EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs A Bonnyface	**v**	Cambridge University Hospitals NHS Foundation Trust

Heard at: Bury St Edmunds **On**: 25, 26, 28, 29 March, 3 & 4 April 2019. 24 & 25 April 2019 in chambers

Before: Employment Judge Laidler

Members: Ms L Daniels and Mr R Eyre

Appearances
For the Claimant: In person (assisted by her husband)
For the Respondent: Mr S Brittenden, Counsel

RESERVED JUDGMENT

1. The claimant did not make protected disclosures

2. If she did she was not treated detrimentally for so doing

3. The claimant was not treated less favourably on the grounds of her race

4. The claimant did not make a protected act(s) within the meaning of section 27 Equality Act 2010

5. If she did she was not treated less favourably for so doing

6. There was no fundamental breach of contract by the respondent entitling the claimant to resign and claim constructive dismissal.

7. All claims are dismissed.

RESERVED REASONS

1. This claim was received on 27 October 2017, in which the claimant brought various claims under the Equality Act 2010 and also that her resignation was an act of constructive dismissal by the respondent. The respondent denied all the claims in its Response.

2. There was a Preliminary Hearing before Employment Judge Michell on 4 May 2018 when the issues were clarified. These were set out in his summary as follows:

'Public Interest Disclosure (PID)

(i) Did the claimant make a protected disclosure for the purpose of Section 43F of the Employment Rights Act 1996 ("ERA") as set out below? The claimant relies on the information she provided to the CQC (which is a 'prescribed person' for s.43F ERA purposes) on or about 23 April 2015, during a CQC inspection on 23 – 25 April 2015, which she says falls within sub-sections (b) and / or (d) of s.43B(1) ERA.

(ii) In so far as the claimant was dismissed (see below), was the principal reason for the dismissal that she had made the protected disclosure to the CQC?

(iii) Did the respondent subject the claimant to any detriments, as set out below? (Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law).

(iv) If so, was this done on the ground that she made the protected disclosure to the CQC?

(v) The alleged detriments the claimant relies on were clarified by her to be as follows:

    a. the respondent's expression of annoyance and irritation *"during and after"* the CQC inspection (POC para 13(iv)(c) – this needs better particularisation – see below);

    b. the content of the 30 April 2015 emails sent to her by Angela Coupe (POC para 13(iv)(j));

    c. the instigation of a performance improvement plan in respect of her on 22 July 2016 (POC para 14(c));

    d. the fact she was told on 2 May 2017 by Holly Sutherland and Angela Coupe that she would be entering into an informal stage of managing employee performance (POC para 23);

e. Nicola Baker's explanation by email dated 22 May 2017 that the claimant could not extend her resignation date, when she had previously been invited to extend it (POC para 39);

f. Nicola Baker's explanation by email dated 23 May 2017 that the claimant could not be redeployed (POC para 40);

g. the referral of the claimant to the NMC in September 2017 (POC para 43(xiii)); and

h. the withdrawal of a Discharge Planning Specialist role on 26 July 2017 (POC para 44).

<u>Constructive Unfair Dismissal</u>

(vi) Was the claimant dismissed? Further to this:

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

b. If so, did the claimant affirm the contract of employment before resigning?

c. If not, did the claimant resign in response to the respondent's conduct (to put it another way, was it <u>a</u> reason for the claimant's resignation – it need not be <u>the</u> reason for the resignation)?

(vii) The conduct the claimant relies on as breaching the trust and confidence term is:

a. those matters set out in this summary as constituting pre-EDT detriment for s.47B ERA purposes (which she says were the principal reason for her dismissal for s.103A ERA purposes);

b. those matters set out in this summary as constituting acts of victimisation for s.27 of the Equality Act 2010 ("EQA") purposes; and / or

c. those matters set out in this summary as constituting acts of direct race discrimination for s.13 EQA purposes.

(viii) If the claimant was constructively dismissed, but her dismissal was not automatically unfair for s.103A ERA purposes, what was the principal reason for dismissal and was it a potentially fair reason in accordance with Sections 98(1) and (2) ERA? The respondent asserts that the reason was capability.

(ix) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all material respects act within the so called 'band of reasonable responses'?

Direct Discrimination / Victimisation

(x) The claimant's race discrimination claim is based only on s.13 EQA (direct discrimination) and s.27 EQA (victimisation). It needs some better particularisation. I have therefore ordered her to provide further particulars (and reminded her that they ought not to be used to introduce into the claim matters which have not already been pleaded. Any matters which are 'new' will need to be subject to an application to amend, which application may be resisted by the respondent). So far, the issues can be identified as follows:

a. Direct race discrimination:

(1) undue scrutiny of her since the 2015 CQC inspection (POC para 14(d) – this needs better particularisation – see below);

(2) on two occasions (late 2016 and early 2017), racist remarks made by Angela Coupe on the telephone concerning recruitment (POC para 17 – this needs better particularisation – see below);

(3) on an occasion in the first two weeks of April 2017, a derogatory remark made by Angela Coupe in the presence of the claimant and Shirley Varghese concerning 'Asian food' and, by implication, those who eat it (POC para 21);

(4) Nicola Baker's above mentioned explanation by email dated 23 May 2017 that the claimant could not be redeployed (POC para 40);

(5) the above mentioned referral to the NMC (POC para 43(xiii));

(6) the respondent's preferential treatment in respect of evidence given by white British staff members (POC para 43(xvi) – this needs better particularisation – see below); and

(7) the claimant's dismissal.

b. Protected acts:

(1) the claimant's complaint at a meeting in about September 2016 that she was being victimised on grounds of race (POC para 14(g) – this needs better particularisation – see below); and

(2) the claimant's comment at the 11 July 2017 meeting that she felt racially discriminated against (POC para 43(viii) – this needs better particularisation – see below).

c. Victimisation:

(1) Angela Coupe's annoyance and non-cooperation on 3 October 2016 (POC para 14(d));

(2) Nicola Baker's above mentioned explanation by email dated 22 May 2017 that the claimant could not extend her resignation date (POC para 39);

(3) Nicola Baker's above mentioned explanation by email dated 23 May 2017 that the claimant could not be redeployed (POC para 40);

(4) the above mentioned referral to the NMC (POC para 43(xiii));

(5) the above mentioned withdrawal of a Discharge Planning Specialist role on 26 July 2017 (POC para 44);

(6) Katie Wilson's advice, on 4 September 2017, that the claimant could no longer apply for jobs pending the MNC investigation (POC para 45);

(7) the failure of the respondent to provide the claimant with a reference (which meant that a conditional job offer made to the claimant was withdrawn – this needs better particularisation – see below); and

(8) the claimant's dismissal.

Time Limits / Limitation Issues

(xi) Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) and (b) of EQA and / or sections 23(2) - (4), 48(3)(a) and (b) and 111(2)(a) and (b) ERA? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and / or conduct extending over a period, and / or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a *'just and equitable'* basis; when the treatment complained about occurred, etc.

Remedy

(xii) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded

compensation and / or damages, will decide how much should be awarded. Specifically:

a. What (if any) award for injury to feelings ought to be made?

b. If the claimant was dismissed, and that dismissal was unfair / tainted by discrimination, what adjustment, if any, should be made to any basic / compensatory award to reflect the possibility that the claimant would still have been dismissed at or about the same time anyway but for any proscribed conduct? See: Polkey v AE Dayton Services Ltd. [1987] UKHL 8; and paragraph 54 of Software 2000 Ltd. v Andrews [2007] ICR 825.

c. Did the respondent unreasonably fail to comply with a relevant Acas Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("section 207A")?

d. Did the claimant unreasonably fail to comply with a relevant Acas Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any compensatory award and if so, by what percentage (again up to a maximum of 25%), pursuant to Section 207A?'

3. The Tribunal spent the first day reading the witness statements and relevant documents. On the second day there was further discussion of the issues in the case. Referring to the above, it was clarified that:

3.1 The only protected disclosure relied upon is that at paragraph 5(i) being the disclosure to the CQC inspectors in April 2015. The respondent confirmed that its pleaded case is there was no disclosure of 'information'. Even if there was, none of the alleged detriments flow from it;

3.2 It was confirmed that the detriments set out at (v) of the list of issues are the detriments relied upon;

3.3 In relation to the claim of race discrimination, the protected characteristic relied upon by the claimant is that she is non-white British.

4. The acts relied upon were discussed:

4.1 Undue scrutiny of the claimant since the 2015 CQC Inspection. Employment Judge Michell noted that further particulars were to be provided and Mr Brittenden did not think they had been but the

respondent understood this to be the performance improvement plan.

4.2 On two occasions, late 2016 and early 2017, racist remarks were made by Angela Coupe. These are the allegations set out at paragraph 17 and 21.

4.3 Direct discrimination/victimisation sub paragraph (6), the respondent's preferential treatment in respect of evidence given by white British staff members, refers to the investigation of the 2 May incident and that their evidence was preferred to that of the claimant.

4.3 The claimant's dismissal is alleged to be an act of direct race discrimination as the claimant states it 'flowed from' the victimisation following the protected act made by the claimant at a meeting in or around September 2016 when she alleged she was being victimised on the grounds of race.

4.4 The claimant attempted to raise another protected act namely the claimant's comment at the 11 July 2017 meeting, that she felt racially discriminated against. As pointed out by Counsel for the respondent, that could not have been a reason for the resignation as by that time the claimant had already resigned.

5. After having had this discussion the claimant confirmed that the list of issues as previously set out and now incorporating the points set out above, represented a full list of all the matters complained of that this tribunal would determine.

6. There were some issues raised by the claimant about the bundle. She had, however, brought with her some documents which she stated should have been in it, or which she said were different to versions in the bundle. The respondent had no objection to those being referred to and they remained in a separate bundle. The claimant took the Tribunal to some of those documents.

7. The claimant had issues with Rachael May's statement, but it was explained to her she would be able to cross examine her on it. It was also pointed out to the claimant that it was up to the respondent which witnesses it wished to call.

8. On the second day the claimant stated she felt, *"uncomfortable"* with the respondent's witnesses sitting in the Tribunal and did not want them to be there. As there were no circumstances brought to the Tribunal's attention which would justify the exclusion of the witnesses from the Tribunal, they remained.

9. The hearing had been listed to take place over seven days, 25 March – 29 March and then continuing 1 and 2 of April. Unfortunately, the Tribunal

could not sit on 27 March. On 28 March at lunchtime, the claimant received news that her father was very ill in India. As a result, she did not feel well enough to continue. An order was made that she advise the Tribunal by the close of business whether she was able to continue the next day. Her husband wrote on her behalf stating that she would not be able to do so but would attend the hearing on 1 April. The hearing was therefore adjourned, and no parties attended on 29 March. Mr Brittenden did attend as he had not been informed by the administration that the postponement had been granted. The hearing continued 1 and 2 April with the claimant's husband, Mr Clements, speaking on her behalf and conducting the cross examination of the remaining witnesses. Submissions were heard on the last afternoon, but there was insufficient time for the Tribunal to commence its deliberations and new dates were listed for that.

10. The tribunal heard from the claimant and the following witnesses for the respondent:

    Angela Coupe, Matron and Interim Head of Nursing, Division C
    Holly Sutherland, Interim role as Head of Operations
    Katie Wilson, Manager of discharge planning, admission avoidance and frailty services.
    Rachael May, Divisional Head of Nursing

    It had bundles running to 640 pages plus the additional pages supplied by the claimant.

11. From the evidence heard the tribunal makes the following findings of fact.

The Facts

12. The claimant commenced employment with the respondent on 25 November 2002 as a Band 5 Staff Nurse. She was appointed to a Band 7 Senior Sister post as a secondment in April 2014 by Angela Coupe to Ward N3. She was then successfully interviewed and appointed to the substantive post from 7 December 2014.

13. Angela Coupe is a Matron at the respondent, a post which she has held for over ten years and since June 2018 she has been interim Head of Nursing for Division C. She qualified as a nurse in 1987.

14. Holly Sutherland, from whom the Tribunal also heard, trained as a Student Nurse and qualified in 1992. She became the Trust's Divisional Head of Nursing for Division C in April 2014 and since June 2018 has been in the interim role as Director of Operations.

15. Rachael May is employed as the Divisional Head of Nursing.

16. The other witness the Tribunal heard from for the respondent was Katie Wilson who has been employed by the Trust from October 1999 to April 2018. She started as a Staff Nurse in Woman's Health and then focused on Discharge Planning. She progressed to the Manager of the Discharge Planning Admission Avoidance and Frailty Service with ultimate responsibility for four teams and supported the Trust with its Delayed Transfer of Care and flow of complex patients through the hospital.

17. The claimant's clinical job description was seen at page 108 of the Bundle. It was a Band 7 post and with responsibility to the Senior Clinical Nurse but professionally accountable to the Divisional Head of Nursing. Her job summary was as follows:

    "To ensure that respiratory nursing care and practice is delivered to an excellent standard using the most current research available.

    As an expert practitioner the post holder will lead, develop and maintain patients centred care in the ward through the provision of organisational and clinical leadership to the nursing and multi-professional team.

    To be responsible for the general functioning and management of the ward.

    To provide clinical leadership for the ward through leading, motivating and supervising a team of qualified and support staff."

18. The claimant confirmed in evidence that that accurately reflected the role of her job. She also accepted the 24 hour responsibility that she had for management of patient care.

19. The key duties and responsibilities were divided into clinical, education, leadership and managerial and again the claimant accepted that the role encompassed those key aspects.

CQC Inspection April 2015

20. There was an unannounced CQC inspection of the respondent on 21 – 24 April 2015. The overall rating for the hospital was 'Inadequate' with most areas including Medical Care either 'Requiring Improvement' or 'Inadequate'. In the summary of the report seen by the Tribunal, the only service assessed as 'Good' was that for Children and Young People.

21. It is at this inspection that the claimant states she provided information to the Inspectors regarding Nurse staffing levels established on the unit which was unsafe according to the British Thoracic Society (BTS) Guidelines for safe staffing numbers for patients with acute non-invasive ventilation (NIV), (paragraph 31 of the claimant's witness statement). It is not disputed that one of the Inspectors was a respiratory physician. The respondent's witnesses all gave evidence that the Inspectors would ask

questions of the staff, which in this case one was particularly able to do with regard to the claimant's ward in view of his specialism, which they were under an obligation to answer truthfully. The claimant did not accept that she was only responding to questions. Her case was that she was the one raising issues.

22. The claimant states that prior to the inspection, she had raised the BTS Guidelines with both Angela Coupe and Hollie Sutherland. That is disputed by them. The claimant stated in cross examination that she raised that from the first day she started working on N3. She was not a thoracic trained nurse.

23. The claimant alleges that, when discussing matters with Angela Coupe from September to December 2014, she would raise the BTS Guidelines with her. She stated that she used it to compare the establishment numbers with her old ward MSEU and the new ward N3 and that her original ward had more staffing than on N3. She says she mentioned the BTS guidelines.

24. When it was put to the claimant that prior to the CQC inspection she had never filed any incident reports that raised the issue of staffing on the ward not being compliant with those Guidelines, she said, *"I can't remember off the top of my head".* She accepted, however, that it would be quite a significant thing to report a breach that the ward was not compliant with those Guidelines. It was put to her that she would have remembered if she had reported such a thing. She stated she would have remembered if it was categorised as a serious incident but could not remember that far back.

25. Angela Coupe was very clear in her evidence that the claimant did not raise the actual guidelines until after the CQC inspection. She was surprised when they were raised as she did not know about them and that the hospital was not meeting them. Angela Coupe emphasised that she covers several different areas as a Matron. They all have different policies, practices and guidelines that she is not an expert in and she is reliant on the ward managers to provide her with the detail. If it was as critical as the claimant has stated, Angela Coupe would have expected a more thorough communication between the team responsible and not just a reference to staffing levels.

26. With regard to the claimant comparing N3 to her previous ward, Ms Coupe gave evidence that you cannot compare wards with each other. N3 was not comparable to MSEU.

27. The tribunal has to conclude that the claimant did not explicitly raise the BTS Guidelines prior to the CQC inspection. Her evidence was not clear as to how and when this had been done. The tribunal accepts the evidence of Angela Coupe that she would have recalled if such specific guidelines had been brought to her attention. This has also lead the tribunal to conclude that whilst the BTS Guidelines were clearly discussed

at the CQC inspection it is more likely than not that this arose as a result of questions put by the inspectors to the claimant rather than her actually volunteering the information of non compliance.

Anonymous letter.

28. Shortly before the CQC inspection an anonymous letter was pushed under the office door of Hollie Sutherland. She and Angela Coupe met with the claimant to discuss the response and the Tribunal saw at page 135 the response that was put together dated 11 June 2015 (well after the CQC inspection). The claimant accepted that this was supportive of her.

Alleged detriments following the CQC Inspection.

Alleged annoyance and / or irritation by Angela Coupe.

29. The claimant asserts at paragraph 38 of her witness statement that her managers were annoyed or irritated, or seemed to be so, during and after the inspection. She says the ‘incident’ occurred on 23 April 2015, in Angela Coupe’s office on Level 4, while she was having lunch, the claimant alleges that she informed her about the conversation and discussions that took place with the CQC Inspectors. From a reading of that paragraph it is not clear what incident is being referred to. What became apparent in cross examination is that the claimant’s actual concerns is about the reply Angela Coupe sent on 30 April (see below).

30. After the inspectors had left on the first day of the inspection 23 April 2015, the Chief Nurse Anne Marie Ingle visited the claimant’s ward for the first time and spoke to her. She asked the claimant to email her concerns and her proposal to rectify the situation. The claimant’s email was seen in the bundle at page 120. Anne Marie replied on 30 April to the claimant, copying in Hollie Sutherland and Angela Coupe. She thanked the claimant for her proposal and stated that she understood the review was underway, so she would look at what the claimant had done alongside the review data. She had asked Hollie if she could receive a weekly report of the ward’s staffing levels against patient acuity. Angela Coupe replied to the claimant asking that they meet to discuss the figures that the claimant had sent Anne Marie as these, *“are not quite right”.* The claimant relies upon that email of 30 April 2015 as the detriment.

31. The claimant dealt with this in her witness statement at paragraphs 38 – 40. She was critical of the fact that Anne Marie Ingle did not reply to her until 30 April 2015 and said in evidence that she needed her support in writing. It should be remembered that Ann Marie Ingle was a significant number of grades above the claimant and after the CQC Inspection,

would, as Chief Nurse have had numerous matters throughout the hospital to deal with.

32. The claimant said in evidence that the email from Angela Coupe of 30 April 2015 was critical of her. She then went on, referring back to the meeting on 23 April in her office *"She didn't verbally criticise me but the way she looked at me was not a happy face."* The Tribunal finds it more likely than not that any unhappy face that Angela Coupe may have exhibited was due to the ongoing CQC inspection and not directed at the claimant and does not find anything critical in that email.

33. In evidence, the claimant accepted the proposition that if someone puts something in writing that contains possible errors, then the manager is entitled to flag that up with the employee. She would not, however, accept that the email was innocuous and not critical at all.

34. On 30 April 2015, Angela Coupe sent an email to the ward and the claimant accepted that that was supportive of the ward.

Performance Improvement Plan.

35. The claimant was taken to the anonymous letter by Counsel in cross examination and asked if she would accept that it raised quite serious concerns. The question had to be repeated several times when eventually the claimant accepted that it was, for a third person to read. She accepted that the response written was supportive of her.

Informal Performance meeting 18 February 2016 (page 149).

36. By February 2016 Angela Coupe had concerns about the claimant's performance and had discussed these with Hollie Sutherland, her line manager. She arranged to meet with the claimant on 18 February 2016 and highlighted where she felt there were concerns that were similar to the anonymous letter received in 2015. Notes were produced which were in the bundle at page 149 and whilst the Tribunal has no reason to doubt the claimant's evidence that she did not see these at the time, it also accepts Angela Coupe's evidence that these were the notes that she prepared. It was an informal meeting.

37. The heading of the notes shows that the following areas were discussed with the claimant: communication, ward rosters, staff training and management, meeting deadlines and data collection, Safer Nursing Care Tool (SNCT) review and CQC.

38. Regarding communication, Angela Coupe had concerns that some recent communications the claimant had had with her via email could be confusing and that the claimant's responses did not always make sense. In telephone conversations the claimant had been challenging and

unproductive. The claimant appeared to be resistant to ideas or change, even when presented in a way which was to try and support the claimant. With regard to ward rosters Angela Coupe expressed concern that the claimant did not always abide by the process of getting the 'off duty' completed on time. Mandatory training compliance was discussed each month at their one to one meeting and there were still many outstanding staff. They had spoken previously about how the claimant managed her time in relation to meeting deadlines and providing timely responses. The Safer Nursing Care Tool (SNCT) audit data had been requested in August 2015 after the CQC inspection but was not commenced by the claimant until several weeks later. The most recent audit collection missed two days of data and indicated very poor results that were inconsistent with previous results. There was concern about data collected for tracheotomy and NIV patient numbers and staffing.

39. The note concluded that although they had discussed concerns there were many positive examples of practice that the claimant should feel proud of. Angela Coupe expressed her hope that the necessary steps to make improvements would be made and the claimant would seek her support and advice if she needed further help or clarification.

The claimant's annual appraisal 17 May 2016.

40. This was conducted by Angela Coupe (page 171). She believed that the claimant met Trust expectations with regard to values and behaviour standards, but because of the issues with her performance which she had outlined at the February meeting, she felt the claimant had only partially met the overall performance standards required of a Senior Sister. This document records that not all aspects of performance were met despite regular meetings to address concerns. It notes that meetings had been held on 18 February 2016 and a review on 29 September 2016.

41. Following the appraisal, although there were some signs of improvement, Angela Coupe felt that the claimant's performance was still not up to the requisite standard. In response to an outbreak of MRSA on the ward and a serious incident (patient death) on 10 July 2016, an observational audit of Ward N3 was carried out by Rachael May from the Trust's Clinical Educational Support Team at the request of the Chief Nurse, (page 180).

42. This report raised various issues on the ward. These concerned the areas of handovers, organisation of the team and workload, patient safety and documentation, infection control, staff education and local training requirements and staff morale. Recommendations were contained at the end of the report (page 185), and included reviews of handover procedures, establishment and staffing levels, the Trust's NIV policy, reinforcement of infection control practice, education and competency for NIV therapy and respiratory knowledge and group supervision with all staff to provide emotional support and the building of resilience. Angela Coupe felt, and the tribunal accepts that concerns she had about the claimant's

performance were reflected in some of the ongoing concerns which had been identified during that review.

43. Angela Coupe discussed the review with Hollie Sutherland and agreed that the claimant should be given an Informal Performance Improvement Plan and clear objectives to work to. Angela Coupe wrote to the claimant on 15 July 2016 inviting her to a meeting to discuss this on 21 July.

The Performance Improvement Plan (PIP) - seen at page 192 – 203 of the bundle said to be an act of detriment for making a protected disclosure.

44. Much was made by the claimant of her view that the document which had been put in the bundle was not the same document as the respondent sent to the Nursing and Midwifery Council **(**NMC) when it made its referral to the claimant's professional body. She produced a copy of the document which the NMC received. This was put to Angela Coupe who had not seen it before and who was not responsible for submitting anything to the NMC. In comparing the two documents, the Tribunal could see that some of the pages were the same, but as pointed out by Angela Coupe, what seemed to have occurred was that the final paragraph setting out the review section had not been left in the final right hand side column but had been cut and paste into a section headed 'Record of Progress' at the end of the document. For example, under Medication Safety on page 193 of the bundle, the review was headed 13 September 2016 and stated, *"you feel that this is now much safer and have been carrying out some spot checking…"* That exact same phrase is used in the section on the document produced by the claimant at page 1031 of her bundle. That appears to have occurred throughout.

45. The claimant then took Angela Coupe to the final page of her version on page 1034 where it merely said, *"final review meeting will take place on 3 October 2016 by Angela Coupe SCN"* and did not have the narrative contained on the document which was in the bundle at page 203 which did contain a summary of that meeting. Angela Coupe was adamant that the claimant received that version of the final document with the observations made on 3 October. She suspected that whoever filed the other version with the NMC, had perhaps, or the claimant had produced the version that she had brought to that meeting. What was clear was that the final meeting did take place, the PIP was concluded and signed off.

46. The claimant accepted in cross examination that the various matters on the PIP were raised with her. Her position however, remains that she had already achieved at least ten of the objectives. She stated that she did, therefore, challenge these objectives as she needed to see where Angela Coupe was 'coming from'. The tribunal accepts the evidence of the respondent that these were all matters on which they still required improvement.

47. The Tribunal accepts the evidence of Angela Coupe that the claimant became quite angry and challenging at the meeting saying that she

considered the process to be unfair. When the claimant said she would not accept the PIP, Angela Coupe told her if she had any concerns about the fairness of the process she could speak with Liz Hughes, Divisional Head of Workforce. This the claimant did, but not until 2 September 2016 by email (page 211).

48. The Tribunal is satisfied that at no time at this meeting did the claimant state she was being victimised because of any disclosure made to the CQC. Angela Coupe's evidence was very clear that no such allegation was made to her. The Tribunal is also satisfied that no such disclosure was the impetus for the PIP. The respondent, through Angela Coupe, had genuine concerns as to the claimant's performance which to some extent had already been raised in the anonymous letter. That was received by the organisation before the CQC assessment. Despite the CQC assessment, Angela Coupe and Hollie Sutherland had been supportive of the claimant in their response to the anonymous letter and had they wanted to victimise the claimant for raising matters with the CQC, then the Tribunal finds it more likely than not, that they would not have been so supportive in that response.

49. The claimant, at this hearing, demonstrated behaviour which is consistent with that described by Angela Coupe in her evidence that she was not accepting of the respondent's view of the ways in which she fell short of the standards expected of her as a Senior Sister. The Tribunal found this throughout this hearing and the claimant's evidence and questions put by her, or on her behalf, to the various witnesses. She does not seem to have accepted even now that as a Ward Sister, the responsibility for everything on that ward stopped with her.

Re-inspection by the CQC.

50. The Trust was notified by the CQC that they would visit again to carry out a re-inspection and although they indicated this would be in September, the Trust was not told exactly when it would be. Hollie Sutherland and Angela Coupe arranged to meet with the claimant, so they could establish how prepared the staff on ward N3 were for that upcoming inspection and to ensure the claimant felt supported with the process. The Tribunal is satisfied, having heard from Angela Coupe and Hollie Sutherland that such conversations were being held throughout the Trust. Hollie Sutherland had responsibility for 21 clinical areas and she was having such conversations throughout her Division. It was put to Angela Coupe that there was no need to have such meeting with the claimant as she was meeting with her regularly anyway. The Tribunal accepts her evidence that she did indeed need to meet with the claimant as there had been considerable scrutiny around the service and she wanted to assure the claimant and her team that they were supported for the second inspection and to give the claimant an opportunity to raise any matters of concern with regard to the process. It was put to Miss Coupe that when the claimant asked if any other managers were being called to similar meetings, both she and Hollie Sutherland *"kept quiet"*. Both Angela Coupe

and Hollie Sutherland denied this was the case and the Tribunal is satisfied it was not. They were having other meetings with other managers and would have had to have done after such a CQC outcome and anticipated re-visit.

51. The Tribunal is satisfied the claimant did not say at that meeting that she felt she was being victimised on any grounds and certainly not on the grounds of having raised matters previously with the CQC or in respect of her race.

52. It was pointed out to the claimant in cross examination that in her witness statement at paragraph 60, her own evidence is that she stated at this meeting that she felt unfairly treated *"since I whistle blew in April 2015".* There is nothing said there about race discrimination. The claimant asserted that the account of race discrimination was at the earlier paragraph 57. That relates to the PIP meeting on 22 July 2016 and not the meeting in September. The tribunal is satisfied it was not said then either.

3 October 2016.

53. The allegation is, as an act of victimisation on the grounds of race, that Angela Coupe expressed annoyance and non-cooperation at the meeting at which the PIP was signed off. The claimant accepted that she had not put anything in her witness statement about this matter. Having no evidence therefore from the claimant on this matter the tribunal cannot find that it occurred.

Alleged racial discriminatory remarks.

ET1 paragraph 17; 'that since September 2016 during EU recruitment events that I used to go for recruiting due to staffing shortages in the unit, the comment that would be made will be *"at least it's not another Asian"* by Angela Coupe'.

54. In paragraph 62 of the claimant's witness statement, she stated this was *"since September 2016".* She stated in evidence that it was 'up to' early 2017.

55. At the preliminary hearing before Employment Judge Foxwell on 19 November 2018, clarification was sought about this allegation and the claimant said it related to an EU recruitment event in 2016 when Angela Coupe said, *"at least you will have more white nurses rather than Indian or Filipino ones".* That, the claimant said, was the same allegation.

56. The claimant accepted that the first time she raised this matter, was in her ET1 and that she had not reported this to anyone.

57. Having heard the evidence of Angela Coupe, the Tribunal is satisfied that this comment was not made by her. It accepts her evidence that the staff

on ward N3 were from a diverse group of racial and ethnic backgrounds. She had had conversations with the claimant in the past where she expressed her desire to go to India and recruit and this interest had been registered over the last year and a half with Hollie Sutherland and the Trust recruitment department. She had also responded positively to the claimant when she herself had requested to go to India on a recruitment campaign.

Asian food; the allegation is that on a Monday in April 2017 while the claimant was completing one of the weekly focus boards in the staff room, Angela Coupe came to the unit and commented on the Asian food that the staff were eating at lunch time and made comments to the claimant *“this is why I do not come to your staff room”.*

58. Angela Coupe’s evidence, which the Tribunal accepts, is that she tried not to go to the staff rooms to give the staff their privacy. The claimant accepted that.

Further PIP May 2017.

59. This is relied upon by the claimant as a further detriment on the grounds of having raised a protected disclosure.

60. Between October 2016 and February 2017, Angela Coupe found no notable problems with the claimant’s performance. In early 2017, however, further concerns began to become apparent.

61. There was a 360° Appraisal Feedback questionnaire which raised concerns about the claimant’s leadership and communication skills.

62. The specialist physiotherapist for the Ward contacted Angela Coupe by email on 30 March 2017, expressing her concern that none of her team had assessed the claimant’s competencies since she started in the role as Ward Manager and that that should be done annually as per the arrangement with all N3 staff. She wanted to highlight her concern as the claimant was aware of the need for all staff to have their competency signed off annually. It did not look like that had been done for the last 3 – 4 years.

63. Angela Coupe was also made aware in March 2017 that there had been an unplanned discussion between the Operations Manager, Clinical Director and Hollie Sutherland relating to a recent staff survey. The Clinical Director had shared concerns about the number of incidents on the ward and the claimant’s ability to provide leadership and management of it. Angela Coupe requested a meeting with the Clinical Director and Operations Manager to understand more about their concerns. The claimant was on annual leave at the time and she met with the claimant on 28 March 2017 to share the concerns. Angela Coupe suggested that as she was to be on leave the next day the claimant arrange to meet the

Clinical Director to get some specific feedback from him which the claimant agreed to do.

64. Angela Coupe was copied into an email from the Clinical Director, Dr Jonathon Fuld, on 6 April 2017, to the claimant in which he thanked her for meeting with him and recorded that they had discussed the Staff Survey results which appeared bad, but that it was difficult to know what in fact, if anything, their findings represented. They had also discussed the serious incidents (SI) events and a lack of underlying common theme. He recorded that he had explained to the claimant that the ward was not being as successful as it could be, although he acknowledged that he did not know how to get things in an even better position. They had discussed ways to address staff morale and he had explained that the consultants had been thinking about that also.

65. At a scheduled one to one meeting on 12 April 2017, Angela Coupe discussed that conversation.

66. There were several serious incidents that had occurred on ward N3 in a relatively short time frame during 2016 and early 2017. They included the death of a patient with motor neurone disease, an information governance breach, an outbreak of MRSA, a fall on the ward leading to a patient death and a patient in cardiac arrest who died from hypoglycaemia. On 10 and 13 April 2017 Angela Coupe attended meetings with the Chief Nurse, Divisional Directors, Clinical Director, Hollie Sutherland and Speciality Lead from the Ward. Her notes were seen at pages 262 - 5. In this, Angela Coupe noted an email from Anne Marie Ingle the Chief Nurse, summarising the position and that Hollie Sutherland and Angela Coupe would identify possible suitable ward sister support (for the claimant) and provide *“baseline review of ward sister PIP”*.

67. Angela Coupe and Hollie Sutherland met on 18 April 2017 to discuss the matter prior to a further meeting on 20 April 2017. This noted that in view of the concerns identified, the performance management process of the claimant which concluded in October 2016, would be recommenced and extended. Angela Coupe and Charlotte Mills of HR would commence the process with the claimant week commencing 24 April 2017. They would agree objectives and outcomes with the claimant and this would include support offered by the Consultants. A number of options were being considered for the *“buddy”* aspect of the Ward Sister report.

Review of Ward N3 April 2017.

68. A review of the ward was carried out in April 2017 (page 249). This identified many concerns and there was a section at the end entitled ‘Leadership Feedback from Relevant Key Senior Staff’. Five themes were identified: lack of enquiry, application of learning more widely across the ward, defensive response, ownership of actions and communication and assurance. The review concluded there was a belief that the Senior Sister (the claimant) required support to be less defensive and to recognise that

a reassuring working environment would be more enquiring and open where constructive feedback is welcomed rather than just a didactic response to a current issue. The hard work of the claimant was recognised and that she had a visible presence on the ward and gets appropriately involved with the more challenging and complex patients in order to support their pathway. The Consultants had noticed some improvements in how the ward was operating, but they had highlighted concerns around the escalating clinical issues and that there may be a culture where ward staff are not encouraged or feel able to raise concerns openly and without criticism. It was felt that the serious incident reports, progress of investigations and resulting action plans had not generally been disseminated well to staff and that this was both a nursing and medical responsibility and indicated that more collaborative working was required.

Meeting with the claimant 26 April 2017.

69. Angela Coupe and Hollie Sutherland met with the claimant on the above date. Angela Coupe's notes of the meeting with hand written comments taken during it were seen in the bundle at page 255. The type written note was seen at page 265. Hollie Sutherland took the lead at the meeting and explained that they would be entering the informal stage of managing employee performance. She asked the claimant at the end of the meeting, having identified their concerns, to take time to reflect on the discussion and focus on what support she would need to address the concerns and achieve the required performance standard. The claimant acknowledged in cross examination that the management could not ignore the feedback they had received. However, she disagreed with being placed on the PIP. The type written notes that Angela Coupe made of that meeting record that at the end of it the claimant said she felt she did not agree with the plan, did not want to go through it and wanted to resign from her position. She felt the regular one to one meetings should be enough to address the concerns and that her objectives should be part of the normal appraisal process. Angela Coupe expressed her concern at the claimant's decision and said that currently she would not want to take receipt of the claimant's resignation as she felt it was too soon and that they wanted to support her to be able to work through the objectives. The claimant went home early on 27 April and took 28 April off sick due to stress related to the current conversation. The claimant agreed in cross examination that the notes broadly reflected what she said at that meeting and that Angela Coupe had said she did not want to accept her resignation and wanted to support her through the objectives. The claimant accepted that she did not say that she felt victimised for raising matters with the CQC at that meeting.

Incident on 2 May 2017.

70. On 2 May 2017, an incident occurred on the claimant's ward N3. A nurse had removed an NIV mask from a patient who was on continuous NIV and reliant on this for breathing and had put her on a normal nebuliser circuit. The patient was disconnected for less than one minute and suffered no

harm, although did subsequently die (but not because of this incident). Angela Coupe was not made aware of the incident occurring on 2 May until she received the automated notification of a 'Safety Learning Report' in her in-box on 10 May 2017. She was not at work on that day and therefore investigated the issue and reviewed the patient's notes when she returned to work the following day 11 May 2017. The claimant did not inform Angela Coupe of this incident despite being at work on 2 and 3 May and 8 and 9 May 2017.

71. On 11 May 2017, Angela Coupe asked to see the Chief Nurse Anne Marie Ingle to discuss her concerns about the incident as Hollie Sutherland was not at work that day. Following that meeting and as requested by the Chief Nurse, she telephoned Hollie Sutherland to see if she had been informed of the incident and she had not.

72. The Chief Nurse requested that Angela Coupe telephone the claimant at home which she did as the claimant was not on shift that day. A note of her discussion with the claimant was seen at page 267 of the bundle. The claimant is noted as telling Angela Coupe that CP (the Specialist Physiotherapist) told her on 3 May about the incident and she asked her to complete an SLR (Safety Learning Report). The claimant had told CP she would speak with the nurse involved but *"it slipped her mind"*. The Consultants had come to her the previous day, 10 May 2017, to discuss the incident and said should they highlight it as it was identical to last year's SI (when a patient died) and the claimant had said that they should. The claimant said to Angela Coupe *"I wasn't in the mind set to dig into details on Wednesday"* because she was still upset over the ongoing performance discussions. She was asked by Angela Coupe on the phone if she had had any discussions or put a plan in place to check on the nurse's practice and the claimant said *"no"*.

73. Angela Coupe was disappointed at the claimant's response to the incident. The claimant appeared to her to lack insight into the significance of the incident and to not have put effective measures in place to mitigate patient harm. She found it concerning the claimant had said the matter had slipped her mind and that she had not been in the right mind set to address what were very serious issues.

74. Angela Coupe discussed the claimant's failure to act appropriately in response to the incident with the Chief Nurse and following that, agreed to give the claimant leave on 12 April to enable her to reflect on the incident and write her own account.

75. On 12 May 2017, the claimant telephoned Angela Coupe at work to say she wished to resign. Angela Coupe assured the claimant that was not what any of them wanted her to do and asked her to reconsider. She sought advice from HR on the issue.

Rachael May's investigation

76. Rachael May was appointed to investigate the non-escalation of this incident by the claimant. That was clearly her remit and not the detail of the incident itself. Her report was at page 316 of the bundle, attached to that was the claimant's own *"time line of events"*. This recorded that on 2 May at 16:30 hours, CP informed the claimant that she thought there had been an error / incident regarding NIV and a nurse. She informed the claimant that she would tell her the details of the incident at a later stage as she was in a hurry to go home. The claimant asked her for further clarification and the completion of an incident form.

77. The claimant then notes that she went off looking for the staff concerned to find out about the incident, but they were not present. She noted that a Senior Band 5 on shift assured the claimant that the nurse did not make an error, was about to, but was stopped. The claimant finished her shift, *"as I could not stay any longer"* and the staff concerned had already left. She noted that on 3 May, Angela Coupe came to see her to find out how she was feeling after the meeting they had had on 2 May. She had permission to go home early. There is no mention in that note that she told Angela Coupe about the matter on 3 May. In cross examination she stated she could not recollect telling Angela Coupe on 2, 3, 8 or 9 May.

78. The claimant could not recollect either leaving any instructions for colleagues about what they should do about the nurse concerned. She accepted with the benefit of hindsight she should have put in place mitigating measures. She did not, however, accept that she should have done more to investigate the incident.

The claimant's resignation.

79. On 15 May 2017, Angela Coupe had a telephone conversation with Nicola Baker the Employee Relations Manager to discuss the conversation she had had with the claimant and her request to tender her resignation. She made a call back to the claimant and the claimant agreed to come in and meet with her and Nicola the following day, 16 May. At that meeting they discussed the incident of 2 May and how the claimant was feeling since. She is noted as stating she had 'totally forgot about it' and had not been thinking right. The claimant explained she felt very stressed and had developed nightmares and Angela Coupe suggested she might see her GP and be signed off work. The claimant again indicated her intention to resign and Angela Coupe asked her to hold off doing so until she had seen her GP, but the claimant felt it would make no difference.

80. The claimant explained she had had her letter of resignation with her since they had discussed the matter previously and was adamant she wanted her resignation to be accepted. Nicola Baker spoke to the claimant about the possibility of being redeployed into a Band 6 role if she was finding Band 7 too difficult or stressful. The claimant said that was not something

she wished to consider because she had worked hard to become a Band 7.

81. The notes record that the claimant would not work her notice and that her last day would be 'next Friday' which it was agreed in evidence was the 26 May. In paragraph 95 of her witness statement the claimant had said that she was asked to extend her resignation until the outcome of the investigation into the non-escalation of the incident and had agreed to do so. She accepted however in cross examination that she had been confused when so stating and accepted that her resignation hadn't been extended but she had been expected to still be part of the investigation.

82. The claimant's letter of resignation (page 282) was dated 8 May 2017, but not received until 16 May 2017, when handed to Angela Coupe at that meeting. In it the claimant stated she wished to resign 'with immediate effect' and that:

> 'I have spent a great deal of time looking at my options and trying to come to a right decision and I feel that I have now made the right decision. Currently I do not have a role to go to. In addition to the reasons that I have already discussed, I am not al [sic] to fully commit to this role as previously. It is not really fair to put myself and my family through the work stress and I have concluded that I do not have any other choice but to resign from the current post'.

She thanked the respondent for the opportunity and stated she had learnt a great deal in her role. There was no mention in the resignation letter of any form of discrimination or less favourable treatment because of the claimant's race, raising matters with the CQC or otherwise.

83. Angela Coupe wrote to the claimant on 18 May 2017 to confirm their meeting on the 16th and her concern about the lack of escalation following the incident on the ward on 2 May 2017. She explained that a Trust meeting would determine whether the incident would be classed as a serious incident or one that would be investigated at divisional level. Either way there would be a meeting with the claimant to understand her involvement in the incident.

84. In the letter Angela Coupe also dealt with the claimant's resignation. She confirmed that she had given the claimant the option of waiting until she had seen her GP, but the claimant had told her that 'would make no difference'. The claimant had declined all other offers of assistance and had stated this was the best decision for her health. Having therefore reluctantly accepted the claimant's decision it was agreed that the claimant would go to her GP and remain on sick leave until her last working day which would be 26 May 2017, the respondent having waived the 3-month required notice period at the claimant's request.

Alleged detriment – Nicola Baker's explanation by email of 22 May 2017 that the claimant could not extend her resignation date.

85. The claimant emailed Angela Coupe on 23 May 2017 confirming she had spoken to Nicola Baker the day before asking whether she could be redeployed to another Band 7 post. She confirmed her resignation still stood but that 'if the redeployment can be considered – then I am happy to extend the resignation date'.

86. Nicola Baker responded by email of 23 May 2017 explaining:

> '…having taken further advice, redeployment would not be applicable, as you have resigned from your post, we would not trigger the redeployment process, as this only applies when an employee is under an HR process if applicable. We would of course welcome any applications if you wish to apply back to the Trust in the future'

This is said by the claimant to be an act of detriment for raising protected disclosures (although she accepted she had wrongly referred to it as the 22 May), direct race discrimination and an act of victimisation on the grounds of race.

87. In cross examination the claimant was not able to clarify this allegation. The claimant explained variously that this was not her understanding of redeployment, as she had asked for her resignation to be extended why was she not redeployed and it all 'added on' to other matters. The claimant gave not oral evidence of how Nicola Baker relaying the policy was in anyway connected to any disclosure or her race and the claimant accepted that she had not told Nicola she had raised any matters with the CQC. She did allege that Nicola was at the meeting on the 16 May when she mentioned the CQC. That was not stated in the claimant's witness statement and there is no reference to it in the handwritten notes of the meeting. The tribunal has concluded it was not raised and the focus of that meeting was the incident on the 2 May and the claimant's resignation.

Claimant's applications for other roles.

88. By letter 30 May 2017 Angela Coupe was advised by Staff Bank Services at the respondent that the claimant had been made a conditional offer of registration for Bank Only registration and had given permission for them to approach Angela Coupe for a reference. She wrote to the claimant on the 8 June 2017 explaining that until the claimant had been interviewed by Rachael May she was unable to process the reference as one of the potential outcomes could be a referral to the Nursing and Midwifery Council. She expressed her hope though that the investigation would be concluded soon, and she would then 'be happy to write a reference at this point'. The claimant chased this up by email and the tribunal saw emails from Angela Coupe to others in the Trust seeking advice on how to respond and how 'unfair' her inability to do so was to the claimant. The tribunal accepts her evidence that she was being proactive on the

claimant's behalf in enquiring as to the progress with the investigation so she could give a reference.

Claimant's interview by Rachael May

89. The claimant co-operated with Rachael May's investigation and attended an interview with her on 11 July 2017 (p305g). She is noted as stating that on the day of the incident she had just returned from a meeting with Holly Sutherland and Angela Coupe and 'wasn't thinking right after meeting – went home'. The notes also record the claimant stating she had been victimised following the CQC inspection.

90. At the interview the claimant told Rachael May that she had been planning to resign before the incident on 2 May as she wanted a 'better work/life balance'

Offer of clinical support nurse role

91. On 26 July 2017 the claimant received a conditional offer for a clinical support nurse role (referred to by the claimant in these proceedings as discharge planning specialist.) This was subject to satisfactory pre employment checks.

92. On 9 August 2017 Racheal May wrote to the claimant with the outcome of her investigation. She explained that had the claimant remained in employment the non-escalation would have been considered under the Trust's disciplinary policy but that in any event a referral would be made to NMC.

93. Angela Coupe provided a reference under the respondents 'trac.jobs' system (page 331a) for the clinical support nurse position but had to advise of the likely referral to the NMC

94. This role was in a team the responsibility of Katie Wilson, manager of the discharge planning, admission avoidance and frailty services, P334 withdrawal of offer. She gave evidence to this tribunal. Ms Wilson was responsible for the decision to withdraw the offer of employment. The tribunal saw the form she completed at p334. It is not dated but by email of the 18 August 2017 Katie Wilson sent this to Charlotte Mills, HR Manager. Ms Wilson could not re advertise until HR had approved the withdrawal and signed off the form. Emails from her chasing this were seen. On 4 September 2017 Zoe Smith, Nurse Recruitment Manager from the Trust's Recruitment Department confirmed that the withdrawal had been approved. Ms Wilson confirmed she would ring the claimant to inform her. Charlotte Mills confirmed to Katie Wilson that the letter the claimant would receive would state that the Trust would not be able to accept applications from her until the outcome of the NMC referral is known.

95. Katie Wilson duly called the claimant on the 4 September and explained the position to her. Although the claimant questioned why it had taken so

long she was otherwise calm upon receipt of this news. This is consistent with the line of questioning put to Katie Wilson by the claimant's husband at this hearing. He became quite emotional as he stated Ms Wilson had been so 'kind and empathetic' when she rang and thanked her for the opportunity she had given the claimant.

96. The withdrawal of this role has been put as an act of detriment for making a protected disclosure and as an act of race victimisation. The claimant puts the withdrawal as on 26 July which is date of the offer not the withdrawal. That the claimant was told she could not apply for jobs pending the NMC investigation was also put as an act of race victimisation.

97. When cross examined on these allegations the claimant stated that Katie Wilson would have known she had raised concerns with the CQC from others in the Trust. As the appointing officer she would have 'known what had happened'. She accepted the proposition therefore that Katie Wilson must be lying when she states that she did not know.

98. As stated Mr Clements when became emotional as Katie Wilson had been so kind and empathetic when she told claimant. He said that the victimisation was not offering the claimant the job back when she was cleared by NMC. That however was not one of issues. It was never put to Katie Wilson that she was lying and knew of matters raised with the CQC and/or that she treated the claimant less favourably by withdrawing the offer on the grounds that the claimant had made an allegation of race discrimination. The tribunal finds that Katie Wilson gave honest and straightforward evidence and that she was unaware of the CQC issue and any allegation made of race discrimination by the claimant. In any event it is satisfied that a hypothetical comparator who had not done those matters would have been treated in the same manner where a referral had to be made to the NMC.

The actual referral to the NMC

99. The referral was made by the Chief Nurse Anne Marie Ingle (p344). It is relied upon as one of detriments for having made a protected disclosure, direct race discrimination and victimisation on the grounds of race.

100. In cross examination the claimant accepted that if there was any doubt the Trust would be expected to report to the NMC. The tribunal has to accept they had to refer. No link whatsoever has been shown to any protected disclosure or race. A hypothetical comparator who had also failed to escalate an incident like that on the 2 May and where the internal investigation concluded as Rachael May had done would also have been referred.

101. By letter of the 29 September 2017 the NMC advised that it would not pursue the matter further. That is of no relevance to the issues before this tribunal.

Relevant Law

102. **Employment Rights Act 1996**

S103A Protected disclosure.

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

S43B Disclosures qualifying for protection.

(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) that a criminal offence has been committed, is being committed or is likely to be committed,

(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) that a miscarriage of justice has occurred, is occurring or is likely to occur,

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

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed

103. The statute calls for a disclosure of 'information'. This was considered in Cavendish v Munro Professional Risks Management Ltd v Geduld [2010] IRL 38 when it was made clear that:

> In order to fall within the statutory definition of protected disclosure, there must be a disclosure of information. There is a distinction between "information" and an "allegation" for the purposes of the Act. The ordinary meaning of giving "information" is conveying facts. For example, communicating information about the state of a hospital would be stating that: "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". However, an allegation about the same subject-matter would be "you are not complying with the health and safety requirements".

104. This requirement was emphasised further in Smith v London Metropolitan University [2011] IRLR 884, when it was stated that:

> In our judgment the ET did not err in holding that the respondent's reason for dismissing the appellant was her misconduct. The misconduct was refusing to perform duties requested of her. Accordingly the ET did not err in failing to hold that the reason for her dismissal was that she had complained and raised grievances that she was being required to perform duties outside her contractual obligations. Even if the appellant had been dismissed because she raised a grievance about being required to perform duties she was not contractually obliged to perform and if the grievance was therefore of a failure to comply with a legal obligation, such a dismissal would not in any event have been for making a protected disclosure within the meaning of ERA s.43A for reasons explained in *Cavendish Munro*. The grievances were not a 'disclosure of information'.

105. This issue was considered more recently by the Court of Appeal in Kilraine v London Borough of Wandsworth [2018] IRLR 846. In that case Sales LJ stated:

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> …the concept of 'information' as used in s 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between 'information' on the one hand and 'allegations' on the other. Indeed, Ms Belgrave did not suggest that Langstaff J's approach was at all objectionable.
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> 31
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> On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute 'information' and amount to a qualifying disclosure within s 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under s 43B(1) will depend on whether it falls within the language used in that provision.
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> 32
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> …I think, in fact, that all that the EAT [in *Cavendish Munro*] was seeking to say was that a statement which merely took the form, 'You are not complying with Health and Safety requirements', would be so general and devoid of specific factual content that it could not be said to fall within the language of s 43B(1) so as to constitute a qualifying disclosure. It emphasised this by contrasting that with a statement which contained more specific factual content. That this is what the EAT was seeking to do is borne out by the fact that it itself referred to s 43F, which clearly indicates that some allegations do constitute qualifying disclosures, and by the fact that the statement 'The wards have not been cleaned [etc]' could itself be an allegation if the facts were in dispute. It is unfortunate that this aspect of the EAT's reasoning at [24] is somewhat obscured in the headnote summary of this part of its decision, which can be read as indicating that a rigid distinction is to be drawn between 'information' and 'allegations.'
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> …35

The question in each case in relation to s 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]'. Grammatically, the word 'information' has to be read with the qualifying phrase, 'which tends to show [etc]' (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in sub-s (1)...

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Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in s 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in *Chesterton Global* at [8], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief.

106. The starting point in a constructive dismissal claim is still the decision in Western Excavation (ECC) Ltd v Sharp [1978] IRLR 27 in which it was held:

‘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. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract’

107. It is now well recognised that the breach of contract may be that of the implied term of mutual trust and confidence. In Mahmud v Bank of Credit and Commerce International SA [1997] [IRLR 462 HL it was stated that the employer must not;

“Without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

Equality Act 2010

108. The claimant also brings claims of race discrimination and victimisation under the following provisions:

13 Direct discrimination

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

23 Comparison by reference to circumstances

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

27 Victimisation

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

109. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 House of Lords. Lord Nicholls stated at paragraphs 11 and 12:

"This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

The most convenient and appropriate way to tackle the issues arising on any

discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the claimant. Adopting this course would have simplified the issues, and assisted in their resolution, in the present case."

110. In the case of a hypothetical comparator Lord Scott stated at paragraph 110:

"In summary, the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. But the comparators that can be of evidential value, sometimes determinative of the case, are not so circumscribed. Their evidential value will, however, be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the victim."

111. In Madarassy v Nomura International plc [2007] IRLR 246 Lord Justice Mummery stated at paragraph 56:

"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

112. Considering the requirements of a 'protected act' in Durrani v London Borough of Ealing UKEAT/0454/2013 the EAT held that:

'...I would accept that it is not necessary that the complaint referred to race using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies…the tribunal found as a fact that the Claimant did not attribute any treatment (at the time) to the fact that he is British of Pakistani origin. That finding of fact alone means that there is no evidence that an employer, seeking to cause detriment to the Claimant as a result of making the complaints he did, could have been victimising him for a complaint made by reference to, under, or associated with the relevant Act…

[23] The tribunal here thus expressly recognised that the word "discrimination" was used not in the general sense familiar to Employment Tribunals of being subject to detrimental action upon the basis of a protected personal characteristic, but that of being subject to detrimental action which was simply unfair…

[27] This case should not be taken as any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of s 27 of the Equality Act. All is likely to depend on the circumstances, which may make it plain that although he does not use the word "race" or identify any other relevant protected characteristic, he has not made a complaint in respect of which he can be victimised. It may, and perhaps usually will, be a complaint made on such a ground. However, here, the tribunal was entitled to reach the decision it did, since the Claimant on unchallenged evidence had been invited to say that he was alleging

discrimination on the ground of race. Instead of accepting that invitation he had stated, in effect, that his complaint was rather of unfair treatment generally.

113. The EAT in Fullah v Medical Research Council and another UKEAT/0586/12 reviewed some of the relevant authorities. It firstly cited Waters v Commissioner of Police for the Metropolis [1997] IRLR 589, [1997] ICR 1073 in which both the Court of Appeal, as did the EAT under Mummery P as he then was, rejected the specific submissions based on a generous construction of s 2(1)(d). Waite LJ who set out in full what we will describe as the generous interpretation advanced by counsel for the Claimant in that case, and comprehensively rejected it:

> "That submission fails, in my judgment, for this reason. True it is that the legislation must be construed in a sense favourable to its important public purpose. But there is another principle involved – also essential to that same purpose. Charges of race or sex discrimination are hurtful and damaging and not always easy to refute. In justice, therefore, to those against whom they are brought, it is vital that discrimination, including victimisation, should be defined in language sufficiently precise to enable people to know where they stand before the law. Precision of language is also necessary to prevent the valuable purpose of combating discrimination from becoming frustrated or brought into disrepute through the use of language which encourages unscrupulous or vexatious recourse to the machinery provided by the discrimination Acts…The allegation relied on need not state explicitly that an act of discrimination has occurred – that is clear from the words in brackets in section 4(1)(d). All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of section 6(2)(b)."

114. The EAT then went onto explain how that approach was followed and expanded by Langstaff P in Durrani v London Borough of Ealing *UKEAT/0454/2013*, but that:

> 24 …An employer is entitled to more notice than is given by a simple contention that there is victimisation and discrimination…
>
> 25… The person on the receiving end of a complaint of victimisation ought to be able to identify what protected characteristic it is in respect of…
>
> 27 This case should not be taken as any general endorsement for the view that where an employee complains of 'discrimination' he has not yet said enough to bring himself within the scope of section 27 of the Equality Act. All is likely to depend on the circumstances, which may make it plain that although he does not use the word 'race' or identify any other relevant protected characteristic, he has not made a complaint in respect of which he can be victimised. It may, and perhaps usually will, be a complaint made on such a ground…'

115. The EAT in Fullah also referred to Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] 4 All ER 834, [2001] ICR 1065 and the three ingredients stated by Lord Nicholls.

> 'The relevant circumstances (see para 23) must be identified. There must be less favourable treatment (see para 24 and 25) and then, finally, the act of detriment must have been done by reason that the Claimant had done a protected act. This requires an examination of the mind of the alleged discriminator (see para 29) …'

Submissions

For the Respondent

116. Counsel handed up written submissions and spoke to them. There had been no protected disclosure and even if there had been no detriment arose from it being made. With regard to victimisation there was no evidence of a protected act being done. In any event the tribunal would have to consider why the respondent did what it did, their explanations are grounded in contemporaneous documents and there was no improper purpose.

117. It must be clear that the employee was alleging race discrimination Durrani). Taking the claimant's evidence at its highest she says that in September 2016 and 11 July 2017 she did a protected act. When however the tribunal considers her witness statement she says that she was victimised since the CQC inspection. That is not relating to race.

118. The first Performance Improvement Plan was over one year after the CQC inspection and it seems implausible that Angel Coupe would wait a year to subject the claimant to that alleged detriment. They had received the anonymous complaint before the CQC inspection and were supportive of the claimant. It seems inconsistent that they would write in such supportive terms if they were seeking retribution.

119. Rachael May's inspection found some concerns about the claimant's management. The claimant accepted some action would be taken. Evidence was seen of performance concerns that had not been sufficiently addressed leading up to the informal PIP.

120. In relation to the PIP in May 2017 there were three prongs. The 360 degree negative feedback, the staff survey results and review of the ward. The claimant accepted the trust could not ignore feedback. There is no evidence to suggest any linkage to any protected disclosure or retaliation.

121. The explanation by Nicola Baker that the claimant could not extend her resignation date the claimant accepted reflected trust practice as she was not part of any HR process. In answer to a question from the judge the claimant accepted that she was not under such a process. The claim therefore fails as the claimant cannot establish that a white member of staff would have been treated differently.

122. The claimant alleges that Rachael May preferred the evidence of white British members of staff but there was clearly enough evidence for Ms May

to find as she did. The core facts were not really in dispute. The incident was reported to the claimant and she did not escalate it.

123. The reason for the NMC referral was the failure to escalate. The claimant accepted that if the Chief Nurse had any doubts she had to make the referral. It matters not that the NMC took no action. That was their decision.

124. Counsel had understood the claimant's case about the delay in a reference to only relate to the band 6 role. If the claimant also seeks to pursue this allegation in relation to the bank nurse role also then the letter from Angela Coupe of the 8 June 2017 set out clearly her reasons for not being able to provide a reference while the investigation was ongoing. There is a series of emails showing that Angela Coupe was chasing up the investigation of her own volition and stating how unfair the delay was on the claimant. That is not the action of someone seeking to retaliate.

For the claimant

125. Soon after becoming Ward Sister the claimant was comparing staffing levels with her previous ward. This took some time. The claimant mentioned the BTS guidelines to Angela Coupe. She then mentioned that they were not meeting the staffing levels under those guidelines to the CQC inspectors who understood.

126. At the 2016 appraisal Angela Coupe had commented positively on the claimant.

127. The anonymous letter was circulated after the CQC inspection and the claimant and Angela Coupe discussed and agreed the response. It was in line with the trust's policy to be supportive.

128. For the PIP in July 2016 at least 8 – 10 of the objectives arose out of the CQC report.

129. Angela Coupe could have provided a reference based on the facts. She provided one for the band 6 job but the claimant did not get the job.

130. Even if the claimant was working as a bank nurse and the incident had been investigated the trust could still have disciplined her. As she didn't get the job the trust knew that she was jobless and couldn't have her day to day expenses met.

131. With regard to the delay in escalation of the incident the claimant trusted the information she was given by the NIV specialist. She was the same level as the claimant and was very knowledgeable. The specialist told her about the incident and the claimant asked her for a report and she rushed out. The claimant still went back to the ward despite what had happened. If the specialist physiotherapist had done her incident form and it had come back to the claimant, the claimant could have escalated it straightaway.

132. The NMC did not find any concerns for the claimant to continue to practice. During the process Angela Coupe confirmed that the reference was to be made by the Chief Nurse and it was her position to do that.

Conclusions

133. The evidence from the respondents was consistent across all witnesses. They were very experienced members of staff with years of experience between them working at a high level in very difficult circumstances. They gave evidence in a clear, honest and consistent manner supported by contemporaneous documents. The claimant's evidence was not consistent and sometimes she had difficulty even explaining own case. Her evidence was at times contradictory. Sometimes it was difficult even with judge's intervention to obtain an answer to the question put in cross examination. The claimant also had a misunderstanding of the role of this employment tribunal. It was to consider the treatment of the claimant and not to re-investigate the incident of the 2 May. The tribunal has to prefer the evidence of the respondent's witnesses.

Protected disclosure

134. The tribunal has heard no evidence as to the detail of the 'information' provided by the claimant to the CQC. It accepts the evidence of the respondent that the CQC team included a respiratory physician and that it is more likely than not that the BTS guidelines were raised by him. The format of the inspection would be the inspectors asking the staff questions and the staff being under an obligation to respond. The claimant may have said something about staffing levels in response but was not providing 'information' within the meaning of section 43B of the ERA.

135. There was no evidence before this tribunal to support the claimant's suggestion she had already raised these guidelines with Angela Coupe. The tribunal accepts Angela Coupe's evidence that she had not. The claimant had not escalated the issue of non-compliance prior to the CQC inspection. The claimant was very vague in her answers in cross examination as to when she had done so and referred to comparing the staffing levels with her previous ward. The tribunal accepts Angela Coupe's evidence that would not be an appropriate comparison.

Detriment

136. Even if the claimant did make a protected disclosure to the CQC the tribunal does not find that she was treated detrimentally for so doing.

137. The tribunal found no evidence of annoyance or irritation with claimant by Angela Coupe or any of the other witnesses from the respondent. That Angela Coupe did not have a 'happy face' following the CQC report that rated the hospital as 'inadequate' overall is not surprising.

138. As set out in the tribunal's findings the instigation of the PIP was as a result of multiple sources of concerns. The respondent was still supportive of the claimant where they could be and emphasised the areas the claimant succeeded in. That is not the action of those out to discriminate against her. Even though the claimant mentioned resigning this was not accepted to start with.

Race discrimination

139. The tribunal has not found there to have been 'undue scrutiny' of the claimant since the CQC inspection. They had performance concerns and attempted to address those with the claimant which they were entitled to do.

140. As stated in its findings it has not found on the evidence that Angela Coupe made the statements upon which the claimant relies as acts of race discrimination.

141. The explanation of Nicola Baker as to why the claimant could not be redeployed had absolutely nothing to do with her race

142. The referral to the NMC was something that the chief nurse was obliged to do, which the claimant has accepted and not at all to do with the claimant's race. She would have referred any senior nurse who had delayed escalating such an incident.

143. Rachael May was quite clearly an experience investigator and was looking only at the non escalation of the incident and not the actual incident. The claimant's own timeline given to her states that she did not follow it up and escalate it. The claimant even at this hearing still doesn't accept that was her responsibility as the senior nurse.

Victimisation

144. The tribunal has concluded on the evidence that there was no protected act. There may have been reference loosely to victimisation since the CQC inspection but not on the grounds of race. That was never made clear to the respondent. Even the claimant's own witness statement refers raising protected disclosures but not a protected act about race discrimination.

145. Even if the claimant had done a protected act(s) the matters of which she complains which she also relies upon as detriment for making a protected disclosure have not been established. The respondent had in every instance a non discriminatory reason for the action taken, be it the non redeployment, the delay/no reference or the referral to the NMC.

146. Katie Wilson gave very clear evidence to the tribunal as to why the conditional offer was withdrawn and it had nothing to do with race. It was never put to her that she knew of any protected disclosure or race complaints and that was her reason for withdrawing the offer.

Constructive dismissal

147. The claimant relies upon the alleged protected disclosure detriments and acts of victimisation as the breaches of trust and confidence leading her to resign. As the tribunal has concluded they did not occur or if they did the respondent has advanced a non discriminatory reason for its conduct it must also follow that there had been no repudiatory breach by the respondent and it had certainly not evidenced an intention no longer to be bound by the terms of the claimant's contract. The respondent tried to persuade the claimant not to resign. The claimant sought redeployment which is not the action of someone who considered there had been a fundamental breach of contract by her employer. In her resignation letter the claimant made no mention of race or protected disclosures as the reason for her resignation.

148. It follows from these conclusions that all claims fail and are dismissed.

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Employment Judge Laidler

Date: …30.04.19……………..

Sent to the parties on: ....03.5.19......

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For the Tribunal Office