EMPLOYMENT TRIBUNALS

Claimant: Ms P Ohikhena

Respondent: Epsom and St Helier University Hospital Trust

Heard at: London South Employment Tribunal, Croydon (by video)

On: 24 and 25 September 2024 (plus deliberations on 25 October 2024)

Before: Employment Judge Abbott, Ms E Whitlam and Mr T Harrington-Roberts

Representation
Claimant: Mr D Patel (counsel)
Respondent: Mr D Bayne (counsel)

RESERVED JUDGMENT

The complaints of (1) direct race discrimination and (2) harassment related to race are not well-founded and are dismissed.

REASONS

Introduction

1. These are the written reasons of the Tribunal for unanimously dismissing all of the claimant's complaints following a final hearing which took place on 24 and 25 September 2024 (with deliberations on 25 October 2024).

2. By way of background, this claim was presented on 10 June 2022, early conciliation having taken place which started on 20 April 2022 and finished on 12 May 2022. The complaints that this Tribunal needed to determine at the final hearing come under the following headings: (1) direct race discrimination under section 13 of the Equality Act 2010 ('**the EqA**'); and (2) harassment related to race under section 26 of the EqA.

3. The issues to be determined were set out in a case management order of EJ

B Smith following a preliminary hearing on 8 August 2023. The list (limited to liability issues) is reproduced below with some editorial corrections. Mr Patel, who appeared for the claimant, explained at the start of the hearing that the claimant was not pursuing certain of the allegations, so these are shown struck-through in the list below.

List of issues

1. **Direct race discrimination (Equality Act 2010 section 13)**

1.1 The claimant is black and she compares herself to an actual comparator, namely Mary Willocks, Lead Midwife/Matron (Inpatient Services) at Epsom Hospital, who is white. Alternatively, she compares herself to a hypothetical white comparator.

1.2 Did the respondent do the following things:

~~1.2.1 Not grant the claimant carer's leave in or around 20 February 2022; and/or~~

1.2.2 Advertise the claimant's role for a secondment whilst she was on sick leave.

The respondent ~~accepts that it did not grant the claimant carer's leave at that time. However, it says that it properly applied its Special Leave policy in making that decision. It~~ accepts that it advertised the claimant's role for a secondment whilst she was on sick leave. However, it says that this was for justified operational reasons.

1.3 Was that less favourable treatment?

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

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

The claimant says she was treated worse than Mary Willocks. Alternatively, she compares herself to a hypothetical white comparator.

The respondent says that Mary Willocks was different to the claimant because another colleague was able to cover for her absence, whereas the claimant is the only person in her role and so a secondment had to be advertised to provide cover during her absence.

1.4 If so, was it because of race? The respondent says that it was not.

1.5 Did the respondent's treatment amount to a detriment? The respondent denies this. It says that the respondent's treatment did not amount to a detriment because it properly applied its Special Leave Policy and the secondment was advertised for operational reasons.

2. **Harassment related to race (Equality Act 2010 section 26)**

2.1 Did the respondent do the following things:

2.1.1 Nicola Shepherd, the respondent's Director of Midwifery, made the comment to the claimant 'I don't mean to be rude, but can you take it as unpaid leave' on 21 February 2022; and/or

~~2.1.2 Nicola Shepherd failed to grant the claimant compassionate leave for bereavement of her mother; and/or~~

2.1.3 Nicola Shepherd refused to retract an advertisement for the claimant's role as a secondment.

The respondent denies that Nicola Shepherd made the comment above. ~~The respondent accepts that it did not grant the claimant compassionate leave. However, it denies that it was required to in accordance with its Special Leave Policy.~~ The respondent accepts that it refused to retract an advertisement for the claimant's role as a secondment, but says that this was for good operational reasons.

2.2 If so, was that unwanted conduct? The respondent denies that it was.

2.3 Did it relate to race? The respondent denies that it was.

2.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? The respondent denies that it did.

2.5 If not, did it have that effect? The respondent denies that it did.

The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Conduct of the hearing

4. The Tribunal was provided with an 394-page main bundle, a 29-page supplementary bundle and three witness statements (1 for the claimant – herself, Patience Ohikhena, 2 for the respondent – Nicola Shepherd and Donna Harris). In addition, Mr Bayne (who appeared for the respondent) produced a chronology, case list and reading list, which the Tribunal did not understand to be controversial.

5. The hearing was conducted by video. The claim was listed for a 4 day final hearing but, unfortunately, due to judicial availability the convened panel was only available to sit on the first 2 days (24-25 September 2024). In the event, that proved sufficient time to hear the evidence and submissions and begin deliberations. Deliberations and the preparation of this judgment were completed on 25 October 2024, which was the first available date on which the panel were all available.

6. After reading time for the Tribunal, we heard evidence from the claimant on the afternoon of the first day. We then heard evidence from the respondent's witnesses through the morning of the second day. After completion of the oral testimony, the Tribunal was sent three further documents that had been referred to during the course of the respondent's witnesses evidence. The claimant did not object to them being considered by the Tribunal and did not consider it necessary to recall either of the respondent's witnesses to be cross-examined in respect of them. We therefore admitted those documents.

7. The parties provided oral submissions on the afternoon of the second day. Mr Bayne also provided a written skeleton argument outlining the law to be

applied, and Mr Patel agreed that it correctly set out the relevant principles. The Tribunal is grateful to all of the participants for their evidence and submissions.

Findings of fact

8. The relevant facts are, we find, as follows. Where there was a dispute between the parties on a matter of fact, we explain at the relevant point why we have found as we did. We have only made findings of fact necessary for the disposal of the live issues in this case. We have not referred to every document we have read and/or were taken to during the hearing, but we have considered all such documents. We have not considered documents that were not referred to in the written or oral evidence or in submissions.

9. The claimant began employment with the respondent as a Midwife in 1990. Since 1 March 2011 she has been a Lead Midwife / Matron (a Band 8a role). At the relevant time for this case, she led the Community and Antenatal Midwifery Services across both Epsom and St Helier Hospitals and had four (Band 7) Team Leaders reporting to her. The claimant herself reported directly to the respondent's Director of Midwifery, Nicola[1] Shepherd ('**NS**'), and the two shared an office.

10. There were two other Band 8a Lead Midwifes / Matrons in role at the relevant times, Mary Willocks ('**MW**') and Suzanne Powroznyk ('**SP**'), who were responsible for the maternity units at Epsom Hospital and St Helier Hospital respectively.

11. On 12 December 2021, MW's mother had a stroke and was hospitalised. MW was granted 3 days of carer's leave to look after her father (who had dementia) at his home. On 16 December 2021, her mother deteriorated and MW commenced a period of sickness absence due to stress. This absence was not verified by a sicknote until one was sent to by MW to NS on 17 January 2022, by which time MW's mother had sadly passed away. The sicknote was backdated to cover the period 13 December 2021 to 6 February 2022. MW returned to work on 5 February 2022.

12. There was a dispute as to who covered MW's work during her absence. We accepted NS's evidence that, during MW's absence, the managerial aspects of her role were covered by SP, who performs the same role as MW albeit at a different site. Operationally, the existing Team Leaders at Epsom Hospital continued to run the maternity unit, liaising with SP by text, email and telephone (as she was not physically present) where necessary. This evidence was both plausible and supported by documentary evidence and we had no good reason to doubt it.

13. In parallel, the claimant's mother, who lived in Nigeria, also fell ill in December 2021. She had regular phone calls about this whilst in the office and also discussed this with NS, which meant that NS was aware at least in general terms about the claimant's mother's health issues.

14. There was some dispute as to the exact date but, on the balance of probabilities considering all of the evidence, on 21 February 2022, the

[1] In some of the contemporaneous documents she is referred to as Nicki or Nicky.

claimant received a call from Nigeria to the effect that her mother's condition had deteriorated rapidly and that she needed to come back to Nigeria urgently. The claimant was understandably upset (visibly so) upon receiving this call. NS was present at the time in their shared office and witnessed this.

15. There followed a conversation between the claimant and NS about what the claimant needed to do. The claimant alleges that during the conversation NS said "I don't mean to be rude, but can you take it as unpaid leave". NS denied saying those words. In her oral evidence NS accepted that she might have mentioned "unpaid leave", but her evidence was to the effect that she was focused on facilitating the claimant's need to go and be with her mother. The Tribunal considered that the account NS provided during the claimant's subsequent grievance was the most reliable version of events. Although the account was given in October 2022, some months after the incident, it was much more contemporaneous than the oral evidence at this hearing. Further, the Tribunal considered that, in view of the claimant's level of upset at the time of the conversation, and her sense of aggrievement at later events that will have coloured her memory, her account was not as reliable. This is well-evidenced by the inconsistent accounts the claimant has given of exactly when this conversation happened.

16. In the grievance, NS gave the following account:

> "I recall the conversation, it wasn't quite like that, so this could have well been the day before she actually left to go to Nigeria or actually went off sick and we had a conversation because this was the time when she was getting numerous phone calls from her Uncle and she was getting quite upset about it and I said to her PO, it just sounds like you need to go, it sounds like you need to be there to sort this out. I don't know how you're going to manage this over the phone. I said, you just need to go. I said have you not got any annual leave, or even take unpaid leave or something, anything just to be able to go and she said to me, I won't need to take any leave because I'm going to go off sick so I said fine. I said if you're going to go to the GP and get certificated, that's probably the best thing to do. And that's where the conversation was left."

For the reasons given in the previous paragraph, we find this to be an accurate summary of the conversation that took place. It is also consistent with what happened subsequently (*i.e.*, the claimant going to the GP and being signed off sick – see below). We reject the claimant's evidence that the words "I don't mean to be rude, but can you take it as unpaid leave" were said to her by NS.

17. On 22 February 2022, the claimant had an appointment with her GP, who signed her off work with stress for a period of 4 weeks starting on that date.

18. On the same afternoon, NS emailed her direct reports (other than the claimant) under the subject "Leadership Cover for Community & ANC". The substantive part of the email read as follows:

> "Following on from Patience's unfortunate sickness period, I have been thinking about how we can support the Community and ANC teams until she returns. Unless any of you fancy a change of place, I was thinking that I will put out expressions of interest to the Band 7's and offer this as a short secondment as at this stage as I do not know when Patience will return.
>
> Let me know if you have any thoughts."

19. NS accepted in cross-examination that it was unusual to advertise a secondment for a period of (in all likelihood) a matter of weeks as opposed to 6+ months. However, NS gave evidence as to why she considered that a short secondment would be beneficial in this instance. She identified 5 points:

    a. First, it would mean that when the claimant returned, she would not have a significant backlog of work to deal with.

    b. Second, NS had noted from the claimant's out of office that she had listed a number of different colleagues in her out of office to act as contacts in relation to various aspects of her role and NS felt this was unhelpful in terms of delivering a joined up service and ensuring continuity.

    c. Third, neither SP nor MW could provide proper cover for the claimant in view of the different nature of their roles, and the fact MW had herself only just returned from an extended period of leave during which SP had had to cover MW's role as well as her own.

    d. Fourthly, it provided an opportunity for more junior colleagues to gain some relevant experience that would be helpful when it came to succession planning.

    e. Finally, and of additional significance, the claimant was engaged with a substantial piece of work called 'Quality Standard 22: Antenatal Care'. It had not been completed and the submission date had already been extended. NS wanted this work to be completed by the colleague or colleagues who took the secondment.

20. Though each of these points was robustly challenged in cross-examination, we accept NS's evidence that these were her true reasons for proposing a short secondment. One of the premises of the challenges was that the claimant was only signed off for 4 weeks so the secondment could never have been effective in the ways NS described. However, we accept NS's evidence that she could not be sure (particularly in light of her recent experience with MW) that the claimant would be fit to return to work as soon as her initial fit note expired. The claimant accepted as much in cross-examination. In the event, it took an extended time (longer than NS had anticipated) to fill the secondment role, but that does not undermine the reasons for proposing it in the first place. Another premise was that the claimant's role could be adequately covered by the Band 7 Team Leaders, just as it would be for annual leave cover. But, again, the possible extended nature of the claimant's absence on this occasion was an important factor, and we accept NS's evidence that the secondment was intended to cover managerial tasks rather than the operational tasks that the Team Leaders could more straightforwardly cover. Another point raised was that NS had decided not to create a secondment opportunity for an already-vacant Band 8a safeguarding role, but we accept NS's evidence that, given the specialised nature of a safeguarding position, she was justified in not offering that role for a secondment – it was not a truly comparative situation. Finally, it was suggested that the concern over the Quality Standard 22 work was not genuine – there was adequate time available and the claimant had already lined up one of the Team Leaders to take it forward in her absence. However,

we accept NS's evidence that she was genuinely concerned about this work being progressed in the claimant's absence.

21. Having taken soundings by way of her email on 22 February 2024, NS decided that the short secondment should be advertised. We accept NS's evidence that the claimant's race played no part in the decision to put her role out for a short secondment during her absence. Her true reasons were as set out in the preceding paragraphs. Further, there is no evidence to suggest that the claimant's race played an unconscious part in that decision, and we find that it did not.

22. At 9:23am on 24 February 2024, NS spoke to the claimant by telephone regarding her sickness absence. The claimant's written evidence on this was that the call lasted 45 minutes and consisted mostly of her telling NS what cover arrangements had been put in place and providing her with all necessary information. However, she accepted in cross-examination when presented with NS's phone records that the call lasted only 6 minutes and 49 seconds. In those circumstances, we find that the call did not include a detailed discussion of handover arrangements but rather a brief overview of who had been put in place to cover the claimant's areas more generally, which is consistent with NS's evidence.

23. As was common ground, the conversation also did not involve a discussion of the proposed short secondment to cover the claimant's role. NS had decided not to discuss this with the claimant. We accept NS's evidence that she had good intentions in this regard – the claimant was already off sick with stress and NS felt it would be insensitive to burden her with a discussion about this topic. NS fairly accepted in her evidence that, with the benefit of hindsight, she would have had a discussion with the claimant about the proposed arrangements, but that does not undermine her justification for why she did not do so at the time.

24. At 15:57pm on 24 February 2024, at NS's request, SP sent an email to "AllMidwives" (copied to Margaret Flynn, a Band 8 Gynaecology Matron who retained her midwifery practice) inviting applications from Band 7 or above midwives, for secondment into C's role during her period of sickness absence. The email attached a detailed candidate brief and job description, as well as an information sheet setting out details of the opportunity in the following substantive terms:

"Community Matron

Band 8a Secondment

37.5 hours/week (1.0 WTE)

An exciting development opportunity has arisen for an experienced Band 7 midwife to take on the role of Matron for Community Services in a secondment role

This is a fantastic opportunity for an experienced midwife to develop their leadership and management skills. The post covers 37.5hrs a week. This is a secondment role, starting immediately on appointment.

The successful applicant must be a confident manager, ready to provide visible support and motivational leadership to the community teams on both sites. Experience of community services is desirable but not essential. The role will involve driving forward the Trust's continuity of carer agenda as well as managing and helping to organise community midwifery services. This opportunity would provide excellent career development experience.

Please note that this post carries a 'Manager on Call' requirement involving approx. 3 on calls per month. These will be supported by the lead midwife team as required.

Other key responsibilities will include:

• Managing Healthroster

• Answering complaints as required

• Undertaking Datix investigations

• Working closely with the lead midwifery team on ongoing workstreams

• Managing HR issues within the team"

25. We accept NS's evidence that she was not herself responsible for preparing the attachments – they were assembled by SP following a discussion between NS and SP about what they should include.

26. The secondment advertisement was brought to the claimant's attention shortly after it was circulated by a junior member of staff who was concerned that the claimant was leaving her job. The claimant was upset about the email having been sent out without anyone speaking to her about it first and was particularly exercised by her role being advertised for a 'secondment'. She conveyed this in a telephone call to Donna Harris ('**DH**'), Senior HR Business Partner, that afternoon. During that call, the claimant asked DH to request that the advert be withdrawn.

27. Immediately after speaking to the claimant, DH spoke to NS by telephone. DH asked NS to call the claimant as soon as possible to explain the rationale behind the email. NS then did so, attempting to call the claimant three times before eventually having a conversation with her at 17:47pm which lasted over 16 minutes. The claimant was about to travel to the airport for a flight to Nigeria. During the call, NS explained her rationale for the secondment advertisement, including that she did not know how long the claimant would be off (and we accept that the claimant disputed this point by reference to the end-date on her sick-note) and was trying to cover the claimant's workload during her absence (and we accept that the claimant referred to the individuals she had already identified to cover her various areas of work). It is common ground that the claimant was upset. We accept NS's evidence that she apologised for having upset the claimant. The claimant again requested that the advert be withdrawn, and NS said that she would think about it.

28. Before departing for Nigeria, the claimant spoke to her Royal College of Midwives representative, Fidelma Evans ('**FE**'), who was herself a Band 7 Community Midwife. The following morning, 25 February 2022, FE emailed DH noting the "immense stress" caused to the claimant by her job being advertised for secondment without her knowledge on top of her already

emotional situation, and again asked for the advert to be retracted immediately.

29. NS did consider whether the advert should be withdrawn, but decided that it should not be. Instead she wrote an email to all Band 7 Community Midwives at 10:00am on 26 February 2022 which was, in substance, in the following terms:

> "As you are aware I have previously asked that an opportunity for someone to cover Patience's role whilst she is absent from work is circulated. Please can I clarify that this needs to be someone with Community experience and I will make this explicit.
>
> It is my aim to ensure that going forward that every area within maternity provides the opportunity for staff to act up in this way to cover unexpected absences and other projects, particularly when we have national directive deadlines to meet in addition to our service pressures and normal day to day work.
>
> The term secondment makes this sound rather formal and I would like to retract that this is offered as a secondment but I would still like to provide an opportunity for one of the Team Leaders to act up and ensure that we recognise the additional responsibility during this temporary period of time whilst Patience is absent and until her return. It also makes it more manageable to communicate directly with one or two individuals during this time. I anticipate that this will be for a short period of time likely 4 weeks.
>
> My apologies if my communication was not clear, in retrospect I feel I should have communicated my intentions earlier and more clearly and I apologise for any confusion or upset that this may have caused but I hope you will appreciate it is intended to support the team and the service as a short-term measure and provide an opportunity for development.
>
> I do hope that this clarifies the situation and that anyone wishing to discuss this opportunity please contact me."

30. We accept NS's evidence that she decided not to retract the opportunity because she still felt it was an appropriate way of supporting the claimant and covering her work during her absence. As far as NS was concerned, the reasons for offering the secondment in the first place still held true. She sought to make amends for the upset to the claimant by retracting the term 'secondment' and by making clear the role required community experience.

31. We also accept NS's evidence that the claimant's race played no part in the decision to not to retract the acting-up opportunity. Her true reasons were as set out above – that offering the opportunity was still justified for the same reasons NS had relied upon originally. Further, there is no evidence to suggest that the claimant's race played an unconscious part in that decision, and we find that it did not.

32. NS forwarded her email to the claimant and DH at 10:06 the same morning. In her covering email, she said:

> "Please see below my communication that has been sent out to the Community team leaders. I hope that this demonstrates that I have listened to the concerns you raised Patience and I again wish to apologise that I caused you upset at such a difficult time for you."

33. The claimant's mother passed away on 26 February 2022.

34. At 07:26am on 28 February 2022, FE again emailed DH. FE's email read in substance as follows:

> "Thank you for the email. I feel we have missed the point in that Patience would like the job retracted. So an email should be sent to All Midwives and Margaret Flynn not just team leaders."

35. DH replied the same morning seeking clarity:

> "The job as it was previously circulated as a secondment has been retracted and offered instead more clearly as an an acting up opportunity only for those with community experience to apply for.
>
> Is it that you are requesting a communication to be sent to everyone by Nicki to confirm what has been shared with the community leaders?
>
> I can discuss this with Nicki today but please let me know if this is your concern, that it should be shared more widely to confirm the expectations of experience in community."

36. FE responded soon afterwards:

> "All I can confirm is that Patience specifically asked that the Job advert be retracted.
>
> So I have taken that as an email sent to all to take back the offer/ secondment.
>
> I know Nicki has sent an email to Team leaders, but the advert did not just go to us it went to all midwives?
>
> I am sorry I cannot be be clearer, I have had no Correspondence with Patience so cannot be more specific."

37. Thereafter, DH must have discussed these concerns with NS, as is evident from her email back to FE at 18:49pm that same day, 28 February 2022:

> "I am acutely aware that any communications around this are extremely difficult and that Patience needs time to herself without interruption or distress at what is a very upsetting time. I wanted to update you given that this might be exacerbating the distress.
>
> I can confirm that Nicki agrees that this should be communicated more widely and had plans to do this as a follow on to make the communication clear that it was as she stated to the community leaders explicitly for those staff within community with relevant experience and for the community leaders to apply for should they choose to."

38. In fact, by the time DH sent her email to FE, NS had already send an "All Midwives" email (at 13:52pm) under the subject "Community Matron Cover" in the following terms:

> "As you are aware I have previously asked that an opportunity for someone to cover Patience's role whilst she is absent from work is circulated. Please can I clarify that this needs to be someone with Community experience. I have asked on this occasion that we seek cover from one of the Community Team Leaders.
>
> It is my aim to ensure that going forward that every area within maternity provides the opportunity for staff to act up in this way to cover unexpected absences and other projects, particularly when we have national directive deadlines to meet in addition to our service pressures and normal day to day work.

My apologies for the change from the previous communication.

I do hope that this clarifies the situation and that anyone wishing to discuss this please do contact me"

39. It is evident that the steps taken by NS were not satisfactory to FE, as FE then emailed on 1 March 2022 the Group Chief Nursing Officer, Arlene Wellman MBE ('**AW**') repeating the concerns she had previously raised with DH. In terms of the managerial hierarchy, AW was two levels above NS. AW responded rapidly to FE to say she would "pick this up immediately". It is evident from a later email sent by AW to FE (dating from 15 March 2022) that AW did have a discussion with NS about this. She told FE this:

"I spoke to Nicky before she went on AL and she assured me that she had withdrawn the secondment advert. However I have since seen what went out and I need to speak to her again."

40. In her oral evidence, NS denied that she had told AW that she would withdraw the advert. We consider it to be highly unlikely, given the relative seniority of AW, that NS would have told AW that she would withdraw the advert and then not do so. On the balance of probabilities, we find there were some crossed-wires between AW and NS. Whilst AW expressed some apparent displeasure with what NS had sent out in her email of 15 March 2022 (see above) there is no evidence of any further follow-up she had with NS, and NS denied any further communications with AW on this topic. We accept that was the case.

41. On 14 March 2022, two Band 7 midwifes (Katie Hamilton and Michelle Boyce) were appointed as temporary cover for the claimant's absence, doing 2 days per week each.

42. On 22 March 2022, the claimant returned to work.

43. On 11 April 2022, the claimant raised a grievance regarding NS's conduct towards her from 20 February 2022 up to her return to work. As part of her grievance she alleged this episode was "the last straw of years of systemic discrimination".

44. The grievance was thoroughly investigated, with the claimant having several meetings to discuss her allegations (including a Stage 2 Grievance Meeting chaired by the Interim Site Chief Nurse, Simon Littlefield; two investigation meetings chaired by the Case Investigator, Shirley Peterson[2]; and two further hearings with the by-then appointed Site Chief Nurse, Betty Njuguna, to discuss the Investigator's findings). NS and DH were also interviewed as part of the investigation.

45. The outcome of the formal grievance (issued on 28 June 2023) was as follows:

"In relation to the terms of reference the investigation concluded the following:

1. In relation to the specific incident in February 2022 referred to in the written grievance, whether PO has been subject to:

[2] Shirley Peterson was brought in from outside of the respondent Trust for these purposes – she was Director of Midwifery/Nursing at Lewisham & Greenwich NHS Trust.

- *direct discrimination of less favourable treatment on protected grounds of race;*

- *Harassment by creating an intimidating, hostile, degrading, humiliating environment*

by the individuals named in the grievance

The investigator found that, having taken into consideration all available information and evidence, this allegation was partially upheld. It was found that you did experience different treatment in terms of your job role being advertised whilst you took a leave of absence as a result of your mother being unwell, and subsequently passing away. The investigator noted that a colleague went through a similar experience slightly prior to you, yet her job role was not advertised; this was because there was a third colleague based at a different site who was able to cover that role. Your role is a standalone role and therefore required a level of cover for the period of absence. The investigator acknowledges that it is your perception that this was due to your race, however there was no evidence found to suggest this connection.

2. Whether PO has been divested from the same 'access to opportunities' as her workplace colleagues based on further evidence and examples to be provided by PO;

Having taken into consideration all of the available circumstances including your perception, and the information provided by you, this point was not upheld by the investigator.

3. Whether PO has been subjected to systemic discrimination over a number of years based on further evidence and examples to be provided by PO.

Having taken into consideration all available information including evidence provided by you and your perception of the events described this point was not upheld by the investigator."

46. The claimant appealed the outcome, and the appeal panel (consisting of the Group Chief Midwifery Officer, Natilla Henry; the Group Deputy Head of Internal Communications, James Thornton; and the Director of People, Steve Russell) upheld the original outcome by a letter dated 20 March 2024. On the same day, the claimant was issued with a formal written apology in the following terms:

"Further to the grievance appeal panel held on 31 January 2024 I am writing on behalf of the panel to provide a further written apology in relation to your grievance.

As previously stated by Betty Njuguna in her grievance outcome letter, it is acknowledged that the process to advertise your role in February 2022 was not handled well and, on behalf of the Trust, we apologise for the hurt and distress that this caused you at the time and which has continued during the grievance process. Whilst the investigation found no evidence of race discrimination or malicious or deliberate intent, it did find that there was a collective focus on the task which demonstrated an unintended lack of compassion.

I hope that this letter helps to allow you to move on from the difficulties that you experienced at what was a very difficult time for you."

47. In the meantime, ACAS Early Conciliation was started on 20 April 2022 and ended on 12 May 2022. The claim was presented on 10 June 2022.

The law

48. As noted above, the applicable legal principles were not in dispute. The following section is largely based upon Mr Bayne's skeleton argument.

Direct race discrimination

49. The test for direct discrimination is set out at section 13(1) of the EqA:

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

50. Race is a protected characteristic: section 9 EqA.

51. By section 23(1) of the EqA, a claimant can only rely upon comparators where there is 'no material difference between the circumstances relating to each case'. As Lord Hope said in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 (in the context of sex discrimination):

> "A comparison of the cases of persons of a different sex … must therefore be such that all the circumstances which are relevant to the way they were treated in the one case are the same, or not materially different, in the other".

52. Where the characteristics of the statutory comparator are in dispute, a tribunal is, in practice, unlikely to be able to identify the comparator without first answering the question of why the claimant was treated as he or she was (*London Borough of Islington v Ladele (Liberty intervening)* [2009] ICR 387, EAT, per Elias P).

53. As to causation, as Lord Nicholls explained in *Nagarajan v London Regional Transport* [2000] 1 AC 501, HL:

> "... in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question.
> …
> Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator."

54. In order to satisfy that test, the claimant's race need not be the only reason for the decision in issue, but it must have been a material influence (see *Nagarajan*).

55. As to the requirement that the claimant was treated to a 'detriment', in *Shamoon*, the House of Lords held that that word should be interpreted broadly, and from the perspective of the complainant. A worker suffers a detriment if:

    a. they genuinely feel that they have been treated to a disadvantage; and

    b. a reasonable worker would or might share that view.

    On the other hand, an "unjustified sense of grievance" is not enough.

Harassment

56. The test for harassment is set out at section 26 of the EqA:

"(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

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

…

(4) In deciding 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."

57. The correct approach to considering whether or not conduct has the proscribed effect (*i.e.*, the effect described in section 26(1)(b) EqA) was set out by Underhill LJ in *Pemberton v Inwood* [2018] ICR 1291*:*

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider *both* (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) *and* (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

58. Whether conduct is 'related to' a protected characteristic is an objective test: the intentions of the various actors are relevant but they are not determinative (see e.g. *Hartley v FCO* UKEAT/0033/15). In considering the necessary connection, it is important to bear in mind that:

    a. The intention of the anti-harassment legislation is to give effect to the principle of equality; and it is no part of that principle that bullying in the workplace *per se* should be punished, however unacceptable that behaviour might be in itself (see e.g. *Brumfitt v Ministry of Defence* [2005] IRLR 4)*.*

    b. The protected characteristic needs to be more than mere background context in order for the test to be met (see *UNITE the Union v Nailard* [2018] EWCA Civ 1203)

The Burden of Proof & Inferences

59. In determining whether a person has contravened either of the above provisions, section 136 EqA requires a two stage approach to the burden of proof:

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

60. As Elias P (as he then was) explained in *Laing v Manchester City Council* [2006] ICR 1519, EAT:

> "76. ... The reason for the two-stage approach is that there may be circumstances where it would be to the detriment of the employee if there were a *prima facie* case and no burden was placed on the employer, because they may be imposing a burden on the employee which he cannot fairly be expected to have discharged and which should evidentially have shifted to the employer."

61. Thus, in *Hewage v Grampian Health Board* [2012] ICR 1054, SC, Lord Hope emphasised the need to avoid an overly technical approach to the application of section 136:

> "32. ... it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

62. Nevertheless, the value of the two stage test at section 136 in cases where there is room for doubt was recently emphasised by HHJ James Tayler in *Field v Steve Pye & Co* [2022] IRLR 948, EAT:

> "41. .. If there is evidence that could realistically suggest that there was discrimination it is not appropriate to just add that evidence into the balance and then conduct an overall assessment, on the balance of probabilities, and make a positive finding that there was a non-discriminatory reason for the treatment. To do so ignores the prior sentence in *Hewage* that the burden of proof requires careful consideration if there is room for doubt.
>
> 42. Where there is significant evidence that could establish that there has been discrimination it cannot be ignored. In such a case, if the employment tribunal moves directly to the reason why question, it should generally explain why it has done so and why the evidence that was suggestive of discrimination was not considered at the first stage in an *Igen* analysis. ...."
> …
> 46. Where a claimant contends that there is evidence that should result in a shift in the burden of proof they should state concisely what that evidence is in closing submissions..."

63. Where there are multiple allegations, it is necessary to consider whether the burden of proof had shifted in relation to each one separately, whilst nevertheless taking into account the evidence as a whole (*Essex County Council v Jarrett* [2015] UKEAT 0045/15/0411).

64. As for what is required to discharge the burden at the first stage:

    a. It must be something more than a difference in the relevant protected characteristic and a difference in treatment (see *Madarassy v Nomura International plc* [2007] ICR 867, CA, at paragraph 56).

    b. That said, the something more required at the first stage need not be a great deal (see *Deman v EHRC* [2010] EWCA Civ 1279 at paragraph 19).

    c. However, a finding that an employer has behaved unreasonably, or treated an employee badly, will not be sufficient, of itself, to cause the burden of proof to shift. That is because, as Lord Browne-Wilkinson explained in *Glasgow City Council v Zafar* [1998] ICR 120, at 124B:

> "... the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer, he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".

    d. Similarly, in *Law Society v Bahl* [2004] IRLR 799, at para 101, Peter Gibson LJ approved the 'impressive analysis' of Elias J (as he then was) in the EAT:

> "Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason."

    e. Indeed, inferences of discrimination are not to be drawn automatically, for example from a failure to disclose documents, as if it were a 'tick-box exercise' (*D'Silva v NATFHE* [2008] IRLR 412); and it would be an error to draw an inference without having regard to the totality of the relevant circumstances (see e.g. *Talbot v Costain Oil* UKEAT/0283/16 per HHJ Shanks at paragraph 15-16).

65. The way in which an employer's alternative explanations (or the absence of such alternative explanations) for impugned treatment are to be addressed in the application of section 136 EqA was considered by the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, where Lord Leggatt observed:

> "40. ... At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account. It follows that ... no adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation. ...

> 41. ... So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. ..."

Application of the law to the facts

66. References to "issue" or "sub-issue" below are to the List of Issues set out earlier in these reasons.

Direct race discrimination

67. There is one live allegation of direct race discrimination – that identified as sub-issue 1.2.2. It is common ground that the respondent did advertise the claimant's role for a secondment whilst she was on sick leave. The first question that arises, therefore, is whether this amounted to less favourable treatment compared to an appropriate real-life comparator or a hypothetical comparator (sub-issue 1.3).

68. The claimant relies upon MW as an appropriate comparator; the respondent denies that MW is an appropriate comparator. We accept the respondent's submissions on this aspect of the case. There were material differences between the situation of the claimant and that of MW. Most notably, there was another Band 8 Matron (SP) doing essentially the same role as MW albeit at the other site who could relatively straightforwardly cover the managerial aspects of MW's role during her absence. The same was not true for the claimant, for whom there was no obvious person to carry out the managerial aspects of her role (particularly given the timing of the claimant's absence, which came soon after MW's, thereby making it impractical to ask SP or MW to cover for the claimant).

69. If we were to assume, contrary to our finding above, that MW was an appropriate comparator then *prima facie* there is less favourable treatment in that the claimant's role was put out for secondment during her absence whereas MW's was not, and this caused the claimant a justified sense of grievance. The question then arises whether that was because of race. In any event, when considering a hypothetical comparator it is necessary in this case to first answer the question of why the claimant was treated as she was (see *Ladele*), *i.e.*, was it because of race.

70. In closing submissions Mr Patel relied upon 3 reasons to support shifting the burden of proof (*i.e.*, the "something more" referred to in *Madarassy*):

    a. The unusual nature of such a short secondment;

    b. The "whiff of underhandedness" in not informing the claimant of the secondment plan; and

    c. Comparisons to how MW was treated by contrast to how the claimant was treated.

71. The third of these cannot help the claimant in this analysis, because they concern (by their very nature) a difference in the relevant protected characteristic and differences in treatment, not "something more".

72. In our judgement, neither of the other two reasons amount to "something more" either. We have to, at this first stage, put aside the respondent's

explanations. Even doing so, we can find no common sense basis to infer from either (or both) of these reasons that the less favourable treatment was because of race. There is simply nothing to support such a leap. Whilst a wider history of alleged race discrimination was referred to in the claimant's grievance (a) none of those allegations were upheld in the grievance and (b) none of that was canvassed or relied upon specifically in the hearing before us, so in our judgement that does not change matters. The claimant has failed to shift the burden to the respondent to disprove that the treatment was because of race.

73. Even if we are wrong about that, and the burden of proof does shift to the respondent, we have accepted NS's evidence regarding her true reasons for offering the short secondment and have found that race played no part in those reasons (see paragraphs 19-21 above). The respondent has successfully proved that there was no contravention of section 13 EqA.

74. Accordingly, for the above reasons, the direct race discrimination complaint fails.

Harassment

75. There are two live allegations of harassment – those identified as sub-issues 2.1.1 and 2.1.3.

76. Sub-issue 2.1.1 failed on the facts – see paragraph 16 above. The words alleged to have been said were not said. What we find was, in fact, said in the conversation on 21 February 2022 cannot conceivably amount to unwanted conduct – NS was seeking to facilitate the claimant going off work to travel to Nigeria and the claimant explained what she planned to do (*i.e.*, go off sick).

77. It is common ground that the respondent did not retract the acting-up opportunity (sub-issue 2.1.3), though it did retract the language of 'secondment'. The first question that arises, therefore, is whether this amounted to unwanted conduct related to race (sub-issues 2.2 and 2.3).

78. We accept this amounted to unwanted conduct. The claimant had made plain that she wanted the advert retracted, and this was not done.

79. As to whether it was related to race, Mr Patel relied on the same reasons as for the initial advert. We rejected those reasons under the direct race discrimination complaint. We recognise there is a subtle difference between the "because of" test for direct discrimination and the "related to" test for harassment; nevertheless, our conclusions are the same for both. Even putting aside the respondent's explanations, we can find no common sense basis to infer from the reasons relied upon by Mr Patel that the unwanted conduct was related to race. There is simply nothing to support such a leap. The claimant has failed to shift the burden to the respondent to disprove that the conduct was related to race.

80. Even if we are wrong about that, and the burden of proof does shift to the respondent, we have accepted NS's evidence regarding her true reasons for not withdrawing the acting-up opportunity and have found that race played no part in those reasons (see paragraphs 30-31 above). The respondent has successfully proved that there was no contravention of section 26 EqA.

81. In view of our conclusions above, it is not necessary to address sub-issues 2.4 and 2.5.

82. For the above reasons, the harassment complaint fails.

Conclusion

83. The judgment of the Tribunal, therefore, is that none of the complaints are well-founded, and all fall to be dismissed. Issues of remedy do not arise.

Employment Judge Abbott

Dated: 25 October 2024

JUDGMENT SENT TO THE PARTIES ON

30 October 2024

FOR THE TRIBUNAL OFFICE

P Wing

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