EMPLOYMENT TRIBUNALS

Claimant: **Miss C Pierre**

Respondent: **Barts Health NHS Trust**

Heard at: **East London Hearing Centre**

On: **17 – 19 March 2020 and**
(in chambers by telephone) 9 April 2020

Before: **Employment Judge A. Ross**
Members: **Ms M Long**
Mr D Ross

Representation

Claimant: In person

Respondent: Mr Patel (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. **All the complaints of unfair dismissal, direct race discrimination and victimisation fail.**

2. **The Claim is dismissed.**

REASONS

1. The Claimant was continuously employed by the Respondent from 7 January 2013 until her resignation with immediate effect on 11 October 2018. After a period of Early Conciliation, by a Claim presented on 28 January 2019, the Claimant brought complaints of constructive unfair dismissal, direct race discrimination and victimisation.

The Issues

2. Complaints and issues were listed in Appendix A to the Order made by Employment Judge Burgher. At the commencement of this hearing, the Tribunal asked the Claimant to confirm whether this list was accurate and whether all the complaints were pursued. The Claimant stated that it was accurate.

3. In the course of cross-examination, however, it became clear that the List did not reflect the case that the Claimant intended to advance. Revisions to the List were agreed with the Claimant during her evidence; then further revisions and corrections were made after the conclusion of her evidence. The final Revised List of Issues is at Appendix A of this set of reasons. However, during her evidence, the Claimant agreed that certain of the allegations at 2(a) – (h) were not, in fact, allegations of discrimination at all. We address this in our conclusions.

4. It is important to record that the Tribunal took into account that the Claimant was a litigant in person and assisted her to accurately list her complaints and to put her case. This included:

4.1. Checking that the list of issues did reflect her case accurately, and revising it in line with her complaints as explained in her evidence;

4.2. Clarifying her evidence during cross-examination to ensure that the allegations were set out clearly where possible;

4.3. Assisting her by ensuring that key parts of her case were put in questions to the Respondent's witnesses;

4.4. Allowing her to re-open cross-examination where requested;

4.5. Copying an additional document that she wished to be included in the bundle;

4.6. Proposing ways in which she could advance cross-examination in a more effective and efficient way eg. by writing down questions.

4.7. Proposing that she provide a reading list of key documents (which she did not do, deciding to rely on documents that she referred to in cross-examination).

5. This hearing was originally listed for 4 days. However, due to lack of judicial resource, this was reduced to 3 days. On Tuesday 17 March 2020, given additional judicial resource for this case, the Tribunal added Friday 20 March 2020 back to the listing to ensure that the case could be concluded and oral judgment given.

6. During the course of this case, the UK government and the Senior Judiciary made a number of necessary decisions which were designed to address the Covid-19 virus pandemic. As a result of this, by the morning of 19 March 2020, the guidance was that hearings where the parties attended in person were to be avoided, to be replaced with hearings by telephone or other means of communication. This direction meant that the case should only proceed in the Tribunal on 20 March 2020 if this was absolutely

necessary. The Tribunal decided that this was not necessary; the Tribunal could meet by telephone, in conference, to reach its conclusions on liability.

7. Counsel for the Respondent attended on 19 March 2020 with detailed written submissions. The Tribunal decided that, in fairness to the Claimant, as a litigant in person, she should have the opportunity to read those submissions and respond to them. The hearing was adjourned at lunch. In order to further the overriding objective, given that the hearing on 20 March 2020 was cancelled, the Tribunal directed the Claimant should file her written submission with the Tribunal by email, and serve them on the Respondent, on or before 1 April 2020. The Tribunal listed the case for a hearing in chambers on 9 April 2020. The parties agreed to this procedure; no party complained of any unfairness. The Claimant duly filed her submissions. The Tribunal considered the submissions in detail.

8. During the hearing, on a few occasions, the Claimant stated that she did not know the technicalities of the law and had put in her claim all that she felt about her experiences. The Tribunal ensured the revised List of Issues set out a roadmap which took into account the relevant legal principles and the statutory provisions within the Equality Act 2010 ("EA 2010").

The Evidence

9. There was a bundle of documents, which was not agreed. The Claimant arrived on the first day of the hearing with additional pages; the parties agreed from these pages that only document marked "Grievance Policy and Procedure" should be added to the bundle (p41A). There were also some missing pages from the Bundle, which were sent in by email by the Respondent's solicitor; these were printed by the Tribunal and copies provided for each bundle.

10. The Tribunal proposed to the Claimant that she provide a reading list, given that her witness statement did not refer to page references.

11. The Tribunal read statements and heard oral evidence from the following witnesses (with their role at the material times):

11.1. Caron Pierre, Maternity Assistant;
11.2. Jacqueline Gabriel-King, Senior Midwifery Manager and then acting Consultant Midwife (from January 2018 to June 2018);
11.3. Lucy Ellis, Midwifery Manager;
11.4. Mona Ugiagbe, Diabetes Specialist Midwife;
11.5. Simon Steward, Head of Human Resources.

12. There was a chronology and cast list produced by the Respondent, which were not agreed. We did not take any fact within them as admitted or proved.

13. In respect of those mentioned in the Cast List, the Tribunal found that there was no need to refer to them by name where they were not witnesses. Indeed, given the public nature of this document and the allegations against them, we found that it would be fair to all parties to refer to them by their initials.

14. During Mr. Steward's evidence, he stated that the grievance procedure produced at the Tribunal by the Claimant (p41A) was not the relevant procedure, being one that he had never seen. He stated that he could send a copy of the relevant and applicable grievance procedure. On 18 March 2020, the Claimant was provided with the Respondent's Grievance Procedure (dated 2019, and marked "R1") and the Dignity At Work policy (dated 2019, "R2"). Recognising that these were not in force at the date of the Claimant's complaints, Mr. Steward said that he could obtain the policy document that was in force at the material times. After his evidence, he obtained and the Respondent disclosed the "Employee Complaints and Grievance Policy" (which states on its face that it was approved on 24 March 2016, and which we labelled "R3"). There was no application to re-call Mr. Steward for cross-examination on this document. We found R3 was the grievance procedure in force at the relevant time.

The Facts

15. The Claimant commenced employment in the Maternity Unit, within the Community Midwifery Team, at Whipps Cross Hospital.

16. The Claimant had worked for the Respondent before, in another Department, for a period prior to 2009. The Claimant had resigned in 2009. Prior to this, she had raised race discrimination complaints against a manager in a different department from that in which she worked in 2013.

17. In 2009, the Claimant had taken advice from the Race Equality Council about bringing a claim of race discrimination to the Employment Tribunal. She was told that there were time limits for bringing such claims, albeit that she was not told what these were.

Events from 2013

18. During the course of her employment from 2013 until her resignation, the Claimant had raised grievances and made allegations of race discrimination because of her colour against various employees. These included a grievance in December 2013 against a midwife (pp 84-86).

19. The Claimant's evidence before the Tribunal was that because of the grievance in 2013, she had been targeted and singled out; and that "they" did not want her in the Community team. She alleged that if she raised concerns after this time, they were ignored. Her case was that there was a conspiracy, involving a number of persons, against her.

20. The Tribunal found that there was no such conspiracy. There was no direct evidence of fact that there was a conspiracy (as opposed to the Claimant's allegation), and we found that there were no primary facts from which such a secondary fact could be inferred. Moreover, the Respondent's witnesses all explained in detail why they had acted as they did; and we accepted their evidence. We found that the Respondent's witnesses acted not in concert, but by a series of separate decisions, made by different individuals, at different times. In cross-examination, when asked about her claim of conspiracy and how so many different decisions or acts were linked in common purpose, the Claimant said that she was the common link; but she lacked sufficient insight to appreciate that this

fact alone could not be a sufficient explanation of the causation of the range of acts complained of. Furthermore, we found that the Respondent's witnesses acted for good reason, and with sensible management objectives.

21. The Tribunal found that there was no evidence of any conspiracy, nor that any of the matters at issues 2(a) – (h) were caused by the grievance of 30 December 2013. For the avoidance of doubt, from the facts found below, we found as a fact that this grievance was not the cause, nor a cause, of any of those matters.

22. Further, the Claimant's evidence was that from 2013, Mr. Steward had put himself in positions where he could alter or manipulate outcomes. The Claimant went on to state that if certain actions were challenged, they were ignored because of her colour, and that they were not dealt with in a fair and proper manner in line with the Respondent's Policy and Procedure. As we shall demonstrate from the following findings of fact, we did not accept the Claimant's allegations. We accepted the evidence of Mr. Steward, whom we found to be a reliable witness.

Events in 2015

23. Ms. Gabriel-King commenced work for the Respondent as Senior Midwifery Manager on 11 May 2015. We found that she was a reliable witness, who gave frank evidence, with a professional focus.

24. After a time, Ms Gabriel-King found that the Service was dysfunctional, for various reasons. Primarily, the teams acted as individual entities, which led to inconsistent standards and treatment, which was nothing to do with the race of the employees within the Community Service. Ms Gabriel-King introduced standards which applied across the Service, which led to several changes for the Teams. These improvements led to challenges from Team Leaders; but these challenges had nothing to do with the fact that Ms Gabriel-King was of black Caribbean ethnicity, and everything to do with the fact that she was trying to improve a dysfunctional Service.

25. On 30 May 2015, by email, the Claimant made allegations of race discrimination and bullying by her Team Leader, DB.

26. Ms Gabriel-King met both parties. During a meeting with the Claimant, lasting about two hours, Ms Gabriel-King learned that she had had disagreements with various members of staff and had taken out grievances, including one for race discrimination (December 2013, above) and one in 2014 against MB, a black team leader, for not following procedure by not phoning the Claimant when she was absent sick. The second of these had led to the Claimant moving to DB's team.

27. Ms Gabriel-King experienced that the Claimant displayed a range of emotion from anger to tears, and found that she had emotional distress due to matters both inside and outside of work. The Respondent had, by that time, already adjusted the Claimant's work pattern in order to assist her. Ms Gabriel-King suggested counselling and a referral to Occupational Health, but the Claimant declined this offer.

28. Ms Gabriel-King met DB about the Claimant's complaint. DB was upset about this complaint believing that it was malicious. DB stated that she did not wish to manage the

Claimant anymore and that she intended to bring a grievance against the Claimant, which she did on 9 June 2015.

29. However, on 4 June 2015, all the Community Midwifery Team Leaders filed a joint grievance against the Claimant: see p186.2. Those who signed the grievance included two Team Leaders who were black, including one (DJ) who was from the same country as the Claimant. The thrust of their complaints was that her behaviour was affecting the Community Service, including the delivery of services. For example, the Team Leaders complained that the number and length of allegations made by the Claimant in emails was distracting the Team Leaders, and taking them away from their clinical and managerial responsibilities.

30. As a result of this grievance from all the Team Leaders in the Community Service, the grievance from DB about the Claimant, and a complaint from the Claimant about DB, Ms. Gabriel-King took advice from a member of HR. The advice was that the Claimant should be redeployed on a temporary basis in order to reduce the conflict within the Team managed by DB.

31. The Claimant was informed that she could file a grievance too, and all grievances would be investigated at the same time. The Claimant refused and commenced a period of sickness absence on 24 June 2015 which lasted until 30 September 2015.

32. Ms Gabriel-King decided that the Claimant should be transferred on a temporary basis to the Diabetic Team; the Tribunal accepted her evidence about the reasons for this.

33. By her Claim and evidence, the Claimant alleged that when she made a grievance against a white employee, the subject of her grievance was not transferred. Moreover, she relied on the Grievance Policy that she produced (p.41A) which she stated had come from the Trust's public website (not the intranet); this Policy stated that the status quo should be maintained pending the conclusion of the grievance. The Claimant complained that this procedure had not been followed in her case.

34. The Tribunal found that the Policy at p.41A was not the relevant Policy; it was an out of date policy, probably from before the Respondent was formed by a merger. We accepted Mr. Steward's evidence on this point. We found that R3 (dated 24 March 2016) was likely to be similar or the same as the relevant policy that applied at the time that the Claimant was temporarily redeployed. This policy states that conflict at work has a disruptive effect on employees involved and on their ability to deliver a high standard of care; and the policy sets out a proactive approach to management of such situations. The aims of the policy do not include retention of the status quo pending conclusion of the grievance; but the aims do include ensuring high quality care for patients. The Tribunal found that the Claimant had not proved any breach of the relevant grievance procedure in force in June 2015.

35. In any event, the treatment of the Claimant who was temporarily redeployed was made in different circumstances to the case of another employee who was not temporarily redeployed when the Claimant filed a grievance. In particular, the grievance of 4 June 2015 came from all the Team Leaders of the Community Service, not from a single non-team leader employee. Moreover, the Team Leaders were responsible for delivering the Community Service and they were refusing to manage the Claimant; their complaints

about the Claimant and that her conduct was affecting the service provided to women had to be addressed by some proactive form of action.

36. Moreover, the Tribunal found that any Maternity Assistant facing a collective grievance from all the Team Leaders in Community service, who were refusing to work with the Maternity Assistant, and in the circumstances described by Ms Gabriel-King, would have been redeployed at this time on a temporary basis.

37. The Tribunal found that the reasons for the Claimant's temporary redeployment had nothing to do with her race or colour. From all the Tribunal read from the contemporaneous documents, and from the Claimant's oral evidence, which demonstrated that she was still very unhappy about her alleged treatment by DB, we found that Ms. Gabriel-King's decision to move the Claimant on a temporary basis was reasonable and sensible management in the circumstances. Ms Gabriel-King acted on the basis of HR advice, but, in any event, we found that she had no real choice but to do what she did.

2016 & Report of independent investigator

38. An independent investigator was appointed, who completed a report which was delivered in November 2016. The reasons for the delay to that report, which were not challenged by the Claimant as inaccurate, are set out in the report. The report details that all the Team Leaders gave evidence about poor behaviour by the Claimant at times, including that which was rude and confrontational. The investigator concluded that the grievances by DB and the Team Leaders were partially upheld; but that the cross-allegations of race discrimination made by DB and the Claimant were not upheld.

39. The investigator also found that the Community team leaders had failed to manage the Claimant appropriately. In evidence, Ms Gabriel-King explained that this failure was because Team Leaders had been concerned that the Claimant would raise grievances against them if she disagreed with something, which meant that she was left to work as she wished, which had led, for instance, to DB not knowing where she was on various occasions. The report concluded that it was a management decision whether the Claimant should remain in the Diabetic Team.

40. The investigator found that the Claimant sometimes misinterpreted information that she received. From seeing the Claimant give oral evidence, the Tribunal found that the Claimant did, indeed, have a tendancy to misinterpret events, often several months after the events in question.

41. Having taken HR advice again, Ms. Gabriel-King decided that the Claimant should remain on a permanent basis in the Diabetic Maternity team. We accepted her evidence as to why she reached that decision. In particular, in over a year since the allegations were made, there had not been sufficient positive change in the behaviour of either party for her to return the Claimant to the Community Service. Moreover, when the grievance outcome was discussed with the Team Leaders on 15 September 2016, none of the Team Leaders wanted the Claimant in their team, for the reasons that Ms Gabriel-King explained which included the Claimant's previous grievances and allegations against Team Leaders and the midwife in another team. Ms Gabriel-King found that complaints had emerged

about issues involving the Claimant, even though she was not working in the Community service during this temporary period.

42. The final straw for Ms Gabriel-King was when, in error, she provided the Claimant with the minutes of the outcome meeting of the Team Leaders of September 2016. The Claimant was very displeased by the contents of these minutes; she stated that she would take further grievances against the Team Leaders. Ms Gabriel-King found that each grievance lasted a long period of time due to the need for investigation; and then each outcome led to a further grievance. She believed that she needed to stop that cycle of conflict creation.

43. In her evidence, in answer to a question from the Tribunal, the Claimant accepted that her real complaint was the decision to transfer her to the Diabetic Team. The Tribunal found that the reasons for the decision to re-deploy the Claimant on a permanent basis to the Diabetic Team had nothing to do with her colour or race. The decision was taken for the sensible and practical management reasons given by Ms Gabriel-King.

44. The Tribunal found that, working in the Diabetic Maternity Team, the Claimant was basically doing Maternity Assistant duties but not in the community. Ms Gabriel-King was anxious to ensure that the Claimant should be treated consistently with other Maternity Assistants, and developed a Job Description for the role, and directed Ms. Ugiagbe, the Claimant's line manager in that team, to ensure consistency of treatment. Moreover, the Tribunal found that Ms. Ugiagbe was supportive of the Claimant and proposed opportunities for career development for her. In evidence, Ms. Ugiagbe explained that the Claimant was intelligent; but the Claimant had not wanted to pursue any of these, which she found sad. We found that there were a number of career opportunities that could have been pursued by the Claimant during her work in the Diabetic Maternity Team. For example, she could have developed a specialism in diabetes, and then been able to work in the community going out to pregnant women with diabetes, or she could have applied for the Associate Nursing course.

45. All the primary facts led to an inference that the Claimant was supported well in her role in the Diabetic Team. There was no evidence that redeploying her to that role was either targeting of the Claimant, nor done because of her race or colour.

Appeal against decision to re-deploy the Claimant permanently

46. The Claimant appealed the decision to transfer her to the Diabetic Team.

47. The Claimant relied upon her written appeal or grievance dated 25 January 2017 (p.279) as a protected act. This was to appeal the outcome of the grievance brought by the Team Leaders, which was delivered on 13 December 2016 to her by Ms Gabriel-King. In the grievance or appeal letter of 25 January 2017, the Claimant alleged that she had been removed from her place of work in June 2015 because she had complained about a white midwife (whom she stated in evidence was DB), and that her removal from Community Team had been an act of race discrimination. The Tribunal found that none of the matters at issues 2(a) – (h) were caused by this grievance.

48. Mr. Steward invited the Claimant to a meeting with himself and Zebina Ratansi, Director of Nursing, on 5 May 2017 (p304). This meeting was informal, to discuss the

outstanding issues raised by the Claimant to see if they could be resolved without going through the formal process. There are no notes of this meeting, which we found unhelpful, but the email of 8 May 2017 (p.306) from Mr. Steward sets out that, at this meeting, all the options were discussed with the Claimant and it was decided that the formal appeal against the decision that the Claimant should be transferred was the best. In addition, Simon Steward and Zebina Ratansi sought to gain further information from the Claimant about her case, so that the appeal panel could be better informed as to why the Claimant felt the decision to transfer her was unfair. We were satisfied that the same approach would have been taken, in the same circumstances, for any Maternity Assistant, irrespective of race or colour.

49. An appeal hearing was arranged. In line with the grievance procedure within R3, the panel consisted of Zebina Ratansi as the senior manager, with Mr. Steward as the HR Manager. The Claimant knew who would be on the appeal panel on receipt of the email of Simon Steward on 8 February 2017 (p330); she raised no complaint at that point, despite complaining about other matters.

50. We did not accept the Claimant's evidence that she had complained in telephone calls; she had never mentioned these before. We found that there would have been no reason for her to object in advance to those on the appeal panel: they were both senior managers and they had had no previous dealings with the Claimant or the issues raised by her in her appeal.

51. Moreover, the Tribunal found that the first time that the Claimant complained about those forming the appeal panel was on 10 May 2018 (some three months after she received the grievance outcome letter), in a grievance letter. Given how ready the Claimant had been to raise complaint where she perceived procedure had not been followed, we found it most unlikely that she would have waited such a long time after learning the outcome if she believed at the time that those on the appeal panel should not have heard the appeal. We found that this was an example where, months after an event, the Claimant reinterpreted matters because she was unhappy about what decision had been reached. We found, also, as recorded in the letter of 10 May 2018 and other documents, that at that time the Claimant had a sense of loss and bitterness due to recent personal experiences following the breakdown of a relationship.

52. During the appeal hearing, the Claimant did not object to those on the panel. Although it was unhelpful to the Claimant and the Tribunal for the Respondent not to have had notes produced, shared, and agreed with the Claimant as correct, because this would have provided memory refreshing detail of the meeting, a detailed appeal outcome letter was sent on 14 February 2018 (p336-339), which we found set out a summary of the relevant discussion at the hearing on the grounds of appeal, and the panel's conclusions on them. Ms Gabriel-King gave a statement to the appeal, and was available for cross-examination by the Claimant.

Alleged comments by Ms. Gabriel-King at grievance appeal 13 February 2018

53. The Tribunal accepted Ms Gabriel-King's oral evidence that she did not make the comments alleged. Her evidence was corroborated by the fact that there was no immediate complaint after the meeting about anything said by Ms Gabriel-King, despite the fact that the Claimant was sensitive to, and largely unable to accept, any criticism. In

any event, we found it inherently unlikely that, having seen Ms Gabriel-King give evidence and having observed her professionalism, she would have made such comments in such a forum, before two senior managers.

54. Moreover, we found that the Claimant herself raised the question of her mental health (p338); and this led the appeal panel to conclude that the Claimant had misrepresented certain facts on that ground of appeal.

55. The Tribunal accepted Ms Gabriel King's evidence at paragraph 20 of her witness statement. She did state that she did not know "what was wrong", because Ms Gabriel-King genuinely did not know why there was a continuous stream of disputes between the Claimant and others.

56. The Tribunal found that this allegation was a further example of the Claimant misinterpreting or reinterpreting past events, in the context of her own emotional loss and anger. The Claimant tended to misinterpret guidance as criticism. We found that her emotions clouded her recollection, and prevented her having the necessary insight into what had occurred, leading her to blame others.

5 June 2018 - dismissal of Claimant's grievance of 24 May 2018

57. The Claimant's sent a letter to Gloria Rowlands, Director of Midwifery, dated 10 May 2018; there was no letter or grievance of 24 May 2018. For the avoidance of doubt, the Tribunal have taken the allegation to refer to the letter of 10 May 2018. The complaint letter of 10 May 2018 was entitled "Grievance Identifying my Discriminatory Experiences in the Trust". It was primarily about her permanent transfer to the Diabetic Team: see, for example, p.355. The letter also included background to this, consisting of complaints and allegations relating to former grievances and stale matters.

58. The Claimant complains that this letter was a grievance and that Mr. Steward dismissed it without following proper process or proper consideration. We did not agree with the Claimant's allegations.

59. The Tribunal accepted Mr. Steward's evidence. He did not simply dismiss the grievance letter. He considered that the letter sought to re-open many issues addressed in the grievance appeal hearing of 13 February 2018, despite the fact that the Claimant had been told following receipt of the outcome letter that the internal appeal process was exhausted in respect of the transfer issue and the Claimant's desire to move back to the Community Team (p.339). He noted that the letter did not challenged any of the decisions on the grounds of appeal, so there was no reason to re-open the enquiry in any event.

60. In short, the Tribunal found that Mr. Steward had reasonable and proper cause for his decision not to progress this letter as a fresh grievance. In any event, Mr. Steward's decision to prevent this issue being recycled as a new grievance was not calculated or likely to seriously damage the relationship of trust and confidence. Had the Claimant's emotions not reduced her insight into events, and their real causes, she would not have sought to bring a further complaint on matters already determined.

61. The Tribunal would only make this point. Even though there is no evidence of any breach of policy or procedure, it may well have been prudent for another HR manager to

take the decision that Mr. Steward took. This is because of the Claimant's sensitivity, and her belief in a conspiracy against her. He had, after all, been involved in the grievance appeal panel.

62. From all the evidence, including that of Mr. Steward, we inferred that any Maternity Assistant in the same material circumstances as the Claimant would have been treated exactly the same as the Claimant, whichever manager had taken the decision of 5 June 2018. Her treatment had nothing to do with race or colour.

9 July 2018: whether Mona Ugiagbe cancelled the Occupational Health ("OH") appointment

63. The Tribunal accepted the evidence of Mona Ugiagbe in relation to this and the other matters upon which she gave evidence. Ms. Ugiagbe had had a good relationship with the Claimant, at least at the start of her time in the Diabetic Service. We find that she had done all she could to support the Claimant and had tried to be a friend to her.

64. On 5 July 2018, the Claimant emailed Ms Ugiagbe to state that she was absent sick and would not be in on 5 or 6 July: see p392. Subsequently, the Claimant emailed on 8 July 2017 to say that she was not feeling 100%, would go and see her doctor, and would not be at work.

65. As a result, on 9 July 2018, Ms Ugaigbe emailed OH to request that the Case Conference be re-arranged. We found that MU did not cancel the Case Conference as alleged by the Claimant in her Claim. In oral evidence (in answer to a question from the Tribunal)**,** the Claimant accepted that the Case Conference had been cancelled by Mona Ugiagbe as a result of her misunderstanding about whether the Claimant would attend. Also, in her evidence, the Claimant accepted that this decision to postpone the OH appointment had nothing to do with her grievance of December 2013.

66. Furthermore, we accepted Ms Ugiagbe's evidence on this issue; she had understood that the Claimant would not be attending because she had been absent sick. Moreover, Ms Ugaigbe copied her email to OH to the Claimant, and asked that she inform KM on her return to work: see p391. We found that this email provides strong corroboration of the evidence of Ms Ugiagbe. The Tribunal concluded that Ms Ugiagbe had acted reasonably and fairly to the Claimant by seeking to re-schedule the Case Conference; this was done for good and sensible reasons, including to allow the Claimant to have more preparation time for the meeting because she did not want the Claimant to be become more stressed.

67. The Tribunal found that this complaint was a further example of the Claimant's misinterpretation of events, after time had elapsed, and where she viewed certain acts by the Respondent in the worst possible light.

Whether MU supplied Lucy Ellis with Claimant's confidential information for the purpose of the Stage 1 Sickness Review Meeting

68. Ms Ugiagbe had never conducted a Stage 1 Sickness Review Meeting before. The Tribunal found that it was a reasonable step for her to ask a more senior manager to chair the Sickness Review Meeting, to enable her to sit in and gain experience. This was particularly so given that the Claimant had a history of making complaints and

misinterpreting events. We found that the Claimant suffered no disadvantage by a more senior manager conducting the Stage 1 Sickness Review Meeting, nor that any reasonable employee could think that it was a disadvantage.

69. Ms Ugiagbe did not give Ms. Ellis any confidential information about the Claimant; the information that Ms. Ellis needed was all in the Claimant's file.

70. The Tribunal had no difficulty in accepting Ms. Ellis' oral evidence, which was the subject of very limited cross-examination (around 4 questions). Ms. Ellis had about 20 years of experience within the Trust at the time of the Stage 1 meeting. She was employed as a Midwifery manager. We accepted her evidence that she had no previous difficulty with the Claimant; we did not accept the Claimant's evidence that she had overheard Ms. Ellis complain about her, which was not raised as an objection at the time of the Stage 1 meeting.

71. The plan had been for Ms. Torks-Jones (also a Midwifery Manager) to chair the Stage 1 meeting. Around 15 minutes before the meeting, Ms. Torks-Jones who had been working elsewhere that morning, asked Ms. Ellis to step in, because she was the only manager on site that could do so. Ms. Torks-Jones wanted avoid re-scheduling the meeting, which had already been re-scheduled. Ms. Ellis agreed and re-scheduled her clients. In answer to a question from the Tribunal, the Claimant agreed that she had complained in the past when the Respondent had not adhered to time-scales.

72. The Claimant's conduct at this meeting was challenging and uncooperative. The Claimant challenged whether Ms. Ellis was competent to chair the meeting; and stated that it was a breach of her confidentiality, because Ms. Ellis was not her manager. The Claimant was offered the chance to re-schedule the meeting (p.408). However, the Claimant agreed to start the meeting with Ms. Ellis conducting it; and we found that, during the meeting, she agreed to continue the meeting with Ms. Ellis.

73. The Tribunal found that this level of agreement was also implicit agreement to Ms. Ellis receiving and using confidential information on her file, including her personal email address for sending the outcome letter. Indeed, in cross-examination, the Claimant agreed that it was proper for Ms. Ellis to be privy to confidential personal information in order to perform her role conducting the Stage 1 meeting.

74. We found that no reasonable employee would feel that Ms. Eilis' receiving and using confidential information on her file was a detriment. Moreover, any Maternity Assistant in the Claimant's circumstances would have been treated in exactly the same way at this Stage 1 Sickness Absence meeting.

75. The meeting was conducted in accordance with the Sickness Absence Policy, and we heard no allegation that Ms. Ellis had misused any confidential information received.

76. After the Stage 1 meeting, on 6 September 2018, Ms. Ellis sent the outcome letter both by recorded delivery and to the Claimant's personal email address (p.4408-410). Ms. Ellis did this because, having checked the Claimant's folder, this was how previous correspondence had been sent. Moreover, we accepted that, at this time, staff of the Respondent could not access their work emails remotely.

77. The Tribunal found that the Claimant had implicitly consented to Ms. Ellis using her personal email address and her home address when agreeing that Ms. Ellis could hear the Stage 1 meeting.

78. In any event, Ms. Ellis had reasonable and proper cause for doing what she did. The Claimant accepted in cross-examination that it was normal for the manager who conducted the hearing to send the outcome letter; so her evidence that Ms. Ugiagbe should have sent the outcome letter, rather than Ms. Ellis, made no sense. Moreover, the Claimant's personal email address had been used for some time by the Respondent without complaint. Furthermore, the Claimant had only received the second invitation to the Stage 1 meeting because it had been sent to her personal email address.

79. We found that no reasonable employee would or might feel that Ms. Eillis receiving and using confidential information on her file was a detriment. Moreover, any Maternity Assistant in the Claimant's circumstances would have been treated in exactly the same way at this Stage 1 Sickness Absence meeting and by the outcome letter being sent to their personal email address.

Ms Gabriel-King sending correspondence using the Claimant's personal email address

80. Ms Gabriel-King did send an email to the Claimant's personal email address in September 2018. In evidence, the Claimant accepted that the only letter and email sent to her were those at p.418-420. The letter was more procedural in style; it was an invitation to the Stage 2 Sickness Absence meeting. There were good management reasons for this letter being sent, because the Claimant had been absent from 5 July 2018 and her sick certificate had stated that she would be unfit until 4 November 2018. The email that accompanied it was sympathetic, wishing the Claimant a good recovery from her sickness.

81. The Tribunal found that there was no breach of the confidentiality duty owed to the Claimant, nor were the letter and cover email capable of forming part of a course of conduct amounting to breach of the implied term of trust and confidence. In particular, Ms Gabriel-King had reasonable and proper cause to use it:

81.1. The Claimant could not access emails to her work email address when she was not at work.

81.2. The inference from the email of 14 July 2015 (p225) is that the Claimant had expressly provided her personal email address to Ms. Gabriel-King and consented to its use, although she was not her line manager. This permission was never withdrawn.

81.3. The Claimant's personal email address had been used without complaint by the Respondent, when the Claimant was not at work, on other occasions since 2015: see pp.392, 400, 403. It was the email address within her maternity file (which is how Ms. Ellis had come to use it). No employee had passed the Claimant's personal email address to Ms Gabriel-King.

81.4. The content of the email and letter were in no way unfair nor less favourable treatment than any other Maternity Assistant who had been absent sick for the same length of time would have received.

82. Again, the Tribunal found this allegation to amount to the Claimant reinterpreting events, months later, in order to try to substantiate the sense of grievance that she felt.

The decision to resign

83. Prior to the Stage 1 Sickness Absence Meeting, on 21 May 2018, the Claimant had an appraisal. This was conducted with MU as her line manager. Ms. Ugiagbe was shocked by what the Claimant had written, which included, under the section "Career Development":

> "*Hopefully out of this Trust. Off [sic] course not in the current forced role management pushed me into. I truly do not believe I will be able to get new opportunities if I continue to be employed in this trust due to the high level of discrimination I experienced.*"

84. In evidence, the Claimant said that the real reason that she resigned was because she had been removed from the Community Team. This evidence is corroborated by the above statements in the appraisal document.

85. We found Ms. Ugiagbe to be a compelling witness on this issue. She saw the potential in the Claimant and had tried to get her to go for career opportunities, such as the Associate Nurse course. However, as Ms. Ugiagbe explained, the Claimant refused to be interested in any training or development.

86. We inferred from the contents of this appraisal, and the job application (bus driver) that followed it later in the Summer, that the Claimant had decided to resign from her Maternity Assistant role quite soon after the date of that appraisal, probably at the time of the Stage 1 Sickness Absence review meeting in September 2018.

87. Whilst absent sick, in August 2018, the Claimant had seen an advert for jobs as a bus driver with London Transport. She applied for this role. The Claimant was interviewed in September 2018. She received a job offer around 1 October 2018.

88. The Claimant resigned without notice on 11 October 2018, about 1 week before she was due to start in her new job.

89. The Tribunal found that the Claimant's sense of grievance about her removal from the Community Midwife's team was one cause of her decision to resign. However, the main cause of this decision was the bus driver job offer.

Alleged failure or refusal by Mr. Steward and Ms Webster to provide the Claimant with her payslips for May to October 2018

90. The Claimant did not request any pay-slips from either Mr. Steward or Ms Webster until her email request of 29 October 2018 (see p. 440.2). This was some time after her

resignation. Therefore, the alleged failure or refusal to supply the pay-slips cannot have had anything to do with the Claimant's decision to resign.

91. We accepted Mr. Steward's evidence about the steps taken to obtain pay-slips for the Claimant. He went out of his way for the Claimant, and did his best to find out what had happened to original payslips, even though he could, quite reasonably, have chosen not to do so. He provided duplicates promptly, where originals could not be found: see 1 November 2018 letter (p.444).

92. When the Claimant had requested originals, Mr. Steward understood that they had been hand-delivered to her. It is apparent from the letter of 9 November 2018 that he had located two more, and that these could be collected from the front desk of the hospital. The Claimant refused to do this, wanting to collect from the Maternity department. In circumstances in which there had been a number of serious complaints made by the Claimant against midwifes and team leaders, this demand was unreasonable by the Claimant.

93. The Tribunal found that any hypothetical comparator Maternity Assistant would have been treated in the same way by Mr. Steward and Ms Webster, irrespective of their colour or race.

The Law

Constructive Dismissal

94. Section 95(1)(c) ERA provides that there is a dismissal when the employee terminates the contract with or without notice, in circumstances such that she is entitled to terminate it without notice by reason of the employer's conduct.

95. Where there is a complaint of constructive dismissal, the burden is on the employee to prove the following:

95.1. That there was a fundamental breach of contract on the part of the employer;

95.2. That the employer's breach caused the employee to resign;

95.3. The employee did not affirm the contract and lose the right to resign and claim constructive dismissal.

96. The propositions of law which can be derived from the authorities concerning constructive unfair dismissal are as follows:

96.1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavation Limited v Sharp*.

96.2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust

and confidence between employer and employee: see *Malik v Bank of Credit and Commerce International* [1998] AC20 34h-35d and 45c-46e.

96.3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Browne-Wilkinson J in *Woods v Wm Car services (Peterborough) Limited* [1981] ICR 666 at 672a; *Morrow v Safeway Stores* [2002] IRLR 9.

96.4. The test of whether there has been a breach of the implied term of trust and confidence is objective as Lord Nicholls said in *Malik* at page 35c. The conduct relied on as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence that the employee is reasonably entitled to have in her employer.

96.5. A breach occurs when the proscribed conduct takes place: see *Malik*.

96.6. Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach; but it is not a legal requirement: see *Bournemouth University v Buckland* [2010] ICR 908 at para 28.

96.7. In terms of causation, the Claimant must show that she resigned in response to this breach, not for some other reason. But the breach need only be an effective cause, not the sole or primary cause, of the resignation.

97. In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] IRLR, the Court of Appeal approved the guidance given in *Waltham Forest LBC v Omilaju* (at paragraph 15-16). These cases provide comprehensive guidance on the "last straw" doctrine:

97.1. The repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: *Lewis v Motorworld Garages Ltd* [1986] ICR 157, per Neill LJ (p 167C).

97.2. In particular, in such a case 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 at p 169F).

97.3. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things is of general application.

97.4. 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. 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 the earlier acts on which the employee relies, it amounts to a breach of the implied

term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

97.5. The final straw need not be characterised as 'unreasonable' or 'blameworthy' conduct, even if it usually will be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy.

97.6. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality referred to.

97.7. 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.

97.8. If an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign, soldiers on and affirms the contract, she cannot subsequently rely on these acts to justify a constructive dismissal unless she can point to a later act which enables her to do so. If the later act on which she seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

97.9. The issue of affirmation may arise in the context of a cumulative breach because in many such cases the employer's conduct will have crossed the *Malik* threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the *Malik* term.

97.10. Even when correctly used in the context of a cumulative breach, there are two theoretically distinct legal effects to which the "last straw" label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the *Malik* threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so.

97.11. The affirmation point discussed in *Omilaju* will not arise in every

cumulative breach case:

"*There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect).*" (per Underhill LJ).

98. The Tribunal noted that a breach of trust and confidence has two limbs:

98.1. the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; and

98.2. that there be no reasonable or proper cause for the conduct.

The Equality Act 2010

Jurisdiction: Time limits in discrimination cases

99. Section 123 EA 2010 provides, so far as relevant, that:

"(1) … proceedings on a complaint … may not be brought after the end of—

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

(b) such other period as the employment tribunal thinks just and equitable."

100. The principles to be applied in the application of section 123 EA 2010 are as follows:

100.1. The Tribunal's discretion to extend time under the "just and equitable" test is the widest possible discretion: *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194 paragraph 17.

100.2. Unlike section 33 Limitation Act 1980, section 123(1) EA 2010 does not specify any list of factors to which the Tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a Tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble [1997] IRLR 336*), the Court of Appeal has made it clear that the Tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London*

Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, paragraph 33.

100.3. There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, nor that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal must have regard. If a claimant gives no direct evidence about why she did not bring her claims sooner a Tribunal is not obliged to infer that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended: *Abertawe Bro Morgannwg University Local Health Board v Morgan* at paragraph 25.

100.4. Factors which are almost always relevant to consider when exercising any discretion whether to extend time are:

(a) the length of, and reasons for, the delay and

(b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

See *Abertawe Bro Morgannwg University Local Health Board v Morgan* at paragraph 19.

101. I remind myself that the exercise of the power to extend time is the exception, not the rule: see *Robertson v Bexley Community Centre* [2003] IRLR 434.

Direct Discrimination

102. For convenience, all section references in this set of reasons are to the Equality Act 2010.

103. Section 13 provides:
"A person (A) treats another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

104. The required comparison must be by reference to circumstances. Section 23(1) provides:

"On a comparison of cases for the purposes of section 13,14 or 19 there must be no material difference between the circumstances relating to each case."

105. In *Shamoon*, at paragraphs 9-11, Lord Nicholls gave guidance as to how an employment tribunal may approach a complaint of direct discrimination and explained that it was sometimes unnecessary to identify a comparator:

> "…*employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others*."

Less favourable treatment and "detriment"

106. The proper test as to whether a detriment has been suffered is set out in *Shamoon* at paragraphs 34-35. In short:

> "*Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment".*"

107. The Tribunal found that this guidance was of particular relevance in this case.

Causation

108. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong,* paragraph 37.

Discrimination by Victimisation

109. Section 27 provides, where relevant:

> "*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.*"

110. If the Tribunal is satisfied that the protected act is one of the effective reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason.

111. The proper test as to whether a detriment has been suffered is set out in *Shamoon,* above.

Burden of proof in discrimination cases

112. We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in *Igen v Wong* [2005] EWCA Civ 142, *Madarassy v Nomura* [2007] ICR 867, and *Efobi v Royal Mail Group* [2019] ICR 750.

113. In *Efobi*, at paragraph 10, Elias LJ explained the correct approach to the burden of proof for a discrimination complaint:

> "The authorities demonstrate that there is a two-stage process. First, the burden is on the employee to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal must leave out of account the employer's explanation for the treatment. If that burden is discharged, the onus shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the tribunal that it was not tainted by a relevant proscribed characteristic. If he does not discharge that burden, the tribunal must find the case proved."

114. The burden of proof is not shifted simply by showing that the claimant has suffered a difference in treatment or detrimental treatment and that he has a protected characteristic or has done a protected act: *Madarassy* at paras 56-58 (followed in *Efobi*).

115. However, it is important not to make too much of the role of the burden of proof provisions at section 136. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other: *Hewage v Grampian Health Board* [2013] UKSC 37.

Submissions

116. Mr. Patel provided a full set of written submissions, helpfully addressing each issue.

117. The Claimant's written submissions were read and considered by the Tribunal. To some extent, her submissions did not assist her case. They included the following:

> "*I believe my experiences while I was employed at Barts Health NHS Trust could be viewed as management doing what is best after hearing the various witnesses at the tribunal. However, management did not employ the disciplinary procedures to address my bad behaviour which would have proven to me I was being treated fairly and in line with the procedures set out in the Trust policies. How I felt while I was employed at the Trust is individual to me.* …"

118. Also, the Claimant complained that a particular culture had been allowed to exist and was not checked by Ms Gabriel-King. The Claimant stated that not all the witnesses treated her differently because of her race, and the underlying issues at the Respondent Trust were unfair practices and behaviours that went unchallenged; and when she challenged these issues, she had to be punished. This theme of "punishment" for challenging a culture does suggest that some of the treatment complained of was not because of her colour nor the protected acts.

119. The Claimant did state that she believed that there was prejudice against her, one reason for which was her race or colour, and that there was a conspiracy against her. However, the Claimant's section on "Victimisation" focussed on allegations of victimisation in the colloquial meaning, rather than the statutory meaning, of the term. For example, it did not link any of the alleged treatment to the grievances referred to in the list of issues.

Conclusions

120. Applying the law set out above to the findings of fact made, the Tribunal reached the following conclusions on the issues within Appx A.

Issue 2a

121. The Tribunal repeats the facts and matters set out at paragraphs 48-52 above. We found that there was nothing about the presence of Zebina Ratansi or Simon Steward on the appeal panel which could amount to something capable or likely to seriously damage the relationship of trust and confidence, whether on its own, or as part of any series of acts. We found that there was no breach of the grievance procedure, whether the letter or the spirit of it; but in any event, there was reasonable and proper cause for Ms. Ratansi and Mr. Steward to form the appeal panel because:

121.1. The Claimant never objected to their presence, despite being warned that they would hear the appeal.

121.2. Zebina Ratansi and Simon Steward had had no prior involvement with the Claimant.

121.3. They had not attempted to resolve any of the Claimant's grievance grounds at the meeting on 5 May 2017.

Issue 2b

122. The Tribunal repeats the facts set out at paragraphs 53-56 above.

123. Ms Gabriel-King's evidence to the appeal panel was honest and given from her genuine, frank, assessment of the circumstances which led to the decision to transfer the Claimant on a permanent basis to the Diabetic Team.

124. Ms Gabriel-King's evidence was not calculated or likely to destroy or seriously damage the relationship of trust and confidence. Moreover, Ms Gabriel-King had

reasonable and proper cause for giving the evidence that she gave to the grievance appeal.

Issue 2c

125. The Tribunal repeats the facts and matters set out at paragraphs 57-63 above. There was reasonable and proper cause for Mr. Steward's decision that the substance of the grievance had already been determined and all internal processes had been exhausted.

126. The Tribunal accepted the Respondent's submissions on this allegation. We concluded that this act of Mr. Steward was not calculated or likely to destroy or seriously damage the relationship of trust and confidence.

Issue 2d

127. The Tribunal repeats the findings of fact at paragraphs 64-68 above. The Claimant's OH appointment was not cancelled, but postponed. We concluded that the misunderstanding surrounding this appointment could not amount to a breach of the implied term of trust and confidence, nor could it add to a course of conduct (which we found did not exist anyway) so as to establish such a breach.

Issue 2e and 2g

128. The Tribunal repeats the findings of fact at paragraphs 69-76 and 77-80 above. The allegations are not proved as matters of fact: Ms. Ugiagbe did not provide the alleged confidential information (which was on the maternity file), the Claimant had experienced no previous difficulty with Ms. Ellis, Ms. Ellis was entitled to use the Claimant's personal email address, and the Claimant had implicitly agreed that Ms. Ellis could use her personal email address.

129. On the findings of fact made, neither Ms. Ugiagbe nor Ms. Ellis were responsible for any breach of the implied term of trust and confidence, and nor were their acts capable of forming part of any course of conduct amounting to such a breach.

Issue 2(f)

130. The Tribunal repeats the findings of fact at paragraphs 81-83 above. The sending of correspondence, which related to the Sickness Absence procedure and which it was important for both parties that the Claimant received, to the Claimant's personal email address could not amount to a breach of the implied term relied upon. As we have explained, Ms Gabriel-King had reasonable and proper cause to use the Claimant's personal address, including the Claimant's own permission to do so.

Issue 2(h)

131. The Tribunal repeats the findings of fact at paragraphs 91-94 above. Given the date of these acts, it is not necessary to decide whether, on the findings of fact made, there was any breach of the implied term of trust and confidence.

132. However, for the avoidance of doubt, the Tribunal concluded that on the findings of fact made, Mr. Steward and Ms. Webster did not "fail or refuse" to provide the payslips. Mr. Steward demonstrated that he had done what he could in practical terms to provide them, or duplicates, to the Claimant. Viewed objectively, the Respondent's acts following the request for the payslips were not calculated or likely to seriously damage the relationship of trust and confidence, nor were they capable of forming part of a course of conduct which had that effect.

Issue 3

133. It is apparent from the conclusions under issue 2 that there was no breach of the implied term of trust and confidence at any time over the relevant period.

134. For the avoidance of doubt, when the findings of fact are viewed objectively, there was no course of conduct which could amount to a breach of the implied term. If the Tribunal are wrong about this, we are satisfied that there was no "last straw" event which entitled the Claimant to resign.

135. However, there was considerable evidence that the Claimant, because of her emotions, lacked insight into her own actions and held an unjustified sense of grievance about several matters, often after a retrospective reinterpretation of events. This unjustified sense of grievance against the Respondent caused her to resign.

Issues 4 – 7

136. Given the findings and conclusions set out above, the Tribunal concluded that the Claimant resigned and was not dismissed. Accordingly, we do not need to determine issues 4 to 7.

Race Discrimination

Issue 8: Jurisdiction

137. Allegations 2(a) – (h) are pleaded as acts of direct race discrimination and/or victimisation. Allegations 2(a)-(e) are, on their face, out of time because they occurred before 31 August 2018.

138. The Claimant claimed that there was a conspiracy against her, and relied on all her complaints forming part of a continuing act. However, the Tribunal has found that there was no such conspiracy.

139. In cross-examination, when asked what the common thread between all the acts was, the Claimant said it was her. We concluded that this fact was not such as to make all these complaints part of a continuing act.

140. Looking over the findings of fact, and taking account of the guidance in *Hendricks*, we concluded that there was no conduct extending over a period because:

140.1. The incidents complained of involved a variety of different people, of different levels of seniority, some of whom had had no previous dealings with the Claimant.

140.2. The circumstances were factually distinct in nearly every complaint.

140.3. As the Claimant said, the only connection between the allegations was herself.

141. We directed ourselves to the terms of section 123 EA 2010 and the guidance in *Morgan*. We concluded that the Claimant had not satisfied the Tribunal that these complaints of discrimination were presented within such further time as was just and equitable because:

141.1. Whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the Tribunal must have regard. The Claimant gave no direct evidence about why she did not bring her claims sooner; but this fact alone did not mean that we inferred that there was no acceptable reason for the delay. However, given that the Claimant gave direct evidence that she had taken advice from the Race Equality Council in about 2009 about bringing an Employment Tribunal complaint of race discrimination, and had been told that there were time limits for doing so, we concluded that there was no good or acceptable reason for the delay, particularly when it was obvious from the appraisal in May 2018 that the Claimant intended to leave, and by the Stage 1 meeting on 29 August 2018 that she had decided to leave the employment of the Respondent, believing that she had been discriminated against because of her colour or race.

141.2. Although the Claimant pointed out during the hearing, and in her written submissions, that she was a litigant in person, this Tribunal has experience in hearing from many types of litigant in person. The hearing and the evidence showed that this Claimant was an intelligent young person, who could access documents online (such as the grievance procedure that she relied upon, which she had found on the Respondent's public website). She attended the Tribunal with a lap top computer. The Tribunal found that she could have found out all she needed to know about time limits for presenting a Claim of race discrimination within the 3 month time limit after she received the grievance appeal decision of 14 February 2018.

141.3. In addition, the Claimant made many complaints of discrimination over a long period of time. The Claimant gave no evidence of any impediment to her bringing complaints in the Employment Tribunal at the time of those complaints.

141.4. In this case, the complaints at issues 2a and 2b are presented over 6 months out of time. The complaint at issue 2c was presented almost 3 months out of time; and the complaint at issue 2d was presented over 7 weeks out of time. The Tribunal concluded that these were all substantial

delays, which occurred without explanation, and that it would not be just and equitable to extend time in respect of them.

141.5. Although the Claimant could argue quite fairly that the complaint at issue 2e was only two days out of time, the Tribunal found that the Claimant would suffer no real prejudice by not extending time in respect of this complaint, nor any of the other complaints. We have set out our positive findings of fact in respect of each issue; like the other complaints, the merits of the complaint at issue 2e are weak.

141.6. The statutory question is whether the Claim in respect of 2a to 2e was presented within such further period as the Tribunal considers just and equitable. This formulation confers a very wide discretion on the Tribunal; but it is not a discretion which should only be exercised in the favour of one party, such as here, where the Claimant is a litigant in person. Section 123(1) EQA provides a primary time limit of 3 months. There is prejudice to the Respondent in extending that time limit, particularly where, as here, it is required to spend time and costs to defend complaints with low merits.

141.7. Furthermore, in this case, certain allegations do rest on the recollection of witnesses, especially the complaint at issue 2b. There was no complaint about this matter at the time, so no investigation could be made then, when matters were fresh in minds.

Direct race discrimination
Issues 9-10

142. Having concluded that the Tribunal has no jurisdiction to hear the complaints under the Equality Act 2010, this set of Reasons could end here. However, the Tribunal would like the parties to know its conclusions on the merits of these complaints.

143. In respect of direct race discrimination, in cross examination, the Claimant accepted that the matters at 2b and 2d were not done because of her colour or race.

144. The Tribunal repeats the relevant findings of fact in respect of the complaints at 2a, 2c, 2e, 2f, 2g and 2h.

Issue 11: Less favourable treatment?

145. In respect of complaints 2a, 2c, 2e, 2f, 2g and 2h, the Tribunal found that there was no evidence of any less favourable treatment at all. We concluded that any Maternity Assistant would have been treated the same in each of the circumstances at issues 2a, 2c, 2e, 2f, 2g and 2h. The Claimant misinterpreted past events, as we have explained.

146. Furthermore, the Claimant provided no particulars in her oral evidence to support the claim that various individuals were comparators (these are named in the list of issues). For example, when asked whether the incident at 2c was because of race or colour, she stated that she was inclined to say yes, which we concluded was only a weak endorsement of her own case without any particulars in support.

147. The Claimant's allegations of less favourable treatment were mere assertions; she did not appreciate that the statutory comparator (whether hypothetical or an actual person) was someone in the same material circumstances as herself.

Issue 12

148. The Tribunal does not intend to repeat the relevant findings of fact. In summary, the Claimant has not shown, on the facts, any primary facts from which an inference of discrimination could be inferred. The burden of proof had not shifted. The Claimant failed to produce evidence or prove primary facts of something more than a difference in race or colour (quite apart from the failure to show less favourable treatment).

149. In addition, the Claimant complained that the Respondent had prioritised line managers and their accusations (paragraph 15 witness statement of Claimant). Although we did not accept this as a matter of fact, this tended to show her misunderstanding of the nature of direct race discrimination, because this pointed not to race but manager status as being the explanation for the difference in treatment.

150. In any event, if the burden of proof had shifted onto the Respondent, the Tribunal concluded that it had been discharged. The Respondent's evidence was accepted. This was cogent evidence which explained why the Claimant was treated as she was; no part of that treatment was caused by her race or colour.

Victimisation

Issue 14

151. The Respondent admitted that the Claimant did a protected act on 30 December 2013 when she complained of discriminatory treatment.

152. The Tribunal disagreed with the Respondent's submissions in respect of the grievance of 25 January 2017 (the submissions in error refer to 27 January 2017) and whether this was a protected act. We found that this grievance was a protected act. Whether or not the Claimant intended it to be a protected act, and whether or not the Claimant thought it contained a complaint of race discrimination are not relevant questions when applying section 27(2)(d) EQA. The letter of 25 January 2017 did make a complaint of direct race discrimination and a complaint of victimisation, even if these were not the main purpose of the letter: see third paragraph of the letter at p.279.

Issue 15

153. In oral evidence, the Claimant admitted that the matters at issues 2b and 2d did not arise because of either grievance relied upon.

154. In addition, the Claimant accepted in oral evidence that the matters in 2c (in cross-examination) and 2h (in answer to a question from the Tribunal) were not caused by the grievance in December 2013.

155. The Tribunal heard no evidence from the Claimant which linked any of the detriments alleged at issues 2a, 2e, 2f, or 2g to the grievance in 2013. The Tribunal found

that the Claimant had not thought through her allegations in this regard, which was reflected in the presentation of her case and submissions. For example, Mr. Steward had had no dealings with the Claimant until 2015, and then only in a limited way. The Claimant made no attempt to put her case to Mr. Steward that he had been part of the grievance appeal panel in February 2018 because of her December 2013 grievance.

156. The Tribunal heard no evidence from the Claimant which linked any of the detriments alleged at issues 2e, 2f, 2g or 2h to the grievance in January 2017. Although the Claimant stated in cross-examination that this grievance was the foundation for what happened after it, there was no evidence of how or why the detriments relied upon occurred because of that grievance.

157. Moreover, two alleged perpetrators, Ms. Ellis and Ms. Webster (key figures in allegations within issues 2e, 2g and 2h), were not involved in the Claimant's line management at all; and there was no explanation as to why they would subject the Claimant to a detriment because of either protected act; they were both dealing with matters that had nothing to do with either grievance, and both grievances had happened many months before.

158. Furthermore, although the allegations at 2a and 2c did have a factual link with the grievance of January 2017, the Tribunal has made findings of fact that there was no conspiracy against the Claimant at any time, whether because of the 2013 grievance or the 2017 grievance. The Claimant's case was essentially one of conspiracy. The Claimant failed to show the existence of a concerted plan or the primary facts from which the existence of such a plan could be inferred.

159. In any event, the Tribunal found that the matters alleged at paragraphs 2a, 2e, 2f, and 2g were not detriments at all. We will not repeat the findings of fact, but our reasons are as follows:

159.1. The Claimant made no complaint about either Simon Steward or Zebina Ratansi hearing the grievance appeal. Given the nature of their earlier meeting with the Claimant, which did hear any evidence or determine any grievance issues, and given that the Claimant had no grounds to (and did not in fact) complain about them hearing the appeal, a reasonable worker could not take the view that the fact that those two managers were to hear the appeal was a detriment.

159.2. In respect of alleged detriment 2e, a reasonable worker would not, or could not, consider that the use of confidential information by a manager to carry out a Stage 1 Sickness Absence meeting, where that manager had authority to hold that meeting, was a detriment. This would be particularly so where the worker had agreed to that manager chairing the Stage 1 meeting.

159.3. In respect of alleged detriments 2f and 2g, the use of a personal email address of a worker, in order to promote communication, and assist the worker at least as much as the employer, would not or could not be viewed by the reasonable worker as a detriment, particularly where consent was express, or implied through previous usage over time.

160. The Tribunal concluded that the Claimant's sense of grievance about various matters prevented her from realising that there needed to be a causal link between events that she regarded as detriments and the protected acts, and that this link was missing in respect of all the detriments relied upon.

Summary

161. All the complaints fail and the Claim must be dismissed.

Employment Judge A. Ross
Date: 23 April 2020

APPENDIX A

FINAL REVISED LIST OF ISSUES
AGREED BY THE PARTIES ON 19 MARCH 2020

1. Section 8 of the Claimant's ET1 states that the ambit of the Claimant's claim is limited to constructive unfair dismissal and race discrimination.

Unfair Dismissal

Constructive Dismissal

2. Did the Respondent breach the implied term of mutual trust and confidence by reason of its treatment of the Claimant by all or any of the following:

a) Simon Steward and Zebina Ratansi chairing the Claimant's Grievance appeal hearing on 13 February 2018 despite having been involved in an earlier appeal hearing on 5 May 2017. The Claimant alleged that they stated that they were not aware of new matters raised in May 2017 and stated that they would have to refer the matter to a panel.

b) At a hearing on 13 February 2018, Jacqueline Gabriel-King stated that the Claimant had psychological problems and asked the Claimant what was 'wrong with her'.

c) In or around 5 June 2018 Simon Steward dismissing the Claimant's grievance of 24 May 2018 without following process and no proper consideration. The Claimant alleges that the time that had elapsed, that she was not provided with the evidence of others, she was not provided with information and that she was unable to challenge the evidence of what others were alleging against her.

d) On or around 9 July 2018 Mona Ugiagbe cancelling the Claimant's OH appointment without notifying the Claimant and without the Claimant's consent.

e) Mona Ugiagbe supplying Lucy Ellis with the Claimant's confidential information for the purposes of the Claimant's stage one sickness review meeting on 29 August 2018. The Claimant alleges that she had previously experienced difficulties with Ms Ellis and Ms Ugiagbe was aware of this.

f) Jacqueline Gabriel-King sending correspondence to the Claimant in August and September 2018, using the Claimant's personal email address when Ms. Gabriel-King was not her line manager.

g) Lucy Ellis emailing the Claimant at the Claimant's personal email address on 6 September 2018. This was against the understanding the Claimant had with Ms Ugiagbe that Ms Ellis would have no further engagement in the Claimant's matters.

h) Simon Steward and/or Cheryl Webster failing or refusing to supply the Claimant with her pay slips for pay period May to October 2018 despite the Claimant repeatedly requesting these by email in October and November 2018.

3. If so, were the breach(es) sufficiently serious to entitle the Claimant to resign and treat herself as dismissed?

4. Did the Claimant resign in response to the breach(es)?

5. Did the Claimant delay in resigning such that she waived the breach(es)?

6. Did the Claimant affirm the contract and insist upon further performance?

7. Section 95(1)(c) of the Employment Rights Act 1996 was discussed and the Respondent does not maintain that, if the Claimant was constructively dismissed that the dismissal was fair.

Race Discrimination

Jurisdiction

8. The Claimant contacted ACAS on 30 November 2018 for the purposes of early conciliation.

a) Does the Claimant rely on any act or omission that occurred wholly prior to 31 August 2018 (that being the last date on which the Claimant could have entered early conciliation for the purposes of an in-time complaint)?

b) If so, and taking into account and 'conduct extending over a period' within the meaning of s.123 Equality Act 2010, is it just and equitable to extend time for the presentation of the Claimant's complaints?

Direct Discrimination s. 13 Equality Act

9. The Claimant is black. She relies on white comparators and/or a hypothetical comparator to establish her claims.

10. In respect of the allegations at 2(a) to (h) above, did the Respondent act as alleged?

11. If so, in so doing, did the Respondent treat the Claimant less favourably that it treated or would treat Rachel Jenkins, Debra Burcombe, Mandy Godbold and Jenny Turny or hypothetical comparator?

12. If so, did the Respondent subject the Claimant to that less favourable treatment because of her colour.

Victimisation s.27 Equality Act

13. The Respondent admits that the Claimant did a protected act on 30 December 2013 when she complained of discriminatory treatment.

14. Did the Claimant's complaint made on 25 January 2017 amount to a protected act?

15. Did the Respondent subject the Claimant to the detriments at 2(a) to (h) above because the Claimant did a protected act?