EMPLOYMENT TRIBUNALS

Claimant: Dr Suad Abdi-Rahman Hirsi-Farah

Respondent: Birmingham Women's and Children's NHS Foundation Trust

Held at Birmingham by CVP **ON:** 22, 23, 24, 25 and 26 May 2023

BEFORE: Employment Judge Dean
Mrs M Howard
Mr R Virdee

REPRESENTATION:

Claimant: Dr Suad Abdi-Rahaman Hirsi-Farah
Respondent: Brimingham Women's and Children's NHS Foundation Trust

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's complaints of direct discrimination because of race in breach of s13 of the Equality Act 2010 which occurred on or before 23 September 2020 [issues 2.2.1, 2.2.2. 2.2.3, 2.2.6 and 2.2.9] are not presented in the time required by s123 of the Equality Act 2010 and, it not being just and equitable to extend time, the tribunal does not have jurisdiction to entertain them.
2. The claimant's timely complaints of unlawful direct discrimination in breach of section 13 of the Equality Act 2010 are not well founded and are dismissed.
3. The claimant's complaints of unlawful deduction from pay contrary to section 13 of the Employment Rights Act 1996 and in Breach of Contract are not well founded and are dismissed.

REASONS

Background

1. The claimant was employed by the respondent, an NHS Foundation Trust, as a Locum Obstetrics and Gynaecology Consultant, from 23 March 2020 until 23

September, on a fixed term basis. Early conciliation started on 13 December 2020 and ended on 24 January 2021. The claim form was presented on 22 February 2021.

2. The claim is about the treatment of the claimant during her time working for the respondent, and whether the claimant was treated differently to her colleagues because of her race. She also claims that she was not paid for certain programmed activities ("PA's") that she carried out. The respondent's defence is that the claimant was not treated less favourably because of her race and, to the extent that some of the matters complained about by the claimant did arise, these were caused by the COVID-19 pandemic. The respondent says that the claimant has been paid in full for the PAs that she carried out and that in fact she carried out fewer PAs that she has alleged and so if anything was overpaid by the respondent.

Issues

3. The issues that we are required to determine have been agreed to be limited to the following:

Time limits

4. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 14 September 2020 may not have been brought in time.

1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.1.2 If not, was there conduct extending over a period?
1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.1.4.1 Why were the complaints not made to the Tribunal in time?
1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Direct race discrimination** (Equality Act 2010 section 13)
2.1 The claimant describes herself as Black African.
2.2 Did the respondent do the following things:
2.2.1 During the COVID-19 pandemic, between 6 April 2020 and 3 May 2020, allocate the claimant more patient facing sessions which made her rota more intense than those who were in a similar contract and had the same experience? The claimant names Dr Sushma Gupta (Asian) and Dr Fidan Bayli (non-European white) as comparators.
2.2.2 On the claimant commencing employment with the respondent on 23 March 2020, not afford the claimant an induction or an introduction to

peers or staff and not do a cursory welcome message to the unit? The claimant names Dr Aisha Janjua (Asian) as a comparator.

2.2.3 On 23 April 2020, deny the claimant the consultant on-call room which was instead given to another consultant, Dr Aisha Janjua? The claimant names Dr Aisha Janjua (Asian) as a comparator.

2.2.4 Between 23 March 2020 and 23 September 2020, not provide the claimant with a job plan or office? The claimant names Dr Sushma Gupta (Asian) and Dr Jessica Davis (white British) and Dr Aisha Janjua (Asian) as comparators.

2.2.5 Not provide the claimant with ambulatory gynaecology sessions throughout her time with the respondent (between 23 March 2020 and 23 September 2020)? The claimant names Dr Fidan Bayli (non-European white) and Dr Sushma Gupta (Asian) as comparators.

2.2.6 On 10 July 2020, Dr Pretlove forced the claimant to cover Dr Caroline Fox's labour ward session so Dr Fox could take a day off? The claimant relies on a hypothetical comparator.

2.2.7 Allocate the claimant more on-calls than all of the other consultants (both fixed term and permanent) during her employment between 23 March 2020 and 23 September 2020? The claimant says that there were 25 consultants in addition to herself, increasing to 27 in addition to herself during her employment, and the comparators named above were consultants. The claimant says that she was the only Black African consultant.

2.2.8 Between 23 March 2020 and 23 September 2020, fail to give the claimant the same informal and formal support as other staff in the same line of work? The claimant names Dr Sushma Gupta (Asian) and Dr Fidan Bayli (non-European white) as comparators.

2.2.9 On 28 June 2020 stating on an email that the claimant was to move to a new slot on the rolling rota because she was a locum however the email did not explain how this aligned with her contract of employment? The claimant names Dr Sushma Gupta (Asian) and Dr Fidan Bayli (non-European white) as comparators.

2.2.10 Fail to provide the claimant with an office and allocate time to do her admin work after the official time throughout her employment between 23 March 2020 and 23 September 2020? The claimant names Dr Sushma Gupta (Asian) and Dr Fidan Bayli (non-European white) as comparators.

2.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant says she was treated worse than the comparators named above.

2.4 If so, was it because of race?

2.5 Did the respondent's treatment amount to a detriment?

3. **Remedy for discrimination or victimisation**

3.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
3.2 What financial losses has the discrimination caused the claimant?
3.3 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
3.4 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
3.5 Should interest be awarded? How much?

4. **Unauthorised deductions and Breach of Contract**

4.1 The claimant alleges that she is owed £35,776 in relation to unpaid PAs. The claimant alleges that the respondent has not taken into account the job that the claimant was doing. The claimant was employed to do gynaecology and the number of PAs that were allocated for on calls was 0.75, when in fact she did all her on calls apart from 5 in obstetrics (which required being on call for 24 hours) which means that the PAs is 2.2.
4.2 Were the wages paid to the claimant throughout her employment less than the wages she should have been paid, because of the failure to pay PAs as alleged above?
4.3 Was any deduction required or authorised by statute?
4.4 Was any deduction required or authorised by a written term of the contract?
4.5 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
4.6 Did the claimant agree in writing to the deduction before it was made?
4.7 How much is the claimant owed?

Breach of Contract

4.8 Did this claim arise or was it outstanding when the claimant's employment ended?
4.9 Did the respondent fail to pay the claimant the full amount due in respect of PAs as outlined in 4.1 above?
4.10 Was that a breach of contract?
4.11 How much should the claimant be awarded as damages?

The Law

5. The complaint of Unlawful discrimination is limited to that of Direct Discrimination. The law to which we have addressed our minds is that contained in the Equality Act 2010 ("EA 10") in particular in relation to the protected characteristics of Race of Direct Discrimination s13.

6. It should be borne in mind that the legislative intention behind the EA10 was to harmonise the previous legislation and to modernise the language used. Therefore, in general terms, the intention was not to change how the law operated unless the harmonisation involved codifying case law or providing additional protection in

respect of a particular protected characteristic, in line with that which had previously been afforded to persons with other protected characteristics.

7. Because of that, much of the case law applicable under the SDA or RRA is relevant to how the provisions of the EA10 are to be interpreted and applied.

8. Sections 39 and 40 of the EA10 prohibit unlawful discrimination against employees in the field of work.

9. Section 39(2) provides that:

> "An employer (A) must not discriminate against an employee of A's (B)—
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment."

10. Section 120 EA10 confers jurisdiction on an Employment Tribunal to determine complaints relating to the field of work.

11. Section 136 of the EA10 provides that:

> *"if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred".*

This provision reverses the burden of proof if there is a prima facie case of discrimination, harassment, victimisation or failure to make reasonable adjustments. The courts have provided detailed guidance on the circumstances in which the burden reverses Barton v Investec [2003] IRlR 332 EAT as approved and modified by the Court of Appeal in Igen v Wong [2005] IRLR 258 CA but in most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred. This approach has been further and more recently approved in Hewage v Grampian Health Board [2012] UKSC 37 and Efobi v Royal Mail Group Ltd [2021] UKSC 33.

12. Section 123 of the EA10 concerns time limits. It provides:

> *"(1) Proceedings on a complaint within section 120 may not be brought after the end of—*

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

Direct discrimination

13. Direct discrimination is defined in section 13of the EA10 as "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

14. Section 23EA provides:
    (1) "On a comparison of cases for the purposes of section 13, 14, and 19 there must be no material difference between the circumstances relating to each case."
15. In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was. By reference to Nagarajan v London Regional Transport [1999] IRLR 572 HL In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

16. If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial. By reference to Nagarajan and also Igen v Wong [2005] IRLR 258 CA

17. Direct evidence of discrimination is rare, and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts, then the second stage is

engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination. the Igen test

18. The explanation for the less favourable treatment does not have to be a reasonable one By reference to Zafar v Glasgow City Council [1998] IRLR 36 HL. In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation. By reference to Bahl v Law Society [2004] IRLR 799 CA. If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

19. It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test. The employee is not prejudiced by that approach, but the employer may be, because the Employment Tribunal is acting on the assumption that the first hurdle has been crossed by the employee. By reference to Brown v London Borough of Croydon [2007] IRLR 259 CA

20. Madarassy v Nomura [2007] IRLR 247 predates the Equality Act 2010 but it is considered as the seminal case for the approach for employment tribunals on when the evidential burden will shift to an employer to prove that its acts were not discriminatory. Lord Justice Mummery stated as follows: *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

21. It is incumbent on a Employment Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are. By reference to Anya v University of Oxford [2001] IRLR 377 CA

22. It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was By reference to

Shamoon However, as the EAT noted (in Ladele) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator. By reference to Watt (formerly Carter) v Ahsan [2008] ICR 82 EAT

23. If the Employment Tribunal does identify a comparator for the purpose of determining whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions were made. The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the "reason why" question) See for example Shamoon and Nagarajan v London Regional Transport[199] IRLR 572 HL.

24. In considering what is less favourable treatment it is not enough to assert only that there is a particular treatment that is considered by them to be disadvantageous and it is for the tribunal to decide if the treatment is capable of amounting to less favourable treatment. The case law for determining what is less favourable treatment should not however be too onerous and the tribunal should not disregard the perception of the claimant. R v Birmingham City Council ex Parte Equal Opportunities Commission [1989]AC1155, Home Office v Saunders [2006] ICR 318.

25. Trivial differences in treatment may be disregarded on the principle that de minimis non curat lex Peake v Automotive Products Ltd [1978]QB 233 ad explained in Ministry of Defence v Jerimiah [1979] IRLR 436.

Jurisdiction – time limits and continuing acts

26. The law provides that in respect of discrimination claims and detriment claims, if there is a continuing course of conduct it is to be treated as an act extending over a period. Time runs from the end of that period. The focus of the Tribunal's enquiry must be on the substance of the complaint that the respondent was responsible for an ongoing state of affairs in which the claimant was less favourably treated. The burden of proof is on the claimant to prove, either by direct evidence or by inference from primary facts, that the alleged acts of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs see Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA.

27. If any of the complaints were not in time, the Employment Tribunal must consider whether there is nevertheless jurisdiction to hear them. In discrimination cases the test is whether it is just and equitable to allow the claims to be brought.
28. The statutory wording of section 123 of the EA10 is slightly different than in the SDA and RRA and, arguably, may be wider. However, for these purposes, we have assumed that the test it the same and that the well-established principles apply.
29. When deciding whether it is just and equitable for a claim to be brought, the Employment Tribunal's discretion is wide and any factor that appears to be relevant can be considered. However, time limits should be exercised strictly and the Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to do so. The exercise of discretion is therefore the exception rather than the rule Robertson v Bexley Community Centre [2003] IRLR 434 . The guidance provides:

    "An Employment Tribunal has a very wide discretion in deciding whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However, time limits are exercised strictly in employment cases. When tribunals consider their discretion to consider a claim out of time of just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise discretion. On the contrary, tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time. The exercise of this discretion is thus the exception rather than the rule."

30. Case law provides that consideration of the factors set out in section 33 of the Limitation Act 1980 may be of assistance, though its requirements are relevant in considering actions relating to personal injuries and death and while a useful check list should not inhibiting the wide discretion of the Employment Tribunal. The Employment Tribunal should have regard to all the circumstances of the case, and in particular to the following:
    a. the length and reasons for the delay;
    b. the extent to which the cogency of the evidence is likely to be affected by the delay;
    c. the steps taken by the claimant to obtain professional advice once he or she knew of the possibility of taking action.

    Of particular import for an Employment Tribunal considering the exercise of it's discretion will be the length and reasons for any delay and whether delay prejudiced the respondent for example in preventing or inhibiting its investigation of the claim while matters are fresh. The length of and reason for the claimant not complying with the primary time limit are identified as of particular importance in determining whether it is just and equitable to extend time and it is always necessary for a tribunal to make some finding about the reason for the delay in starting a claim. Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

31. In addition, when deciding whether to exercise its just and equitable discretion, the Employment Tribunal must consider the prejudice which each party would suffer as a result of the decision to be made (sometimes referred to as the balance of hardship test) British Coal Corporation v Keeble [1997] IRLR 336 EAT.

32. Additionally, the authorities say that the pursuit of internal proceedings is one factor to be taken into account. However, the fact that a Claimant defers presenting a claim while awaiting the outcome of an internal appeal process does not normally constitute a sufficient ground for the delay see Apelogun-Gabriels v Lambeth London Borough [2002] ICR 713.

Unlawful deduction from wages/ Breach of contract

33. Section 13 Employment Rights Act provides:

> "(1) An employer shall not make a deduction from wages of a worker employed by him unless-
> (a) The deduction is required or authorized to be made by virtue of a statutory provision or relevant provision of the worker's contract, or
> (b) The worker has previously signified in writing his agreement or consent to the making of the deduction."

Evidence

34. At the start of the first day of the hearing, having confirmed to the parties the documents that had been provided to the Tribunal Mr Ludlow on behalf of the respondent referred the panel to a number of applications the claimant had made since March 2023 which had not been dealt with by the Tribunal.

35. The panel was informed that the Tribunal took a unilateral decision to convert the hearing originally scheduled to be in person to be a hearing conducted by CVP. Initially the claimant had resisted the move to CVP as she was uncertain that she had the resource to access a remote hearing. At the hearing the claimant who was able to join by CVP confirmed that she was content for the hearing to continue by CVP unless she encountered technical difficulties joining online.

36. The claimant sought to assert that the respondent had failed to provide the bundle of documents in accordance with the directions made by EJ Edmunds as subsequently amended. Having obtain sight of the various correspondence and applications the tribunal determined that it was not proportionate to strike out the response. The claimant had however not had sight of the hard copy bundle until 15 May 2023 and the additional documents provided by the respondent until 19 May and she required more time to read the additional documents and gather her thoughts on the response made by the respondent. In the circumstances it was agreed that the hearing would be adjourned until 9:45 on Tuesday 23 May when the hearing would start at 9:45 prompt.

37. The claimant, who at all material times worked for the respondent as a locum Consultant in Obstetrics and Gynaecology, has provided a witness statement and referred to a number of additional documents that are appended to her statement. The respondent has produced three witnesses, Mrs Ruchira Singh, a consultant in Gynaecology and Obstetrics and Clinical Director of Gynaecology who was the claimant's line manager along with Miss Samantha Pretlove, Deputy Chief Medical Officer at Birmingham Women's Hospital who was the claimant's line manger in respect of her Obstetrics work. We have heard also from Mrs Joanne Webb the Medical Workforce, ESR and Payroll Lead. All witnesses have adopted their witness statements as their evidence in chief.

Findings of Fact

38. The Respondent is a specialist NHS provider of children's and women's services throughout Birmingham and the wider West Midlands. On 5 February 2020, the Claimant joined the Respondent as a Locum Consultant. This was a temporary staff role, with the Claimant being engaged on a 6 month fixed term contract. [111-120].

39. It is acknowledged that, during her engagement with the Trust, the Claimant was seeking to be appointed to the substantive Maternity and Gynaecology Consultant role, working in the Gynaecology department. However, as a result of the COVID-19 pandemic the majority of gynaecological treatments were unable to take place. Staff were therefore reallocated to departments in need and unfortunately this led to some difficulty in confirming where staff, including the Claimant, would routinely work and in finalising job plans. This was denied being because of the Claimant's race as alleged or at all but due to the difficult circumstances faced by the Respondent, and every other NHS organisation, which was required to divert its services and manage the emergency situation resulting from the COVID-19 pandemic.

40. Although the Claimant was employed to undertake a role primarily in the Gynaecology department it was an appointment to the Obstetrics and Gynaecology ("O&G") Department, during her interview for the role and for a previous job application for a substantive post she had expressed an interest in working in Obstetrics. The Respondent considered this interest in obstetrics to be beneficial for the wider team, should additional support be required.

41. The Claimant commenced her role with the Respondent on 23 March 2020, just at the first wave of the pandemic and on the announcement of the national lockdown in the UK which came into force on 26 March 2020 ordering all people in the UK to "stay at home". It is acknowledged by the respondent that the Claimant was asked to fill gaps in the wider service as were all staff working at the Respondent. The need for the claimant to work flexibly in her job role was to be the same for any other member of staff who usually worked in a department whose service has been temporarily condensed, in order to make staff available to assist other departments in dealing with the impact of the pandemic. Given the unprecedented circumstances faced by the Respondent in responding to the pandemic, some staff were required to work in different ways to ensure patient safety and service delivery.

The impact of the Covid 19 Pandemic

42. During the pandemic the Respondent were faced with a situation where, in order to free up enough capacity to deal with the initial peak of the pandemic, the NHS was forced to shut down or significantly reduce many areas of non-COVID care. Consequently, in the department the respondent had to prioritise Obstetrics, acute Gynaecology and Oncology. All other clinics were cancelled or running on reduced capacity [327].

43. Due to the COVID-19 pandemic, the Claimant and her colleagues working in O&G were asked to fill gaps in the wider service as a large amount of staff were

to be made available to assist other departments in dealing with the impact of the pandemic.

44. All the consultants in the Gynaecology department, including Mrs Singh, were temporarily re-assigned to support the Obstetrics department. The consultants were split into two teams; one team supported the High Dependency Unit ('HDU') and provided care to COVID positive pregnant patients at University Hospital Birmingham NHS Foundation Trust's Intensive Treatment Unit ('ITU') (Group 1). The second team provided care for cancer patients, undertook emergency gynaecology treatments, and supported in the Respondent's Labour Ward (Group 2). The Claimant was appointed to Group 2 on the basis that she had shown an interest in working in both Obstetrics and Gynaecology at interview. Pure Obstetricians and Foetal medicine consultants were allocated to Group 1 as they had more experience with sick obstetric patients and it was determined that they would therefore be better suited to dealing with sick covid patients. All O&G consultants, including the Claimant, were allocated to Group 2. The details of who was allocated to Group 1 is set out in the bundle [346].

45. Around the time at which the claimant began her employment two staff members within the department in which she worked died from COVID-19 and a number of others were critically ill. Having heard evidence from Dr Pretlove and Dr Singh it is apparent that in unprecedented times they endeavoured to ensure that the services at Birmingham Women's Hospital were run as efficiently and effectively as possible in order that they could look after acutely sick pregnant women who needed breathing support at the Queen Elizabeth Hospital on the adjacent site. Staff at the same time were distressed by the death of their colleagues and the impact of the pandemic and as a result the claimant and her colleagues working in O&G were asked to fill gaps in the obstetric service as the Obstetrics consultant team were needed to assist another department in dealing with the impact of the pandemic in particular with the care of pregnant women.

The claimant's appointment

46. The claimant applied for a position of a local consultant in gynaecology and obstetrics with a special interest in gynaecological scanning, outpatients hysteroscopy and colposcopy. This post was to commence as soon as possible and was to join a team of 29 consultants in obstetrics and gynaecology. The job description set out the specification of the role for which the claimant applied and to which she was appointed [102-110].

47. The claimant's terms and conditions of employment on a locum contract detailed her terms and conditions [112- 120] and provided that the claimant was employed to work for 10 Programmed Activities ("PAs") in her role. The job description provided to the claimant identified the provisional timetable of direct clinical care programmed activities set out under the heading' job plan' [107]. A job plan was sent to the claimant on 20th January 2020 by Dr Singh [133-132].

48. Having applied for the job advertised for "Locum Consultant Obstetrics & Gynaecology" [386-388] the Job description sent to the claimant identified the position as " Consultant Gynaecology & Obstetrics". The job description

identified that the claimant's hours of work would be full time with on-call commitments on the obstetrics and gynaecology consultant rota [102].

49. The respondent issued a contract of employment to the claimant on the 7 April 2020[150] which key relevant terms included:

> *"**5.1 Main duties and programmed activities***
> *Except in emergencies or where otherwise agreed with your manager, you are responsible for fulfilling the duties and responsibilities and undertaking the programmed activities set out in your job plan, as reviewed from time to time in line with the provisions of section 6 below."*
>
> *"6.1 **Job Plan***
> *You and your clinical manager have agreed a perspective job plan that sets out your main duties and responsibilities, a schedule for carrying out your programmed activities, your managerial responsibilities, your accountability arrangements, your objectives and supporting resources. [113]"*
>
> *"7.1 **Scheduling of Activities***
> *"… a Programmed Activity is a timetable of four hours. Each Programmed Activity may include a combination of duties. Your job plan will contain 10 Programmed Activities per week on average, subject to the provisions below for recognising emergency work arising from on call rotas. A standard full time job plan will contain 10 Programmed Activities subject to the provisions of paragraph seven point 6 to agree up to two extra and Programmed Activities."*
> *" **7.2 Flexibility***
> *Attaching a time value to programmed activities is intended to provide greater transparency about the level of commitment expected of consultants by the NHS…*
> *any variations in your schedule weekly commitments should be averaged out over 26 weeks, so that you average commitment is consistent with the provisions of the working time regulations.**"***
> ***7.6 Additional Programmed Activities***
> *You and your clinical manager may agree that you will undertake additional programmed activities over and above the 10 Programmed Activities that constitutes your standard contractual duties…*
> *Any such agreement will be made in writing and the additional Programmed Activities will be incorporated into your job plan schedule.*
> *Subject to the provisions of section 7.7 below, and without prejudice to section 7.8 below, you do not have to agree to carry out more than 10 Programmed Activities on average per week."*

50. Within the NHS standard contract terms each programmed activity allocated to a doctor equates to four hours work.

51. Within the claimant's contract and the job plan the claimant was allocated 0.75 PAs working on call obstetrics and gynaecology [107]. We note that pure obstetric consultants June 2020 are paid at the rate of 0.86 PAs as an on call rate. Whenever O&G consultants worked any on-call PAs whether in Obstetrics or Gynaecology they were paid based upon 0.75 PAs.

Working arrangements

52. The claimant began her employment with the respondent on 23 March 2020. It had been anticipated that on the first day have work she would be met by Dr Singh who was Clinical Director Gynaecology. Unfortunately Dr Singh's husband was seriously ill because of Covid -19 and she was working from home on the 23 March and arranged for Mr Yadava, deputy Clinical Director Gynaecology to meet the claimant [306]. The rota for the week [228] confirmed that the claimant had been scheduled to have an initial induction with Dr Singh, that was compromised and she received IT training in the afternoon. Dr Singh remained in contact with the claimant, albeit remotely and by text [306-309], directing the claimant to assistance from her secretary to arrange computer support and that the claimant should make shared use of Dr Hassan's office for the next month.

53. It is fair to say that the claimant was not happy to find that she would have to share an office with other consultants and Dr Singh offered to share own office with the claimant. Dr Hassan's office was also available for the claimant to share with Dr Bayli and Dr Gupta. There is no evidence before this tribunal that the claimant was the only consultant who had to share office accommodation and any expectation that she would have exclusive use of an office was one that was not reasonably held. On the contrary the claimant complains that it was suggested that she should share an office with other consultants who were already sharing office accommodation. We find that accommodation within the respondent was limited and a number of consultants, including the claimant and her comparators, were required to share office accommodation.

54. The respondent accept that the claimant was not given a formal induction that ordinarily would have been in place to familiarise a new consultant to the hospital with the idiosyncrasies of the department and the hospital and in the functions and policies of the respondent. The claimant acknowledges that she was given an IT induction to familiarise her with the systems and technology available and was given assistance by Dr Singh's secretary and from Dr Singh remotely and from others on an ad hoc basis. The tribunal finds that the claimant's induction was at best informal and below the standards usually operated by the respondent. We find that the induction support, such as it was, was limited as a result of the surrounding circumstances which were unprecedented and exceptionally challenging.

55. The evidence given by both Dr. Singh and Dr. Pretlove has been unchallenged that the respondent's normal induction was not in place at all during the COVID pandemic due to pressures on the department during that time and that the failure to provide an induction applied not only to the claimant but also to Dr. Aisha Janjua who joined the respondents in April 2020 and Dr. Jessica Davidson who joined in June 2020. We note the claimant states that Dr Janjua did not need an induction as she had been a clinical fellow at the hospital and already knew about procedures having worked at registrar level there. However, having heard

all of the evidence the tribunal considers that even had Dr. Janjua joined without any previous experience of the respondent hospital she, like the claimant and Dr. Davidson would not have been given the usual Trust induction programme at that time. Whilst the failure to provide the usual induction is not good employment practise, we find undoubtedly that it's omission was entirely due to the overwhelming pressures of COVID-19 and the inability of the clinical managers and staff working remotely to focus on anything other than the delivery of the essential service to patients.

56. The claimant accepts that the duties and job roles of all consultant's at the respondent Trust were modified to accommodate the impact of COVID-19 in order to deliver safe care to patients. The claimant asserts that this arrangement was in place for a narrow period of time focused between the periods of 6 April and 3 May 2020.

57. Having heard evidence from the claimant and also from Dr. Singh and Dr. Pretlove we find that after the immediate commencement of the national lockdown, on 2 April 2020, Dr Pretlove sent an e-mail to the consultant body of the O&G department identifying the need to provide cover for sick pregnant women on the QE site which is on the rota as the ITU/HDU rota. It was necessary to develop a COVID rota so that there was appropriate cover for the QE hospital. To set context of the reason why measures were required Dr Pretlove explained that one to two women per thousand would die from COVID which meant that over the following six months the respondent would have 8 maternal deaths assumed to be young women, the majority of whom would be in ITU when they died. Dr. Pretlove invited comments from consultants including the claimant:

"I would like you to feedback to me whether you prefer option one or two. If you are not in the foetal or maternal medicine teams but would like to be on the ITU team rather than the standby team please let me know" [146]

58. The claimant did not respond to Dr. Pretlove's e-mail but responded to receiving the following rota for the 5th April 2020:

"Thank you for next weeks rota. I could only envisage the challenges of the new rotor and the time and effort it requires. I understand the current Rotas devised to cover COVID-19 services " [149]

59. As the need to respond to the pandemic pressures increased Dr Pretlove emailed all consultants on 10 April 2020 at 12:03 [155] setting out how the rota was to be constructed from 14 April explaining that while the rota required more on-calls PAs there were fewer daytime PAs and she would send out rota templates and that:

"*the rotas would roll to ensure they were equitable*" [157-158].

60. On 12 April 2020 at 18:30 Dr Pretlove emailed the consultants, including the claimant [155], to confirm the arrangement following feedback:

" Thank you for the feedback. I'm aware that whatever we come up with and produced, it's not possible to please everyone and it may not be in line with the preferences that you have helpfully articulated.
These are going to be the rota principles:

1. *There will be two rotas running simultaneously. One covering O&G at the Women's and one covering obstetric patients at the QE. We have chosen to do this to run a safe service for both sets of women…*
2. *the rotas will be as equitable as humanly possible...*
3. *We are learning as we go…*

I am aware that for some of you, the job you signed up to do as a consultant is very different from the one you may have to do week to week at the moment. I'm also really mindful that we also have between us our own health vulnerabilities and anxieties, childcare responsibilities, elderly parents and sick family members and that all these things make working together harder. Thank you for what you were doing, your willingness to help and the feedback on how things are working (or not working)…."

61. In the respondent's efforts to deliver the best care and make use of resources the claimant was asked to provide support at the Women's hospital. The claimant has confirmed, in response to examination that at her interview for the Substantive Consultant Role O&G that she had applied for on 28 February 2020, which was a different job to the locum post she had earlier been offered, she had told Dr Pretlove that she was an "obstetrician at heart" [397].

62. On 17 April 2020 Dr Pretlove wrote an email to the consultant body, including the claimant, at 11:58 in which she provided a summary of how the consultant rota that had been created and was then operating had been devised [174]. It summarised inter alia:

"….

1. *Elective gynae elective activity has stopped… This has included cancelling 120 gynae clinics per week and the majority of the operating.*
2. *The majority of the remainder of the workload, that cannot be cancelled, is therefore obstetrics. Obstetrics has become more onerous with some pregnant women ventilated at the QE requiring extensive specialist input.*
3. *To share the remaining (largely obstetric) workload as equitably amongst the consultants as possible, the following system has been devised.*

12. We are also calculating how many PAs you are working against your job plan. This is taking time to do and when we have done it, we will share the calculations with you. This will be how this works for you as an individual and how many PAs are delivered by each team…."

63. The rota [152-154] was mapped to run for a 16 week period and it was initially anticipated that the system of two parallel rotas would run for three weeks from April to 3 May 2020.

64. All consultants within the Gynaecology department including Dr Singh were temporarily reassigned to support the obstetrics department. In her witness statement the claimant refers [para 31] to the fact that a number of the consultants were unhappy with the allocation of the rota to address the needs as a result of the pandemic. The claimant on 5 April had sent an e-mail enquiring about the mechanics of the rota, questioning the intensity of it. There is no doubt that the claimant expressed her concerns about the intensity of the duties allocated to her on the rota from 23 March that appeared on the weekly rota as opposed to the Omni rolling rota even before the proposed Covid rota was introduced.

65. Notwithstanding the so called Covid Rota the respondent also operated a shadow rota which was prepared as a back-up in the event staff or their families contracted Covid-19 requiring them to self-isolate [326-348, 350-361]. The tribunal find that as a result of the pandemic the overwhelming majority of work in the gynaecological department had been cancelled and there was no elective operating in that field and all of consultants and the staff working in that department changed to a greater or lesser extent and they were all deployed to other areas. In response to cross examination the claimant did accept that during the course of April the respondent's management team were making efforts to be as fair as possible to all of their staff including the consultants.

66. The claimant has accepted that on reviewing the paperwork, emails and rotas the objective evidence is that a fair process was being adopted by the respondent to try to ensure that the Covid rota distributed duties as fairly as possible and was unrelated to race. The claimant has confirmed that the allocation of the rota duties meant that there was less gynaecology work and the respondent sought to use the claimant's previous obstetrics experience to cover that work which continued.

67. During the period 6 April to 3 May surgical lists were postponed or cancelled and only emergency surgeries and surgeries for cancer patients were being conducted. Such surgery as was conducted was undertaken by more senior consultants or by the Oncology Team for cancer patients.

68. In the event the claimant did not respond to Dr Pretlove's email of 10 April to assert that the rota was unfair or that she was being treated less favourably because of her race.

69. The claimant has asserted that her named comparators Dr Gupta and Dr Bayli were treated differently and the claimant was treated less favourably. The claimant has not identified the manner in which she asserts the comparators

were treated differently, on our understanding of the rota [154] Dr Gupta and Bayli were scheduled over the 16 week rolling period to complete the same profile of duties as was the claimant, subject to the vagaries of the weekly rota when it was distributed. The Tribunal accepts the account given by Dr Singh that Dr Gupta and Dr Bayli covered Obstetrics work and acute clinics in a similar way to the claimant in the period 6 April to 3 May 2020 as evidenced in the rota allocations.

70. On 29 April Dr Pretlove emailed the claimant and her consultant colleagues [181-182] to confirm that from 4 May the parallel rotas would end and there would be a return to the Omni rota.

71. The claimant has suggested that the COVID rota applied until 3 May and thereafter it returned to the Omni rolling rota. The evidence before us leads us to conclude that although the two parallel rotas came to an end on 3 May 2020 the working environment did not return to its pre pandemic norms nor did the rota and weekly rota scheduling.

72. The claimant has acknowledged that if the rota, as originally was planned, operated for 16 weeks it would balance out the PAs that she and her colleagues worked but she complained that as she was scheduled her rota in the first 3 weeks was more intense that her comparators. The claimant's identifies her comparators, Dr Gupta and Dr Bayli, who she says like the claimant were on the O&G team and were completing Acute Gynaecology clinics when they ran and Obstetrics. We find that where possible the original Omni rota was reinstated subject to the fact that because of the Covid measures in place and the appointment backlog many ambulatory out patient clinics were cancelled.

73. The Tribunal has been referred to the PAs worked by the claimant and her comparators. To the extent that during the weeks 6 April 2020 to 3 May 2020 the claimant worked more patient facing sessions which made her rota more intense than those who were on a similar contract and experience namely Dr Sushma Gupta and Dr Fidan Bayli we find that the system of rolling rotas as operated by the respondent inherently meant that until the cycle of the rota had been completed there may be some inconsistency in the number of PAs completed by a doctor in patient facing sessions. In that event it is clear that the reason for any different treatment in individual weeks in comparison between any doctors was because of the stage at which the rolling rota stood. To the extent that the claimant was allocated PAs that were considered more intense than others in the limited period to 3 May 2020 we find any such inequality was anticipated to resolve over a six month period, which it did, and moreover that the allocation of the PAs was on the clinical needs of the business rather than because of the claimants race.

74. As the national lockdown began to be lifted in May and by 15 June nonessential shops were opening, by mid-June 2020 the respondent's Gynaecology services

began to reopen. The claimant has sought to say that after 3 May 2020 the hospital environment and rotas returned to normal and that only she was not allocated PAs in accordance with the Job Plan that had been issued when she received her contract. The evidence before us contradicts the claimant's argument.

75. It is agreed that after 4 May 2020 the shadow rota came to an end and the Omni rota returned to place [181] as the incidence of new Covid cases was reducing. However, the suspension of usual clinics and surgery since 23 March 2020 had a detrimental impact on the waiting times with a backlog of patient cases as evidenced by discussion in a meeting held on 5 June 2020 [190]. The evidence of Dr Pretlove that for a long period of time the ambulatory gynaecology sessions was consistent with the evidence of Dr Singh whose evidence was that the ambulatory care, ie medical services performed on an out patient basis without admission to hospital was limited to emergencies such as high risk patients and cancer patients and that those sessions were covered by the oncology team and the most experienced consultants such as Dr Sushma Gupta and Professor Justin Clarke.

76. Dr Singh acknowledged that Dr Fidan Bayli and Dr Sushma Gupta the claimant's named comparators may have covered a few sessions in ambulatory care if it was their own session or patient. The claimant had been scheduled to undertake a Friday afternoon outpatient hysteroscopy session however the sessions were unable to run as there was a lack of nursing support for the session.

77. Against the landscape of the exceptional working environment during the response to the Covid pandemic many of the usual working practices in the Trust did not operate as they usually would have done. We remind ourselves that as the country was in lockdown, many usual services and services industries did not operate they usually would.

78. During the pandemic the 'on-call' accommodation available on site (of which there were 2) was reserved for the Consultant Anaesthetist and the on-call Obstetric Consultant as there was more demand for their services at that time and more demand for those doctors to be on site. In contrast we are told that on-call Gynaecology Consultants were rarely called onto site out of hours.

79. We have been referred to an email from Dr Singh to the claimant and her colleagues on 27 March 2020 [139] in which it was confirmed that one of the on call rooms on the 4th floor of the hospital had been allocated to the Consultant Anaesthetist who was to be a resident on call to support the services at that difficult time and that the other on-call room may be used by the Obstetric consultant on call and if any of them needed to they could book a room in a nearby hotel for their use. While the hotel industry was operating in a very restricted way it nonetheless was open to accommodate essential workers and the respondent had set up arrangements for the booking of hotel accommodation

if necessary on call to which the staff were referred. The claimant under examination at first asserted that she had not received the email relating to on-call accommodation and the booking of Gynaecology hotel accommodation [139]. We have found that the claimant, as she subsequently confirmed to the tribunal, was in fact a recipient of the email. Notwithstanding the availability of hotel accommodation in the event the on-call accommodation on site was unavailable the claimant did not seek to book any hotel accommodation.

80. The claimant was, at the relevant time, undertaking O&G work contributing to both rotas and on 23 April 2020 she was the on-call Gynaecology Consultant [228]. We are told, as Gynaecological work at that time was limited, the Gynaecology consultant on-call work was not prioritised for the on-call room as they would not have to be on site. We have heard no evidence to suggest that such a state of affairs applied only to the claimant when she was on call for Gynaecology and not to other Gynaecology on call consultants.

81. On 23 April 2020 the claimant says that her comparator Dr Janjua was allocated the on-call room which was denied to her. Dr Janjua was the Obstetrician consultant on call on 23 April and in accordance with the respondents stated policy she was allocated the on-call room. We find that although the claimant considered she, who lived further from the hospital than did Dr Janjua, ought to have been allocated the available on call room, for the reasons set out in the early email the on-call room was allocated to Dr Janjua because on that night she was the on call obstetrician and in contrast the claimants on-call PA was for Gynaecology not at all because of the claimant's race. We find that in any event Dr Janjua, a substantive pure Obstetrician Consultant was not a comparator to the claimant.

82. The claimant has referred us to a number of emails and messages that she sent to the respondent questioning her duties under the rota allocation from the start of her employment, not least as she wanted to understand her commitments balancing her work and family life commitments [w/s para 27-36, 39-40]. The claimant, who had in an early interview with the Trust had explained that she was an obstetrician at heart and had skills in that area, was seen as an individual who, working as a locum and without a personal patient base, was best able to assist in that field when there was a relatively light work stream for her to do in gynaecology.

83. It is unfortunate that the many questions that the claimant raised in respect of her rota and the duties allocated to her and other questions that she raised about her job role were not answered as they ought properly to have been by an attentive manager in normal times. Sadly, the claimant began employment in extraordinary times and was line managed by Dr Singh and Dr Pretlove who, in their frank evidence to the tribunal, were working under unprecedented pressure in an ever-changing work environment. The impact of the pandemic does not excuse their failure to respond promptly or adequately to all of the claimant's questions, however it does explain the reason why Dr Singh and Dr Pretlove treated the

claimant, and indeed also her colleagues, as they did outside the norms and standards of the pre-pandemic workplace. There is no evidence before the tribunal that leads us to conclude that the claimant was treated differently than her comparators.

84. We have been referred to minutes of meetings that were held within the Trust which clearly describe that, as a result of the national lockdown and in managing the response to the pandemic, there was a backlog of cases. Although service reopened after 4 May 2020 there were still not fully operational theatres and clinics, in particular dealing with gynaecology.

85. It was evident, and the claimant agreed, that NHS England approached the issue within the NHS to prioritise patients waiting the longest period of time. Each consultant was dealing, as best they could, with their theatre lists and only urgent new patients were being seen. Inevitably as the claimant had been working at the Trust for a very short period of time she did not have a list of patients who had been waiting a length of time and were a priority. The claimant was concerned that she was not being given patients to see on other consultants waiting lists however, as a result of these environmental factors we find the claimant was allocated duties on rota where the needs of the Trust were greatest.

86. The claimant was provided with acute gynaecology clinic work as evidenced in the distribution of PAs in but was not offered ambulatory gynaecology sessions. At the time of the COVID-19 pandemic ambulatory care services, in effect out patience appointments without admission to hospital, were limited to emergencies such as high risk patients and cancer patients. Without a previously established patient base, the claimant was scheduled to undertake an outpatient hysteroscopy session on a Friday afternoon however the respondent's evidence is that that session was unable to go ahead due to the lack of nursing staff to support it. In the event we are informed that hysteroscopy outpatient session has been introduced to the respondent's trust only in 2022.

87. In addition to raising her concerns about her rota and the duties allocated to her the claimant raised concerns about the fact that the work she was doing bore little resemblance to the Job Plan that had been issued with her contract of employment. The explanation that is given by Dr Singh for the respondent's failure to provide a Job Plan that reflected the reality of the tasks being undertaken by the claimant is the same as that given for the failure to respond to emails raising concerns about the rota. Dr Singh's evidence that we have found to be convincing was that the effect of managing the service within the demands and constraints of the pandemic meant that she was not able to respond to communications and questions in the way she ordinarily would in pre-pandemic days. The tribunal have heard no evidence to suggest that Dr Singh treated the claimant any less favourably than she did other consultants within her line management.

88. A Job Plan within the NHS is an annual agreement that sets out the duties and responsibilities and includes often a timetable of activities and a summary of all

the Programmed Activities for all the types of work that will be done, including on-call arrangements. The claimant when offered the job was sent a draft Job Plan [132].

89. The claimant's Job Plan was later attached to her Contract of Employment by which time the nature of the work that she was in practice doing as a Locum Consultant was different from that mix of O&G work she was originally appointed to undertake. The claimant at the time asked that her Job Plan should properly reflect the allocation of PAs she considered she was working, particularly as she was doing more Obstetric work than originally foreseen. As we have referred to above, for the reasons already detailed, the rota from the start of the claimant's employment was dynamic and the requirements of the role changed so that she, as did other O&G Consultants, including Dr Sushma Gupta, had to cover more Obstetrics services than their Job Plan provided. We find that although all of the claimant's O&G comparators and other O&G consultants were asked to undertake more Obstetric work than was normal none of them were issued with redrafted Job Plans during the pandemic and the relevant period of the claimant's employment. Although a number of the consultants returned to their original job plans that was not universally the case during the period of the claimant's employment. We find that the failure to revise the claimants Job Plan from that originally prepared was because of necessarily dynamic nature of the rota sessions to respond to the clinical needs.

90. The claimant has been taken to the exchange of emails between those arranging the rotas in April 2020 which she acknowledged demonstrated that the respondent was seeking as far as they could to allocate PAs on the rota as equitably as possible [157-156, 152-154, 159, 169 166-170]. The claimant asserted that none the less in practice that was not the case. The evidence to which we have been refereed does not support the claimant's assertion. To put none too fine a point on the arrangement, the Respondent Trust and the managers within it were crisis managing on an ad hoc basis to deliver a service to fulfil urgent clinical needs.

91. In answer to questions from the tribunal to clarify our understanding, it appears to be the case that although doctors may work beyond the core of their hours in their rota PAs there is no payment for work done beyond those PAs in the Job Plan, the basis of the doctors pay, in effect remuneration to doctors is a defined salary based on their Job Plan PAs and salary scale grading and not on the hours worked. The PA commitment being averaged over a six month period or so.

92. Within the PAs allocated to the claimant there was 1 PA allocated for Clinical Admin/Ward Round which was time included within the sessions noted as DCC on the Amni Rota meaning Direct Clinical Care. The claimant has asserted that she did not have sufficient time allocated to her to complete the administrative tasks that were required of her.

93. The claimant like her comparators was allocated a significant amount of DCC Direct Clinical Care/Patient admin which encompassed the clinical service and the related administration. There is nothing in the evidence before us to suggest that the claimant was treated less favourably than her comparators whether because of her race or at all.

94. The claimant has asserted that she was employed to do on-call Gynaecology and that each on call session was allocated 0.75 PAs. The claimant says in fact all but 5 of her on-call sessions were in Obstetrics and that when on call in Obstatrics that was for 24 hours and should accrue 2.2 PAs. The respondent denies Obstetrics on-call being for a 24 hour period. It is the respondent's case that all O&G consultants were credited with 0.75 PAs for an on call-duty and the claimant was allocated the same. We refer to the contract and the term which in the job description [106] confirms:

    "The *current planned timetable attracts 10PAs. They will be expected to partake in obstetrics and gynaecology on call rotas"*

95. Our own analysis of the rota demonstrating the sessions for which the claimant worked during her contract with the respondent [288] demonstrates that the claimant worked 19 on-call sessions of which 9 were in Obstetrics including 3 on call for 24 hours and 10 on-call sessions in Gynaecology which included 9 being on-call for 24 hours.

96. Dr Pretlove informed the claimant and all the O&G Consultants in summary how the consultant rota was devised and operated [174]. To provide clarity on the operation of PAs and the impact of payment for sessions worked by a doctor we have heard evidence from Ms Webb who has given her evidence as ESR and Payroll lead Medical Workforce. A consultant enters a contract to work an allocated number of PAs within a Job Plan within which a PA of 0.75 was allocated to on-call as a rate paid every week that a Consultant works. Although the notional PA allocation is constant for every week it is the case that in some weeks a consultant may not work any sessions on-call and in others may be available and work on call more than 0.75 sessions, the figure in the Job Plan is the average PA worked while on-call.

97. During the course of hearing evidence Dr Pretlove was recalled at the conclusion of hearing the respondent's case and acknowledged in answer to our questions that the nature of the doctor's contract was in reality such doctors very often worked longer hours than the times allocated to the shifts, starting somewhat earlier and finishing later than their shift times suggested. It was confirmed that the additional hours are not paid as overtime but are assumed remunerated within the allocation of the PAs.

98. When asked how PAs are calculated in the Job Plan it was confirmed that the calculation of PAs was on the basis of predicted time and unpredicted time. Predicted time is that which is scheduled to be in the hospital and unscheduled to be time that might be spent at home while on call to be available to provide

assistance whether remotely or in the hospital if necessary. On call PAs include an element of predicted and unpredicted time that is estimated or renegotiated based upon a business case and objective evidence.

99. What is clear to the tribunal is that the respondent allocated 0.75 PAs per week to be paid regardless of the time worked during the week on on-call sessions.

100. The claimant has referred us to her diaries. They are based on the BMA dairies that are used by many doctors. The BMA doctors diaries are not the source material by which doctors are remunerated. Dr Pretlove as accepted that it is likely if someone kept a diary for a period as did the claimant she may feel that she had worked more hours than are reflected by the PAs and may that they had been underpaid. Of academic interest only is the fact that in 2022 Dr Singh confirmed that doctors kept Doctors Diaries to collate objective evidence of their work patterns and the unpredicted PAs were inadequately reflected in the PA allocation.

101. The tribunal find that the contract terms under which the claimant was employed by the respondents were those which she entered into on accepting employment and though she expressed dissatisfaction with the arrangements in respect of working a different range of work type which she considered was more onerous in obstetrics than in gynaecology the basic terms of her contract remained unchanged. The claimant was paid to work 10 PAs and her contract terms were not varied. We accept the evidence given by Dr Pretlove that to renegotiate contract terms it would be necessary to provide diary evidence to found the future assessment and valuation of PAs and it would be necessary to present a business case to the trust who would have to expressly agree to fund it.

102. In response to the tribunals query that the doctor working beyond the timetables session times would be working for nothing if not paid beyond their contracted PAs, Dr Pretlove acknowledged that the issue relating to the time allocated to PAs is a matter for discussion and negotiation and that the reality, in particular during the response to the covid pandemic, was that doctors worked in excess of their PA hours without additional payment.

103. The tribunal acknowledges that the claimant, as did many doctors during 2020 and throughout the pandemic in particular, is likely to have worked many hours in excess of those she was contracted to work and without additional payment as she adhered to her high professional standards to deliver care to patients. However the tribunal finds that the contractual terms by which the claimant was employed were clearly stated to be for a salary at the stated band rate on a contract for 10 PAs a week unless agreed Additional PAs were to be undertaken. On the evidence before this tribunal the standard contractual terms were not varied between the claimant and the respondent.

104. Although the contract provides at 7.6 Additional Programmed Activities, no such agreement was reached in writing or at all. At no time did the claimant

refuse to undertake an average of more than 10PAs on average a week and of course the respondent denies that the claimant ever did work more than 10 PAs a week on average.

105. The claimant continued to be unhappy about her issues with the rota allocations and her request for annual leave as detailed in her statement [paras 35 – 40]. It is clear from the email exchanges that Matthew Parsons the consultant rolling rota coordinator advised the claimant that although it was not common for there to be 2 on-calls in the same week without swap it did happen "to fit them in".

106. On 27 June 2020 [198] the claimant sought clarification on a rota allocation alteration when she had notice of an extra Obstetric weekend when the claimant saw she had done an Obstetric weekend 8 weeks previously. In her witness statement the claimant details [para40] that she had been told by Mr Parsons that she was a locum Consultant and she had been advised that she was moved to cover the slot that Nesreen was previously doing.

107. Sadly the claimant was unwell at the end of June and returned to work on 6 July. On 8 July the claimant sent an email to Dr Singh and Dr Pretlove and to Tracey Johnston the divisional director which she describes as an unofficial grievance [236] which was headed "Clarification".

108. The claimant has referred to a particular occasion when she alleges that on 10 July 2020 Dr Pretlove forced the claimant to cover Dr Caroline Fox's labour ward session so that Dr Fox could take a day off.

109. Dr Pretlove gives an honest account that she has no recollection of any request that she made that the claimant cover Dr Caroline Fox's labour ward session although she does recall that there was a time when Dr Fox took time off for personal reasons. Dr Pretlove is clear that she had not asked the claimant to cover a session for Dr fox to take annual leave. Whether the claimant found out that the session she was asked to cover had been vacated by Dr Fox or not, is not apparent however the claimant confirmed in her evidence that she had not been told by Dr Pretlove that the reason she was asked to cover was for personal reasons nor did she expect to be told if there were personal reasons why someone had to withdraw from a duty.

110. The claimant was most aggrieved that the request was made for her to cover the duty in the week immediately after she had been absent and she had not been assessed by the respondent to determine if she was fit to take on an extra duty at the time. Dr Pretlove in answer to cross examination by the claimant acknowledged that the claimant had not been given an return to work interview when she returned the week commencing 6 July 2020. We accept the account Dr Pretlove gives that like so many usual practices because of the pressures on he service at the time she had not conducted return to work interviews. Dr Pretlove acknowledged that in her role as a clinical director she was responsible for the health and safety of her staff as well as that of patients however that element of

her role was overlooked in the months of the claimant's employment and beyond. Dr Pretlove has confirmed that it was her understanding that as the claimant returned to work that her high blood pressure which had caused her sickness absence had been resolved and that she was fit to work.

111. It is clear from the claimant's email that she was aggrieved at the lack of communication from the respondent to respond to her concerns about the rota session allocations and to her working conditions. The claimant expressed the view, perhaps not a misplaced one, that she was "*being utilised as an all-purpose gap filler in my role as a fixed term locum consultant*."

112. What is striking in it's omission from the claimant's email is any suggestion that she had been treated by the respondent less favourably because of her race.

113. In response to the claimant's email seeking clarification Dr Singh sent a text to the claimant suggesting that they meet however the claimant asked for a formal meeting rather than an informal 'corridor talk'. There was text message communication with Dr Pretlove on 6 August with a view to arranging a meeting with all three recipients of the claimant's email. Unfortunately, due to annual leave and other commitments a meeting to discuss the claimants email of 8 July was not arranged before the claimant's locum contract came to an end on 23 September.

114. It was not until the claimant wrote a follow up email of 10 October 2020 [236] that Dr Pretlove responded on 15 October to acknowledge the claimant's concerns and thanking her for her flexibility during the very demanding period in the hospital. In particular Dr Pretlove reminded the claimant with reference to the claimants concerns relating to job plans and working arrangements stated:

> *"I know you found the system we instituted during Covid difficult and were disappointed that you did not have the fixed job plan suggested in the application and the interview process. As you know during the first spike of Covid, all our consultants moved away from their standard job plans as our elective gynae work was cancelled but our obstetric commitments increased. We want to thank you for your flexibility during this very demanding period in the hospital."*

115. We have been referred to the comparison of the PAs worked by the claimant and her comparators and as we have referred above while in the very first weeks of the Covid response rota the claimant has a concentration of duties it was not at odds with those of her comparators [285] and rotas showed a rotation of sessions allocated in Obstetrics as well as Gynaecology.

Claimant's pay concerns

116. The claimant complains that there were significant discrepancies in her pay. We have heard evidence from Ms Webb and Dr Pretlove on this point.

117. The claimant alleges that she is owed £35,776 in relation to unpaid PAs. The claimant alleges that the respondent has not considered the job that the claimant was doing. The claimant was employed to do gynaecology and the number of PAs that were allocated for on calls was 0.75, when in fact she asserts that she did all her on-calls apart from 5 in obstetrics (which required being on call for 24 hours) which means that the PAs is 2.2.

118. We have already detailed in our earlier findings that the evidence before the tribunal of the sessions that the claimant was scheduled to work are detailed in the rota [228-231]. Contrary to the claimant's assertion that all her on-calls in obstetrics were for 24 hours and all bar 5 were in obstetrics, we have found the claimants worked 19 sessions on call, 12 of which were 24 hour periods on-call, 3 in Obstetrics and 9 in gynaecology. Although the claimant now asserts that her on-call rate ought to have been paid as PA rate of an Obstetrics consultant.

119. The claimant in her witness statement has given a detailed account of how, when she first began her employment with the respondent, there were a number of inconsistencies in the arrangements for payment of her salary and she engaged with correspondence with payroll and Dr Singh to rectify the initial short payments. We have no doubt that the administrative errors were frustrating for the claimant, however they would appear to have been resolved and do not form part of the complaint that we are required to consider.

120. The claim which the claimant now makes in respect of pay discrepancy is that she alleges that she was not doing the job she was employed to do and that the PAs she worked on call were all, apart from 5 on calls in Gynaecology worked in Obstetrics and that the PA rate for those sessions worked on call should have been at the rate of 2.2.

121. Dr Pretlove has given unchallenged evidence that the on-call rate for pure Obstetric Consultants was 0.86 in 2020 at the relevant time. The Obstetrician on call PA rate has increased since the termination of the claimant's contract to 1 PA in 2021 and to 1.8 PA from 2022. The claimant has not provided evidence to the tribunal that the claiant was in fact employed by the respondent as a pure Obstetrics Consultant or even purely an Obstetrics Consultant during on-call PAs. There is no evidence to support the claimant's assertion that she ought to have been paid at the rate of 2 PAs a week for on-call duties in Obstetrics. Moreover Dr Pretlove confirmed that at no time while working for the respondent did the claimant say to her in any terms that she was only ever doing on call Obstetrics so to pay her the obstetric rate for those on call rates and not the O&G rate.

122. We have been referred by the claimant to her entries in the BMA electronic diary that she had completed [144-145, 183-184, 188-189, 197-198, 203-204, 215-216, 234-235] and have sought to understand the PAs that she records being undertaken by her. Ms Webb the respondent's Medical Workforce ESR and Payroll Lead has given evidence of the analysis of the claimant's work schedule

which has been used to compare the claimants recording of her working time. We note that the claimant's record of PAs worked does not record the times of those PAs nor does it appear to record when the claimant has worked on-call. We have considered the respondents rota which records the PAs worked by the claimant [228-305]. Like Ms Webb we have conducted an analysis of the PAs as recorded by the claimant and compared them to the PAs recorded as worked. Ms Webb has provided a comparison table [252-257] which from the evidence before us would appear to be correct. Having sought to reconcile the recorded hours between the claimant's diary and the hours of PAs worked on the rota compiled by the respondent which refers specifically to the timing of shifts whether on call, 24 hours or twilight we prefer the more detailed record of the respondent.

123. It is evident, taking the PAs actually worked on the rota that there were 17 weeks when the claimant worked marginally in excess of 10 PAs, compared to 8 marginally fewer than 10PAs. We find that as originally envisaged the rota over a longer period of time balanced the overall number of PAs to 10 a week. We remind ourselves that in general terms a PA is usually 4 hours duration.

124. In their reconciliation Ms Webb suggests that in real terms the claimant had been paid over the duration of her contract for 9.29 PAs in excess of that to which she was entitled. The respondent does not counterclaim any sum in respect of overpayment however we are led to conclude that the claimant was paid for each month of her employment a salary based on her band rate based upon a 10PA working week.

125. The claimant would appear to have calculated her PAs based upon claiming on-call rates as an Obstetric Consultant at a rate above that of an obstetric consultant which at the time was 0.8 PAs and moreover in excess of an Obstetric Consultant who was paid at 0.86PAs while on call. What is clear is that the on-call duty was paid at a rate per PA allocated and not by the length of time the consultant was on-call.

126. It is disappointing that the administration of the claimant's salary payments with the respondent was not well organised. The claimant was initially paid at the incorrect salary scale for her experience as a consultant however the claimant in her evidence [w/s para 24] accepts that arrears of pay that she referred to earlier had been paid but what now remains outstanding is remuneration for:

> *"the additional shifts and the extra PAs that resulted from the change in my job plan and imposed the extra shifts that were added to my Omni rolling rota."*

127. In light of our findings we conclude that the claimant has now been paid in respect of all the hours that she worked for the respondent.

Equal Opportunities

128. The respondent is an Equal Opportunity employer. We have been referred to the respondent's policy document "Creating the best place to work, our strategic commitment to inclusion, diversity and equality [416-422] and to the job advertisements drafted by Dr Singh for which the claimant applied [386-388] which highlighted the policy.

129. We have heard evidence from each of the respondent witnesses that they are trained on Equal Opportunity and that training in normal circumstances is refreshed annually. The witnesses confirmed that in 2020 that training was not refreshed due to the demands on their time of responding to the impact of the Covid pandemic.

130. At no point in her evidence, either in her witness statement nor in response to examination, has the claimant suggested that her two line managers Dr Singh or Dr Pretlove or any other at the respondent have discriminated against her because of race. The claimant in her email subject "Clarification" of 8 July 2020 [236] which she describes as a grievance does not suggest that any of the respondent's treatment of her was discriminatory for any unlawful reason related to race or any protected characteristic. The claimant's concerns centre on her complaint that although a directly employed locum she was treated as a gap filler as would be a bank locum consultant have been.

131. The claimant did not expressly put to the respondent witnesses that she was treated the way she was because of her race. When questioned by the tribunal both Dr Singh and Dr Pretlove confirmed that the claimant had never in their exchanges with the claimant had she raised concerns with them that she felt that she was being treated differently because of her racial background. We have no doubt that the respondent described itself as an Equal Opportunity employer and was aware of the grievance procedures within the hospital which were consistent with general NHS procedures.

Argument and Conclusions

132. We are grateful to the claimant and to Mr Ludlow for their written submissions and oral argument to assist us in considering the issues in this case to lead us to our conclusions.

Time limits

133. Given the date the claim form was presented on 22 February 2021 and the dates of early conciliation which began on 13 December 2020 and in respect of which an Early Conciliation Certificate was issued on 24 January 2021, any complaint about something that happened before 14 September 2020 may not have been brought in time.

134. The claimant has sought to assert that the respondent's treatment of her was an ongoing state of affairs up to the end of her locum contract and that her

claims ought to be heard. Other than asking for her claims to be considered the claimant has not provided any explanation why in respect of discrete acts of discrimination which occurred before 14 September it is just and equitable that time ought to be extended. In fact the claimant has made no express application that time should be extended and we make our determination on the issue of time in respect of each of the issues where it is a relevant consideration.

135. The tribunal has reminded itself of the test that is to be applied in considering if it is just an equitable to extend time as detailed in our summary of the law. To extend time is in any event the exception rather than the rule.

Direct race discrimination (Equality Act 2010 section 13)

136. The claimant describes herself as Black African. We refer to our findings of fact that while the claimant was employed by the respondent, though clearly able to voice her concerns on a day to day basis and via emails the claimant has at no time asserted that the respondent's treatment of her was less favourable because of her race. On the contrary the claimant has asserted on a number of occasions that she was treated as a bank locum would have been and used as a "gap filler"; the claimant distinguishing her status to be that of a substantive locum on a six month contract. The claimant now asserts that the respondents treatment of her was less favourable because of her race. While we acknowledge that there is rarely direct evidence of an intention to discriminate because of race in this case we have seen nothing other than a history of poor administration of the claimant's employment relationship set against the landscape of exceptional working conditions causing many usual good employment practices to be foregone.

137. Sadly, the respondent has fallen short in many respects to adhere to its own good employment practices however that omission does not of itself cause us to infer that the their treatment of the claimant was less favourable because of her race. This is a case in which we find that without more than the claimant referring to the fact she was the only Black African consultant the claimant has not been able to shift the burden of proof under s136 of the Equality Act 2010. The claimant has not established less favourable treatment compared to her comparators and has nothing to show the treatment was because of her race. In reaching that over all view we have made findings of fact based upon the allegations to establish the reason why the claimant has been treated in the way in which she was. We observe, as in fairness the respondents line managers did that the respondent has treated the claimant in a way in which, had they taken time to respond to her concerns may have avoided the increasing discontent and suspicion held by the claimant. The tribunal is asked to consider whether the respondent did the following things and did they treat the claimant less favourably because of her race:

Issue 2.2.1 *During the COVID-19 pandemic, between 6 April 2020 and 3 May 2020, allocate the claimant more patient facing sessions which made her rota more intense than those who were in a similar contract and had the same experience?*

The claimant names Dr Sushma Gupta (Asian) and Dr Fidan Bayli (non-European white) as comparators.

138. The complaint the claimant makes is a discrete one about behaviour that ended on 3 May 2020. The complaint as a self-standing complaint is presented not within the required time limit and the claimant has not provided any satisfactory explanation why her complaint was not presented in time on or before 2 August 2020 and is presented approximately 4.5 months out of date. We have made findings of fact in respect of the events in the period which confirm that to the extent that the claimant may have had more patient facing sessions, ie working on Obstetrics, which made her rota more intense we have found that the reason for the rota allocation was because of unprecedented working conditions whereby gynaecology services were depleted, as non urgent outpatient clinics and surgical lists were postponed or cancelled, and in order to manage the demand for maternity care the claimant who was employed to work in Obstetrics and Gynaecology undertook like other G&O consultants a greater workload in obstetrics. The respondent's treatment of the claimant was not less favourable than their treatment of her O&G comparators and in any event was unrelated to the claimant's race.

Issue 2.2.2 *On the claimant commencing employment with the respondent on 23 March 2020, not afford the claimant an induction or an introduction to peers or staff and not do a cursory welcome message to the unit? The claimant names Dr Aisha Janjua (Asian) as a comparator.*

139. The complaint the claimant makes is a discrete one about behaviour that ended on 23 May 2020. The complaint as a self-standing complaint is presented not within the required time limit and the claimant has not provided any satisfactory explanation why her complaint was not presented in time on or before 22July 2020 and is presented approximately 5.5 months out of date and why it is just and equitable to extend time. We have made findings of fact in respect of the events in the period in the event they inform of view of the respondent's treatment of the claimant to draw any adverse inferences.

140. It has been admitted that the claimant was not provided with the usual induction and welcome to the hospital as would ordinarily have been the case. Our findings of fact clearly record the reasons why the usual induction and welcome was not extended to the claimant nor to her comparators who joined later than the claimant. The reason why the claimant and her comparators were treated in the way they were, unsatisfactory thought the situation was, was because of the overwhelming pressures of Covid-19

Issue 2.2.3 *On 23 April 2020, deny the claimant the consultant on-call room which was instead given to another consultant, Dr Aisha Janjua? The claimant names Dr Aisha Janjua (Asian) as a comparator.*

141. The complaint the claimant makes is a discrete one about behaviour that ended on 23 April 2020. The complaint as a self-standing complaint is presented not within the required time limit and the claimant has not provided any satisfactory explanation why her complaint was not presented in time on or before 22 July 2020

and is presented approximately 4.5 months out of date and why it is just and equitable to extend time. We have made findings of fact in respect of the events in the period in the event they inform our view of the respondent's treatment of the claimant to cause us to draw any adverse inferences to suggest discrimination.

142. In our findings of fact we have clearly determined that all consultants, including the claimant were informed that during the pandemic there was more demand for the services of Consultant Anaesthetists and Obstetricians during the pandemic and one on-call room was reserved for Consultant Anaesthetist who was resident on call to support the services and the other on-call room was given priority booking to the the Obstetric consultant on call. While on call the gynaecology consultant was rarely called onto site and therefore the claimant, like any gynaecologist consultant on call as a gynaecologist on call session was not prioritised for use of the on call room as they would not have to be on site. We have made findings of fact hat Dr Aisha Janjua the claimant's comparator in this complaint is not in truth a suitable comparator as the shift on 23 April was one in which the claimant was on-call Gynaecology consultant and the substantive Consultant Obstetrician, Dr Janjua had priority to book the on call room. We find no evidence to suggest that any other G&O consultant, a hypothetical comparator, undertaking the on-call Gynaecology session would have been treated more favourably in the same circumstances than was the claimant.

Issue 2.2.4 *Between 23 March 2020 and 23 September 2020, not provide the claimant with a job plan or office? The claimant names Dr Sushma Gupta (Asian) and Dr Jessica Davis (white British) and Dr Aisha Janjua (Asian) as comparators*.

143. This complaint is one which is arguably about a continuing course of conduct and is presented in time. Within our findings of fact we have found that the claimant was issued with a job description when she applied for the job which included a description of the provisional timetable of the direct clinical PAs the claimant would be required to undertake as set out under the heading Job Plan. Subsequently a Job Plan was sent to the claimant before she took up her contract on 20 January 2020 and it was included again when her contract of employment was sent to her.

144. We have made findings that on 23 March 2020 the claimant's first day at work was the start of the National Lockdown in England and in the steps taken by the respondent to address urgent clinical needs it was necessary for all consultants in G&O to shift the emphasis of their job roles. We accept the evidence that all consultants roles who worked in O&G were radically varied compared to their Job Plans and no changes were recorded to their original Job Plans. We have found that whilst following the extreme period to 3 May 2020 some consultants largely Obstetricians returned to their original Job Plans that was not universally the case. Within the cohort of O&G consultants the staff undertook those sessions whether in Gynaecology or Obstetrics where there was greatest demand. We accept te evidence given by Dr Pretlove that consultants undertook such work which dependant on a variety of factors including new guidance, pressures and staff shortages all as a consequence of the Covid – 19 pandemic meant that the work load and session scheduling varied.

Issue 2.2.5 *Not provide the claimant with ambulatory gynaecology sessions throughout her time with the respondent (between 23 March 2020 and 23 September 2020)? The claimant names Dr Fidan Bayli (non-European white) and Dr Sushma Gupta (Asian) as comparators.*

145. The complaint is presented in time. And is in respect of a continuing course of behaviours, not providing the claimant with ambulatory gynaecology sessions throughout her time with the respondent. In our findings of fact we have found that the claimant who was a locum O&G consultant was like her colleagues subject to the limitations placed upon ambulatory gynaecology sessions as a result of the response to Covid -19 in so far as the services were limited to emergencies such as high risk and cancer patients. The claimant acknowledges that she was provided with acute gynaecology sessions.

146. We have found that the claimant had been scheduled to undertake a regular Friday afternoon outpatient hysteroscopy session however due to support staff shortages the sessions were not able to go ahead and did not recommence until 2022. The evidence that was given that such few ambulatory gynaecology sessions undertaken by the claimant's comparators Dr Fidan Bayli and Dr Sushma Gupta were undertaken by them in respect of their own patients has been accepted by the tribunal in our findings of fact.

147. The tribunal find that the claimant has not been treated less favourably than her named comparators. We have found that the claimant who joined the workforce on 23 March 2020 did not have a bank of her own patients to require scheduling attendance at out patients clinics in any event as did her comparators. Finally the claimant has not demonstrated to the tribunal that other than the bare fact of her race that the claimant was treated less favourably because of her race.

Issue 2.2.6 On 10 July 2020, Dr Pretlove forced the claimant to cover Dr Caroline Fox's labour ward session so Dr Fox could take a day off? The claimant relies on a hypothetical comparator.

148. The complaint the claimant makes is a discrete one about behaviour that ended on 10 July 2020. The complaint as a self-standing complaint is presented not within the required time limit and the claimant has not provided any satisfactory explanation why her complaint was not presented in time on or before 9 October 2020 and is presented approximately 2 months out of date and why it is just and equitable to extend time. Furthermore this case is one in which the evidence fro Dr Pretlove is that she has no clear recollection of the events of 10 July and to grant an extension of time would prejudice the respondent who have no clear recollection of the events. We have made findings of fact in respect of the events in the period in the event they inform our view of the respondent's treatment of the claimant to cause us to draw any adverse inferences to suggest discrimination.

149. Within our findings of fact we have determined that there were not infrequently last minute changes to the rota to cover unscheduled absences and to ensure that clinical needs were best met it was not unusual for the sessions to be rearranged. We have no reason to conclude that the claimant was treated less favourably than a hypothetical comparator. The respondent made a reasonable management decision to list the claimant to cover an absence for what ever reason. It is we

record again unfortunate that at this time the claimant's line manager did not address the claimant's concerns regarding her scheduled work sessions in a timely manner. We accept that the respondent witnesses acknowledge that their failure to answer the claimant's concerns while regrettable was because of the focus of their time manging the response to the pandemic and clinical and operational demands.

150. We conclude that were the complaint to have been brought in time or were time to have been extended on grounds of it being just and equitable to do so we none the less conclude that the claimant was not treated less favourably because of her race.

Issue 2.2.7 *Allocate the claimant more on-calls than all of the other consultants (both fixed term and permanent) during her employment between 23 March 2020 and 23 September 2020? The claimant says that there were 25 consultants in addition to herself, increasing to 27 in addition to herself during her employment, and the comparators named above were consultants. The claimant says that she was the only Black African consultant.*

151. The claimant's complaint to be addressed by this issue is brought in time. We have made very detailed findings of fact in respect of the operation of the Omni rota and the timing of it's operation. We have found that the claimant's view that the pressures in relation to the completion of sessions after 3 May 2020 returned to pre-pandemic norms is a mistaken one. The claimant was allocated session in accordance with the rolling Omni rota and to the extent that the claimant agreed to undertake additional sessions to meet the clinical needs of the hospital the claimant was at all times at liberty to decline to undertake additional duties. We do have sympathy with the claimants view that she was aware of the need to provide care to patients being paramount to accord with her professional standards. On our analysis of the rota and the sessions allocated to the claimant we have found the session allocation did over the 26 week period of her employment average to her contracted 10 PAs a week. We have not found the incidence of the claimant's on call sessions to be more than that allocated to her comparators over the relevant period. All of the claimant's comparators were included in the rota devised by Dr Pretlove after consultant with the consultants including the claimant.

152. To the extent that the claimant has undertaken more on call sessions than her comparators there is nothing before us other than the bare fact of the claimant's race to suggest it was less favourable treatment because of her race.

Issue 2.2.8 *Between 23 March 2020 and 23 September 2020, fail to give the claimant the same informal and formal support as other staff in the same line of work? The claimant names Dr Sushma Gupta (Asian) and Dr Fidan Bayli (non-European white) as comparators.*

153. It is accepted by Dr Pretlove that she was unable to give the claimant support as in different times she would have been able to do. In witnessing the evidence of both Dr Pretlove and Dr Singh we do not doubt that both were working under incredible pressure manging the clinical and operation response to the Covid -19 pandemic and the weight of that responsibility to vulnerable patients and their staff

was very heavy. Dr Pretlove acknowledged that she was unable to provide the claimant with support and her account that she was likewise unable to provide support to Drs Sushma Gupta and Finlan Bayli was not challenged by the claimant.

154. In response to the complaint Dr Singh maintained that she gave support to the claimant who frequently raised telephone or in corridor queries with her and the claimant agreed that to be a correct account. The claimant however seeks to assert that those queries and support related only to Covid. We accept the evidence of Dr Singh that she supported the claimant in the same way she did Drs Sushma Gupta and Finlan Bayli. The claimant has raised no more particularised allegation of lack of formal and informal support to enable the respondent to respond to the allegation. To the extent that the claimant's line mangers did not support the claimant in so far as responding to her various concerns, sadly we conclude tht both Dr Singh and Dr Pretlove fell below the standard of support that would ordinarily have been expected in response to concerns being raised by a member of staff. We have found however that the response or lack of it to the claimant's concerns though lacking in support was as a result of the burden of the covid pressures on Drs Singh and Pretlove and not as a result of the claimant race.

Issue 2.2.9 *On 28 June 2020 stating on an email that the claimant was to move to a new slot on the rolling rota because she was a locum however the email did not explain how this aligned with her contract of employment? The claimant names Dr Sushma Gupta (Asian) and Dr Fidan Bayli (non-European white) as comparators.*

155. The complaint the claimant makes is a discrete one about behaviour that ended on 28 June 2020. The complaint as a self-standing complaint is presented not within the required time limit and the claimant has not provided any satisfactory explanation why her complaint was not presented in time on or before 27 September 2020 and is presented approximately 2.5 months out of date and why it is just and equitable to extend time. We have made findings of fact in respect of the events in the period in the event they inform our view of the respondent's treatment of the claimant to cause us to draw any adverse inferences to suggest discrimination.

156. The email is one from Matthew Parsons to the claimant [196] informing her that she was a locum consultant and therefore moved to cover a slot that had been left vacant. In his submission para 104 Mr Ludlow appears to have conflated views of Dr Pretlove in response to a session cover on the labour ward for Dr Fox issue 2.2.6 with this issue. However we have been referred to the email from Mr Parsons which simply identified that the claimant had been moved to the session because she was a locum consultant and was in effect available to do the session. There is nothing to suggest to the tribunal that there was a need to align the respondent reasonable management direction to the contract. We observe however that the claimants contact does provide at 7.2 that there was flexibility in the PAs and that the schedule of weekly commitment was to be averaged out over 26 weeks.

157. Throughout the contract the claimant was advised at 7.6 that:

> *Subject to the provisions of section 7.7 below, and without prejudice to section 7.8 below, you do not have to agree to carry out more than 10 Programmed Activities on average per week."*

158. In the event the claimant did in fact not refuse to work the PAs that she did in any week as the sessions were scheduled and the average of PAs over the 26 week period did not exceed 10 PAs. There is no evidence before us that the allocation of this session to the claimant was for any reason other than that she was an available locum consultant. Were the complaint to have been presented in time we find that the complaint of race discrimination is not well founded.

Issue 2.2.10 *Fail to provide the claimant with an office and allocate time to do her admin work after the official time throughout her employment between 23 March 2020 and 23 September 2020? The claimant names Dr Sushma Gupta (Asian) and Dr Fidan Bayli (non- European white) as comparators.*

159. The complaint is of a continuing act of discrimination. The findings of fact we have made are clear. The respondent did not provide the claimant with an office however that was a fact common to many O&G consultants and in particular the claimant's named comparators all of whom shared office space which was in short supply. The claimant was throughout her employment, like her comparators allocated time within the PA allocation to undertake administration. The claimant while undertaking obstetric work had little administration generated from work on the delivery suite of antenatal clinics where follow up work was often undertaken by midwives.

160. The claimant like her comparators was allocated a significant amount of DCC Direct Clinical Care/Patient admin which encompassed the clinical service and the related administration. There is nothing in the evidence before us to suggest that the claimant was treated less favourably than her comparators whether because of her race or at all.

161. Having considered each of the complaints of Direct Race Discrimination we have found that those of the complaints of discrimination which not in time have none the less been considered as surrounding facts from which we might look to draw an adverse inference. In the event our findings of fact do not lead us to draw adverse inference. It is we have found unsatisfactory that the respondent have treated the claimant in the way that they have. The poor administration of the claimant's salary payments and the late reconciliation of payments made to the claimant are sadly a reflection of the rather strange times when staff within the respondent organisation were working form home if they could. Similarly the manner in which the claimant was inducted into her new job was not as it ordinarily would have been and the pressures on her line managers were immense and disruptive of usual management protocols and standards.

162. Bad or poor standards do not of themselves make the bare fact of a person's treatment automatically less favourable because of the protected characteristic of race. We have found that the circumstances affecting the claimant's employment and her working conditions during the relevant period were driven by the response to the Covid-19 pandemic and, while not an excuse entirely for the poor standards of employer care of their employees, is a lawful explanation for it.

<u>Unlawful deduction from wages/ Breach of contract</u>

Issue 4.1 *The claimant alleges that she is owed £35,776 in relation to unpaid PAs. The claimant alleges that the respondent has not taken into account the job that the claimant was doing. The claimant was employed to do gynaecology and the number of PAs that were allocated for on calls was 0.75, when in fact she did all her on calls apart from 5 in obstetrics (which required being on call for 24 hours) which means that the PAs is 2.2.*

163. The findings of fact that we have made in respect of the claimant's pay are clear. The only matter outstanding between the claimant and the respondent remains that of pay the claimant asserts that she is owed for unpaid PAs which she asserts ought to have been paid at the rate of 2.2 for the claimant's obstetric on-call sessions. The tribunal have found that all on-call PAs undertaken by the claimant under the terms of her contract were payable at the rate of 0.75 and all those session have been paid in full.

164. The claimant was paid on final reconciliation the wages she ought to have been paid throughout her employment.

165. The judgment of the tribunal is that:

a. The claimant's complaints of direct discrimination because of race in breach of s13 of the Equality Act 2010 which occurred on or before 23 September 2020 issues 2.2.1, 2.2.2. 2.2.3, 2.2.6 and 2.2.9 are not presented in the time required by s123 of the Equality Act 2010 and, it not being just and equitable to extend time, the tribunal does not have jurisdiction to entertain them.
b. The claimant's timely complaints of unlawful direct discrimination in breach of section 13 of the Equality Act 2010 are not well founded and are dismissed.
c. The claimant's complaints of unlawful deduction from pay, contrary to section 13 of the Employment Rights Act 1996 and in Breach of Contract, are not well founded and are dismissed.

Employment Judge Dean

15 February 2024