she would get as evidence to support her assertion but we accept he was known for doing that with everyone and it is not in itself evidence of the workload distribution.
45. There was eventually mediation between the claimant and Rachel Heath in May 2019. Ms Heath took the claimant’s workload concerns on board and the claimant accepts Ms Heath’s work distribution improved after that.
46. An associated allegation is that from around the same time Naomi Harrison would not permit the claimant time to complete her notes before being allocated more work. There was little evidence before us on this issue separate to the evidence about the assignment of work generally. At paragraph 6 of her statement when addressing the allegations above about allocation of work the claimant included

one line as follows: “Naomi Harrison, would also assign me the most work. Immediately after delivering a woman, Naomi would ask me to hand my notes over for another midwife to input my delivery and complete my birth notification, and reassign me to another patient without any break”. She did not give much additional detail orally. In response in her witness statement Naomi Harrison stated that it was common place that one patient requiring care would follow quickly after another and it was not personal to the claimant. It was normal for all midwives to experience this without respite. We accept that the work is pressured and stressful and it can be seen from the respondent’s records that other midwives frequently did not get a break at all. There is no evidence that the claimant was being singled out in the way she was assigned work, and if anything the evidence suggests she would tend to get breaks more frequently than other colleagues.

47. Ms Faye Chewter is currently employed by the respondent but at the time was an agency midwife. She had previously worked for the respondent, having trained at the respondent. She was part of the group of Ms Bayat’s friends and did not like the claimant, which the claimant picked up on. The claimant’s email to Ms Olagboyega on p 80 describes the claimant as experiencing repeated aggression, anger and dislike from Ms Chewter.
48. The claimant says Ms Chewter told the claimant she should not answer the buzzer for her patients. This account is confirmed on page 80 where the claimant’s account in 2018 was that she avoided contact with Ms Chewter’s patients as she had requested. Ms Chewter said she looked after the women in her care and accepts it is something she could have said. She says she probably said it to other midwives, though there is no evidence to support that.
49. The claimant says Ms Chewter asked the claimant whether she knew what she was doing. This allegation was not in the list of issues. Ms Chewter said she would not have said that as the claimant was a good midwife clinically. The claimant has not repeated that in her account on page 80. We do not find it more likely than not that that was said.
50. There was a further incident between Faye Chewter and the claimant around August 2018 when Faye Chewter told the claimant she did not like her. We accept she also said that nobody liked the claimant. This is again corroborated by the claimant’s account nearer the time on page 80.
51. The claimant says that Fay Chewter also said “go back to where you came from” but that she (the claimant) did not initially think that she meant a racist reference but meant back where she had worked before. Indeed they had both worked together elsewhere previously. She did not put this allegation in her account to Ms Olagbeyega on page 80. We do not find it more likely than not that Ms Chewter said such a comment as if she had the claimant would have recognised that as a racist comment and it would have been in her account on page 80.
52. Ms Chewter told the claimant at the time that she did not like her because of the way the claimant treated her friend and she called the claimant a bully. The claimant says Ms Chewter would not say who the friend was and she assumed it was

Kelly Relf as a result of the incident between them above. In fact it was Claire Bayat but we accept Ms Chewter did not make that clear, as is reflected on page 80.

53. As can be seen from page 80 the claimant raised the way she was treated by Ms Chewter to Ms Olagboyega. In fact this was part of what she had initially eluded to with Ms Gilmore, as the initial meeting with Ms Olagboyega was the culmination of the emails between the Claimant and Ms Gilmore. She initially met with Ms Olagboyega in December 2018. Ms Olagboyega then had what she describes as a frank discussion with Ms Chewter. She says that she was aware that the issue with Ms Bayat was the underlying reason for Ms Chewter's behaviour to the claimant. Nevertheless that issue is not raised with the claimant. The claimant's email on page 80 reflects advice from Ms Olagboyega that she get more familiarised with her colleagues to improve understanding and working relationships.
54. After that discussion the claimant and Ms Chewter were both on shifts together at QEQM. Ms Chewter says that as soon as she saw the claimant was also working she thought "of all the people" to be working with and went to see the matron (who she did not know) and said "that midwife" and I don't get on (referring to the claimant) and requested they be separated. This was an extreme reaction. She said her reason for doing so was the disagreement she and the claimant had had previously. The claimant says she did not see Ms Chewter until the morning as they were on separate wards but then in the morning the claimant was sent to assist on the ward Ms Chewter was working on. She says Ms Chewter asked her why she was there and told her to leave as they did not need the claimant's help. The claimant had waited for another member of staff who had then been glad of her help. This account was recorded that same day on page 80 and we accept it. It is consistent with Ms Chewter's reaction to the claimant being on the same shift and having tried to avoid the claimant.
55. We consider Ms Chewter's reaction somewhat inconsistent with her stated goals of trying to keep a quiet life, be professional and get on with the job, not drawing attention to herself. Going to raise an issue like this with a matron who she had never worked with before is contradictory to that.
56. Ms Olagboyega's response was that she was very sad for the claimant as she had honestly felt she had had a frank discussion with Ms Chewter that would have ironed out the issues.
57. Eventually, around New Year, at the claimant's instigation she and Ms Chewter reconciled and Ms Chewter acknowledged respect for the claimant in being the better person, saying she would not have done that herself.
58. The claimant said on 19 December 2018 that she and a black health assistant were sent on a break of just one hour together but then later in the shift white midwives and friends of Ms Heath were allowed an extra 30 minutes each. The previous grievance by the claimant's colleague had also raised an issue about breaks. The claimant relies on this one off incident. We accept the evidence given on behalf of the respondent that the claimant was concerned to get her breaks and

so Ms Health would generally try to give her one as soon as there was an opportunity as there might not be one later. As a result she usually got a break, even when others did not on the same shift. The fact that some midwives (not usually the claimant) did not get a break was supported by the actual hours sheet. The business of the unit changed very quickly over a night. We accept Ms Heath's evidence that on a quieter night it was possible to be more generous with breaks.

59. We turn now to Dr Essex and the first of the allegations involving her in 2019. At the time Dr Essex was a registrar. Her contact with the claimant would occur when she was on call overnight. She was in her last year of training but would be in charge of the whole service that night. It was therefore a very stressful role and she would do multiple nights on call which was very tiring. Her perspective would therefore be very different to that of the claimant who was an autonomous midwife responsible for a patient, whose role included being an advocate for that patient.
60. Dr Essex at that time was known for swearing and accepts she regularly swore "in her sentences" and was spoken to about this as it was not considered acceptable and she had to work on it before she could become a consultant (which she has now become).
61. In early 2019 the claimant took over care of a patient who she considered was in labour. Dr Essex had not done a delivery plan as she had concluded she was not yet in labour. The claimant went to speak to the night shift registrar within earshot of Dr Essex as she was leaving. She says Dr Essex interrupted to say that the patient was not in labour. The claimant says that as she walked out of the office Dr Essex followed her to furiously say that "she is not in fucking labour. I have reviewed her". The night registrar confirmed that the woman was in labour and she went to theatre immediately (as she had opted for an elective c-section).
62. Dr Essex agrees she could have said this in front of the night shift registrar. The incident is briefly described in the email from the claimant written on 24 May 2019 and we accept it occurred.
63. There was a further occasion when the claimant had asked Dr Essex to review a patient briefly and in front of everyone Dr Essex snapped that she was too busy and off to theatre.
64. On the 28 March 2019 the claimant fell ill at work and went with a colleague to A & E. As the ward became busier Ms Harrison called the staff member back. The claimant compares this situation to when Ms Heath was treated in the workplace and then driven home by a colleague. Ms Harrison also did not allow the colleague time to move the claimant's car when requested as the ward was too busy, although the colleague went ahead and did it anyway.
65. On about 3 April 2019 the claimant was very upset as she believed that Rachel Heath had complained to a more senior colleague that the claimant had swapped shifts to avoid working with her. This was Ms Heath's understanding and she believed the claimant had swapped shifts after having had her request to do so refused. The claimant's account was she swapped at someone else's instigation

and with permission. Ms Olagbeyega looked into this and was unable to draw conclusions as to what had happened but the senior staff member involved confirmed to the claimant that Ms Heath had in any event not complained about the claimant to her in the way claimant had believed (p 114). In the event the underlying issue between the claimant and Ms Heath was resolved at mediation.

66. The email on page 126 dated 24 May 2019 was written about an incident on the preceding night shift. The claimant wanted Dr Essex to come and review her patient and write a plan. She first asked Dr Essex who did not come. She then spoke to the midwife in charge (Ms Harrison) who went to Dr Essex who again declined to come. Ms Harrison in her statement says she also received resistance and an abrupt manner from Dr Essex and that this was not unusual for her. She says Dr Essex was stressed and frustrated.
67. The claimant asked for a “fresh eyes” and that midwife agreed with the need for a review. The Claimant then spoke to a more senior midwife who went to see Dr Essex. As she did so she said “I will put my big girl’s panties on and get her to come and review”. Dr Essex did finally come to do a review. Ms Harrison in her written statement says when Dr Essex reviewed the patient she was reticent and challenging about the reason for review, she likely swore and used a rude tone. Her own recollection was that this confrontation was not easy.
68. Dr Essex perceived the above as her being hounded and, instead of reviewing the patient and if need be standing by her clinical view, she agreed to a c-section in circumstances when she was uncomfortable doing so. She said to the claimant “fucking tell me what to put down as an indication”. She took the consent form and slammed it on the desk. Dr Essex then apologised to Ms Harrison for the outburst but not to the claimant. The claimant then wrote the email on page 126. Dr Essex replied to the claimant apologising if she had upset her and asking to sit down and go through things properly to clear the air. She said she wanted a nice relationship with the claimant with no “bad vibes or misunderstandings”. She said she also wanted her to know how she was feeling during those times as she also found them difficult and upsetting (p129). The other Senior Midwife involved suggested a debrief and said it was a difficult night and they were all put under stress but it is not an excuse for poor relations. She apologised to the claimant for how she had felt during the shift and that she did not debrief with her at the time. She confirmed she wanted to work amicably. Ms Harrison likewise apologised and suggested a reflection and debrief with the support of management but in the end that did not get taken further. Ms Harrison apologised to the claimant when she told her she felt unsupported. She said she wished she could have supported her more but she also found the confrontation difficult. She says she did not condone the behaviour but also said it was not uncommon. We have given some weight to Ms Harrison’s evidence despite it being a written statement as we find it credible as it is critical of a consultant, which it would not be self serving to have invented.
69. Dr Essex in her account of this incident described the claimant as intimidating because she sent different people to see her and that she was intimidated into doing a c-section. We infer from her evidence that she would not do this again now, that she recognises that she should reviewed the patient and then stuck by her clinical view.

70. In late 2019 there was an incident when the claimant asked Naomi Harrison if she could leave early to fetch a family member from the airport. Ms Harrison agreed but then forgot and assigned the claimant to a patient. The claimant did not remind her at that time. Ms Harrison herself had left early. She apologised to the claimant when she remembered. The claimant accepted that apology at the time, even if she does not do so now.
71. We accept the claimant's evidence that there was an incident with Dr Crowe in which he shouted at her and said that she was the only midwife not capable of keeping contemporaneous notes. He accepts that he raised his voice. He accepts he was not happy with the claimant's note taking in respect of a particular patient believing she had done it on the CTG for too long, though he agrees it might be normal to do that for the final stages of delivery. He does not agree that it would be normal to do it on the CTG for so long and so it is likely he did say what the claimant said. The context was a difference of opinion between himself who had decided the action plan for the patient and the claimant as the autonomous midwife who is advocate for the patient. Ms Olagboyega was not as concerned about the claimant's conduct in this incident as Dr Crowe was, recognising that she is an experienced and autonomous practitioner. He raised the claimant's conduct with Ms Olagboyega the next day. She informed the claimant who said she was thinking of leaving and requested a reference. Ms Olagboyega organised for them both to have a catch up and coffee to move forward with a more conducive relationship. The claimant applied for a position elsewhere on 18 November 2019 (p 141) and a few other positions.
72. The meeting with Dr Crowe eventually happened on 29 November 2019. At that meeting both spoke heatedly initially but ended the meeting with a resolution. He apologised and the claimant accepted this cleared the air. The claimant confirmed that this was a professional disagreement and a one off involving Dr Crowe. If it was just that incident she would not have thought it was race discrimination. She does not equate every aggression with racism.
73. The claimant gave notice that she was leaving on 9 December 2019. Her email says nothing about the reason for leaving. We accept Ms Olagboyega's evidence that she communicated that she was leaving to work in a place with greater diversity. This is reflected on P 176 where it is noted that she felt she had to go to London. Ms Olagboyega also understood that the claimant was leaving having been suffering for a long time (p175) with respect to working relationships at the respondent. She said the claimant had been thinking of leaving for a long time, which we accept.
74. After the claimant had resigned, at the Christmas party, Ms Olagboyega was sitting next to a consultant who she describes as a BAME colleague better able to talk about discrimination than she would be. She discussed with him whether he believed there was race discrimination in the workplace in the context of the claimant leaving because of working relationships.
75. On the claimant's last day Ms Kathy Carr, a band 7 and Shift Coordinator on that shift, said the words alleged by the claimant. We accept the claimant's account

that this was in front of other people. The comment only makes sense said to an audience and there is a reference on page 175 to Ms Carr later realising it was not appropriate in front of colleagues. She herself has reflected and tried to understand why she said what she accepts was a joke in bad taste. She said she was embarrassed to have only just found out that the claimant was leaving. She said she wanted to say something light hearted but realised in the moment that this was not, though she did nothing in the moment to take it back or apologise. She believes upon reflection that the trigger could have been the poster on the inside of the changing room door that she had put up in response to actual thefts. There is a little more detail on page 175 that she said to Ms Olagboyega at the time, including that she thought the claimant had wanted a fuss of her leaving but Ms Carr thought she had removed herself from the team by then. She said there she found the Claimant difficult to communicate with.

76. The Claimant said she did not have a jokey kind of relationship with Ms Carr and we accept that.
77. The claimant prepared an exit statement dated 27 January 2020 (pp156-157) in which she referred to Ms Carr's comment as discrimination and prejudice. A reply from the Deputy Head of Midwifery suggests the matter was considered serious (p157). She then had an exit interview on 30 January 2020.
78. An HR Business Partner recorded in an email dated 14 February 2020 at page 160 that Ms Olagboyega had asked Ms Carr about the comment and recorded "[Ms Carr] confirms that she had talked to [the claimant] earlier in the shift about it being her last day- and says [the claimant] ignored her She did make the statement- but it was meant to be light hearted. She now realises her mistake. Not sure how we want to proceed- if we investigate I think it definitely needs to be someone outside of the department. But is that what she wants?".
79. The claimant chased feedback on 16 February putting particular emphasis on the complaint about Kathy Carr (p168). The response she received from Maria Knight on 18 February 2020 told the claimant what Ms Carr had said (that she had made the statement, it had meant to be light hearted and now realises her mistake), she said she was not sure if she was going to make a formal apology. She also said if the claimant did wish to proceed further with an investigation she would appoint someone outside the department to undertake this (page 164).
80. The claimant responded on 19 February expressing surprise that the decision whether or not to investigate was left with her. She said "If the Trust have zero tolerance to racism then it should act appropriately. About the Kathy Carr allegation she said: "My complaint against Kathy Carr is however a formal complaint because she never was a friend nor joked with me. Yes, I have had a few sarcastic remarks from her but I do not see what was funny in being portrayed a thief in front of my colleagues, patients and family members". She said the explanation was not good enough.
81. Maria Knight responded on 11 March 2020 confirming that the complaint about Kathy would be taken forward. She confirmed the matter was serious.

82. There was then a delay caused by the pandemic. The claimant chased feedback from her complaint again on 9 June 2020. Ms Knight replied saying it had not been forgotten but explaining how HR staff has been deployed to front line services during the pandemic. The claimant replied saying that it had been agreed the treatment was wrong and it was baffling why it was taking so long to know “the Trust’s response to such ill treatment of their BAME staff.” She said “even if I overlook everything else, I do not intend to overlook being embarrassed so [publicly] with false and baseless spiteful remark. The fact that [Kathy] Carr acts freely in such a manner goes without saying how she treats ethnic minorities. It’s been almost six months since this incident and my formal complaint but it still upsets me to think how I felt in front of her audience...”(p166). On 3 July 2020 in a further email the claimant repeated that she had been humiliated with a false accusation in front of an audience, querying whether it could be in jest (p173).
83. Ms Knight had a meeting with Ms Olagboyega and the Deputy Head of Midwifery on 6 July 2020. The minutes are in the form of the email on page 175 and record the following as being discussed:

“Kathy Carr

Thought [the claimant] wanted a fuss on her leaving but [Kathy Carr] felt she had removed herself from the team by then
[Kathy Carr] found [the claimant] difficult to communicate with, the claimant would prefer to go off and talk to Emmanuel (another BAME member of staff)
[Kathy Carr] has attended the unconscious bias training, reflected and said that she is sorry for her comment and recognises the inappropriateness of it
[Kathy Carr] did not deny making the comment, she said she had made it in jest but in hindsight realises it was inappropriate to make such a comment and in front of colleagues.
[Kathy Carr] is aware that this behaviour is not accepted as the “norm” by management and has stated that she will not do it again- if she does she knows management will take action under the disciplinary procedure (she has reflected and learned in accordance with the B&H /respect ethos...
[Ms Olagboyega and the Duputy Head of Midwifery] did not feel there would be any benefit in the two meeting.” (pp175-176)

84. The above response was then relayed to the claimant by email on 16 July 2020 as follows (page 179): “Kathy Carr- ...The Respect programme and B & H policy require the trust to make an employee aware of the impact of their actions and to give them the chance to demonstrate that they have learned and improved. Kathy has since attended unconscious bias training – as a result, she has again reflected on her comment and realises how inappropriate it was and insensitive to make such a comment, particularly in front of colleagues and she is sorry for this. She has stated she will not do so again, and is now very much aware of the expectation of management in relation to her behaviour and the consequences (i.e. disciplinary action) if she behaves like this again towards any member of staff”. Ms Carr gave evidence that it was not in fact true that she had attended unconscious bias training nor was it true that she had been warned of the potential of disciplinary

action in future. She has not ever had the unconscious bias training and the statement on p179 is completely untrue in that respect. There was one session of unconscious bias training following the recommendation in the earlier grievance brought by the claimant's colleague and Ms Carr did not attend it.

85. The claimant replied on 20 July 2020 saying she wanted an apology from Ms Carr for her unfair, discriminatory and insensitive behaviour.
86. The claimant then submitted her claim on 3 August 2020 and the HR action stopped.
87. We note the race champion recommended by the earlier grievance was never appointed.
88. Ms Knight came across as somewhat dismissive of the claimant's complaint in evidence and said she did not understand the claimant to link the complaint by Ms Carr to race but we find that both the claimant and the respondent (including Ms Knight) did at the time, with the claimant's repeated reference to it being discriminatory and the respondent's linking of their response to the unconscious bias training.
89. Somewhat unusually the claimant's evidence was that she did not perceive the acts complained of as discriminatory at the time but did so with hindsight when looking back at what happened.

Relevant law

Direct race discrimination

90. Section 13 Equality Act 2010 states that a person (A) discriminates against another (B) if because of race A treats B less favourably than A treats or would treat others. Section 23 provides that where a comparison is made for the purpose of section 13 there must be no material difference between the circumstances relating to each case.

Victimisation

91. Section 27 Equality Act 2010 states that a person A victimises a person B if A subjects B to a detriment because B does a protected act, which includes making an allegation that A or another person has contravened the Equality Act.

Burden of proof

92. Section 136 (2) provides that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person A contravened a provision of the Equality Act then the tribunal must hold that the contravention occurred unless A proves that A did not contravene the provision. This is known as the shifting burden of proof.

93. The respondent's representative referred us to the following legal principles in his skeleton argument:

"Something more than less favourable treatment is required to raise a prima facie case of direct discrimination in ***Madarassy v Nomura International [2007] ICR 867 CA***, Mummery LJ held:- "*The bare facts of a difference in status and a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*".

Likewise, unreasonable treatment is not sufficient to raise a prima facie case of direct discrimination. It is not enough for a Claimant to show that she has been treated badly to prove that she has suffered less favourable treatment. Nor is unreasonable treatment, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift. (See ***Glasgow City Council v Zafar [1988] ICR 120***.)"

Time limits

94. Proceedings may not be brought after the end of a period of three months (plus any extension by virtue of ACAS conciliation) from the date of the discriminatory act or such further period as the tribunal considers just and equitable (s23 Equality Act). Conduct extending over a period is treated as being done at the end of the period.

Discriminatory constructive dismissal

95. The claimant's representative referred the tribunal to the case of ***De Lacey v Wechseln Ltd t/a The Andrew Hill Salon [2021] IRLR 547*** in which it was stated: "*where there is a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory.*" In such a discriminatory constructive dismissal time runs from the date of the termination of employment upon the claimant accepting the repudiatory breach and not the discriminatory acts (***Nottinghamshire County Council v Meikle [2005] ICR 1***).

Conclusions

Did the respondent treat the claimant in the following ways:

In or around June 2018, Kelly Relf undermining the claimant's work in front of patients and other staff

96. We have accepted the claimant's evidence that there was an occasion around that time when Ms Relf told the claimant that she (the claimant) did not know what she

was doing as she was using a fetal ECG ST segment analysis (STAN) rather than a CTG. She then said that the claimant should “learn the right way to use the STAN”. When the claimant explained herself and asked her to leave her to look after the patient Ms Relf angrily left the room and returned to the midwives’ station where she discussed the claimant’s practice with other colleagues.

From in or around June 2018 until April 2019, Rachel Heath regularly allocating the heavier/more intense work to the claimant;

From in or around June 2018, Naomi Harrison allocating the heavier workload and high risk patients to the claimant while allocating lesser workloads to white midwives;

97. We do not find these allegations proven. There is insufficient evidence to support this assertion. The evidence does not show the claimant was consistently assigned the more difficult or high risk patients. The claimant produced one snap shot of the white board which was one moment on one night shift. We accept the respondent’s evidence that it does not show the claimant was given a disproportionately high workload on that occasion, and in any event neither Rachel Heath or Naomi Harrison were in charge on that occasion.

98. We accept the workload was allocated based on the coordinator’s assessment of the patient workload and the skills of the midwives. The claimant was perceived to be good at one to one with patients and not as able to multi task and not always as willing to help others. She also was known to insist on having her breaks. There would be other factors to consider such as who had a student and there was a particular midwife who tended to be assigned still births due to her skills and experience. We accept that the claimant would tend to stay with her patients and not be best placed to know what else was going on. As stated above the work in general is high risk and stressful and complications can arise over a shift.

99. The claimant refers to another doctor joking about which patient she would get as evidence to support her assertion but we accept he was known for doing that with everyone and it is not in itself evidence of the workload distribution.

From in or around June 2018, Naomi Harrison not permitting the claimant time to complete her notes before being allocated more work;

100. We find this is an aspect of the complaint about allocation of work and we have not found it proven that the claimant was given a heavier workload than colleagues or treated any worse than anyone else in respect of time given to complete notes. For the reasons set out above we do not find this allegation proven.

In or around June 2018 , Fay Chewter persistently asking the claimant not to go near her patients;

101. We accept Ms Chewter told the claimant she should not answer the buzzer for her patients. This account is confirmed in the contemporaneous documents in the account given on page 80 that she avoided contact with Ms Chewter’s patients as

Ms Chewter had requested. Ms Chewter said she looked after the women in her care and accepts it is something she could have said. She suggests she probably said it to other midwives but there is no evidence of this.

Later in 2018 Fay Chewter stating to the claimant that “nobody likes you or wants you here” and “go back to where you came from”;

102. We have accepted there was a further incident between Faye Chewter and the claimant around August 2018 when Faye Chewter told the claimant she did not like her. We accept she also said that nobody liked the claimant. This is corroborated by the claimant’s account nearer the time on page 80.

103. We have not accepted that Fay Chewter also said “go back to where you came from” for the reasons set out in the findings of fact above, including that the claimant did not put this allegation in her account to Ms Olagbeyega on page 80 and that she says she did not initially perceive this as a racist comment. We do not find it more likely than not that Ms Chewter said such a comment as if she had the claimant would have recognised that as a racist comment and it would have been in her account on page 80.

On 13th December 2018 Fay Chewter telling the claimant that her help was not needed when they worked together at QEQM;

104. We have accepted the claimant’s evidence that when on a shift together at QEQM Ms Chewter asked her why she was there and told her to leave as they did not need the claimant’s help. The claimant recorded that account on the same day (page 80) and we accept it.

105. Indeed unbeknownst to the claimant Ms Chewter says that the evening/night before as soon as she saw the claimant was also working at QEQM she thought “of all the people” to be working with and went to see the matron (who she did not know) and said “that midwife” and I don’t get on (referring to the claimant) and requested they be separated.

On 19th December 2018 Rachel Heath allocating longer breaks to white colleagues but not black colleagues (including the claimant);

106. We accept that on 19 December 2018 the claimant and her colleague had an hour break but white colleagues were able to have longer breaks.

In early 2019, Dr Essex saying to the claimant about a patient “she is not in fucking labour, I assessed her”;

107. We have accepted this occurred as set out at paragraphs 24-25 above.

On or around 28th March 2019 Naomi Harrison not allowing a member of staff to stay with the claimant when she was ill at work and went to A & E, in contrast to a white colleague (Rachel Heath) who was previously treated in the workplace and driven home by another colleague;

108. We have accepted, at paragraph 27 above, that on the 28 March 2019 the claimant fell ill at work and went with a colleague to A & E. As the ward became busier Ms Harrison called the staff member back to the ward. The claimant compares this situation to when Ms Heath was treated in the workplace and then driven home by a colleague.

On or around 3 April 2019 Rachel Heath complaining to more senior management when she assumed the claimant tried to change the workplace allocation to avoid working with her;

109. We have not found this occurred as the senior staff member involved confirmed to the claimant that Ms Heath had not complained about the claimant to her in the way claimant had believed (p 114).

On date unknown Dr Essex snapping at the claimant that she was too busy to see a patient because she was on the way to theatre;

110. We have accepted this occurred.

On 24 May 2019 Dr Essex failing to review a patient when requested to do so by the claimant and shouting at her "What the fuck do you want me to write down as indication for the c-section!"

On 24 May 2019 Naomi Harrison failing to intervene when Dr Essex verbally assaulted the claimant and used the F word;

111. On 24 May 2019 the claimant wanted Dr Essex to come and review her patient and write a plan. She first asked Dr Essex who did not come. She then spoke to the midwife in charge (Ms Harrison) who went to Dr Essex who again declined to come. The claimant asked for a "fresh eyes" and that midwife agreed with the need for a review. The Claimant then spoke to a more senior midwife who went to see Dr Essex. As she did so she said "I will put my big girl's panties on and get her to come and review". Dr Essex did finally come to do a review. When Dr Essex reviewed the patient she was reticent and challenging about the reason for review, she likely swore and used a rude tone. Dr Essex perceived the above as her being hounded and, instead of reviewing the patient and if need be standing by her clinical view, she agreed to a c-section in circumstances when she was uncomfortable doing so. She said to the claimant "fucking tell me what to put down as an indication". She took the consent form and slammed it on the desk. Ms Harrison apologised to the claimant when she told her she felt unsupported. She said she wished she could have supported her more but she also found the confrontation difficult.

Later in 2019 Naomi Harrison refusing the claimant permission to leave early whereas she had previously left early;

112. Ms Harrison did not refuse permission, In late 2019 there was an incident when the claimant asked Naomi Harrison if she could leave early to fetch a family member from the airport. Ms Harrison agreed but then forgot and assigned the claimant to a patient. The claimant did not remind her at that time. Ms Harrison herself had left early.

In late October 2019, Dr Ciaran Crowe shouting at the claimant that she was the only midwife not capable of keeping contemporaneous notes;

113. We accept the claimant's evidence that there was an incident with Dr Crowe in which he shouted at her and said that she was the only midwife not capable of keeping contemporaneous notes. The context was a difference of opinion between himself who had decided the action plan for the patient and the claimant as the autonomous midwife who is advocate for the patient.

On 25 January 2020, Kathy Carr stating to staff members "its Kemi's last day everyone check your bags" and repeating this in the hallway.

114. On the claimant's last day Ms Kathy Carr, a band 7 and Shift Coordinator on that shift, said the words alleged by the claimant. We accept the claimant's account that this was in front of other people. Ms Carr's evidence was that the trigger could have been the poster on the inside of the changing room door that she had put up in response to actual thefts.

Was any of the above conduct that we have found occurred less favourable treatment in comparison to a white midwife? The claimant relies on a hypothetical comparator save for allegations 1.10 and 1.15 where the claimant relies on Rachel Heath and Naomi Harrison respectively as the actual comparator.

Was any of the treatment done "because of" the Claimant's race.

Ms Relf's treatment in June 2018:

115. The claimant did not consider this an act of race discrimination at the time. Ms Relf accepts she was frosty to the claimant at that time because of her perception that the claimant was "fat shaming" Ms Bayat. Ms Gilmore gave evidence that she had to speak to Ms Relf more than once about rudeness to colleagues generally as at the time Ms Relf "had an attitude problem and...behaved like a moody teenager".

116. We find there is insufficient evidence to conclude that this incident was less favourable treatment. The evidence is that Ms Relf spoke to others rudely too.

117. Although Ms Relf was part of the group that treated the claimant badly over the Ms Bayat issue (see below) we do not consider we can draw an inference based

on this when the evidence is that she was also rude to other colleagues and so the less favourable treatment is not established.

Ms Chewter's treatment of the claimant:

118. Ms Chewter's treatment taken together involved asking the claimant to stay away from her patients, telling her she did not like her and no one liked her, and telling her to leave as her help was not needed when on a bank shift at QEQM (having unbeknownst to the claimant asked matron to separate them on that shift).
119. We find that this was less favourable treatment. There is no evidence of Ms Chewter treating others in this way (only that she **might** have asked others not to answer buzzers for her patients) and she said she tries to keep a quiet life, be professional and get on with the job, not drawing attention to herself.
120. We find on the balance of probability, based on the facts below, that the claimant's race was at least part of the reason for this treatment, consciously or unconsciously. If we are wrong about that we find that we could infer that was part of the reason based on the same facts, and we have not received an adequate explanation, and so we do so.
121. The facts we have based the above decisions on are as follows:
122. Ms Chewter's behaviour at QEQM on the bank shift was a very extreme reaction.
123. It was inconsistent with her own stated goals of keeping a quiet life, being professional and getting on with the job.
124. The way she spoke about the claimant as "that midwife" to a matron she had never met before.
125. Her account about how she felt about the claimant due to comments the claimant had said to Ms Bayat does not adequately explain such an extreme reaction to being on the same shift.
126. Ms Bayat's own relationship with the claimant was positive, notwithstanding the claimant had made some unwitting comments about food and/or weight to which Ms Bayat was particularly sensitive. Once the claimant realised she was apologetic and their relationship remained positive.
127. Ms Bayat was brought to the tribunal as a witness despite not having any allegations against her and gave an elaborate account of the "fat shaming" and her response which we have not accepted as a true reflection of their relationship. That was done as a defence/explanation to this allegation and we have found it neither adequate nor true.

Allocation of breaks on the 19 December 2018

128. We do not consider that the assignment of breaks on one particular occasion should be taken in isolation. It was just one snap shot. Looking at the issue of breaks overall it depended on the workload on the unit at any particular time. There were occasions when the ward was so busy midwives did not get the breaks that they were entitled to at all. There were other occasions when it was quieter when it was possible to be more flexible and give longer breaks. In terms of the overall pattern the claimant was treated preferentially as she was known to be more concerned to get her breaks than others who were more willing to forego breaks when necessary. She was therefore given breaks ahead of others if the time allowed. The respondent's evidence shows that other midwives did not get breaks at all on a number of occasions.
129. Even if we are required to look at the allocation of breaks on 19 December 2018 in isolation there is no evidence from which we could infer the reason for the claimant being limited to an hour whereas others were given longer later in the shift was the claimant's race, rather than the workload on the unit and her reputation as being more concerned to have her break and therefore being given it earlier in the shift when it was only possible to allow her an hour.

Dr Essex's treatment of the claimant

130. The evidence is that Dr Essex's treatment of the claimant was not less favourable than her treatment of others. Dr Essex at that time was known for swearing and accepts she regularly swore "in her sentences" and was spoken to about this as it was not considered acceptable and she had to work on it before she could become a consultant. Both senior white colleagues that were involved in the incident on 24 May 2019 also found Dr Essex confrontational and the situation difficult. Ms Harrison's evidence was that Dr Essex's behaviour on that occasion was not uncommon and was unlikely to be a personal attack.
131. The reason for Dr Essex's behaviour was the stress she was under at that stage of her career, being still in training but in overall charge of the service during a shift on a high risk and demanding ward, and working multiple nights in a row. On the particular occasion of 24 May 2019 she herself rightly or wrongly felt pressured into making a clinical decision which she knew she should not have made, and would not now make in the same circumstances.

28th March 2019 Naomi Harrison not allowing a member of staff to stay with the claimant when she was at A & E, calling her back to the ward

132. We do not find this was less favourable treatment. The colleague was called back as the ward became busy and we find that was normal behaviour. We do not consider this a comparable situation to when Ms Heath was driven home by a colleague. In the claimant's situation the colleague remained at the hospital. There is no evidence that this decision was because of race as opposed to balancing the

claimant's needs with the needs of the women on the labour ward once it became busy.

On 24 May 2019 Naomi Harrison failing to intervene when Dr Essex verbally assaulted the claimant and used the F word

133. Ms Harrison accepted that she did not intervene. She said she herself also found the confrontation difficult. There is no evidence her failure to intervene was due to the claimant's race.

Naomi Harrison refusing the claimant permission to leave early whereas she had previously left early

134. Ms Harrison had agreed to the claimant leaving early but then forgot and assigned a patient. The claimant said nothing. Once Ms Harrison remembered she apologized which at the time was accepted. There is nothing to suggest this was anything other than a mistake on Ms Harrison's part which could have happened to any midwife and there is no evidence to suggest it was done because of the claimant's race.

Dr Ciaran Crowe's shouting at the claimant that she was the only midwife not capable of keeping contemporaneous notes

135. The context was a difference of opinion between himself who had decided the action plan for the patient and the claimant as the autonomous midwife who is advocate for the patient. He believed the claimant had taken notes for too long on the CTG. The claimant confirmed that this was a professional disagreement and a one off involving Dr Crowe. She said if it was just that incident she would not have thought it was race discrimination. She does not equate every aggression with racism. It was in fact just a one off involving Dr Crowe. There is no evidence of a link between this and the other incidents we have found. There is no evidence that he would not have had a similar disagreement with a white midwife in the same circumstances. Nor is there any evidence to suggest the reason was the claimant's race. She herself does not offer a reason for thinking that it was due to her race and indeed says that looking at this incident in isolation she did not consider it due to her race.

Committing a repudiatory breach of contract of employment by reason of the discriminatory acts or omissions set out in the above paragraphs which entitled the claimant to resign and regard herself as dismissed (with notice) on 9 December 2019, with the termination date of 2 February 2020;

136. The only discriminatory act we have found that predated the claimant's decision to leave is the conduct of Ms Chewter back in 2018, a year before her decision to leave. Their relationship had improved in April 2019. We do not find the alleged last straw to be discriminatory.

137. The case was not really run on the basis of there being other actions (for example the conduct of Ms Relf, Dr Essex and the amount of work) that were not

discriminatory that nevertheless together amount to a breach of the term of mutual trust and confidence. It was based on there being a number of discriminatory acts that caused the resignation.

138. In any event we consider the one discriminatory act is so far removed from the rest of the alleged conduct in breach of trust and confidence in that it happened so long before and their relationship had since improved, that we cannot say that the actions of Ms Chewter sufficiently influenced the overall repudiatory breach (if indeed there was one) so as to render any constructive dismissal discriminatory overall.

On 25 January 2020, Kathy Carr stating to staff members “its Kemi’s last day everyone check your bags” and repeating this in the hallway.

139. This was an extremely offensive comment in the context of a black colleague leaving the workplace and the knowledge that there had been actual thefts from staff. The implication is clearly that colleagues should take care of their things as the claimant might be going to steal from colleagues on her last day. We accept the claimant’s account that this was said twice and in front of colleagues and others. Ms Carr says she was trying to be light hearted but she also in her later accounts made a number of negative statements about the claimant. She made reference to the claimant having already distanced herself from the team and to her being embarrassed that the claimant was leaving and she did not know. She felt the claimant had wanted a fuss made of her. She said the claimant had ignored her. She said the claimant was difficult to communicate with and preferred to talk to another “BAME” colleague. These comments suggest she was not feeling positive towards the claimant and there was a malign intent behind the comment. It is in the context that she did not have a jokey relationship with the claimant. It is not credible that this comment was made lightheartedly.

140. There is no suggestion that she has made such a comment about a white midwife. The respondent linked this comment to race and in their response said she had had unconscious bias training (which she has not). She has not been able to explain why she did make such an extremely offensive comment. We find it more likely than not that she was motivated consciously or unconsciously by the claimant’s race. If we are wrong about this then we do consider the above to be primary facts from which we could conclude the treatment was because of race, and we have not had an adequate explanation, so we do so find.

Victimisation Related to Race (s.27 EqA 2010)

141. The respondent accepts the Claimant did a protected act during her exit interview with Maria Knight on 30 January 2020 and her complaint of race discrimination. The particular complaint relied on is the complaint about Kathy Carr’s comment.

Was the Claimant subjected to a detriment in relation to the way in which the Claimant's complaint was addressed and the alleged failure to treat her allegations of race discrimination seriously?

142. We conclude that the claimant was subjected to detriments in the way that complaint was handled:

- 142.1 Ms Carr was not asked to given the claimant a direct apology, even though the claimant expressly requested one;
- 142.2 There was no formal investigation by someone outside the department as the respondent had indicated was required, despite the claimant making clear she did want an investigation and found the account being given to be inadequate;
- 142.3 The claimant was told that she could not raise a grievance as she had left (despite the indication that it ought to be looked at formally by someone outside the department);
- 142.4 There were substantial delays given how little action was actually taken by the respondent;
- 142.5 The claimant was given a false explanation of what the respondent had done in consequence of her complaint. She was told Ms Carr had done unconscious bias training and reflected on her actions and had been warned about the possibility of disciplinary action if she repeated such conduct. The only unconscious bias training organized had been in response to an earlier grievance by another colleague. Ms Carr had not even attended it. She was not warned about any possible disciplinary action. She had been spoken to in order to get her account and that was all.

If so, were the above detriments done because the Claimant had undertaken the protected act?

143. We find they were. We find that the above are primary facts from which we could conclude that the reason the investigation was handled as set out above was because of the nature of the complaint and that it involved race discrimination. We also take account that Ms Knight was dismissive in her evidence. She said she did not believe the claimant was raising an allegation of race discrimination, whereas the respondent had accepted in these proceedings that she was and it is evident from the documents that it was what she was saying and that that was understood by Ms Knight and the respondent generally at the time. We also take account that there were contradictions in how the matter was handled. The claimant was told there would be a formal investigation by someone outside the department but then it was handled very informally internally. She was told she could not bring a grievance. At one point it was considered that the matter should be reviewed and progressed by the Trust's Equality and Diversity Officer but then that is not how it was in fact handled.

144. Instead the claimant was given an untrue explanation of what had been done. No explanation was given for the untrue explanation given to the claimant or for why the matter was not handled in the way the respondent itself had identified would be appropriate for such a serious allegation. We question why the respondent would say this had happened when it had not. The intention must have been to persuade her the matter had been adequately handled when it had not so that the matter could be closed down. The untrue explanation involved seeking to persuade the claimant that unconscious bias had been addressed when it had not. This was obviously motivated by the nature of the complaint.

Jurisdiction / Limitation Issues

Are any of the claims before 25 January 2020 out of time?

145. The incidents with Fay Chewter are well out of time as the last one occurred on 13 December 2018.

If so, are any of the above claims brought within time, by virtue of conduct extending over a period of time pursuant to section 123(3)(a) of the EqA 2010?

146. We do not accept that there is a link between the treatment by Faye Chewter and Kathy Carr's treatment that would make them part of conduct extending over a period. In each case the context is different. Ms Chewter and the claimant's relationship had improved well before the comment from Ms Carr. There is no evidence that Ms Carr's behaviour was influenced by the "Ms Bayat issue" as Ms Chewter's was. The incidents are over a year apart.

Is it just and equitable to extend time for any acts of discrimination pre-dating 25 January 2020?

147. We heard no evidence upon which we could conclude that it would be just and equitable to extend time to include the actions of Ms Chewter.

148. Finally we note the following. This was an unusual case, with the claimant relying on matters which she did not believe were race discrimination at the time, but only with hindsight. The evidence we heard reflected a toxic and difficult working environment generally where the claimant and colleagues were shouted and sworn at over differences of professional opinion.

149. There was some evidence before us that there were wider issues beyond the specific allegations before us and which were possibly related to race. There were references to further issues related to the claimant's reasons for leaving. Indeed this prompted Ms Olagboyega to ask a consultant for his view as to whether there was race discrimination at the Christmas party. There is evidence of wider bullying of the claimant in the way the group of colleagues treated the claimant as a result of her comments to Ms Bayat and in respect to her clinical work generally. We've also heard that the previous grievance had highlighted risks in respect of unconscious bias and identified recommendations which were not actioned. The

race champion was not appointed and the unconscious bias training not sufficiently followed through. We also heard evidence of staff being wary of further such complaints. These matters were all concerning but we had to limit ourselves to the specific allegations brought by the claimant and which the respondent had been given an opportunity to address.

Employment Judge Corrigan
19 January 2023

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