EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs T Penicela	**v**	**Sanctuary Care Limited**

Heard at: Watford

On: 24, 25, 26, 27 February 2020
19, 20 and 21 October 2020

Before: Employment Judge R Lewis
Mr D Bean
Mrs S Wellings

Appearances
For the Claimant: In person
For the Respondent: Mr C Edwards, Counsel

JUDGMENT

1. The claimant made one qualifying protected disclosure to the respondent on 13 September 2017.

2. The claimant's protected disclosure was not the reason or the main reason for her dismissal, and her claim of automatically unfair dismissal fails.

3. The claimant's claims of discrimination on grounds of race, howsoever formulated, fail and are dismissed.

4. The claimant did a protected act by complaining of discrimination on 11 January 2018.

5. The respondent did not victimise the claimant, and her complaints of discrimination by victimisation fail and are dismissed.

REASONS

Procedural history

1. This was the hearing of a claim presented on 23 February 2018. Day A was 11 January and Day B was 25 January.

2. There had been a number of preliminary hearings; notably before Employment Judge Manley on 21 January 2019; before Employment Judge

McNeill QC on 20 March 2019; and before Employment Judge Alliott on 21 January 2020.

3. Despite the resource devoted to case management, and despite the relative simplicity of this case, there remained case management challenges at the start of this hearing. The list of issues (139A-D) was not entirely clear. Bundles in excess of 600 pages proved incomplete. Material presented by the claimant, including her witness statement, was not entirely clear.

4. At the start of the February hearing dates, it was agreed that this hearing would deal with liability only, and that the claimant would be heard first. The claimant gave evidence from about 2pm on the first day until about 12.30pm on the second.

5. On the second afternoon the respondent began its witness evidence. Its first witness was Ms Alison Allden, Regional Finance Manager, who explained the respondent's budgeting and finance processes, and in short denied that the claimant had made any protected disclosure to her.

6. At the start of the third day, the respondent called Ms Sheila O'Connor, Director of Operations, who had dismissed the claimant. The tribunal asked her a number of questions by way of scene setting before cross-examination. In the course of the tribunal's questions, Ms O'Connor confirmed that before the claimant's probation review meeting (at which she had been dismissed) Ms O'Connor had received a short report from Ms Cranfield, the line manager (483-485) which had attached to it a significant bundle of documents. The attached bundle was not in the tribunal bundle and the claimant had never seen it. Ms O'Connor was released while enquiries were made, and the tribunal continued, hearing evidence from the respondent's remaining witnesses. They were Mr Chris Poole, Director of Business Development, who dealt partly with senior management's knowledge of the claimant's performance and partly with protected disclosure; and then of Mrs Lynda El-Guindi, HR Business Partner, who had supported the probationary review meeting.

7. At the end of their evidence, Mr Edwards explained the position about the absent documents. The respondent accepted that Ms O'Connor had received from Ms Cranfield a 94 page bundle of evidence, which she had considered before the probationary review meeting. Although it was not in the tribunal bundle as a single item, about three quarters of the contents were scattered throughout our bundle in context.

8. The respondent prepared a single set version of the 94 page bundle, which was handed to the claimant on the afternoon of the third day. All the pages which were already in the tribunal number were then double numbered, ie they contained a number as per Ms Cranfield's arrangement of them, plus the original bundle number which had been in our bundle. It followed that any page which was not double numbered was new to the claimant. There were about 27 pages in that category.

9. The respondent produced additional sets of the Cranfield bundle for the tribunal to read before the start of evidence on the fourth day. We envisaged that having done so, we would hear the evidence of Ms O'Connor. However, when we had read that bundle on the morning of the

fourth day, further issues arose. The first was that the claimant had had only overnight to read this material and had not had the opportunity to give evidence on it. Although she had seen about three quarters of it, she had not seen it as a single unit.

10. We were also concerned to note that there seemed to be some discrepancy between pages in the Cranfield bundle and the same document in the main tribunal bundle. We asked for an explanation, which was that the version in the tribunal bundle was often a reduced or redacted copy of the full item in the Cranfield bundle. We add that the respondent's solicitor, Ms Reeve, asked to address the tribunal in person. She offered the claimant her personal apologies for the errors in making up the bundle, and gave the tribunal her assurance that the errors were genuine mistakes, and did not represent an attempt to mislead. Ms Reeves' explanation is entirely accepted, and it is wholly to the credit of her professionalism that she addressed the claimant and the tribunal in the language in which she did.

11. However, the position at the start of the fourth day seemed to us that we could not fairly proceed. It seemed to us that fairness demanded that we adjourn so that the claimant could give evidence about the newly disclosed documents; and have time to rethink any cross-examination of Ms O'Connor in the light of having done so. Accordingly, we adjourned to a listing for two days in April. That listing could not be maintained due to lockdown. During lockdown, the present judge conducted a telephone hearing for case management and listed for the three days at the head of this judgment.

12. When we resumed in October, the claimant had prepared a lengthy supplemental statement. Although the adjournment order in February limited supplemental evidence to answering the Cranfield bundle only, the claimant's statement was reiteration of points already made, and contained little by way of analysis of the new material. She briefly gave evidence about it. She also produced a fresh bundle, 'TP' to which she made brief reference. Much of it post dated the events in question, and could not be relevant to the task of this tribunal.

13. Ms O'Connor relied on the witness statement available in February, and on a supplemental statement prepared during the adjournment since February. She gave evidence.

14. Mr Edwards had prepared written submissions, and it seemed to us fair to adjourn at the end of 19 October, and have closing submissions the following morning by CVP. After Mr Edwards' submissions, we adjourned for about 35 minutes to enable the claimant to finalise her reply. The tribunal gave judgment, also by CVP, on the final and seventh day. The claimant contacted the tribunal the following day to exercise her right to request written reasons.

Executive summary

15. It may make our judgment easier to follow if we give a brief executive summary. The claimant was born in 1964. She was educated to Masters degree level. She had a career history in management, including in the care sector. In August 2017 she took up post as Regional Manager for the

respondent. The respondent is a provider of care homes. Reporting to the claimant were 11 home managers in the south east of England. The claimant reported to Ms Cranfield, Regional Director.

16. A significant part of the role of management was to ensure that safe and proper levels of care were provided to all residents, many of whom were extremely vulnerable. Care had to be provided within an organisational and budgetary framework. There was frequent dialogue about organisational need and budget systems. We find that in the course of that dialogue the claimant made one protected disclosure. We find that the claimant's assertions of having made a number of other disclosures are not made out.

17. In December 2017 Ms Cranfield stepped down from line management of the claimant. One of the tasks for her successor, Ms O'Connor, was to complete the claimant's probationary review. Ms O'Connor read the material prepared by Ms Cranfield for the probationary review. The probationary review meeting took place on 11 January 2018 and the claimant was dismissed. We find that the reason for dismissal was that set out below, and that the protected disclosure played no part whatsoever in the decision to dismiss.

18. The claimant alleged that Ms O'Connor at the review meeting made a remark which at least called for an explanation as to whether it was tainted by race. We find that the alleged remark was not made and we find that race played no part whatsoever in the decision to dismiss.

19. It was common ground that the claimant raised the allegation of race discrimination almost immediately and that by doing so she did a protected act. She alleged that she suffered three events of post employment victimisation as a result. We accept the respondent's explanation that the first two events were wholly untainted by any consideration of race or a protected act. We find that the third alleged event did not happen.

General Approach

20. We preface our findings with a number of matters of general approach.

21. In this case as in many other, we heard evidence or reference to a wide range of matters. Where we do not make a finding about a point of which we heard; or if we do so, but not to the depth about which we heard, that is not oversight or omission, but a true reflection of the extent to which the point was of assistance to us. While that observation is commonplace in our work, it was particularly important in this case, where the claimant acted in person, and raised many issues about which she had strong feelings.

22. We are often asked to consider cases with an approach which appears to us binary in the sense that each side asks us to find that it is wholly in the right and the other is wholly in the wrong. That approach rarely helps the tribunal, because it rarely reflects the reality of workplace life. In the context of this case, it seems to us important to record that Ms O'Connor acknowledged in evidence that there had been many positives in the claimant's work, and that Mr Edwards for his part conceded that there were failings and shortcomings in the respondent's management.

23. We try to approach our fact finding with realism. We do not expect of any party or witness a standard of perfection of work, and we approach every case on the understanding that at work human beings make mistakes, or say or do things which with hindsight could have been said or done better. We are careful of the wisdom of hindsight, particularly where we hear emotive evidence about past events.

24. The tribunal has experience of the difficulties faced by litigants in person. We understand that they often bring to their case unfamiliarity with the legal framework, inexperience of the discipline and structure of the tribunal, and strength of feeling which is difficult to reconcile with objective analysis. One frequent consequence of these factors is that claimants approach their cases with unrealistic expectations.

25. We note, without criticising the claimant, that the claimant seemed not to understand a number of the fundamentals of the issues in her own case. We mention our concern that the claimant focused considerably on procedural shortcomings, which we did not find relevant in this case of automatically unfair dismissal, although we accept that they could have been relevant if the claimant had had two years' service.

26. The claimant appeared to believe that as she had been dismissed for, in effect, incapability, she needed to prove her competence to the tribunal; the tribunal's view is that we are not qualified to assess the claimant's capability, and our approach is to rely on the evidence available to experienced decision-makers at the time of the reason for dismissal. The claimant likewise appeared to believe that she was required to prove the truth of her own protected disclosures, and we explained to her that the framework protects a whistle blower, even if the contents of a protected disclosure are incorrect. Finally, the claimant did not understand the importance of adhering to the case management discipline. The list of issues of January 2020 recorded for example that the claimant's discrimination claim relied on a hypothetical comparator; seemingly for the first time, and in closing submission, the claimant sought to introduce Ms Cranfield as an actual comparator, and we attach no weight to this.

Legal framework

27. This was primarily a claim under the protected disclosure provisions of the Employment Rights Act and we were concerned with s.43B, which states as follows:

> "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…
> (b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…
> (d) That the health or safety of any individual has been, is being, or is likely to be endangered."

28. S.43C covers disclosure to the employer, and s.43F disclosure to prescribed persons, namely those prescribed under SI 2014/2418 for the

purposes set out in the Order. A disclosure may be of information already known to the respondent. It may be made more than once.

29. S.47B provides that,

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

30. In considering whether an event was a detriment, we follow the well-known guidance in Shamoon v RUC 2003 UKHL 11, and ask whether the reasonable person in the claimant's position would consider herself placed at disadvantage in the same setting. We note that while there is no reason in law to show that the respondent was hostile to the disclosure, or had an interest in its suppression, those points of approach are matters of the logic of evidence.

31. S.48(2) provides that,

> 'It is for the employer to show the ground on which any act, or deliberate failure to act, was done.'

32. We therefore ask whether a protected disclosure played no part whatsoever in the treatment alleged, or was a material (ie more than trivial) factor.

33. The claimant also brought a claim of victimisation. Section 27 Equality Act 2010 provides that "A victimises B if A subjects B to a detriment because (a) B does a protected act". Section 27(2) includes in the definition of a protected act "doing any other thing for the purposes of or in connection with this Act; … making an allegation (whether or not express) that A or another person has contravened this Act". We accept that the protected act need not be shown to be the sole or even main reason for the detriment complained of, provided that it is shown to have been material.

Findings of fact

34. We do not, in this case, set out a chronology of separate relevant events. We do not consider it helpful or necessary to do so. The broad framework was the for the first weeks of the claimant's employment she had induction, and was then, for a few months, working in post during her probationary period. She was in contact with Ms Cranfield for line management, telephone supervision, and operational purposes. Her work involved the multitude of daily operational issues which arose out of the management of eleven care homes.

35. The claimant's CV, TP1, showed a career of achievement in, broadly, nursing and management. Her last job before joining the respondent was as Regional Manager with responsibility for three nursing homes maintained by a charity. The respondent is a large national provider of care homes.

36. The claimant was appointed on 14 August 2017 as Regional Manager subject to six months' probation. She was home based, and responsible for 11 care homes in the respondent's London region, which the respondent

categorised as five nursing homes and six residential homes. She reported initially to Ms Cranfield who reported at the time to Ms O'Connor.

37. The bundle contained a number of the respondent's policies, procedures and handbooks. It was common ground that the claimant's post had been vacant for some time before she joined, and although we had no detailed evidence on the point, we accept, as a matter of general experience, that that may have led to an accumulation of neglected background tasks. Ms Cranfield came into post earlier in 2017 as Regional Director, stepped down from that post for a number of personal reasons just before Christmas 2017. Ms O'Connor described her as a manager who was "not forceful". We accept that comment as one indication that Ms Cranfield may have under-managed the claimant.

38. The respondent provided a detailed induction programme (163) which was largely but not fully carried out. As stated, the claimant's appointment was subject to a six month period of induction, at the end of which was a probationary review. She had weekly catch up meetings by telephone or Zoom with Ms Cranfield, who made running notes. In addition, Ms Cranfield had a role in ensuring the claimant's effective induction, and appeared to take an active role where required in supporting the claimant's functional work. We therefore take it that Ms Cranfield, even if not a forceful manager, was a knowledgeable line manager, and as supportive as she was able to be given her other work commitments.

39. We heard evidence about specific interactions, of which we give three examples. Ms Earl, Director of Nursing, raised repeated concerns about the claimant's communication style (343, 379); in two other instances (concerning a meeting with a GP, [403-4] and a report to the NMC, 379) Ms Earl and Ms Cranfield shared concerns that the claimant seemed reluctant to carry out tasks which both thought fell properly within the remit of the claimant as Regional Manager. We find that in each instance of the three, a manager senior to the claimant recorded a concern about a central aspect of her performance.

40. We heard some evidence about the process of budget, planning and staffing for the respondent's homes. We were very conscious that this is an area of professional judgment with which the tribunal is unfamiliar, and we take the general proposition that any matter of professional judgment may give rise to more than one assessment, and that there may be more than one right answer to any question.

41. The underlying point, however, was not complex. The respondent is responsible for the care of individuals. Each individual has his or her own needs, and any need of any individual can change on any day, temporarily or permanently. There is therefore a need for dynamic assessment of individual needs, which in turn will inform the professional assessment of the staffing and organisational needs of each home.

42. In managing its homes, the respondent is required to provide a safe system, and is subject to inspection, including unannounced inspection, by the CQC. CQC inspections are serious priority events, and their reports may have significant consequences. In considering whether a home is safe, CQC is

likely to have regard to whether the staffing level is adequate, and safely deployed. We were told that while there is no statutory level of staffing, the industry standard is that in relation to any home, staff costs will be in the region of 60 to 64% of budget. We accept that staffing contingencies may be covered by agency staff, who we know are likely to be significantly more expensive in the short term than employed staff.

43. We understand that in assessing the needs of a home, the respondent conducts dialogue between the home manager, the regional manager (the claimant) and more senior management, balancing all relevant considerations. This is not a simplistic dispute between safety demands versus resource needs; and we were told of disagreements (about which the claimant plainly felt very strongly) about whether a "dependency tool" should be used for these purposes. In about October 2017 the claimant proposed use of a particular mechanism of assessing staff need, which the respondent preferred not to use. We are simply in no position to assess which method of assessing need was more apposite. It is a professional assessment which requires expertise which this tribunal does not possess.

44. On 13 and 14 September 2017 the claimant attended budget meetings at each of three homes in her region, with the home managers. Broadly the purpose was to assess need and make budget bids to be considered at higher level for the following year. The note of a meeting at Time Court on 13 September 2017 recorded that there was a request for (550),

> "One additional senior staff at night so we could remove the additional two hours for each of three seniors, after recent night events, one senior across five suites is not safe."

Those present at the meeting were the claimant, the home manager (Ms Johnson) and Ms Allden. The proposals made at these meetings were considered at the wider budget review meeting on 11 October 2017, attended by Ms Cranfield, Ms Allden and the claimant. The Time Court minute was updated after the 11 October meeting with,

> "11/10 review yes: as comparable with RBG homes also H&S issues, recent coroners outcomes and future inquest to be held."

45. We accept the claimant's case, which was that at the 13 September meeting she and/or Ms Johnson submitted (either jointly, or by one supported by the other) that the level of senior staff at Time Court at that time was unsafe, such as to require an additional appointment.

46. Due to the unclarity of the evidence we are unable to find what precisely was said by each of the claimant or Ms Johnson, beyond the note at 550. Our finding is that they each made the same point, and / or that one made it, and that the other agreed. We accept that the request was repeated at the budget review meeting on 11 October 2017, because the request was discussed and approved there. We do not feel able to find that the protected disclosure was repeated on 11 October, because the evidence about what was said at that meeting about Time Court was incomplete.

47. We find that the information conveyed on 13 September was that staffing was below the safe level, and / or that safety should be enhanced by the

additional appointment; that that tended to show that the current level of staffing endangered the health and safety of any resident. We accept that it was based on reasonable belief, namely the observation of the home manager endorsed by the claimant; and the respondent correctly accepted that any such disclosure was in the public interest.

48. It follows that the tribunal finds that the claimant had the status and protection of "whistle blower" from 13 September. Our finding is that Ms Johnson was in the same position. We heard as a matter of logic that the respondent cannot have been hostile to the disclosure because it approved the request; and that there was no evidence that Ms Johnson was in any way subsequently prejudiced as a result of the disclosure.

49. We also accept the over-arching evidence on this point of Mr Poole and Ms O'Connor: discussion about safe delivery of services, and of balancing human need, budgetary framework, and staff levels, were part of the daily working vocabulary of the respondent and its senior management: there was accordingly nothing untoward about a request for more staff, or about the request being linked to patient safety. There was therefore no logical reason why any expression of support for the appointment of more staff should be penalised. We noted a striking instance of this approach in the claimant's annual leave handover notes of 15 December, (R84 and 454-6). The claimant wrote a four page detailed summary of current issues and events, with one short sentence ('Staffing costs nursing, 456) as the sole reference to this issue.

50. The list of issues (139B) alleged that the claimant had made a number of other disclosures. All were said to relate to safe staffing levels at Time Court and at two other homes. We have been unable to rely on evidence of sufficient clarity to enable us to make any finding that there was any further disclosure. We accept that budgeting and staff levels were a recurrent discussion topic among management. We accept that such discussions took place in the framework of a shared desire to provide a safe service, within budgetary and other organisational constraints. However, we were not shown evidence of any other disclosure having been made of clarity comparable to that on 13 September above.

51. The list of issues identified the claimant's email to Mr Poole of 7 December 2017 as a qualifying disclosure (392-393). We do not agree: we can see no disclosure of information in that document. We understood the claimant further to rely on an email of 12 December to Mr Poole at 20:53 in which she raised a complaint or grievance against Ms Cranfield (440). While this email refers to the claimant's sense of grievance, and to a history of feeling unsupported with concerns, we do not accept that it conveys information which meets the statutory formula.

52. We heard considerable evidence about the process of formal challenges required by the CQC procedures. As we understood it, and put very simply, following a CQC inspection of a home, CQC sent the respondent its draft report. CQC reports are public documents. and a poor report could cause the respondent very great difficulty. Criticism in a draft report therefore had to be addressed quickly and was a priority task. The respondent had a limited time within which to prepare factual challenges to the draft report.

The CQC was open to receiving factual information which might lead it to revise the conclusions and outcomes of its inspections. It was clear to us that this was regarded by the respondent as a high profile priority task.

53. In autumn 2017 the claimant was responsible for preparing two factual challenges to inspection. Ms O'Connor agreed that one had been prepared to a high quality and was at pains to offer praise for it. However, Ms O'Connor's evidence was that one challenge prepared by the claimant was of such poor quality that at the last moment a number of senior colleagues had to be removed from other pressing tasks in order to re-write it. (Documents attached to Ms Cranfield's report, which had not been previously disclosed to the claimant, evidenced the involvement of at least Ms Cranfield, Ms Earl, Ms Knowles [Business manager], and Mr Poole in the urgent work of completing an acceptable final draft, R31-32). The word which Ms O'Connor used a number of times about the claimant's draft was "appalling". Mr Poole said in evidence that he agreed.

54. The claimant's probation review was to be conducted by her line manager, Ms Cranfield. We do not share the claimant's strength of feeling or concern about procedural aspects of the process. It appeared that a date was set for the review to take place in December, which was then postponed, and postponed again when Ms O'Connor took over line management responsibility from Ms Cranfield. We accept that this delay and uncertainty were frustrating for the claimant. We accept that the reasons for delay were partly operational (ie priorities in home management) but also related to Ms Cranfield's personal. The result was that the probationary review took place about 2-3 weeks later than the claimant would have wished; and was conducted by a manager other than her line manager. The claimant felt strongly about both these points, and presented a grievance about them. We do not attach weight to either of these points. We do not find that either point impinged on the overall fairness of the process, or had any relationship to any issue of protected disclosure (or race).

55. Ms O'Connor had before her a report prepared by Ms Cranfield (483-485) which is the single most important document in the lengthy bundle. It sets out Ms Cranfield's preparation for the probationary review. A section then is headed 'I would like to highlight some the good things you have completed, or been involved in.' That is followed by five brief items in which there is positive comment on discrete tasks or outcomes. Three of them refer to good participation and / or support. One is expressed in a slightly half-hearted way, 'You have attention to detail, on concentrated things but not in a wider way.'

56. The next heading is 'Areas of concern.' There follow 14 items, over two and a half pages. The contrast between the 'good things' versus the concerns is not just a matter of numbers or space. Ms Cranfield set out a more detailed analysis of several areas of concern. Ms Cranfield's first item was CQC challenges, of which she wrote that 'several senior managers' had become involved and that the claimant had permitted deadlines to be missed. Within the remainder, she combined individual specific events with general observations about management skills in planning and organisation, prioritising and managing workload, and communications. Ms O'Connor also had the 94 page bundle (discussed above) which Ms Cranfield

attached to evidence her summary. It contained records of the claimant's induction, and of supervision discussions. It also contained extracts from the correspondence about some of the issues and concerns about, eg, the CQC report and communication questions. Ms O'Connor also had personal knowledge of the CQC matter, which she knew of through discussion with senior management colleagues and from her own involvement.

57. The claimant's meeting with Ms O'Connor was a probationary review. The procedure which it applied to it was set out in the relevant procedures (196-209). The respondent prepared and presented it differently from how it would have prepared a capability or disciplinary meeting. We accept that before an 'ordinary' dismissal meeting, the claimant would have seen the evidence which was before the decision maker, and that she did not have that material. We also accept that by the start of the meeting, and on the basis of her reading and her knowledge, Ms O'Connor had a clear idea of what the likely outcome was. We accept that in a potentially dismissal context, a manager who had been closely involved in the events under discussion might stand down.

58. We find that Ms O'Connor entered the meeting on the understanding that dismissal was likely. She was supported by Mrs El-Guindi of HR. The claimant attended accompanied by Mr Godecharle, a Senior Officer of the RCN.

59. Ms O'Connor's initial view was confirmed by two events at the meeting. At the start of the meeting Mr Godecharle said words to the effect that it was predictable where matters would lead, and asked for an agreed settlement to be entered into. There was an adjournment, at the end of which there was no further discussion of the settlement. It was clear to Ms O'Connor that the claimant and Mr Godecharle had disagreed about a settlement, and we find that this irritated Ms O'Connor, because it seemed to her an indication on the claimant's part of lack of preparation for the meeting, and poor communication with her representative. Both of these had been issues highlighted by Ms Cranfield in her report. Secondly, Ms O'Connor found the claimant's presentation at the meeting disorganised, which confirmed her provisional assessment (and that of Ms Cranfield) that the claimant was lacking in the level of organisational and communication skills required of a regional manager. At the end of the meeting there was brief discussion of a grievance which the claimant had raised about postponement at the meeting. The notes record that Mr Godecharle repeated the request for a settlement agreement, and the meeting was adjourned at 1.10pm to enable that to be implemented (507-510).

60. At 6pm that evening the claimant submitted her resignation by email (511). Her letter referred to protected disclosures and to constructive dismissal. It closed with a request that the respondent should liaise with the claimant direct, and not with the RCN.

61. Mrs El-Guindi replied the following morning, 10 January (514C). She wrote that the claimant's resignation was not in accordance with the agreement reached at the end of the meeting the previous day, which was that the claimant would resign as part of a settlement agreement. She went on,

> 'As the letter you sent last night is not in line with what was agreed, I am writing to advise that if you do not want proceed with the settlement agreement then the original decision to terminate your employment will stand and any reference will state the reason for you leaving employment with Sanctuary as 'dismissed due to unsatisfactory performance during probation.
> I would be grateful if you could advise me by return of email today how you wish to proceed.'

62. There was delay in the claimant receiving this (520-520A) and the claimant replied the following morning, 11 January (520). In her email of 11 January at 11.58 the claimant confirmed that she stood by her resignation email. She also, for the first time, raised the allegation that Ms O'Connor made the remark that she did not 'look like a Regional manager.' She confirmed that she would proceed externally. Later she spoke to Mrs El-Guindi, and followed up with another email of that day, sent at 14.34 (521) alleging unlawful dismissal, unfair treatment, and racial discrimination.'

63. On 15 January, Ms O'Connor wrote formal letters to the claimant in which she dismissed her, and rejected her grievance (532-537). We proceed on the basis of EJ McNeill QC's ruling that the claimant's employment ended by Ms O'Connor terminating the claimant's employment and probation.

64. We need first find whether the reason for her doing so, or, if more than one, the main reason, was the protected disclosure which we find the claimant made on 13 September 2017. By 'reason' we mean the factual considerations which operated in Ms O'Connor's mind to lead her to the decision to dismiss. Ms O'Connor did not dispute that broadly she was aware of the 13 September discussion.

65. We find that the reason for dismissal was that Ms O'Connor had a genuine belief, based on the reporting and supporting documentary evidence provided by Ms Cranfield, and drawing further on her own knowledge from senior management discussions, notably of the CQC report; and drawing on events at the probation review meeting itself, that the claimant could not attain and sustain the standard of performance required of a Regional Manager. In short, the reason for termination was the claimant's lack of capability.

66. We find that the disclosure of 13 September 2017 played no part whatsoever in the claimant's dismissal, or in any part of Ms O'Connor's decision making process. Although we have not found that any of the other protected disclosures relied upon was in fact a protected disclosure, we make the following finding. Ms O'Connor's decision to dismiss was wholly uninfluenced in any respect by any contribution which the claimant had made to dialogue about safety levels and staffing levels in any homes; and for avoidance of doubt wholly uninfluenced by the contents of any grievance raised by the claimant. Our decision on the reason for dismissal would therefore have been the same, even if we had found that the claimant had made more protected disclosures than we find she did make.

67. The claimant alleged that in the course of the meeting Ms O'Connor said to her: "You do not look like a Regional Manager." As the claimant is black African, she understood that this remark referred to race, and was both (a)

striking evidence of racial prejudice and (b) a strong indication therefore that her race was at least part of the reason for her dismissal.

68. Ms O'Connor's evidence was that she did not use that phrase, but that she may have stated that the claimant did not "present" as a Regional Manager. Her evidence was that that word indicated a range of the expectations of the capability of a Regional Manager. We have no evidence of the ethnic composition of the respondent's management level workforce, although it appeared that the list of home managers who reported directly to the claimant included a significant minority of non-European names: however, that observation does not assist us.

69. We prefer Ms O'Connor's evidence, for two reasons. We would hope that an HR professional who overheard such a remark would intervene at the time or at least call a short adjournment, after which Ms O'Connor would have the opportunity to retract or clarify the remark. We would likewise expect to see at least some reference to the remark in the notes of the meeting, which there was not. We were not sure that Mrs El-Guindi would have had the confidence to intervene openly in a meeting conducted by Ms O'Connor. We are however confident that a senior official of the RCN, representing a black African member who faced dismissal, hearing such a remark, would have objected to it or commented on it at the time. It would not have been necessary for him to raise an allegation of racism; it would have been sufficient to point out to Ms O'Connor that the remark was at least capable of evidencing racial prejudice. Mr Godecharle did not intervene.

70. An even more compelling point arose some months later. Ms El-Guindi spoke to Mr Godecharle, and on 21 May 2018 he sent the following email to her (547A):

> "Further to our conversation last week, at which time you asked if I could confirm or deny, that comments of a racial nature were made at a meeting that I attended with my member, Ms Penicela. I have now had the opportunity to discuss your request with my manager, and they have advised that any record of the meeting is confidential between our member and the RCN and cannot be disclosed."

71. The RCN is an active union, with a significant membership in a sector with a high level of BAME employees. We find it inconceivable that the reply at 547A would have been sent if Mr Godecharle had heard the words which the claimant alleged. The much likelier explanation is that Mr Godecharle had no record or recollection of those words being spoken, and rather than commit himself on paper to a reply which might be contrary to the claimant's best interests, he preferred to fudge the question. We find his fudge unconvincing. It is a smokescreen to avoid the truthful answer, which was that he had neither note nor recollection of the alleged words being spoken, and that he would have remembered them if they had been said.

72. Relying heavily on the alleged remark, the claimant has alleged that race was a factor in her dismissal. We find that the remark was not made. The tribunal finds further that race played no part whatsoever in the decision to dismiss the claimant. The claimant has made a bare assertion and the burden of proof does not shift. If it did shift, the tribunal accepts that the

reason for dismissal in its entirety was that set out in its entirety at #65 above.

73. It was agreed that on 11 January the claimant put her complaint of race discrimination in an email to Mrs El-Guindi (520). It was common ground that this was a protected act for the purposes of s.27 Equality Act 2010. The claimant relied on three other matters as detriments consequent on that allegation of race discrimination.

74. The first detriment appears to have pre-dated the protected act, and for that logical reason alone must fail. However, as we have heard the evidence, we deal briefly with the point. On 7 January 2018 the claimant registered with Barchester, another provider, as potentially interested in employment. We take that as an indication that at that time she had some sense that her job with the respondent might not be secure.

75. At the probation review meeting on 9 January Ms O'Connor said that a friend who worked for Barchester had spoken to her, mentioning the claimant's registration, and asking about the claimant in general terms. Ms O'Connor went on to say that she had only said in reply that the claimant had provided a good challenge to a CQC report. That was the end of the matter.

76. We find that between 7 and 9 January, and certainly before the protected act of 11 January, the claimant registered with Barchester. We accept that an employee of Barchester saw the registration, and spoke to Ms O'Connor, who is a friend, mentioning the claimant's name. We find that Ms O'Connor gave a truthful reply, although it was far from the whole truth. We accept that she did so because she understood that the claimant's employment with the respondent was not likely to last much longer, and she could see the opportunity of assisting the claimant into the next employment with another provider. We can see nothing wrong in what Ms O'Connor did; it cannot have been an act of victimisation for the protected act which followed it; it was wholly unrelated to any matter of race or protected disclosure for that matter. It was also not a detriment: Ms O'Connor gave a selective and positive reply to a casual question.

77. The second matter is defined in issue 2.11(b) as a complaint that the claimant asked for a "dates only" reference but was given a "dismissal" reference. The point is straightforward. Part of the settlement which was to have been brokered was that the respondent would give a "dates only" reference. However, the claimant withdrew from that settlement on 11 January and therefore can have had no expectation that a "dates only" reference would be provided. Ms El-Guindi made clear to the claimant on 10 January, which, as Mr Edwards stressed, was before the protected act the next day, that dismissal in the absence of agreement would lead to a dismissal reference (514C). In due course a dismissal reference was given. We add immediately that the reference was provided to a company called HC One, which in fact employed the claimant, so the claimant was not prejudiced by being given a dismissal reference.

78. We find that this cannot in fact have been an act of victimisation because the decision to give the dismissal reference (514C) was made both before

the protected act and for the reasons stated in the same letter: that was the procedure in the absence of a settlement agreement. We find that in no respect whatsoever was the nature or content of any reference provided by the respondent for the claimant tainted by any prohibited factor, whether of race or protected disclosure.

79. The final allegation is that the respondent victimised her by impacting on her subsequent employment at HC One. After her dismissal, the claimant was employed by HC One until 20 August 2018 when she was dismissed due to failing her probation (577A). It was common ground at this hearing that the claimant brought a separate claim against HC One, which has been struck out as it was presented out of time, a matter against which the claimant has appealed. The claimant would have difficulties in proving that this respondent had procured her dismissal by a separate employer, giving rise (according to the claimant's schedule of loss) to a claim for compensation against Sanctuary for losses which might be argued to flow from her dismissal by HC One.

80. The claimant's case before us was that there must have been communication from the respondent to HC One which led to her dismissal from HC One. She submitted that the apparent similarity in reasoning between the two dismissal letters was evidence of that having happened. Mr Edwards submitted that the claimant's subsequent dismissal from a similar role in similar circumstances indicated that at HC One, like the respondent, the claimant had aspired to a role beyond her capabilities. We do not find that either proposition has been made out.

81. The claimant's case, which was that the apparent similarity in circumstance between her dismissal by the respondent, and her subsequent dismissal by HC One, proved that the respondent had put some form of pressure on HC One to dismiss her. She could not give evidence of by whom, to whom, when or how such pressure was communicated. We find that there was no evidence whatsoever to support the allegation that there was any communication between the respondent and HC One which led HC One to dismiss the claimant.

82. It follows that all the claimant's claims fail and are dismissed.

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Employment Judge R Lewis

Date: 11 November 20

Sent to the parties on: 12 November 20

For the Tribunal Office