



EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 4 to 11 December 2023

Claimant: Mrs Francisca Holmes

Respondents: Lewisham and Greenwich NHS Trust

Before: Employment Judge E Fowell
Mr M Simon
Mr F Benson

Representation:
Claimant Winston Brown, Solicitor, of Brown & Co. Solicitors
Respondent Camille Ibbotsen of counsel, instructed by Capsticks LLP

JUDGMENT

The unanimous decision of the tribunal is as follows:

1. The claimant's resignation did not amount to a constructive dismissal as there was no fundamental breach of contract by the respondent.
2. The complaint of harassment on grounds of religion is dismissed
3. The complaints of discrimination on grounds of race or age are dismissed
4. The complaints of detriment at work for making a protected disclosure are dismissed on the basis that the claimant did not suffer any detriment for raising concerns.
5. The complaint of automatically unfair dismissal for making a protected disclosure are dismissed.

REASONS

Introduction

1. These written reasons are provided at the request of the claimant following oral reasons given at the hearing. The request for written reasons was made on the last day of the hearing but only passed on yesterday, 23 January 2024.

Fortunately written reasons had already been prepared during the hearing, as set out below.

2. By way of background, Mrs Holmes worked as a staff nurse until her resignation on 18 August 2021. By then a number of issues which had arisen between her and one of the ward managers, Ms Jean Firaza, and a grievance process had been underway for about six months. That grievance covered issues going back to the death of a patient with Covid in May 2020. Mrs Holmes says that she raised concerns about this incident at the time and so was a whistleblower, and that from then on her relationship with Ms Firaza became more difficult. She also says that she suffered unfair treatment of one sort or another because of her age or her race; she was 58 at the time of her resignation and describes herself as a black person of African ethnicity. The main ethnic groups at work were those of African and Filipino background. Ms Firaza is from the Philippines and was 29 at the time.
3. The complaints presented are therefore as follows:
 - (a) constructive dismissal
 - (b) automatically unfair dismissal for making a protected disclosure
 - (c) detriment at work for making a protected disclosure
 - (d) direct discrimination on grounds of race or age, and
 - (e) harassment on grounds of religion
4. The issues to be decided are set out in an agreed list of issues and so need not be repeated at the outset. We will return to them shortly.

Procedure and evidence

5. We heard evidence from Mrs Holmes, and on behalf of the Trust from:
 - (a) Ms Firaza, who is now a Matron
 - (b) Mr Rodney Katandika, the Matron in charge of the ward at the time
 - (c) Ms Ann-Marie Coiley (Head of Nursing, and at the time Senior Matron for the Medical Wards) who commissioned the grievance investigation: and
 - (d) Ms Lucie Kabatesi (Matron in the Acute and Emergency Medicine Department) who investigated the grievance.
6. There was also a bundle with about 1100 pages of documents. Having considered this evidence and the submissions on each side, we make the following findings of fact.

Findings of Fact

Background

7. The events in question took place at the Queen Elizabeth Hospital in Woolwich. Mrs Holmes started there as an agency nurse in 2018 and became a permanent member of staff in June 2019. She was a Staff Nurse at Band 5 and assigned to Ward 22, a newly established ward with about 40 members of staff. These included Health Care Assistants, Staff Nurses at Bands 5 and Band 6 and several others. The two ward managers, Ms Firaza and Ms Thurdy Campbell, reported to the Matron, Mr Katandika. Two ward managers is not enough for round-the-

clock cover so when neither of them was on shift one of the Band 6 nurses would be designated as the nurse in charge.

Lockdown began

8. During March 2020 the first national lockdown began, a time of enormous pressure and anxiety for frontline medical staff. Ward 22 was changed into a covid ward, taking patients who were discharged from intensive care. Mrs Holmes, like all her colleagues, found herself dealing with the risk of infection every day and with very sick patients, including some deaths.
9. Many of the normal admin and managerial processes had to take a back seat for the next few months as the staff struggled to care for so many seriously ill patients. Covering the shifts and planning the rotas also became much more difficult. Staff frequently had Covid themselves or were self-isolating.

The death of patient MS

10. By May 2020, on a typical day, there might be several deaths on the ward. One of these was a patient called MS. On 17 May Mrs Holmes came on duty at about 7pm for a night shift. She looked at the white board to see which patients she had been allocated and there were four of them. She then had a handover on each patient. All seemed to be in order. Shortly afterwards however one of the Healthcare Assistants came running to tell her about MS. When they went in they found that she was not breathing. Mrs Holmes had expected to find her with a tube in her right nostril through which oxygen was being administered but there was no tube. She simply had a face mask attached to a machine, known as a nebuliser, which supplies a mixture of air and oxygen. But the mask was lying on her pillow. Mrs Holmes went to find the Charge Nurse, Mr Malabuyoc and told him what had happened. She was concerned that the patient should have had an oxygen tube inserted and had not been given enough oxygen. They agreed that the patient was not breathing, left the bed flat and left the bay. Shortly afterwards a doctor certified her as dead.
11. Neither ward manager was at work that night, but Mr Malabuyoc messaged Ms Firaza anyway and she told him to get a statement from the nurse who had been dealing with the patient and to document how the patient was found. That statement was provided [564] that evening, even though the nurse had gone off duty. She emailed Mr Malabuyoc and explained that the patient had been very chesty and vomited during the day and that her oxygen level had been low, so they had changed her nasal cannula to a mask with a high flow of oxygen, then monitored the oxygen level as it returned to the target level; the patient had been calm by the time her shift ended.
12. A report [1314] was completed by Mr Katandika two days later, by which time he had obtained further information. He recorded that the patient had been admitted with shortness of breath, had been agitated and restless and had kept removing her face mask. She had vomited and then been aspirated as her oxygen saturation levels had come down but had later become more unwell. His conclusion was that this local investigation was all that was indicated, that staff could not have done anything else to avoid her death, but they could perhaps have been there for her as she passed away.

13. We heard nothing to cast doubt on those conclusions or to suggest that this local investigation was not the appropriate course of action. We also heard evidence that a doctor attended the patient at 6.45 pm and approved the use of the nebuliser. In his evidence to us, Mr Katandika explained that MS was very ill on arrival and that for patients like her, with a chronic lung condition, too much oxygen can also be harmful and there was a target level of oxygen to be achieved. That matched the account given by the patient's nurse on the night. She stated that they had achieved this level by the end of the shift. It appears that shortly afterwards the patient took a turn for the worse but the hospital was not able to maintain constant one-to-one attendance for each patient at that time and so they were unable to prevent her death. For the avoidance of doubt there was nothing to suggest to us that the level of oxygen provided to MS, or the method of administering it, was at fault.
14. That does not prevent Mrs Holmes being a whistleblower but it is important to be clear about what she said or disclosed at the time. Nothing was put in writing, so this claim is based on what she told Mr Malabuyoc that night. Based on his account during the later grievance investigation, we accept that she raised a concern about a lack of oxygen being administered to the patient, even though we have concluded that that concern was misplaced.
15. Ms Firaza had little or no involvement in the unfortunate death of this patient. She simply had a call and then an email from Mr Malabuyoc on the night in question. When she returned to work two days later the report was being dealt with by Mr Katandika and she was not even aware that Mrs Holmes had been involved.
16. Nor did Mr Katandika see any need to speak to Mrs Holmes to get her account. He was not aware of any whistleblowing concern on her part and he would have been able to get the information he needed about how the patient was treated and found from the HCA or from Mr Malabuyoc, or the doctor in question.

Band 6

17. On the day after this sad event, 18 May, Mrs Holmes started an 8 month secondment as a Band 6 nurse. This was meant to be a period of development and training so that at the end she would be in a much better position to obtain a full-time Band 6 role. Her colleague Ester Lewis was also offered this secondment.
18. There was no formal training requirement but Mr Katandika wanted there to be monthly meetings with a ward manager where they would go through the various tasks set out in a competency book she was issued. Unfortunately, in the first wave of the pandemic, this was just not possible.
19. On 28 June 2020 there was a disagreement on the ward between Mrs Holmes and Ms Firaza. Ms Firaza overheard Mrs Holmes giving a handover to another nurse and then took her to task for giving the oncoming nurse a body map of the patient's injuries without having seen them all – something that would involve removing or partially removing bandages. Mrs Holmes took great exception to the way she was spoken to, and said so in an email to Ms Firaza about a week

later [574]. They discussed it, and as Mr Katandika described it, they 'hugged it out' at the time, so he thought no more about it.

20. We do not need to resolve the rights and wrongs of this incident since it is not in the list of issues, although that itself is surprising. It is the first of several occasions when Mrs Holmes has been unhappy at the way she was spoken to or treated at work, which have not been included in the list of issues. By contrast, many of the incidents which do appear in that list seem much less significant. The common factor in each of the excluded cases is that Mrs Holmes was to some extent being criticised.
21. Mrs Holmes and Ms Firaza then met on 20 July to review Mrs Holmes' progress and to go through the competency book together. Far from recording any criticism, in each task or area Ms Firaza has recorded a letter 'I' for Independent, indicating that Mrs Holmes was already working independently at the required level [838]. The meeting was quite brief however and no other comments are recorded.
22. The following month, on 28 August, Mrs Holmes had her annual PDR meeting. This was with the other ward manager, Ms Thurdy Campbell [589]. Ms Campbell was also very positive about her, starting her report with the words,
 'Fran is a very caring and compassionate individual who takes great pride in her work as a competent member of staff'.
23. At the end of the report [593] objectives were set, and Mrs Holmes expressed an interest in learning more about male catheterization, leadership and management and about diabetes.
24. There was a box on the form to record any discussion about flexible working and this states, 'Yes but not an option at this time'. That was presumably a reference to Covid, which had had a profound effect on the roster. Although Mrs Holmes had had an initial informal agreement or arrangement that she would work a certain pattern, it had not been possible to keep to it for some time. The pattern was to work three long days – 7 to 7 – on Monday, Tuesday and Wednesday then to work nights on the same days the week after. She also worked extra shifts as part of the bank staff, often at the weekends.
25. To illustrate the extent of the disruption caused by Covid, at the start of lockdown Mrs Holmes worked 21 back to back shifts, an extraordinary number. That no doubt reflected the acute need for nursing staff and her own dedication. Things then began to return to something like normal but as the pandemic wore on more and more staff were having to self-isolate or had covid themselves. Rotas, which were normally prepared six to eight weeks in advance, had to be changed and changed again at short-notice. Band 6 nurses were particularly affected as there were fewer of them and at least one was needed for every shift.
26. Despite all this, Mrs Holmes' original pattern was still discernible in the roster records for 2020 although the days of the week might vary, or the number of days. She was still doing extra bank shifts, so the number of shifts did not appear to be a problem, and she was continuing to be flexible about when she worked.

27. In early September, Esther Lewis was offered the chance to do a course on Cardiac Nursing but declined it. Mrs Holmes was unhappy that it had not then been offered to her but this was something that Ms Lewis she had expressed a preference for in her PDR. (Esther is also of African heritage and about four years younger than Mrs Holmes.)
28. Then on 26 September there was another of those incidents which seem to have caused a good deal of upset at the time but which do not appear in the agreed list of issues. Mrs Holmes gave a handover to Ms Firaza at the end of her shift, having set out information about each patient on the white board, and afterwards Ms Firaza wiped it all off. There was only a small space for each patient and Ms Firaza wanted to keep it free, not full of old information. That was the way she worked. But Mrs Holmes felt affronted. In fact, she had formed the view by then that Ms Firaza wanted to see the back of her.
29. On 13 October Mrs Holmes had a longer meeting with Ms Firaza to go through her competency book. Mr Katandika attended too, at his request, because he was aware that there should have been more meetings and he was keen to support Mrs Holmes' development. He took the notes, which were all very positive [1315]. He asked Mrs Holmes to give some examples of her strengths and weaknesses, which are recorded. The weaknesses were minor – dealing with difficult patients plus some technical or audit points, such as how to use an app called *Perfect Ward*. Mrs Holmes had not brought her competency book to the meeting so later on, after Mr Katandika had typed up his notes, Ms Firaza had to write them in by hand in the comments section [844].
30. A week later, on 19 October, Mrs Holmes went to see Mr Katandika. By then she was firmly convinced that Ms Firaza wanted her out. It is difficult to understand why she thought so but that is what she told him. She even recorded the meeting in secret to see what he said about it.
31. That recording was only disclosed on the third day of this hearing. The Trust did not object to its use, and since one of the allegations is that Mr Katandika discriminated against her on grounds of age and race during that meeting we concluded that it was too important to refuse. Having listened to the 10 to 15 minutes of rather muffled conversation the tenor of the discussion at least is clear. Mr Katandika was at pains to reassure Mrs Holmes that Ms Firaza did not want her to leave. He encouraged her not to take offence at the feedback she had received but instead to reflect on it and to use it as a positive. He was calm and professional throughout.
32. Afterwards Mrs Holmes used several of these comments in her grievance [789] but it is difficult to understand why. The first was “don't think she doesn't want you here” which is self-explanatory. The last was “dig deeper” which he explained in evidence as him encouraging her to reflect on her practice and on the feedback she had received from Ms Firaza. Having set out these comments in her grievance Mrs Holmes adds,
“Perhaps Rodney could shed some light on the above seeming [sic] he knows why Jean did what she did and he did nothing to stop or correct it...”

33. Indeed her subsequent claim form in May 2021 starts with the words,
“I have continued to reflect as Rodney’s words (“dig deeper”) continue to ring in my ears.”
34. She seems to have interpreted this as a coded message to the effect that there was an alternative explanation for her difficulties with Ms Firaza, namely her whistleblowing allegation, but having listened to the conversation we can see no basis for that interpretation at all.
35. Mr Katandika continued to be a supportive manager, even attempting to obtain a pay rise for Mrs Holmes on 5 November 2020. In the relevant form he stated that:
“She has proven to be dependable, a vital team player acknowledged by patients and staff, including the Clinical Director of Acute Medicine. I have heavily depended on Francisca to mentor and teach the junior staff, as most of the workforce on Ward 22 are recently qualified, or are overseas nurses.”
36. On 24 November 2020, Mrs Holmes submitted a Flexible Working Request [621]. Unusually however it was not a request to change her hours, it was request to stick to the existing agreement i.e. that she worked three long days on Monday, Tuesday and Wednesday followed by three nights on Monday, Tuesday and Wednesday the week after. She stated on the form that
“Since taking up the band six position my shifts become staggered making it impossible to balance my work and home life.”
37. Essentially therefore this was a complaint and Mr Katandika appears to have treated it as such. Certainly it did not lead to the usual process of a meeting to discuss the request and a written outcome. A meeting would perhaps have been helpful but it seems that nothing was formal done about it. Ms Firaza was not made aware of it at all, and as ward manager she was involved in the rotas.
38. We have looked at the shift records in some detail to see if the original shift pattern was being accommodated. It is a confusing picture. The rotas are done about 6 to 8 weeks ahead, so a sudden change would not have been easy. The request was made about a month before Christmas, which has a disruptive effect on the roster, and then Mrs Holmes was off sick for a while before taking some carers leave, then holiday, after which she was off more often with work-related stress. She then moved to a different ward in March. So, while Mrs Holmes’ working pattern did not fit rigidly into the shifts she preferred, there was no settled period in which to assess it fairly. There was no follow-up from Mrs Holmes about this request either, and overall it seems to us that her preferred dates were used where possible.
39. In December there were some away-days planned as part of a team-building exercise. Ms Firaza was behind this initiative and she had obtained permission for two days, on 7 and 9 December. She asked if Mrs Holmes could attend either of them but she was away on leave. Subsequently a third day was added, on 14 December, but again Mrs Holmes was down to do a night shift. Ms Firaza rang her to see if she would like to do the away day instead. Mrs Holmes told her that she had in fact already been on the 7 December event, despite being on holiday at the time, because some others had encouraged her to take part. Ms Firaza

was pleased to hear it and arranged for Mrs Holmes to have that day reimbursed to her as holiday.

40. As just mentioned, in the New Year Mrs Holmes took the first week of January as holiday and then her husband became ill with Covid. As a result she was self-isolating for the following week. As her return date approached she asked Ms Firaza if she could have some carer's leave so that she could look after her husband and Ms Firaza said yes. She forwarded to her a copy of the Special Leave policy for good measure [637]. In fact that policy mentioned some alternatives, including taking the time as annual leave or making up the hours later on. Ms Firaza was unaware of this and did not suggest either option. It seems that Mrs Holmes did not read about these options either, so she simply had a further week off work on an unpaid basis and returned to work for the first of three long days on Monday 1 February. (The following week she did two shifts on the Monday and Tuesday too, in accordance with her preferred rota, but this was then interrupted by a period of sickness starting on 10 February.)
41. During that period of absence in January there was another small incident which took place on Sunday 10 January 2021. Mrs Holmes had been due to work a long day on Monday 11 January (again in accordance with her preferred shift pattern) but Ms Firaza sent her a WhatsApp message to cancel it. As we understand it, that was at Mrs Holmes' request. Mrs Holmes chosen username on WhatsApp was
'Psalm 91 and God is With Me'
and that is the name that Ms Firaza used in the message. She simply used the '@' key followed by the username, just as he did in the same message to another colleague on the group chat – 'Dora Ward 22'. Mrs Holmes complains about this use of her username and it now forms an allegation of harassment on grounds of religion.
42. Also during this period of absence, on 18 January 2021, Mrs Holmes' eight month secondment came to an end. She was aware that it was for a fixed period but she was not notified or reminded of this the time and so she reverted to Band 5 without any mention of the fact. It also followed that her pay for January was slightly less than it would have been, although the pay differential is modest - just £750 gross for the year, or about £60 per month. Her friend Ms Lewis was also in the same position and she emailed Mr Katandika saying that she felt disappointed and disrespected. Mr Katandika responded to them both [642] to apologise and to say that they would shortly be advertising for a Band 6 post and that he wanted them both to apply.
43. On her return to work in February Mrs Holmes found the notes of her last meeting with Ms Firaza written up in her competency book. She then went off sick on 10 February, this time with work-related stress. The following day Ms Campbell sent a surprising email to Mr Katandika and Ms Firaza expressing her concerns about Mrs Holmes [648]. She also copied it to Mrs Holmes. In it she set out her view that Ward 22 had become a less hospitable environment, that there was a lack of civility at daily huddles. She added in particular:
'I love Fran. She is a hard-working talented and dedicated staff. It pains me to see the hurt she is experiencing at present.'

44. She clearly felt that Mrs Holmes was not being treated well although there does not appear to have been any particular incident that day to prompt this concern. Mrs Holmes makes no mention of anything untoward and it seems that Ms Campbell simply observed her being or seeming unhappy. Mr Katandika spoke to Ms Campbell about this message (including him and Mrs Holmes in the message was not perhaps the ideal way to deal with a such a concern) but he too was concerned about Mrs Holmes. He did not want to send her an email while she was signed off sick but he did send one within five minutes of her return to work for her next night shift on 17 February, asking if you would like to meet to discuss things. She did not, or at least she did not take up his offer.
45. During the preceding week the Band 6 post had been advertised. Ms Lewis had applied for the post and had been successful but Mrs Holmes had decided not to apply. Asked at this hearing why this was, she said that there would have been no point given the comments in her competency book. We struggle to see why that was. The comments were overwhelmingly positive and state that she met all the requirements of the role.
46. On her return to work on 17 February Mrs Holmes was allocated six patients for her night shift. This was done by Ms Firaza. There had been discussions about how many patients are allocated to nursing staff and whether it should be done by the number of beds or the number of patients or the degree of care needed by the patients. Mrs Holmes preferred the more traditional method of allocating by beds. On this occasion, to meet that preference, she was allocated six beds, six being the usual number. Later, however, Ms Campbell (the ward manager that night) took one of the patients away from her, feeling that she was overloaded.
47. Mrs Holmes lodged her formal grievance that day [660]. It did not set out any particulars but it listed her concerns under various headings: (1) her agreed hours of work, (2) bullying and harassment, (3) Covid awards - a complaint which was later withdrawn - (4) her exclusion from training, (5) carers leave, (6) discrimination and (7) the Band 6 role. The grievance was sent to Ms Coiley, the Head of Nursing.
48. Subsequently, presumably on request, she completed the Trust's formal grievance form [671] but that did not add any further details. She then expanded on these points at a meeting with Ms Coiley on 25 February 2021. It was a formal meeting, with a colleague from HR present and Mrs Holmes' TU representative, and there was an initial discussion of these headings.
49. In this meeting she mentioned the death of patient MS for the first time. One curious feature - and it was not a point explored at this hearing - was that she began with the words [675] "Jeany was there." That is a clear reference to Ms Firaza, who of course was not there. That is not disputed. But in this initial recollection of events Mrs Holmes said that Jean went through the handover then called Mrs Holmes over to see the patient and when Mrs Holmes got there she was 'shocked beyond belief', seeing that the patient was being nebulised on air and not on oxygen. It follows that Mrs Holmes reimagined this occasion as one at which Ms Firaza was present and where Mrs Holmes expressed her shock and

concern directly to Ms Firaza. We do not suggest that Mrs Holmes was deliberately misrepresenting things but it does show the fallibility of memory.

50. The day after that meeting there was a further incident at work when Mrs Holmes had a disagreement with a colleague, Aileen Duriano, over a handover. Ms Duriano accused her of leaving without giving a handover, something which Mrs Holmes disputed. Immediately afterwards Mrs Holmes went off sick for a further week with work-related stress.
51. On 5 March Ms Firaza made a welfare call to her. In that discussion Mrs Holmes asked her to make sure that her absence was being recorded as work-related stress. Ms Firaza looked at the menu of options for recording absences, and the only relevant option that should could select was one that covered psychological illnesses, mental well-being etc., and which was abbreviated on the system to 'psyche'. That is therefore how it appeared on the team roster, something other members of staff could see.
52. While she was off Mrs Holmes provided additional information to Ms Coiley about her grievance in the form of eight appendices, the eighth of which related to the death of MS.
53. On her return to work on 16 March Mr Katandika spoke to her about the disagreement with Ms Duriano and the importance for patient safety of a proper handover. She was back at work that week, working Monday Tuesday and Wednesday, but the following week from Saturday 20 March she was off sick for about four weeks, returning on 18 April.
54. During that four-week period various steps were made to progress her grievance. Ms Kabatesi was appointed as the grievance investigator. She had considerable experience in this area and it was felt that she had the time to devote to it although this was in addition to her main role as matron in the Emergency Department. Terms of reference for the investigation were set out for her which followed the additional detail provided at the meeting Ms Coiley had held.
55. Also during that absence Mrs Holmes complained to Ms Firaza that she had not been put down to work on either of the May Bank Holiday Mondays. It may well be that Ms Firaza assumed that she would want this as holiday but the request was actioned and she worked both days.
56. It was also decided that during the investigation it would be better if Mrs Holmes was working in a different ward and so she was transferred to Ward 18. Consequently her return to work on 19 April involved a period of induction and orientation there. She never returned to Ward 22.
57. On 20 April she was invited to an investigation meeting by Ms Kabatesi and on 24 April she sent Ms Kabatesi some additional complaints, including mention of the disagreement with Ms Duriano and the fact that she had been spoken to by Mr Katandika as a result.

58. Her investigation meeting with Ms Kabatesi took place on 27 April 2021. Again she was accompanied and again there was a note taker present. It was a meeting which lasted for about six hours, at which point they had to adjourn. It had not been possible to cover everything and there was little or no discussion of the incident with MS.
59. Shortly after that, on 4 May, Mr Katandika sent round an email announcing that Jean Firaza had been successful in obtaining a promotion to Matron and would be leaving shortly to take up her new role at Lewisham hospital. That did not go down well with Mrs Holmes however and she raised it in her second meeting with Ms Kabatesi on 10 May 2021 [798], complaining about its unfairness and suggesting that the Trust had a culture of promoting people who hurt others.
60. In that meeting they went on to discuss the death of MS, but this time Mrs Holmes did *not* suggest that Ms Firaza had been present. It may be that by then she had seen some of the original documentation about this incident and realised that Ms Firaza had in fact been telephoned at home.
61. On 16 May 2021 Ms Firaza provided her written response to the grievance (809+). She dealt with the allegations set out in the terms of reference and discussed at the six-hour meeting, so she was not asked to comment on the death or treatment of MS and did not do so.
62. This was followed on 21 May 2021 by a letter from Ms Holmes to Ms Kabatesi with further details of the grievance and additional complaints [818]. For the first time this made mention of whistleblowing i.e. that she had been mistreated as a result of raising a concern:

“... I, for nearly one year suffered the detriments of whistleblowing against a Phillipino nurse ... which I reported to my Phillipino charge nurse (Rey), who rang our Phillipino manager (Jean) at home on 17 May 2020.”
63. Again, and for the avoidance of doubt, Ms Firaza was entirely unaware of any such allegation or that Mrs Holmes regarded herself as a whistleblower. The same applies to Mr Katandika.
64. This further information was followed a few days later, on 24 May 2021, with Mrs Holmes' first ET1, which opens with the reference to being told to 'dig deeper'.
65. After that there were no significant exchanges for several weeks. Mrs Holmes found out on 15 July Mr Katandika had emailed all of the staff on Ward 22 for feedback on his management as part of a 360° feedback exercise. By then Mrs Holmes had been on Ward 18 for about three months and Mr Katandika had taken her off the distribution list. It was not a case of him trying to avoid any feedback from her.
66. The final incident before Mrs Holmes resigned was on 24 July 2021. That day she was late for work. She had not been sleeping well and slept in. She should have been in work for 7 o'clock but by 08.28 Ms Coiley recorded her on the E-roster as having “unpaid unauthorised leave.” There was nothing sinister about

this, it simply meant that she would have budgetary scope to get an agency nurse in for the day. She followed it up with a text message to Mrs Holmes stating:
“checking if okay as haven’t arrived on shift and phones going straight to voicemail.”

67. Shortly afterwards she got a message that Mrs Holmes was on her way into work and Ms Coiley cancelled the unpaid unauthorised leave request. Confusingly perhaps that generated an automatic email from the E-roster to Mrs Holmes stating
“The leave starting on 24/7/21 for one-day has been denied.”
68. Finally, Ms Coiley said a further text stating
“I know you’re on your way thank you”.
69. Mrs Holmes therefore arrived late but was paid in full for the day and suffered no adverse consequences.
70. The following week there were some further investigation meetings concerning those present on 17 May 2020 but nothing was done to keep Mrs Holmes informed about the progress of the investigation. Nor in fact did she enquire. On 18 August 2021 she simply submitted her resignation [873]. In her letter she gave four reasons:
 - (a) Her agreed shift pattern had not been adhered to
 - (b) It had taken almost 6 months to investigate her grievance
 - (c) She had been excluded from the 360 degree feedback exercise, and
 - (d) A request for annual leave had been put in for her without her consent and then denied – a reference to the events on the day she was late.
71. Ms Coiley responded promptly to say that she was very sorry to receive her email and said that she would look into those issues as soon as possible. She offered Mrs Holmes the chance to meet to discuss those concerns. Initially Mrs Holmes was only willing to have a meeting unless a long list of senior managers at the Trust were present, including Thurdy Campbell, but Ms Coiley explained that that was not possible at such notice. They did meet on 26 August, via Teams, and again Mrs Holmes had her TU representative present. Ms Coiley made enquiries about the progress of the grievance investigation was told that a draft report would be ready by 10 September 2021. She passed this on to Mrs Holmes who responded thanking her but said that her resignation stood.
72. It is not necessary to go through all of the events following her departure. There were two other interviews to conduct, one with Mr Malabuyoc and one with Aileen Duriano, which were carried out on 1 and 2 September respectively, so the proposed date of 10 September was tight but probably manageable. Given the resignation however, and perhaps influenced by the fact that Employment Tribunal proceedings were already on foot, the eventual 60 page report was not provided until April 2022. In fact, the appeal process was not concluded until shortly before this hearing.
73. Two points were partly upheld in the report.
 - (a) she should have been told about her secondment coming to an end, and

- (b) her competency book showed that there had been just two short meetings, not much feedback and the comments were hard to read.

Applicable Law and Conclusions

Direct discrimination

74. The test under section 13 Equality Act is as follows:
- (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.
75. So, the question is whether the Trust treated her *less favourably* than it treated or would have treated someone else in the same circumstances apart from her age or race.
76. Almost all of the allegations of race discrimination are against Ms Firza save for three in respect of Mr Katandika – the contents of the recorded conversation, the fact that he did not speak about her absence on her return to work in March (although he offered to do so) and speaking to her about the incident with Aileen Duriano.
77. There is also a particular provision at section 136 dealing with the burden of proof:
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
 - (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
78. In **Ayodele v CityLink Limited** [2017] EWCA Civ 1913, the Court of Appeal explained that the first stage required the claimant 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. That first stage involves hearing all of the evidence, not just the claimant's case, and then making appropriate findings. If those findings suggest that there might have been some discrimination involved, if some explanation is called for from the respondent, the burden shifts to them to prove otherwise.
79. That is in keeping with the previous guidance in **Madarrassy v Nomura** [2007] ICR 867 that it is not enough a claimant to show that she had a protected characteristic and was dismissed - "something more" is required.
80. So the starting point is to consider whether any of these events was at all unexpected in the circumstances or out of the ordinary – whether something more is needed to explain it.
81. The first allegation of age discrimination is that Mrs Holmes was not offered the chance to go on the cardiac nursing course on 4 September 2020 when Ms Lewis declined. That seems to us entirely understandable. Unlike Ms Lewis, Mrs Holmes had not expressed any interest in a cardiac course on her PDR. In any event, she is a very similar age to Ms Lewis.
82. There are then allegations of age and race discrimination in relation to the management of Mrs Holmes' secondment to the Band 6 post i.e., Ms Firza

writing negative feedback in the competency book, and only holding one review meeting.

83. Again, this seems misconceived. It is true that there were fewer meetings than planned but Ms Firaza did not initiate that plan, and Ms Campbell might equally have held those meetings. There were in fact two meetings and in our view no negative feedback was given. It was in fact clear from the first meeting that Mrs Holmes met the requirements of the Band 6 role and in those circumstances, given the pandemic, it is understandable that the process lapsed. It would have been better to have more meetings, so that Mrs Holmes would have had a better chance at interview for the permanent post, and could give evidence of the range of tasks she had done, but she did not chose to apply. We heard nothing to suggest that her treatment was any worse than that of Ms Lewis, who of course went on to be appointed.
84. The meeting on 19 October 2020 which was secretly recorded does not disclose any basis for a complaint of race or age discrimination. We have to say that Mrs Holmes has completely misinterpreted what was said.
85. It is certainly the case that Mrs Holmes' Flexible Working Request was not handled formally. That request was not passed on to Ms Firaza so any failure can only be laid at Mr Katandika's door. We conclude that the reason nothing formal was done was simply because it was not a request to change her working hours but to stick to what had been agreed. And as far as we can see, given the number of interruptions that followed, that pattern was adhered to and there was no further complaint. Hence, we can find no actual basis for complaint.
86. The next allegation concerns the fact that Mrs Holmes was not put down to work on the two bank holiday Mondays in May 2021 despite her shift pattern. Those patterns are not generally applied inflexibly, and give way to bank holidays such as Christmas, so again we see no ground for complaint here, especially as the rosters were then changed as requested.
87. Nor do we see any issue arising over the arrangements for the away-day in December 2020. This is put forward as an allegation of race discrimination. Ms Firaza went to some lengths to include Mrs Holmes in this event, and she had been able to take part, so again we can see no cause for concern.
88. There is also a full and clear explanation for the use by Ms Firaza of Mrs Holmes' WhatsApp name, starting '@Psalm91'. That was simply the username she had chosen for herself, and she might equally have been criticised had she ignored it.
89. There is a further allegation that Ms Firaza was at fault over Mrs Holmes' request for carer's leave, in that she should have read the Special Leave policy and advised her about her options. That places altogether too high a burden on Ms Firaza, at a busy time. She took the time to obtain and forward the policy and approved the request for unpaid time off. She was not in fact aware of any other options, and Mrs Holmes had the opportunity to explore this for herself.
90. Similarly the use of the word "psyche" on the roster in February and March 2021 is at least well explained. This was, we accept, the only option on the system which would ensure that Mrs Holmes' absence was recorded as work-related stress and not something done by her on grounds of age or race.

91. Mr Katandika is criticised for not speaking to Mrs Holmes about the concerns that caused her sickness absence when she returned to work on 17 February 2021. Again, that places too high a burden on managers in question, and he could equally have been criticised for trying to have a discussion with her while she was off sick, but he diligently diarised her next shift and sent an immediate email when she got in. That seems entirely appropriate.
92. There is a further complaint about the allocation of patients on 17 February 2021 by Ms Firaza. We do not accept, as Mrs Holmes suggested, that two patients were more usual. It does appear that she wanted patients allocated by the number of beds, and that was done. On this occasion one of them was removed. There is no complaint about having 5 beds to manage. And so we see no basis to conclude that the initial allocation of 6 beds was unwarranted, or an act of discrimination.
93. There was a final issue over the patient handover which occurred on 26 February 2021 and which Mr Katandika later met with Mrs Holmes to discuss on 16 March. We have to say that that seems a perfectly reasonable approach on his part. He wanted to emphasise the importance of a proper handover for patient safety, and there is no suggestion that his manner or words were inappropriate or that he was not willing to listen to her side of things.
94. In each of these incidents there seems to be no reason why Mrs Holmes would have taken offence. It may well be that her mental health had suffered as a result of the pandemic, and she was off work with stress a good deal in the later stages. But nothing here propels us to the next stage of the enquiry, which is to ask us whether the incident in question was or might have been because of age or race. On the contrary, the impression we form is that she had supportive managers who wanted her to progress, but also to take on board her new responsibilities.

Harassment

95. The sole allegation of harassment here concerns the use of the WhatsApp username and very much the same conclusions apply.
96. The test under section 26 Equality Act is as follows:
 - (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.
97. The first question therefore is whether the conduct in question was unwanted. The Equality and Human Rights Commission (EHRC)'s Code of Practice on Employment (2011) notes that 'unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. "A serious one-off incident can also amount to harassment" — para 7.8.
98. This was not on any view a serious incident. It must have been obvious to Mrs Holmes at the time that Ms Firaza had simply made use of her own username. Had Mrs Holmes not wished this username to be used in a work context she could

of course have said so. It does not therefore seem to come within the definition of unwanted conduct.

99. If that conclusion is wrong for any reason, the use of this username does not seem to us to approach the threshold test of violating Mrs Holmes's dignity – a particularly strong form of words - or of creating an intimidating et cetera working environment for her, for very much the same reasons. We note that there was no complaint at the time about it, or in the subsequent grievance, or even in the three subsequent employment tribunal claims. It has only been added by amendment in the course of these proceedings.

Was there a Public Interest Disclosure?

100. Section 43A Employment Rights Act 1996 provides that:

(1) In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

101. Then by section 43B:

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) ...

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) ...

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) ...

102. For the reasons already given we are satisfied that Mrs Holmes did raise a concern (1) to Mr Malabuyoc about oxygen being administered and then later (2) that the death of MS had not been investigated. That would tend to show that the health and safety of an individual had been put at risk and also the breach of a legal obligation. But was she dismissed or did she suffer any detriment as a result?

Detriment at work under section 47B Employment Rights Act 1996 for making a protected disclosure.

103. By s.47B Employment Rights Act 1996:

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

104. Hence, the test is whether a detriment was done 'on the ground of' the disclosure. This need only be a material influence. But the fact is that neither Ms Firaza nor Mr Katandika were aware of the first allegation, about oxygen being administered. He investigated the incident, but what Mrs Holmes said to Mr Malabuyoc did not feature in his report. It was just a remark to the charge nurse at the time that did not go any further. It must follow that none of the subsequent events can relate in any way to that initial concern.

105. As to the second disclosure, Ms Coiley's evidence, which we accept, was that she did not understand at their first meeting that Mrs Holmes was raising a whistleblowing allegation. It was not until 21 May, when Mrs Holmes provided the further information to Ms Kabatesi, that this became apparent. Ms Firaza was not asked to comment on it before then. Hence the only possible detriments which happened after this disclose concerned the failure to include her in the 360 feedback and the handling of her lateness for work in July.
106. Even then, Mrs Holmes had left Ward 22 several months earlier and (on balance) we conclude it is more likely than not that she had been removed from the distribution list before this allegation was made. That just leaves the confusion over her attendance at work on 24 July 2021, but that was not a detriment. All of the messages are perfectly understandable given her lateness, and in fact she was treated supportively over that issue too.

Automatically unfair dismissal under section 103A Employment Rights Act 1996 for making a protected disclosure.

107. By s.103A Employment Rights Act 1996:

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

108. Mrs Holmes was not of course actually dismissed but a resignation may amount in law to a dismissal (as set out below) if she resigned in circumstances where she was entitled to resign without notice by virtue of the employer's conduct. Given our conclusions so far, and as further explained below, we can see no such circumstances here. Hence, this was not a dismissal and this claim cannot succeed either.

Constructive dismissal

109. Constructive dismissal is not a term used in the Employment Rights Act 1996, but section 95(1) gives the legal definition of a dismissal, and it includes where:

"(c) ... the employee terminates the contract under which [she] is employed (with or without notice) in circumstances in which [she] is entitled to terminate it without notice by reason of the employer's conduct."

110. So there have to be circumstances justifying the employee in downing tools and walking out. In legal terms, there has to be a fundamental breach of contract by the employer. In cases of constructive dismissal that usually means a breach of what is known as the implied duty of trust and confidence. According to the House of Lords in the case of **Malik v BCCI** [1997] UKHL 23 that happens where an employer conducts itself:

"in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence".

111. Once again, the reasons given for her resignation at the time were essentially:
- (a) that her agreed shift pattern was not being adhered to
 - (b) her exclusion from the 360 feedback exercise
 - (c) the handling of her lateness on 24 July and

- (d) the delay in dealing with her grievance and the lack of information during that process.
112. We have already considered the first three of these and the did not in our view in any way undermine the relationship of trust and confidence. The main concern is over the delay in the grievance process, which we have considered with some care.
113. It has to be recalled that there were a total of 19 allegations raised by Mrs Holmes, in three batches. The last of these was on 21 May, when she raised the most serious concern about the death of MS and that it had essentially been covered up. Although the Trust's policy provides for a response in four weeks, that applies equally to a single allegation, so in these circumstances such a quick response was never realistic. In that time however serious steps were taken, steps that Mrs Holmes knew about. She had the initial meeting with Ms Coiley. That led to the appointment of Ms Kabatesi. She had two meetings with her to get all the facts, one of which lasted 6 hours. This was therefore a major exercise. The first step was to obtain a response from Ms Firaza which was done promptly in mid-May. There was then the further allegation about MS.
114. Overall therefore Mrs Holmes knew from then onwards, i.e. from 21 May that there were many more people to interview. The period in question, to her resignation on 18 August, was a little under 3 months. In that time, there doesn't seem to have been any chasing by her, even for a progress report. That does not absolve the Trust of the obligation to keep her informed, but they were certainly taking her concerns seriously and not dragging it out in the hope that she would leave. There was also the summer holiday period to consider and the other pressures on Ms Kabatesi's time. In those circumstances it is not surprising that she still had two witnesses to interview in early September. Can that be said to be conduct on the part of the Trust calculated or likely to destroy or seriously to damage the relationship of trust and confidence?
115. On this point we were referred by Mr Brown to the case of **Blackburn v Aldi Stores Ltd** UKEAT/0185/12/JOJ, which concerned a similar situation. The Employment Appeal Tribunal found at paragraph 25:
- “In our judgment, failure to adhere to a grievance procedure is capable of amounting to or contributing to such a breach. Whether in any particular case it does so is a matter for the Tribunal to assess. Breaches of grievance procedures come in all shapes and sizes. On the one hand, it is not uncommon for grievance procedures to lay down quite short timetables. The fact that such a timetable is not met will not necessarily contribute to, still less amount to, a breach of the term of trust and confidence. On the other hand, there may be a wholesale failure to respond to a grievance. It is not difficult to see that such a breach may amount to or contribute to a breach of the implied term of trust and confidence. Where such an allegation is made, the Tribunal's task is to assess what occurred against the *Malik* test.
116. We do find that there was a significant delay here, and a failure to keep the Mrs Holmes informed, which must have been difficult for her, but we cannot find that this test is met here. They certainly did not calculate that she would leave if there was delay, and the circumstances were not such that she might have been expected to do so. Accordingly, this claim too cannot succeed.
117. Concluding matters, this seems to us a most unfortunate case. Mrs Holmes has given many years of dedicated service to the NHS and was clearly well thought

of by her managers and colleagues, who did not want her to leave. She has become convinced that she has been unfairly treated at work in various respects, although as far as we can see her managers were supportive and concerned. Quite what led to this conviction on her part is unclear to us, but the working relationship seems to have suffered badly from an early stage on Ward 22. It was suggested to us that everything went wrong from 17 May 2020 but for the reasons already given that does not seem to have had any adverse impact of itself. It seems more likely that her secondment to Band 6 and the further, new responsibilities caused a deterioration and for her to feel under more pressure, bringing with it the occasional correction or instruction. Whatever the reason, we have to conclude that she was not a victim of discrimination or of whistleblowing and that the events in question did justify her in resigning.

Employment Judge Fowell
Date: 24 January 2024

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