



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C. Ilounoh  
**Respondent:** University Hospitals of Leicester NHS Trust  
**On:** 9 – 12, 16 -20, 23 -27 September 2024  
**Before:** Employment Judge Ahmed  
**Members:** Ms L Woodward  
Ms D Newton  
**At:** Leicester

## Representation

**Claimant:** Ms Rajuno Eteng (Claimant's spouse)  
**Respondent:** Mr Jonathan Heard of counsel

## JUDGMENT

The unanimous decision of the Tribunal is that:

The Claimant's complaints of direct and indirect race discrimination, victimisation and constructive dismissal are all dismissed.

## REASONS

1. In these proceedings the Claimant brings complaints of direct and indirect race discrimination, victimisation and constructive unfair dismissal.
2. In coming to our decision we have taken into consideration the oral evidence of the witnesses, the documents in the three bundles, the contents of all the witness statements and the closing submissions made by the parties' representatives.
3. The Claimant was represented at the hearing by his wife, Ms Rajuno Eteng, who is currently employed by the Respondent as a Sonographer. The Respondents were represented by Mr Heard of counsel.
4. Despite not being legally trained Ms Eteng undertook the advocacy and representation to a standard which gained admiration from all three members of the

Tribunal. Her grasp of the issues and documents was such that she was usually able to identify the relevant issue or page number very quickly. Her written submissions were commendable. We should also compliment Mr Heard for his detailed and comprehensive submissions on each and every allegation and the sensitive way he undertook cross-examination. We are grateful to them both for their assistance to the Tribunal throughout.

5. Oral evidence was given on behalf of the Claimant as below. The three immediately after the Claimant are all former employed sonographers of the Respondent:

5.1 The Claimant himself;

5.2 Mr Augustine Obi;

5.3 Ms Ogochkwu Gibson;

5.4 Mr Nelson Chukwu;

5.5 Ms Rajuno Eteng.

6. In addition we received various witness statements in support of the Claimant who did not attend to give evidence. It is fair to say that their evidence was largely if not wholly irrelevant. There was no objection to admitting their statements into evidence. Those statements were from:

6.1 Mr Chinwendu David Ene (a Sonographer at East Kent Hospitals University NHS Trust);

6.2 Ms Tina Dilibe (a Sonographer at Northern Care Alliance NHS Trust);

6.3 Ms Mary Omonigho Aizebeokhai (Sonographer at Surrey and Sussex Healthcare NHS Trust).

7. Witness evidence on behalf of the Respondent was given in person by:

7.1 Ms Catherine Berry (Ultrasound Clinical Lead)

7.2 Mr Lewis Cade (Operational Lead and Stage 2 Grievance Manager);

7.3 Mr Matthew Archer (Head of Operations and Mr Cade's line manager);

7.4 Mr Jody Alexander (Care Facilitator and Cultural Ambassador);

7.5 Ms Sue Moss (HR Business Partner);

7.6 Ms Sally Hill (Midwife);

7.7 Ms Maggie Cowlshaw (Midwife);

7.8 Ms Hilary Brooke-Clarke (Sonographer and Clinical Lead for Obstetrics);

7.9 Mr Claudius Masakure (Ultrasound Clinical Lead);

7.10 Ms Amanda Parry (Clinical Lead Sonographer);

7.11 Ms Helen Lang (Imaging General Manager);

7.12 Ms Melanie Cross (General Manager and Service Manager for Ultrasound at the relevant time);

7.13 Ms Hannah Brown [formerly Tucker] (Service Manager);

7.14 Ms Amy Barnes (Consultant Radiographer and Ultrasound Clinical Lead);

8. Prior to this hearing there were several lengthy case management Preliminary Hearings. We say more on that below.

9. There were no applications for anonymisation or restricted reporting orders. Where necessary reasonable adjustments were made. This decision represents the views of all three members of the Tribunal.

#### Amendment application

10. At the commencement of the hearing the Claimant sought to add the following allegation (in his own wording) by way of an amendment:

*“25 October 2022 -The Respondent’s desktop review on the Claimants’ complaints of microaggressions experienced at work.”*

11. This allegation could not reasonably be understood without further amplification or evidence. The Claimant initially argued that it was already pleaded. It was not immediately apparent where that was and we concluded that it was not. The essence of the complaint is that the Claimant was accused of doing something he had not.

12. In this, and on all of the various amendment issues where they arose we considered the guidance and principles set out in **Selkent Bus Co. v Moore** (1996) ICR 836, **Vaughan v Modality Partnership** (2021) ICR 534 and **Chaudhury v Cerebus Security and Monitoring Services Ltd** (EA 2020/000381). This particular amendment application was made late when there had several other opportunities to make the application, the allegation could not be understood without further written amplification which would require witness statements to be prepared or amended and the Claimant was alleging other incidents more or less to the same effect. The Respondent would not have covered it in their evidence as they regard it as a new allegation. It is one of several acts the Claimant relies on to show he was wrongly accused. It is difficult to see what it will add to the case. The Claimant suffers little or no prejudice by it being disallowed whereas the Respondent would need to call additional evidence. In the circumstances the amendment application was refused.

13. The Claimant also sought to amend by seeking to add various factual matters in relation to the constructive dismissal complaint. These were included in his further and better particulars but in our view they were by way of background only. We considered that the issues on which the Claimant relied for constructive dismissal had been fairly and clearly identified by Employment Judge Smith at an earlier Preliminary Hearing. He had sight of them and the draft that he produced did not include these matters. The Claimant made no objection at the time to their exclusion though he did object to other parts of Employment Judge Smith’s order. The

application to add further matters by way of amendment was refused for the same reasons as above.

14. The Respondent intended to expand upon their justification defence in the list of issues. We considered this was not an amendment issue but merely further and better particulars of an existing pleading. There was therefore no need to require them to apply for an amendment. Similarly the Claimant did not need to amend to supply further details as to how he constructed his hypothetical comparators(s).

#### Acronyms

15. The following acronyms are used in this decision:

CASE = Consortium for Sonographic Education

FASP = Fetal Anomaly Screening Programme

PHE = Public Health England

RLP = Record of Prior Learning

#### Background

16. The NHS is highly regulated and heavily litigated-against organisation. It is important for every NHS Trust to ensure that every medical practitioner it employs is properly qualified and legally able to perform their duties. If they have been trained abroad it is essential that their qualifications meet the necessary equivalence of UK qualifications. It would be difficult to defend any negligence claim should it be found that any medical procedure was undertaken by someone not properly qualified or authorised to do so. The Respondent rightly takes its responsibilities in that respect very seriously. In cases where the medical professional has foreign qualifications it is not always easy to make the determination as to equivalence as the facts of this case demonstrate. The question in this case is whether the actions of the Respondent in making that assessment amounted to direct and/or indirect race discrimination and/or victimisation.

17. The problem for managers and recruitment teams is that most foreign qualifications do not readily 'map' to UK qualifications. There is no official definition of mapping and no universally agreed process on how to do so. Much depends on which institution or body is used to undertake that exercise. For example the University of Derby, who are the chosen academic institution used by the Trust for most of their medical training, say that foreign-trained sonographers are required to undertake a focus module in this area to be able to practice in the UK.

18. Relevantly, guidelines by Public Health England ('PHE') state that any practitioner undertaking a foetal anomaly ultrasound scan on pregnant women at the appropriate times for the purpose of screening and diagnosis of a related condition should as a minimum hold one of the following:

18.1 A Certificate/Diploma in Medical Ultrasound of the College of Radiographers with evidence of appropriate continuous professional development;

18.2 A Postgraduate Certificate in Medical Ultrasound approved and validated by a higher institute of education and accredited by the Consortium for Sonographic Education (CASE) or equivalent (the qualification should be relevant to obstetric ultrasound practice) and/or;

18.3 A Diploma in Obstetric Ultrasound from the Royal College of Obstetricians and Gynaecologists /Royal College of Radiologists or the Advanced Training Skills Module.

### **THE FACTS**

19. The Claimant is of Nigerian ethnic origin. He trained as a Sonographer and Radiologist in Nigeria. He possesses a PG Dip in Medical Ultrasound from educational institutions in Nigeria. Prior to joining the Respondent he worked for two years for The Diana Princess of Wales Hospital in Grimsby. He left to join the Respondent on 18 November 2019 as a Sonographer. Shortly prior to joining the Respondent the Claimant had begun studies at AECC University College in Bournemouth for an MSc in Medical Ultrasound.

20. At the Diana Princess of Wales Hospital there does not seem to have been any detailed enquiry as to whether the Claimant was entitled to practice as a Sonographer in the UK. Those engaged in the recruitment process at the Respondent at the time of the offer of employment assumed that as he was already employed by a NHS Trust that he must have the necessary qualifications to do so.

21. The Claimant was interviewed for the role by a panel of three consisting of Ms Melanie Cross, Ms Teresa Lardner and Ms Catherine Berry. At that time none of them had a detailed understanding of the relevant Fetal Anomaly Screening Programme ('FASP') guidelines.

22. Shortly after the Claimant was offered the role there was a discussion between service managers as to whether the Claimant's qualifications were compliant with the PHE guidelines in relation to obstetric scanning.

23. Ms Lardner had attended a meeting where qualification guidelines under FASP for those undertaking 12 and 20 week scans was discussed. She discovered that qualifications should be CASE accredited or CASE equivalent. The position on what was CASE accredited was relatively well-defined, the position on what was CASE equivalent was far from clear.

24. On 18 November 2019, after the Claimant had been offered the job but before he had started the role, he was informed that he would not be permitted to undertake any obstetric scanning whilst the matter was investigated. The Claimant would be able to undertake all his other duties, save for obstetrics.

25. Ms Berry made enquiries of clinical leads at other local Trusts who were asked whether they employed any sonographers who did not have a CASE accredited course and who performed anomaly scans. She did not receive any information that would enable her to make a decision.

26. Enquiries were also made of PHE who confirmed that if a sonographer's qualifications could not be mapped to any of the required qualifications, the medical professional should not undertake scans on pregnant women at both the first trimester and the 18 to 20 week foetal anomaly scan.

27. Ms Berry emailed the Programme Lead for MSc Medical Ultrasound Course at the University of Derby. The Programme Lead had been involved in the past in comparing the Nigerian Courses to a UK CASE accredited course.

28. On 3 December 2019 Ms Berry wrote to the Programme Lead as follows:

"I am after a little advice regarding a tricky situation in our trust. We have employed a very good sonographer who was trained in Nigeria and subsequently has worked in the UK for around 2 years. We unfortunately mistakenly believed and then did not check at interview, that as he was already working in the UK and performing obstetrics that he had done a CASE accredited course in obstetrics.

We have realised that he does not have this and have offered to put him through university to get this sorted but he is not keen. We have explained the FASP guidance around having a CASE accredited course to perform screening obstetric scans and have told him that he now can't scan in obstetrics at Leicester. He is obviously not happy about this decision.

He also believes that his Nigerian qualification is UK equivalent and that therefore this should allow him to scan. One of the regional leads mentioned that you have been involved in the past in comparing the courses and had decided that the Nigerian qualification was not equivalent. Do you have any documentation to prove this?

We have contacted FASP who are very clear that he should not scan obstetrics.

He states in some communication that he previously 'got admission to study MSc ultrasound in the University of Derby and I was offered the option of transferring my credits in Obstetrics, abdomen and gynae via "recognition of prior learning (RPL)'. And also AECC university college Bournemouth transferred my credits including obstetrics to make up my current Msc ultrasound credit load via RPL- which operates on CASE accreditation standards. Again, they would not have done this if my obstetric training was irrelevant.

Do you have any insight into all of this?"

29. The Programme Lead at Derby University replied as follows:

"This is a really tricky situation and I can completely understand your trust's position on this as I have seen it happen elsewhere also.

A lot of foreign qualifications do not match up to the UK PG qualifications and this is where it gets really tricky in defining the scope of practice for each sonographer who has trained in a foreign country. Part of it will depend on what he studied, what level this was at and when it took place.

FASP guidance is really quite explicit when it comes to obstetric screening scanning and that is why for example the students coming through the BSc programme are not allowed to scan obstetrics and the majority of foreign trained/ qualified are not allowed to.

It would help if you could let me know his name and then if we have already appraised his documents then we can have a look back at when they were appraised and what the outcome was."

30. The Programme Lead then confirmed she had received an enquiry from same person some 15 months earlier and there had been a discussion of allowing direct entry onto their PGDip stage. However, she said that on review whilst the Physics and Gen Med teaching in Nigeria was comparable to the UK modules of study, the Obstetrics modules was not and they would not allow RPL (Recognition of Prior

Learning) for the Obstetrics modules.

31. The Programme Lead gave an example of a student from Nottingham with exactly the same qualifications as the Claimant. She said that they had allowed that student into the Programme with direct entry into the PG Dip stage so that they could complete the obstetrics module to be able to scan in obstetrics and comply with FASP requirements of having a CASE accredited qualification. She confirmed that the person in question understood this was a FASP requirement and actually found the module helpful.

32. On 7 December 2019 Mr Masakure, part of Ms Berry's team, wrote to CASE as follows:

"I am a Clinical Lead sonographer working for the University Hospitals of Leicester. We have employed someone who trained in Nigeria and does not have a CASE accredited qualification. There are no issues with clinical competence, however the National Fetal Screening Programme (FASP) recommends that anyone undertaking fetal screening should have a CASE accredited qualification or equivalent. Therefore we have restricted the individual from practicing obstetrics.

Is there a way of getting the qualifications CASE accredited or the individual has to enrol onto an US Obstetric module?"

33. CASE responded on 11 December and confirmed that they worked with the UK and Ireland Universities to accredit their courses in sonography but there was no mechanism for accrediting an individual's qualifications. They said that the only way for an individual to meet the FASP recommendations was for them to successfully complete a CASE accredited course.

34. Ms Cross wrote to the Claimant on 9 December 2019 and confirmed that the advice from PHE was that the Claimant's PG Cert would need to be CASE equivalent and needed to be relevant to obstetric ultrasound practice. She confirmed an offer to support the Claimant through a CASE accredited course at a University and that this course would be funded by the Respondent.

35. The Claimant responded to Ms Cross on 13 December 2013 and said that he believed his PG Dip medical ultrasound qualification was CASE equivalent and that the Trust should make the relevant enquiries to confirm this. He stated that his obstetrics credits had been transferred to his current MSc ultrasound course and he believed were found to be CASE equivalent. He said that AECC had transferred his obstetrics credits and thus he was thus CASE accredited.

36. The Trust, having no personal experience or knowledge of mapping qualifications to determine equivalence, asked the Claimant to provide the relevant evidence.

37. On 6 January 2020 the Claimant sent an email enclosing a number of documents which he said showed he met the criteria. Having considered them, and in the light of the advice they had received previously from Derby University, the Trust concluded that this was not sufficient evidence. Their reasons were as follows: Firstly, AECC did not provide proof of mapping the Claimant's obstetrics

qualifications to the UK CASE standard. Secondly, the transfer of the Claimant's University credits as recognition of prior learning was not proof of mapping qualifications. Thirdly, the Claimant had supplied a DQASS assessment (Down's Syndrome Screening Quality Assurance Report) which was not a qualification at all but an assurance that a practitioner was able to scan to the required standard.

38. On 21 February 2020 the Claimant submitted a formal written grievance. He named a representative from the Society of Radiographers. The only managers identified as the persons against whom the grievance was addressed were Ms Cross and Ms Berry.

39. A meeting was set up on 5 March 2020 with Mr Scott Barton of the Trust to discuss the grievance at the informal first stage of the process. Ms Berry was also in attendance. She explained that none of the documents the Claimants had provided showed that his obstetric qualifications were CASE accredited or equivalent. The correspondence from AECC did not show that the modules he had undertaken in obstetrics had been mapped to be CASE equivalent. The meeting ended in an impasse. The outcome of the discussions were confirmed in writing. Mr Ilounoh indicated his wish to proceed to the Second stage of the grievance process.

40. On 11 March 2022 Ms Berry emailed Mr Warren Foster, Head of School of Medical Ultrasound at AECC to establish if the Claimant's obstetric modules had been mapped to be CASE equivalent. Her email was as follows:

"We currently employ Christopher as a sonographer at University Hospitals Leicester. He originally trained as a radiographer and sonographer in Nigeria and has since undertaken further studies at AECC with you in October 2019. I understand that he has recently been in contact with you to ask whether his overseas qualifications are CASE equivalent. The reason that he has asked this is because at UHL we do not allow any sonographer to perform obstetric screening ultrasound if they do not have a case ultrasound qualification or equivalent. This is due to the Public Health England (PHE) and the Foetal Anomaly Screening Programme (FASP) recommendations outlined below with the link

[there is then a repeat of what is set out previously in terms of the FASP guidelines at paragraph 18 above]

Unfortunately despite correspondence from Sally Newton confirming that his academic credits were transferred from his Nigerian qualifications to enable him to undertake further studies at your institution, the obstetrics qualifications have not been proven to have been mapped to determine if they are CASE equivalent. To enable us to have this confirmed we would need a full transcript of his qualifications including the full details of what was studied at each stage in all of the modules on the obstetrics content to be mapped to the UK case equivalent courses

Christopher has given permission for us to ask on his behalf if this is a service that you would be able to provide as following correspondence with case, the society of radiographers and FASP, they do not provide this."

41. Mr Foster's response (through the Admissions Manager) was as follows:

"Upon Christopher's application to the MSc Medical Ultrasound programme, all relevant transcripts and certificates were provided and reviewed in relation to his request for approval of his Record of Prior Learning (RPL) in accordance with our RPL policy. The documentation that he supplied from his studies in Nigeria satisfied us that all relevant modules were mapped and agreed at the required level. The training that Christopher completed at a UK-NARIC recognised institution, and his PG Dip is deemed by NARIC to be at the same level as a UK postgraduate qualification.



On successful completion of our programme, Christopher would then be considered case accredited.”

**42. Ms Berry sent a further email to Mr Foster as follows:**

“Thank you for the prompt reply but I think there is some confusion regarding what it is that we need in order for Christopher to be able to practise obstetrics at UHL. You say below that on completion of your programme he will be CASE accredited but this would not be in an obstetrics qualification so we would need the below query answering to satisfy that his qualifications in obstetrics are indeed CASE equivalent.

*Were the obstetrics modules that he completed in Nigeria directly mapped to a UK course and deemed equivalent to include within the academic content the specifics of screening ultrasound scans performed in the UK, that are not performed in Nigeria, where his PG Dip was gained*

We contacted CASE previously and they responded to our query regarding qualifications mapping by saying that CASE accreditation is not based on academic level and skills but on meeting very specific standards set out in mapping documents on their website. They do not provide this mapping service for individuals unfortunately and neither do Public Health England or FASP.

When I contacted the regional lead sonographers to inquire whether they have overseas trained sonographers performing obstetrics in the UK, they answered that they do not have any Nigerian qualified sonographers performing obstetrics as their local university mapped the qualifications and deemed them to not to be equivalent in the obstetrics modules but equivalent for other modules such as physics and general abdominal. Their sonographers have therefore gone on to complete a UK course to allow them to scan in obstetrics As we now have this information we are obviously concerned because of the legal implications, that we need the above query answering so that Christopher can commence his obstructive scanning.

Are you able please to provide us with the document of mapping his previous qualification to a CASE abstract ICS qualification and the academic content that was deemed equivalent? If this was not previously done to this level is this a service that you could provide perhaps by the obstetrics tutors that you have teaching at the university?” *(emphasis in the original)*

**43. Mr Foster’s reply, so far as is material, was as follows:**

“In order for the university to offer RPL we must be able to map the required units to the UK case accredited programme we run. This is done through NARIC which informs us that his obstetrics training is at the same level. We are able to then offer him credit for this training and add this to any new modules he takes with us to form a new UK qualification higher than that he originally undertook ie a PG Cert converted to a PG Dip.

This is an academic process and does not involve us or any other university practically examining the sonographer.

If you are wanting to accept the clinical capability that would need to be done through a process of preceptorship within your Trust.

If you would like us to formally and practically examine Christopher’s screening skills I would suggest that he is enrolled on a negotiating skills module in which we would set the learning outcome to demonstrate FASP and NT competency thus avoiding the need for a preceptorship.”

**44. Ms Berry’s view following the exchange of these emails was that the obstetrics modules could not be deemed CASE equivalent. AECC had not broken down the course content to map it to a CASE accredited course. She had before her the views of the Programme Lead of Derby University and at the same time she did not receive specific answers to her queries from AECC who had clearly decided not to undertake a mapping exercise despite the opportunity to do so. She was also aware that in**

Nigeria they did not perform the same foetal anomaly screening programme as the programme was unique to the UK.

45. Ms Berry concluded that in all the circumstances the CASE guidelines were not met. We are satisfied that she genuinely held that belief and that belief was based on the information she had received, or more accurately perhaps on the information she had not received from either the Claimant or AECC.

46. Ms Berry contacted the UHL Head of Legal Services and asked whether, from an indemnity insurance perspective, the NARIC certificate was sufficient. She was advised that having regard to the FASP Guidelines the Trust would not be legally covered if the Claimant made a clinical error. The advice was given orally and not confirmed in writing.

47. The grievance at stage 2 was allocated to Mr Lewis Cade, then Lead General Manager for Imaging.

48. Mr Cade spoke to the Claimant's previous employer in Grimsby. They confirmed that they had allowed the Claimant to practice on the assumption that he held a CASE equivalent qualification. Mr Cade asked them to put this in writing but they declined to do so.

49. Mr Cade confirmed to the Claimant that following his investigation he was unable to conclude that the Claimant's qualifications were CASE equivalent. He explained that if the Claimant wished to resume obstetrics scanning he would need to undertake a post grad certificate module in obstetric scanning to cover the standards required under the UK screening programme.

50. Mr Cade apologised on behalf of the Trust and the Department that the issue of his qualifications was not picked up at the recruitment stage. It was arranged for them to meet on 15 July to discuss the suggested resolution of the grievance. The meeting was postponed to 13 August as the Claimant's wife was expecting a baby around that time and the Claimant would be taking paternity leave after that.

51. In or around June 2020, Ms Sue Moss, an HR Business Partner, informed the Claimant that the Respondent had a group of Cultural Ambassadors whose remit was to identify and challenge any cultural or unconscious bias, less favourable treatment or discrimination and to ensure that such issues were taken into consideration in the decision-making process. The job of a Cultural Ambassador was not to represent the Claimant during the grievance process. It was a voluntary role without any extra remuneration. The Claimant requested that his case be reviewed by a Cultural Ambassador. Mr Jody Alexander, a Cancer Data and Navigator Manager, was appointed as the Cultural Ambassador. Mr Alexander received documentation in relation to the exercise in July 2020. It included the grievance form and related emails.

52. On 28 July 2020, the Claimant provided a letter from AECC University Bournemouth confirming completion of his MSc degree. That meant the Claimant now had a CASE accredited qualification from a relevant UK institution.

53. Mr Lewis Cade wrote to the Claimant on 6 August 2020 to say that the Claimant would now be able to practice obstetrics following a short period of supervision.

54. Mr Cade met the Claimant on 13 August to formally discuss the grievance by MS Teams. This was the first time they had spoken. Mr Cade says that the Claimant was aggressive and had to be told to stop shouting at him. The Claimant said the earlier email from AECC showed his qualifications were CASE equivalent. Mr Cade said that was one interpretation. Mr Cade agreed that he had misread the earlier emails. He now says that whilst he did accept at the time that he had previously misunderstood the emails from AECC, he should have gone back to Ms Berry to clarify the position before admitting he might have misunderstood. In any event his understanding did not alter the facts.

55. The Claimant began his obstetrics practice at the Trust from 21 September 2020 and continued to do so until he left the Trust. He had effectively been unable to undertake this work for a period of approximately 10 months.

56. On 5 August 2020, Mr Alexander reviewed the documentation in his role as Cultural Ambassador and concluded that there was nothing to suggest any discrimination or unconscious bias. He did find that the issue as to the Claimant's ability to undertake the role could have been identified before he was offered the role but there was nothing to suggest bias. According to the Respondent's Resolution Policy, the Cultural Ambassador does not report directly to the individual raising the grievance but instead to the decision makers so that they can then have regard to the findings within their decision-making process. It appears that Mr Alexander's review was sent to Mr Cade but not sent to the Claimant until almost a year later in July 2021. Upon receipt of it the Claimant sent an email to Ms Moss strongly criticising Mr Alexander's opinion. His email also suggested that Mr Alexander may have not been provided with all of the relevant documentation to consider his case properly.

57. Upon being copied into the Claimant's email Mr Alexander was concerned that perhaps he had not been told the full story. However on a review of all the documents he concluded that they made no difference to his earlier view.

58. There are a few other miscellaneous matters that we should deal with as part of the factual scenario. In an appraisal in December 2021 the Claimant mentioned that some midwives, including Ms Hill and Ms Cowlshaw, had said to Ms Brooke-Clarke that the Claimant was prone to making decisions on his own implying that he should consult more. Ms Hill, who has been employed by the Trust for 35 years (15 years as a midwife), gave evidence that she had no recollection of such a conversation with Ms Brooke-Clark.

59. Ms Cowlshaw, who has been a midwife for 33 years and employed by the Respondent Trust for 20 years, gave evidence to the effect that far from making decisions without asking, the Claimant would frequently come to the midwives' office to seek advice and that he did so more frequently than most of the other sonographers. She says that her impression of the Claimant was that he was pleasant but did not like to be kept waiting.

60. The Claimant resigned on 17 January 2022 giving 3 months' notice. It is agreed that the effective date of termination was 22 April 2022. The Claimant began ACAS conciliation on 5 May 2022. The ACAS certificate was issued on 15 June 2022. The claim form to the Tribunal (ET1) was presented on 30 June 2022.

61. The complaint of unfair dismissal is agreed as having been presented in time but there is an issue as to whether all but a few of the discrimination and victimisation complaints have been presented in time. We will now deal with some of the facts and allegations relating directly to certain individuals.

Allegations relating to Mr Claudius Masakure.

62. The Claimant alleges that on 28 February 2020 Mr Masakure falsely told him that a colleague and patient had complained that the Claimant had coerced a patient into undergoing a transvaginal scan. Such a scan is optional for patients. It is open to women to refuse if they are uncomfortable with it. It is standard practice to ask a patient for their consent before undertaking such a scan.

63. On 27 February 2020, Mr Holland, a senior sonographer, emailed Ms Berry and Mr Masakure raising a concern about the Claimant. Mr Holland said that Radiology Assistants had alleged that the Claimant had allowed patients to insert the probe themselves. It is standard practice at the Trust that the person performing the scan is the one who inserts the probe and does not routinely ask patients to do so themselves.

64. It was also separately raised with Mr Masakure by one particular Radiology Assistant that the Claimant had asked a patient several times for consent to do a transvaginal scan. The Radiology Assistant said that she was surprised as other sonographers did not do this. To ask for consent several times may give the impression to a patient that they were being dissuaded from having a transvaginal scan.

65. Mr Masakure decided to discuss these issues with the Claimant. He told him in a private meeting that it 'was not a big issue' and that he did not want to make more of it than it was. Mr Masakure explained that within the Trust they always insert the probe themselves and that that the Claimant should do the same unless the patient insists on doing it themselves. Mr Masakure also explained that the Claimant should not seek consent several times because this could cause the patient to be unsure or lose confidence. Mr Masakure reminded the Claimant that if a patient asks if they could insert the probe themselves or if a sonographer was struggling this can be done but a patient should not be asked under normal circumstances. Mr Masakure had intended the discussion to be informal and helpful.

66. The following week the Claimant sent an email to Mr Masakure in which he said he "didn't take incorrect accusations like that lightly." He went on to deny that he had coerced anyone to have a transvaginal scan (which in fact was not the suggestion) and that he always gave patients 'all the options'. The Claimant wanted the hospital number of the patient who had complained.

67. On or about 7 April 2020 Mr Masakure was made aware of a concern that had been raised by Mr Bell, a Consultant Physician that there had been several reports which stated that the scans were 'limited' due to excessive bowel gas, or a high lying liver, or both. Dr Bell said it was apparent that these reports were coming from a single reporter and gave the Claimant's initials. Dr Bell queried if there was a training issue. He later clarified that on 5 out of the Claimant's 6 scans there were stated limitations.

68. Mr Masakure spoke to the Claimant about these concerns. He said that he understood that there may sometimes be good reasons for stating limitations but that the Claimant was writing limitations on a number of reports. It was fine to document limitations but the Claimant needed to make it clear what the reasons were.

69. The Claimant replied to say to that he was not alone in what he did and that radiology doctors were also routinely adding limitations on their reports. Mr Masakure was not aware of this nor was he sure how the Claimant would have such information. Mr Masakure wondered if the Claimant was looking at other doctors' reports which if true would be a serious data protection breach. When he asked for examples, Mr Ilounoh refused to provide them. Mr Masakure told the Claimant that he was not supposed to undertake any private audits without approval from clinical leads. The Claimant said that it was not fair because "lots of radiologists have poor practices". Mr Masakure said that he only managed sonographers and not radiologists but that he was more than happy to take the Claimant's concerns to the Clinical Director if necessary. Mr Masakure's evidence was that the Claimant then sought to backtrack on his earlier statement about viewing reports and asked for a copy of the email from the Consultant. When that was refused Mr Ilounoh accused of Mr Masakure of bullying him. Mr Ilounoh raised his voice at Mr Masakure at which point the meeting was brought to an end.

70. On this occasion Mr Masakure decided that it was necessary to confirm the discussion in writing, having concluded on the previous occasion that it should be kept informal. Mr Masakure thought this might be the end of it but the next day the Claimant sent a detailed response disagreeing with the approach suggested. The email exchange was forwarded to Ms Berry who copied Ms Ros Ahmed, a Consultant Radiologist. Ms Ahmed read the emails and agreed with Mr Masakure adding that the Claimant's approach was causing confusion to the referring Consultants. She went on to say that the Claimant's approach caused significant clinical risk and that this needed to be raised with him. She said that if he (the Claimant) was not able to work within this remit she would rather he did not participate in cancer surveillance scans.

71. On 8 December 2020, the Claimant emailed Mr Masakure to raise a concern about a case he had been reviewing. Mr Masakure forwarded this email to ultrasound management colleagues and added that he was concerned that the Claimant had been secretly auditing doctors.

Allegations relating to Mr Cade

72. It is alleged that Mr Cade lied about the findings of the investigation. There is also an issue that he took too long in processing the grievance.

Allegations relating to Ms Brooke-Clarke

73. Ms Brooke-Clarke held a meeting with the Claimant on 9 September 2021. The purpose of the meeting was to discuss a number of issues that had arisen in relation to the Claimant's work in maternity.

74. Ms Brooke-Clarke had asked Ms Amanda Parry to stay in the office for the meeting. They both shared the same office. She did not inform the Claimant in advance that Ms Parry would be present. Ms Brooke-Clarke's concern was that having had an unpleasant experience with the Claimant in the past she would prefer to have some support. Upon entering the room however the Claimant objected to Ms Parry being there. He felt it was his 'right' to have a private conversation and asked for Ms Parry to leave to which Ms Brooke-Clarke reluctantly agreed. The Claimant alleges that the description of him in a later email that he "refused to allow Amanda Parry to be present in the room" was an act of victimisation.

75. One of the purposes of the meeting was to discuss a growth scan which the Claimant had done in August 2021. This had been brought to Ms Brooke-Clarke's attention by a colleague who had felt the need to repeat the scan as the Claimant's measurements were believed to be incorrect. Ms Brooke-Clarke had, prior to the meeting, emailed the Claimant to say that she had reviewed the image and thought that the Claimant had undermeasured. The Claimant had asked to meet to discuss the measurements. Both of them reviewed the images and measurements together. The Claimant was adamant that he did not see any fault in his work. Ms Brooke-Clarke disagreed.

76. This was followed by a discussion of an audit of the Claimant undertaken by Ms Aylin, a sonographer. Ms Aylin had earlier emailed Ms Brooke-Clarke to say that she felt pressured to alter her findings of the audit by the Claimant. The Claimant denied applying any pressure. He said that if that is what she was saying then Ms Aylin was 'lying' and that Ms Brooke-Clarke was now taking her side. He said that whilst he respected auditors he would not accept things when they were incorrect. Ms Brooke-Clarke denies telling the Claimant to 'take audits the way that they are without raising concerns'.

77. Ms Brooke-Clarke mentioned to the Claimant that his anomaly rate remained high. She says that his repeat rate was in fact the highest of the group at 20% with the next being 16.5%. It was her practice to monitor all those with a rate above 15% and to offer support. She said she felt obliged to bring these matters to the attention of the Claimant. On a different note, a patient had written to express how upset she was following her scan by the Claimant. She said that the Claimant's body language and tone of voice was upsetting. Mr Ilounoh's reaction was that this must be about someone else as he was always 'very nice to his patients'. A review of the scan on the data management system confirmed it was the Claimant who had seen the

patient in question. Mr Ilounoh said that the patient must be lying. Ms Brooke-Clarke asked for a written response from the Claimant.

78. The Claimant then said that he felt unsafe and that he was constantly being “picked on”. He said he had no trust or confidence left in the department or the Clinical Leads. Ms Brooke-Clarke describes this as a difficult and upsetting meeting. She says that the meeting left her in tears and remembering it now still upsets her.

79. Ms Brooke-Clarke confirmed the content the meeting in an email to the which the Claimant responded the following day. It is unnecessary to set out the contents of the exchange of emails save that in the opening of the email Ms Brooke-Clarke said that “I would like to note that you refused to allow Amanda Parry to be present in the room”.

80. In April 2022, Ms Brooke-Clarke received an email from the Clinic Coordinator to say that the Claimant had scanned a patient but that he had not documented that she was pregnant with twins. Ms Brooke-Clarke forwarded the email to the Claimant and asked him to be careful to complete such forms more accurately.

81. The Claimant replied to say that he did not fill in the request for the detailed scan and that he only wrote the gestation and estimated due date then discussed the case with midwives.

82. The Claimant alleges that within the first six months of her role as Clinical Lead, two midwives told Ms Brooke-Clarke that the Claimant made decisions on his own. Ms Brooke-Clarke says she does not recall such a conversation.

#### Allegations relating to Ms Parry

83. In or about February 2022 the Claimant sought advice from Ms Parry, a Clinical Lead, after conducting a scan on an elderly patient suspected of having Deep Vein Thrombosis (DVT). Such a scan focuses on examining the deep veins in the leg. The Claimant had identified an ‘incidental finding’ in the front of the knee after following a branch of superficial veins. As well as imaging the incidental finding, the Claimant also imaged and labelled the quadriceps tendon in the anterior knee as a separate structure, which is not protocol for a DVT examination but is part of the musculoskeletal (MSK) assessment of the knee.

84. The Claimant sought Miss Parry’s opinion on this incidental finding due to Miss Parry’s expertise in MSK ultrasound. She reviewed the case and added an addendum. Ms Parry was aware that the Claimant was independently pursuing additional qualifications in MSK ultrasound.

85. Miss Parry’s concern was that the Claimant had completed the DVT examination but was possibly ‘practicing’ MSK skills, which then led to the incidental finding at the front of the knee. The Claimant did not possess the necessary qualifications to examine and interpret findings in the anterior knee. Ms Parry explained that this patient had been scanned a week before by a different sonographer and no issues were found then.

86. According to Ms Parry's evidence the Claimant's report showed some confusion regarding patient management suggesting a need for specialist review which would indicate a review by a Consultant and a MSK sonographer review.

87. In her email to the Claimant Ms Parry reminded the Claimant that it was important to adhere to the specified area of interest during a scan.

88. Before sending the email, Ms Parry consulted with Ms Berry, who was clinical lead for MSK at the time. They both agreed that the Claimant's examination of the front of the knee was unnecessary for a DVT scan and could cause confusion without the relevant patient history.

### **THE AGREED ISSUES**

89. Before we set out the list of issues a prior explanation is necessary. There have been four Preliminary Hearings in this case, all of which to varying degrees have dealt with defining the list of issues. What is usually an exercise that takes only a part of a single case management hearing it has in this case taken a considerable amount of time ultimately without agreement.

90. The first Preliminary Hearing was before Employment Judge Smith. His detailed and carefully drafted Order set out a workable and comprehensive list of issues from the Claimant's somewhat unstructured particulars and claim form. Employment Judge Smith noted that some of the issues may require an amendment application from the Claimant.

91. The second preliminary hearing was before the same Employment Judge as this hearing and dealt primarily with applications by the Claimant to amend his claim but also once to identify the issues. In order to avoid an impasse it was directed that each party should send to the Tribunal their version of what they considered the issues to be. The Tribunal at the final hearing would be the final arbiter of the issues to be determined.

92. In the course of subsequent correspondence between the parties it was identified that it may be appropriate to attempt identification of the issues prior to the final hearing. Accordingly a further preliminary hearing was listed for 24 June 2024. It was conducted by Employment Judge M Butler. It is appropriate to set out his summary of what occurred on the day:

"The Claimant's list of issues runs to 37 pages which, it is fair to say, comprises mostly of further narrative, evidence and criticisms of the Respondent's actions. In addressing these matters, I attempted to explain to the Claimant on numerous occasions and in a variety of ways which I hoped would enable him to understand, that there is a difference between the issues and the evidence and that the evidence should be not appear in the list of issues. I explained to him that I appreciated his difficulty as a litigant in person, but there were many matters referred to in his list of issues which were not appropriate to be included. Each time we addressed these matters, however, he continued to insist that all of them were issues and should be included.

By approximately 3.30pm [the hearing began at 10.00am] we had only managed to get as far as page 14 of 37 pages of the Claimant's list of issues and it was clear we would not



have sufficient time to get through all 37 pages today. I asked the parties whether they were available if another preliminary hearing could be listed within a week but they were not.

I have taken some time to reflect on this matter. I did determine that many paragraphs of the Claimant's list of issues were not issues but evidence. This applies to approximately 40 paragraphs in the first 14 pages. I had intended to record these amendments and set them out in a further document but, on reflection, consider that will not assist either the parties or the Tribunal hearing the case if only half of a list has been completed.

Whilst I am reluctant to now leave the list of issues to be determined by the Judge at the final hearing, I think it is inevitable that the issues will not be agreed by the parties before then. I did propose making orders and have made them in the hope that there can be some further agreement between the parties. Due to the proximity of the first day of the hearing and the history of this case so far, it would not be proportionate to hold a further preliminary hearing to try to determine the issues.

I sincerely hope that the Claimant will take note of my comments on his list of issues in relation to evidence not being included. If the issues are not agreed, I consider it inevitable that much of what is included will be struck from the list of issues presented to the Judge on the first day of the hearing. I repeat what I told the Claimant on numerous occasions, namely, that evidence should be included in his witness statement and not the list of issues. Accordingly, in deleting evidence from the draft before me, he was not being deprived of his right to give his evidence at the hearing."

93. Unfortunately, Employment Judge Butler's advice went largely unheeded by the Claimant. The list in the form for the final hearing still contained much evidence and comment. Indeed in the final main hearing bundle there is a heading in red ink above each series of emails which sets out the Claimant's description (rarely in neutral terms) of what it is supposed to be about.

94. A few days before the final hearing the parties were still very far apart on agreeing the list of issues. We decided that on the morning of the second day (the first two days had been allocated for reading-in) there would be a further case management session to deal these and other matters that had arisen in correspondence not all of which are necessary to set out here. It was the Respondent's position that the Claimant was seeking to add several new allegations which were not part of his pleaded case. The Claimant's position was that they were already pleaded and therefore no amendment was required.

95. The Respondent had prepared supplemental statements to deal with what it considered were new allegations, in particular allegations by Ms Eteng of the discrimination that she said *she* had suffered which of course was nothing to do with these proceedings.

96. The Claimant was strongly opposed to the Respondent relying on any supplemental statements. Having considered the matter we decided that the Claimant would not be able rely on new matters which were in his witness statement and those of his witnesses (other than those which were the subject of amendment applications) and that accordingly we would not read or consider any of the supplemental statements.

97. With that preamble we set out below the 'final' list of issues. It is longer than it should be. There remains a considerable amount of duplication and comment. We have not included the following:

97.1 An issue which was given the numbering of 20.1.3 which we mention only for ease of identification and was said to be as follows:

"All sonographers (full-time, part-time, loan or agency) with CASE accredited qualifications who practised obstetrics with the Respondent from January 2020, except Australian-trained sonographers."

The Respondent's position was that this required an amendment. The Claimant's position was that it was already pleaded. We took the view that it was more a matter of submissions but that it was not already pleaded. An amendment to add it was refused on the grounds that the balance of hardship favoured the Respondent in refusing the amendment rather than allowing it. We did not regard it as a re-labelling exercise.

97.2 The following allegation originally numbered 29.17:

"The Claimant was accused of interrupting Maggie and Sally (Midwives) at work. During a meeting with the Respondent (Hilary Brooke-Clarke), the Claimant explained he was following departmental (sic). However, the meeting minutes recorded by Hilary stated, "on Friday the 9th April at LGH, you interrupted Maggie and Sally as they were checking drugs"

98. We did not find this allegation to have been pleaded either. An application to amend was refused on the grounds that it was late and the balance of hardship favoured the Respondent. We did not consider it to be a re-labelling exercise.

99. The issues to be determined in their final form are therefore set out below. In order to enable the parties to be able to cross-refer to the original list we have used the same numbering as the list we were provided. The list curiously begins at paragraph 13. Whilst our approach has its disadvantages on numbering of this decision it will hopefully make it easier to cross-refer. We have removed references to page numbers in the bundle which appeared in the list:

### Time limits

13. Were all of the Claimant's discrimination and victimisation complaints presented within the time limits set out in the Equality Act 2010 section 123?

14. If not, were any complaints presented outside that time limit nevertheless part of a course of conduct extending over a period with a complaint presented within the time limit?

15. If not, should the Tribunal extend time for bringing the claim because it is just and equitable to do so (in respect of a claim under the Equality Act 2010)?

16. It is the Respondents opinion that based on the date that the Claimant presented the claim to the Tribunal and the period of early conciliation, it appears that any complaint about things that happened before 6 February 2022 is out of time and the Tribunal therefore cannot consider it.

17. It is the Claimant's stance that based on the ongoing actions of the Respondent till 25 October 2022, it appears that any complaint about things that happened before 6 February 2022 is not out of time and the Tribunal can therefore consider it.

Direct discrimination

18. The Claimant describes his race as being his Nigerian nationality. He contends that discriminatory things were done to him because of his Nigerian nationality, his Nigerian obstetrics training and his Nigerian ultrasound qualifications, and incorrect assumptions were made about the validity of his training and obstetrics qualification because of his Nigerian nationality and nationality of training.

19. Did the Respondent subject the Claimant to the following treatment?

19.1 On 18 November 2019, Catherine Berry said "where did you train from?" to which the Claimant replied 'Nigeria'. Catherine Berry then mentioned, falsely, that there is a new policy in the UK that prevents people from Nigeria practising obstetrics Ultrasound in the UK and UHL.

19.2 The Respondent required the Claimant to have a CASE accredited qualification at the very start of his employment.

19.3 On 26 November 2019, Catherine Berry said to the Claimant, in Room 1 and in the presence of Melanie Cross, that management are happy to refer the Claimant for retraining because he was Nigerian- trained and that he should forget his practice at his previous NHS Trust.

19.4 On 26 November 2019, in Room 1 and in the presence of Melanie Cross, Catherine Berry told the Claimant that a colleague (Augustine Obi), a Nigerian with similar Nigerian qualification as the Claimant, was retrained by the Respondent prior to his commencing obstetrics with the Trust.

19.5 From November 2019 onwards, the Respondent's management ignored the proof of qualification the Claimant provided despite having sent him to prove his qualification through different organisations.

19.6 On 13 December 2019 at 8:37am and again on internal communication 13 December 2019 at 8:49am the Respondent put the responsibility (onus) on the Claimant to determine the equivalent status of his qualification but does not currently put the responsibility on its overseas staff to do the same.

19.7 As a basis for not letting the Claimant practice Obstetrics scanning with the Respondent, the Respondent (Melanie Cross) on the 13 December 2019 stated that only the Claimant's Physics and Gen Med credits were transferred onto his UK MSc programme from his Nigerian qualification, and not his Obstetrics credits.

19.8 On 6 January 2020, 13 March 2020, 2 July 2020 and August 2020, the Respondent's managers (Catherine Berry, Melanie Cross, Amy Barnes, Lewis Cade, Helen Lang and Claude Masakure) refused to accept the validity of the Claimant's qualification to practice obstetrics in UHL.

19.9 In March 2020, during the Claimant's grievance process stage 1, Catherine Berry repeated what she had said on 26 November 2019.

19.10 On 21 August 2020, Matthew Archer lied to the Claimant in his apology letter when he said, "I am writing in Lewis' absence to apologise on behalf of the Trust and the Ultrasound Team for not clarifying whether or not your qualification was CASE accredited before you commenced employment with the Trust and the subsequent delay that this has caused in enabling you to practice in Obstetrics Ultrasound at University Hospitals of Leicester"

20. Was that treatment "less favourable treatment", i.e., did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

20.1 The Claimant asserts that the appropriate comparators are:

20.1.1 All the sonographers (full time, part time, bank, locum/agency) with Non-CASE accredited qualifications who practiced obstetrics with the Respondent from January 2016 until October 2020, except Australian-trained sonographers.

20.1.2 All Australian-trained sonographers who practiced obstetrics with the Respondent from January 2016 until October 2020.

21. If so, was this because of assumptions made about the Claimant's qualifications because of his race, and/or because of the protected characteristic of race generally?

*Indirect race discrimination*

22. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs (as formulated by the Claimant):

22.1 PCP 1: At the beginning of this case, the Respondent required all its obstetrics sonographers to have a CASE accredited qualification.

22.2 PCP 2: All obstetrics sonographers must have a CASE accredited or equivalent qualification as per PHE guidelines. The Respondent adopted a practice of obtaining equivalence, which by so doing prevented sonographers who trained outside the UK from practicing obstetrics ultrasound without specific evidence of a CASE accredited or equivalent qualification.

23. Did the Respondent apply the PCPs to the Claimant at the relevant time/the time of the Claimant's employment?

24. Did the Respondent apply (or would the Respondent have applied) the PCP to persons with whom the Claimant does not share the characteristic, e.g. people who were not of Nigerian nationality and Nigerian trained?

25. Did the PCP put persons with whom the Claimant shares the characteristic, e.g., persons with Nigerian nationality at one or more particular disadvantages when compared with persons with whom the Claimant does not share the characteristic, in that:

25.1 Nigerian nationals who are Nigerian-trained obstetrics sonographers are assumed to have obstetrics qualifications and experience that are inferior; and,

25.2 Nigerian nationals who are Nigerian-trained obstetrics sonographers are required to enter into a significantly extensive and unstructured process of proving the equivalence of their obstetrics qualifications.

25.3 Nigerian nationals who are Nigerian-trained obstetrics sonographers have their professional practices restricted for not having CASE accredited qualifications when PHE guidelines make provision for those with equivalent qualification.

25.4 Nigerian nationals who are Nigerian-trained obstetrics sonographers are required to undergo university re-training in obstetrics ultrasound.

26. Did the PCP put the Claimant at that/those disadvantage(s) at any relevant time?

27. If so, has the Respondent shown the PCP to be a proportionate means of achieving a legitimate aim? The Respondent relies on the legitimate aims set out in its Amended Response, namely:

27.1 To ensure that the Guidelines were being adhered to;

27.1.1 The Respondent - a publicly funded NHS Trust which provides public health services, was required to ensure that it adhered to relevant applicable guidelines to the provision of those services. That was an expectation that existed internally and externally of the Respondent

27.2 To ensure that appropriately trained employees were undertaking scans;

27.2.1 By ensuring that sonographers were appropriately trained ensured that:

27.2.1.1 The sonographers were clinically competent in performing those scans;

27.2.1.2 That there was no risk to patient safety and/or confidence in performing those scans by reason of a sonographer not being appropriately trained;

27.2.1.3 There was no risk created in respect of any claims that may be brought against the Trust and/or its sonographers as a result of a scan that was undertaken by a sonographer who was not appropriately trained; and/or

27.2.1.4 That the Respondent was indemnified by its insurer were any claims brought against it and/or the sonographers.

27.3 To maintain patient safety and confidence.

27.3.1 By ensuring that sonographers were appropriately trained ensured that the risk that mistakes or errors would be made when those scans were performed was minimised, therefore protecting patient safety and/or patient confidence in the Respondent's sonography service.

#### Victimisation

28. Did the Claimant do a protected act? The Claimant relies upon the following:

28.1 On 20 February 2020, the Claimant raised a grievance with the Respondent

28.2 On 18 November 2019, in ultrasound room 1 - LRI, Catherine Berry said "where did you train from?" to which the Claimant replied "Nigeria". Catherine Berry then mentioned, falsely, that there is a new policy in the UK that prevents people from Nigeria practising obstetrics Ultrasound in the UK and UHL. In response to this, the Claimant specifically documented the following in his stage 1 grievance form on 20/2/2020: "For managers who were aware of my foreign medical ultrasound qualification all through the interview and employment process, and said nothing about their reservations until I made a life- changing decision to move to Leicester and resume work. I find this highly deceitful, misleading and discriminatory."

28.3 On 18/11/19, Catharine said she is not sure of the claims she made about the Claimant's Nigerian qualification, because she does not practise obstetrics or know much about obstetrics, but proceeded to restrict the Claimant's obstetric practice immediately.

28.4 On 26/11/19, when the Claimant informed Catherine Berry and Melanie Cross that falsely stating there was a policy restricting his obstetrics practice due to his Nigerian qualifications was unfair and discriminatory, Catherine responded, "That's just the way it is, and there's nothing we can do about it"

28.5 On 13 December 2019, the Claimant told Melanie Cross (as well as some other ultrasound managers copied into the email) that his Nigerian-obtained obstetrics ultrasound credits were transferred onto an MSc. ultrasound programme in a UK university because they were equivalent, Melanie Cross specifically responded to this email on the same date, stating "the credits for your Msc would have been taken directly from the qualification obtained in physics and gen med, not from any credits gained from obstetrics as far as I am aware". Upon the Respondent's refusal to accept evidence presented, the Claimant wrote this to the Respondent on 20/January/2020 amongst other thing: "Irrespective of proof ..... of the transfer of my Pg D obstetrics credit units unto Masters program in a CASE-accredited university, .....you have still refused to accept the validity of my qualification, probably because I didn't get these proofs from the university you wanted (university of Derby) even when they are both CASE accredited. However, the very least you can do is take out a little time to verify the core responsibilities of these organizations you refer me to rather than tossing me about please. It is unfair treatment, please consider my wellbeing and mental health".

28.6 In the Claimant's email to Lewis Cade on 23 March 2020, responding to the minutes of the Stage 1 grievance meeting held on 5 March 2020 by Catherine Berry and Scott Barton, the Claimant specifically stated the following;

"They also failed to include that it was only upon my refusal and resistance to be discriminated against and bullied, did they re-evaluate the PHE guidelines, see that I was correct about the provisions of the guideline for foreign-trained sonographers and then bother to try to verify/prove the CASE-equivalent status of my qualification (which should have been done in the first place if they had any concerns, rather than initially making untrue, conclusive and derogatory remarks like "there's a new policy

so we do not allow Nigerian-trained sonographers to practice obstetrics in UHL”, or “there’s nothing we can do” or trying to invalidate my obstetric practice in Grimsby)”

28.7 On the 19 March 2020, Catherine’s line of enquiry with AECC University College reads as follows; “Were the obstetrics modules that he completed in Nigeria directly mapped to a UK course and deemed equivalent, to include within the academic content the specifics of screening ultrasound scans performed in the UK, that are not performed in Nigeria where his PG Dip was gained?”

28.8 On the 19 March 2020, Catherine Berry stated to Warren Foster: “When I contacted the regional lead sonographers to enquire whether they have overseas trained sonographers performing obstetrics in the UK, they answered that they do not have any Nigerian qualified sonographers performing obstetrics, as their local university mapped the qualifications and deemed them not to be equivalent in the obstetrics modules but equivalent for other modules such as physics and general abdominal”.

28.9 On the 9 December 2019, 26 November 2019, 2 July 2020, Catharine Berry, Melanie Cross, Claudius Masakure, Amy Barnes, and Lewis Cade repeatedly offered to retrain the Claimant in obstetrics in a UK University despite receiving proof from an accredited University that the Claimant’s qualification was equivalent. The Claimant told the Respondent the following in his email on 27/11/19; “I truly hope there isn’t any form of personal bias as far as this issue is concerned. If my professionalism in obstetrics is undermined based on a personal/individual bias without evidence or factual justification, then that is very unfair and unprofessional. On the day of my interview, I was asked if I practice Obstetrics in my previous NHS trust, and I confirmed that I do. Not for once was it stated that if I were to take the job in UHL that my qualification and experience in obstetrics ultrasound will be rendered invalid, so I do not take it lightly that all this is coming up now. I was not employed on the basis of retraining in obstetrics before practicing, and so I cannot do that now. I do not want to be de-skilled in obstetrics ultrasound, if I was told that was going to be the case I would have considered my options critically”.

28.10 On 2 July 2020, Lewis Cade lied to the Claimant, stating: “We have also been able to contact Bournemouth University, who confirmed that they cannot map your post graduate diploma in Medical Ultrasound obtained in Nigeria against the FASP standards which would give you the required CASE accreditation”. On the 10/July/2020, amongst other things, the Claimant stated the following in his reply to Lewis Cade: “However, if with all these provided evidences, UHL still insists on bullying me into undertaking a focused course to formally and practically examine my screening skills, then I will undergo a UHL fully-funded focused negotiated skill module in AECC Bournemouth University, in order to specifically demonstrate my FASP and NT competence. It will be a discriminatory and unjust move by UHL, but I would do it to make you all happy, albeit at the detriment of my rights.”

28.11 In September 2020, the Claimant was reinstated to resume obstetrics practice with UHL. But on 9 Feb 2021, despite being against national PHE guidelines, the Respondent communicated internally that they have now produced an obstetric guideline which makes provision for only CASE accredited qualifications,

and not equivalent qualifications. They proceeded to say “that means Ekene should not be working in obstetrics”, despite being aware that Ekene now possessed a CASE accredited qualification after the completion of his MSc.

28.12 On 9 February 2021, the Respondent stated “If it is not a UK or Australian qualification we would not take them without their proof of CASE equivalence”

29. Did the Respondent subject the Claimant to any detriments as follows?

29.1 On 28 February 2020 Claude Masakure verbally, and falsely, told the Claimant that a colleague and a patient had complained that he had coerced the patient into having a transvaginal scan.

29.2 On 2 March 2020, 6 October 2020, 16 June 2021 and 23 June 2021, the Respondent (Claude Masakure, Lewis Cade, Scott Barton, Catharine Berry, Amy Barnes, Helen Lang and Hannah Tucker) were aware of this issue in 29.1 but no action (by way of an investigation) was taken in relation to it until October 2022.

29.3 On 8 April 2020, the Respondent Claude Masakure received feedback about the Claimant (concerning stating limitations on his scans) from a consultant, and as expected Claude in turn fed this back to the Claimant, dishonestly informing the Claimant that on previous reports there were no recorded limitations when in fact there were on some of them. Making the Claimant feel inadequate in the course of discharging his duties because he spoke up about discrimination.

29.4 On 9 September 2021, the Claimant had a meeting with his lead, Hilary Brooke-Clarke. Upon arrival, the Respondent asked if another colleague (Amanda), using the computer in the same room, could stay during the meeting. The Claimant objected, as the meeting was intended to be confidential. However, in the meeting summary, Hilary Brooke-Clarke noted, “You refused to allow Amanda Parry to be present in the room”

29.5 On 13 December 2020 Claude Masakure sent an email falsely saying the Claimant secretly audit doctors thereby placing him in a bad light amongst his colleagues.

29.6 On 25 January 2021, Catherine Berry emailed the Claimant, copying several ultrasound management staff, to ask about an incident, assuming the Claimant's involvement. The Claimant requested more information and was later informed by Scott Barton via email that it was a case of mistaken identity. However, the management staff copied on the initial email were not copied on the email acknowledging the Claimant's innocence. The Claimant had to respond and copy the management staff himself to prevent the spread of misinformation.

29.7 On the 9 February 2021 and on 10 April 2022 the Respondent produced a new obstetrics guideline with the intention of maliciously targeting the Claimant, discriminating and actively looking for ways to discredit and stop the Claimant's obstetrics practice.



29.8 On 15 March 2021 Amy Barnes told the Claimant that he was accused of being rude to a colleague, and when the Claimant asked for an explanation, none was provided

29.9 Between April 2021 and December 2021, the Claimant informed Hilary Brookes-Clarke, Lewis Cade, Amanda Parry, that he felt unsafe working in the Respondent's maternity ultrasound department, and they took little or no action in relation to that despite the Claimant requesting if the excessive rostering to maternity could be moderated. It wasn't until March 2022 (after the Claimant resigned, and subsequently went off sick because he felt additionally traumatized working in the maternity department), that the managers decided not to excessively roster him in maternity again.

29.10 On 9 August 2021 the Claimant's growth obstetrics scan was being repeated by a consultant with no shown justification (as per departmental standards) or explanation from the lead (Hilary) for why that was so, even upon the Claimant's request for an explanation. There was no indication from the Claimant's report as to why a repeat scan was necessary for this patient (no risk to the foetus was indicated).

29.11 On the 9 September 2021, Hilary Brookes-Clarke told the Claimant to take audit reports the way they come without raising concerns, and concluded that the auditor (Nikki Aylin) had been forced to correct her report by the Claimant when he had not done so

29.12 On 1 April 2022, the Claimant was blamed for the mistakes of others with regards to filling patients' forms by Hilary Brookes-Clarke.

29.13 In February 2022 Amanda Perry falsely accused the Claimant of scanning an area he was not qualified or trained in (Annex 8 pages 105-109). (Bundle B pages 693-697)

29.14 Lewis Cade, Helen Lang, Claude Masakure, Catherine Berry, Amy Barnes, Hannah Tucker, and Scott Barton (the Ultrasound management) withheld documents relating to the Claimant's grievance from his personnel file.

29.15 The midwives told the obstetrics lead (Hilary) that the Claimant takes decisions on his own and does not meet them with cases concerning patients; and the lead (Hilary) told the Claimant that he does not meet them as they have said.

29.16 Since the Claimant lodged his grievance and thence throughout his employment, the Claimant has been subjected to extra scrutiny by ultrasound managers.

30. The Claimant was accused of interrupting Maggie and Sally (Midwives) at work. During a meeting with the Respondent (Hilary Brooke-Clarke), the Claimant explained he was following departmental. However, the meeting minutes recorded by Hilary stated, "on Friday the 9th April at LGH, you interrupted Maggie and Sally as they were checking drugs".

[Issues 31 – 32 deal with potential remedy. This hearing was limited to the issue of liability only]

Constructive dismissal

33. Was the Claimant dismissed? The following questions apply:

33.1 Did the Respondent breach the so-called "trust and confidence term", i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant?

33.2 The conduct the Claimant relies on as breaching the trust and confidence term is as follows:

33.2.1 The Claimant was treated differently to others in that he had to undergo an extensive and unstructured process to establish the CASE equivalent status of his qualification.

33.2.2 The Respondent lied by stating to the Claimant that there is a policy that prevented him from practising obstetrics at the Respondent when in fact the policy presented (PHE guidelines) makes provision for the type of qualification possessed by the Claimant (a CASE equivalent qualification).

33.2.3 The Respondent failed to identify the issues regarding the Claimant's qualification but hired him for the role anyway

33.2.4 The Respondent failed to clearly identify and explain the issues with the Claimant's qualification from the start of his employment onwards.

33.2.5 The Respondent failed to take into account the fact the Claimant had been permitted to practise obstetrics for 23 months in the UK without having to provide extensive evidence of his qualification.

33.2.6 The Respondent adopted a policy (presumably, the PCP the Claimant contends it applied in his indirect discrimination claim) which put the Claimant at a substantial and clear disadvantage because of his nationality.

33.2.7 The Claimant was required by the Respondent to provide unrealistic evidence from CASE.

33.2.8 The Respondent's repeated rejections of the evidence the Claimant provided.

33.2.9 The Claimant's managers lied about their own investigation under the guise of COVID-19 pressures in attempt to bully him into accepting that his qualification was less than standard.

33.2.10 The Respondent offered to unjustifiably retrain the Claimant in an area he was clearly competent in and approached it in such a derogatory manner all in an attempt to further devalue his qualification.

33.2.11 During and long after the Claimant had resumed obstetrics practice with the Respondent in October 2020, the Respondent continued to look for ways to discredit the Claimant's qualification.

33.2.12 The significant pattern of delay in the Respondent's approach to the Claimant's case. for instance:

33.2.12.1 It took the Respondent 3 weeks (18/11/19 – 9/12/19 to provide the Claimant with PHE guidelines as a basis for restricting his practice, after multiple follow up requests from the Claimant.

33.2.12.2 The Respondent received an outcome of their investigation in March 2021 and did not discuss the case with the Claimant until July 2021, after significant pressure/requests for an update from them. The Respondent also failed to discuss the cultural ambassador's review with the Claimant until after 12 months, and after several follow-up emails were sent by him. Further, on 26 July 2021, when a second review was requested by the Claimant, it took an additional eight months (6 April 2022) for a response from the Respondent refusing that request, despite several follow-up emails from the Claimant demanding a response.

33.2.13 The Respondent said they made an incorrect assumption that the Claimant's former NHS trust (in Grimsby) followed the guidelines issued by - PHE (incorrectly insinuating that the Claimant had to be CASE accredited to practice obstetrics and it was the employing organisations responsibility to make sure he was CASE accredited).

33.2.14 The Claimant's direct clinical lead (Catherine Berry) made a statement that Nigerian-trained sonographers cannot practice obstetrics in the UK, and together with the then service manager (Melanie Cross) insisted that is just the way things are and that there's nothing they can do about it.

33.2.16 Despite the Claimant's issues involving direct clinical leads, including Catherine Berry, stage 1 of the Claimant's grievance was handled by Catherine Berry and new service manager Scott Barton.

33.2.16 Unsatisfied, the Claimant escalated to stage 2, where Lewis Cade (general manager) was the investigating manager. However, evidence shows that Catherine Berry continued to be involved in the investigation, potentially introducing bias.

33.2.17 The Respondent, in a bid to buttress their false assumptions, told the Claimant that the then currently practising sonographer (Augustine Obi, who has the same qualification that the Claimant has), was retrained in the university before practicing obstetrics with the Respondent. This turned out to be a lie as he was never retrained and had practiced obstetrics with the Respondent until 2019 when he voluntarily stopped because he took on additional responsibilities in the Trust.

33.2.18 The Respondent lied about having a document that restricted the Claimant's practice, because the PHE guideline that was eventually presented as the document made provision for the Claimant's qualification.

33.2.19 The Respondent continuously chose to interpret PHE guidelines unfavourably to deliberately side-line Nigerian-trained sonographers (even after the Claimant brought this to their attention), further subjecting Nigerian-trained sonographers to significant disadvantage.

33.2.20 The Respondent insisted that the Claimant must not practice obstetrics with the Respondent without at least carrying out core checks to verify his qualification, or at least offering the option in the first instance, and by the Respondent only accepting the need to carry out these checks after significant resistance from the Claimant

33.2.21 On 2 July 2020 Lewis Cade lied to the Claimant that the findings of his investigation into the Claimant's qualifications confirmed that his qualifications were not valid and that he would need to be retrained.

33.2.22 In July 2020 the Claimant requested a review of his grievance with the Respondent's Cultural Ambassador. Jody Alexander was assigned to conduct this. The Respondent withheld important documents that were key to the grievance proceedings from Alexander. This was acknowledged by Mr. Alexander.

33.2.23 On 26 July 2021 the Claimant requested a second review from the Cultural Ambassador. No action was taken on this until 6 April 2022 when Sue Moss informed the Claimant that no second review would be carried out.

33.2.24 The Respondent implemented a guideline for overseas-trained sonographers in October 2020, which was not in place before this time (Annex 41 pages 1, 2) (Bundle B Pages 815-816). This indicates that there was no existing framework for handling the Claimant's case prior to this guideline.

33.2.25 The new guideline for obstetrics practice for foreign-trained sonographers requires the same documentation and information that the Claimant provided during the investigation, which was previously rejected.

33.2.26 On the 9 February 2021, despite the Respondent being aware of PHE guidelines making provision for eligibility of CASE equivalent qualifications in the practice of obstetrics ultrasound in the UK, and the Respondent being aware of the Claimant's qualification as now CASE accredited, the Respondent still produced a new obstetrics guideline aiming to restrict the Claimant's obstetrics practice.

33.2.27 As of 19 March 2020 and 6 August 2020, the Respondent had established that the Claimant's Nigerian qualification in obstetrics was CASE equivalent and became CASE accredited by July 2020. Despite this, the Respondent informed another Nigerian job seeker on 10 April 2022 that the Nigerian qualification was not equivalent, particularly in obstetrics.

33.2.28 On 21 August 2020 Matthew Archer lied to the Claimant in his apology letter when he said, "I am writing in Lewis' absence to apologise on behalf of the Trust and the Ultrasound Team for not clarifying whether or not your qualification was CASE accredited before you commenced employment with the Trust and the subsequent delay that this has caused in enabling you to practice in Obstetrics Ultrasound at University Hospitals of Leicester.

33.2.29 On 13 December 2020 Claude Masakure sent an email falsely saying the Claimant secretly audits doctors.

33.2.30 All of the allegations of direct discrimination referred to above.

33.2.31 All of the allegations of victimisation referred to above.

34. If so, did the Claimant affirm the contract of employment, or waive the breach of contract, before resigning? The Respondent contends that in his having resigned on more than three months' notice and having continued to work without protest in that period, the Claimant either affirmed the contract or waived the breach, meaning he cannot establish that he was constructively dismissed. The Claimant contends that as a sponsored worker in the UK on a visa, continuous employment was necessary for his legal stay. Facing discrimination, prejudiced treatment, and severe distress by the Respondent's actions, he lost trust and confidence in the Respondent, forcing him to resign. He did not resign because of a new job but due to the Respondent's fundamental breach of contract, securing another job beforehand to ensure continuous legal stay and practice in the UK, meaning he can establish he was constructively dismissed.

35. If he did not waive the breach or affirm the contract, was it a reason for the Claimant's resignation? The Respondent contends that the reason the Claimant resigned was not because of any fundamental breach of contract but because he was leaving to take up employment at another NHS Trust. The Claimant contends that as a sponsored worker in the UK on a visa, he did not resign because of a new job but due to the Respondent's fundamental breach of contract. Securing another job beforehand was crucial to ensure the Claimant's continuous legal stay and practice in the UK.

[paragraph 36 relates to issues on remedy for unfair dismissal]

## **THE LAW**

100. Section 13 of the Equality Act 2010 ("EA 2010") describes direct discrimination and states:

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

101. Section 19 of EA 2010 deals with indirect discrimination and states:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

102 Section 23 EA 2010 deals with comparators and states:

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

Section 27 EA 2010 deals with victimisation and states:

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

103. Section 39 EA 2010 prohibits discrimination generally and so far as is relevant states:

“(1) An employer (A) must not discriminate against a person (B)—

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.”

104. Section 123 EA 2010 deals with time limits and states:

“(1) Proceedings on a complaint within section 120 may not be brought after the end of

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

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

(3) For the purposes of this section—

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

(b) failure to do something is to be treated as occurring when the person in question decided on it.”

105. Section 136 EA 2010 deals with the burden of proof and states:

“(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the 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.”

106. Section 95(1) Employment Rights Act 1996 (“ERA 1996”) sets out what is commonly called “constructive dismissal” as follows:-

“For the purposes of this Part an employee is dismissed by his employer if (and subject to subsection (2) and Section 96, only if)-

(a) – (b) [not relevant]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

### The case law on time limits

107. Conduct continuing over a period is treated as done at the end of period. When there are a number of incidents occurring over a period of time they may in appropriate circumstances be considered as being part of a continuing act in the sense of a continuing state of affairs pursuant to which discriminatory acts occurred from time to time (see **Hendricks v Commissioner of Police of the Metropolis** [2003] ICR 530).

108. A distinction is drawn between conduct extending over a period and a one-off act that has continuing consequences (see **Barclays Bank v Kapur** [1991] 2 A355, [1989] ICR 753; **Owusu v London Fire and Civil Defence Authority** [1995] ICR 574 c.f. **Sougrin v Haringey Health Authority** [1992] 650).

109. The Tribunal can extend time if it considers it ‘just and equitable’ to do so. In that respect the Tribunal has the ‘widest possible discretion’ - see **Abertawe Bro Morgannwg v University Local Health Board v Morgan** [2018] IRLR 1050). In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. Extensions of time should be the exception. The burden is on the Claimant to persuade a tribunal that it is just and equitable to extend time: see **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434. In considering its discretion the Tribunal will often consider the so-called ‘Keeble factors’ (see **British Coal Corporation v Keeble** [1997] IRLR but it should not consider it a checklist.

### The law on direct discrimination and burden of proof

110. In **Nagarajan v London Regional Transport** (1999) 1 AC 501 the following statement by Lord Nicholls sets out the classic position on deciding race discrimination cases:

“Section 2 [then the Race Relations Act 1976] should be read in the context of section 1. Section 1(1)(a) is concerned with direct discrimination, to use the accepted terminology. To be within section 1(1)(a) the less favourable treatment must be on racial grounds. Thus, in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it

on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.

The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred. For the purposes of direct discrimination under section 1(1)(a), as distinct from indirect discrimination under section 1(1)(b), the reason why the alleged discriminator acted on racial grounds is irrelevant. Racial discrimination is not negated by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign. For instance, he may have believed that the applicant would not fit in, or that other employees might make the applicant's life a misery. If racial grounds were the reason for the less favourable treatment, direct discrimination under section 1(1)(a) is established."

111. In **Greater Manchester Police v Bailey** (2017) EWCA Civ 425 the Court of Appeal (per Underhill LJ) explained the principles set out in **Nagarajan** further:

"Both sections [section 13 and 27 EA 2010] use the term "because"/"because of". This replaces the terminology of the predecessor legislation, which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying issue as the "reason why" issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in *Nagarajan v London Regional Transport*[1999] UKHL 36, [2001] 1 AC 501, referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the same as "motive"). It is also well-established that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome: see, again, *Nagarajan*, at p. 513B."

112. Section 136 EA 2010 is sometimes referred to as the 'reversal of the burden of proof' provision. There is considerable judicial guidance on how this provision should be applied.

113. In the Court of Appeal case of **Igen v Wong** [2005] ICR 931 which was approved (with some additional guidance) in the later case of **Barton v Investec Henderson Crosthwaite Securities Ltd** [2003] ICR 1205, the Court set out the following:

"(1) Pursuant to section 63A of the 1975 Act [now section 136 EA 2010] it is for the applicant [now Claimant] who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the applicant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or 42 of the 1975 Act, is to be treated as having been committed against the applicant. These are referred to below as "such facts".

(2) If the applicant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the applicant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such



discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

(5) It is important to note the word is "could". At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts proved by the applicant to see what inferences of secondary fact could be drawn from them.

(6) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire....

(7) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant, and if so take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(8) Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably on the grounds of sex, then the burden of proof moves to the employer.

(9) It is then for the employer to prove that he did not commit, or, as the case may be, is not to be treated as having committed, that act.

(10) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive 97/80.

(11) That requires a Tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not any part of the reasons for the treatment in question.

(12) Since the facts necessary to prove an explanation would normally be in the possession of the employer, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

114. In **Madarassy v Nomura International Plc** [2007] IRLR 246, the Court of Appeal said that the burden does not shift to the employer simply on the Claimant establishing the difference in status (for example a difference in race) and the difference in treatment. Those 'bare facts' only indicate a possibility of discrimination, not that there was in fact discrimination. "Could conclude" in the wording of section 136 EA 2010 must mean that a reasonable Tribunal could *properly conclude* from all the evidence before it. Thus, the first stage of the two-stage process envisaged by section 136 EA 2010 is to consider whether the Tribunal could properly conclude from the facts (if proved by the Claimant) whether discrimination is a possible explanation for the treatment. At the second stage of the process, once the Tribunal is satisfied that the Claimant has proved facts from which an inference of discrimination can be drawn, the Respondent must provide a non-discriminatory explanation for its treatment of the Claimant. If, upon a balance of probabilities, the Respondent is not able to show that discrimination was not the

reason for the treatment, the Claimant must succeed. If the Respondent discharges the burden by proving, for example, that a non-discriminatory reason for the treatment exists, then the claim must fail.

115. The tribunal's focus "must at all times be the question whether or not they can properly and fairly infer... discrimination." (see **Laing v Manchester City Council**, [2006] IRLR 748)

116. In considering what inferences can be drawn, tribunals must adopt a holistic approach, by stepping back and looking at all the facts in the round, and not focussing only on the detail of the various individual acts of discrimination. The Tribunal must see "both the wood and the trees": **Fraser v University of Leicester** (UKEAT/0155/13 at paragraph 79).

#### The law on indirect discrimination

117. There is no statutory definition of what constitutes a PCP. In **Ishola v Transport for London** (2020) ICR 1204 the Court of Appeal gave the following guidance (at paragraphs 34 – 38):

"The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words "act" or "decision" in addition or instead. As a matter of ordinary language, I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs, as Mr Jones submits. Mr Jones' response that practice just means "done in practice" begs the question and provides no satisfactory answer. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice". It is just done; and the words "in practice" add nothing.

The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a Claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.

In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant

ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

118. In respect of the justification defence in **Homer v Chief Constable of West Yorkshire Police Authority**, the Supreme Court (per Lady Hale at paragraph 22) said this:

"A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate."

#### The case law on victimisation

119. An unjustified sense of grievance about an allegedly discriminatory decision cannot constitute a detriment but a justified and reasonable sense of grievance about a decision may well be so (see **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 (paragraph 105)).

#### The case law on constructive dismissal

120. Under the principles established in **Western Excavating v Sharp** [1978] IRLR 27, for an employee to succeed in demonstrating that he has been constructively dismissed, the Tribunal must be satisfied that the employer has either broken a principal term or terms of the contract or has evinced an intention to be no longer bound by one or more of those terms. The breach must be of such seriousness as to strike at the very root of the contract and the employee must leave promptly in response to the breach.

121. The Claimant in this case relies on a breach of the implied term of trust and confidence. In **Malik v Bank of Credit and Commerce International SA** [1997] IRLR 462, the House of Lords explained the implied obligation of trust and confidence as follows:-

"The implied obligation extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. If conduct objectively considered is likely to cause damage to the relationship between the employer and employee, a breach of the implied obligation may arise."

### **CONCLUSIONS**

122. This case is not determined solely by whose evidence we prefer but credibility is relevant in determining some of the factual disputes.

123. The Claimant has in a number of instances stated openly that the Respondent's witnesses have been untruthful. It is not the case that they are mistaken or have misunderstood but that they have deliberately lied. These include Ms Berry Mr Cade, Mr Archer and Mr Masakure amongst others. In the course of his evidence Mr Ilounoh said that he had proof of them being lies.

124. We do not accept the Claimant's contention that any of the Respondent's witnesses have in fact lied. There is no independent proof of untruthfulness - it is merely the Claimant's own belief only and a belief which in our view is neither reasonable nor sustainable.

125. On the other hand we did not find the Claimant to be a credible witness. He was evasive in giving answers to simple and straightforward questions. A number of questions in cross-examination had to be put to him repeatedly because he failed to answer them. He was elusive in relation to relevant matters that he must have known would not help his cause. For example, he could not remember when he applied for his present job at a Nottingham Hospital despite this being relatively recent compared to more historical events. The event would be an important matter for the Claimant so it is likely to be remembered. It is inconsistent with his assertion that he can remember events going back to 2019 where he says he can remember things clearly. He was coy about when (rather than the content which of course would be privileged) he sought legal advice from a firm of solicitors other than Howes Percival about his legal position.

126. The Claimant has failed to disclose relevant documents in his possession which he would no doubt have recognised as being relevant, such as the offer letter from his present employer and the job offers he says he turned down before he took up his present role. His evidence that they were never requested by the Respondent suggests he knew they were relevant but because they were never requested he chose not to disclose them. A failure to ask does not of course relieve him of his duty to disclose, a duty with which he is familiar because he has on other occasions disclosed documents citing that duty.

127. On the other hand we found the Respondent's witnesses to be honest and credible. They have no reason or motive to lie. They did not provide inconsistent answers nor did we find them to be evasive. We therefore prefer where it conflicts the evidence of the Respondents' witnesses although we have considered each factual matter separately rather than taking a blanket approach.

#### Conclusion on time limits

128. The Claimant began ACAS early conciliation on 5 May 2022 which ended on 15 June 2022. Working back three months from that would be 6 February 2022. On the face of it therefore the Claimant's time limit for bringing proceedings expired on 6 February 2022. Anything prior to that is out of time.

129. The Claimant argues that this is a case of conduct extending over a period. We do not agree. The allegations involve different scenarios, different people and in entirely different events. They are not a single act other than perhaps the restrictions on his obstetrics practice which in any event concluded in September 2020 when the

Claimant was permitted to undertake obstetrics work from that time onwards. It was no longer an act of discrimination beyond that. Where any alleged act occurred before 6 February 2022 we therefore find it is out of time.

130. We do not consider that it is just and equitable to extend the time limit in this case for the following reasons:

130.1 The length of the delay is considerable. The earliest allegations go back to November 2019;

130.2 The passage of time means that memories have faded and therefore it is difficult for the tribunal to make decisions on factual disputes based on recollection. There are instances where the witnesses simply cannot remember. The Respondent is put at a considerable disadvantage in having to defend very historical allegations given the passage of time;

130.3 There is no satisfactory reason for the delay. The Claimant had the benefit of advice from the Society of Radiographers more or less from the outset;

130.4 The Claimant must have received some advice from the Society of Radiographers who were representing him at an early stage;

13.5 The Claimant had legal advice from solicitors in August 2020. It is highly likely that time limits would have been discussed then.

131. We therefore find that those allegations of discrimination and victimisation which have been brought out of time are dismissed on that basis.

#### Conclusions on direct discrimination

132. We have attempted to stand back from the volume of evidence to concentrate on what the real issues are in this case and to try and see both the wood and the trees. To some extent the issues have been clouded by the sheer number of allegations and against the number of individuals who are said to have discriminated or victimised. In real terms though it seems to us that the core issues are relatively straightforward.

133. In our judgment this case is not about the Claimant being Nigerian or of Nigerian origin or even his medical training in Nigeria. At the heart of this case is a dispute as to what was required in terms of qualifications or equivalence for the Claimant to be permitted to undertake obstetrics work. There was a fundamental disagreement between the Claimant on the one hand and various managers of the Respondent on the other as to what was necessary to legally permit the Claimant to practise obstetrics.

134. The Claimant's position is and always has been that he had the necessary qualifications to undertake obstetrics and that he was legally permitted to undertake such work in this country. His view was supported by the fact that he had worked for a different Trust for two years without question and it was only the Respondents that were raising this issue after they had appointed him. He argues they did so because

he was Nigerian or because there was a stereotypically negative assumption of qualifications obtained from Nigeria.

135. The Respondent for their part had considered carefully the relevant FASP guidelines and concluded that the Claimant did not comply with them. Furthermore after undertaking various enquiries they concluded that the Claimant's qualifications could not be mapped to any of the domestic qualifications and therefore the Claimant was not permitted to undertake scans on pregnant women both at the first trimester and the 18 and 20+ week foetal anomaly scans. The Claimant could undertake other work which did not contravene the guidelines and this is what he did until he was CASE accredited.

136. The Respondent made enquiries with other Trusts. They sought advice from The University of Derby. It was the view of the Programme Lead that whilst some of the modules the Claimant had done were comparable to the UK modules of study the obstetrics modules were not and thus the Claimant would not be able to demonstrate CASE equivalence.

137. This case is therefore about a fundamental disagreement as to whether the Claimant's qualifications obtained in Nigeria enabled him to practise in the UK. It is nothing to do with the Claimant being Nigerian and it is nothing to do with any training from Nigeria. The position would have been the same whether the Claimant was from any other country where CASE equivalence could not be established with any degree of certainty. The requirement was therefore neither Nigerian-specific nor was it Nigerian-training specific. In short the core issues in this case have nothing to do with race.

138. Direct race discrimination essentially involves two elements - less favourable treatment and less favourable treatment *because* of race.

139. 'Less favourable' implies a comparison of treatment. The person with whom the comparison is made or can be made is referred to as the comparator. The comparator can be an actual person, that is a named identifiable individual, or it could be a hypothetical comparator, that is someone whose circumstances were materially but whom the Respondent would have treated more favourably.

140. There is only one actual comparator relied on and that is Mr Augustine Obi. The Claimant also relies on two categories of hypothetical comparators namely Australian and Canadian sonographers. The Claimant's description of comparators is rather more prolix in the list of issues but that is the sum total of it.

141. Mr Obi being Nigerian as well as being Nigerian-trained clearly cannot be a valid comparator. He has the same protected characteristic as the Claimant. The relevant comparison has to be made with someone of a different race.

142. As for the Australian and Canadian comparators there are several difficulties in relation to that. The first is a complete lack of evidence as to their requirements. The Claimant has failed to provide any relevant evidence as to what the circumstances of Australian or Canadian sonographers are and what they are

required to do (or not required) in relation to their qualifications. On the information supplied we simply cannot construct a suitable hypothetical comparator.

143. The second difficulty is that from the evidence there was only ever one Canadian sonographer who was employed in January/February 2019 on an agency basis. There was also only one Australian sonographer who was similarly engaged on an agency basis for four weeks in December 2017. They are not therefore factually comparable to the Claimant who was never an agency worker.

144. Perhaps the most serious difficulty is the timing. Both the Australian and Canadian sonographers were engaged at a time when the Respondent was not fully cognisant of the FASP guidelines. This issue arose because of the discovery of the guidelines. For those reasons there is no valid hypothetical comparator.

145. In the absence of a comparison of less favourable treatment there can be no case for direct race discrimination. That complaint must therefore fail.

146. Notwithstanding the above we have nevertheless gone on to consider if there was less favourable treatment was it *because* of the Claimant's race?

147. In determining that issue we have considered the guidance in **Nagarajan** and **Bailey**. We have asked ourselves why the Claimant was treated the way he was.

148. We conclude that the reason why the Respondent acted as they did was because of the relevant managers' understanding of the FASP guidelines and the fact that they genuinely believed that the Claimant was not able to undertake his obstetric duties because of the relevant regulations and guidelines. We do not consider that the Claimant's race played any part in their thought processes.

149. In relation to the burden of proof provisions we find that the Claimant has failed to prove facts from which an inference of race discrimination can be drawn. If we are wrong on that we would have found that the Respondent has discharged the burden by proving a reason for treatment which had nothing whatsoever to do with the Claimant's race.

150. The Claimant has made a number of wild and unsubstantiated allegations without any factual basis. Mr Archer is perhaps the best (or worst) example of that. He was merely signing off a letter in the absence of Mr Cade. He did not have any direct involvement nor any detailed knowledge of the facts. It is difficult to see why allegations are made against Ms Barnes who was only copied in on emails because she was part of the team but had little to do with the day-to-day management of the Claimant or decisions affecting him.

151. The Claimant has alleged race discrimination against all members of the recruitment panel except Ms Lardner, which is somewhat odd because she was involved in the recruitment process to the same extent as Ms Berry and Ms Cross. We can assume why he has left Ms Lardner out is because he thinks that having left the Trust she can no longer be held responsible, which of course not the case.

152. When Ms Eteng was asked by the Tribunal in her closing submissions why the Claimant believes the panel would appoint him if they held racist views against

Nigerians her reply was that the Respondent was keen to appoint the Claimant as there is a real shortage of sonographers but they would not allow him to undertake obstetrics because of his race.

153. Such an argument seems to us both illogical and unconvincing. If Ms Berry and Ms Cross were biased against Nigerians because of their nationality they are unlikely to have appointed the Claimant to the role in the first place. They knew he was from Nigeria and that he had qualifications from Nigeria. They had seen his application form. It would make no sense to employ someone who was expected to undertake all the responsibilities of the role (including obstetrics) but then restrict them to a lesser or a reduced role on the same salary. Similarly there is no logical reason why they would then offer a fully funded course to allow the Claimant to be CASE accredited.

154. The issue of Ms Berry's mindset is clearly something that the Claimant has given careful consideration to. Ms Eteng puts the argument in her submissions as follows:

"Catherine's [Berry] testimony is particularly telling. She admitted that prior to the Claimant's employment, she was informed by colleagues that Augustine, another Nigerian obstetrics sonographer, had struggled with his practice and required significant supportive sessions in the year following his hire.....Whether Augustine's difficulties are factual is, in fact, irrelevant here. What matters is Catherine's belief in that narrative, which she testified to under oath. This testimony reveals that Catherine harboured preconceived notions about Nigerian qualified sonographers long before the Claimant even joined the Trust."

155. We do not accept that Ms Berry or Ms Cross harboured any antipathy towards Nigerians because of their race nor because they thought their qualifications were inferior. Mr Obhi was given assistance because it was felt he needed it.

156. The Claimant said he had evidence of the Respondent's witnesses being untruthful. Of course evidence of lying is rarely available and somewhat predictably there was ultimately no such evidence. At its highest the Claimant's case is for us to draw an adverse inference from the Respondent's failure to respond to emails rebutting his allegations. The Claimant wrote extensive emails, sometimes 4 - 5 pages in length. It would not be realistic to expect busy professionals to reply to each and every point by way of rebuttal. A failure to reply is not necessarily an admission. Most of the emails written by the Respondent's witnesses are relatively short and to the point.

#### Conclusions on indirect discrimination

157. The Claimant as a litigant in person has, unsurprisingly, found it difficult to identify an appropriate PCP. As a consequence he has set out a number of isolated one-off events. We do not make any criticism of the Claimant but the reality is that the only possible PCP that was applied was as follows:

*"That all obstetric sonographers must have either a case accredited or a case equivalent qualification as per PHE guidelines."*



158. The rest do not satisfy the test or guidance set out in **Ishola v Transport for London** and they are not valid PCPs. Accordingly we say no more about them.

159. We would be prepared to accept that the above PCP would place people from Nigeria undertake training in their own country at a particular disadvantage in that they would be required to show that their training was CASE-equivalent. It would also put the Claimant at a disadvantage as a member of that group.

160. The real issue is one of justification, that is to say whether the PCP was a proportionate means of achieving a legitimate aim.

161. We are satisfied that the following were legitimate aims:

161.1 That there was no risk created in respect of any claims that may be brought against the Trust and or its sonographers as a result of a scan that was undertaken by a sonographer who was not appropriately trained and,

161.2 That the Respondent was indemnified by its insurer were any claims brought against it and all the sonographers.

162. There can be no doubt that the above are legitimate aims. The decision not to allow the Claimant to undertake obstetrics work was in our judgment a proportionate means of achieving legitimate aims. The Claimant was permitted to undertake all his other duties save for that which was not viewed as permissible. It was therefore proportionate. The indirect race discrimination complaint is dismissed.

#### Conclusions on victimisation

163. The allegations that are out of time are dismissed for that reason. In relation to the others, they are dismissed for the reasons given below.

164. We find that the only possible protected acts are those specifically making a reference to 'discrimination' even if it is not specified what type of discrimination it is.

165. We find that Ms Barnes was not aware of the grievance so she could not have victimised the Claimant in relation to it.

166. The other alleged perpetrators were aware of the existence of a grievance but had not seen the actual grievance document nor were they aware of its actual contents. The grievance did not, other than Ms Cross (and by implication Ms Berry), name them personally or refer to them by implication.

167. The Claimant has failed to put his case to each of the witnesses to establish a prima facie case reason for acting as they did. He simply did not ask any questions, nor was there any evidence, which might establish a causal link between knowledge of the protected acts and the detriment relied on.

168. In all the circumstances we do not find any causal connection or link between the Claimant committing any protected acts and the detriments relied on for the following reasons:

168.1 All of the alleged victimisers knew little or nothing about the contents of the grievance;

168.2 The issues of which the Claimant was complaining against Ms Cross and Ms Berry pre-date some of the protected acts;

168.3 The suggestion that the Trust should go to the lengths of producing new guidelines in April 2022 with the intention of maliciously targeting the Claimant is clearly absurd. The issue relating to the Claimant was settled as at July 2020. There was no reason for the Respondent to issue a policy 21 months later simply to punish him. The complaint of victimisation is therefore dismissed.

#### The cultural ambassador issue

169. There is nothing of substance on this. Mr Alexander considered the documentation and found nothing of suggestive of discrimination. The Claimant led him to believe that his view would be different if Mr Alexander had all the documentation. After he saw the 'missing' documents Mr Alexander confirmed his original view that the process was not tainted by race.

170. The Claimant has not suffered any detriment by reason of either having an opinion from the Cultural Ambassador or not being given a further opinion by someone else when he wanted a different one appointed. It seems to us unlikely that the Claimant was going to accept the findings of any Cultural Ambassador unless they agreed with him.

171. We accept that there were unacceptable delays in replying to correspondence but these were not because of the Claimant's race or the doing of any protected acts.

172. There is no basis for asserting that any documents were withheld from his file. The allegation is founded on a manifestly incorrect understanding of what is kept on a personnel file. The file does not retain emails. Moreover there was absolutely no reason for anyone to withhold anything from the Claimant's file.

#### Delays

173. Delays in dealing with grievances are not unusual but we do not find that there was any significant delay on the part of Mr Cade. In the overall scheme of things the matter was dealt with in a reasonable time.

174. We do find it necessary though to say (although not the subject of any allegation) that the delay in replying to some of the Claimant's email from HR on the Cultural Ambassador issue was inexcusable. We recognise some of this was during the height of Covid and there were severe pressures on staff but it would not have taken very long to simply acknowledge.

#### Constructive unfair dismissal

175. There are several significant reasons why this complaint must fail:

175.1 The Respondent's actions, considered objectively, do not satisfy the **Malik** test, namely that they do not amount to conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence;

175.2 The Claimant affirmed any possible breach by continuing to work and significantly rejecting job offers from other institutions during that time. At no time did he say that he was working under protest.

175.3 The Claimant delayed too long in resigning. There was nothing of any substance to complain of after the Claimant was allowed to resume his obstetrics practice. He spoke of a breach of trust and confidence several months before he decided to leave. He clearly made a decision to stay;

175.4 The Claimant said that he was keeping his options open as to his resignation and would cancel it if necessary. Of course he was unaware of the principle that a resignation once accepted cannot generally be withdrawn save by agreement but the point is that he could not have thought the Respondent's actions were so severe as to destroy trust and confidence if he reserved to himself the option to rescind his resignation;

175.5 We find the Claimant did not resign because of any perceived breach of the implied term of trust and confidence but rather because he found a role elsewhere at a time and place of his choosing. The Claimant may have been unhappy at UHL but being unhappy is not enough.

175.6 There is no last straw entitling the Claimant to resign nor has the Claimant identified a last straw;

175.7 Some of the matters relied on by the Claimant occurred after he had already submitted his resignation;

176. Far from the Respondent breaching the trust and confidence term, it is at least arguable that the Respondent has been relatively tolerant of the Claimant's behaviour. Mr Masakure's unchallenged evidence was that the Claimant would talk to female colleagues in an aggressive and loud manner. He says that some were scared to have one-to-one meetings with him.

177. Ms Berry gave evidence in her statement about how she was left feeling upset by the Claimant when he raised his voice at her in the stage one grievance meeting.

178. We accept the evidence of Ms Hilary Brooke-Clarke that she was so concerned about a meeting with the Claimant that she wanted to have a colleague present. As it was her concern was justified because she says that after the meeting she was in tears and remembering it still upsets her.

179. Mr Masakure's attempts to point out deficiencies in the Claimant's practice, or simply pass on what he had been told by senior managers was met with protracted discussions about who, what and why whilst it was simply Mr Masakure's intention to pass on guidance.

180. Mr Masakure had a reasonable belief that the Claimant was secretly viewing the reports of other radiology doctors which would generally be regarded as a serious data protection breach. The Claimant's explanation that it was merely accidental seems implausible.

181. The Claimant was clearly someone who did not take any form of criticism, constructive or otherwise, well. In almost every instance when anything potentially critical was pointed out or he disagreed and had a tendency to become defensive. That was the view of several witnesses who gave direct evidence to that effect in these proceedings. We do not accept that they are all being untruthful.

182. The complaint of constructive unfair dismissal is therefore dismissed.

### **CONCLUSIONS ON THE SPECIFIC ALLEGATIONS**

183. We will now deal with the specific allegations. We have summarised some of them for the sake of brevity.

*On 18 November 2019, Ms Catherine Berry said "where did you train from?" to which the Claimant replied 'Nigeria'. Catherine Berry then mentioned, falsely, that there is a new policy in the UK that prevents people from Nigeria practising obstetrics Ultrasound in the UK and UHL.*

184. We do not accept the Claimant's contention that Ms Berry asked the Claimant where he trained from or that she went on to say that there was a new policy in the UK that prevented people for who trained in Nigeria from practising obstetrics ultrasound in the UK.

185. We prefer the evidence of Ms Berry over the Claimant for the following reasons:

185.1 There is no independent evidence which supports the Claimant's version;

185.2 A few months after this alleged conversation the Claimant submitted a lengthy written grievance on 21 February 2020. Although the Claimant makes reference to that meeting he makes no reference to a conversation in the terms that he now alleges. It is interesting that at the commencement of this hearing the substance of what he says was further amended thus suggesting that even now he is not sure.

186. It seems to us highly unlikely the alleged conversation took place in the form and in the words the Claimant now suggests.

187. We consider it much more likely that the Claimant either misheard or misunderstood what was said. He may have thought Ms Berry was talking about a new policy whereas what she was talking about a discovery of new information. We cannot accept that Ms Berry would have mentioned a new policy when it could simply be proved that there was no such thing.

*The Respondent required the Claimant to have a CASE accredited qualification at the very start of his employment.*

188. The Claimant could not have CASE accredited qualifications at the start of his employment as he was not trained in the UK. He could only have *CASE-equivalent* qualifications which is what was required.

*On 26 November 2019, Catherine Berry said to the Claimant that management are happy to refer the Claimant for re-training because he was Nigerian-trained and that he should forget his practice at his previous NHS Trust.*

189. We do not accept that the Claimant was told he would have to re-train but was told that the Trust were willing to pay for him to undergo a further course which the Trust would pay for. He was certainly not told that this was because he was 'Nigerian-trained'. The Claimant made no reference to this allegation, as it is now framed, in his Stage two grievance

*On 26 November 2019, Catherine Berry told the Claimant that a colleague Augustine Obi was retrained by the Respondent prior to his commencing obstetrics with the Trust.*

190. Mr Obi, who was also from Nigeria and appears to have the same qualifications as the Claimant, was not re-trained. His own witness statement says he was "never asked to undertake any formal retraining in obstetrics ultrasound scans from the University, as it not deemed necessary."

*From November 2019 onwards, the Respondent's management ignored the proof of qualification the Claimant provided.*

191. The qualifications were not 'ignored' nor was there proof of equivalence.

*On 13 December 2019 within internal emails the Respondent put the responsibility on the Claimant to determine the equivalent status of his qualification but does not currently put the responsibility on its overseas staff to do the same.*

192. There was nothing wrong or discriminatory in the onus being put on the Claimant to show equivalence.

*As a basis for not letting the Claimant practice Obstetrics scanning with the Respondent, the Respondent (Melanie Cross) on the 13 December 2019 stated that only the Claimants Physics and Gen Med credits were transferred onto his UK MSc programme from his Nigerian qualification, and not his Obstetrics credits.*

193. The basis for Ms Cross' belief was the information supplied by the University of Derby. It was reasonable for her to rely on that information.

*On 6 January 2020, 13 March 2020, 2 July 2020 and August 2020, the Respondent's managers (Catherine Berry, Melanie Cross, Amy Barnes, Lewis Cade, Helen Lang and Claude Masakure) refused to accept the validity of the Claimant's qualification to practice obstetrics in UHL.*

194. They did not do for the reasons set out above and not for reasons of race or because the Claimant had done protected acts.

*In March 2020, during the Claimant's grievance process stage 1, Catherine Berry repeated what she had said on 26 November 2019.*

195. We repeat the above.

*On 21 August 2020, Matthew Archer lied to the Claimant in his apology letter when he said, "I am writing in Lewis' absence to apologise on behalf of the Trust and the Ultrasound Team for not clarifying whether or not your qualification was CASE accredited ...".*

196. This is perhaps the most egregious of the 'lying' allegations. Mr Archer was simply signing a letter, drafted by HR officers, on a matter in which he had no prior involvement. His only contribution to the letter was to correct some punctuation errors. He was not making any substantial changes to the draft or introducing something of his own volition. The Claimant's allegation that Mr Archer knew the contents of the letter was a lie and that this was because of the Claimant's race is wholly without any foundation.

Indirect race discrimination

*First PCP: At the beginning of this case, the Respondent required all its obstetrics sonographers to have a CASE accredited qualification.*

197. This is plainly not a PCP on the facts. The Respondent could not have required sonographers to have a CASE accredited qualification as foreign-trained sonographers would not generally be able to possess this.

*Second PCP: All obstetrics sonographers must have a CASE accredited or equivalent qualification as per PHE guidelines. The Respondent adopted a practice of obtaining equivalence, which by so doing prevented sonographers who trained outside the UK from practicing obstetrics ultrasound without specific evidence of a CASE accredited or equivalent qualification.*

198. We would accept that the Respondent applied a PCP as to the first sentence only or perhaps at the end of '...obtaining equivalence'. The rest is simply commentary.

*Did the Respondent apply the PCPs to the Claimant at the relevant time/the time of the Claimant's employment?*

199. Only the second PCP as set out above was applied to the Claimant

*Did the Respondent apply (or would the Respondent have applied) the PCP to persons with whom the Claimant does not share the characteristic, e.g. people who were not of Nigerian nationality and Nigerian trained?*

200. We accept that the PCP would apply to Nigerians or Nigerian-Trained sonographers and thus group disadvantage is established.

*Did the PCP put persons with whom the Claimant shares the characteristic, e.g., persons with Nigerian nationality at one or more particular disadvantages when compared with persons with whom the Claimant does not share the characteristic, in that*

*- Nigerian nationals who are Nigerian-trained obstetrics sonographers are assumed to have obstetrics qualifications and experience that are inferior; and,*

- *Nigerian nationals who are Nigerian-trained obstetrics sonographers are required to enter into a significantly extensive and unstructured process of proving the equivalence of their obstetrics qualifications.*
- *Nigerian nationals who are Nigerian-trained obstetrics sonographers have their professional practices restricted for not having CASE accredited qualifications when PHE guidelines make provision for those with equivalent qualification.*
- *Nigerian nationals who are Nigerian-trained obstetrics sonographers are required to undergo university re-training in obstetrics ultrasound.*

201. We shall deal with all of these issues together. The Claimant's qualifications were not seen as inferior, it was simply that they did not meet the relevant guidelines. There is no evidence that Nigerian nationals or Nigerian-trained sonographers are required to enter into significantly extensive or an unstructured process of proving their equivalence. There is no restriction placed because of nationality. The restriction was based on the application of relevant guidelines. The Claimant was not required to undergo University re-training. He was offered it as an option which he refused.

*Did the PCP put the Claimant at that/those disadvantage(s) at any relevant time?*

202. The only disadvantage that was placed on the Claimant was that he was required to establish CASE-equivalence.

*If so, has the Respondent shown the PCP to be a proportionate means of achieving a legitimate aim?*

203. We are satisfied that the Respondent has shown the PCP, as set out in the first sentence of the second PCP was a proportionate means of achieving a legitimate aim for the reasons set out above.

#### Victimisation

*Did the Claimant do the following protected acts?*

*On 20 February 2020, the Claimant raised a grievance with the Respondent and complained multiple times of being treated unfairly and discriminated against by the Respondent's ultrasound managers*

*On 18 November 2019, Catherine Berry said "where did you train from?" to which the Claimant replied "Nigeria".*

*On 18/11/19, Catharine Berry said she is not sure of the claims she made about the Claimant's Nigerian qualification, because she does not practise obstetrics or know much about obstetrics, but proceeded to restrict the Claimant's obstetric practice immediately.*

*On 26/11/19, when the Claimant informed Catherine Berry and Melanie Cross that falsely stating there was a policy restricting his obstetrics practice due to his Nigerian qualifications was unfair and discriminatory, Catherine responded, "That's just the way it is, and there's nothing we can do about it".*

*On 13 December 2019, the Claimant told Melanie Cross (as well as some other ultrasound managers copied into the email) that his Nigerian-obtained obstetrics ultrasound credits were transferred onto an MSc. ultrasound programme in a UK University because they were equivalent, Melanie Cross specifically responded to this email on the same date, stating “the credits for your MSc would have been taken directly from the qualification obtained in physics and gen med, not from any credits gained from obstetrics as far as I am aware”. Upon the Respondent’s refusal to accept evidences presented, the Claimant wrote this to the Respondent on 20/January/2020 amongst other things;- “Irrespective of proof ..... of the transfer of my PgD obstetrics credit units unto a masters program in a CASE-accredited university, .....you have still refused to accept the validity of my qualification, probably because I didn’t get these proofs from the university you wanted (university of Derby) even when they are both CASE accredited. However, the very least you can do is take out a little time to verify the core responsibilities of these organizations you refer me to rather than tossing me about please. It is unfair treatment, please consider my wellbeing and mental health”.*

*In the Claimants email to Lewis Cade on 23 March 2020, responding to the minutes of the Stage 1 grievance meeting held on 5 March 2020 by Catherine Berry and Scott Barton, the Claimant specifically stated the following; “They also failed to include that it was only upon my refusal and resistance to be discriminated against and bullied, did they re-evaluate the PHE guidelines, see that I was correct about the provisions of the guideline for foreign-trained sonographers and then bother to try to verify/prove the CASE-equivalent status of my qualification (which should have been done in the first place if they had any concerns, rather than initially making untrue, conclusive and derogatory remarks like “there’s a new policy so we do not allow Nigerian-trained sonographers to practice obstetrics in UHL”, or “there’s nothing we can do” or trying to invalidate my obstetric practice in Grimsby)”*

*On the 19 March 2020, Catherine’s line of enquiry with AECC University College reads as follows; “Were the obstetrics modules that he completed in Nigeria directly mapped to a UK course and deemed equivalent, to include within the academic content the specifics of screening ultrasound scans performed in the UK, that are not performed in Nigeria where his PG Dip was gained?”*

*On the 19 March 2020, Catherine Berry stated to Warren Foster; “When I contacted the regional lead sonographers to enquire whether they have overseas trained sonographers performing obstetrics in the UK, they answered that they do not have any Nigerian qualified sonographers performing obstetrics, as their local university mapped the qualifications and deemed them not to be equivalent in the obstetrics modules but equivalent for other modules such as physics and general abdominal”.*

*On the 9 December 2019, 26 November 2019, 2 July 2020, Catharine Berry, Melanie Cross, Claudius Masakure, Amy Barnes, and Lewis Cade repeatedly offered to retrain the Claimant in obstetrics in a UK University despite receiving proof from an accredited University that the Claimant’s qualification was equivalent. The Claimant told the Respondent the following in his email on 27/11/19; “I truly hope there isn’t any form of personal bias as far as this issue is concerned. If my professionalism in*



*obstetrics is undermined based on a personal/individual bias without evidence or factual justification, then that is very unfair and unprofessional. On the day of my interview, I was asked if I practice Obstetrics in my previous NHS trust, and I confirmed that I do. Not for once was it stated that if I were to take the job in UHL that my qualification and experience in obstetrics ultrasound will be rendered invalid, so I do not take it lightly that all this is coming up now. I was not employed on the basis of retraining in obstetrics before practicing, and so I cannot do that now. I do not want to be de-skilled in obstetrics ultrasound, if I was told that was going to be the case I would have considered my options critically”.*

*On 2 July 2020, Lewis Cade lied to the Claimant, stating: “We have also been able to contact Bournemouth University, who confirmed that they cannot map your post graduate diploma in Medical Ultrasound obtained in Nigeria against the FASP standards which would give you the required CASE accreditation”. On the 10/July/2020, amongst other things, the Claimant stated the following in his reply to Lewis Cade: “However, if with all these provided evidences, UHL still insists on bullying me into undertaking a focused course to formally and practically examine my screening skills, then I will undergo a UHL fully-funded focused negotiated skill module in AECC Bournemouth University, in order to specifically demonstrate my FASP and NT competence. It will be a discriminatory and unjust move by UHL, but I would do it to make you all happy, albeit at the detriment of my rights.”*

*In September 2020, the Claimant was reinstated to resume obstetrics practice with UHL. But on 9 Feb 2021, despite being against national PHE guidelines, the Respondent communicated internally that they have now produced an obstetric guideline which makes provision for only CASE accredited qualifications, and not equivalent qualifications. They proceeded to say “that means Ekene should not be working in obstetrics”, despite being aware that Ekene now possessed a CASE accredited qualification after the completion of his MSc.*

*On 9 February 2021, the Respondent stated “If it is not a UK or Australian qualification we would not take them without their proof of CASE equivalence”.*

204. We will deal with all of the above together. With the exception of the reference to instances of discrimination where they occur we do not find that the above constitute protected acts. The reference to 26 November is not a protected act as we do not accept that the alleged words were said. The rest do not satisfy the test of a PCP as set out in **Ishola**.

Did the Respondent subject the Claimant to detriment?

*On 28 February 2020 Claude Masakure verbally, and falsely, told the Claimant that a colleague and a patient had complained that he had coerced the patient into having a transvaginal scan.*

205. Mr Masakure did not tell the Claimant that a colleague and patient had complained that the Claimant had coerced a patient into having a transvaginal scan. The issues were not about coercion. They were about patients inserting the probe themselves and about seeking their consent too often. The Claimant has simply misunderstood.

*On 2 March 2020, 6 October 2020, 16 June 2021 and 23 June 2021, the Respondent (Claude Masakure, Lewis Cade, Scott Barton, Catharine Berry, Amy Barnes, Helen Lang and Hannah Tucker) were aware of this issue but no action (by way of an investigation) was taken in relation to it until October 2022.*

206. There is nothing to suggest that the matter required any further investigation.

*On 8 April 2020, the Respondent Claude Masakure received feedback about the Claimant (concerning stating limitations on his scans) from a consultant, and as expected Claude in turn fed this back to the Claimant, dishonestly informing the Claimant that on previous reports there were no recorded limitations when in fact there were on some of them. Making the Claimant feel inadequate in the course of discharging his duties because he spoke up about discrimination.*

207. We do not find there was any 'dishonesty' involved nor was there any detriment. Mr Masakure was simply providing passing on information which he would be required to do as a line manager. There is nothing to suggest he was influenced by a grievance.

*On 9 September 2021, the Claimant had a meeting with his lead, Hilary Brooke-Clarke. Upon arrival, the Respondent asked if another colleague (Amanda), using the computer in the same room, could stay during the meeting. The Claimant objected, as the meeting was intended to be confidential. However, in the meeting summary, Hilary Brooke-Clarke noted, "You refused to allow Amanda Parry to be present in the room"*

208. We have dealt with this and the factual background to it above. There is no causal link with the Claimant's grievance. Ms Brook-Clarke's description of the Claimant refusing to allow Ms Parry to be present was a fair reflection of the events.

*On 13 December 2020 Claude Masakure sent an email falsely saying the Claimant secretly audit doctors thereby placing him in a bad light amongst his colleagues*

209. We do not accept there was any false statement. There were good reasons for Mr Masakure to believe that the Claimant was secretly viewing records of other doctors.

*On 25 January 2021, Catherine Berry emailed the Claimant, copying several ultrasound management staff, to ask about an incident, assuming the Claimant's involvement. The Claimant requested more information and was later informed by Scott Barton via email that it was a case of mistaken identity. However, the management staff copied on the initial email were not copied on the email acknowledging the Claimant's innocence. The Claimant had to respond and copy the management staff himself to prevent the spread of misinformation.*

210. This was a simple case of mistaken identity. It had nothing to do with the Claimant's grievance. There was no accusation about the Claimant, merely an enquiry as to whether it was the Claimant who had raised the issue.

*On the 9 February 2021 and on 10 April 2022 the Respondent produced a new obstetrics guideline with the intention of maliciously targeting the Claimant,*

*discriminating and actively looking for ways to discredit and stop the Claimant's obstetrics practice.*

211. The Respondent did not in fact issue new guidelines on 9 February 2021 - they were still at a draft stage at that point. The final version was in March 2021. It is simply not the case that the Respondent issued a new policy many months after the Claimant was restored to obstetrics practice purely in order to victimise him. The policy would not affect the Claimant in any event. He was by then practising obstetrics and would continue to do so.

*On 15 March 2021 Amy Barnes told the Claimant that he was accused of being rude to a colleague, and when the Claimant asked for an explanation, none was provided.*

212. The Claimant was simply informed of the matter. There was no detriment.

*Between April 2021 and December 2021, the Claimant informed Hilary Brookes-Clarke, Lewis Cade, Amanda Parry, that he felt unsafe working in the Respondent's maternity ultrasound department, and they took little or no action in relation to that despite the Claimant requesting if the excessive rostering to maternity could be moderated. It wasn't until March 2022 (after the Claimant resigned, and subsequently went off sick because he felt additionally traumatized working in the maternity department), that the managers decided not to excessively roster him in maternity again.*

213. The Claimant was told he could not pick and choose what area of work he wanted to do. That was not influenced by any protected act.

*On 9 August 2021 the Claimant's growth obstetrics scan was being repeated by a consultant with no shown justification (as per departmental standards) or explanation from the lead (Hilary) for why that was so, even upon the Claimant's request for an explanation. There was no indication from the Claimant's report as to why a repeat scan was necessary for this patient (no risk to the foetus was indicated).*

214. There was no detriment and in any event it had nothing to do with any protected act.

*On the 9 September 2021, Hilary Brookes-Clarke told the Claimant to take audit reports the way they come without raising concerns, and concluded that the auditor had been forced to correct her report by the Claimant when he had not done so.*

215. We do not accept the Claimant's version of events. He was not told to take audit reports without a right of reply. He was perfectly at liberty to challenge audits which he evidently did. The issue was that the Claimant had been perceived of applying pressure to change the audit.

*On 1 April 2022, the Claimant was blamed for the mistakes of others with regards to filling patients' forms, by Hilary Brookes-Clarke.*

216. The email did not blame the Claimant. It merely raised an issue and a reminder to be careful.

*In February 2022 Amanda Perry falsely accused the Claimant of scanning an area he was not qualified or trained in.*

217. This was an issue as to disagreement on medical practice. The Claimant had deviated from standard practice. Examining areas outside the scope of requested scans could lead to unnecessary referrals, delayed treatment and potential misdiagnosis. There was no false accusation.

*Lewis Cade, Helen Lang, Claude Masakure, Catherine Berry, Amy Barnes, Hannah Tucker, and Scott Barton (the Ultrasound management) withheld documents relating to the Claimant's grievance from his personnel file.*

218. There is no factual basis for this assertion. There is no rational basis for suggesting that seven managers all conspired (or individually decided) to withhold documents from the Claimant's file.

*The midwives told the obstetrics lead (Hilary) that the Claimant takes decisions on his own and does not meet them with cases concerning patients; and the lead (Hilary) told the Claimant that he does not meet them as they have said.*

219. Ms Hill has no recollection of the matter. Given the passage of time it is not surprising. As for Ms Cowlshaw the cogency of her recollection can be assessed by the fact that she remembers the Claimant did not like to be kept waiting. She therefore appears to remember the Claimant well. We have no reason to disbelieve her testimony. Quite apart from the out of time issue the Claimant has failed to prove any factual basis of the allegation.

*Since the Claimant lodged his grievance and thence throughout his employment, the Claimant has been subjected to extra scrutiny by ultrasound managers.*

220. This is a general allegation without specifics and as such it is unnecessary for us to say anything about it.

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Employment Judge Ahmed

Date: 4 October 2024

JUDGMENT SENT TO THE PARTIES ON

.....16 October 2024.....

FOR THE TRIBUNAL OFFICE

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