



EMPLOYMENT TRIBUNALS

Claimant: Mr Z

Respondent: Medway NHS Foundation Trust

HELD AT: London South (hybrid) **ON:** 17-18 March 2025
19 March 2025 (in chambers)

BEFORE: Employment Judge Hart, Mr Sheath, Mr Huggins

REPRESENTATION:

Claimant: Ms Bennett (lay representative)

Respondent: Mr Jackson (counsel)

These proceedings are subject to the following Order made under Section 11(a) of the Employment Tribunals Act 1996 and Rule 50 of the Employment Tribunal Rules 2013.

*This case concerns an allegation of the commission of a sexual offence. This order **PROHIBITS** for the duration of the lifetime of patient A and the claimant the publication in Great Britain, in respect of these proceedings, of identifying matter in a written publication available to the public or its inclusion in a relevant programme. In particular the following information must not be published:*

- 1. the identity of patient A and the claimant; and*
- 2. the names of the wards that patient A stayed on and the identity of those who cared for her and / or those who worked with the claimant on those ward/s.*

The publication of any identifying matter or its inclusion in a relevant programme is a criminal offence. Any person guilty of such an offence shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

RECONSIDERATION JUDGMENT (RESERVED)

UPON APPLICATION made by letter dated **19 April 2024** to reconsider the Judgment dated **8 April 2024** under rule 69 of the Employment Tribunal Procedure Rules 2024.

The unanimous judgment of the Tribunal is that:

- 1.** The claimant's application for reconsideration does not succeed. The original Judgment is confirmed.

REASONS

INTRODUCTION

1. By written judgment sent to the parties on 8 April 2024, following a final hearing on 4-8 December 2023 (the original hearing), Mr Z's (the claimant) complaints of race and sex discrimination were dismissed (Judgment).
2. On 19 April 2024 Ms Bennett on behalf of Mr Z sought reconsideration of this decision.
3. This hearing was listed to reconsider the complaint of direct and indirect race discrimination and harassment related to race in the light of 'new evidence' provided by the Nursing and Midwifery Council (NMC) dated 5 January 2024 and 5 February 2024 (NMC Response).

THE RECONSIDERATION HEARING

4. The claimant was represented by Ms Bennett (lay representative); the respondent was represented by Mr Jackson (counsel). Both had appeared before us at the original hearing. The claimant did not attend this hearing. Ms Bennett confirmed that he was aware of this hearing and that she had instructions to proceed in his absence.
5. Ms Bennett has a diagnosis of PTSD which can impair her ability to process information. At the outset of the hearing Ms Bennett was asked what reasonable adjustments she needed and informed us that she would need 20 minutes adjournment to gather her thoughts following any submission by the respondent's counsel. This was agreed. In addition, during the course of the hearing she was provided with considerable assistance with producing and copying documentation that she wished to rely on, despite not having included these in the agreed bundle or provided a supplementary bundle.
6. During the hearing we were provided with and / or had access to, the following documents:
 - 6.1 The original hearing bundle and witness statements, the references to page numbers with the prefix 'OB', are to the pages in this bundle.
 - 6.2 An agreed hearing bundle of 168 pages (having been added to during the hearing), the references to page numbers with the prefix 'RB', are to the pages in this bundle.
 - 6.3 A witness statement for Ms Gorman and two witness statements for Ms Bennett dated 13 and 18 March 2025.
 - 6.4 The claimant's pre-hearing applications dated 23 December 2024, 7 and 14 March 2024 (with accompanying documentation) and the respondent's responses.
 - 6.5 The claimant's mid-hearing application dated 18 March 2025.
7. Ms Bennett, founding member and Chief Executive Officer of Equality 4 Black

Nurses (E4BN), a charity, gave evidence on behalf of the claimant. Ms Gorman, Acting Deputy Chief Nurse and Associate Director of Infection Prevention and Control, gave evidence on behalf of the respondent. Following the completion of the evidence both parties gave oral closing submissions. During her submission Ms Bennett referred to a number of authorities without providing us with a copy of the full citation. During the hearing Mr Jackson attempted to locate these authorities, identifying some but not all. Ms Bennett was given with the opportunity to provide the full citations by email the next day; she did so but only provided the name and year (see paragraph 40 below). Judgment was reserved.

THE ISSUES

8. The reconsideration issues to determine were set out in the Case Management Order made at the preliminary hearing on 25 September 2024:
 - ‘3.1 *Whether the NMC Response could not have been obtained with reasonable diligence by the claimant and/or his representative for use at the original hearing?*
 - 3.2 *Whether the NMC Response is relevant and would probably have an important influence on the case?*
 - 3.3 *[The respondent is not disputing that the NMC Response is credible]’*
9. It was confirmed at the preliminary hearing that the NMC Response only applied to the complaint that the respondent's decision to refer the claimant to the NMC was direct / indirect race discrimination and / or harassment, and not to the other complaints that the Tribunal had determined at the original hearing: paragraph 5, **RB pg 55**.

FACTUAL FINDINGS

10. We have only made findings of fact in relation to those matters relevant to the issues to be determined. Where there were facts in dispute, we have made findings on the balance of probabilities. We confirm that we have taken into account all the documentation and evidence before us, and if something is not specifically mentioned, that does not mean that we have not considered it as part of our deliberations.
11. Mr Z (the claimant) is a registered nurse employed by the respondent NHS Trust to work at its Medway Maritime Hospital. He is male and of Asian Filipino background. He describes himself as Black Asian and Minority Ethnic (BAME). In the course of his work a female patient (patient A) accused him of a serious sexual assault during a seizure. In making our determination of facts at the original hearing, we accepted that Mr Z had been falsely accused and was therefore innocent: Judgment paragraph 2, **RB pg 4**.
12. The respondent is a large NHS Trust with 18 separate hospitals including Medway Maritime Hospital.
13. On 26 January 2022 Mr Z submitted a claim form which included allegations of

direct and indirect race discrimination and harassment related to race in relation to the respondent's decision to refer him to the NMC (his regulatory body). He was represented by Ms Bennett.

14. On 6 February 2023 at a preliminary case management hearing, Employment Judge Ord made the usual case management orders to prepare for the original final hearing. This included Order 5 that the parties disclose relevant documents by list and then by copy by 8 May 2023 and 22 May 2023 respectively. The Order specifically stated that *'A document must be included whether it supports or hinders a party's case'*: **OB pg 35**.
15. In May 2023 Ms Bennett received an anonymous letter which alleged that black and asian nurses employed at Medway NHS Trust were referred more often than white nurses, and for more minor offences. The letter provided names, ethnicity and sex, type of misconduct, whether referred to the NMC and the date of referral: **RB pg 162-163**. The letter ended:

'What I'm sending here doesn't stand for anything unless you get this from Medway Trust or get it through a Freedom of Information (FOI) request to Medway NHS Trust. They need to answer for themselves and give you the real data. This list on its own won't hold up in court.'

Ms Bennett stated in evidence that she did not do anything about this letter upon receipt, because she was concerned about its reliability and considered it to be a fake. She did not recognise any of the names provided and the author had not identified themselves. Ms Bennett did not disclose this letter to the respondent.

16. On 10 August 2023 the respondent's solicitor emailed Ms Bennett and Ms Annan (Executive Assistant for E4BN) informing them that the respondent had been asked to *'provide some data relating to the numbers of referrals it made to the NMC in 2021, which is clearly relevant to the alleged PCP relied on for your client's indirect discrimination claim. As soon as I have that, I will of course share it with you'*: **RB pg 103**.
17. On 30 August 2023 at 16:44 the respondent's solicitor emailed Ms Bennett attaching a number of documents including one titled: *'Undated Spreadsheet of NMC Referrals 2019 to 2022-c.pdf'* (**RB pg 99**) stating that:

'Further to my email below, please see attached a spreadsheet that my client has prepared, showing all referrals made by my client to the NMC during 2019-2022. The data has of course been anonymised. However, for clarity, the referral made in respect of the Claimant appears in the penultimate entry dated 15 October 2021.'

My client would like to be able to refer to this data in its witness statements – are you content for me to add this to the end of the bundle please?'

This document is referred to in our Judgment as the 'Chief Nurse table': **RB pg 144**. The table was divided into 4 columns: 'Date referral submitted', 'Job title',

‘Ethnicity’ and ‘Type of practice concern’. It recorded that 13 nurses and midwives had been referred to the NMC by the Chief Nurse between 5 April 2019 and 8 July 2022; 5 were identified as BAME, 7 as white and 1 as unknown. A detailed analysis of this table is set out in our Judgment at paragraph 91: **RB pgs 23-24**.

18. At 17:02 Ms Annan responded by email stating ‘*Thank you for your email. We are content for you to add this data to the end of the bundle*’: **RB pg 125-126**.
19. On 4 December 2023 the original final hearing commenced; it was listed for five days. On it becoming apparent that Mr Z and Ms Bennett did not have the correct hearing bundle, the hearing was postponed to the next day: Judgment paragraph 7, **RB pg 5**. There was no suggestion that these were documents that had not previously been disclosed to the claimant.
20. Later that afternoon, at 15:49 the respondent’s solicitor emailed Ms Bennett providing a link to the hearing bundle and in addition attaching an additional document (**RB pg 146**) stating:

‘In addition, as part of the Respondent’s ongoing duty of disclosure, please see attached an additional document which the Respondent intends to refer to during the hearing.

Please note:

- *This is a document setting out information held by the Respondent in relation to NMC referrals that it has made (column D).*
- *This data is only for the period April 2021 – December 2022. The Respondent’s HR case tracking system was only implemented in April 2021 so data prior to this date cannot be captured.’*

This document is referred to in our Judgment as the ‘HR table’: **RB pg 147**. The table was divided into 5 columns: ‘Reference’, ‘Type’, ‘Role’ and ‘Date referred to HR’ and ‘referral to NMC’. It recorded the staff referred to HR for disciplinary investigations between 13 April 2021 and 21 November 2022. The table did not include the date of referral to the NMC, nor did it include data on ethnicity or practice concern. At the original hearing we found that it was not possible to correlate the NMC referral information on the HR table with the Chief Nurse table and we considered that the Chief Nurse table referrals to be the more accurate for the reasons set out in our Judgment: Judgment paragraphs 95 and 150.3, **RB pgs 25 and 38**.

21. On 8 December 2023 Ms Bennett by letter submitted a Freedom of Information request (FOI) to Medway Maritime Hospital requesting data on the number of registered nurses ‘referred by Medway Kent Hospital’ (our emphasis) to the NMC between 1 September 2021 and 1 September 2022 and requesting that the data be broken down by ethnicity, gender, and reason for referral.
22. The same day Ms Bennett by letter submitted a FOI request to the NMC requesting data regarding the number of nurses referred to the NMC ‘from Medway Kent Hospital’ (our emphasis) between 1 September 2021 and 1 September 2022 and requesting that the data be broken down by ethnicity and

reason for referral. We noted that the request to the NMC was not limited to data of registrants that had been referred by the respondent, but instead asked for data of those referred from the hospital ie it could include those referred through another route.

23. These requests were made on the last day of the original hearing. Ms Bennett attended the hearing that morning to provide her closing submissions, the panel then adjourned to deliberate. Ms Bennett did not inform the Tribunal at any point during the 5 day hearing or on that last day, that she intended to, or had in fact, submitted FOI requests, nor did she seek an adjournment. Ms Bennett did not refer to, and did not disclose, the anonymous letter.
24. On 14 December 2023, the respondent responded to the claimant's FOI request stating that Medway NHS Foundation Trust did not hold a central record of the information requested and that referrals can be made by anyone in the Trust.
25. In December 2023 Ms Gorman was appointed to the role of Acting Deputy Chief Nurse. Therefore she was not the author of the Chief Nurse table and could provide little information about its compilation. She stated that the Chief Nurse table contained the referrals to the NMC made by the Trust over the relevant period but not those from members of the public, colleagues or the registrants. It therefore provided an incomplete picture. We accepted her evidence because the respondent would not necessarily know of a referral from a difference route unless informed about the referral by the NMC. She explained that since taking over the role she has put in place regular meetings with the NMC regional advisor to obtain this information. She further explained that the ethnicity data held by the respondent trust was based on the HR records, and would be different from the ethnicity data recorded by the NMC. We accepted this evidence, since they are different organisations with different purposes and therefore would have different recording criteria and practices.
26. On 5 January 2024 the NMC responded to the FOI request and provided data specific to the NHS Medway Maritime Hospital but stated that due to the low number of referrals over the period they were unable to provide a breakdown by ethnicity: **RB pg 63**. The NMC reported that they had received 8 concerns (referrals) *'where we have identified a link to NHS Medway Maritime Hospital'* (our emphasis) between 1 September 2021 and 1 September 2022. Ms Gorman's evidence was that the NMC Response included nurses referred to the NMC by members of the public, colleagues or by the registrant themselves. We accepted this evidence because the NMC Response stated that the data was for registrants where they had identified a link to the hospital and did not state that it was limited to registrants referred by the respondent.
27. The NMC Response also came with the following caveats which included that hospitals operating under trusts may not be fully captured in their response and therefore the data could not be regarded as exhaustive. Of the 8 'concerns' (referrals) identified, the allegations were recorded as including:
 - Nurse A – 'verbal abuse' 'violent behaviour' and 'handling patients'.
 - Nurse B – various patient care, record keeping and medicine management

allegations.

- Nurse C – ‘not disclosing NMC investigation to employer’.
- Nurse D – ‘breach of patient confidentiality’.
- Nurse E - ‘drugs misuse or dependency’ and ‘arrest’.

The remaining 3 referrals were merely logged as ‘misconduct – nursing’. We noted that Mr Z’s case is not identifiable as Nurse A-E and therefore we assume that he fell into the ‘misconduct – nursing’ category.

28. On 5 February 2024, following a further FOI request from Ms Bennett the NMC provided the following data on ethnicity: **RB pg 66**:

‘Of the 8 registrants involved in the concerns [referrals] we provided the breakdown is:

1. *75% Black, Asian, and Minority Ethnic (BAME),*
2. *0% White*
3. *25% ethnically unknown’.*

29. On 8 April 2024 the Judgment was sent to the parties.
30. On 19 April 2024 Ms Bennett on behalf of Mr Z sought reconsideration of the Judgment: **RB pgs 68-74**. Ms Bennett did not refer to, or rely on, the anonymous letter.
31. On 5 June 2024 EJ Hart decided that the claimant’s application to reconsider the Judgment on the grounds of ‘new evidence’ provided in the NMC Response be permitted to proceed to a hearing to determine: **RB pg 48**. The claimant’s other grounds for reconsideration were dismissed: **RB pg 49-51**. The claimant did not appeal this decision.
32. On 25 September 2024, Ms Bennett and Mr Jackson attended a preliminary hearing to identify the issues and make case management orders for this hearing: **RB pg 54**. Following the hearing, on 1 October 2024 the parties were sent the Case Management Order recording the issues to be determined (as set out at paragraph 8 above) and ordering disclosure of documentation by 24 October 2024 and exchange of witness statements by 23 January 2025: **RB pg 54-61**.
33. On 23 December 2024 Ms Bennett applied for the Tribunal to admit in evidence Mr Z’s ‘NMC Fitness to Practise Substantive Hearing Decision’ dated 9-20 December 2024. The NMC Panel had concluded that the charges of sexual misconduct (which included inserting his fingers into the patient’s vagina) whilst caring for a patient when they were having a seizure, were not proven. This application was opposed by the respondent on 17 January 2025.
34. On 7 February 2025, Ms Bennett applied for the Tribunal to admit Mr Prew’s ‘NMC Fitness to Practise Substantive Hearing Decision’ dated 31 January to 3 February 2025. Mr Prew was a white nurse employed by the respondent. The NMC Panel had found the charges of racist language, bullying and harassment and other inappropriate conduct towards colleagues between 2019 and 2022,

were proven. The application was opposed by the respondent on 21 February 2025.

35. On 14 March 2025, Ms Bennett again applied for the Tribunal to admit the NMC Decision on Mr Prew. She also applied for the Tribunal to admit the anonymous letter sent to E4BN in May 2023.

RELEVANT LAW

36. Rule 68 of the Employment Tribunal Procedure Rules 2024 says:

*‘(1) The Tribunal may.... reconsider any judgment where it is necessary in the interests of justice to do so.
(2) A judgment under reconsideration may be confirmed, varied or revoked’.*

37. This provides a broad discretion to be applied in accordance with the overriding objective under rule 3 to deal with cases fairly and justly. The concept of interests of justice includes a strong public interest in the finality of litigation: **AIC Ltd v Federal Airport Authority of Nigeria** [2022] UKSC 16. An unsuccessful party should not be permitted to have a second bite of the cherry, because of the decisions that they made leading up to and during the original hearing.

38. Where ‘new evidence’ has become available, that was not available to the tribunal at the time that it made its judgment, the principles to be applied are set out in the the well-known case of **Ladd v Marshall** [1954] 3 All ER 745 (CA). Specifically, the party seeking to adduce the new evidence must show:
- (1) that the evidence could not have been obtained with reasonable diligence for use at the original hearing;
 - (2) that it is relevant and would probably have had an important influence on the hearing; and
 - (3) that the evidence is apparently credible.

The claimant is required to meet all three limbs of this test. The respondent submitted, and we accept, that the standard to be applied when considering whether the claimant acted with reasonable diligence is an objective one. Ms Bennett is not required to meet the standard of an experienced lawyer but is required to meet the standard of a reasonably competent lay advocate.

39. It is accepted the broad discretion under ‘interests of justice’ is not limited to the **Ladd v Marshall** principles, and that a tribunal can also reconsider a judgment where there is some ‘additional factor or mitigating circumstance’ which is in the ‘interest of justice’ to take into account: **General Council of British Shipping v Deria** [1985] ICR 198 EAT; **Outasight VB Ltd v Brown** [2015] UKEAT/0253/14/LA.

Cases relied upon by the Claimant

40. In closing submissions Ms Bennett referred us to the following cases:
- 40.1 **Kabeya v Westminster City Council** (2022) which she stated was

authority for the obligation of the courts to accommodate people with disabilities. Neither Mr Jackson nor the Tribunal could locate this case, however we accept that there is an obligation on the courts to make reasonable adjustments and we did so.

- 40.2 **Hickling v Marshall** (2013) which she stated provided guidance on evaluating the reliability of different data sources. The only case that we could locate was Hickling v Marshall (2010) UKEAT/0217/10/CEA (unreported). This was a TUPE consultation case and not relevant. However we accept the principle that we should take into account the reliability of different data sources. The respondent accepted that the NMC Response was credible therefore the issue before us was whether it called into question the reliability of the respondent's evidence.
- 40.3 **Tibbles v SIG Plc** [2012] EWCA Civ 518, which she stated was authority for the importance of procedural fairness and reopening cases where injustice might occur. The respondent agreed that this case was relevant. The case explored the limitation to the civil court's wide discretion to vary or revoke its own orders under the CPR rule 3.1(7). In our opinion this case does not add anything to the already broad discretion under our tribunal rules which permit a judgment to be reconsidered where it is in the 'interest of justice' to do so.
- 40.4 **Kwamin v Abbey National Plc** (2008) which she stated provided that the Tribunal has discretion to reconsider new evidence if it is justified. The only case that we could locate was Kwamin v Abbey National [2004] ICR 841. This case concerned the injustice of delayed judgments, it was not about the test to be applied when considering new evidence.

THE CLAIMANT'S PRE-HEARING APPLICATIONS TO ADMIT FURTHER NEW EVIDENCE

The 23 December 2024 application to admit the NMC Fitness to Practise Committee Substantive Meeting Decision on Mr Z

41. This application was refused for the reasons provided orally at the hearing. The fact that a separate body has subsequently concluded that the allegations against Mr Z were not proven, has no bearing on our decision-making. Further and in any event the NMC Decision could not have an important influence on the case because our original decision was based on our acceptance that Mr Z had been falsely accused and he was innocent.
42. In her written application Ms Bennett stated that the NMC Panel had concluded that '*the claimant's referral to external bodies was premature and based on insufficient evidence*'. She accepted in response to our questions that the NMC's Decision did not contain this conclusion. In fact the Decision recorded that the NMC Panel rejected Ms Bennett's submission of 'no case to answer' during the hearing because it was of the view that there was '*sufficient evidence to support the charges at this stage*'.
43. Therefore we concluded that the NMC Decision on Mr Z would not have had an important influence on our original decision.

The 7 February 2025 application to admit NMC Fitness to Practise Committee Substantive Meeting Decision on Mr Prew

44. This application was refused for the reasons provided orally at the hearing. It would not have had a significant influence on determining the issue as to whether the respondent discriminated by race when making referrals to the NMC. This was because according to the NMC Decision Mr Prew was referred direct to the NMC by colleagues on 25 March 2022 (and not by the respondent). The NMC Decision does not provide evidence that the respondent knew about his conduct prior to his referral and / or that it made a decision not to refer him to the NMC. Without this further information we could not draw any negative inference from the referral. Nor does the fact of this referral undermine the information provided in the Chief Nurse table, since the table only records those referrals made by the respondent not by other persons (see below).
45. Further and in any event, however unacceptable Mr Prew's conduct was, it was not equivalent to the allegations facing the claimant. The behaviour was towards colleagues not a vulnerable patient, and the conduct was not at the same level of seriousness as a criminal allegation of serious sexual assault (including digital penetration of a vulnerable patient's vagina). Therefore even if the NMC Decision had contained evidence that the respondent had decided not to refer Mr Prew to the NMC, this alone would not have had an important influence on our original decision.

The 14 March 2025 application to admit the Anonymous letter

46. This application was refused for the reasons stated at the hearing. Ms Bennett had not acted with reasonable diligence having received the anonymous letter in May 2023, seven months before the original hearing. Further her conduct was not reasonable in that she had failed to disclose it to the respondent prior to (or during) the original hearing, in breach of the Tribunal's orders for disclosure.
47. In her oral submissions before us, Ms Bennett stated that she had not acted on the letter upon receipt, or at any point prior to the original hearing, because she was concerned about its reliability and there was no corroborative data to support its contents. It was only when the respondent disclosed the ethnic breakdown on the first day of the hearing that she realised the claims in the anonymous letter needed further investigation. On being asked whether she requested this data prior to the hearing, she referred us to the e-mail on the 10 August 2023. On it being pointed out to her that the Chief Nurse table had been provided by email on the 30 August 2023 Ms Bennett submitted that she had been unable to open this document because of problems with accessing Mimecast. This submission was undermined by an e-mail from Ms Annan confirming receipt and agreeing for the document to be added to the hearing bundle. Therefore by 30 August 2023 at the latest Ms Bennett had in her possession '*data on the racial breakdown of nurses referred to the NMC*'.

48. In any event, if the receipt of the disclosure on the first day of the hearing meant that the anonymous letter was now relevant, Ms Bennett had failed to explain why she did not disclose it or refer to it at the original hearing.

CLAIMANT'S MID-HEARING APPLICATION TO ADMIT FURTHER NEW EVIDENCE

49. On the morning of the second day of the hearing, Ms Bennett made a further application to admit additional documentation. This was dealt with as set out below.

Medical evidence about Ms Bennett's disability

50. This application was not opposed by the respondent and the Tribunal granted the application for these documents be added to the hearing bundle.

Ms Bennett's second witness statement

51. This application was opposed by the respondent, but granted by the Tribunal since it contained evidence that Ms Bennett was likely to provide under oath in any event. The Tribunal stated that any hearsay evidence in the statement would be treated with caution.

A witness statement from Professor Anandi Ramamurthy and emails between Ms Bennett and Professor Ramamurthy dated 5 and 7 December 2023.

52. Ms Bennett submitted that it was only when we explained to her the previous afternoon the two issues to be dealt with at this hearing, that she realised that Professor Ramamurthy's evidence was relevant. She relied on it as explaining her thought processes following receipt of the HR table on the first day of the hearing. This application was opposed by the respondent.
53. In considering this application we took into account that:
- 53.1 The case management order made at the preliminary hearing on 25 September 2024 and sent to the parties on 1 October 2024 had set out the issues to be discussed at the reconsideration hearing (reproduced above). At the hearing the previous day Ms Bennett had merely been referred back to the issues as set out in the case management order. Therefore she was not provided with any new information to justify the disclosure of a witness statement from Professor Ramamurthy and accompanying documentation, in breach of the Tribunal's orders for disclosure of documentation by 24 October 2024 and exchange of witness statements by 23 January 2025.
- 53.2 Permitting the claimant call a new witness without providing the respondent with any notice or time to take instructions would inevitably result in this hearing having to be postponed. The overriding objective did not justify such a delay, given the inevitable impact on scarce tribunal resources and the respondent's time and costs.

- 53.3 In any event, Professor Ramamurthy's evidence did not assist us with the question as to whether or not the claimant, through his representative Ms Bennett, acted with reasonable diligence, since this was a question for Ms Bennett to answer.
- 53.4 Finally the issue before us at this hearing was whether the NMC Response undermined the evidence in the Chief Nurse table. The issue was not whether there was a discrepancy in the evidence between the Chief Nurse table and the HR table (since that was a matter that we had already fully explored at the original hearing). Therefore Professor Ramamurthy's opinion evidence about these 'discrepancies' was not relevant.
54. The Tribunal did however decide to admit the anonymous letter as evidence relevant to the question as to whether the claimant had acted with reasonable diligence in making the FOI requests to the NMC (which we considered below).

DISCUSSION AND CONCLUSIONS ON THE NMC RESPONSE

That the evidence could not have been obtained with reasonable diligence for use at the original hearing;

55. Ms Bennett provided three reasons as to why she could not obtain the NMC Response for use at the original hearing, by submitting an FOI to the NMC prior to that hearing.
56. Reason 1: In her first witness statement dated 13 March 2025 Ms Bennett relied on the anonymous letter as the trigger for the FOI request. She stated that: *'based on this letter, I made a request to the Respondent in advance of the hearing asking them to disclose details on NMC referrals by ethnicity to verify whether there was a pattern of racial bias. The respondent stated that they do not keep this data. This prevented me from providing comparative evidence at the original hearing.....'* This statement was consistent with the submission that Ms Bennett had made on the first day of the reconsideration hearing that she had not been provided with ethnicity data in advance of the hearing and therefore had been unable to corroborate the anonymous letter. This was a submission that we did not accept (see paragraph 47 above). On the second day of the reconsideration hearing, Ms Bennett provided a further witness statement which accepted that she had been provided with ethnicity data (Chief Nurse table) on 30 August 2023. On it being pointed out to her in cross-examination that her two statements were inconsistent, she stated that there was typing error in her first witness statement and that what she meant to say was that the request was made in advance of the original hearing 'concluding' (i.e. on the last day).
57. Therefore in her evidence Ms Bennett accepted that upon receipt of the Chief Nurse table in August 2023 she did not request any further information about referrals to the NMC (from either the respondent or the NMC) prior to the commencement of the original hearing. Nor did she conduct any enquiry into

the authenticity of the anonymous letter received in May 2023. Accordingly we did not consider that Ms Bennett acted with reasonable diligence in failing to make an FOI request prior to the original hearing. The anonymous letter concerned a central issue in Mr Z's case (that of discrimination in referrals to the NMC). It was received at a time when Ms Bennett would have been actively considering the documents in the case, since the deadline for disclosure was May 2023. Further, it was not reasonable for Ms Bennett to consider that the letter was a fake without checking the information contained therein. The letter contained specific details that could easily have been checked by conducting a simple google / internet search. Finally, the author had specifically suggested that EqBN submit an FOI request to corroborate the evidence and Ms Bennett has provided no good reason for failing to do so. Ms Bennett's explanation for failing to check whether or not the letter was a fake was lack of resources and she explained to us the difficulty she had in retaining staff to assist her. Whilst we acknowledge the inevitable pressure on a small charity, this is not a good reason for failing to act with reasonable diligence. Moreover we noted that she did have access to some support. She informed us in evidence that Hogan and Howell solicitors gave her half an hour of free legal advice every month. Whilst we accept that other more pressing matters were discussed, it provided her with an opportunity to have raised this issue if she had wished to do so.

58. We considered that in failing to make the FOI request prior to the original hearing as suggested by the anonymous letter Ms Bennett was not acting to the standard expected of a reasonably competent lay representative. Further in failing to disclose the letter to the respondent at the time or at all during the original proceedings, she was acting both unreasonably and in breach of tribunal orders for disclosure.
59. Reason 2: In her second witness statement dated 18 March 2025 Ms Bennett stated that it was only when the respondent provided the HR table on the first day of the original hearing that the discrepancies between the HR table and the Chief Nurse table became apparent. She says that this was because the Chief Nurse table had not provided a full account of disciplinary actions taken internally before referral. It was these discrepancies, she says, that were the trigger for her FOI request. She says that she spoke to Mr Z about making an FOI request upon receipt of this information but did not raise it with the Tribunal (or the respondent) during the hearing because the hearing had already started. The request was made on the last day of the original hearing, this being the first opportunity that she had could make this request.
60. Whilst we have considerable sympathy for a lay representative, provided with last minute evidence during a hearing, we do not consider that her interpretation of the HR table was correct nor was it reasonable. As we stated in our Judgment, the HR table did not contain the ethnic breakdown of nurses referred to the NMC and could not be correlated with the Chief Nurse table: Judgment paragraph 95, **RB pg 25**. It was therefore of limited (if any) assistance.
61. At this hearing Ms Bennett has sought to argue that the reason why the HR table was so significant was because the Chief Nurse table had not included '*crucial details about internal disciplining actions before referrals*'. Putting aside

the fact that we did not consider that the Chief Nurse table could be correlated with the HR table, this was not an argument that was presented to us at the original hearing. The claimant's claim for indirect discrimination alleged a PCP of 'referring nurses to the NMC for matters of misconduct' and the claimant's claim for direct discrimination alleged that the less favourable treatment was 'the referral to the NMC'. Therefore whether or not there had been an internal disciplinary investigation prior to referral was immaterial to the determination of both of these claims.

62. Further and in any event Ms Bennett did not act reasonably by failing to inform the Tribunal of her intention to make a FOI request at any point during the original hearing. She claimed that this was due to her cognitive impairment but she also stated *'I thought I could manage the discrepancy in cross examination and kept asking the witnesses about it and was not getting the answer....'* This suggests that she made a conscious decision not to seek an adjournment during the original hearing.
63. Reason 3: That Ms Bennett stated that she had not made the FOI request on receipt of the anonymous letter and / or on identifying the 'discrepancies' between the Chief Nurse table and the HR table because of her disability. She stated that her disability (PTSD) affected her ability to process and retrieve information efficiently especially in high-pressure legal proceedings. In support of this submission she provided the two medical reports, dated 24 September 2019 and 7 March 2025. Whilst the 2019 report was several years ago, and the information provided was limited and not specific to these proceedings, we accepted her evidence that she has this disability.
64. We also accepted that Ms Bennett's disability was an additional factor to take into account when considering whether she acted with reasonable diligence. However, on the basis of the information provided to us, we do not find that this was a material factor at the time of the original hearing. This is because she did not apply for reconsideration on the grounds that she had been unable to act upon receipt of the anonymous letter due to her disability (indeed she did not refer to the anonymous letter at all). Nor did she apply for reconsideration on the grounds that she had not been able to deal with the respondent's late disclosure of the HR table due to her disability. At the original hearing the only disability related issue that she raised was the need for extra time during the hearing to contact her assistant to help locate documents, which was provided to her: Judgment paragraph 8 (**RB pg 5**). Further, she did not object to the late disclosure of the HR table or seek an adjournment in order to consider it. The only disability related ground upon which she sought reconsideration was in relation to the provision of an outdated bundle which she said 'critically impacted on her ability to engage effectively in analysing the bundle and witness statements'. This ground was rejected due to it having no reasonable prospect of the original decision being varied or revoked, because she was provided with considerable assistance at the original hearing to address this concern. Therefore at no point has Ms Bennett sought to argue that her disability was such that she was unable to meet the standards expected of a reasonably competent lay representative in preparing or conducting the original hearing. No did she seek reasonable adjustments to overcome any barriers to

enable her to meet that standard.

65. Therefore the claimant's application for reconsideration falls on the first limb of Ladd v Marshall in that we find that the evidence could have been obtained with reasonable diligence for use at the original hearing.

That the new evidence is relevant and would probably have had an important influence on the hearing

66. We accept that the new evidence is relevant since it concerns, and potentially undermines, the statistical evidence of NMC referrals provided by the respondent in the Chief Nurse table. In particular we were concerned about the NMC Response that between 1 September 2021 and 1 September 2022 75% of referrals were BAME, 0% were white and 25% were 'ethnicity unknown', which suggested that referrals of BAME nurses to the NMC was disproportionate. However the issue before us was not whether the NMC received disproportionate referrals of BAME nurses but the narrower question as to whether the respondent was being disproportionate in the referrals that it made and if so, whether that was direct or indirect discrimination.
67. When considering the data, we first took into account that the Chief Nurse table and NMC Response covered different time periods: the Chief Nurse table was between 5 April 2019 and 31 July 2022 whereas the NMC Response was between 1 September 2021 and 1 September 2022. Therefore the only overlapping period was between 1 September 2021 to 31 July 2022. Over this period the Chief Nurse table identified 3 referrals to the NMC, whereas the NMC Response identified 8 referrals having been received. These were the referrals we focused on.
68. Ms Bennett submitted that the difference in the number of referrals in the Chief Nurse table and NMC Response fatally undermined the reliability of the evidence provided by the respondent. We do not agree. The evidence of Ms Gorman, which we have accepted for the reasons set out in our findings of fact, is that the Chief Nurse table only recorded those nurses and midwives referred to the NMC by the respondent whereas the NMC Response included referrals by members of the public, colleagues and registrants themselves. This provided a reasonable explanation for the difference in numbers.
69. Second we noted that there was a possible discrepancy between the Chief Nurse table and the NMC Response, in that the Chief Nurse table recorded that of the 3 nurses referred, 2 were BAME nurses and one was a white nurse whereas the NMC Response identified that of the 8 nurses referred 75% (6) were BAME, 0% (0) were white and 25% (2) were 'ethnicity unknown'. Ms Bennett relied on this discrepancy to argue that the white nurse identified in the Chief Nurse table was not in fact referred to the NMC and this therefore called into question the reliability of that table. We reminded ourselves that there is always a need for caution where the numbers are very small. We considered that the most likely explanation for the discrepancy was that the white nurse referred to in the Chief Nurse table fell under the 'ethnicity unknown' category. This conclusion is supported by the data before us in that the Chief Nurse table

recorded that on 8 July 2022 a white nurse was referred to the NMC for drug taking in Maidstone High Street involving a police investigation and the NMC Response recorded that Nurse E was referred for 'drugs misuse or dependency' and 'arrest'. This was the only allegation of this nature and we considered it highly likely that it was the same person. We find that the reason for this apparent discrepancy was because the Respondent and the NMC are separate organisations with separate processes for collecting data on ethnicity.

70. Finally we did not consider that the NMC Response had any bearing on the other 'discrepancies' relied upon by Ms Bennett in her second witness statement:

70.1 The white nurse accused of physical assault (referred to in the original hearing as comparator 2): Ms Bennett submitted that this nurse was not referred to the NMC on 7 April 2021, as recorded in the Chief Nurse table, since an entry in the HR table recorded that a staff nurse was referred to HR on 13 April 2021 but not to the NMC. For reasons set out in our Judgment, there was no evidence that these entries were about the same person, but even if they were it was far more likely that the error was in the data recorded in the HR table not the Chief Nurse table: Judgment paragraph 95.1 and 50.3: **RB pgs 25 and 38**. In any event, this discrepancy is not resolved by the NMC Response which runs from 1 September 2022, post-dating this referral. Therefore the NMC Response does not provide evidence which undermined what was recorded in the Chief Nurse table.

70.2 The black nurse accused of a safeguarding allegation (referred to in the original hearing as comparator 3): The Chief Nurse table recorded that this nurse was referred to the NMC on 27 September 2021. Ms Bennett submitted that there was a discrepancy because there was no evidence of an internal HR investigation before referral. Even if correct, this discrepancy cannot be resolved by the NMC Response, since the NMC can only provide information about nurses referred to it and not what if any internal disciplinary action was taken by the respondent. Nor does the NMC Response undermine what is recorded in the Chief Nurse table, since it was not disputed that the black nurse was referred to the NMC on 27 September 2021.

70.3 The Asian nurse accused of sexual misconduct (the claimant): The Chief Nurse table recorded that the claimant was referred to the NMC on 15 October 2021. Ms Bennett submitted that the 'discrepancy' was that this had been done without a prior internal investigation. Again even if correct, this discrepancy cannot be resolved by the NMC Response, since the NMC can only provide information about nurses referred to it and not what if any internal disciplinary action was taken by the respondent. Nor does the NMC Response undermine what was recorded in the Chief Nurse table, since it was accepted that the claimant was referred to the NMC on 15 October 2021.

70.4 That the HR table showed other white nurses facing disciplinary action for professional behaviour and misconduct who were not referred to the NMC: The HR table did not provide an ethnic breakdown of the nurses and therefore it was not possible to draw this conclusion from the HR table. In any event, this 'discrepancy' cannot be resolved by the NMC Response, since the NMC can only provide information about nurses referred to it and not what if any internal disciplinary action was taken by the respondent.

71. Therefore we concluded that the new evidence, although relevant, would not have had an important influence on the original hearing.

That the evidence is apparently credible.

72. The respondent did not dispute that the evidence was apparently credible.

CONCLUSION

73. Our unanimous conclusion was that the claimant's application for reconsideration did not succeed. The original Judgment was confirmed.

The JUDGMENT was **approved** by:

Employment Judge Hart

Dated: 11 April 2025

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