Case No: 2301565/2018

EMPLOYMENT TRIBUNALS

Claimant: Ms Gissele Buckle

Respondent: (1) Ashford and St Peter's Hospital NHS Trust

(2) Your World Recruitment Group

(3) Ms Monika Mills

Heard at: London South **On:** 30 September to 3 October 2019

Before: Employment Judge E Fowell

Mrs S Dengate

Ms S J Murray

Representation:

Claimant: Mr D Brown instructed by Ashtons Legal

Respondent: Mr B Jones instructed by Capsticks Solicitors LLP

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the claim is dismissed.

REASONS

Introduction

1. The claimant, Ms Buckle, worked for an employment agency, the second respondent. They arranged for her to work shifts as a midwife at St Peter's Hospital in Middlesex which is run by the first respondent Trust. She did about 20 shifts in all, the last one

on the night of 12 and 13 July 2017. All of the events in question took place that night and centred around a dispute with her supervisor, Ms Mills, the third respondent. Ms Buckle accuses the Trust, and Ms Mills in particular, of direct and indirect race discrimination, and also of harassment and victimisation on grounds of her race. Her complaints against the agency were withdrawn in August this year, and as this has not yet been dealt with by the Tribunal we record at the outset that that claim is dismissed on withdrawal.

2. By way of background, Ms Buckle says that she was assigned a particularly difficult patient, A, and her partner B, who were abusive towards her. There are two main allegations against them: firstly that B, with his face close to hers, shouted at her that she should take her hands off his wife; secondly that one or both of them said at one point that they wanted to be treated by people who spoke English. (There is no issue whatever over Ms Buckle's level of English, and it is common ground that any such remark would be regarded as racially motivated.)

3. She says that she was particularly scared by the shouting, that she felt rooted to the ground with fear and asked Ms Mills not to have to deal with this couple; but, she says, Ms Mills refused. She had to soldier on until another midwife, Ms Morgan, came in to take over, but even then she was not allowed to leave the room. She complained about this when the shift ended, as a result of which her work at the hospital was cancelled.

4. Ms Mills on the other hand agrees that the couple were aggressive but says that this happens and that the patient was distressed and in pain. It was also a very busy shift. Patient A needed an experienced midwife and Ms Buckle was the only one available so she could not release her. Ms Mills also says that there was an earlier incident which was the real cause of Ms Buckle's concern - she found Ms Buckle in the staff room when she should have been in the delivery room and then later on noticed that Ms Buckle had written up the patient notes to obscure this fact. That led to a row, when Ms Buckle shouted at her and Ms Mills told her that she would report her in the morning over the notes and for leaving the patient alone. She agrees that Ms Buckle did not want to have to deal with this couple any longer but she could not do anything about it at the time.

5. In addressing these rival accounts we heard evidence from Ms Buckle and Ms Mills, and also several witnesses for the Trust: Ms Jeffries, the manager who investigated these events; Dr Hussain who was the registrar on duty on the labour ward that night, and Dr Oommen, the anaesthetist who was present for some of these events. There was also a bundle of something over 500 pages.

6. Among those documents was an expert medical report prepared by Mr Timothy Acton, an experienced Chartered Psychologist, concluding that Ms Buckle is now suffering from PTSD and severe depression. There has also been concern at times over her risk of suicide. She is still on heavy doses of medication and receiving counselling

through the local NHS mental health team, over two years later.

7. Given that view, we naturally treated Ms Buckle as a vulnerable witness. Although no particular measures were requested on her behalf, more frequent breaks were taken, generally at half hour intervals, and on one occasion Ms Buckle asked to break off herself. She found the process of giving evidence very difficult, particularly dealing with questions in which she was taken to her witness statement and then to other documents, and having to take in a number of points before responding. We rose early on the first day when it became clear she was unable to concentrate further, and on the next morning her solicitor, Mrs Dingle, sat with her to help her with finding the relevant pages in the extensive bundle. Efforts were also made to encourage simpler, more open questions and we were satisfied that she had been able to take an effective part in the hearing and to explain her account. We also explained to her that she did not need to remain in the room to hear the evidence of the Trust's witnesses if she felt anxious, but she remained throughout.

8. We also remind ourselves that we need to take account of her vulnerability in assessing the credibility of that account, and the difficulty she may have experienced, for example, in recalling or interpreting events. Having done so, we make the following findings of fact.

Findings of Fact

9. Ms Buckle is an experienced Band 6 midwife. She is originally from Sierra Leone but has been in the UK for about 28 years and is a British citizen. For the past 18 years she has been working on an agency basis as a midwife and in other clinical areas. That night she was assigned by Ms Mills to Patient A, a patient in the highest risk category – category 5. There were a number of risk factors in her case:

    a. The birth was to be induced.

    b. She had a condition called vaginismus, which meant that the vagina can spasm involuntarily which can be very painful. As a result she was very scared about any vaginal examinations and would not let anyone examine her. She had to put the induction medication inside herself, which Ms Mills said had only occurred a few times in her career. In fact she described this is as one of the most extreme cases she had witnessed.

    c. The baby had to be induced because of its small size, which in turn made it difficult to monitor the baby's heartbeat, which is done by a sensor placed on the abdomen. Monitoring was a continuing struggle throughout the night.

10. They were also a challenging couple personally. Ms Mills was in and out of the room during the shift and was aware that Ms Buckle was having a tough time with them. She described them as not very nice people and said they shouted at her as well, as related below, but such reactions are not uncommon; when the mother is in pain and

distressed the partner feels helpless and anxious and can become aggressive.

11. Handwritten notes were taken by those present throughout the evening, although they focus on the patient's care and not on other events. Ms Buckle was taking them at the start. They show that bloods were taken at 1.10 and that shortly after that a cannula was put in to administer intravenous fluids.

12. At about 1.46, Ms Mills went into the delivery room but Ms Buckle was not there. She noticed from the CGT trace – the cardiotocograph or heart-rate monitor - that there was a deceleration in the baby's heartbeat. She found Ms Buckle in the staff room and told her that she needed to get back in to see to the patient. Dr Hussein was there at the time and witnessed this. Ms Mills told Dr Hussain to finish her sandwich as she had just sat down, and to come in ten minutes time, which she did. That account was recorded in a Data Incident Report (Datix) made by Ms Mills at 6.44 that morning (p.90). It also accords with the patient's notes, Dr Hussain's recollection and the first written account given by Ms Buckle.

13. Ms Mills went on in the Datix report to record that she asked Ms Buckle why she was in the staff room and she replied that she had gone in to look for her glasses and did not stay long. Ms Mills emphasised the importance of continuous care for such a high risk mother.

14. Ms Buckle went on her break at about 2.35 am and Ms Mills looked over the patient notes. Those notes are at p.491. They record at 01.35 am that patient A needed an obstetrician to come in and that she had accelerated things to the Labour Ward Co-ordinator. Ms Mills took the view that Ms Buckle was rewriting things to make it seem like Ms Buckle had alerted *her* to the deceleration rather than the other way round. On that point we prefer the view of Ms Mills. Hence we accept her account of the incident in the staff room and that this occurred shortly after 1.46 am.

15. The patient records also show that Dr Hussain arrived in the room at 2.00, as expected. The care of the patient was taken over by another midwife, Ms Morgan, at 2.35 am, which was when Ms Buckle went on her one-hour break. This had been arranged by Ms Mills.

16. Although Ms Buckle said at this hearing that there was constant abuse by the couple from 1.00 am onwards, and she was asking Ms Mills to be relieved throughout, in her witness statement she only described difficulties which occurred after her break, and she has not suggested at any previous point that she was intimidated or that any offensive comments were made before then. We accept that they were a difficult couple and that it was all very fraught, but there were no incidents of particular note during this first period.

17. Ms Buckle did not return from her break until after 4.00 am. During that break Ms Mills took her to task over the medical notes and Ms Buckle became angry and upset. In

the course of that exchange, or very shortly afterwards, she asked Ms Mills to move her to a different patient and Ms Mills refused. Ms Buckle found all this extremely difficult to deal with. At 4.03 am she sent a lengthy email from her iPhone to her line manager, Omega. It is worth quoting.

> Dear Omega
>
> I am on the night shift on the Labour Ward working with Labour Ward Coordinator Midwife Monika. I have a lady whose has been having decelerations on her CTG. I informed Monika about this several times and at one point I had to leave the room to get my glasses and quickly send of some bloods I had taken from the women and Monika came to me whilst I was in the room quickly scribbling in my notes to send off the bloods to inform me that there were decelerations on the CTG. I immediately went back into. the room when I was informed about this. I had kept Monika informed since the woman was admitted at approximately 0100 to labour ward. I tried to ask Monika to help me send of the bloods but she refused. I also went back in inform Monika that the CTG needed to be reviewed by the Doctor. The Doctor was sitting in the office and I heard Monika saying to the doctor to finish her meal prior to reviewing the lady. Monika later accused me of falsifying my records and denied that I did not inform her about the decelerations and that she inform[ed] me. That is incorrect as I had kept Monika updated throughout."

18. There followed some sections emphasising her poor relations with Ms Mills by recalling previous differences of opinion and she concluded:

> "I feel very vulnerable and hopeless at present and need your support desperately"

19. We note that there is no mention of any abuse by the patient or by B, which confirms our view that no such event had taken place by that stage. We also note that she was already extremely upset. This must also have been drafted after the row with Ms Mills, which Ms Mills says took place when Ms Buckle was coming back from her break. The likely series of events appears to be therefore that Ms Buckle was coming back from her break about 3.30 am, they had this row, Ms Buckle then failed to return to the delivery room until 4.10 am and spent the intervening time processing things and sending this email.

20. At some point, and it may well have been in the course of the same exchange, Ms Buckle asked not to have to carry on dealing with these patients. Ms Mills said she would try and find another midwife, although the position was that the ward was short-staffed that evening, and Ms Buckle had to go back in. That was at 4.10 am.

21. The anaesthetist, Dr Oommen, was already there. He had come in five minutes earlier to administer an epidural. That required the patient to be still and calm for 15 minutes or so, and after explaining this to the patient and her husband they decided this was impossible. At the same time Ms Buckle was having difficulties with the CTG and getting a reliable reading. She had to press the monitor on the patient's abdomen, which may well have been painful, and that, we conclude, prompted her

partner to yell at her from close range, words to the effect that she should keep her hands off his wife.

22. Patient A was writhing around so much at this time that the cannula came out and had to be replaced, something Ms Mills had to do as agency staff are not supposed to do so. Ms Buckle was adamant that Dr Oommen was in the room at the time of the shouting incident but he did not recall it. It may well have been much less memorable for him as the anger was not directed at him, and it was part and parcel of a tense situation. In addition, he was not asked at the time for a statement, which might have helped with his recollection. We bear in mind too that at the time of this incident, Ms Buckle had already sent her email at 4.03 expressing her feelings of feeling vulnerable and hopeless and needing support desperately, over the allegation of falsifying her notes, so she may also have been particularly sensitive to any further confrontation.

23. Overall we accept that there was a shouting incident, which Ms Buckle did indeed find intimidating, although she may well subsequently have amplified the effect in her own mind. We say all that for two reasons:

    a. Shortly after her shift, she submitted her own Datix report about the behaviour of B, described in more detail below.

    b. After all this Ms Buckle did indeed go into a steep mental decline, and the various reports from her treating specialists and the expert report from Mr Acton all refer to the index trauma as being shouted at.

    c. On the other hand, the emails sent immediately after this shift and other evidence showed that her main concern at the time was over the allegation of falsifying her notes.

24. Expanding on those points, the report from Mr Acton diagnosing her PTSD describes the trauma in some detail at section 3.2 (p.465) This account is slightly at odds with her witness statement but she mentioned firstly the husband saying “don’t touch her”, then him saying that they wanted someone who spoke English, then asking Ms Mills to change room, being refused, carrying on, giving pain relief, requesting to be moved again and they the husband screaming at her “Take your hands off my wife”. This, she said, made her feel like there was a bubble around her and bricks were holding her to the floor. In context, the main trauma was this shouting incident, and that persuades us that something of the sort happened.

25. Her own Datix report (98), submitted the next day, attributes this incident to 4.08 am. She stated:

> “Patient’s husband was very aggressive towards me and shouted loudly at me, I felt the clients partner was going to hit me.”

26. Then later:

> "I informed the Labour Ward coordinator about the incident, I stated to Labour Ward coordinator that I felt intimidated by the patient's partner's behaviour towards me and I felt unsafe therefore I will prefer another midwife take over the care of this patient. I requested that the patient is allocated to another midwife.
>
> I felt very unsupported and vulnerable during the whole shift. Another midwife was not allocated to patient as I have requested."

27. This is a near contemporaneous account. It also supports the view that there was some such shouting incident, but there is no mention in that report of the comment about speaking English.

28. Similarly, when her shifts were cancelled she emailed her manager at the agency to explain things. That was on 14 July at 11.52 am. In that email she also described the partner shouting at her and being frozen to the spot with fear.

29. There was also a statement made in the course of internal proceedings by Ms Buckle's line manager at p.194. According to that, the manager (Omega) arrived at work at about 7.45 am and Ms Buckle was waiting for her and immediately broke down in tears. She said it was the worst shift she had ever experienced and she had been accused by Ms Mills of falsifying her notes. She also said that the patient's partner had been rude and aggressive towards her and Ms Mills had not been supportive.

30. The manager was supportive of Ms Buckle and so there is no reason to suppose that she has downplayed her concerns. There seem to have been three main elements – the accusation of falsification, the shouting and the lack of support from Ms Mills. But again there is no mention here either of any racial element, and neither Dr Hussain or the Dr Oommen, both of whom are of BAME heritage, were aware of any such accusation. Dr Hussain said that she was surprised to hear of the allegation and did not get that "vibe" from the couple.

31. The alleged racial element is essentially the remark about wanting to be looked after by staff who spoke English. That is how Ms Buckle phrased it the next day in her email to the agency. The first record of it is in the patient's notes. It is clear from them that the period from 4.10 to 5.10 was very busy. During that time, Ms Morgan was relieved and Ms Buckle was the midwife responsible but unlike Ms Morgan made no contemporaneous notes. Some notes were made by Ms Mills at 4.20 and 4.25 and then by Dr Hussain at 4.40, all about the proposed epidural and care plan, but the first entry by Ms Buckle comes later, is stated to be at 4.05 and starts "Writing in retrospect". (She was not in fact in the room at 4.05). This entry states that the patient was "very very very distressed", that there was concern over the difficulty in monitoring the baby, that the CTG was decelerating, that she told the shift leader to inform the doctor. This seems to us another attempt to rewrite things.

32. There is then an authentic record made at 5.00 by Ms Mills, followed by further entries

by Ms Buckle starting "Again writing in retrospect". And then she apparently records a blow by blow account of events from the previous hour, and records there that the partner shouted at her, and that the patients said they wanted to be looked after by people who spoke English.

33. These notes were clearly made at a time when Ms Buckle was upset, and wanted to be taken out of the room, and was concerned about losing her placement, so the claim about the English speaking remarks has to be seen in that context. Again, it was not mentioned in her own Datix report, or noted by the doctors, and Ms Mills had no recollection of this either; it was not mentioned to Omega in the morning, and is the sort of allegation that would be important to note at the time. It is clearly a serious issue and we find it difficult to imagine that Ms Buckle would not have made more of it and that Ms Mills would simply have ignored it if it had been brought to her attention.

34. Mr Brown cross-examined Ms Mills about these notes, and asked her which parts she objected to, in the context of the falsification allegation. In reply she referred only to the earlier notes from about 1.30 onwards, and some crossing out at the end. He submitted that she therefore accepted all of the rest of the contents as true and accurate, including this comment, but in fact when he put to her that the claimant told her about "English speaking" comment, she said that the first she heard of this was when she went to Omega's office to see Ms Buckle after the shift. Since Ms Buckle claimed that the anaesthetist was present at the time she went to speak to him and he did not recall this – he just said they were not just rude people. The fact that she went away to check is also an indication that this is the first she had heard of it.

35. Drawing these threads together, given the weight of evidence from the respondent's witnesses, the lack of any consistent complaint at the time about this issue and the questionable nature of the patient records in which it makes its appearance, we prefer the view that no such comment was made. The thrust of all her complaints and comments at the time was about the shouting incident and of not being supported by Ms Mills.

36. If we are wrong about that for any reason, we are satisfied that Ms Mills was not aware of this comment until the shift had ended, long after the accusation of falsifying records had been made. Even in her own email account to the agency the next day, Ms Buckle said that she told Ms Mills about the shouting, but made mention of telling Ms Mills about any such comment.

37. Ms Mills escalated her concerns to Ms Jeffries after the end of the shift at about 7.30. Ms Jeffries also made an initial statement as part of the internal investigation (p.193). She took the concern about falsifying records seriously and there is no mention in her statement either of any racial comments. She then notified the agency later that morning of the decision to suspend shifts. Again, we find that she knew nothing of any alleged discriminatory comment.

38. The last factual issue is the further request made by Ms Buckle to leave the room. At some point after the shouting issue Ms Buckle spoke to Ms Mills outside the delivery room and asked to be relieved. That was not immediately possible and Ms Buckle went back in. Ms Mills joined her a little later and then took B to one side and said that there was no need to shout at staff. He shouted back at Ms Mills and said that he had already apologised to Ms Buckle. Whether he did or not is unclear, but Ms Mills was making efforts to defuse the situation while she juggled her resources.

39. The ward was very short staffed that night. Ms Mills had one Band 6 midwife in the High Dependency Unit and could not use Ms Buckle in there as an agency worker, and one in Triage, which she was not able to do either. Her third Band 6 midwife was already looking after two patients so there would have been more to hand over, and there had been a recent issue about too many changes of midwife. Ms Morgan was however going to become available in due course.

40. When this became apparent a further conversation took place between the patients and Ms Mills about this. Again, Ms Buckle was not in the room. Ms Mills asked if they were OK with Ms Buckle and they said that words to the effect that she was lovely but they had a better rapport with Ms Morgan. Ms Mills then arranged to bring Ms Morgan back into the room. However, she also wanted Ms Buckle to stay in the room because she was more experienced and this was a high risk patient. Ms Morgan was a Band 5 midwife and so less experienced. She was also just back from her maternity leave and had had a year off, and since her return she had only done three shifts.

41. Further, by then - 5.10 am - patient A was fully dilated and they expected that the delivery would start imminently. As it happened, it took about two hours longer and she had to be taken to theatre for a caesarean section. Hence, Ms Buckle remained in the room although Ms Morgan was looking after the patient with her on hand and taking notes.

42. We are perfectly satisfied that Ms Mills made genuine efforts to find another midwife to replace Ms Buckle after the shouting incident. Before then, there was no real cause for concern but she tried anyway. And her decision to require Ms Buckle to stay in the room after 5.10 was for sound medical reasons, given Ms Morgan's relative inexperience and the risk to the patient. She had also taken steps to ensure that there was no fear for her safety by then.

43. It is not necessary to make any detailed findings about how the Trust handled this incident. Ms Jeffries carried out a largely informal investigation and the decision not to offer further shifts was upheld. Ms Buckle independently reported her concerns to the Freedom to Speak Up Guardian. She was advised to put in a grievance, then told that it would be treated as a complaint. It was ultimately addressed by Ms Urben, the Divisional Chief Midwife. She was sympathetic to the allegation of shouting and felt that Ms Mills should have removed the claimant from the room. She added that Ms Mills agreed that she could have explained her rationale better at the time and

apologised for not being able to allocate her to another patient. We also note that she stated in her letter:

> "I have also reminded all team leaders that shouting at the staff is not an acceptable behaviour and that there is a clear escalation process for support and advice if they need any assistance".

44. As to the falsification of records, this was a serious allegation and Ms Urben was surprised that this had not been investigated more thoroughly. Her view was that there was no evidence of falsification.

45. We also found it surprising that that aspect had not been the subject of a more thorough process. Ms Jefferies, who has now left the Trust but agreed to return as a witness, explained that the general procedure with agency staff was simply to inform the agency and cancel their further shifts. It was only about a week later that she took advice from HR about how to handle the situation, which was essentially to do an informal investigation. That does not seem to us the appropriate course of action. If there is any allegation of clinical malpractice, certainly one which might have professional consequences, it does not seem to us satisfactory for the agency to be expected to investigate it since all of the witnesses and resources will be in the hands of the trust. However, it is clear from Ms Urben's detailed letter of 26 December 2017 that the main concern was over Ms Buckle being shouted at, and although by then Ms Buckle said that there was a racial motive, there is no suggestion that Ms Mills knew of this, or had failed to support her knowing that they were being racist towards her, let alone that Ms Mills had any discriminatory motivation herself.

46. Finally, we would add a few words about the claimant's mental health. This deteriorated gradually over the next few months. In September 2017 she was referred to the Mental Health Team with concerns about being verbally abused by the husband and possible PTSD. Sadly, it is clear from Mr Acton's report that there are background circumstances which also go to explain this serious decline in her mental health, for which this incident was the trigger, but the sharp decline alone does not mean that there was a racial component to the mistreatment she suffered from the patient's husband.

Applicable law

47. The applicable provisions of the Equality Act are as follows:

13. Direct discrimination

(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.

19. Indirect discrimination

(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.

26. Harassment

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

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

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

(i) violating B's dignity, or

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

27. Victimisation

(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—

…

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

48. There is also a particular provision dealing with the burden of proof:

136. Burden of proof

(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.

49. This was considered recently by the Court of Appeal in *Ayodele v CityLink Limited [2017] EWCA Civ 1913*, where the Court reasserted the view that this involved a two-stage approach: in the first stage the claimant has to prove facts from which the Tribunal *could* conclude, in the absence of an explanation from the respondent, that discrimination had occurred; and if so, there is a second stage, when the respondent has the burden of proving that this was not the case, in fact that the mistreatment was not to any extent tainted by discrimination.

50. However, Tribunals are also cautioned against the risk of getting bogged down in technicalities. Mr Justice Elias in *Laing v Manchester City Council and anor 2006 ICR 1519, EAT* held that their focus 'must at all times be the question whether or not they can properly and fairly infer… discrimination.'

51. Similarly, in *Chief Constable of Kent Constabulary v Bowler EAT 0214/16* Mrs Justice Simler (then President of the EAT) emphasised that: 'It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'

52. We shall attempt to adopt this approach and our conclusions follow straightforwardly from the findings we have just made.

Conclusions

53. The allegation of less favourable treatment is that Ms Mills insisted that the claimant returned to the patient's room following abuse. We have found that that abuse – the shouting incident – occurred shortly after 4 am. Technically speaking therefore the claimant did not return to the room but simply remained in it as her main role for the rest of her shift. Given our main finding that there was no such racially motivated abuse it has to follow that the decision that she remain in the room was not on grounds of her race. That view is reinforced by our further finding that Ms Mills knew nothing of any racial connotation. The difficulty in finding a replacement was more than adequately explained by the lack of suitably qualified staff on the night in question and the need to ensure the safety of the patient and the baby.

54. The allegation of harassment is very similar. It is that she was returned to an environment in which she was suffering racially motivated abuse, despite repeated

requests to be moved. On our findings she was not suffering such abuse and therefore this cannot succeed for the same reasons.

55. The allegation of victimisation involves a total of four 'protected acts", the main one being the Datix report. To be a protected act it is necessary that there is an allegations that someone has contravened the Equality Act 2010. Simply put, of the three written complaints referred to, none of them makes any such allegation. For that reason no doubt Mr Brown applied to amend the claim during the course of the hearing to add an allegation that the claimant made a verbal complaint to Ms Mills that the patient or her partner wanted a midwife who could speak English. Again, for the reasons already explained, we do not accept that any such remark was made, let alone that she told this to Ms Mills.

56. The final complaint is of indirect race discrimination. The basis of this complaint is that there was a provision, criterion or practice (PCP) of insisting that midwives return to the care of patients assigned to them notwithstanding any abuse they may have suffered. Further, this placed BAME people generally at a disadvantage since there are more likely to encounter racial abuse. It is for the claimant in such cases to show that there was such a PCP. Here again, that allegation cannot succeed. We have already quoted from a letter from Ms Urben to the effect that shouting at the staff is not an acceptable behaviour and that there is a clear escalation process for support and advice if they need any assistance. It would be highly surprising if any other view was taken. We were not provided by the claimant with any relevant policies or procedures indicating that staff are expected to put up with abuse. At its highest, Ms Mills appeared to accept that shouting by patients or their partners was something of an occupational hazard on a labour ward but it is clear from her actions that night that she did make efforts to relieve Ms Buckle even before the shouting incident, simply on the basis that they were an unpleasant couple and she did not mind working with them. As approved, given the constraints on staff members, she was able to accommodate that request. But that is very different from establishing that there was a policy or practice that such requests would not be complied with and she would be required to return to deal with these particular patients, let alone to face abuse.

57. Indeed we see no reason to believe that if there had been racial abuse and it had come to Ms Mills' attention, that she would not have dealt with it more firmly. She gave some evidence about what she might do in an extreme circumstance and this included calling security to remove the partner and ultimately taking over the delivery herself although that would of course carry risks for other patients on the ward. In practice, this was a very difficult shift and there was an incident of shouting. She stepped in to deal with that directly and made arrangements to remove the claimant from having to deal with this couple, but given the high risk category of this patient felt unable to dispense with her services altogether.

58. Given that serious risk to patient and baby, it also seems to us inescapable that if we are wrong for any reason in our conclusions about the existence of this PCP, that the

Trust would be entitled to succeed in its justification defence on the ground that the overriding priority is to the health and safety of the mother and baby.

59. This is therefore a particularly unfortunate case given the profound effect it has had on Ms Buckle, but on the evidence presented we are satisfied that this was not the result of any discrimination against her on grounds of race and so the claim must be dismissed.

Employment Judge Fowell
Date 03 October 2019