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EMPLOYMENT TRIBUNALS

Claimant: Mr Lovejoy Charidza

Respondents: North East London NHS Foundation Trust

Heard: East London Hearing Centre

On: 16 to 19 January 2018 and
(In Chambers) 29 January 2018

Before: Employment Judge G D Tobin

Members: Mr R Blanco
Mr M L Wood

Representation

Claimant: In person

Respondent: Ms S Omeri (Counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that:

1. The claimant was not dismissed for making a protected disclosure in breach of section 103A Employment Rights Act 1996.
2. The claimant was not subject to any detriments for making a protected disclosure in breach of section 43B of the Employment Rights Act 1996.
3. The claimant was not subject to any less favourable treatment on the grounds of his race contrary to section 13 Equality Act 2010.
4. The claimant was not dismissed in breach of contract.

Consequently, all claims made by the claimant against the respondent are dismissed.

REASONS

The case

1. This case concerned the following claims: automatic (constructive) unfair dismissal for making a protected disclosure, contrary to section 103A Employment Rights Act 1996 (hereinafter referred to as “ERA”); Detrimental; treatment for making a protected disclosure, contrary to S43B ERA; direct race discrimination, under section 13 Equality Act 2010 (“EqA”), alleging that the claimant had been treated less favourably because of his national and/or ethnic origins by being dismissed; and, breach of contract for the shortfall in the claimant’s contractual notice pay as the claimant alleged that he was wrongfully dismissed (i.e. dismissed in breach of contract).

2. An agreed List of Issues was prepared by representatives in advance of the hearing and this was presented to the Tribunal on the first day of the hearing. The Employment Judge took some time going through the relevant issues and some amendments were made. The finalised List of Issues, adopted by the parties and the Tribunal at the outset of the hearing, were as follows:

Jurisdiction – out of time

Only acts which took place on or after 28 November 2016 (“the Relevant Date”) are within time.

The respondent accepts that the claimant’s claim of automatic unfair dismissal (on 28 November 2016) is within time. The respondent disputes whether any detriment or discrimination claims that occurred prior to 28 November 2016 are within time.

1. Has to claimant submitted his non-dismissal claims within the relevant 3-month statutory time limit (as extended by ACAS early conciliation)?
 - 1.1 On what dates did the alleged acts of discrimination take place and are there any continuing acts? Did the acts and/or continuing acts take place before 28 November 2016?
 - 1.2 On what dates did the alleged acts of detriment take place and are there any continuing acts? Did the acts and/or continuing acts take place before 28 November 2016?
2. If not:
 - 2.1 In respect of detriment claims, was it reasonably practical for the claim to be brought within 3 months (as extended by ACAS Early Conciliation) of the alleged acts of detriment taking place and if not, was it brought within a reasonable further period?
 - 2.2 In respect of discrimination claims, was the claim submitted within 3 months (as extended by ACAS Early Conciliation) of the alleged acts of discrimination taking place, and if not, is it just and equitable for the tribunal to extend the time limit?

3. The claimant will argue that the Tribunal should exercise its discretion and extent time on the basis that he delayed lodging his claims because he needed time to raise Employment Tribunal fees. The claimant will rely on *R (on the application of Unison) (Appellant) v Lord Chancellor*.

Protected disclosures

4. The claimant alleges that he told the respondent that its wards were “unsafe and grossly understaffed” on the following occasions:
 - 4.1 At a meeting with the Chief Executive on 28 July 2016; and
 - 4.2 Thereafter, during supervision meetings and weekly management meetings with his managers, including on 18 and 28 November 2016.
5. Did the claimant make the alleged disclosures?
6. Are they disclosures of information?
7. Did the alleged disclosures, in the reasonable belief of the claimant, tends to show that one of the six specified types of malpractice under section 43B(1) ERA has, or is likely to take place? The claimant relies on:
 - 7.1 s43(1)(d) that the health or safety of any individual has been, is being or is likely to be endangered – the claimant asserts that the respondent’s staffing level could have had an adverse effect on the health and safety of staff and patients; and/or
 - 7.2 s43(1)(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject – the claimant asserts that the respondent was failing to comply with the legal obligations in accordance with the CQC [Care Quality Commission] regulations.
8. Did the claimant reasonably believe that his alleged disclosures were in the public interest?

Dismissal

It is agreed that the claimant resigned on 28 November 2016. The claimant asserted that this resignation was a constructive dismissal.

There is no claim of ordinary unfair dismissal (such claim having been withdrawn and Dismissal Judgement having been issued). However, there is a claim of automatic constructive unfair dismissal under s103A [ERA] and of discriminatory constructive dismissal.

9. Was the claimant dismissed?
 - 9.1 Was there a fundamental breach of contract? Claimant relies on the alleged termination of his probationary period.

9.2 Did the claimant resign in response to that breach?

9.3 Did the claimant affirmed a breach?

Whistleblowing

Automatic constructive unfair dismissal (S103A ERA)

NB. As the claimant lacks 2 years qualification service, the burden of proof is on him to show that the reason for dismissal: *Smith v Hayle [1978] IRLR 413; Kuzel v Roche Products Ltd [‘s 2008] IRLR 530.*

10. If the claimant was constructively dismissed (i.e. he resigned in response to acts or omissions amounting to a fundamental breach of contract), has the claimant proven that the reason, or principal reason, for the respondent carrying out the acts or omissions amounting to fundamental breach was that he had made a protected disclosure?

Detriments (s47B(1) ERA)

11. The claimant relies on the following alleged acts of detriment:

11.1 Following a meeting with the Chief Executive (protected disclosure 4.1), the claimant alleges that he was ostracised and treated differently – in that he was (a) put under the spotlight; (b) micro-managed; (c) eventually forced to leave: and (d) denied adequate support – by senior staff, namely: Mr Paa Otchere, Mr Wellington Makala and Ms Sue Smyth¹.

11.2 The claimant alleges that he was threatened with the termination of his probationary period.

11.3 The claimant alleges that his probationary period was terminated.

12. Did the acts take place as alleged?

13. Has the claimant proved that the alleged acts amounted to acts of detriment – would a reasonable worker take the view that the claimant had been disadvantaged in the circumstances in which he had to work?

14. Was the claimant subjected to the alleged acts of detriment on the grounds that he had made a protected disclosure – did the alleged protected disclosure materially influence (in a sense of being more than a trivial influence) the respondent’s treatment of the claimant in the manner alleged?

15. Has the respondent shown the reason for the alleged treatment as something other than the alleged protected disclosures?

15.1 The respondent relies on a normal process of managing and reviewing a new employee’s work and ability during a probationary period, the

¹ The allegations against Ms Smyth were withdrawn on the second day of the hearing.

application of its probationary policy to the claimant, as well as normal and appropriate interventions by directorate management, which the respondent says was all appropriate and fair in all the circumstances.

15.2 The respondent will also say that the claimant received favourable treatment in the level of support given to him, the extension of his probationary period and the offers of alternative employment made to him.

Direct race discrimination

16. It is agreed that the claimant is of black African ethnicity.
17. The claimant relies on the following alleged acts of discrimination:
 - 17.1 The claimant alleges that he was threatened with the termination of his probationary period by Mr Otchere and Mr Makala.
 - 17.2 The claimant alleges that this probationary period was terminated by Mr Otchere, ~~Ms Smyth and Dr Vincent Perry~~².
 - 17.3 The claimant alleges that the above treatment amounted to constructive dismissal³.
18. Did the acts take place as alleged? As of 30 October 2017, the claimant has said that he will rely on an argument of institutional racism "*the respondent has a history of racial discrimination against black Africans*"⁴.
19. If so, are they acts of less favourable treatment?
20. [Deleted – following discussion, the claimant said that he would rely upon a hypothetical comparator rather than the manager of the Brookside Adolescent Unit]
21. If not, are they acts of less favourable treatment that would have been given to a hypothetical comparator, in materially the same circumstances as the claimant (namely an employee with the same length of service, who was on probation in the same role and ward, at the same time and who had the same quality of work performance) who was not black African?
22. If so, was the less favourable treatment because of the claimant's race (black African)?
23. On consideration of all the facts, does the Tribunal conclude that discrimination may have occurred in the absence of any other explanation?

² The claimant withdrew his allegation against Ms Smyth and Dr Vincent Perry on the second day of the hearing.

³ This is a consequence of discrimination and not an allegation of discrimination.

⁴ Following a lengthy discussion at the outset of the hearing, the Employment Judge recorded this issue as being withdrawn. However, the claimant adduced some evidence and referred to this in his closing submission, so the issue has been reinstated for the determination.

24. If so, is there any other explanation for the alleged acts? The respondent relies on the same reasons set out at paragraph 15 above

Disability discrimination and sex discrimination

NB. The claimant claims that he was dismissed by reason of associated disability discrimination and sex discrimination were withdrawn on 3 July 2017 (Dismissal Judgement has been issued).

Wages claims

25. What contractual payments was the claimant entitled to on termination? The claimant claims?

25.1 [deleted]

25.2 [deleted]

25.3 [deleted]

25.4 Notice pay – the claimant said he should have received notice pay because the respondent normally pays notice in lieu for employees who are dismissed on grounds of capability. The claimant says that the respondent decided to terminate his employment on 18 November 2016.

26. Has the claimant proven that he was contractually entitled to the sums? The respondent will say:

26.1 [deleted]

26.2 [deleted]

26.3 [deleted]

26.4 The respondent disputes that the claimant entitled to notice pay as he resigned his employment with immediate effect on 28 November 2016 and did not work his notice period.

27. [Deleted]

28. [Deleted]

Remedy – issues to be determined at liability hearing.

29. Did the claimant contribute to his dismissal and if so, should any reduction to any award be made on that basis?

30. Would the claimant have been fairly dismissed, in due course and, if so, should any reduction to any award be made on this basis (namely, should the claimant's loss of earnings be limited to the time it would have taken for the claimant to be fairly dismissed)?

31. Should any reductions or uplifts for failures to follow the ACAS Code, by the claimant or the respondent as appropriate, be applied by the Tribunal?

Agreed between the parties on 11 November 2017

The claimant's [additional] list of issues

The Employment Judge determined that these were not a List of Issues or the questions to be determined by the Tribunal. They were submissions by the claimant and would be considered as part of the claimant's submissions at the end of the case.

The relevant law

3. The relevant applicable law, in the order that the claims are set out in paragraph 1 above, is as follows.

4. Certain reasons for dismissal are deemed automatically unfair. This means that, once a tribunal finds that the reason for the dismissal was one of these reasons it *must* make a determination that the dismissal was unfair. S103A ERA (as inserted by s2 Public Interest Disclosure Act 1998) states that:

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 dismissal is that the employee made a protected disclosure.

5. There is no longer any requirement for an employee to act in *good faith* to be afforded statutory protection (pursuant by s18(1)(c) Enterprise & Regulatory Reform Act 2013) although ss49(6A) and 123(6A) give the Tribunal the power to reduce compensation (by up to 25%) where an employee has been subject to a detriment or dismissed because he made a protected disclosure. The burden of showing bad faith is on the employer. Nevertheless, there must be a clear causative link between the dismissal and the disclosure before protection is given: see *London Borough of Harrow v Knight [2003] IRLR 140*.

6. S43B ERA provides that for a worker to gain protection:
- a. the disclosure in question must be a "qualifying disclosure";
 - b. the worker must have followed the correct procedure for disclosure; and
 - c. the worker must have been subjected to a detriment or dismissed as a result of this.

7. A "qualifying disclosure" means one that, in the reasonable belief of the worker, tends to show one or more of the following:
- a. a criminal offence has been committed or is likely to be so;
 - b. a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or he is subject;
 - c. a miscarriage of justice has occurred or is likely to occur;
 - d. the health and safety of any individual has been, is being or is likely to be endangered;
 - e. the environment has been, is being or is likely to be damaged;

- f. information tending to show any matter falling within any of the above has been, is being or is likely to be deliberately concealed.

8. The standard of belief is *the reasonable belief* of the worker. This is not a high hurdle. The test is therefore largely a subjective one, i.e. it is not judged against the belief of a reasonable worker. The focus is on the claimant himself. The claimant does not have to be reasonable; however, his belief in the qualifying disclosure must be reasonable so a genuine belief in a mistaken fact or situation will satisfy this threshold so long as this belief was “reasonable”.

9. There must be a disclosure of information and not just a mere general allegation or an expression of opinion. An allegation can convey information and a disclosure to the workers employer or other responsible person gains protection, pursuant to S43C ERA.

10. A constructive dismissal occurs where the employee terminates the employment, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer’s conduct. In the leading case *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221* the Court of Appeal ruled that for an employer’s conduct to give rise to a constructive dismissal. It must involve a *repudiatory breach of contract*. As Lord Denning put it:

If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.

11. In order to claim constructive dismissal, the employee must establish that:
- a. There was a fundamental breach of contract on the part of the employer;
 - b. The employer’s breach caused the employee to resign; and
 - c. The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

12. In order to identify a fundamental breach of contract on the part of the respondent, it is first necessary to establish the contractual term in question, and whether this form a fundamental part of the contract. Contractual terms may be either express or implied. Express terms of those which have been specifically agreed between the parties, whether in writing or under an oral agreement. Implied terms of those that exist either because of the nature and circumstances of the contract itself, or because the law states that such a term is to be implied into the particular circumstances. The grounds on which a term may be implied into a contract is very limited. It is not sufficient for an employee to say an implied term is a reasonable one in all of the circumstances. A term can only be implied if:

- It is necessary to give the contract “business efficacy” or
- It represents the customer practice in the employment and it is “reasonable, certain and notorious”: *Devonald v Rosser and Sons 1906 2 KB 728 CA*, or
- It is an inherent legal duty central to the relationship between employer and employee, for example, the duty not to undermine trust and confidence.

13. A term may also be implied from the conduct of the parties or because it is so obvious to parties are deemed to have intended it.

14. A fundamental breach of contract by the employer must be an actual or anticipatory breach. An actual breach of contract arises when the employer refuses or fails to carry out an obligation imposed by the contract at the time when performance is due.

15. Once a Tribunal has established that the relevant contractual term exists and that a breach of contract has occurred, it must consider whether the breach was fundamental. This is essentially a question of fact and degree and a key factor the tribunal to take into account is the effect that the breach has on the employee concerned. Where an employee breaches and implied term of trust and confidence, the breach is inevitably fundamental: *Morrow V Safeway Stores Plc 2002 IRLR 9 EAT*.

16. It makes no difference to the issue of whether or not there has been a fundamental breach that the employer did not intend to end the contract: *Bliss v South East Thames Regional Health Authority 187 ICR 700 CA*. Similarly, the circumstances that induced the employer to act in breach of contract are irrelevant to the issue of whether a fundamental breach has occurred: *Wadham Stringer Commercials (London) Ltd v Brown 1993 IRLR 46 EAT*. The test of whether there was repudiatory breach of contract is an objective one: *Leeds Dental Team Ltd v Rose 2014 ICR 94 EAT*. The concept of reasonable behaviour by either party should not enter the analysis; this means an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably: see *Western Excavating and Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908 CA*.

17. S13(1) Equality Act 2010 (“EqA”) precludes direct discrimination:

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.

18. Under s4 EqA, a claimant's protected characteristic includes race, which includes: (a) colour; (b) nationality; (c) and ethnic or national origin.

19. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing an appropriate comparator, “there must be no material difference between the circumstances relating to each case”: s23(1) EqA.

20. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination or harassment, and it is then for the employer to prove otherwise.

21. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provided a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence:

- a. Has the claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the respondent had committed unlawful discrimination?

- b. If the claimant satisfies (a), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

22. The Court of Appeal in *Igen* emphasised the importance of *could* in (a). The claimant is nevertheless required to produce evidence from which the tribunal could conclude that discrimination has occurred. The tribunal must establish that there is prime facie evidence of a link between less favourable treatment and, say, the difference of race and not merely two unrelated events: see *University of Huddersfield v Wolff* [2004] IRLR 534. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the employment tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford* [2001] EWCA Civ 405, [2001] ICR 847.

23. Where one party brings the contract of employment to an end this should usually be done by giving the appropriate notice set out in the contract (or, if longer, the statutory notice set out in s86 ERA). Where the employer terminates the employment, i.e. dismisses the employee, without notice or with inadequate notice, this will constitute a *wrongful dismissal* unless the employer was acting in response to a serious breach of the contract by the employee. Wrongful dismissal applies equally to constructive dismissal. The contractual jurisdiction of the Employment Tribunal is governed by s3 Employment Tribunals Act 1996 together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623. The Employment Tribunal may hear a contract claim for payment in lieu of notice brought by an employee if the claim can be one that a court in England would have jurisdiction to hear and determine and must arise or be outstanding on the termination of the employment of the employee who seeks damages for breach of a contract of employment or any other contract connected with employment. Damages for breach of contract is capped at £25,000 in the Employment Tribunal: Article 10 of the aforementioned Order.

Our findings of facts

24. We (i.e. the Tribunal) set out the following findings of fact, which we determined were relevant to finding whether or not the claims and issues identified above have been established. We have not resolved all of the points of dispute between the parties, merely those that we regard as relevant to determining the central issues of this case as identified above. When determining certain findings of fact, where we consider this appropriate, we have set out why we have made these findings.

25. The claimant commenced employment with the respondent on 29 March 2016 as a Band 7 Ward Manager on Turner Ward at Goodmayes Hospital, which is part of the respondent NHS Trust.

26. The claimant was subject to a 6-month probationary period. According to the respondent's job offer letter of 2 February 2016, the claimant was subject to an express requirement to demonstrate, to its satisfaction, his suitability for his role. The claimant's probation was due to be formally reviewed after 3 months and 5 months.

27. The respondent's management responsibilities for the claimant were not initially clearly defined. Initially, the claimant was managed by Ms Lorna Mitchell, then Mr Sanjay

Ahgun, and from 4 July 2016, Ms Emma Terry took over the claimant's line management. All 3 were Modern Matrons and had some experience of supervising the claimant's role.

28. Mr Ahgun conducted the first monthly supervision meeting with the claimant on 25 April 2016. On 1 July 2016 Mr Ahgun conducted a further supervision meeting during which he raised his raised concerns over some aspects of the claimant's performance.

29. On 5 July 2016, Mr Ahgun conducted the claimant's first probation review meeting, accompanied by claimant's new line manager Ms Terry. It was Mr Ahgun's conclusion that the claimant had not sufficiently addressed the concerns that he had raised at the previous meeting and he noted in the Probation Review Form, which was sent to the claimant the following day that the claimant "accepted that the current trend could not continue and that changes [were] required"

30. On 28 July 2016 the claimant attended an executive management team meeting off-site in a hotel. This meeting was presided over by the respondent's chief executive and other senior staff. At this meeting, new staff such as the claimant were invited to speak to the meeting as to how they saw things at the Trust. At this meeting, the claimant said that he made a protected disclosure, specifically he said that his ward was unsafe because it was understaffed. This complain conveyed sufficient information that the health and safety of patients has been, is being or is likely to be endangered. We accept the claimant's evidence in this regard and the fact that this was a protected disclosure.

31. The next day, i.e. 29 July 2016, Ms Terry met with the claimant for a pre-arranged and regular supervision meeting. Ms Terry raised the substance of the claimant's protected disclosure with him, specifically her note of this meeting records the claimant's concern about: the ward being unsafe, the size of the ward, not enough staff and the level of acuity. Notwithstanding that we have not heard directly from Ms Terry, our reading of the notes of this meeting satisfy us that this was a genuine attempt to engage with the claimant's concerns and to address any problems.

32. During the course of this supervision meeting, Ms Terry advised the claimant that if there were insufficient substantive nursing staff on duty during a particular shift/period then he must escalate this matter as early as possible. This reflected the position as set out in the claimant's job description.

33. Ms Terry remained concerned about the claimant's performance prior to the supervision meeting of 22 August 2016. In preparation for this meeting Ms Terry produced a detailed action plan for the claimant. This action plan set out: (a) the issues of concern; (b) the expected standard required; (c) the agreed action that the claimant should take to reach the expected standard; (d) how the expected standard would be addressed; and (e) the review dates.

34. Mr Paa Otchere (Operational Lead) became the claimant's line manager on 12 September 2016. He raised his concerns about the claimant's performance with him promptly. We accept Mr Otchere evidence that he raised concerns that the claimant may not pass his probationary period. Mr Otchere recommended that he seek to extend the claimant's probationary period for one month to enable the claimant to improve his performance. The claimant agreed to this.

35. Mr Otchere made an error with dates thinking that the claimant's 6-month probation ended at the end of October 2016, when according to the claimant's contract, the claimant's probationary period was due to conclude at the end of September 2016. At this time, we determine, the claimant did not know that Mr Otchere had made a mistake about the duration and expiry of his probationary period, as he did not draw attention to his line manager's mistake. Mr Otchere convened a formal probationary review meeting with the claimant on 30 September 2016. He advised the claimant that human resources had approved the extension of his probationary period to the end of November 2016.

36. The record of the formal probationary review meeting of 30 September 2016 shows that Mr Otchere had taken up with more senior management the staffing issues raised by the claimant. The record also demonstrates; that the claimant was satisfied with the level of support he had been offered; that the claimant was clearer about what he needed to do; and that he also needed to demonstrate the improvements required. From this meeting onwards, Mr Otchere arranged to meet with the claimant each Friday, where possible, to review his progress.

37. On 11 November 2016, during a Friday supervision meeting, Mr Otchere informed the claimant that he was at risk of not passing his probationary period.

38. The claimant's final probationary review meeting was held on 18 November 2016. Notwithstanding, the claimant's improvement in certain areas, Mr Otchere was not satisfied that the claimant had made sufficient improvements and he determined that the claimant had not achieved a satisfactory level of performance in his Ward Manager's role. Consequently, Mr Otchere decided that the claimant had failed his probationary period. Mr Otchere had sought input from Dr Jude Ezeonwuka (a Consultant on Turner Ward) and Dr Richard Duffett (the Associate Medical Director, and another Consultant on Turner Ward). Mr Otchere also met with a human resources official and Mr Wellington Makala (the Deputy Director for Acute Services).

39. Notwithstanding that Mr Otchere determined the claimant had failed his probationary period, Mr Otchere advised the claimant that he would be considered for a Band 6 post (i.e. a senior mental health nurse position) on either the in-patient or HTT ward/department. This demonstrated Mr Otchere's contention that the claimant was a good clinical nurse, albeit with some managerial shortcomings. Mr Otchere advised the claimant that he would support him should he wanted to pursue other management opportunities in the future.

40. This exploration of other suitable employment also represented the claimant's contractual position. Although the claimant had failed his probation, this did not, in itself, bring his employment to an end. The claimant was entitled to a further review hearing, through the capability procedure, prior to any dismissal.

41. The claimant requested time to consider Mr Otchere's offer of a Band 6 position on a different ward and Mr Otchere agreed to give the claimant until 25 November 2016 to consider this offer, which was confirmed in the notes of this meeting.

42. The claimant was absent from work on 24 and 25 November 2016 due to sickness. He returned to work on 28 November 2016. Mr Otchere conducted a return to work interview that day and then asked the claimant for his answer in respect of the Band 6/senior mental health nurse role. The claimant prevaricated, he was reluctant to take a

step down, so he asked for further time to consider this offer. Mr Otchere pressed the claimant for an answer, which we consider was appropriate in these circumstances as the claimant had already had ample notice that his probation was failing and already had 10 days to consider his options. It was obvious to us that Mr Otchere wanted to retain the claimant as an employee. He discussed possible avenues of advancement to Band 7 Ward Manager appointments in the future and when the claimant asked for more information, Mr Otchere invited Mr Makala into the meeting to discuss opportunities that may arise in the future for Band 7 roles. The claimant was not persuaded by the future possibility of a Band 7 role and he saw the Band 6 route as an effective demotion. The claimant had been a senior mental health nurse and he wanted to progress his career.

43. The claimant said that he was “vilified” by the offer of a Band 6 role and in evidence, he said he considered this to be a “poisoned chalice”. His subsequent firm rejection of Mr Otchere’s offer was at odds with the claimant’s initial request for time to consider the alternative job offer and also his request, at the meeting of 28 November 2016, for more time to consider his position.

44. We rejected the claimant’s contention that Mr Otchere tried to force him into accepting a Band 6 role by referring to a dismissal letter having been written. In evidence Mr Otchere said that he did not have the authority to dismiss the claimant as this was a decision that could only be made by more senior managers and following recourse to the capability procedure. The claimant said that he would resign. He saw his dismissal as inevitable because he had failed his probation and he was unwilling to accept a senior mental health nurse/Band 6 position.

45. The claimant was then asked to put his resignation in writing, which he declined to do. The claimant said that Mr Otchere and Mr Makala had to accept his verbal resignation. Mr Otchere then turned to his computer and brought up the employee leaver’s form. He went through some of the main points on this form, with the claimant, including the claimant’s last working day and his dates of service. In respect of the reason for leaving, the claimant directed Mr Otchere to tick the box labelled “Incompatible Working Relationships”.

46. Mr Otchere then printed off this form which the claimant checked and signed. The claimant did not alter, or comment upon, the fact that the form clearly identified that this was a “voluntary resignation”.

47. Mr Otchere wrote to the claimant on 1 December 2016 to confirm that the claimant had, in effect, failed his probation, that they had offered to consider Band 6 clinical positions within the Acute and Rehabilitation Directorate and that the claimant wished to resign with immediate effect.

48. On 23 December 2016 which was over 3 weeks later, the claimant wrote to the respondent’s Chief Executive outlining his purported constructive dismissal.

49. Notwithstanding the claimant was no longer employed by the respondent, the respondent dealt with the claimant’s complaint as a grievance under the respondent’s grievance policy. Mr Kieran Mahony, Lead OT, investigated the claimant’s grievance and produced a 24-page report. This concluded:

- a. The extension of the claimant's probation period was enacted outside the six month period allowed by the respondent's policy; however, the claimant was aware of this and was in agreement with this at the time it occurred. Furthermore, the claimant was not adversely impacted by this extension. Indeed, the extension was a supportive measure aimed at assisting the claimant address his under-performance
- b. The claimant was not forced to leave his job as alleged. He chose to resign rather than ultimately faced dismissal.
- c. The claimant had not been bullied or harassed by management or any staff in relation to his race, or for any other reason.
- d. The respondent could not investigate the claimant's allegations in respect of breaches of ethical practice by the senior management team in facilitating fair recruitment processes because the allegations lacked detail. Nevertheless, the respondent contended, that there had been no other substantial claims of any unethical practice regarding recruitment.
- e. The claimant had, in fact, been underpaid in respect of accrued but untaken holidays. [This matter had been resolved prior to the Employment Tribunal Hearing].

Our Determinations

Time limits

50. In order to understand the circumstances of the claimant's termination and the claims related to the process that lead to the claimant's dismissal, we needed to undertake an examination of the claimant's performance throughout his probationary period as the claimant's dismissal is extricable linked with his failure of his probationary period. We determined it was appropriate, first to provide the analysis of the circumstances leading up to the claimant 28 November 2016 and then address the time limit and jurisdiction points raised at points 1 to 3 of the List of Issues.

Protected disclosures

51. So far as the protected disclosures are concerned, the claimant alleged that he told the respondent that Turner Ward was "unsafe and grossly understaffed" at a meeting with the Chief Executive on 28 July 2016 and at various points thereafter. Whether or not the claimant's disclosure amounted to an allegation, it also conveyed information. We find that the claimant's protected disclosures also amounted to disclosures of information relevant to health and safety concerns. The claimant was not able to refer us to the appropriate CQC regulations. Nevertheless, any likely failure in respect of this was inextricably linked to health and safety shortfalls. The claimant's assertion at the executive management team meeting amounted to a qualifying disclosure under Section 43B(1)(d) ERA. These disclosures qualify as protected disclosures if they were made in "good faith" by the claimant.

52. The respondent raised “good faith” as an issue but did not assert the claimant acted in “bad faith”, presumably as Ms Omeri had no positive evidence to proffer on this point. In her submission Ms Omeri undertook a microanalysis in her attempt to convince us that the claimant could not have had a reasonable belief either in his allegations or that such allegations were in the public interest. We are wholly unconvinced by such arguments. As explained by the Employment Judge at various stages throughout the hearing, it is not the function of the tribunal to determine the veracity of the allegations. The claimant, as a new member of staff, raised his concerns that, amongst other things, his service was understaffed. These are common complaints amongst staff in the NHS in general and particularly in mental health provision. The whole point of raising understaffing issues was that in critical areas, such as mental health provision, this also amounted to health and safety concerns. There is, of course, a public interest in raising health and safety concerns in an NHS hospital and it is difficult to understand the respondent’s contention on how it could not be. The claimant’s complaint/protected disclosure was hardly surprising in the context of an under-resourced healthcare provision, particularly where a blame culture may have been prevalent. The respondent’s managers, Mr Otchere and Mr Makala did not regard the claimant’s protected disclosure as particularly controversial and there is no evidence that these managers were the type to blame the claimant for structural or system failings. Indeed, both Mr Otchere and Mr Makala were supportive of the claimant throughout his probation. There was no arguments or adverse comments directed towards the claimant indeed the contents of his remarks went largely unnoticed by Mr Makala and Mr Otchere who were also at this meeting and had raised concerns of their own. We find that the claimant made alleged disclosures.

53. We heard scant information as to whether the claimant raised issues of safety and understaffing during his supervision and management meetings. The respondent accepts the claimant said words to the effect that Turner Ward was “unsafe and grossly understaffed” on at least 28 July 2016, 29 July 2016 and 30 September 2016. The notes of the meeting of 18 November 2016 unsurprisingly makes no reference to any ongoing protected disclosures. Nevertheless, on the balance of probabilities, we are inclined to accept that the claimant did make some ongoing protected disclosures. We make this determination on the basis that we accept the claimant made the initial disclosure on 28 July 2016 and that the respondent also accepted that he raised the safety–staffing issue on, at least, two further occasions. Given that understaffing was the claimant’s chief response to his poor performance as a Ward Manager, we find it more likely than not that he raised these issues during review meetings.

Dismissal and whistleblowing

54. At the outset of the hearing, the Employment Judge spent some time explaining to the claimant, the difference between an express dismissal by the employer, a constructive dismissal and an employee’ resignation and the law relevant to this. The list of issues noted that the parties agreed that the claimant resigned on 28 November 2016 and the claimant asserted that his resignation was constructive dismissal.

55. So far as the claimant’s resignation of 28 November 2016 is concerned, the claimant said he resigned (as acceptance of the repudiatory breach of his contract) because of Mr Otchere’s termination of his probationary period. Mr Otchere confirmed that the claimant did not passed his probationary review at the meeting of 18 November 2016

and subsequently confirmed this in writing to the claimant on 20 November 2016. This would not, in itself, bring the claimant's employment to an end, as that required recourse to the capability procedure. It is difficult to see how the capability procedure could come to a different conclusion; however, even if he wanted to, which we do not accept he did, Mr Otchere did not have the authority to terminate the claimant's employment.

56. Mr Otchere had the authority to determine whether or not the claimant had passed his probation because the claimant's contract of employment expressly subjected him to a probationary period during which he was required to demonstrate – to the respondent satisfaction – his suitability as a Ward Manager. There were regular and ongoing concerns raised by a whole series of the claimant's line manager throughout his probationary period. This commenced with Mr Argan, and then Ms Terry, and finally Mr Otchere. The claimant's previous line managers discharged their supervision correctly because they met with the claimant regularly and assessed his performance appropriately. Mr Otchere's continued this role, as the claimant's line manager, conscientiously because he provided the claimant with regular and ongoing support, culminating in weekly meetings. Indeed, we are satisfied that the claimant recognised that his performance had been deficient, at least on 5 July 2016 and 30 September 2016 because we accept the truthfulness of the near-contemporaneous notes. Mr Otchere offered the claimant an additional extension to his probationary period to assist him progress. Indeed, the claimant accepted this offer of additional support.

57. We find that Mr Otchere decision to fail the claimant's probation was in line with his authority and consistent with facts as outlined above. It can never be the case that the appropriate exercise of an express contractual authority can amount to a fundamental breach of contract.

58. Even if there was a repudiatory breach of contract, this, in itself, does not constitute a dismissal. The claimant must show that he accepted (i.e. relied upon) a repudiation of his employment. A constructive dismissal requires the employee to communicate to the employer, either by words or by conduct, the fact that he is terminating his employment. We accept the evidence of Mr Otchere and Mr Makala, that the appellant resigned rather than pursue a lower grade vacancy. The claimant saw his dismissal as inevitable – as did we – once he failed his probationary period, if he did not take-up a Band 6 opportunity. It was his prerogative to decline another suitable role within the organisation, but his resignation did not arise from a breach of contract, fundamental or otherwise, and his resignation was not compelled in any way.

59. The claimant refused any role as a senior mental health nurse. Mr Otchere's requested that he put his resignation in writing, indeed the claimant signed the Employee Leavers Form after ensuring that Mr Otchere's ticked the box marked Incompatible Working Relationships. This explanation was contained within the Voluntary Resignation section and the appellant did not cross out the applicability of this voluntary resignation nor did he write on the form that his resignation was not freely given. In evidence, the claimant did not say that he said to either Mr Otchere or Mr Makala that he was resigning because he felt he had been badly treated as a result of making a protected disclosure or even that he considered himself to be constructively dismissed. Under the circumstances, the claimant has not established that the reason, or principal reason, for his resignation was that he made a protected disclosure.

60. In addition, we are satisfied with Mr Otchere's account that the consultants on Turner Ward had also expressed their concerns about the claimant's ward management. It is obvious to us that had the respondent reviewed the claimant's performance at the end of the six-month probationary period then the claimant would have failed his probation at that point. The respondents were responsible in alerting the claimant as to his problems, and the likelihood of his probationary failure, well in advance of the final probationary review.

61. The claimant resigned because he knew he had failed his probationary period and he did not want to accept a lower band role. That is understandable and perfectly reasonable. However, it does not constitute a response to a purported fundamental breach of contract.

62. As we find there was no fundamental breach of contract it cannot be said that the claimant affirmed such a breach.

63. As we find the claimant was not constructively dismissed and as we have made the above findings in respect of his constructive dismissal, we find that the reason, or the principle reason, for the claimant's finding was in no way related to his protected disclosure.

Whistleblowing detriments

64. Following his protected disclosure, the claimant claimed three detriments:

1. Being ostracised and treated differently.
2. That he was threatened with determination of his probationary period.
3. That probation period was terminated.

65. In respect of detriment 1, at the case management discussion at the outset of the hearing, the Employment Judge pressed the claimant to identify how he said he was treated differently following his protected disclosure. The claimant alleged that he was: (a) put under the spotlight; (b) micro-managed; (c) eventually forced to leave and (d) denied adequate support by Mr Otchere and Mr Makala. Alleged detriment (c) is not in fact a detriment, it is the alleged consequence of detrimental treatment. The alleged detriment (a) and (b) are not consistent with the claimant's case that he was ostracised and alleged detriment (d) is not compatible with alleged detriment (a) and (b).

66. The claimant was not ostracised or subjected to detrimental treatment. Mr Otchere tried to help the claimant by offering him support and guidance throughout his period of line-management and supervision. Having reviewed the notes of meetings carefully we are in no doubt that the claimant was aware of his deficiencies and shortcomings throughout his probationary period. Mr Otchere offered the claimant an extension of his probationary period in order to address his shortcomings and to assist the claimant in his employment progression. The claimant accepted the extension of his probationary period willingly. He subsequently argued that the extension did not apply as technically by the 27 September 2016 he was contractually outside the probationary period. Therefore, because he had not been informed formally that he had failed his probationary period he had, an effect, passed this requisite hurdle.

67. We determine that had the respondent not extended the claimant's probationary period the claimant would have failed his probation earlier. The claimant's contract provided for a one-month probationary extension. Mr Otchere offered the claimant a one-month probationary extension, which in effect was a two-month extension because of his miscalculation of the probationary review date. We do not believe that the claimant was aware of this error because he did not raise it at the time. He has subsequently argued that this error represented a breach of contract. We do not find this mistake to amount to a breach of contract. The claimant was offered an extension until the end of November 2017 which he accepted, therefore no breach of contract could possibly be established. This extension was not to the claimant's detriment, Mr Otchere was trying to assist the claimant. He did not want to lose another member of staff.

68. We accept that Mr Otchere should have been aware of when the claimant's six-month contractual probationary period expired. Nevertheless, this mistake made by the respondent was not a detriment to the claimant. If anything, it worked to the claimant's advantage by offering him additional time to improve his performance.

69. Notwithstanding we do not find that there was any repudiatory breach of contract in respect of the duration of the probationary period. We also find it was not a repudiation of the claimant's employment to offer him a Band 6 opportunity following the failure to his probationary period. The respondent was short of staff. The claimant was an experienced mental health nurse who had operated at a Band 6 level successfully. He had recently taken a step up into management with the respondent. The respondent managers were concerned about important aspects of the claimant's management. However, in evidence, they raised no concerns about the claimant's ability as a mental health nurse and indeed thought highly of him for that capacity. Mr Otchere initially offered the claimant a week or ten days to think about alternative Band 6 employment and, indeed, he raised the prospect of a further promotion in due course to enable the claimant to have another attempt at ward management.

70. Upon the claimant's return to work, Mr Otchere pressed the claimant for his response to the Band 6 offer. This was reasonable in the circumstances. It was clear from Mr Otchere's evidence and also Mr Makala's, that a failure of a probationary period did not equate to a termination of employment. That was a separate stage under the respondent's procedures which required a formal review by more senior staff than Mr Otchere.

71. We believed that the claimant did not view the Band 6 role as a fundamental breach of contract because he did not object to the offer and initially he asked for some time to consider his position and thereafter he asked for more time. The facts that the claimant was unwilling to accept a Band 6 role, which we accept he saw as a demotion, does not mean that it was inappropriate for the respondent to offer it to him. Indeed, we regard this as a generous offer and do not see anything untoward in it.

72. In respect of the further detriments the claimant alleges, that he was threatened with termination of his probationary period and that his probationary period was terminated. We do not find that these were detriments that related to his whistleblowing disclosure for the reasons we expand upon the next section. The claimant was not subjected to any detriments pursuant to Section 47B(1) ERA.

Direct race discrimination

73. The claimant referred to *institutional racism* during the course of the hearing and during his submissions, so we will deal with this issue first. At the outset of the hearing, the Employment Judge spent some time advising the claimant of the specific types of discrimination and the appropriate tests. To discriminate against someone is, not in itself, unlawful. The EqA only seeks to protect certain individuals from being discriminate against. Protection is given to those who have a *protected characteristic*. The mere fact that, say, a Black African man (which is how the claimant described himself) is treated badly does not necessarily mean that the conduct is discriminatory. The employer might treat everyone badly. Equally, discrimination against men who have beards, for example, as opposed to men who are clean shaven is not unlawful because being bearded is not a protected characteristic. The principle behind the EqA is equality of treatment, not fairness per se.

74. The different forms of discrimination are:

75.

- i. Direct discrimination – where, because of the persons protected characteristic, an employer treats the person less favourably than he treats, or would treat, others.
- ii. Indirect discrimination – where an employer creates a provision, criteria or practice that does not in itself appeared discriminatory but that may be judged to be discriminatory because it puts the employee (and others who shared a protected characteristic) at a particular disadvantage.
- iii. Harassment, and
- iv. Victimisation.

76. This claim is centred on (i) above. The term “institutional racism” is a populist concept that has no foundation in law. Race discrimination is outlawed as unlawful under the EqA. It is the creation of statute, and statute is the EqA only. The EqA does not address institutional racism, so, therefore the concept is not recognised in law and does not form part of the Employment Tribunal process or any enquiries thereunder.

77. In respect of direct race discrimination. The claimant relies upon (a) the purported threat to terminate his probationary period by Mr Otchere and Mr Makala and (b) the termination of his probationary period by Mr Otchere.

78. In respect of our findings above, we find that the claimant was not threatened with the termination of his probationary period. He was warned of the consequences of his poor performance, which we determine did not constitute threats and could not, in any way, be related to his race. In respect of the “forewarnings”, Mr Otchere actions were rational and consistent with his predecessors’. The claimant initially suggested that another Ward Manager from an underperforming unit was treated more favourably than he was, which Mr Makala and Mrs O'Donnell denied. The respondent contended that the situation in respect of the Brookside Adolescent Unit was entirely different. For a comparator to have any value, there must be no material difference between the circumstances relating to each case and, from the limited evidence proffered, the claimant accepted that there was no non-black African employee who was on probation and performing as poorly as the claimant, who was treated differently. So any reliance upon a

comparator had to rely on a hypothetical comparator, who was non-black African in the same circumstances as the claimant as identified at point 21 of the List of Issues.

79. We are satisfied with the respondent's accounts as to the reasons why the claimant's performance was deemed to fall short of the respondent's standards in his evaluation of the claimant's probationary performance. As set out above, various line managers, Mr Asgun (South Asian), Ms Terry (white British) and Mr Otchere (black African – i.e. the same ethnic background as the claimant), assessed the claimant's performance at regular intervals and identified shortcomings. The claimant was not able to rectify many of these shortcomings, which were deemed to be serious. Mr Otchere merely continued the claimant's line management in a manner similar to that of the previous Modern Matrons. As Mr Otchere supported the claimant and was committed to his improvement and career development, he regularly appraised the claimant so he could address where his performance fell short. We accept the evidence of both Mr Otchere and Mr Makala that Mr Makala (black African) was not involved in threatening or forewarning the claimant.

80. As we do not find that there was a less favourable treatment, the issue of a comparator becomes otiose. We do not find any relevant primary facts to assess whether the burden of proving unlawful discrimination has shifted in accordance with *Igen and Barton*.

81. The termination of the claimant's probationary period by Mr Otchere was clearly less favourable treatment. This allegation is made against Mr Otchere only. It follows from what we say above that the termination of the claimant's probationary period was a logical and consistent step following the warnings given in respect of the claimant's poor performance and his failure to improve. The *Barton/Igen* burden has not shifted to the respondent because there are no facts that would enable us to conclude, in the absence of an adequate explanation from the respondent, that Mr Otchere had committed unlawful discrimination. Again any comparison with a hypothetical probationer in the same circumstances as the claimant, but not sharing the claimant's protected characteristics, is futile as we determine that probationer would have failed his probationary review also.

Wages claim

82. It follows from our determination in respect of constructive dismissal that the claimant was not *wrongfully dismissed*, i.e. dismissed in breach of contract.

83. The claimant resigned, such resignation taking effect immediately. The claimant appeared to be in breach of contract because he did not work his notice period. However, that said, we are not tasked with determining any breach of contract claim against the claimant. As the respondent had not breached the claimant's contract and as the claimant did not work his notice period the claimant is not entitled to any notice pay.

The alleged out of time complaints

84. The claimant has not established that he was subject to whistleblowing detriments or less favourable treatment on the grounds of his race, so we have not determined whether it would be just and equitable for any claims related to incidents prior to the 27 February 2017 to proceed.

Remedy

85. As the claimant has not been successful, the issues in respect of remedy do not fall to be determined.

Employment Judge Tobin

26 February 2018