EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Sana Shah	**v**	The Everglade Medical Practice

Heard at: Watford

On: 20 to 23 August 2024, and 13 September 2024 (in Chambers)

Before: Employment Judge Bedeau
Members: Mr S Bury
Mr N Boustred

Appearances
For the Claimant: Mr A Aymer, Union representative
For the Respondent: Mr E Walker, Litigation Consultant

RESERVED JUDGMENT

1. The claim of discrimination because of pregnancy or maternity, section 18 Equality Act 2010, is not well-founded and is dismissed.

2. The claim of detriment, regulation 19 Maternity and Parental Leave Regulations 1999, is not well-founded and is dismissed.

3. The claim of detriment because of pregnancy or maternity, section 47C Employment Rights Act 1996, is not well-founded and is dismissed.

4. The claim of direct race discrimination, section 13 Equality Act 2021, is not well-founded and is dismissed.

5. The claim of harassment related to race, section 26 Equality Act 2021, is not well-founded and is dismissed.

6. The claim of victimisation, section 27 Equality Act 2021, is not well-founded and is dismissed.

7. The claim of constructive discriminatory dismissal is not well-founded and is dismissed.

8. The claim of constructive unfair dismissal is well-founded.

9. The case is listed for a remedy hearing on **Friday 13 December 2024, to start at 10.00am, for 1 day, by Cloud Video Platform.**

REASONS

1. By a claim form presented to the Tribunal on 24 July 2022, the claimant made claims of discriminatory constructive dismissal; direct race discrimination; pregnancy and maternity discrimination; harassment related to race; and victimisation.

2. In the response presented on 6 September 2022, the claims are denied. The respondent avers that the claims, either some or all, are out of time.

3. This case is about the claimant alleging that, as Reception Manager, she was discriminated against because of pregnancy and/or maternity, and that upon her return to work, some of her duties and responsibilities were taken away from her and given to the new Facilities Manager without her knowledge and approval. She was also undermined and isolated in her role. Although she lodged a grievance, her grievances were not properly investigated. She claimed also that, as a person of Asian and Indian national origins, race played a part in her treatment. She resigned after working for the respondent for 6 years.

The issues

4. At the case management preliminary hearing held on 18 March 2023, the issues were clarified and agreed and were set out in the record of preliminary hearing. They are:

“1. **Time limits**

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 24th February 2022 may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Pregnancy and Maternity Discrimination (Equality Act 2010 s18)**

2.1 Did the Respondent treat the Claimant unfavourably because of her pregnancy by doing the following things:

2.1.1 Increasing Claimant's pay by 25p per hour while on maternity leave and without conducting a pay review?

2.1.2 Converting a maternity return review meeting on 21st March 2022 to a complaint investigation and threatening disciplinary action?

2.1.3 Failing to advertise the facilities manager role, which was offered to another employee, Cieli O'Donnell?

2.1.4 In 2020, Ms Nadia Buckingham, Practice Manager, said that staff complained about the claimant but she refused to give the claimant a a copy of the complaints.

2.2 Did the unfavourable treatment take place in the protected period?

2.3 If not did it implement a decision taken in the protected period?

2.4 Was the unfavourable treatment because of the pregnancy?

3. **Regulation 19 of the Maternity and Parental Leave Regulations 1999:**

3.1 Was the Claimant subject to a detriment as a result of the above 2.1.1-2.1.3?

4. **Section 47c Employment Rights Act 1996:**

4.1 Did the Respondent breach Section 47c of the ERA 1996 by failing to inform the claimant of career opportunities that arose whilst the Claimant was on maternity leave?

4.2 What remedy is the Claimant entitled to if any?

5. **Direct Race Discrimination (Equality Act 2010 s13)**

5.1 Did the Respondent do the following things:

5.1.1 Change the hierarchy by offering Cieli O'Donnell a higher position with one year tenure and excluding Claimant from management roles?

5.1.2 Remove the Claimant's responsibilities without communicating or informing the Claimant?

5.1.3 The claimant was being ignored.

5.2 Was that less favourable treatment because of the claimant's race being Asian and Indian national origins?

5.2.1 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.

5.2.2 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.

5.2.3 The Claimant says she was treated less favourably compared with Ms Cieli O'Donnell, white Irish.

5.3 If so, was it because of race?

5.4 Did the Respondent's treatment amount to a detriment?

6. **Harassment (Equality Act 2010 section 26)**

6.1 Did the Respondent do the following things:

6.1.1 Failure to give Claimant a lanyard.

6.1.2 7 July 2022, the asked to help out in relation to a blood pressure but was ignored by Ms Buckingham.

6.1.3 Called into a room without notice before managers wrongly accused her of a data breach.

6.1.4 The claimant was ignored by the managers.

6.2 If so, was that unwanted conduct?

6.3 Did it relate to any of the protected characteristics complained of by the Claimant?

6.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

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

7. **Victimisation (Equality Act 2010 section 27)**

7.1 Did the Claimant do a protected act by email 21 April 2022, after her return from maternity leave, in that, she complained to Ms Buckingham that she had been treated unfavourably.

7.2 Did the Respondent believed that the Claimant had done or might do a protected act?

7.3 Did the Respondent do anything which subjected the claimant to a detriment? The claimant will say that her role and responsibilities were removed and given to Ms O'Donnell.

7.4 Being denied the opportunity to present her case during the grievance process.

7.5 The respondent insisting on the grievance meeting being audio recorded.

7.6 The grievance outcome was biased.

7.7 If so, was it because the Claimant did a protected act?

7.8 Was it because the Respondent believed the Claimant had done, or might do, a protected act?

8. **Constructive discriminatory dismissal and constructive unfair dismissal**

8.1. As a result of her treatment described about the claimant resigned on 5 October 2022 because of her discriminatory treatment.

8.2 Further and or alternatively, the claimant was constructively unfairly dismissed.

9. **Remedy for discrimination and/or victimisation**

9.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

9.2 What financial losses has the discrimination caused the Claimant?

9.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

9.4 If not, for what period of loss should the Claimant be compensated?

9.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

9.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

9.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

10. **Remedy**

10.1 How much should the Claimant be awarded?

10.2 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

10.3 Did the Respondent unreasonably fail to comply with it by continuing to audio record the meeting and delaying the outcome?

10.4 Is it just and equitable to increase or decrease any award payable to the Claimant?

10.5 By what proportion, up to 25%?"

The evidence

5. The Tribunal heard evidence from the claimant who did not call any witnesses.

6. On behalf of the respondent evidence was given by Dr Shabneet Chadha, Partner; and by Ms Natalie Buckingham, Practice Manager.

7. In addition to the oral evidence the parties produced a joint bundle of documents comprising of 231 pages. Three further pages were admitted into evidence following the respondent's application which took the bundle

from 232 to 234 pages. References will be made to the pages as numbered in the bundle.

Findings of fact

8. The respondent is a medical practice offering patients a range of services and clinics. It is situated in Graham Park Health Centre, Northwest London.

9. The claimant commenced employment with the respondent initially as Receptionist on 4 January 2016, and in or around April 2019, she took on the role of Receptionist/Secretary (page 59 of the joint bundle).

10. On 11 September 2019, she was appraised by her then line manager, Ms Laura Wardle, Practice Manager, during which she expressed an interest in learning administrative and management-related tasks. She also said that she would like more training. They discussed her taking up a Master of Arts degree and a reception course. The appraisal was quite favourable to the claimant (80 to 85).

<u>Claimant's Reception Manager role</u>

11. On 23 December 2019, she was promoted to the position of Reception Manager on a salary of £12.50 per hour, £19,500 per annum gross, full-time. This was confirmed in writing on 8 January 2020. She told the Tribunal that she was approached by one of the partners who offered her the role. She said that she asked her colleagues whether they were interested in applying for the position, but they were not. We find that there was no open recruitment and selection for the Reception Manager post (64).

12. Her duties and responsibilities as Reception Manager were:

“ • Cover general reception duties.

- To oversee the smooth running of reception, monitoring standards of service against agreed targets. To audit standards on a quarterly basis.
- To ensure that holidays and sickness are covered at all times to maintain the smooth running of the practice.
- To support the clinical staff and the smooth running of their surgeries.
- To ensure all reception staff have six monthly reviews.
- To ensure that staff PDPs (Personal Development Plans) are updated regularly and meet appropriate training and learning needs.
- To assist with the recruitment and interviewing of new reception staff.
- To ensure adequate induction and training of all new reception staff.
- To attend weekly practice meetings and implement any changes amongst the Team when appropriate.

- To update protocols pertaining to reception.
- To ensure regular updates of reception with the Practice Manager.
- To attend other appropriate meetings when required.
- To do a yearly appraisal with all reception staff." (66)

13. These tasks are relevant in this case because the claimant asserted that some of them were taken from her and given to one of her work colleagues, Ms Cieli O'Donnell, Facilities Manager. It meant, for her, that she had been demoted.

14. In December 2019, Ms Natalie Buckingham commenced employment with the respondent as the new Practice Manager and the claimant's line manager.

15. In January 2020, the claimant became pregnant but, unfortunately, had a miscarriage in February 2020. In August 2020, she became pregnant again and her pregnancy went to full term.

16. On 15 September 2020, she alleged that she was called to a meeting with Ms Buckingham who put to her that there were several complaints made by the reception staff about her. These complaints were not in writing and were anonymous. The claimant was unaware of who had complained and precisely what their complaints were about. Following on from the meeting she told the Partners that she felt bullied and harassed by Ms Buckingham and that if such behaviour continued, she would formally raise a grievance. It appeared to the claimant that, thereafter, the relationship she had with Ms Buckingham had cooled prior to going on maternity leave on 15 March 2021.

17. She invited the Tribunal to treat events prior to her going on maternity leave as background evidence. In that regard she told us about two incidents, one on 27 February 2020, and the other on 15 September 2020, which we have already referred to in the above paragraph. In relation to the earlier incident in February 2020, she alleged that Ms Buckingham said to her that she did not behave like a Reception Manager and did not have the qualities of a manager. Ms Buckingham, in evidence, denied having made that statement.

<u>Ms Cieli O'Donnell</u>

18. Within the first month of her return to work from maternity leave the claimant had a two-weeks handover with Ms Ceili O'Donnell, her locum while she was on maternity leave.

19. Ms O'Donnell was known to Ms Buckingham's mother as they worked together at the same medical practice in West Hampstead. Ms O'Donnell was working as a Medical Secretary. Ms Buckingham told her mother that the claimant was due to go on maternity leave from 15 March 2021 and that the respondent was looking for a temporary replacement. This information

was then passed on to Ms O'Donnell who applied, was interviewed by Ms Buckingham, and subsequently offered the temporary Reception Manager position covering the claimant's maternity leave.

20. When the claimant was due to return to work the respondent was anxious to retain the services of Ms O'Donnell, who had proved very competent and efficient in the role. A new position was, therefore, created for her of Facilities Manager without any direct reports.

21. The claimant alleged that she was unaware of the vacancy and would have been interested in applying if she had been told about it as she wanted to broaden her experience, her skills set, and as demonstrated in her last appraisal with Ms Wardle, to advance within the respondent's undertaking.

22. Ms Buckingham told the Tribunal that she had spoken to the claimant about the position when the claimant visited the practice after returning from a visit to India. The purpose of a visit, in January 2022, was to seek a reduction in her part-time hours from 28 to 24 hours a week before returning to work in February 2022.

23. The claimant asked whether Ms O'Donnell would be kept on and was told that she would be as a position had been created for her of Facilities Manager. Ms Buckingham then went on to tell the claimant that Ms O'Donnell would be moving, full-time, to an administrative role to help the practice prepare for a Care and Quality Commission inspection. She told the Tribunal that the claimant did not enquire about the role. It would not have been a promotion and was not of higher seniority than the claimant's position. Ms Buckingham said that she printed out the advertisement for the position for Facilities Manager and, over two days, showed it to staff but no one applied. She further stated that if it was advertised on the respondent's system, staff would not have read it as they did not look on the system every day.

24. We find that the claimant was aware of the vacant position of Facilities Manager but did not apply because at the time she was seeking a reduction in her hours due to the difficulties she was experiencing in securing appropriate childcare cover. We also find that the respondent's intention was to offer the position to Ms O'Donnell.

25. Ms O'Donnell formally took up the post of Facilities Manager on 7 March 2022, working 37.5 hours a week with a 30-minute unpaid break, working from 8am to 4pm Monday to Friday (71 to 76).

26. In Ms O'Donnell's job description she was required to: maintain and optimise facilities; streamline processes; support new and current staff with training, bluestream, teams training, provide support with recruitment; manage new systems and integrate them into the practice, managing ongoing projects, rooms, computers; and integrate new technology (77).

Claimant's pay rise

27. On 15 March 2022, the claimant was awarded a 25pence per hour pay rise for the year ending 2021 to 2022. This was at a time when she was on maternity leave. She asserted that she never had a pay review or an appraisal in the previous three years and that her reception staff were given a higher pay rise. At the time she was earning £12.50 an hour and her subordinates were earning £10.50 an hour. They had an increment of 55pence per hour, taking their hourly rate to £11.05. She calculated their increase was 5% whereas in her case she received 2%, giving an hourly rate of pay of £12.75, effective from 1 April 2022. In the previous years she was given a 19% increase or more. She claimed that this was done to reduce the salary gap between her and her reception staff. (88)

28. We find that the respondent was eager to bring its staff up to the London Living Wage which was at the time of £11.05 per hour. Staff who were receiving less than that were to be given an increase up to that amount. Two or three out of twelve staff members were receiving less than £11.05 per hour. They were on £10.50 per hour and were given a 55p increase taking them to £11.05 per hour. Those who were receiving an hourly rate greater than £11.05 only received 25p increase per hour, including the claimant.

29. In relation to Ms O'Donnell, she had only been taken on in the role of Facilities Manager from 7 March 2022, and was on a rate of £12.50p per hour. The respondent decided that she would not be given the 25p increase.

30. We find that the decision to give the claimant a 25p per hour increase was unrelated either to her race, pregnancy or maternity but was to comply with the decision taken by Barnet primary care providers that staff were to be paid at least the London Living Wage. All of the respondent's administrative and reception staff received their pay increase up to £11.05p per hour on 1 April 2022.

Maternity Review Meeting on 21 March 2022

31. The claimant returned to work from maternity leave on 21 February 2022, working 24 hours a week, Monday through to Thursday, from 8.30am to 3pm. Her day off was on Friday. (67)

32. A month later, Ms Buckingham invited her to a Maternity Review Meeting on 21 March 2022, in the presence of Dr Heather Hills, senior Partner. Prior to the meeting, Ms Buckingham told the Tribunal that she had received complaints from some reception staff members about the claimant's behaviour. She contacted the respondent's Human Resources and legal advisors, Peninsula, for advice. She said that the advice given was that she could discuss the complaints with the claimant during the meeting.

33. Following on from her discussion with Peninsula, Ms Buckingham wrote out a list of matters she intended to discuss with the claimant. They were:

> "• Attitude towards other members of staff.
> - Ignoring other members the team.
> - Comments to other staff members.
> - Making reception feel uncomfortable to speak to members of staff.
> - Asking reception to leave WhatsApp group.
> - Telling Jordanne she is no longer part of the reception team.
> - Not saying hello in the mornings.
> - Speaking about other staff in an unfriendly or appropriate way." (233)

34. By describing the meeting as a Maternity Review Meeting, the claimant reasonably believed that Ms Buckingham was going to discuss what supports the respondent could provide for her in her role after being absent for nearly a year. Instead, according to Ms Buckingham's brief notes of their discussion, they discussed: time to sit and learn about the respondent's referral system; the new receptionist once Jordanne moved to the post of Healthcare Assistant; not to send tasks to reception and to send texts to patients to book appointment for results; communication being cut off by the claimant who would take over conversations with patients; to have reception meetings, including all of the team, and one-to-one meetings with reception team.

35. Then in the notes Ms Buckingham wrote on 22 March 2022,

> "Sana put patient on hold for 40 minutes and went off to her appointments." (234)

36. We bear in mind that the claimant was on a phased return to work for two weeks. Thereafter, she was working 24 hours a week and yet what was produced and discussed by Ms Buckingham with Peninsula, was a litany of complaints about the claimant. There was little reference to how the respondent would be helping her back into her role as Reception Manager. There were no notes of the claimant's concerns about the job, her hopes and aspirations. She asked for details of the complaints as alleged by Ms Buckingham and who had made them, to which Ms Buckingham replied that the complaints were anonymous. We agree with the claimant that she ought to have been told the details of the complaints prior to the meeting. What was meant to be a maternity review ended up being a complaint investigation meeting by Ms Buckingham.

37. Ms Buckingham did not give the claimant a copy of her notes to either correct or agree them. Further, the notes were only adduced into evidence on the third day of the hearing following a search for documents by Mr Walker, the respondent's representative. The reference to the incident, as noted on 22 March 2022 when the claimant allegedly put a patient on hold for 40 minutes and went off to her appointments, no context has been given and the claimant was not given the opportunity, on or around 22 March 2022, to respond to it.

38. With reference to the meeting on 21 March 2022, Ms Buckingham told the Tribunal that in her discussion with Peninsula, she was advised to go through a pro-forma in relation to matters relevant to a maternity return to

work meeting, but that document, although relevant, was not produced as part of the bundle in this case.

39. The following day, 22 March 2022, the claimant visited her doctor as she was unable to cope with the stress she was experiencing at work. She accused Ms Buckingham of bullying and harassing her by making false complaints which were impacting on her life. She was prescribed antidepressant medication.

40. In her contemporaneous account to her doctor, it is recorded that she said that the meeting on 21 March 2022 was not a return-to-work meeting, but a meeting during which she was blamed for various things and was not told who made the complaints and what they were about. (90)

41. On 19 April 2022, two new staff members were hired for reception work. Without reference to the claimant, Ms O'Donnell, in her role as Facilities Manager, was assigned to train them. We find that training of new reception staff was the claimant's responsibility, the Facilities Manager was only required to provide a supporting role.

<u>Two new staff members and the claimant's responsibilities</u>

42. One of the claimant's responsibilities was the training of reception staff. Here she had concerns about how she had been treated by Ms Buckingham in relation to training. There is a difference between having a meeting with the claimant, Ms O'Donnell, and Ms Buckingham to discuss training of new staff members and for there to be an agreement that the new staff members would be trained in the morning by Ms O'Donnell, and the claimant taking over in the afternoon. That is one approach. The other approach is to decide, without reference to the claimant, that Ms O'Donnell should do the training in the morning with the claimant taking over in the afternoon. The second of the two approaches was likely to cause the claimant some upset and was likely to cause anyone in her position some concern as a decision, relevant to their role, had been taken without prior consultation. It was the latter approach, we find, that was taken by Ms Buckingham. Ms Buckingham told the Tribunal that reception staff are normally quite busy in the mornings dealing with lots of calls. To help the claimant, Ms O'Donnell was to train the new members of staff from 8am to around 10am in the morning, thereafter, the claimant would take over their training. The claimant should have been consulted in advance of a decision being taken.

43. A screen shot shows that one of the new reception staff, Ms Susan Mavros, reported to Ms O'Donnell and not to the claimant. Further, in relation to training, Ms Mavros was assessed by Ms O'Donnell and not by the claimant. On the face of it, these documents support the claimant's contention that some of her managerial responsibilities were assumed by Ms O'Donnell. (209 and 211)

44. During the investigation into the claimant's grievance, which will be dealt with later on in this judgment, Ms Buckingham was asked by the investigator whether the Facilities Manager had taken over recruitment and training of

reception staff to which Ms Buckingham replied "No" as recruitment had always been done by herself with training being provided by the claimant, "But we recently had a new starter that came to me on the second day and asked not to be trained by Sana."

45. There was no supporting documentary evidence produced that the new starter had any concern about the claimant. She was 19 years of age at the time and only worked for six weeks with the respondent before leaving. There were no notes of the alleged conversation between the new starter and Ms Buckingham. It is difficult to imagine someone, age 19 years, on the second day of their new job saying to the Practice Manager that she did not want to be trained on reception duties by her line manager, the claimant. It is the claimant's role to train new staff. We treat this account by Ms Buckingham with some degree of circumspection. (120)

46. On 21 April 2022, the claimant sent to Ms Buckingham a private and confidential email. The subject line being "Issues and concerns", in which she wrote:

> "Hi Natalie,
>
> I hope you are doing well.
>
> I would like to raise a few issues and concerns with you. Some of the issues are listed below:
>
> Recently there are two reception staff who were interviewed and apparently hired. As a reception manager, why was I not part of the interview process or their training?
>
> On 21 March 2022 when you emailed me for maternity return review meeting. The meeting was supposed to be a duty of care but was later converted to a complaint investigation meeting. I clearly express myself that I am returning to my job role which I handed over to temporary staff Ceili O'Donnell, but now when I am back to my substantial role and duty she is trying to manage me and keeps interfering with my work and staff.
>
> I did ask you if she has been promoted to assistant manager as she is now sharing a space in your office. And if there is any such opening, I should be interested in it.
>
> You said she is not, then why is she still acting like my manager and why is she training the reception staff when its clearly my job role. This is to degrade my position and respect in the mind of new staff and other reception staff. I also stated in that meeting that I am back from my maternity and want to carry out my work peacefully and I believe that this is harassment that people who wish to remain anonymous come to you and complain about me whereby it was just my fourth week back to work.
>
> Also my last appraisal was in 2019, whereas all the other reception staff have had appraisals twice since then. I do not believe that any support or duty of care was offered to me and I still believe that I am being targeted and harassed and provoked due to favouritism.

> I have also noticed that I don't receive any communication from yourself about any changes or improvements with regards to reception. It always comes through from someone else as if you don't want to recognise me as a reception manager and that I am never part of any decisions or discussions.
>
> I would like to have an opportunity to sit down and discuss at your convenience so hopefully we can get to a resolution on how I can peacefully perform my roles and responsibilities without any harassment and interference.
>
> Kind regards
>
> Sana Shah" (93)

47. On 28 April 2022, at 11.26.55, Ms O'Donnell thanked the claimant for her message and replied:

> "I have taken the two girls under my wing in order to make your life easier. As explained I will take Suzie from 8 to 10am to show her what we do at opening, and it is very busy in reception between them time so to ensure that the reception manage the phone lines better it is…" (223)

48. On the same day the claimant sent a message to Ms O'Donnell querying Ms O'Donnell's training of the newly hired reception staff which was one of the claimant's responsibilities. In a text message by Ms O'Donnell to the claimant and Ms Buckingham, on 28 April 2022, at 11.28.05, Ms O'Donnell wrote:

> "If there is a morning that it is quiet and you would like to personally train them that is absolutely fine by me, but as I am not in reception it can be very difficult for me to know, so you can just drop me a …..". (226)

49. Contrary to Ms Buckingham's evidence before the Tribunal who said that there was a discussion about training the new staff and it was apportioned the way set out above, the claimant did not accept that account and clearly raised Ms O'Donnell's involvement in her duties and responsibilities.

Lanyards

50. On 10 May 2022, Ms Buckingham was offering NHS lanyards to all staff who were present. She kept the last lanyard in her hand and when the claimant approached her and asked that it be given to her, Ms Buckingham declined stating that she would be ordering more lanyards later. The claimant at the time felt embarrassed and humiliated in front of the reception staff.

51. During the grievance process Ms Buckingham was questioned by the grievance investigator about this particular incident, and it is recorded that she said the following:

> "I have added an email trail between myself and Sana regarding the lanyard. I had a small number of lanyards for staff that didn't have one and I said I would order more staff that wanted a new one. Sana asked if she could have the one I

> had left and I explained I had ordered some more and I wanted to make sure I offered all staff one before giving staff new ones."

52. The emails between Ms Buckingham and the claimant in respect of the lanyards, were cut and pasted in the investigation report. (122)

53. Ms Buckingham told the Tribunal that she found some lanyards and asked those in reception whether they needed one. Some said that they did not have one. She distributed the lanyards to them but as one member of staff was not working that day, Ms Buckingham was unsure if that person had a lanyard, so she held on to the last one for following day when that staff member was expected to return to work and ordered 15 more.

54. The claimant told the Tribunal that she and the other staff members had old lanyards, and it was Ms Buckingham who said that some of them told her that they did not have one.

55. We find that the claimant approached Ms Buckingham and asked for a lanyard, but Ms Buckingham did not give her the last one she had because she told the claimant that she was ordering more. The new staff member, she believed, did not have one and she wanted to make sure that that person was given a new lanyard before the others. All members of staff including the claimant wanted a new one. The claimant had an old one and within a couple of days, received a new one.

56. In relation to the race of the three members of staff, two white and one African. The new member of staff who was absent, was Greek.

57. Having considered the evidence given by both the claimant and by Ms Buckingham and having looked at the emails pasted in the grievance report, we find that the account given by Ms Buckingham to be credible. Although the refusal to give the last lanyard to the claimant was embarrassing, that was not Ms Buckingham's intention nor did race, pregnancy or maternity, play any part in her decision. The claimant eventually received a new lanyard two days later. The reason why she declined to give the last one to the claimant was that she genuinely believed that the absent staff member did not have one.

<u>The claimant's grievance</u>

58. The claimant's email of 21 April 2022 was treated by Ms Buckingham as a grievance and the respondent instructed its Human Resources Advisors, Peninsula, to conduct a grievance meeting with the claimant. The Peninsula representative, Ms Wendy Liddard, Peninsula Face-to-Face, was a Human Resources Consultant. There followed a discussion between Ms Liddard and the claimant about the format of the grievance meeting. Ms Liddard was of the view that it should be audio recorded. The claimant disagreed and suggested that they could arrange for an impartial notetaker (104).

59. The meeting scheduled to take place on 23 May 202, was adjourned as the claimant suggestion that they should both take notes was declined by Ms Liddard. There then followed phone calls and emails regarding the format of the meeting.

60. Ms Liddard referred the claimant to the Employee Handbook which states:

> "We reserve the right to record any formal meetings whether conducted by us or a third party, a copy of the recording can be made available on request. All personal data collected for this purpose will be processed in line with the current Data Protection Act." (Page 23 of the Employee Handbook)

61. They were not able to agree the format of the meeting and it was resolved that the claimant would submit written representations by close of business on 24 May 2022. If she had any evidence or further information, it was agreed that she should submit those by email to Ms Liddard again by 5pm, 24 May 2022. (105-110)

62. The claimant also wanted her union representative to be present during the grievance meeting. Ms Liddard's response was for the claimant to provide details of the union representative in question. The claimant's view was the representative's name had already been submitted. From the Teams video call screen the name was Mr Abdel Zaki.

63. The respondent's policy provides that the grievance report or outcome should be sent within 10 days. However, on 27 May 2022, Ms Liddard wrote that she would be on annual leave from 28 May and that her report would be completed on her return on 9 June 2022. (108)

64. The report is dated 18 June 2022 but was received by the claimant on 30 June 2022. In it, Ms Liddard identified 16 areas of concern raised by the claimant. These were to do with: Not being part of interviewing and training processes; converting the meeting on 23 March 2022 to a complaint investigation meeting; Ms O'Donnell trying to manage the claimant and training reception staff; that the claimant believed that she was being targeted and harassed, and that there was favouritism; Ms Buckingham did not communicate with her over reception changes or improvements; she was treated unfairly with regard to the lanyard incident; the issue in relation to pay review and that it may be connected with her pregnancy and maternity; that Ms O'Donnell was trying to overpower, intimidate, undermine and interfere with her work; Ms Buckingham questioned her ability to carry out her job; the statement made by Ms Buckingham following a maternity review meeting which was harassment; that Ms O'Donnell had been treated more favourably as she was involved with appraisals, hiring and training staff and was engaged in other management roles which were taken away from the claimant; Ms Buckingham had not enquired into the claimant's welfare, appraisals, training, recruiting, or about staffing issues, unlike Ms O'Donnell; and that the claimant had been picked on, undermined, and treated less favourably by Ms Buckingham who had not spoken to her with regard to any growth opportunities.

65. In her grievance report, Ms Liddard did not find in the claimant's favour in relation to the 16 areas of concern. However, she recommended that the respondent should consider a full review of the appraisal and performance management procedures to ensure that the procedure was transparent, and that staff knew what was expected of them. (112-126)

66. Ms Liddard wrote in paragraph 77 of her report, the following:

> "Whilst the Grievances are not upheld, it is noted that there is damage to employer/employee relationship and that this is causing disturbance to the workplace. It is recommended that consideration be given to taking part in workplace mediation in order to build a professional workable relationship between both parties."

67. Mediation was not pursued.

68. Ms Buckingham wrote to the claimant on 30 June 2022, informing her of the grievance outcome. She stated, amongst other things, that:

> "Having carefully considered the report of their findings and recommendations, it is my decision that there are no grounds to uphold your grievance for the following reasons: No evidence or specific examples of being, harassed, provoked, or treated unfairly have been provided.
>
> I trust that you are satisfied with the outcome.
>
> You have the right to appeal my decision…" (128)

69. The claimant strongly disagreed with the process followed by Ms Liddard in the way she obtained information and in the questioning of Ms Buckingham, which was cursory. She also disagreed with the outcome of the report. On 5 July 2022, she appealed by emailing Dr Hill alleging that the grievance investigation and report were partial and bias. She questioned the delay in submitting it which was, as she alleged, contrary to the ACAS Code, paragraph 4, which states, "Employers should deal with issues promptly without unreasonable delay". She further asserted that, contrary to paragraph 4 of the Code, no facts were established by Ms Liddard and that only five simple questions were put to Ms Buckingham. No consideration was given to the information provided by her to Ms Buckingham and, "No clear evidence such as minutes of meeting, emails related to the issues has been provided.". (130)

70. Ms Liddard did not question Ms O'Donnell as part of the grievance investigation. (119)

71. We find that Ms Liddard could have conducted a much more thorough investigation by speaking to Ms O'Donnell and with either/or some or all of the Partners, and reception staff, in relation to the concerns raised by the claimant.

The grievance appeal

72. Ms Rachael Barlow, Peninsula Face2Face consultant, was instructed to conduct the grievance appeal. The claimant was adamant that her meeting with Ms Barlow should not be audio recorded. Ms Barlow's position was that the Employee Handbook states that the meeting be recorded. It was agreed between them that as the respondent was unable to get the assistance of a notetaker, the claimant would put her concerns in the form of written submissions. (147-150)

73. Ms Barlow, in her email to the claimant dated 20 July 2022, summarised the points made in the grounds of appeal to six in number, namely, that the grievance process was contrary to the ACAS Code, paragraph 4; she repeated the points she had raised in her grievance that no facts were established in the grievance report; the investigation and recommendations were vague and bias; all the attachments in the report were used to support Ms Buckingham; that the grievance investigator had no right to dismiss the grievance in its entirety; and that the appeal should be fairly and thoroughly investigated having regard to the ACAS Code. (151-152)

74. Ms Barlow did speak to the claimant on Wednesday 20 July 2022. The claimant then submitted her written submissions on 23 July 2022. (155-162)

75. The report was prepared on 28 July 2022. Out of the six grounds as identified by Ms Barlow in her report, the first ground, in relation to the ACAS Code, paragraph 4, namely, that issues raised should be dealt with promptly and the decision should not be unreasonably delayed, was partially upheld. The other five grounds were not upheld. Ms Barlow, like Ms Liddard, recommended mediation for the same reasons given by Ms Liddard. (163 to 175)

76. The claimant, having read the grievance appeal outcome, had concerns about the investigation process and the interview with Ms Buckingham, as well as the answers given to questions put to her by Ms Barlow. She disagreed with Ms Barlow's findings and conclusions.

Email from Ms O'Donnell to the claimant

77. On 7 July 2022 at 9:18:19am, she emailed Ms Buckingham stating the following:

> "Kindly look at the screen message that I have received from Ceili O'Donnell this morning:
>
> "I would really appreciate it if once you have completed a task, to complete it on EMIS to remove it from the work list.
>
> You left – on the task list for a 2ww, and myself and Angela both attempted to do it this morning, generating more work."
>
> Can I please have a clarification as why is it coming from her as you are my line manager." (132)

78. Ms Buckingham's response to this issue was to state in an email 14 minutes later to the claimant, that Ms O'Donnell was helping with tasks from home and she, Ms Buckingham, did not feel it was something that she should have communicated to the claimant first as the issue was out of her remit and she did not have knowledge of the tasks being done on a daily basis. (133)

79. We find that the email sent by Ms O'Donnell to the claimant was in the form of an instruction and was an attempt at undermining the claimant in her role as Reception Manager.

<u>Blood pressure machines</u>

80. The claimant on 7 July 2022, at 8:40:50pm, emailed Dr Hill regarding the instructions from Ms O'Donnell to her in relation to EMIS but also in relation to blood pressure machines. In relation to the latter, she wrote:

> "Later on at around 14:45:
>
> Megha went at back reception to ask Meena where she can find a big blood pressure cuff when Natalie came and asked them what they were looking for. Natalie then went through the BP machine drawers and saw we don't have many BP machines left. She asked Megha to get the BP machine book from front reception. Later as the reception was busy I went at back reception and asked what happened to which Natalie did not reply anything to me even after repeatedly asking and chose to ignore me. I later then asked Megha to come back to reception to help me with phones. Then Natalie and Charlotte came to front reception and they were discussing with Megha the patients who were given BP machines need to be called and checked who have not returned etc. As I was unaware of what was happening, I asked Natalie again
>
> "Is there something I should also know", to which Natalie again ignored me and continued talking to them, Charlotte replied saying that it's the BP machines."

81. The claimant alleged that Ms Buckingham's behaviour was an act of victimisation because she had raised a grievance. She then wrote:

> "The rude and unprofessional behaviour makes clear that Natalie Buckingham doesn't want to acknowledge me as a reception manager and is waiting for opportunities to degrade my position and undermine me."

82. In Ms Buckingham's evidence, paragraphs 33-34 of her witness statement, she stated:

> "33. On 7th July 2022, the claimant says two members of reception staff were discussing issue related to blood pressure machines and I came to reception and got involved. The claimant further asserts that she enquired about what this conversation was about but I kept ignoring her, "as if she did not exist". I refute this allegation and under no circumstances have I ignored the claimant as she alleges, what happened was one of the nurses was at reception discussing a project called 'At Home BP'. We were given 60 x blood pressure machines. The discussion was around the blood pressure machines was not coming back. The nurse was talking to one of

> the reception staff, I walked mid-conversation. I added, what are you talking about and Charlotte the nurse said she was just counting how many machines are left. Charlotte said to Megha what do you do when patients come in. Charlotte and Megha went to the front where the sign in and out sheet for the blood pressure machine was. Whilst Megha was showing us the claimant turned around and asked what are we talking about, Charlotte said we are talking about blood pressure machine, that was it.
>
> 34. The claimant says that this amounted to harassment which is simply not true as explained above"

83. A patient at the surgery who stated that she was present on the day of the incident involving the blood pressure machines, wrote a complaint on 7 July 2022 regarding this discussion. She stated:

> "To the doctors of Everglade Medical Practice, I am one of the patients registered at Everglade surgery and my name is [R A-F]. I was at the surgery to book appointments on 7 July and one of the receptionists named Sana was dealing with my request. I saw the surgery manager with nurse come to reception and were asking another member of reception staff about some issue. Sana asked her is there anything I should also know. I heard it clearly but the manager who was next to Sana completely ignored her as if she was not there and did not exist. I feel it was very insulting and rude behaviour with Sana as she looked on the verge of crying. I asked Sana to remain calm and strong. It was shocking to see how the staff are treated in this practice. Thought I should bring it to your attention as sometimes people are treated badly and it goes unnoticed by the seniors. If you need any clarification please don't hesitate to contact me. Regards…" (141)

84. It was alleged that the patient who had written the complaint was the claimant's childminder to which the claimant denied. Instead the claimant gave the name of a completely different person who had been her childminder for nine years. We find that the patient who had complained had been a patient at the surgery for several years. She did not attend as a witness to be cross-examined.

85. A response, dated 1 August 2022, was sent to the patient by the respondent. It stated that the complaint was investigated, and appropriate action had been taken. (186)

86. Having considered the accounts, we find that the account given by the claimant in her email to the Senior Partner, Dr Hills, was supported to some extent by the complaint raised by the patient. We, therefore, find that the incident on 7 July 2022 during which she was ignored by Ms Buckingham did take place. Her account to Dr Hills is contemporaneous. Further, we find that the patient who lodged the complaint attended regularly the Patients Participation Group and so was familiar with the respondent's policies, procedures and its staff.

<u>Meeting on 1 August 2022-alleged breach of data protection</u>

87. On 1 August 2022, without prior notification, the claimant was called into Dr Hills' room. Also present were Dr Chadha, Partner, and Rachel Keane, IT

Manager. In Dr Chadha's notes, Dr Hills explained to the claimant that it was an informal meeting for information gathering, and that it had been reported by a receptionist a few weeks earlier, that photographs on the claimant's mobile phone appeared to have been taken of the computer screen she was working on. Dr Hills explained to the claimant that this would have implications for data protection and asked the claimant if she had any further information. The claimant denied that she had taken any photographs on her mobile phone of the kind alleged and asked whether it was a complaint being made to which Dr Hills responded by saying that it was not a complaint, just information gathering regarding the observation made by the receptionist. Dr Hills asked the claimant whether she had observed any such behaviour, to which the claimant responded in the negative. Dr Hills then asked her what she would do if she saw anything similar happening, the claimant replied that she would ask the person about what they were doing and agree that it would be a data protection issue. Dr Hills apologised for any stress caused by the informal meeting and reiterated that it was an information gathering exercise. The claimant responded by saying that if there was to be a complaint it should be put in writing and sent to her. (185)

88. What was of concern to the Partners was whether or not the claimant had taken screen shots of patient information, which was a serious matter, amounting to gross misconduct. In fact, the claimant did take screen shots but not of patient information. (207, 208, 209 and 210)

89. The claimant attended her GP surgery on 2 August 2022 and discussed the meeting with the Partners and the IT manager on 1 August. The doctor noted that the incident was placing her under undue stress as she broke down during consultation and was tearful. It was also noted that she was taking 40mg Citalopram medication. (189)

<u>Proposed meeting on 5 September 2022</u>

90. On 5 September 2022, Dr Aashish Bansal, Partner, emailed the claimant stating that he would like to meet with her the following day at 12 noon, to discuss the grievance appeal recommendations and the incident as reported by her on 7 July 2022. The meeting would be informal. (191)

91. As the claimant had presented her claim form to the Employment Tribunal on 24 July 2022, her reply to Dr Bansal was to decline his invitation because the matter was now with the Tribunal. She further wrote that she did not agree with the grievance outcomes and in respect of the blood pressure machines incident on 7 July 2022, had requested that it be part of the grievance appeal, but her request was never acknowledged. (191)

92. The claimant saw her doctor on 4 October 2022, as an emergency appointment, as she stated she was unable to cope mentally with the stress of work. She told the Tribunal that at the time she needed help as she was suffering from being unable to sleep; she was worried that it was having an affect on her care of her children; that the Partners were not talking to her; she felt helpless; and was excluded from the management team and from

management duties. The doctor noted that she had said that there was too much backbiting and that she was unable to face work, was crying during consultation, and was fighting hard to hold back her tears. She felt that she gave 100% to her work and did not wish bad for anyone. She felt ignored. People would exchange greetings while she was present and treated her as non-existent. Things were affecting her home life as she could not give her best to her children. She was signed off as unfit for work from 4 October to 4 November 2022 because of stress at work. It was noted that she was still on Citalopram, 20mg, one to be taken daily. (196)

93. On 5 September 2022, she drafted her resignation letter in which she wrote:

> "Subject: Resignation letter
>
> Dear Dr Hills,
>
> I hereby resign from the post of reception manager with immediate effect.
>
> Thank you." (190)

94. This letter was not sent on 5 September 2022, or at any time prior to 5 October 2022.

The claimant's resignation on 5 October 2022

95. The claimant told the Tribunal that on 5 October 2022, at or around 5 o clock in the morning, she was unable to sleep due to stress/anxiety the entire night. She decided to email her resignation with immediate effect as she had had endured enough humiliation, and at that at the time she was completely broken.

96. On 5 October 2022, she emailed Dr Hills attaching the resignation letter dated 5 September 2022.

97. Dr Hills replied on the same day expressing surprise at receiving the claimant's resignation and wrote that she believed the claimant may have reached the decision in the heat of the moment and asked her whether it was something that she really wanted to do. Dr Hills was concerned that there could be some underlying issues in relation to her employment which the respondent would need to address. She advised that should the claimant wish to raise a formal grievance, then she should put it in writing by 7 October 2022, at the latest. Should she also wish to reconsider her decision to resign she should let Dr Hills know again by 7 October 2022. (198)

98. On 10 September 2022, the claimant emailed Dr Bansal stating that as the grievance had been completed and was partisan, her case was before the Tribunal, and that she would be "happy" for mediation to take place through ACAS. (193)

99. By 13 October 2022, the claimant had not retracted her resignation. Dr Hills wrote to her on that day stating that her resignation had been accepted and that her last day of employment would be 5 October 2022. Her pay would be paid on 31 October and her P45 would be sent to her home address. She instructed the claimant to return all the respondent's property in her possession. Dr Hills then wrote that she would like to take the opportunity of thanking her for her work at the practice over the past six years and nine months and wished her all the best in the future. (199)

100. After the claimant's resignation she was informed by a work colleague that staff were discussing her medical records and conversations with her GP. She complained to NHS England. Four practices were together sharing their nursing and teams under the primary care network in the Barnet area, which was managed by Ms Buckingham. The claimant's GP surgery, Parkview Surgery, and the respondent's practice are part of the primary care network of the four practices.

101. After lodging her complaint, she was informed by the registered doctor at Parkview Surgery that, following an investigation, there was a breach of her medical data which was committed by a member of staff working at the respondent's practice and it was reported to Ms Buckingham.

102. On 12 December 2022, the claimant was informed by Parkview Surgery that as the individual was not directly employed by Parkview Surgery and was working on behalf of PCM, the PCM Practice Manager was informed. "Actions have been taken both on PCM and Practice side." (205)

103. The claimant did not produce evidence that she was ignored by the Partners.

The racial make-up of the respondent's Practice

104. It is useful to note the racial and national origins of the staff who worked in the practice during the claimant's employment. There were employees from India, Portugal, Spain, and the Caribbean. Some were white. We accepted the evidence given by Dr Chadha that the practice was and is multi-cultural, multi-ethnic, and multi-national. Dr Chadha is Indian. Dr Hills, white, Dr Sandha is Indian, and Dr Bansal is also Indian.

Submissions

105. The Tribunal took into account the submissions by Mr Walker, on behalf of the respondent, and by Mr Aymer, on behalf of the claimant. We do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013, as amended. We have also taken into account the cases they made reference to.

The law

106. Under section 13, Equality Act 2010, "EqA", direct discrimination is defined:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

105. The protected characteristics are set out in section 4 EqA and includes race, sex, and pregnancy and maternity.

106. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

107. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

108. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the Tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a Tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions has an important role to play where there is room for doubt as to the facts, they do not apply where the Tribunal is in a position to make positive findings on the evidence one way or the other.

109. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation, and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

110. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicated 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.

111. The Court then went on to give a helpful guide, "Could conclude" or "could decide", must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

112. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting, or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

113. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy, or gender reassignment.

114. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

115. The Tribunal could pass the first stage of the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age, or sex. This was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

116. The claimant must prove that the act occurred and, if so, did it amount to less favourable treatment because of the protected characteristic, Ayodele v Citilink Ltd [2017] EWCA Civ 1913.

117. Unreasonable conduct does not amount to discrimination, Bahl v Law Society [2004] IRLR 799.

118. In the Supreme Court case of Royal Mail Group Ltd v Efobi [2021] UKSC 33, Lord Leggatt, held that at the first stage of the burden of proof, the claimant must prove less favourable treatment because of the protected characteristic

119. Harassment is defined in section 26 EqA as;

> “26 Harassment
>
> (1) A person (A) harasses another (B) if-
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of-
> (i) violating B’s dignity, or
> (ii) creating and intimidating, hostile, degrading, humiliating or offensive environment for B”

120. In deciding whether the conduct has the particular effect, regard must be had to the perception of B; other circumstances of the case; and whether it is reasonable for the conduct to have that effect, section 26(4).

121. In this regard guidance has been given by Underhill P, as he then was, in case of Richmond Pharmacology v Dhaliwal [2009] ICR 724, set out the approach to adopt when considering a harassment claim although it was with reference to section 3A(1) Race Relations Act 1976. The EAT held that the claimant had to show that:

(1) the respondent had engaged in unwanted conduct;

(2) the conduct had the purpose or effect of violating his or her dignity or of creating an adverse environment;

(3) the conduct was on one of the prohibited grounds;

(4) a respondent might be liable on the basis that the effect of his conduct had produced the proscribed consequences even if that was not his purpose, however, the respondent should not be held liable merely because his conduct had the effect of producing a proscribed consequence, unless it was also reasonable, adopting an objective test, for that consequence to have occurred; and

(5) it was for the tribunal to make a factual assessment, having regard to all the relevant circumstances, including the context of the conduct in question, as to whether it was reasonable for the claimant to have felt that their dignity had been violated, or an adverse environment created.

122. Whether the conduct relates the protected characteristics "will require consideration of the mental processes of the putative harasser", Underhill LJ, GMB v Henderson [2016] EWCA Civ 1049.

123. As regards victimisation, section 27 EqA states;

"27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because-

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

124. For there to be unlawful victimisation the protected act must have a significant influence on the employer's decision making, Nagarajan v London Regional Transport [1981] IRLR, Lord Nicholls. In determining whether the employee was subjected to a detriment because of doing a protected act, the test is whether the doing of the protected act had a significant influence on the outcome, Underhill J, in Martin v Devonshire Solicitors [2011] ICR EAT, applying the dictum of Lord Nicholls in Nagarajan.

125. Section 47C(1), Employment Rights Act 1996 provides,

> "An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for a prescribed reason.
>
> (a) pregnancy, childbirth, or maternity"

126. In relation to pregnancy and maternity discrimination, section 18 EqA, provides,

> (2) A person (A) discriminates against a woman if, in or after the protected period in relation to the pregnancy of hers, A treats her unfavourably –
>
> (a) because of the pregnancy, or
>
> (b) because of illness suffered by her in that protected period as a result of the pregnancy….
>
> (3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave or on equivalent compulsory maternity leave.
>
> (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or is seeking to exercise or has exercised or sought to exercise the right to ordinary or additional maternity leave, or a right to equivalent maternity leave.

127. Regulation 19 of the Maternity and Parental Leave Regulations states

> "(1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2).
>
> (2) (a) is pregnant,
>
> (b) has given birth to a child."

128. Section 24 EqA states that it does not matter whether discriminator has the same protected characteristic/s as the person being discriminated.

129. Section 95(1)c Employment Rights Act 1996, provides,

> "(1) For the purposes of this Part an employee is dismissed by his employer if …..
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

130. It was held by the Court of Appeal in the case of Western Excavating (ECC) Ltd-v-Sharp [1978] IRLR 27, that whether an employee is entitled to terminate his contract of employment without notice by reason of the

employer's conduct and claim constructive dismissal must be determined in accordance with the law of contract. Lord Denning MR said that an employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

131. It is an implied term of any contract of employment that the employer shall not without reasonable cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee, Malik-v-Bank of Credit and Commerce International [1997] IRLR 462, House of Lords, Lord Nicholls.

132. In the case of Lewis-v-Motorworld Garages Ltd [1985] IRLR 465, the Court of Appeal held in relation to the "last straw" doctrine that,

> "…the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?", Glidewell LJ.

133. Dyson LJ giving the leading judgment in the case of London Borough of Waltham Forest-v-Omilaju [2005] IRLR 35, Court of Appeal, held:

> "A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with earlier acts on which the employee relies, it amounts to a breach of the implied term of mutual trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.
>
> I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be…. .
>
> If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.", pages 37 - 38.

134. The test of whether the employee's trust and confidence has been undermined is an objective one, Omilaju.

135. A constructive discriminatory dismissal arises where the discriminatory conduct materially influenced the conduct that amounted to a repudiatory breach. The last straw need not be discriminatory, Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 589, a judgment on HHJ Auerbach, Employment Appeal Tribunal, and De Lacey v Wechseln Ltd t/a The Andrew Hill Salon [2021] IRLR 547, EAT, Cavanagh J.

136. Mr Walker produced the judgment in the case of Penaluna v All About Venues Ltd, 1303365/2023 he was involved in at Birmingham Employment Tribunal. It is a first instance judgment that is only persuasive on us.

Conclusions

137. We have followed the list of issues in this case in numerical order and came to our conclusions as set out below.

Pregnancy and maternity discrimination, s.18 Equality Act 2010, paragraph 2

138. We have found that converting the maternity return review meeting on 21 March 2022 to a complaint investigation regarding the claimant's conduct, was unfavourable treatment. The claimant believed that the meeting was to discuss her return to work from maternity leave, her concerns, and what supports the respondent, if any, could provide for her at work. It was a shock to her when Ms Buckingham disclosed the anonymous complaints by reception staff. Although she denied the allegations, the matter did not proceed towards disciplinary action, but the way in which the meeting had changed and the allegations made, caused her considerable upset.

139. She returned to work on 21 February 2022. The meeting on 21 March 2022 was after the protected period as defined by s.18(6) Equality Act 2010. No evidence was given that the decision to change the purpose of the meeting on 21 March 2022, was taken during the protected period.

140. Was the unfavourable treatment because of the claimant's pregnancy? The claimant did not advance a case that the unfavourable treatment in changing the purpose of the meeting on 21 March 2022, was because pregnancy or of her pregnancy.

141. We have come to the conclusion that the meeting was conducted with little regard for the claimant's welfare following her return to work from maternity leave. Much of the discussion was about the complaints and her conduct. Ms Buckingham told the Tribunal, and we do accept that part of her evidence, that she was following the advice given to her by Peninsula on how to conduct the meeting taking into account the concerns allegedly raised by reception staff. The concerns raised by staff were not new as similar concerns were raised with the claimant prior to her going on maternity leave. We conclude that the unfavourable treatment was not because of either the claimant's pregnancy or maternity leave. It was Ms Buckingham following human resources' advice. This claim is, therefore, not well- founded and is dismissed.

Detriment, regulation 19, Maternity and Parental Leave Regulations 1999, paragraph 3

142. As with our findings and conclusion above, while we accept that the claimant suffered a detriment because the purpose of the meeting on 21 March 2022 had changed and she was upset that anonymous complaints were made against her, the detriment was not because of nor was it significantly influenced by either pregnancy or maternity leave, or both. Accordingly, this claim is not well-founded and is dismissed.

Did the claimant suffer a detriment under s.47C Employment Rights Act 1996 in that, the respondent failed to inform her of a career opportunity which arose while on maternity leave?, paragraph 4

143. There was only one vacancy while the claimant was on maternity leave and that was of Facilities Manager. We have already made findings of fact in relation to this issue and found that the claimant would not have been interested in the position as it was full-time, and she was reducing her part-time hours from 28 to 24 a week. The position was at the same level of seniority as Reception Manager. She did not produce evidence of any career opportunities apart from the Facilities Manager role. We also bear in mind that the decision to keep Ms O'Donnell was taken after the claimant returned to work and during their handover. Until she returned to work the respondent could not have taken steps to recruit Ms O'Donnell to the role. We conclude that the claim that she suffered a detriment because of pregnancy, childbirth or maternity, is not well-founded and is dismissed.

Direct race discrimination, paragraph 5

144. In relation to the assertion that Ms O'Donnell was offered a higher position, paragraph 5.1.1, we have found that Ms O'Donnell's position was at the same level or seniority as the claimant's role. Ms O'Donnell did not have any direct reports. In relation to excluding the claimant from management roles, we have found that she was excluded from training and recruitment and that one of her staff members, Ms Mavros, appeared to be line managed by Ms O'Donnell.

145. Was the claimant's treated less favourably because of her race, being of Asian and Indian national origins?

146. Looking at the "reason why" for the treatment, we have come to the conclusion that Ms Buckingham viewed Ms O'Donnell as more experienced, competent, and more efficient than the claimant. She had a good, close working relationship with Ms O'Donnell. Ms Buckingham works in multi-racial and multi-cultural team. We did not hear evidence that she behaves in a racially discriminatory towards non-white staff members. Some managerial duties which were in the sphere of the claimant's responsibilities, were given to Ms O'Donnell as she was viewed as more competent. Staff did not seem to complain about Ms O'Donnell's behaviour and/or performance.

147. Ms O'Donnell is not an appropriate comparator as she was performing a completely different function and was on a lesser salary. She is white Irish. Compared with a hypothetical comparator not of the claimant's race, employed as Reception Manager and whose circumstances are similar to the claimant's, it is highly likely that Ms Buckingham would still have favoured someone like Ms O'Donnell in giving her some of the Reception Manager's duties and responsibilities. Such treatment would not be less favourable because of race as it would be based on that person's competence and capabilities. We also bear in mind that those working at the practice at the time were and are multi-racial and multicultural. The majority of the Partners are Asian. Accordingly, this aspect of the direct race discrimination claim is not well-founded and is dismissed.

148. In relation to removing the claimant's responsibilities without communicating and informing her, paragraph 5.1.2, compared with a person not of the claimant's race, and whose circumstances were similar to those of the claimant, we conclude that some of the hypothetical Reception Manager's responsibilities would have been given to someone of Ms O'Donnell's competence and capabilities, if there was a close working relationship between that person and Ms Buckingham. Accordingly, removing the claimant's responsibilities without communicating or informing her, although less favourable treatment, was not because of race.

149. As regards paragraph 5.1.3, the general allegation that the claimant was being ignored, we have found that the claimant was ignored by Ms Buckingham. That part of her evidence we accepted. Would the hypothetical comparator have been treated any differently? We have come to the conclusion that they would not have been treated any differently. We repeat that Ms O'Donnell was highly regarded and had taken over some of the claimant's duties and responsibilities. She was seen as more efficient and competent. A lot of Ms Buckingham's focus was on Ms O'Donnell and to a lesser extent on the claimant. The same treatment would be afforded to the hypothetical comparator irrespective of race.

150. In arriving at our conclusion we considered unconscious bias on the part of Ms Buckingham. We took into account that the practice has a racially mixed workforce which Ms Buckingham had overall management of. We did not hear evidence that she had been racially discriminatory towards other members of staff or had disrespected the Partners because of their race. We accept that someone can discriminate without being conscious of their actions, however, in this case what Ms Buckingham displayed was a belief in Ms O'Donnell's strengths as a manager and that race did not play a part in her decision making. This claim of direct race discrimination is not well-founded and is dismissed.

<u>Harassment related to race, paragraph 6</u>

151. We have found that the account given by Ms Buckingham in relation to the lanyard was credible and we accepted it. The failure to provide the claimant with a lanyard when she asked was not unwanted conduct related to race. Ms Buckingham had the one remaining lanyard that she intended to give to

the member of staff who was absent at the time. The claimant received a new lanyard a couple of days later, paragraph 6.1.1.

152. We have found that in relation to the blood pressure machines incident on 7 July 2022, the claimant was ignored by Ms Buckingham, paragraph 6.1.2.

153. In relation to paragraph 6.1.3, being called to Dr Hill's room on 1 August 2022, where Dr Chadha, Partner, and Ms Keane, IT Manager, were present, without notice and wrongly accused of a data breach, we found that no prior investigation of the complaint was conducted before calling the claimant into the room.

154. Further, in relation to paragraph 6.1.4, the claimant being ignored by the managers, we accepted the claimant's evidence on this.

155. The question to ask is whether or not the incidents as set out in paragraphs 6.1.2 to 6.1.4, are unwanted conduct related to race? We accept that they were unwanted but there was no evidence upon which we could decide that the unwanted conduct was related to race or to the claimant's race. Race was not referred to nor were the behaviours racially overt. We have come to the conclusion that this claim is not well-founded and is dismissed.

<u>Victimisation, paragraph 7</u>

156. We find that the email dated 21 April 2022 and explanation given by the claimant during the grievance investigation that she was racially discriminated against, constituted a protected act.

157. In relation to paragraph 7.3, we have found that some of her responsibilities and duties were removed and given to Ms O'Donnell. There was no evidence in support of the claimant's assertion that in doing so Ms Buckingham was in any way significantly influenced by the protected act. In reality the claimant only raised discriminatory treatment during the grievance process. The have already found and concluded that the reason why Ms Buckingham gave some of the claimant's duties to Ms O'Donnell was that she viewed Ms O'Donnell as very competent, capable, and efficient in carrying out her work.

158. In relation to paragraph 7.4, being denied the opportunity to present her case during the grievance process, the claimant was not present at the grievance meeting because she objected to it being audio recorded. She was given time to send in written submissions which she did. We find that she did have the opportunity to present her case by way of written submissions. There was no evidence to the effect that insisting on the meeting being audio recorded was because the claimant had made a protected act. The respondent's position was, at the outset, that grievance meetings should be audio recorded although the provision in the Employee Handbook states that the meetings be "recorded". The advantage of meetings being audio recorded is that it provides an accurate account of what was discussed. If notes are taken, they are open to challenge. In our view, it was reasonable for the respondent to have a policy that its meetings

should be audio recorded. In any event, the claimant was given the opportunity of putting forward her case and was not denied that opportunity.

159. In relation to paragraph 7.5, the respondent insisting on the grievance meeting being audio recorded, we simply repeat what we have said above.

160. With regard to paragraph 7.6, the grievance outcome being biased, we have found that detailed questions could have been asked of Ms Buckingham and other individuals could have been called to be questioned. There was no evidence given that the grievance and appeal outcomes were in any way significantly influenced by the claimant making a protected act, and the lack of a detailed investigation was not significantly influenced by the claimant making a protected act.

161. We have come to the conclusion that the matters referred to in the victimisation claim are not well-founded and are dismissed.

Constructive discriminatory dismissal, paragraph 8

162. As we have found that the claimant had not been racially discriminated against nor was she discriminated by reason of her pregnancy or maternity leave, there are no findings upon which we could decide that she had been constructively discriminatory dismissed. This claim is not well-founded and is dismissed.

Constructive unfair dismissal, paragraph 8

163. We have taken into account our findings of fact that some of the claimant's duties and responsibilities in relation to training and recruitment of her staff, were taken away from her without prior consultation and given to Ms O'Donnell. At the meeting held on 21 March 2022, the claimant genuinely believed it was a maternity return to work meeting, instead it discussed her conduct and anonymous complaints. She had not been informed prior to the meeting that these matters would be discussed by Ms Buckingham. In relation to the blood pressure machines, she was ignored by Ms Buckingham. She was invited to a meeting without prior warning and falsely accused of a data breach. Ms Buckingham line managed Ms Mavros, a member of the reception staff. On 7 July 2022, the claimant complained to Ms Buckingham that Ms O'Donnell was giving her instructions. The grievance process was not as thorough as it could have been leading the claimant to feel that it was conducted unfairly. On 5 September 2022, she was invited by Dr Bansal, to discuss the grievance appeal outcome and the event on 7 July 2022 when she had, earlier, specifically asked that the 7 July incident should be addressed as part of the grievance appeal, but this was not done.

164. On 5 September she drafted her letter of resignation but did not send it as she wanted to give the respondent time to improve its relationship with her. After a month nothing had changed. She saw her doctor for medical advice and, thereafter, formally tendered her resignation on 5 October 2022.

165. Taking all of the above into account, we have come to the conclusion that there was a breach of the implied term of mutual trust and confidence, Malik-v-Bank of Credit and Commerce International. The claimant had been undermined, belittled and ignored in her role as Reception Manager. In delaying her resignation by a month she was hoping that situation at work would improve. Such an approach was perfectly reasonable in view of the fact that she was most reluctant to leave a job that she enjoyed. In do so she did not affirm the breach.

166. There was also no ulterior motive for her resignation.

167. We, therefore, have come to the conclusion that the claimant was constructively dismissed by the respondent. As there was no potentially fair reason to dismiss her and no procedure was followed in relation to her dismissal, the dismissal was unfair. Her constructive unfair dismissal claim is well-founded, and the case is now listed for a remedy hearing on Friday 13 December 2024 by Cloud Video Platform.

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Employment Judge Bedeau

Date: 20 October 2024

Sent to the parties on: 25/10/2024

For the Tribunal Office

Recording and Transcription

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