



EMPLOYMENT TRIBUNALS

Claimant: Ms M Tafa

Respondent: Hull University Teaching Hospitals NHS Trust

Heard at: Hull

On: 7th to 11th August 2023

Before: Employment Judge Moxon
Ms Fisher
Mr Brewer

Representation

Claimant: In person

Respondent: Ms Rumble, counsel

JUDGMENT having been sent to the parties on 11th August 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

These reasons are supplied at the request of the Claimant.

Introduction

1. The Respondent hospital Trust is spread over two main sites: Castle Hill and Hull Royal Infirmary. The Claimant, Ms Melisa Tafa, mainly worked at Castle Hill but sometimes worked at Hull Royal. She commenced employment with the Respondent on 11th October 2021 as a Band 5 Radiographer with a six-month probationary period.
2. She submitted her resignation on 4th April 2022 and a grievance letter on 30th May 2022. Her employment ended on 4th June 2022, although she only worked six days after submitting her resignation on account of ill health.
3. By claim form, dated 16th August 2022, the Claimant commenced proceedings against the Respondent which were defended in a response, dated 26th October 2022, and an amended response, dated 20th December 2022.

4. The claims include claims for direct race discrimination and harassment. The Claimant is black and from an African background.

Factual background

5. The Claimant commenced employment with the Respondent on 11th October 2021 as a Band 5 Radiographer with a six-month probationary period.
6. The Respondent had a relocation policy which expressly states at paragraph 2.5.4 that it was discretionary. At paragraph 2.6 of the policy, it details that receipts have to be provided for reimbursement of expenses.
7. The Claimant completed an application form to recoup expenses on 16th November 2021 but did not specify details of the costs. She did not provide receipts or other evidence. The application was approved in principle by email on 31st January 2022. The Claimant subsequently told the Respondent that the expenses amounted to £2,102.40. During her oral evidence, she said that she had not provided receipts as they had not been available because she had purchased items over Facebook marketplace. She said that, despite the expenses accrued being £2,102.40, she should be awarded the maximum £4,000 permitted by the policy to compensate the fact that she accrued costs after she resigned from the employment.
8. The Claimant attended a probationary review on 20th October 2021 with her line manager, Alison Whittle, Section Manager for the General Department of Castel Hill Hospital. The meeting was positive, as demonstrated by the completed pro-forma that was signed by the Claimant.
9. The Claimant claims that in November or December 2021 she overheard a conversation between Ann Atkinson and Samantha Andrews, Support Workers, during which a doctor, Dr Gupta, was described as a "*stupid monkey*".
10. She claims that in January 2022 she overheard a conversation in which Jack Ward, Band 2 Clinical Imaging Support Worker, made reference to two members of staff from ethnic minority backgrounds, one of which being the Claimant's friend and fellow radiographer, Ms Cecilia Linus, and the fact that they had odour problems. The Claimant claims that during the conversation Mr Ward said: "*They all smell, don't they? It's probably because of the food they eat*". Ms Linus is black and from an African background.
11. It is not in dispute that Ms Linus had been spoken to about body odour. Ms Linus had found that the approach taken by her manager to have been unprofessional and upsetting. In WhatsApp conversations and WhatsApp voice recordings, she disclosed to the Claimant that she believed that she was being treated unfairly. Ms Linus also disclosed to the Claimant that she had been assaulted by another member of staff but that inadequate action had been taken by the Respondent. She disclosed feelings of being generally treated unfairly.
12. The Respondent had a BAME group which held 'Root out Racism' sessions. Notes from the meeting held on 25th and 26th November 2021 detail that overt

examples of racism in the department had included “*Support workers referring to a member of staff as a “monkey”*”. The Claimant said that she made the disclosure and that she had disclosed that she had had heard the comment “*stupid monkey*”.

13. The Claimant attended another probationary meeting with Ms Whittle on 11th February 2022. There is again a completed and signed pro-forma. The pro-forma includes a question about whether there are any quality or diversity matters and, in that section, the following was recorded:

“Melisa has raised concerns re diversity in the dept. Alison to speak with her line manager ie concerns”.

14. There is a dispute as to what was said during that conversation. Ms Whittle said that the Claimant had explained that she felt that Ms Linus had been treated unfairly and had also said that there had been a comment made by a colleague about Yorkshire Cricket Club. Ms Whittle said that the Claimant did not report any allegation of inappropriate comments such as those outlined above. The Claimant contends that she disclosed the comment purportedly made by Mr Ward.

15. On 5th March 2022, the Claimant contacted Ms Whittle by email to say that:

“I had to do fluoro screening in room 1, Even though I managed, I struggled a bit to remember the sequence of things and the controls. I think this is mostly because I didn't get this as part of my student training and when I finally got the hang of it post-qualifying, I haven't been rostered to be in there for close to three months. I was wondering if this could be considered for weeks to come, please.”

16. Ms Whittle was notified verbally by a nurse of an issue that had occurred on 7th March 2022 when the Claimant was working in the Intensive Care Unit and had been asked to take an x-ray of a patient and required two attempts to produce a diagnostic image. The nurse was concerned that this had caused overexposure to the patient. Ms Whittle investigated the matter and noted that there were a number of patients that day where images had been rejected. Ms Whittle explained in her witness statement:

“....we aim to get these images correct the first time not only from reducing radiation to the public but also to prevent moving the patient many times to readjust our x-ray plate and ruin the risk of dislodging of impeding the lines and tubes....It is important to keep radiation as low as possible...”

17. Ms Whittle also received a complaint from a Band 6 nurse, Stephen Kalladayil, who had witnessed the Claimant working in the trauma theatre with Dr Gopal. The complainant said that The Claimant was taking longer to achieve the correct positioning of the mobile image intensifier during trauma cases and Dr Gopal, who is normally patient, had become inpatient with her.

18. By email, dated 8th March 2022, Dr Tatikola emailed Claire Shepherdson, Operational Lead Radiographer, to express the following concerns about the Claimant's performance:

"It looks like both of them, we have discussed need some training and guidance. As there was an issue with getting the right images with lesser exposure. The specific radiographer for my 15 Feb list was very unsure of simple images. It made my list on 15 Feb significantly challenging, I have worked with her previously and she was the same. Simple AP/ Lateral were so difficult to get with her, I remember for Caudal we had so much of exposure as there was so much of flare and she couldn't understand our area of interest. I tried to teach her as much as I can, but with the busy lists it would be challenging, I appreciate if you can please look at supporting them with some mentored lists before they can do my list again please."

19. Ms Shepherdson forwarded the email to Ms Whittle.
20. Ms Shepherdson, as part of her regular quality assurance audits of a random sample of images taken by radiographers. She would not know the identity of the radiographers when looking at the images, and would only obtain details of the radiographer if she identified a problem.
21. Ms Whittle discussed the concerns with the Claimant on 11th March 2022 and told her that she would prepare an action plan. She told the Claimant that her probationary period would be extended. However, Ms Whittle explained to the Tribunal that this meant that the Claimant would be signed off at the end of the sixth month of the six-month probationary period, rather than on the fifth month as is often the case. It was arranged for the Claimant to spend some time with Ms Shepherdson for additional support.
22. Later that day, the Claimant spoke to Ms Whittle and asked who would be supervising her. Ms Whittle replied that the Claimant was not being subjected to supervision.
23. The Claimant told Ms Whittle that she believed she was being victimised for raising concerns during the 11th February 2022 probationary review. The Claimant made a similar complaint to HR on the same day.
24. The Claimant sent an email to Ms Whittle, at 11:56pm on 11th March 2022, again asking who would be supervising her the following day. The Claimant accepted during oral evidence that this was a Friday night and that she knew that Ms Whittle did not work weekends. Ms Whittle replied on 14th March 2022 to state:

"I did not say that you were being put under supervision but would be supported/mentored in pain lists so that we could look at how to assist you to improve your technique. I said that this may only take one or two sessions to give the extra support you may need. I said I would do the same in an orthopaedic trauma list too and also give support on cardiac mobile X-rays."

I had noted and said that the patients I reviewed that had been imaged on 7th March, some had taken two attempts to produce a diagnostic image so the aim was to assist you to try and achieve this in one attempt. As I said I am confident that you know what constitutes a diagnostic image but if we can achieve this with less radiation then this will benefit the patient. As discussed on Friday, I will write the notes of our meeting up with an action plan going forward. I also said that we would extend your probation period for a further month to ensure that this support is given to you. Your next day at CHH is Weds 16th March so I will discuss the objectives with you then and answer any further questions you may have."

25. Later on 14th March 2022 Ms Whittle sent the Claimant notes from their 11th March 2022 meeting.
26. A further meeting was arranged for 16th March 2022 but the Claimant asked for it to be arranged as she wanted "...to be in the right frame of mind".
27. Written objectives were drafted by Ms Whittle in an action plan dated 16th March 2022 and signed by Ms Whittle on 4th April 2022 and by the Claimant on 6th April 2022. The following two areas of support were identified:
 - a. *"Correct centring and positioning of the patient for mobile chest X-rays to prevent rotation ensuring all the area of interest in on the image and to produce a diagnostic image"; and*
 - b. *"Correct positioning of image intensifier in theatres including orthopaedic and pain, to produce diagnostic images achieving images requited by surgeons. Support given particularly in pain theatres and orthopaedic theatre".*
28. The support to be provided was detailed as *"observation and support by a senior radiographer"* and to *"revisit equipment checklist for image intensifiers"*. The date to be completed was 13th April 2022.
29. There is dispute as to when the Claimant was provided with a copy of the plan. Ms Whittle said that the intention had been to give it to her on the meeting on 16th March 2022 but that had been postponed upon request by the Claimant. Subsequently, the Claimant had time off sick and time working in Hull Royal. In any event, it was provided no later than 6th April 2022, the date it was signed for by the Claimant.
30. The observations, pursuant to the action plan, were undertaken with Ms Shepherdson on 16th and 17th March 2022 at Castle Hill. The Claimant claims that during those two days Ms Shepherdson stood on the other side of the room and shouted instructions at her. As a consequence, the Claimant became upset on the second day and expressed an intention to resign. She had a WhatsApp conversation with Ms Linus, during which they described Ms Shepherdson as *"cruel"* and a *"nightmare"*.
31. Ms Shepherdson told the Tribunal that she stood in the corner of the room so that she could observe the whole proceedings. She was not training the

Claimant but was observing. The only time she raised her voice was when another member of staff walked into the room without wearing appropriate PPE as the Claimant was about to take an image. Ms Shepherdson raised her voice to tell the Claimant not to take the image. She did this as otherwise the member of staff may have been exposed to a dangerous amount of radiation. The Claimant denies that the incident occurred.

32. The Claimant submitted her resignation by email on 4th April 2022. Her effective date of termination was 4th June 2022, although between her resignation letter and end of employment she was mostly signed off ill.
33. The Claimant worked at the Royal Infirmary on 12th April 2022. It is agreed by her and Beverly Tweed, Band 7 Operational Lead Radiographer, that the department was busy on that day. The Claimant was working in theatre for two hours and asked to have a break and was told by the consultant surgeon to return in ten minutes. She went to the staff room for a coffee and was accompanied by a student. Ms Tweed walked past and, from the doorway, queried why the Claimant was not working. The Claimant said that Ms Tweed shouted at her, which is denied. It is accepted that Ms Tweed said that the Claimant was not being paid to sit down. Ms Tweed accepts that she acted unprofessionally and was annoyed. The Claimant later spoke to Ms Tweed about the incident. There is dispute as to precisely what was said: The Claimant says that she was told that she had “*no common sense*”, whereas Ms Tweed says that she told her to “*use her common sense*”.
34. The Claimant submitted a grievance letter on 30th May 2022 in relation to various allegations, including those of discrimination.
35. The Respondent conducted an investigation, during which 14 people were interviewed, including the Claimant and Ms Linus. The Claimant was notified that her grievance had been dismissed on 30th October 2022.

Issues

36. The issues were agreed at a preliminary hearing on 24th January 2023 and confirmed at the outset of the final hearing.

“6. The issues the Tribunal will have to decide in order to determine those claims are as follows:

Time limits: victimisation, discrimination and harassment

6.1 Do the events complained of amount to conduct over a period ending on or after 28 April 2022?

6.2 If not, why were the complaints about things that happened before that date not brought within the time limit and, in any event, is it just and equitable to extend time for bringing the complaints?

Direct race discrimination

6.3 *Did the Respondent do the following things:*

6.3.1 *In March 2022 Claire Shepherdson shouted instructions to the Claimant from across the room on many occasions;2 and/or*

6.3.2 *On 12 April 2022, Beverley Tweed said that the Claimant had “no common sense” and that she was not “paying [her] to sit down” and shouted at the Claimant?*

6.4 *Was that less favourable treatment?*

The Tribunal will decide whether the Claimant was treated worse than a hypothetical white radiographer would have been treated. There must be no material difference between their circumstances and the Claimant’s.

6.5 *If so, was it because of race?*

Victimisation

6.6 *Did the Claimant do a protected act on 11 February 2022:*

6.6.1 *What did she say?*

6.6.2 *Did she allege, expressly or impliedly, that the Respondent or somebody else had breached the Equality Act 2010?*

6.7 *Did the Respondent subject the Claimant to detriment by:*

6.7.1 *Extending her probation;*

6.7.2 *Deliberately delaying in drawing up an action plan, to allow complaints about the Claimant to come forward; and/or*

6.7.3 *Excessive scrutiny of her work?*

6.8 *If so, was it because she did a protected act?*

Harassment

6.9 *Did the Respondent do the following things:*

6.9.1 *In November/December 2021 Samantha Andrew and Anne Atkinson referred to Dr Gupta as a “monkey,” which was overheard by the Claimant; and/or*

6.9.2 *On 26 January 2022, Jack Ward spoke about Cecilia Linus and Banny Azor and made comments to the effect,*

“They smell. It’s the food they eat,” which was overheard by the Claimant?

6.10 If so, was it unwanted conduct related to race?

6.11 Did the conduct have the purpose of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

6.12 If not, did it have that effect? The Tribunal will take into account the Claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Discriminatory constructive dismissal

6.13 Did the Respondent discriminate against, harass and/or victimise the Claimant as set out above?

6.14 If so, did that conduct amount, singly or cumulatively, to a fundamental breach of the implied term of mutual trust and confidence?

6.15 Did the Claimant resign in response and without affirming the contract?

Breach of contract

6.16 Did the Respondent breach a term of the Claimant’s contract of employment by failing to make a payment of £4,000 under the Respondent’s relocation expenses policy?

6.17 If so, what losses did that cause the Claimant?

Remedy

6.18 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant of discrimination, harassment or victimisation?

6.19 What should it recommend?

6.20 What financial losses has any discrimination, harassment or victimisation caused the Claimant?

6.21 What injury to feelings has any discrimination, harassment or victimisation caused the Claimant and how much compensation should be awarded for that?

6.22 Has any discrimination, harassment or victimisation caused the Claimant personal injury and how much compensation should be awarded for that?

6.23 Should interest be awarded? How much?"

The relevant law

37. By section 123 of the 2010 Act, a claim concerning work related discrimination, victimisation or harassment must be presented to the Tribunal within the period of three months beginning with the date of the act complained of. Conduct extending over a period is to be treated as done at the end of that period. Where there is a series of distinct acts, the time limit begins to run when each act is completed whereas if there is continuing discrimination, time only begins to run when the last act is completed.
38. The Tribunal has discretion to allow a claim to be brought within such other period as the Tribunal thinks just and equitable. It is for the Claimant to show that it is just and equitable to extend time. In considering whether to exercise discretion under section 123, all factors must be considered including in particular the length of and the reasons for the delay. It is necessary for the Tribunal to weigh the balance of prejudice between the parties.
39. Many of the Claimant's complaints arise under the Equality Act 2010. By section 136 of the 2010 Act, it is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could decide that an unlawful act of discrimination, victimisation or harassment had taken place. Should she do so, then the burden of proof shifts to the Respondent to prove on the balance of probabilities a non-discriminatory explanation.
40. The complaint of unfavourable treatment for something arising in consequence of race is brought pursuant to section 15 when read in conjunction with section 39(2) of the 2010 Act. The latter provides that an employer must not discriminate against an employee by subjecting the employee to detriment.
41. A claimant needs to establish that they have been unfavourably treated. The unfavourable treatment must then be shown to be because of race. It must have at least a significant, or more than a trivial, influence on the unfavourable treatment and so amount to an effective reason for it.
42. The complaint of victimisation is brought pursuant to sections 27 when read in conjunction with section 39(4). The latter provides that an employer must not victimise an employee by subjecting the employee to detriment.
43. To succeed in a claim of victimisation, the claimant must show that she was subjected to a detriment because she had done a protected act or because the employer believed that they had done or might do a protected act. The Tribunal must identify the real reason or the core reason for the treatment complained of. The protected act must have a significant influence upon the acts in question. It is not necessary for the protected act to be the primary cause of a detriment, so long as it is a significant factor. There is a need for some evidence

from which the Tribunal infers a causal link between the protected act and the detriment.

44. The complaint of harassment is brought pursuant to section 26 when read in conjunction with section 40 of the 2010 Act. The latter provides that an employer must not, in relation to employment, harass an employee.
45. There are three essential elements. Firstly, it must be shown that there was unwanted conduct. Secondly, the conduct needs to have a proscribed purpose or effect. Thirdly, the conduct must relate to a relevant protected characteristic.
46. The second limb of the statutory definition of harassment requires that the unwanted conduct in question has the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant. Conduct that is intended to have that effect will be unlawful even if it does not in fact have that effect. In order to constitute unlawful conduct under section 26(1) of the 2010 Act, the unwanted and offensive conduct must be "*related to a relevant protected characteristic.*"
47. In relation to constrictive dismissal, the test is as outlined by Lord Denning in *Western Excavation (ECC) Ltd v Sharp* 1978 ICR 221, CA, held:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed"

48. A breach of the implied contractual term of trust and confidence occurs where:

"...without reasonable and proper cause [the employer] conduct[s] itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee".

49. The authorities are clear that a failure to specify the reason for resignation in the letter of resignation, and the service of notice period, are not relevant considerations and do not defeat a claim for constructive dismissal.

The Hearing

50. The Claimant represented herself. The Tribunal had regard to the Equal Treatment Bench Book, particularly at paragraph 17 of the second on litigants in person, which states:

"The aim is to ensure that litigants in person understand what is going on and what is expected of them at all stages of the proceedings – before, during and after any attendances at a hearing. This means ensuring that:

- *The process is (or has been) explained to them in a manner that they can understand.*
 - *They have access to appropriate information (eg the rules, practice directions and guidelines – whether from publications or websites).*
 - *They are informed about what is expected of them in ample time for them to prepare and comply.*
 - *Wherever possible, they are given sufficient time for their particular needs.”*
51. The parties relied upon a 564-page bundle. The Claimant provided two additional documents relating to her witness, Ms Cecilia Linus. There was no objection to those documents being introduced late.
52. The Claimant provided a witness statement and also gave oral evidence. She sought to rely upon witness evidence of Ms Linus. A witness Order was granted by Employment Judge Ayres to secure the attendance of Ms Linus. She had been given permission by Regional Employment Judge Robertson to give evidence remotely via CVP on account of the fact that she was due to give birth on 5th August 2023.
53. Ms Linus did give birth, by caesarean section, on 5th August 2023. The Claimant maintained that she wished to rely on Ms Linus’ evidence but that she would not be available to give evidence until the Thursday morning (day 4 of 5) in order to allow her sufficient recovery time. The Tribunal proposed that Ms Linus be called out of turn. The Claimant would give evidence first, then the Respondent witnesses and then the Claimant would be permitted to re-open her case to call Ms Linus. Ms Rumble did not object to that course of action.
54. The Tribunal considered Ms Linus to be a vulnerable witness on account of the fact that she was giving evidence only five days after giving birth by caesarean section. She was therefore experiencing the emotional and physical effects of invasive surgery and having given birth. The Tribunal had at the forefront of its mind the Presidential Guidance: ‘Vulnerable parties and witnesses in Employment Tribunal Proceedings’ and the Equal Treatment Bench Book. It prioritised fairness to all parties together with ensuring that Ms Linus was enabled to give her best evidence.
55. It was noted that Ms Linus’ evidence was limited in that, whilst she could detail her own perceived treatment whilst working for the Respondent and give evidence about the general culture, she had not been a witness to any of the alleged mistreatment of the Claimant or the incidents that are alleged to have amounted to discrimination, harassment and victimisation.
56. To that extent, the Tribunal adjusted its procedure. The proposals were outlined to the parties and, after them being given time to seek instructions and to consider the matter, they agreed with the proposals. The following adjustments were therefore made:

- a. Ms Linus was permitted to give evidence 'out or turn', namely on the Thursday morning instead of the Tuesday when she would have otherwise have been due to give evidence;
- b. Ms Linus was permitted, as per the pre-hearing decision, to give evidence remotely. There was an indication from the Claimant that Ms Linus intended to attend the venue. The Tribunal considered that to be inappropriate under the circumstances. Ms Linus' evidence was not undermined in any way by giving evidence remotely. The Tribunal clerk spent time with Ms Linus the day prior to her giving evidence to ensure that she was able to use the equipment. The equipment worked without difficulty;
- c. Ms Linus was asked at the outset of her evidence whether she was willing and able to give evidence. She confirmed that she was;
- d. Ms Linus was reassured that she would not be giving evidence for long and that she should not hesitate to ask for a break, including if her baby requires her attention;
- e. Ms Linus had not provided a witness statement so was asked to confirm the truth of the accounts she had given orally to the Claimant, which had been recorded, transcribed and included in the bundle; contents of WhatsApp messages between herself and the Claimant; contents of an email that she had sent to the Respondent about her treatment; and her annotated investigation interview;
- f. Pre-agreed questions were asked by the Employment Judge, rather than the Claimant being subjected to questioning, including cross-examination, in the usual way;
- g. Employment Judge Moxon asked her the following questions that were pre-agreed between the parties:
 - i. To briefly sum up her view of the culture of the Respondent workplace in 2021 and 2022 and her perception of the treatment of staff from an African background;
 - ii. Whether she accepted that when she commenced her employment with the Respondent that she required additional training during her probationary period;
- h. Ms Linus was asked a third question by Employment Judge Moxon, arising from her initial answers, upon agreement between the parties:

"Do you believe that any of the incidents that you have told us about were on account of your African background?"
- i. The Claimant requested that Ms Linus be asked a further question about whether Ms Linus had ever disclosed to the Respondent that her laundry had not been done, resulting in her wearing a dirty work uniform. It was agreed by the parties that the question was appropriate and Employment Judge Moxon asked it on the Claimant's behalf; and

- j. Ms Rumble requested that Ms Linus be asked a further question about an answer given by Ms Linus during her investigation interview in which she had indicated that her relationship with Ms Shepherdson had improved. It was agreed by all parties that the question was appropriate and Employment Judge Moxon asked it on the Respondent's behalf.
57. The adjustments ensured that all questions that the parties wished to be asked of the vulnerable witness were asked and that the witness was not required to give evidence for any longer than necessary.
58. The Respondent relied upon written and oral evidence from the following witnesses:
- a. Alison Whittle;
 - b. Ann Wilkinson;
 - c. Samantha Andrew;
 - d. Jack Ward;
 - e. Claire Shepherdson; and
 - f. Beverley Tweed.
59. The Tribunal had the benefit of closing oral submissions by the parties. Ms Rumble's were supported by written submissions.

Findings of fact

Extension of time

60. The claim was presented over three months after the last allegation of victimisation, discrimination and harassment, all of which were said to have taken place no later than April 2022. The claim was expanded during a preliminary hearing on 29th November 2022 and allegations were raised on that occasion that fell significantly outside the time limit.
61. However, the Tribunal was satisfied that it was just and equitable to extend the time to bring the claim. The Tribunal took into account the fact that the Claimant was unrepresented and that she had experienced periods of illness since the alleged events. A grievance had been raised and investigated by the Respondent and so the presentation of the claim, and clarification of the issues in November 2022, was not the first time the Respondent was informed of the allegations.
62. There was no suggestion that the delay has prevented the Respondent from being able to rely upon witnesses or documents. In fact, little by way of prejudice was argued by the Respondent. It was suggested that recollections would have been affected but witnesses on behalf of the Respondent had been

able to provide clear accounts of what occurred or otherwise deny the allegations as not being consistent with how they would behave.

63. On the other hand, the prejudice of refusing the extension of time would have been significant to the Claimant, as she would have been denied the opportunity to pursue her claim.

Culture

64. The NHS benefits from a diverse workforce and the Respondent Trust is no different. However, within the radiography department of Castle Hill there were only two employees of an African background: the Claimant and Ms Linus, both of whom alleged that they were subjected to unfair treatment.
65. The Tribunal noted that, during the Respondent's investigation into the Claimant's grievance, a member of staff called Debbie Cook said that she had been told by a previous locum that there "*may*" be a little racism. Ms Cook had not heard any racial comments about Ms Linus but detailed that Ms Linus had a difficult time and presented as "*a beaten dog*" when returning to Hull Royal after working at Castle Hill. An email from Jason Clemmey, upon being sent the Claimant's grievance, detailed that: "*It strikes me of a similar international recruit who left recently – but this was in Josh's area*".
66. Other than Ms Cook, those interviewed during the investigation did not reference any examples or culture of racism.
67. Ms Linus expressed that she was treated unfairly whilst working for the Respondent, particularly by her line manager, Ms Bowering, and Ms Shepherdson. However, she did not claim that it was on account of her race. She was specifically asked this during her oral evidence and she replied that she would not say that it was because of race. She has not claimed that she heard racist comments whilst working for the Respondent.
68. The Tribunal noted that the Respondent has a Black and Minority Ethnic leadership network which the Claimant was permitted to attend during her working day. It has a Root out Racism scheme. Employees are asked, during probation reviews, whether they have any equality or diversity matters to raise. The Respondent has an equality and diversity manager and staff receive equality and diversity training.
69. The Tribunal was therefore satisfied that the Respondent, as an organisation, has anti-racism protocols. However, it noted the aforementioned unparticularised concerns alluded to by Ms Cook and Mr Clemmey and the fact that the only two employees from an African background within the radiography department at Castle Hill had raised concerns about their treatment. The Tribunal took care, throughout its deliberations, to consider the presence of prejudice by those employed by the Respondent, whether conscious or unconscious.

Breach of contract

70. The Claimant relocated to Hull to take employment with the Respondent and sought to benefit from the Trust's relocation policy.
71. The policy outlines that it is discretionary. It was never a term of the Claimant's contract. As it was not a term of her contract of employment, a failure to permit her to benefit from the policy cannot be considered a breach of that contract.
72. In any event, at paragraph 2.6, the policy provides that original receipts will be required for authorisation of payment.
73. The Claimant submitted a claim for expenses but did not outline the figure being claimed. It was approved on 31st January 2022 and the Tribunal accepted that this was in principle and that no specific amount had been claimed.
74. In any event, no receipts were ever provided by the Claimant, as accepted by her in her oral evidence. Whilst she said that this was not possible as she had purchased items over Facebook marketplace, she could nevertheless have obtained receipts from sellers, such as handwritten receipts.
75. She did not comply with the policy, which required the production of receipts, and therefore would not have qualified for recoupment of expenses even had it been a contractual term.
76. The claim for breach of contract therefore fails.

Harassment

77. The claim for harassment is based on two allegations:
 - a. The first is that in November / December 2021, the Claimant overheard a discussion between two colleagues, Ms Andrews and Ms Atkinson, during which one of the Trust's doctors, Dr Gupta, was referred to as a "*stupid monkey*";
 - b. The second is that on 26th or 27th January 2022, the Claimant overheard colleagues talking about the body odour of Ms Linus and another employee from an ethnic minority background and that one of her colleagues, Mr Ward, said: "*They all smell, don't they? It's probably because of the food they eat*"
78. In relation to the first allegation, Ms Andrews and Ms Atkinson denied having referred to Dr Gupta in such a manner and said that any reference would be to a "*cheeky monkey*" or "*little monkey*" and would have been in jest and as an outcome of him being "*naughty*" by failing to sign a relevant form. They both said that they have a good relationship with Dr Gupta and that they use phrases such as "*cheeky monkey*" and "*little monkey*" to others and it was not related to race.
79. The Tribunal was satisfied that the word "*stupid*" was not said.

80. In reaching that conclusion, the Tribunal noted that the Claimant was the only witness to have said that the phrase was used and that her account had been inconsistent. Within her witness statement she said that "*Samantha Andrew and Anne Atkinson referred to Dr Gupta as a "monkey"*". However, in her oral evidence she said that she believed that it had been Samantha Andrew.
81. The notes from a BAME meeting, which the Claimant attended on 25th November 2021, refer to someone having used the word "*monkey*" but does not include the word "*stupid*". Similarly, the Claimant did not include the word "*stupid*" within either her letter of grievance or her witness statement. It was, however, said during her investigation interview. She did not mention the incident at all within her claim form.
82. The Tribunal noted that there was no complaint raised by the Claimant until her grievance approximately six months later. There is no contemporaneous record or disclosure made to a manager.
83. The Claimant was inconsistent as to whether she raised the matter in her review on 11th February 2022. In her witness statement she did not say whether she raised the matter in that meeting. There is no reference to it within the review form. The Tribunal rejected the Claimant's assertion that she was not permitted to read the form before she signed it.
84. The Tribunal also noted that there is no reference to the alleged comment within the WhatsApp chats between the Claimant and Ms Linus. Whilst they also had face to face conversations, and so not everything discussed would be included in their electronic communications, it was nevertheless notable that, despite regular and lengthy WhatsApp chats about perceived unfairness, no reference was made to that allegation.
85. The Tribunal noted that the use of the phrase "*stupid monkey*" is liable to be discriminatory and offensive, and that the use of the word "*monkey*" in relation to any person from an ethnic minority is ill-advised on account of how the word has been used in society as a racial slur. However, the Tribunal accepted the account that any reference to "*monkey*" during the conversation between Ms Andrews and Ms Atkinson was in the context of "*cheeky monkey*" or "*little monkey*", was said in jest, and had no relation to Dr Gupta's actual or perceived race.
86. The Tribunal therefore did not accept that the comment was made as alleged and found that any comment that was made was not unwanted conduct related to race.
87. The allegation arising from January 2022 was denied by Mr Ward and he outlined that it is not the type of thing he would say, that it is a racist comment, and that if he heard anyone else say something similar, he would have "*called it out*" and reported it to a manager.
88. The Claimant said that she was not in the same room and could not see who was speaking but could hear and recognise Mr Ward's voice.

89. Again, there is no contemporaneous record of the conversation or any recent complaint. There is no reference to it within the WhatsApp conversation between the Claimant and Ms Linus, despite the fact that they otherwise did discuss the fact that Ms Linus had been spoken to about her body odour. Whilst the Claimant said that she raised the comment in the February 2022 review with Ms Whittle, the Tribunal noted that this was denied by Ms Whittle and is not referenced in the February 2022 review notes. There is no reference to the Claimant raising the matter elsewhere until her grievance letter four months later. She did not disclose who had made the comment until her investigation interview on 11th July 2022.
90. Further, given that she was in a different room to Mr Ward, and said that she could not see him, she could have misheard.
91. Whilst the Tribunal accepted that the evidence on the issue was finely balanced, it was not satisfied, on the balance of probabilities, that the comment was made.
92. The claim for harassment therefore fails

Victimisation

93. The Claimant claims that she made a protected disclosure on 11th February 2022 and that thereafter she was victimised in the following ways:
 - a. An extension of her probation;
 - b. Deliberately delaying drawing up an action plan to allow complaints about the Claimant to be forwarded; and
 - c. Excessive scrutiny of her work.
94. The Claimant attended a review with Ms Whittle on 11th February 2022. There is a signed note of that meeting and, as outlined above, the Tribunal was satisfied that the Claimant read the contents of that short document before signing. The record was not adequate as it did not provide detail of the assertions that the Claimant had made in relation to equality and diversity concerns. Ms Whittle stated that the only concerns raised were that “...*things had been said about the Yorkshire cricket*”. The Claimant also mentioned that Ms Linus had been spoken to about body odour.
95. The Tribunal was satisfied that the Claimant did not disclose the allegations of harassment. The Tribunal was satisfied that had she done so there would have been further action taken by the Respondent, especially given that Ms Whittle said that she was going to escalate any concerns to her manager, and the fact that the Respondent has a Root out Racism scheme and there was evidence that Ms Whittle had advised The Claimant to attend BAME meetings. The seriousness that the Respondent would have taken such allegations was evidenced by the investigation undertaken following the Claimant’s grievance, during which 14 employees were interviewed.

96. Further, the Tribunal was satisfied that, had the Claimant raised the issues and found that they were ignored, she would have raised a grievance far sooner than over 3 ½ months later.
97. The Tribunal was satisfied that raising, under the subject of equality and diversity matters, that comments had been made about Yorkshire Cricket Club, at a time when there was a probe of institutional racism at that club, was sufficient to be considered a protected disclosure.
98. Thereafter, concerns were raised about some aspects of the Claimant's performance.
99. An ICU nurse told Ms Whittle verbally, on 7th March 2022, that the Claimant may need support with positioning of patients. They said that when they worked together there was an issue which resulted in a patient requiring a repeat image. Ms Whittle investigated the matter and found that on that day some of the Claimant's patients had required a repeat image. Another nurse communicated a concern to Ms Whittle that a doctor had become impatient with the Claimant as she had been unable to get the position of the image intensifier to where he wanted. That nurse queried whether the Claimant required additional support.
100. An email was sent to Ms Shepherdson by Dr Tatikola, on 8th March 2022, to say that there had been an issue with the Claimant "*getting the right images with less exposure*". Dr Tatikola suggested that the Claimant be provided with support and mentoring.
101. The Tribunal was satisfied that this feedback had to be taken seriously given that overexposure to radiation is potentially harmful. Having to repeat images increases the level of exposure.
102. Ms Whittle met with the Claimant on 11th March 2022 to discuss the issues and to suggest that the Claimant would benefit from support, including a couple of sessions with Ms Shepherdson.
103. The Tribunal accepted Ms Whittle's account of the 11th March 2022 meeting and noted her written account that she sent to the Claimant on 14th March 2022. The Tribunal accepted that Ms Whittle told the Claimant that she was generally doing well and that there were just those identified areas that required development. The Tribunal was satisfied that Ms Whittle did not tell the Claimant that she would be under supervision and that she reiterated this to the Claimant in person later in the day, when it was queried by the Claimant, within the written notes of the meeting and within an email on 14th March 2022.
104. The Tribunal accepted that there was a miscommunication as the Claimant was told that her probation was to be extended, whereas, in fact, the decision was made not to sign her off on month five but to sign her off at the end of the six-month period. As such, the plan was not to extend her six-month probationary period.

105. The Tribunal accepted that the Claimant was disappointed to have learnt of the feedback indicating that she required support, and was upset as a consequence of the miscommunication leading her to believe that her probationary period was to be extended. However, her reaction was disproportionate. She had to be told on numerous occasions that she was not being placed under supervision. She failed to acknowledge that she had been told that generally she was performing well. She told Ms Whittle and HR that she felt victimised.
106. The Tribunal noted that the Respondent's investigator found that Ms Whittle's actions in respect of the probationary period were a "*slight deviation from the Trust policy*" however it went on to accept that it was intended to be a supportive measure. The Tribunal agreed with that conclusion.
107. The Tribunal found as a fact that Ms Whittle's actions were appropriate, proportionate and as a direct consequence of the feedback received by nurses and a doctor which had identified a discrete area for development that, if not addressed, could result in a risk to patient safety.
108. The Tribunal considered that Ms Whittle's actions were a suitable response to the issues raised and were as a direct consequence of those issues and unconnected to any disclosures made by the Claimant on 11th February 2022.
109. An action plan was produced by Ms Whittle which detailed that the areas of support required were radiographic techniques and that the Claimant required observation and support from a senior radiographer. It detailed that it was expected that the support would be completed by 13th April 2022.
110. The Tribunal did not accept that there was unreasonable delay in the provision of the action plan. The discussion between Ms Whittle and the Claimant was on Friday 11th March 2022 and Ms Whittle was not working over the weekend. The Tribunal accepted that, whilst signed by Ms Whittle on 4th April 2022, it was prepared on 16th March 2022, as dated on the document itself, and the intention was to give it to the Claimant on that day. A meeting was arranged to do so but the Claimant asked to delay that meeting. There were then periods of absence and days where the Claimant was working at Hull Royal instead of Castle Hill.
111. There was some dispute as to whether the plan was given to the Claimant prior to 4th April 2022 but, in any event, the Tribunal did not find that this was an unreasonable delay and, regardless of the actual day it was provided, the Claimant was already aware of the support she was being given and had been provided with that support by Ms Shepherdson on 16th and 17th March 2022.
112. The Tribunal rejected the suggestion that there was another motive to any delay in providing the plan to the Claimant or that it was associated with any disclosures made in the 11th February 2022 meeting.
113. The Tribunal accepted that the work of radiographers is scrutinised. For obvious reasons, the area of practice is highly regulated. There must be safety measures and checks and balances to ensure that patients are not overexposed to harmful radiation. It was therefore appropriate and necessary

for Ms Shepherdson, as operational lead, to undertake regular quality assurance audits. Further, those audits related to the whole department. The Tribunal accepted that she would take images from each day and, only if there were any areas of concern, would she then identify who the radiographer was responsible for the image. Similarly, it was appropriate and necessary for Ms Whittle to scrutinise the Claimant's images upon having received the feedback outlined above.

114. The Tribunal did not accept that there was excessive scrutiny of the Claimant's work or that the scrutiny undertaken was associated with any disclosures by the Claimant in the 11th February 2022 meeting.

115. The claim of victimisation therefore fails.

Direct race discrimination

116. The Claimant alleges that she was directly discriminated against on two occasions:

- a. On 16th and 17th March 2022 by Ms Shepherdson who shouted instructions to her from across the room on many occasions; and
- b. On 12th April 2022 by Ms Tweed who shouted at the Claimant and told her that she had "*no common sense*" and that she was not being paid to sit down.

117. Pursuant to the identified area of development, the Claimant spent two days with Ms Shepherdson. Ms Shepherdson stood in the corner of the room rather than beside the Claimant whilst the Claimant was working. The Tribunal accepted that this was because Ms Shepherdson was not training the Claimant but was observing and giving advice where necessary. Standing in the corner of the room allowed her to observe everything occurring in the room. That approach was appropriate and consistent with the objectives of the development required, as outlined within Ms Whittle's written notes arising from the 11th March 2022 meeting and the action plan.

118. The Tribunal did not accept that Ms Shepherdson shouted instructions to the Claimant. The claim is fundamentally undermined by the Claimant's failure to provide examples of anything that was shouted. The Tribunal accepted Ms Shepherdson's evidence that the only time she raised her voice was to prevent the Claimant commencing imaging when another member of staff entered the room without wearing appropriate protective equipment. This was to prevent that staff member from being exposed to radiation. The Tribunal found that this was entirely appropriate in the circumstances.

119. The Tribunal accepted Ms Shepherdson's written evidence that she expects high standards from her staff. The Tribunal accepted that this may result in her appearing critical and demanding to those that she is training or observing, and that appeared to have been the experience of both the Claimant and Ms Linus. However, the Tribunal accepted that this was necessary to ensure high

standards and patient safety. It accepted Ms Shepherdson's oral evidence that she also identified areas of practice that were done well.

120. The Tribunal was satisfied that Ms Shepherdson did not act inappropriately towards the Claimant at any stage or that she treated her any differently than she would a white radiographer or a radiographer not from an African background.
121. The incident on 12th April 2022 occurred when the Claimant was assisting at Hull Royal. The Tribunal accepted Ms Tweed's uncontested evidence that on that day they were very short staffed and needed as much help as possible from all staff.
122. The Claimant was allocated to a theatre and was not permitted by the clinician to leave, save for a ten-minute break. She went to the staff room for a break and a coffee. The Tribunal was satisfied that this was appropriate and that it would have been unreasonable to expect her to have spent the ten minutes looking for other work.
123. Whilst she was sitting in the staff room, the Claimant was seen by Ms Tweed who was walking past. From the doorway to the staff room Ms Tweed confronted the Claimant and said that she was not being paid to sit down and should have sought additional work.
124. The Tribunal was satisfied that, had Ms Tweed instead calmly sought to clarify the situation with the Claimant, she would have appreciated that the Claimant had not done anything wrong and was following instructions.
125. Ms Tweed denied shouting but candidly accepted that she was annoyed, authoritative, direct and that addressing the Claimant in that manner in the presence of others was not professional. She accepted that, later in the day, when the Claimant approached her to discuss the earlier incident, she told the Claimant that she should have used her common sense to seek additional work.
126. The Tribunal did not accept that Ms Tweed shouted but accepted that, given she was not in the staffroom but in the doorway, she probably did raise her voice and the Claimant may have perceived it as shouting. The Tribunal found that she did not tell the Claimant in the later conversation that the Claimant had no common sense, but accepted that she told her that she should have used her common sense.
127. In any event, Ms Tweed's behaviour towards the Claimant was inappropriate and unprofessional. She should have spoken privately with the Claimant to have established the situation rather than reprimanding her in the presence of others. It was not appropriate for her to later accuse the Claimant of not using common sense.
128. However, the Tribunal found as a fact that her actions were that of a harassed lead radiographer working in a busy and particularly short-staffed NHS department where she and others had not taken a break that morning and that

she did not treat the Claimant any differently than she would a white radiographer or a radiographer not from an African background.

129. The claim for direct discrimination therefore fails.

Discriminatory constructive dismissal

130. This claim could only succeed upon there being findings of harassment, victimisation and / or discrimination. In light of the Tribunal's dismissal of those matters, it follows that the claim for discriminatory constructive dismissal must also fail.

Conclusion

131. The claims pursued by the Claimant, as outlined in the list of issues, are all dismissed. That concludes the case.

Employment Judge Moxon

Date: 7 September 2023

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.