EMPLOYMENT TRIBUNALS

Claimant: Mrs PK George

Respondent: Croydon Health Services NHS Trust

Heard at: London South on 12th, 13th, 14th, 15th & 16th June 2017 and in Chambers on 20th June 2017

Before: Employment Judge Pritchard
Members: Miss B Brown
Ms J Forecast

Representation
Claimant: In person
Respondent: Mr I Scott, counsel

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1 The Claimant's claim that she was directly discriminated against because of her race is dismissed.

2 The Claimant's claim that she was harassed on racial grounds is dismissed.

3 The Respondent is ordered to pay the Claimant the sum of £2,207.49 net (after deductions for tax and any national insurance) in respect of unlawful deductions from wages.

4 The Claimant is ordered to pay costs to the Respondent in the sum of £1,000.00 (the deposit of £150.00 to count towards settlement of this sum).

REASONS

1. Following a hearing held over 10 days in October and November 2014 the Employment Tribunal chaired by Employment Judge MacInnes ("the MacInnes Tribunal") found that the Respondent had unlawfully harassed and discriminated against the Claimant on grounds of race and had made unlawful deductions from her wages. The Claimant's other claims before the

MacInnes Tribunal, including those of constructive unfair dismissal and detriment for having made public interest disclosures, were unsuccessful. In particular, the MacInnes Tribunal concluded:

1.1. that the Claimant could not have resigned in response to any matters which took place after the date of her resignation (see paragraphs 24.1 and 24.2 of the Reserved Judgment of the MacInnes Tribunal;

1.2. that the Claimant had not been subjected to a detriment for having made a protected disclosure made in December 2007 because Ms Fosbrook had no recollection of receiving the letter which was never acted upon (see paragraphs 286 and 287 of the Reserved Judgment of the MacInnes Tribunal). In other words, the Claimant had failed to show a causal link between the protected disclosure and the detriment relied on.

2. At a preliminary hearing held on 9 April 2014, Employment Judge Hall-Smith ordered the Claimant to pay a total deposit of £150, being £75 in respect of each of the Claimant's claims of constructive unfair dismissal and detriment for having made public interest disclosures. With regard to constructive unfair dismissal, Employment Judge Hall-Smith considered that the Claimant's letter of resignation expressly stated that she wanted to retire from her job "on age" and the fact that the Claimant relied on a number of allegations which post-dated her letter of resignation considerably undermined her complaint. With regard to the Claimant's public interest disclosure complaints, Employment Judge Hall-Smith considered that the passage of time involved between the date of the alleged disclosures and the detriments complained of might well lead the Tribunal to conclude that, in such circumstances, the Claimant had failed to establish a causal link between them. The Claimant nevertheless paid the deposit and continued to advance those claims.

3. The Employment Appeal Tribunal ("EAT") allowed an appeal by the Respondent against the judgment of the MacInnes Tribunal in respect of its finding that the Respondent had unlawfully harassed and discriminated against the Claimant on grounds of race. The Claimant's cross appeal against the finding that she had not been constructively dismissed did not succeed. The EAT upheld the Claimant's claim for unlawful deduction from wages. The EAT ordered that the case be remitted to a differently constituted Tribunal for re-hearing of those claims which were the subject of the Respondent's successful appeal. This Tribunal was charged with that duty. The issue as to remedy for unlawful deductions also had to be determined.

4. The Tribunal heard evidence from the Claimant on her own behalf. On the Respondent's behalf the Tribunal heard evidence from: Jeanette Hennessy (Clinical Midwifery Manager); Mary Fosbrook (Acting Head of Midwifery at relevant times); and Ann Morling (Director of Midwifery). The Tribunal was provided with a bundle of documents contained within two lever arch files.

5. After the issues had been discussed with the parties on the first day of the hearing, the Tribunal's clerk produced two emails which had been received from the Claimant.

5.1. The first, dated 11 June 2017 timed at 02.37, was an application for an Order that the Respondent be required to disclose the maternal and

baby labour notes and delivery notes including the baby's special care unit notes. This was a reference to the baby born following the CTG incident of 12 May 2012 referred to below. The Respondent resisted the application.

5.2. The second, dated 12 June 2017 timed at 10.04 (the Claimant, who was late attending the listed hearing explained that she had sent the email from her mobile telephone while she was on the train travelling to the hearing) was an application that the Tribunal order the Respondent to produce the names, jobs, job titles and ethnicity of all midwives including the Midwifery Managers employed by the Respondent. The Respondent resisted the application.

6. The Tribunal refused the Claimant's applications. The case had been case managed at the preliminary hearing. The Claimant originally presented her claim about 4 years ago; she and her former advisors had every opportunity to seek such documents and information if they were thought to be relevant before the first day of a re-hearing. In any event, the Tribunal failed to see why the documents and information might be relevant to the limited issues to be decided. The Tribunal notes that the Claimant was not bringing an indirect discrimination claim. Further, an order for disclosure of documents and information at such a late stage was likely to cause delay and expense which would not be in accordance with the overriding objective.

7. The Claimant also asked for a number of black midwives to attend the Tribunal to give evidence that they too had been racially discriminated against. The Tribunal was provided with no witness statements for these individuals. Again, this was a last minute request by the Claimant on the first morning of the hearing which had been listed many months ago and for which case management orders had been issued for the production and simultaneous exchange of witness statements. The Claimant clearly knew the case she was bringing, having commenced proceedings nearly four years ago and with representation for most of this period. She had had ample opportunity to prepare her case, to marshall any witnesses she wished to appear on her behalf and provide witness statements for them as required by the case management order. The Tribunal was concerned that if the request was granted, the effect would be to ambush the Respondent on the first morning of the hearing or that a postponement would be inevitable and lead to delay and wasted cost and expense. Given that the claim involved direct discrimination and harassment against the Claimant, it was the view of the Tribunal that any evidence such witnesses could give (the Claimant did not specify exactly what the evidence might be) would be of very limited value, if any. In these circumstances, the Claimant's request was refused.

8. The Tribunal used the remainder of the first day of the hearing to read the witness statements and to consider various documents in the bundle.

9. As the hearing progressed the Claimant told the Tribunal that she had received the bundle only shortly before the hearing, that it contained extra documents, and that she had not had the opportunity to read it. Mr Scott, who had also appeared for the Respondent before the MacInnes Tribunal, assured the Tribunal that, save for a document dating back to 2009 to which the Respondent would not in any event be referring, the bundle contained the

same documents which were before the MacInnes Tribunal (some of which were not actually contained within the bundle before that Tribunal but were placed before it in loose form). Mr Scott also said that documents in the original bundle which were no longer relevant, given the limited scope of the re-hearing, had been removed. The Tribunal accepted Mr Scott's assurance and the hearing proceeded.

10. On the third day of the hearing, the Claimant produced a copy of an email she had received from the Respondent's solicitors to show that she had been provided with the hearing bundle and the Respondent's witness statements on Friday 9 June 2017. In response, the Respondent provided the Tribunal with a clip of correspondence which clearly showed that the bundle was sent to the Claimant in accordance with the Case Management Order on 7 April 2017 but that a few documents had subsequently been added, the Claimant having been provided with these documents and an updated index. Mr Scott explained that the bundle delivered to the Claimant on 9 June 2017 was simply a further complete copy of the bundle.

11. The correspondence also made it clear that the reason for the late exchange of witness statements was due to the Claimant's failure to facilitate simultaneous exchange as required by the case management order.

12. The Tribunal was satisfied that the Claimant had had full opportunity to consider all the relevant documents which must have been in her possession or that of her previous advisors for a very considerable period of time and that the bundle from which she could prepare her case for this hearing had been provided (albeit slightly amended subsequently) in accordance with the case management order. The Tribunal was also satisfied that the Claimant had advance knowledge of the content of the Respondent's witness statements in any event because she had been informed that the content was the same as that before the MacInnes Tribunal but limited to the matters the subject of the re-hearing. Any fault for late exchange of witness statements lay with the Claimant. The Tribunal was perfectly satisfied that she was not prejudiced in any way and had had ample opportunity to prepare for the hearing.

13. Also on the third day of the hearing, the Claimant sought to put further documents in evidence. Despite the Respondent's objections, the Tribunal permitted the Claimant to put these documents in evidence. Although they did not appear to be immediately relevant to the issues in the case, the Tribunal determined that the Claimant should be permitted to put them in evidence and demonstrate their relevance, if any, through cross examination.

14. The Claimant then went on to complain that when she had been outside the Tribunal room the day before, and on the morning of the third day of the hearing, and she had discussed with Mr Scott her losses for deductions of wages, Mr Scott had "treated her like dirt". Mr Scott told the Tribunal that what the Claimant said was a misrepresentation, that he had treated her professionally throughout and would continue to do so. The Tribunal explained to the Claimant that it was not possible to deal with any matter which took place outside the Tribunal room and which concerned discussions about compensation. However, the Tribunal noted that Mr Scott had treated the Claimant with courtesy in the Tribunal and during cross examination. The Tribunal was at pains to explain to the Claimant the courtesy that was

expected of her, as is expected of all participants in a Tribunal hearing, and it became necessary to remind the Claimant of this at several points during the hearing.

15. The Tribunal also records herein that the Claimant is diabetic and that she informed the Tribunal at the outset that her blood sugar levels might not be stable. Accordingly, the Tribunal took frequent breaks and informed the Claimant she should inform the Tribunal at any time she needed a break. On the third day of the hearing the Claimant informed the Tribunal that her blood sugar was low and that she was suffering from diarrhoea but that she was happy to proceed provided she could take a break at any time. This was permitted. However, just after midday the Claimant left the Tribunal room and, despite a break for lunch, she said she was too unwell to continue. Accordingly, the Tribunal adjourned for the remainder of the day. In addition to the breaks in proceedings suggested by the Tribunal, there were also breaks at the Claimant's request (although not all of those requests on the basis of unstable sugar levels or other health issues).

16. On the final day of the hearing, the Claimant told the Tribunal she was feeling well and could proceed. The Claimant then went on to allege that the Respondent had refused to include in the bundle the NMC's outcome report which she said exonerated her. To the extent that this document was at all relevant (and on the facts it would appear to be of limited relevance, not least because it significantly post-dates the alleged acts of discrimination), it was a document which the Claimant possessed and she told the Tribunal that she had not sent it to the Respondent. Thus, if the document was relevant the Claimant was under a duty to disclose it to the Respondent. If she wished for its inclusion in the bundle, she could have made a request of the Respondent to have it included. It appeared to the Tribunal that the Claimant might be making unfounded allegations as to the Respondent's conduct in the preparation of the case.

17. It appeared to the Tribunal that, notwithstanding the fact that the Claimant was a litigant in person, the way in which she was acting and conducting proceedings might be construed as vexatious, abusive, disruptive and/or unreasonable. In particular, the allegations she had made against the Respondent during the course of the hearing with regard to their failure to produce certain documents and include them in the bundle as well as the allegation that the Respondent had failed to comply with the case management order. The parties were informed that in such circumstances the Tribunal must consider making a costs order under Rule 76 of the Employment Tribunal Rules 2013. The parties were invited to include any representations they wished to make on this issue in their submissions for the Tribunal's consideration.

18. Despite repeated reminders as to the scope of the issues to be determined, the ambit of the Claimant's cross examination of the Respondent's witnesses was more wide-ranging and as a consequence was lengthy. The Tribunal sought to ensure fairness to both parties by allowing the Claimant, who was acting in person, a significant degree of leniency while at the same time seeking to curtail irrelevant questioning. Because of this, the frequency of breaks, the Claimant's inability to continue on the Wednesday, and the fact that the Claimant arrived late on the first two days of the hearing, it was

inevitable that proceedings became protracted. The Tribunal heard evidence from the last witness on the final day of the hearing finishing at 12.35 pm. This did not leave sufficient time for the Tribunal to deliberate and give oral judgment. The Tribunal therefore reserved judgment. Although the Tribunal indicated that it was happy to hear submissions on the Friday afternoon, the Claimant insisted that since she was a litigant in person, she should be permitted to present written submissions after the close of live proceedings. This course of action was permitted, the parties being required to provide the Tribunal with any written submissions they wished to make by no later than 4.30 pm on Monday 19th June 2017 so that the Tribunal had those submissions for deliberation in chambers on Tuesday 20th June 2017. The parties were in agreement with this course of action. The parties provided written submissions accordingly, the Claimant providing a second set of submissions opposing the idea that she should pay costs. The Tribunal has had regard to those submissions during its deliberation.

Issues

19. The issues had been identified at a preliminary hearing before Regional Employment Judge Hildebrand. These issues were again discussed with the parties at the commencement of this hearing and they can be described as follows:

Jurisdiction

19.1. In relation to any incident alleged to have occurred on or before 28 February 2013, did those incidents form part of an act extending over a period ending on or after 1 March 2013?

19.2. If not, in relation to out of time incidents, is it just and equitable for the Tribunal to hear the Claimant's complaint within the Hendricks principle; and Afolabi v Southward Council?

19.3. The Respondent conceded that a time issue only appeared to be relevant in respect of the alleged act listed at paragraph 19.4.2 below but that time issues might also arise in relation to the alleged acts listed at paragraphs 19.4.3 to 19.4.6 below depending on how the Claimant put her claim in respect of those alleged acts.

Direct discrimination

19.4. Did the following alleged conduct take place:

19.4.1. Reducing the Claimant's pay from that of a Band 7 to that of a Band 2 from 25 February to 21 May 2013? The Respondent admitted that the Claimant's pay was so reduced (see paragraph 19.6 below).

19.4.2. Reporting the Claimant to the Local Supervising Authority ("LSA") in London. The Respondent admitted that the Claimant was "referred" to the LSA.

19.4.3. Inviting the Claimant to a disciplinary hearing to take place on 19 April 2013 even though the Claimant was still off sick. The Respondent admitted that such invitations were sent to the Claimant.

19.4.4. Threatening to dismiss the Claimant at the hearing on 19 April 2013. The Respondent denied that the Claimant was "threatened" with dismissal.

19.4.5. Notifying the Claimant that management would be setting a date for the Claimant's sickness review. The Respondent conceded that it sought to arrange sickness reviews with the Claimant.

19.4.6. Threatening to dismiss the Claimant for sickness before she retired. The Respondent denied that the Respondent was threatened with dismissal.

19.5. The Claimant's race is black and she is of African descent, which is both her colour and ethnic origin that is being referred to pursuant to Section 9(1)(a) and 9(1)(c) of the Equality Act 2010.

19.6. It was agreed by the Respondent that the Claimant's pay was reduced to that of a Healthcare Assistant between 25 February 2013 and 21 May 2013 in response to the NMC's Interim Order restricting the Claimant's practice.

19.7. It was the Claimant's case that the NMC stated in imposing the restriction that the Claimant was entitled to carry out non-clinical duties (and it did not follow that the Claimant be demoted 5 levels down from being a band 7). Further, the Claimant relies on Sue Jarman, a white nurse, who made a serious clinical error whereby a baby died in the process but she was not reported to the NMC. At the preliminary hearing Employment Judge Hildebrand ordered that neither Val Gee nor Rosemary Morgan is an appropriate comparator in respect of this aspect of the Claimant's case.

19.8. The Respondent disputed that Ms Jarman was an appropriate comparator – section 23 of the Equality Act 2010.

19.9. The Claimant also claimed that the acts set out at paragraphs 19.4 above were acts of direct discrimination.

19.10. The crucial question is what was the reason for the treatment?

19.11. Was it because of the Claimant's race?

19.12. Did that treatment (i.e. the acts set out paragraphs 19.4 amount to less favourable treatment than the Respondent afforded to Sue Jarman in materially the same circumstances as the Claimant?

19.13. Section 136 of the Equality Act applies.

Harassment

19.14. Did the Respondent engage in the following conduct:

19.14.1. The Claimant relies on those matters at paragraph 19.4 above.

19.15. Was such conduct unwanted by the Claimant?

19.16. Did the conduct have the purpose or effect of (i) violating the Claimant's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? In considering its effect, the Tribunal would have regard to section 26(4) of the Equality Act 2010.

19.17. Was any such conduct related to race?

Unlawful deduction from wages

19.18. In accordance with the findings of the MacInnes Tribunal at paragraphs 288 to 291 of its Judgment: what was the difference between what the Claimant was paid and the amount of wages that was properly payable to the Claimant on each of the Claimant's pay days (that is the dates on which the Claimant was due to be paid an amount of wages by the Respondent) from 25 February 2013 onwards? In accordance with the ruling of the EAT, the Claimant is required to give credit in the sum of £1000 by way of partial reimbursement of the Respondent's appeal fees. The Tribunal indicated that the sums in question must be known to the parties and was hopeful that agreement could be reached on this issue before the conclusion of the hearing. However, the Tribunal was told that the Claimant did not accept the Respondent's calculations and therefore the Tribunal would have to decide the issue.

Discrimination and harassment compensation

19.19. If the Claimant was unlawfully discriminated against or harassed, what compensation should be awarded under section 124 of the Equality Act 2010? Mr Scott informed the Tribunal that the Claimant provided a schedule of loss late last night (contrary to the date for compliance set out in the Case Management Order) seeking compensation in the region of £250,000 whereas since she resigned, her post employment losses were non-existent and any compensation would only be payable for injury to feelings.

Costs

19.20. Should the Tribunal make a costs order in favour of either party? In particular, what costs should be awarded in respect of the Claimant's unsuccessful complaints of unfair constructive dismissal and detriments on the grounds of public interest disclosure in light of the Deposit Order dated 2 May 2014?

Relevant findings of fact

20. At material times the Claimant was a qualified Staff Nurse and Midwife. She was employed by the Respondent from March 2005 until 21 May 2013 following her resignation.

21. The Respondent's maternity services deliver approximately 4,500 babies each year. The Tribunal accepts Ann Morling's evidence that the black/white ethnic mix of midwives is about 50/50.

22. The Respondent's disciplinary policy provides, among other things:

    Suspension from duty
    …

    Suspension from duty may be used in cases of gross misconduct or, where there are risks to patients, staff or Trust property or, where the continued presence of the individual could prejudice the conduct of the investigation

23. The Respondent's Sickness and Attendance Management Policy states: "The intention is for illness to be dealt with sympathetically and effectively with the ultimate aim of supporting staff to be able to return to work". The policy sets out a formal three stage procedure for cases of short term absence. The procedure for managing long-term sickness absence requires a long-term sickness review meeting with ideally follow up meetings on a monthly basis. The policy states, among other things:

    Short-term absence
    ….

    The following should act as triggers for the manager to take action if he/she has not done so already:

    - *3 or more episodes or 5 days or more of sickness absence within a 6 month period*

    - *Where a combination of odd days, longer periods of less than 4 weeks, or where patterns of absence exist with cause concern*

    Long-term absence is where an employee has a continued period of 4 weeks or more

24. The Respondent's Registration of Staff Policy and Procedure provides, among other things:

    <u>Lapsed Registrations</u>
    …
    The employee whose registration has lapsed will not be eligible for employment in positions requiring registration with a regulatory body.

    One of the following actions will be implemented by the line manager, in conjunction with the HR Department.

- *Temporary redeployment where possible to a non-professional or unqualified position (for example a nurse will be required to work as a Health Care Assistant; a Biomedical Scientist will be required to work as a Medical Laboratory Assistant). The employee's salary will be adjusted to reflect the role that they are undertaking.*

- *Suspension from duty in accordance with the Trust's Disciplinary and Suspension Policy. This suspension will be on no pay.*

25. The LSA was at relevant times a statutory body set up to supervise the professional standards of nurses and midwives within the region.

26. The Nursing and Midwifery Council ("NMC") is the professional body which registers and regulates the nursing and midwifery profession. The NMC issues rules and standards which govern the profession. The 2012 Rules and Standards which govern the practice of midwifery, the supervision of midwives and which provide guidance to LSAs provide, among other things:

Rule 10 – LSA Standard

> *"Local supervising authorities must develop a system with employers of midwives and self-employed midwives to ensure that a local supervising authority midwifery officer is notified of all adverse incidents, complaints or concerns relating to midwifery practice or allegations of impaired fitness to practise against a midwife.*

Rule 10 – Referral to the NMC

> *"Referral to the NMC is required if the investigation, or subsequently the programme, identifies that the midwife's fitness to practise may be impaired. In some circumstances the local supervising authority may decide that it would also be appropriate to suspend a midwife from practice in accordance with Rule 14.*

Rule 14 – Suspension from practice by a local supervising authority

> *"A local supervising authority may, following an appropriate investigation and having taken into account any representations made by or on behalf of the midwife concerned, suspend a practising midwife from practice in circumstances where the local supervising authority intends to refer an allegation to the Council that the fitness to practise of that midwife is impaired"*
> ….
>
> *"Where a local supervising authority has notified the Council of its suspension of a midwife … and an allegation that the fitness to practise of that midwife is impaired has been referred to a Practice Committee, that Committee must determine whether or*

not to make an interim suspension order or interim conditions of practice order in respect of her"

27. On 11/12 July 2008 a white band 7 midwife named Sue Jarman, who was employed by the Respondent at the time, was involved in an incident which resulted in the death of a baby. A disciplinary hearing was held on 17 October 2008 chaired by Cynthia Davies. Cynthia Davies found that Sue Jarman was guilty of sub-standard midwifery care which amounted to gross misconduct. Cynthia Davies decided to take action short of dismissal and issued Sue Jarman with a Final Written Warning and ordered that she undergo a period of management supervision in addition to the supervised practice she was already undertaking. Sue Jarman was not referred to the NMC and she was not restricted from clinical activities. In March 2009 Sue Jarman indicated her intention to retire on her 65th birthday at the end of August 2009. During the period before her retirement, Sue Jarman continued in her role but, because she could not bear to be on the labour ward, she worked in the antenatal clinic.

28. As the Claimant's own evidence contained in her witness statement makes clear, she had what might be described as a turbulent employment history while working for the Respondent. The Interim Order of the NMC dated 25 February 2013, referred to below, notes that: eighteen complaints were made against the Claimant regarding her behaviour by staff and patients dating back to 2005; there were a total of twelve complaints made by the Claimant regarding bullying and harassment by managers or supervisors (some against more than one individual); and fifteen formal trust investigations undertaken at various levels; three appeal processes; two LSA investigations resulting in supervised practice; and two suspensions from the Trust.

29. In April 2011 the Claimant was diagnosed as suffering from type 2 diabetes. The Respondent referred the Claimant to Occupational Health who made recommendations to ensure the Claimant took regular meal breaks.

30. In February 2012, three midwives complained about the Claimant's conduct. On the same day the Claimant made complaints about two midwives, one of whom had complained about her. The Claimant's line manager carried out an investigation meeting with the Claimant on 28 March 2012 about the midwives' complaints and those of the Claimant.

31. In April 2012 the Claimant was referred to Occupational Health because the Respondent had concerns regarding the impact of the Claimant's health on her ability to safely deliver care. It was noted that the Claimant was having sudden episodes of feeling unwell just before the commencement of her shift. The Occupational Health Manager duly advised in light of the Claimant's unstable glucose levels. Dr Ian King, Consultant in Occupational Medicine, also advised.

32. The Respondent held an absence review meeting with the Claimant on 30 April 2012 under the first stage of the policy. It was noted that the Claimant had taken 103 sick days on 8 occasions since April 2011 – she had been off work sick more than she had been at work. The Claimant was informed that her sickness would be monitored, the standards of attendance that were

expected, and that if the standards were not met the matter would proceed to a Stage 2 Sickness Absence Review.

33. On 26 April 2012, Dr Eve Allen complained about the Claimant's attitude and behaviour. On the same day, an incident between the Claimant and Dr Yannic Graichen caused the latter to complain (by email dated 14 May 2012) that the Claimant had used a rude and threatening tone which was not warranted in front of an anxious patient. Together these complaints shall be referred to as "the doctors' complaints".

34. On 8 May 2012, a Midwife Coordinator of the Labour Ward complained to the Respondent about the Claimant and stated that the Claimant gave her more stress than the whole shift.

35. On 12 May 2012, the Claimant was involved in a clinical incident which will be described as the "CTG incident". Fortunately, no harm came to the baby.

36. Mary Fosbrook held a preliminary investigation meeting with the Claimant on 25 May 2012 upon the Claimant's return from abroad. Given the seriousness of the allegations, Mrs Fosbrook decided that the Claimant should be suspended under the Respondent's disciplinary policy so there was no risk to patients and to give the Respondent the opportunity to carry out an investigation.

37. Mrs Fosbrook also informed Jessica Read of the SLA that the Claimant had been suspended and the reasons for it. By letter dated 8 June 2012, Kate Brintworth of the SLA informed the Claimant that she would be investigating the matter and invited the Claimant to attend a supervisory investigation meeting.

38. It was decided that a formal disciplinary investigation should commence on three grounds – that the Claimant had:

    - failed to act on and escalate a pathological cardiotocogr普 (CTG) result
    - deliberately failed to seek appropriate support which resulted in negligence and an inadequate standard of care
    - deliberately failed to listen to or carry out reasonable management instructions

39. Juliet Kenney, the Respondent's ADO for Cancer and CORE Functions, completed an investigation into the CTG incident and produced a report which recommended that there was a case to answer and that the matter should proceed to formal disciplinary proceedings. By letter dated 10 August 2012, Ann Morling invited the Claimant to attend a disciplinary hearing on 12 September 2012 with regard to the CTG incident. The Claimant was informed that the hearing could lead to formal disciplinary action up to and including dismissal.

40. In August 2012 the Respondent commenced an investigation into the doctors' complaints.

41. In the event, the disciplinary hearing relating to the CTG issue took place on 17 September 2012 but was adjourned because Ann Morling wished to seek further information.

42. On 9 October 2012, Kate Brintworth of the LSA produced her report into the CTG incident. Having had regard to mitigating factors, Kate Brintworth concluded that the allegations against the Claimant were upheld. These allegations were:

    - Failure to respond appropriately and escalate concerns regarding abnormalities of the foetal heart
    - Failure to communicate effectively as a team member in the best interests of women
    - Failure to retain contemporaneous records
    - Failure to ensure on-going care for women in the triage area who were under her responsibility

    In light of the serious nature of the concerns, the report's key recommendations were that for the Claimant:

    - A period of supervised practice is required and the programme should be for 450 hours
    - A referral should be made to the NMC

43. Janitha Jayatilake, the Respondent's Operations Manager for Women's Services, produced an outcome investigatory report into the doctors' complaints. The report concluded that there was a case for the Claimant to answer.

44. The disciplinary hearing relating to the CTG issue was reconvened on 25 October 2012. By letter dated 1 November 2012, Ann Morling informed the Claimant of her conclusion that the allegations were upheld. Ann Morling issued the Claimant with a Final Written Warning to remain on the Claimant's file for 18 months. In common with Kate Brintworth of the SLA, Ann Morling also thought it appropriate that the matter should be reported to the NMC. The Claimant's suspension was lifted and Ann Morling required the Claimant to complete a developmental programme.

45. On 1 November 2012, Kate Brintworth of the LSA met with the Claimant to communicate the conclusions of her report and its recommendations. With regard to her recommendation that the matter should be referred to the NMC, Kate Brintworth deemed this necessary in view of issues raised in the investigation being of a similar nature to those for which the Claimant had been required to undertake supervised practice in 2009.

46. The Claimant returned to work but, as there were serious concerns about her midwifery practice and the requirement for a supervisory programme, it was decided that she should undertake administrative work in the ante-natal clinic

inputting data onto a computer which would not involve patient contact. The Claimant continued to be paid as a Band 7 midwife.

47. On 16 November 2012, Beverley Reyes-Roberts produced her report following investigation into the allegations made by the Claimant against the midwives and against the Claimant by midwives as described above. Ms Reyes-Roberts concluded that the Claimant's behaviour and conduct fell well below the expected standard of an experienced senior midwife and that there was a case for her to answer at a disciplinary hearing. Ms Reyes-Roberts found that the Claimant's complaints about other midwives were not substantiated; the Claimant subsequently appealed this aspect of the investigation.

48. In November 2012 the Claimant appealed against the imposition of the Final Written Warning which had been issued in relation to the CTG incident.

49. In December 2012 Ann Morling wrote to the NMC following the Respondent's investigation and disciplinary outcome to notify them of the CTG incident.

50. On 5 December 2012, the Claimant attended a stage 2 sickness absence review meeting, the meeting having previously been postponed because of the Claimant's unavailability. Because of her further absences, the Claimant was issued with a formal written warning for poor attendance. The Claimant was informed that if the required levels of attendance were not met and improvements sustained, a review would be scheduled within 6 weeks to 3 months to take the process to stage 3 at which consideration would be given to the termination of the Claimant's employment. The Claimant appealed against the formal written warning.

51. On 18 January 2013, an appeal panel considered the Claimant's appeal against the imposition of the final written warning which was issued in relation to the CTG incident as well as the referral which was made to the NMC. By letter dated 28 January 2013, Zoe Packman, Director of Nursing, Midwifery and Allied Health Professionals, informed the Claimant that her appeal had been unsuccessful.

52. On 21 January 2013, Ann Morling wrote to the Claimant inviting her to attend a disciplinary hearing on 7 February 2013 to consider the doctors' complaints and the complaints which had been made by the midwives. The letter informed the Claimant that the hearing may lead to formal disciplinary action up to and including dismissal. In the event, the disciplinary hearing scheduled for 7 February 2013 did not take place because the Claimant visited Nigeria to visit her sister who was unwell. The disciplinary hearing was therefore rescheduled to take place on 28 February 2013.

53. By letter dated 14 February 2013, the Claimant informed the Respondent that she wished to retire with effect from 21 May 2013.

54. Appeal hearings took place on 13 February 2013 and 20 February 2013 to consider the Claimant's appeal against the written warning issued because of her sickness. By letter dated 22 February 2013, Angela Watts, Interim Associate Director of Nursing, informed the Claimant that her appeal had not been successful and that her sickness monitoring would continue.

55. The NMC held an Interim Hearing on 25 February 2013. The NMC panel was of the view that based on the information it had there was a real risk significant harm posed to patients and colleagues. The panel decided to impose on the Claimant an Interim Conditions of Practice Order. Since the Claimant was retiring in May 2013, and currently working in a non-practising role, the panel was satisfied that the Claimant did not currently pose a risk of harm to patients and the public in that non-clinical role. The interim conditions were:

    1 *You must not work in any clinical setting in any clinical role as a registered nurse or midwife.*

    2 *You must inform the NMC of any criminal or professional investigation started against you and any criminal or professional disciplinary proceedings taken against you within 7 days of you receiving notice of them.*

    3 *You must immediately inform the following parties that you are subject to a conditions of practice order under the NMC's fitness to practice procedures, and disclose the conditions at (1) to (3) above, to them:*

    - *Any organization or person employing, contracting with, or using you to undertake nursing or midwifery work*
    - *Any agency you are registered with or apply to be registered with (at the time of application)*
    - *Any prospective employer (at the time of application)*
    - *Any educational establishment at which you are undertaking a course of study connected with nursing or midwifery, or any such establishment to which you apply to take such a course (at the time of application)*

56. On 25 February 2013, Ann Morling caused the Claimant's grade, and therefore pay, to be reduced to Band 2 which is equivalent to that of a Health Care Assistant.

57. On 25 February 2013, Elaine Clancy, Associate Director of Operations for Integrated Care, held an appeal meeting into the Claimant's appeal against the findings of the investigation which concluded that the Claimant's complaints against other midwives had not been substantiated. Elaine Clancy concluded that the original decision should be upheld. The Claimant's appeal was thus unsuccessful.

58. The Claimant was unable to attend the disciplinary hearing arranged for 28 February 2013. She reported that she was sick, her diabetes having flared up. The Claimant provided a medical certificate, covering the period 1 March 2013 to 1 April 2013, which showed that she was suffering from work-related stress. The Claimant asked for the disciplinary hearing to be re-scheduled and it was re-arranged to take place on 8 March 2013; Ann Morling asked occupational health to assess the Claimant's ability to attend the meeting.

59. On 8 March 2013 Jeanette Hennessy telephoned the Claimant because she had failed to attend her occupational health appointment the day before and wanted to know how she was. The Claimant told Jeanette Hennessy that she had been admitted to hospital. Jeanette Hennessy wrote to the Claimant the same day informing her that she had re-arranged the occupational health appointment for 15 March 2013 on the basis that she would be out of hospital by then; Jeanette Hennessy also informed the Claimant that in due course a stage 3 long-term sickness review meeting would take place under the Sickness and Attendance Management Policy.

60. The Claimant was discharged from hospital on 12 March 2013. However, she did not attend the occupational health appointment on 15 March 2013 and remained too unwell to return to work. The occupational health advisor wrote to Ann Morling and Jeanette Hennessy informing them, amongst other things, of her suggestion that management considers the health related information it has and continues the necessary management processes. The Claimant asked Jeanette Hennessy to leave her alone and not bother her with telephone calls or make requests for her to attend occupational health. The Tribunal notes that Jeanette Hennessy sent an email to Moira Powie, the occupational health advisor, on 21 March 2013 as follows:

    Dear Moira

    I am concerned as Pauline's employer that she is telling us that she is not going to attend occupational health prior to her retirement. I find this most unacceptable as her retirement date is 21/5/13 and she has been off sick now for nearly 4 weeks.

    Can you please send her an appointment please as I note that she is able to attend St Thomas's Hospital and her GP therefore I fail to comprehend why she cannot come to Occ Health.

61. By letter dated 24 March 2013 the Claimant appealed against her demotion to Band 2.

62. Jeanette Hennessy duly referred the Claimant to occupational health. By letter dated 27 March 2013 Jeanette Hennessy informed the Claimant that she could not leave her alone as requested because of her responsibility under the Sickness and Attendance Management Policy to support the Claimant during her period of sickness. Jeanette Hennessy invited the Claimant contact her to arrange a long-term sickness review meeting or a home visit.

63. On 28 March 2013 the Claimant was again certificated by her GP as not fit for work for 4 weeks because she was suffering from "job stress/diabetic".

64. By letter dated 2 April 2013, Ann Morling informed the Claimant that 19 April 2013 had been set for the disciplinary hearing to consider the outstanding disciplinary matters. The letter informed the Claimant that the hearing may lead to formal disciplinary action up to and including dismissal.

65. By email dated 2 April 2013, the Claimant informed Jeanette Hennessy that her diabetic condition had taken a turn for the worse and that her GP had extended her sickness absence by 4 weeks. Among other things, the Claimant wrote:

    "… I cannot understand how a long-term sickness review and appointment with an occupational Health Officer can be appropriate in my situation given the fact that I am due to retire in 6 weeks.

    Nevertheless, I am committed to cooperating with you but I would like to urge you to reconsider your stand on the issue of whether it is necessary or indeed appropriate to refer me to an occupational health office [sic] *when my doctor had given clear instruction on my recovery plan and has explicitly recommended that I set aside work related issues for the duration of my sick leave"*

66. By email dated 9 April 2013, Jeanette Hennessy informed the Claimant:

    "As your manager we are expected to refer all staff to Occupational health and see staff after 4 weeks off sick. You have now been off sick since the end of February and I would like to meet up with you as per Trust policy to see how you are and how best we can support you. I am sorry to hear that your diabetes is still unstable and therefore I am happy to come to your home to visit you with Carlene Nurse or Helen Baker from HR"

67. The Claimant replied saying she was still unwell and included an extract of her email of 2 April 2013.

68. By letter dated 16 April 2013, the Claimant was informed that an appeal meeting to consider her appeal against downgrading would take place on 3 May 2013.

69. By email dated 17 April 2013, the Claimant informed Ann Morling that she was still unwell, had been unable to attend an occupational health appointment the day before and would be unable to attend the disciplinary hearing on 19 April 2013. Among other things, she wrote:

    "I wonder what you wish to achieve by insisting I must come for disciplinary hearing when you know I am not well and I am retiring prematurely from the Trust on 21 May 2013 and my last working day with the Trust is the 12 of May 2013 because my manager Jeanette Hennessy has given me the remaining 9 days as annual leave which is barely 4 weeks left. Do you want me to commit suicide?

    My doctor has advised me to set aside work related issues for the duration of my sick leave

    I beg you, please can you help me by allowing me to get well and retire from the Trust gracefully"

70. The Claimant enclosed her consultant's report which reads as follows:

"To whom it may concern

I would be grateful for your help in this matter. Mrs George is seeing me for her diabetes. We recently admitted her for out of control diabetes and she still has significant hyperglycaemia. She is undoubtedly very depressed, very anxious and very stressed at the moment and this is a major contributor to her significant hyperglycaemia. I have real concerns about Mrs George at the moment physically and in terms of her stress and anxiety. I am arranging for her to see our Psychotherapist within the Department as I think there is an urgent need to address these issues. She is currently suffering from frequent hypoglycaemia and hyperglycaemia and this is undoubtedly contributing to her stress and anxiety. We are addressing this with some medication changes and as I say by getting our Psychotherapist to meet with her. I know she is due a scheduled meeting with you tomorrow and I would medically ask that this is inappropriate at the moment given these issues. We have advised her to avoid work related issues during the time of her illness. She will be seeing us and liaising with us on a daily basis at the moment until we have found some resolution for this as I am anxious to avoid another hospital admission for hyperglycaemia"

71. By letter dated 17 April 2013, Jeanette Hennessy informed the Claimant that in light of her request she would not pursue the matter of a home visit and set out her reasons for wanting the Claimant to attend an occupational health appointment. Jeanette Hennessy noted that the Claimant had not attended an occupational health appointment on 16 April 2013, the fifth appointment in a row which had been missed, and that she would be in touch with further details regarding a long-term sickness review.

72. By letter dated 25 April 2013, Ann Morling informed the Claimant that in light of the consultant's letter the disciplinary hearing did not proceed on 19 April 2013. Ann Morling also commented that, given the consultant's letter, she did not think it would be appropriate for the Claimant to attend the meeting due to take place on 3 May 2013 to consider the Claimant's appeal against downgrading. Zoe Packman, who was to chair that appeal meeting, wrote to the Claimant confirming that the appeal meeting would be postponed until medical advice had been received confirming that the Claimant was able to attend.

73. The Claimant remained certificated as unfit for work.

74. By letter dated 16 May 2013, upon the instruction of Dr King, Consultant in Occupational Medicine, the Respondent's occupational health department invited the Claimant to attend an occupational health appointment on 4 June 2013.

75. The Claimant's employment ended on 21 May 2013. The Tribunal understands that the Claimant was permitted to take special class retirement despite having been downgraded to Band 2.

76. By letter dated 23 May 2013, Jeanette Hennessy informed the Claimant that she understood from Dr King's perspective that he had seen no reason why

the Claimant should not attend an occupational health appointment since the Claimant had attended other appointments. However, Jeanette Hennessay acknowledged that in light of the Claimant's wish not to attend an occupational health appointment, and because she had now retired, there was no requirement to attend occupational health.

77. By letter dated 10 June 2013, Ann Morling wrote to the Claimant to confirm that the outstanding disciplinary allegations remained inconclusive.

Applicable law

Time limits

78. Section 123(1) of the Equality Act 2010 provides that 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 Tribunal thinks just and equitable.

79. Under section 123(3)

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

    (b) … .

80. In Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 the Court of Appeal held that when determining whether an act extended over a period of time (expressed in current legislation as conduct extending over a period) a Tribunal should focus on the substance of the complaints that an employer was responsible for an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably on the grounds of a protected characteristic. This will be distinct from a succession of unconnected or isolated specific acts for which time will begin to run from the date when each specific act was committed. One relevant but not conclusive factor is whether the same or different individuals were involved; see: Aziz v FDA 2010 EWCA Civ 304 CA.

81. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

82. In accordance with the guidance set out in British Coal Corporation v Keeble [1997] IRLR 336, the Tribunal might have regard to the following factors: the

overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case. It is sufficient that all relevant factors are considered. See: Department of Constitutional Affairs v Jones [2008] IRLR 128 CA; Southwark London Borough Council v Afolabi 2003 ICR 800 CA.

83. As identified in Miller v Ministry of Justice UKEAT/003/004/15 at paragraph 12, there are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.

84. If a Claimant advances no case to support an extension of time, he is not entitled to one. However, even if there is no good reason for the delay, it might still be just and equitable to extend time. See for example: Rathakrishnan v Pizza Express Restaurants Ltd UKEAT 0073/15.

85. The fact that a Claimant has been given incorrect advice about time limits which has led to the Claimant making a claim out of time can be a relevant factor in deciding whether or not it is just and equitable to extend time. This principle will apply whether or not the incorrect advice has been given by a solicitor or other advisor. See for example: Chohan v Derby Law Centre 2004 IRLR 685; Wright v Wolverhampton City Council EAT 0117/08.

86. Similarly, reasonable ignorance of time limits can be a relevant factor in deciding whether or not it is just and equitable to extend time. See: Director of Public Prosecutions v Marshall 1998 ICR 518 EAT. In such cases, the date from which a Claimant could have become aware of the right to present a worthwhile complaint is relevant.

87. In Apelogun-Gabriels v Lambeth London Borough Council [2001] EWCA Civ 1853 it was said that that the fact that a Claimant deferred commencing proceedings in the Tribunal while awaiting the outcome of internal proceedings is only one factor to be taken into account when considering an application to extend time.

Direct discrimination

88. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting her to a detriment.

89. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race in this case), A treats B less favourably than A treats or would treat others.

90. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual.

91. In constructing a hypothetical comparator and determining how they would have been treated, evidence that comes from how individuals were in fact treated is likely to be crucial, and - of course - the closer the circumstances of those individuals are to those of the complainant, the more relevant their treatment. Such individuals are often described as "evidential comparators"; they are part of the evidential process of drawing a comparison and are to be contrasted with the actual, or "statutory", comparators (see, Ahsan v Watt [2007] UKHL 51).

92. Whether there is a factual difference between the position of a claimant and a comparator which is in truth a material difference is an issue which cannot be resolved without determining why the claimant was treated as he or she was; see: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.

93. If the alleged discriminatory act is not inherently discriminatory, such as in the present case, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he or she did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason? This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport 1999 1 AC 502. See also the judgment of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884.

Harassment

94. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:

    (a) A engages in unwanted conduct related to a protected characteristic (race in this case); and

    (b) the conduct has the purpose or effect of : -

        (i) violating B's dignity, or

        (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

95. Section 26(4) provides that whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account:

    (a) the perception of B;

    (b) the other circumstances of the case;

    (c) whether it is reasonable for the conduct to have that effect.

    Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

96. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336, the Employment Appeal Tribunal held a Tribunal should address three elements in a claim of harassment: first, was there unwanted conduct? Second, did it have the purpose or effect of either violating dignity or creating an adverse environment: Third, was that conduct related to the Claimant's protected characteristic?

The burden of proof

97. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

98. Thus, it has been said that the Tribunal must consider a two stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will generally wish to hear all the evidence, including the Respondent's explanation, before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see Igen Ltd v Wong and Others CA [2005] IRLR 258.

99. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

100. The Court of Appeal reminded Tribunals that it is important to note the word "could" in respect of the test to be applied. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence

from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

101. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. “Could conclude” must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see Madarassy v Nomura International [2007] IRLR 246. As stated in Madarassy, “the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination”.

102. If the Claimant does not prove such facts, his or her claim will fail.

103. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic (race in this case), then the Claimant will succeed.

104. In Laing v Manchester City Council [2006] ICR 1519, the EAT stated, among other things, that:

> “No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case… An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in Shamoon …. it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. … The focus of the Tribunal’s analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, “there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race”’

105. In the case of London Borough of Islington v Ladele [2009] IRLR 154 the EAT gave further guidance on the question of comparison and the application of the burden of proof as follows:

(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in Nagarajan v London Regional Transport [1999] IRLR 572 'this is the crucial question'. He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(2) 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. It is sufficient that it is significant in the sense of being more than trivial …

(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the section 136 of the Equality Act 2010. These are set out in Igen. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:

> 'Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably on the prohibited ground, then the burden of proof moves to the employer.'

If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the tribunal must find that there is discrimination.

(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson pointed out in Zafar v Glasgow City Council [1997] IRLR 229:

> 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'

In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: (see the judgment of Peter Gibson LJ in Bahl v Law Society [2004] IRLR 799) and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself - or at least not

simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test … The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in Anya v University of Oxford [2001] IRLR 377 …

(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in … Ahsan … a case of direct race discrimination by the Labour Party. Lord Hoffmann summarised the position as follows (paragraphs 36-37):

> The discrimination … is defined … as treating someone on racial grounds "less favourably than he treats or would treat other persons". The meaning of these apparently simple words was considered by the House in Shamoon … Nothing has been said in this appeal to cast any doubt upon the principles there stated by the House, but the case produced five lengthy speeches and it may be useful to summarise:
>
> (1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the "statutory comparator") actual or hypothetical, who is not of the same sex or racial group, as the case may be.
>
> (2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant …
>
> (3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated … This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in

question (the "evidential comparator") to those of the complainant and all the other evidence in the case.

106. It is probably uncommon to find a real person who qualifies … as a statutory comparator. … At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are "materially different" is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator.' "

Costs

107. Rule 76(1) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 provides that a Tribunal may make a costs order, and shall consider whether to do so, where, insofar as relevant to the present case, it considers that:

(a) "a party … has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way the proceedings (or part) have been conducted; or

(b) …."

108. Thus the Rules provide that a Tribunal must apply a two stage test: firstly, to determine whether the circumstances set out in paragraphs (a) or (b) of Rule 76(1) apply; if so, secondly the Tribunal must exercise its discretion as to whether a costs order should be made and, if so, for how much.

109. The Court of Appeal has stated in Gee v Shell UK Ltd 2003 IRLR 82 that costs in Employment Tribunals are the exception rather than the rule. Importantly, costs are compensatory, not punitive; see Lodwick v Southwark London Borough Council 2004 IRLR 554.

110. In McPherson v BNP Paribas (London Branch) [2004] IRLR 558 the Court of Appeal held that in exercising its discretion to award costs, a Tribunal must have regard to the nature, gravity and effect of the unreasonable conduct. It was also held in that case that unreasonable conduct is both a precondition of the existence of the power to make a costs order and is also a relevant factor to be taken into account in deciding whether to make a costs order and the form of the order.

111. In Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78, a case decided in the Court of Appeal, Lord Justice Mummery said that the vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and ask whether there was unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, identify the conduct, what was unreasonable about it and what effects it had.

That case also decided that although there was no requirement for the Tribunal to determine whether there is a precise causal link between the unreasonable conduct in question and the specific costs being claimed, that did not mean that causation is irrelevant.

112. It is well recognised that obtaining evidence of discrimination is often difficult and that a Claimant will often rely on being able to show, through cross examination of witnesses, that the employer's stated reasons for the treatment complained of were not in fact the true reasons; see London Borough of Lewisham v Oko-Jaja EAT 417/00; also Saka v Fitzroy Robinson Ltd EAT 0241/00.

113. The Tribunal may properly have regard to the fact that the party against whom a costs order is made is a litigant in person. In AQ Ltd v Holden UKEAT/0021/12/CEA His Honour Judge Richardson stated that a Tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Justice requires that Tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. Tribunals must bear this in mind when assessing the threshold tests in rule 40(3). Even if the threshold tests for an order for costs are met, the Tribunal must exercise its discretion having regard to all the circumstances and it is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help or advice. This does not mean that lay people are immune from costs orders; some litigants in person will be found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.

114. Rule 41 sets out the amount of a costs order that may be made by a Tribunal. Paragraph (2) provides that a Tribunal may have regard to the paying party's ability to pay when considering whether it shall make a costs order or how much that order should be.

115. In Jilley v Birmingham and Solihull Mental Health NHS Trust UKEAT/0584/06/DA, His Honour Judge Richardson said that if a Tribunal decided not to take account of the paying party's ability to pay, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision to award costs or on the amount of costs, and explain why. His Honour Judge Richardson also said that there may be cases where for good reasons ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means. See also Doyle v North West London Hospitals NHS Trust UKEAT/02271/11/RN in which the Employment Appeal Tribunal suggested that there must be some circumstances (for example where a claimant is completely un-represented) where, in the face of an application for costs, the Tribunal ought to raise the issue of means itself before making an order. In that case it was also stated that a Tribunal should always be cautious of making an order for costs in a large amount against a claimant where such an order will often will be well beyond the means of the paying party and have very serious potential consequences for him or her and it may also act as a disincentive to other claimants bringing legitimate claims. Notwithstanding those rulings, it was held in Arrowsmith v Nottingham Trent University 2011 EWCA Civ 797 that a

costs order does not need to be confined to the sums a party could pay as it may well be that their circumstances improve in the future.

116. In Rodgers v Dorothy Barley School UKEAT0013/12/LA an application for costs of the appeal was refused in circumstances in which the Respondent had not given the Claimant warning that it would apply for costs and had supplied no schedule of costs in advance of the hearing. However, in Vaughan v London Borough of Lewisham and others UKEAT0533/12/SM the Employment Appeal Tribunal held that whilst a warning might be well relevant, it did not believe that as a matter of law an award of costs can only be made where the party in question had been put on notice.

Deposit orders

117. Rule 39 of the Employment Tribunals Rules of Procedure 2013 provides, among other things:

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party…

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs … order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

Conclusion and further relevant findings of fact

Jurisdiction/Time limits

118. It is clear that the only allegation which might be out of time is that relating to the LSA referral of 29 May 2012. Whilst the referral itself might be described as a discrete act, the substance of the Claimant's complaints before the Tribunal was that the Respondent was responsible for an ongoing situation in which the claimant was treated less favourably on the grounds of race. The LSA referral is inevitably wrapped up in that alleged state of affairs. Therefore, the Tribunal concludes that the LSA referral can be considered as alleged conduct extending over a period.

119. Even if that conclusion is incorrect, the Tribunal would in any event exercise its discretion to extend time in this case. The Claimant informed the Tribunal that she did not take legal advice at the time, explaining that she could not afford to do so (which the Tribunal accepts, not least because, as the Claimant reminded the Tribunal, she completed her ET1 Claim Form herself). It was only when she retired that she thought of taking action and

read a note about applicable time limits and understood that she had to take action within a certain time limit or lose the right. The delay in bringing the claim was not insignificant but it was not excessive. It appears that the Claimant acted promptly once she knew of the applicable time limits: she presented her ET1 Claim Form within a few days of her retirement. Although the Respondent will suffer the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, this is not a case in which it can be said that the Respondent is prejudiced by such things as fading memories, loss of documents, and losing touch with witnesses. The Respondent was fully able to defend the allegation both before the MacInnes Tribunal and at this hearing.

120. The Tribunal concludes that it has jurisdiction to consider all of the Claimant's complaints.

Direct discrimination

Reducing the Claimant's pay from that of a Band 7 to that of a Band 2 from 25 February to 21 May 2013

121. The Tribunal first considers the question of less favourable treatment at the first stage of Igen. The Claimant sought to suggest that the computer work she was undertaking was also undertaken by white Band 5 and Band 6 nurses; that might be so but the registration of these nurses had not lapsed and they were permitted, and did, carry out clinical work (the Tribunal also notes here that Val Gee and Rosemary Morgan, upon whom the Claimant had relied at the hearing before the MacInnes Tribunal are not appropriate comparators as determined by Employment Judge Hildebrand at the preliminary hearing). Sue Jarman is not an appropriate comparator, not least because she was not subject to an NMC Interim Order like the Claimant. Ann Morling's evidence, which the Tribunal accepts, was that both black and white midwives have been downgraded under the policy. The Claimant has failed to prove facts from which it could be inferred that she was treated less favourably than the Respondent would treat a white midwife who had been subjected to an NMC Interim Order that she must not carry out clinical duties. There was simply no credible evidence to suggest otherwise.

122. In any event, the Respondent has shown an adequate and non-discriminatory reason for having reduced the Claimant's pay. The Tribunal notes that although the Claimant was removed from clinical duties following the CTG incident, throughout her suspension and upon her return to work she remained at Grade 7. It was not until the NMC Interim Order that Ann Morling downgraded the Claimant to Band 2, that of Health Care Assistant. As Ann Morling's contemporaneous letter to the Claimant of 29 February 2013 states: "The decision to downgrade you has been made in consideration of the recent subsequent NMC order". Why did Ann Morling downgrade the Claimant and thus reduce her pay? Although the Claimant's registration had not "lapsed" in a technical sense, the effect of NMC's Interim Order – that the Claimant must not work in any clinical setting in any clinical role as a registered nurse or midwife – was the same. Ann Morling's decision to downgrade the Claimant to Band 2 was taken under the Respondent's Registration of Staff Policy and Procedure. The Tribunal accepts Ann Morling's evidence that the only work available for the Claimant was Band 2 work. As the policy provides, the

Claimant's salary was adjusted to reflect the role she was undertaking. The Tribunal is satisfied that that reason had nothing whatsoever to do with the Claimant's race.

123. The Claimant was not directly discriminated against because of her race when her pay was reduced from that of a Band 7 to that of a Band 2 from 25 February to 21 May 2013.

Reporting the Claimant to the Local Supervising Authority (LSA) in London

124. The Tribunal finds that the Claimant has failed to prove facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent treated her less favourably than it treats or would treat others. As for Sue Jarman, she was managed by a different manager several years before the CTG incident involving the Claimant and it was never made clear to the Tribunal whether or not Sue Jarman was actually referred to the LSA. The Tribunal concludes that Sue Jarman is not an appropriate comparator. There was no evidence before the Tribunal such that Sue Jarman might be an evidential comparator in the circumstances. Further, there was simply no credible evidence to suggest that Mary Fosbrook would not have similarly referred a white midwife in accordance with her professional duty in the same circumstances.

125. In any event, the Respondent has shown an adequate and non-discriminatory explanation for having referred the Claimant to the LSA. Rule 10 of the NMC Rules and Standards is clear: the local supervising authority must be notified of all adverse incidents, complaints or concerns relating to midwifery practice or allegations of impaired fitness to practice [emphasis added]. The Tribunal notes the seriousness with which the LSA, an independent body, considered the CTG matter. Similarly, at the interim hearing, the NMC, another independent body, took the matter so seriously that it imposed interim conditions. Having heard Mary Fosbrook's evidence, the Tribunal is perfectly satisfied that she referred the CTG incident, which was a serious incident, to the LSA because it was her professional duty to do so. That referral had nothing whatsoever with the Claimant's race.

126. The Claimant was not directly discriminated against because of her race by reason of having been referred to the LSA.

127. The Claimant's allegation made during the hearing that the LSA itself was institutionally racist has not been considered. It was not an issue for the Tribunal's determination.

Inviting the Claimant to a disciplinary hearing to take place on 19 April 2013 even though the Claimant was still off sick

128. The Tribunal finds it helpful to summarise the relevant circumstances: the Claimant was first invited to a disciplinary hearing by letter dated 21 January 2013 for consideration of the allegations made against her by the doctors and the midwives when there was no reason to think she would be unable to attend a disciplinary hearing on 7 February 2013. The Claimant was provided with the detailed reports of the investigation into the disciplinary allegations. The allegations, as set out in the reports, were sufficiently

serious to justify disciplinary proceedings. After the Claimant had been permitted to defer her return from annual leave to 11 February 2013, the disciplinary hearing was re-arranged to take place on 28 February 2013. On 14 February 2013, the Claimant gave notice that she would be retiring on 21 May 2013. The Claimant did not attend the re-arranged meeting because she was unwell and the disciplinary hearing was therefore again re-arranged to take place on 8 March 2013; it is clear that the Claimant's attendance at the disciplinary hearing was conditional upon being well enough to attend: Ann Morling asked occupational health to assess the Claimant's fitness to attend the disciplinary hearing. The Claimant did not attend the occupational health appointments that had been arranged for her. By letter dated 2 April 2013, Ann Morling invited the Claimant to attend a disciplinary hearing to take place on 19 April 2013. Again, Ann Morling arranged for Claimant to attend occupational health beforehand, on 16 April 2013, to first ascertain her fitness to attend the disciplinary hearing. The Claimant told the Tribunal that this invitation of 2 April 2013 was the subject of her allegation that the Respondent had discriminated against her because of her race. On 17 April 2013 the Claimant emailed Ann Morling to say that she had been too unwell to attend the occupational health appointment the day before and would be too ill to attend the disciplinary hearing the following day; she attached her consultant's report referred to above. As a result, Ann Morling decided that the disciplinary hearing should be postponed until such time as the Claimant was well enough to attend.

129. Ann Morling's evidence was that she previously had cause to dismiss two black and two white midwives. Sue Jarman is clearly not an appropriate comparator, not least because she did not have outstanding disciplinary matters outstanding against her. The Claimant failed to adduce any credible evidence that she suffered less favourable treatment than a white midwife would suffer in similar circumstances.

130. In any event, the Tribunal finds Ann Morling's actions completely rational. The Claimant remained employed by the Respondent and it was entitled to seek to bring to a conclusion serious disciplinary matters concerning the Claimant's conduct which had allegedly taken place before her sickness and before her indication that she would be retiring from the Trust. Even if the Tribunal were to conclude that Ann Morling's actions were unreasonable, which it does not, that would not lead to the inference of race discrimination: see Zafar. The Tribunal is perfectly satisfied that the Respondent has shown an adequate reason for inviting the Claimant to a disciplinary hearing when she was off sick and that it had nothing whatsoever to do with her race.

131. The Claimant was not directly discriminated against because of her race by being invited to a disciplinary hearing when she was off sick.

Threatening to dismiss the Claimant at the hearing on 19 April 2013

132. The Claimant told the Tribunal that she perceived the warnings of potential dismissal contained in the various letters inviting her to a disciplinary hearing as threats. The Tribunal is unable to accept that the warnings amounted to threats. They were nothing more than standard warnings of potential outcomes. Warnings of this kind are in accordance with established

industrial relations practices and indeed endorsed by ACAS and by the courts and Tribunals. The Claimant has failed to show the potentially discriminatory acts relied on, namely threats.

Notifying the Claimant that management would be setting a date for the Claimant's sickness review

133. Whilst it might appear surprising that Jeanette Hennessy continued to make arrangements for a sickness review in circumstances in which the Claimant had indicated her intention to retire and was in any event off sick and had asked not to be bothered, the Tribunal is mindful that unreasonable treatment is a frequent occurrence regardless of race and the mere fact that the Claimant might have been treated unreasonably does not suffice to justify the inference of unlawful discrimination: Zafar.

134. The Claimant failed to identify any comparators or adduce any evidence from which it could be concluded that an actual or hypothetical comparator would have been treated in the same circumstances. In short, the Claimant failed to show a prima facie case of any less favourable treatment.

135. Turning in any event to the Respondent's explanation, it is that Jeannette Hennessy was complying with her managerial responsibility. It seems clear that Jeanette Hennessy was frustrated by the Claimant's failure to attend occupational health in circumstances in which the Claimant appeared able to attend other appointments. Whether or not that frustration was reasonable is not to the point: Zafar. The Tribunal is perfectly satisfied that notifying the Claimant of a date for a sickness review had nothing to do with the Claimant's race. Jeanette Hennessy's evidence was clear: she felt it was her duty to follow the Respondent's Sickness and Attendance Management Policy by requiring long-term absence sickness review meetings.

136. The Respondent did not discriminate against the Claimant because of her race by notifying her that management would be setting a date for a sickness review.

Threatening to dismiss the Claimant for sickness before she retired

137. The Tribunal reaches the same conclusion in relation of this allegation as it does in relation to the Claimant's allegation that the Respondent was threatening to dismiss her at a disciplinary hearing. Warnings are issued in accordance with established industrial relations practices and endorsed by ACAS and by the courts and Tribunals. It is both fair and rational to warn an employee of the possible consequences of poor attendance. The Claimant was simply warned, not threatened. The Claimant has failed to prove that the alleged discriminatory acts, namely threats, had been made.

Harassment

138. The Claimant's claims of racial harassment fail for the same reasons. The conduct complained of was not related to the protected characteristic of race.

139. With particular regard to the Claimant's complaints that she was threatened with dismissal by reason of conduct and/or sickness, the Tribunal has considered the criteria to be considered under section 26(4) of the Equality Act 2010 and concludes that the warning of potential dismissal set out in various letters did not have the effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even assuming the Claimant perceived the warnings to be threats, when also taking into account the other circumstances of the case it was not reasonable for content of the letters to have that effect. The letters did no more than include standard warnings of potential outcomes.

Unlawful deductions

140. The Claimant provided no documentary evidence to prove the deductions made from her wages. Having had regard to the clip of inter party correspondence provided by the Respondent, it appears that the Claimant failed to provide a schedule of loss as required by the case management order issued by Employment Judge Hildebrand. When questioned by the Tribunal, the Claimant said that the deductions made to her wages were about £8,000 with interest to be added to give £10,000. This sum, she said, was before making any deduction for the £1,000 costs ordered by the Employment Appeal Tribunal and without giving credit for what she was paid as a Band 2 Healthcare Assistant. The Respondent provided the Tribunal with screen-shots of the Claimant's wage slips for the relevant period and provided a calculation which shows a gross deduction of £4,489.20. This calculation includes an uplift for wages that would have been paid had the Claimant worked unsocial hours at Band 7 during the period in question. The Respondent submitted that the net figure after tax was £2,676.00. The Respondent provided the Tribunal with an interest calculation to bring the total figure to £3,207.49. The Tribunal accepts that this figure is likely to be the more accurate calculation of the final figure for deductions from wages. As ordered by the EAT, the Claimant must give credit to the Respondent in the sum of £1,000. The Respondent is therefore ordered to pay the Claimant the net sum of £2,207.49 subject to set off for costs as set out herein.

Costs

141. The Tribunal first deals with the question of costs in relation to the Claimant having continued to advance her unsuccessful claims of constructive unfair dismissal and detriments for having made public interest disclosures. The Respondent makes an application for costs apportioned to these claims in the sum of £9,267.00 as set out in a Schedule of Costs provided to the Tribunal.

142. The Tribunal notes that the Claimant's claims before the MacInnes Tribunal failed for substantially the reasons given in the deposit order issued by Employment Judge Hall-Smith. There was no evidence before the Tribunal to suggest that the Claimant had not acted unreasonably in continuing to advance those claims and the Tribunal must therefore treat the Claimant as having acted unreasonably in doing so. The deposit of £150.00 must therefore be paid out to the Respondent.

143. As to the full amount of costs claimed by the Respondent in this regard, see below.

144. Secondly, the Tribunal considers the Respondent's costs application made in Mr Scott's written submissions and opposed in the Claimant's further written submissions. In this application, the Respondent seeks a further £5000.00 in costs. It is a serious matter to make unfounded allegations in the course of proceedings; it prompted the Respondent to prepare a clip of correspondence and make submissions to the Tribunal on the matter to refute and rebut the allegations. The Tribunal is perfectly satisfied that in making unfounded allegations against the Respondent of failures and unfairness in the preparation of the case, the Claimant's conduct crossed the threshold in Rule 76. The Tribunal must therefore consider making a costs order.

145. In respect of both of these costs applications, the Tribunal concludes that a costs order should be made. In doing so the Tribunal has had regard to the Claimant's stated means. The Respondent submits that the Claimant's evidence as to her means should be treated with suspicion. However, the only evidence before the Tribunal as to the Claimant's present means was that of the Claimant herself and the Tribunal concludes that it must be accepted. After a period of unemployment, the Claimant is now working, in a probationary period, as a Band 5 staff nurse. She works 42 hours a week for £14.40 per hour. This gives a weekly wage of £604.80 gross (£2,620.80 per month gross). In addition, she receives a net monthly pension payment of £678.00. She pays rent of £1,850.00 per month and pays bills for utilities. She pays approximately £400 per month for food. She is paying about £800 to £900 each month to clear credit card bills. She does not own property. Although she was paid a lump sum upon retirement (a document in the bundle suggests this was in the sum of £52,508.64), she says gave that sum to her husband with whom she no longer lives and she believes that money has been spent. The Claimant's son, a doctor, lives with the Claimant and contributes towards the household outgoings. On any view, the Claimant is not a woman of substance. Nevertheless, having had regard to the legal authorities cited above, it is right that the Claimant should pay some costs in this case and concludes that the Claimant should pay to the Respondent £500.00 in respect of the first costs aspect (inclusive of the £150 deposit to be paid out to the Respondent) and £500 in respect of the second costs application.

Employment Judge Pritchard
Date 4th July 2017