Case No: 3304195/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs T Penicela	v	Sanctuary Care Limited
Heard at:	Watford (in part by CVP)	**On**: 1-3 November 2023
Before:	Employment Judge R Lewis Mr D Bean Mrs S Wellings	

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

JUDGMENT having been sent to the parties on 12 November 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Procedural background

1. This tribunal heard this case over seven days between February and October 2020. Judgment was sent to the parties on 12 November 2020.

2. Following a hearing in the Employment Appeal Tribunal on 6 October 2022 (2022 EAT 181) the case was remitted to this tribunal for part rehearing.

3. The Appeal Tribunal's discussion of remission is set out at paragraphs 55 to 61 of its judgment, as follows:

> " 55. I have now heard further submissions on what should happen next, in light of my having upheld this appeal on Ground 1. Both counsel agree that there is no need for, nor should there be, a full re-hearing of the section 103A complaint upon remission. Mr Kohanzad accepts in particular that the findings of fact already made by the employment tribunal, including of course as to the claimant having made a protected disclosure on one, but only one, occasion, should and must stand.
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> 56. However, both counsel also agree that the respondent should be permitted, if so advised, to call further evidence from Ms Cranfield on the question of what did or did not influence her when she wrote her report and Ms O'Connor on the question of how significant a part consideration of the contents of Ms Cranfield's report played in relation to her decision to dismiss, by comparison with the other

aspects on which she said she relied from her own knowledge and experience. Both counsel have also agreed that if any further evidence is to be adduced it should be limited to that; and the tribunal will then have to reach a conclusion on this point drawing on the existing findings of fact together with any further findings it makes in light of any such further evidence.

57. I note also, as I have noted in my decision but without expressing any view, that there may be some argument to be heard on the question of whether this is a Jhuti type of case, such that the tribunal is required to consider the motivation of Ms Cranfield in order to determine the reason or principal reason for dismissal.

58. All of that being so, I see considerable benefit and attraction in the matter being referred back for further consideration by the same three-member tribunal, or at any rate as many of the three of them as are available if they are not all now available. That is a more proportionate way of dealing with the matter. Although the hearing took place some time ago now, in two parts, in February and October 2020, I think that the same, or as nearly as possible the same panel, will have an advantage from being able to recall, and no doubt refer to its own notes of, the evidence given previously.

59. As against that, Mr Kohanzad submits that there is a risk of this tribunal being consciously, if not unconsciously, disposed towards finding against the claimant, or there being that appearance, given the contents of its existing decision so far as it goes. However, I am not ultimately persuaded that there is a sufficiently compelling reason to direct that this matter should not be heard by the same tribunal. I do not think this is truly a second bite of the cherry case. The tribunal may or may not have had the point in mind, but, even if it did, it did not in terms address it in its decision. Nor can it be said that this was a totally flawed decision. It is significant that ultimately, while I have concluded that the tribunal failed to address this point and it needed to do so, as I have indicated, I have found the matter myself to be finely balanced; and this is not a flawed decision in the sense of the tribunal having addressed the point but fundamentally got the law wrong, or something of that sort.

60. Furthermore, this is a highly experienced tribunal panel which showed in its decision a conscientious approach to the fact that the claimant was a litigant in person and to ensuring fairness to her. It has not been necessary for me to refer to it in deciding this appeal but, for example, it made some serious criticisms of the inadequate preparation for the hearing initially on the part of the respondent, although it accepted explanations that it was given for that, but these led it to the conclusion that fairness to the claimant demanded the hearing be adjourned in particular so that she have a fair opportunity to address materials that were not before the tribunal at the outset of the hearing, and to prepare her case and cross-examine the respondent's witnesses in relation to it.

As both counsel have agreed it should, the tribunal will have the benefit, if the respondent chooses, of hearing further witness evidence at the reconvened hearing. If it is called, the claimant will have the chance to test that evidence in cross-examination. Both parties will have the opportunity also of making further submissions in light of all the evidence which the tribunal will by the end have heard, and on any further issues of law arising, before it makes its final decision. Whatever the outcome, the tribunal will have to give a reasoned decision and I think it can be relied upon to do so with absolute fairness and professionalism."

4. On reading the judgment of the EAT, the present judge was concerned, in light of the difficulties shown by the claimant in representing herself at the first hearing, that the purpose and extent of the remission might not be clear to her. Accordingly he made an order under Rule 29 of the Tribunal's own

initiative which was sent to the parties on 13 June 2023. In part it set a procedural timetable for this hearing, but it also sought to explain to the claimant the scope of this hearing at paragraphs 5 to 10 as follows:

"5 The EAT has written that the scope of the remitted hearing is limited. The remitted hearing will not re-open any of the existing findings of fact in the 2020 judgment. The tribunal's task will be to decide only the following points:

- Was Ms Cranfield's reporting about the claimant 'tainted' by the claimant's protected disclosure;
- If so, what was the effect, if any, of the 'taint' on the decision to dismiss;
- If the decision to dismiss was 'tainted,' does the claim of automatically unfair dismissal succeed, bearing in mind that in a claim of automatically unfair dismissal, the protected disclosure must be the only or main reason for the dismissal?
- If the claim for automatically unfair dismissal succeeds, to what remedy is the claimant entitled?

6 The EAT expressly permitted the respondent to call the evidence of Ms Cranfield and Ms O'Connor on the first three of these points. It said that the claimant may question the witnesses, in the usual way, and make submissions.

7 The EAT did not say whether or not the claimant may give evidence about any of the first three points. While it is difficult to envisage what evidence she could give about the thought process of Ms Cranfield or Ms O'Connor, or about the thought process which led to the decision to dismiss her, I do not think that she is precluded from submitting a witness statement. If it contains relevant evidence, it would be unfair to exclude it; but if it does not, then it could be excluded on the grounds of irrelevance.

8 With reservations, I have in my Order below, as a matter of fairness to the claimant, provided for the witness evidence about the first three points to be exchanged sequentially, not simultaneously.

9 The fourth point for the tribunal in November will be to decide what remedy the claimant is entitled to, if she wins her claim of automatically unfair dismissal. The limitations on evidence which I have set out above do not apply to her remedy evidence. I have made provision below for her to provide an updated remedy statement and schedule of loss. Although it would be unusual, I have included in that provision for the respondent to give evidence about remedy, and for the statements on remedy to be exchanged simultaneously, in the usual way.

10 I take the opportunity to remind the claimant of paragraphs 79 to 81 of the 2020 Judgment, so that she can prepare for this question. I anticipate that the respondent will argue that any compensation which it is ordered to pay should be limited in time to cover only the period between her dismissal by Sanctuary and the start of her employment at HC One."

5 At this hearing, we had five bundles. They were available both in paper and electronic form. The first two consisted of the original bundles available at the 2020 hearing, a total of about 900 pages. We had two separate bundles prepared for the present hearing, and a bundle of the 2020 witness statements, to which had been added the witness statements prepared for the present hearing.

6 The respondent had served witness statements from Mrs Cranfield and Ms

O'Connor, prepared in September 2023 for this hearing, in accordance with the tribunal's order of 13 June. The claimant had not prepared a statement for the liability stage of this hearing, but had submitted a short statement on remedy, supporting a schedule of loss which was in the approximate region of £500,000. We return briefly to this below.

7 Although the June direction had been for a fully in person hearing, it was in the event appropriate for one of the non-legal members and both of the respondent's witnesses to participate remotely. We thank all parties for their co-operation and patience in this regard.

8 The claimant cross examined each witness for approximately three hours which, with time for reading and submissions, took the first two days of hearing. We gave judgment by CVP on the morning of the third day.

9 We record two specific procedural points. In correspondence before the hearing, the claimant had asked for further disclosure of emails written mainly by her about the matters which supported Mrs Cranfield's report. The respondent replied that they were not available, reminding the tribunal that they were emails created in 2017. It was explained to the claimant that the tribunal could not order disclosure of documents said not to exist.

10 The second point was that on the first day of hearing, Mrs Cranfield had attended in person while Ms O'Connor gave evidence remotely. On the afternoon of that day, the claimant applied under Rule 43 for Mrs Cranfield to be excluded from the hearing during Ms O'Connor's evidence. Her concern was that as she wanted to question both about their interactions with each other, the second witness should not have the advantage of hearing the answers of the first. Mr Edwards resisted the application.

11 We refused the application, which did not seem to us in the interests of justice. Mrs Cranfield was attending at a public hearing, and we were asked to take the significant step of restricting her right of attendance, in a case where her actions and motivation were under discussion. Given that the case involved events six years previously, of which detailed personal recollection was likely to have faded, but which were heavily documented (as the size of the bundles perhaps indicates), it seemed to us unlikely in the extreme that wholly fresh evidence would emerge from Ms O'Connor's evidence, such as to justify Mrs Cranfield's exclusion.

Scope of this hearing

12 The scope of the EAT's remission was very narrow indeed, as the claimant acknowledged in her closing submission. While we accept that the claimant understood the narrowness of the scope and sought to respect it, we also find that she struggled to do so. Her cross examination focused repeatedly on events at work about which she felt strongly, such as the delay in process in arranging her probationary review, but about which we had made findings, and which could hardly be relevant to the point for decision at this stage.

13 At this hearing, the claimant showed a good grasp of the contents of the paperwork, but repeatedly put questions based on misunderstanding or misinterpretation. One striking example was that she put to Ms O'Connor

that Ms O'Connor had told the tribunal in 2020 that she considered that Mrs Cranfield had "underperformed" in her role as the claimant's line manager. The judge intervened and drew to the claimant's attention paragraph 37 of our first judgment. That showed that Ms O'Connor had described Mrs Cranfield as not forceful, and the tribunal had then used the word ''undermanaged.' It was the tribunal's word, not the word of Ms O'Connor, and it was not the word underperformed.

14 We were grateful to Mr Edwards who produced concise and well-made written submissions in opening, which he also relied on in closing. As there had been discussion in the EAT on whether this was a case to be considered by analogy with Royal Mail Ltd v Jhuti [2020] ICR 731, his submission dealt with the principles to be drawn from that case, and touched on subsequent authority. In the event, our firm finding has been that Mrs Cranfield's report was not tainted by an improper consideration, and that therefore this is not a case of the Jhuti type, where an innocent decision maker acting in good faith was misled into dismissing an employee for reasons which were false or fabricated. We approached our task by considering whether the reporting by Mrs Cranfield was to a material degree tainted by the claimant having made the one protected disclosure which we found in 2020 she had made.

15 We had found that the claimant made only one protected disclosure, on 13 September 2017. It was however apparent that the first indication of any detriment to the claimant which was done by Mrs Cranfield was three months later on 13 December. The claimant could see very well the logical problem which that caused, and sought to get round it by arguing that her concerns about staffing levels were a recurrent point, to which she returned many times. However, in our first judgment we clearly found that there was one protected disclosure only, and we did not regard ourselves as free to depart from that finding.

16 In hearing evidence, we were concerned not to be drawn into revisiting any finding of fact made in 2020. We were concerned to avoid not just changing any finding of fact, but putting any further explanation or comment or modification on any finding. We did not think that right in principle.

17 That said, we were considerably assisted by the direct evidence of Mrs Cranfield, which undoubtedly would have assisted us had it been available at the original hearing.

Additional findings

18 We make the following additional findings of fact. They should be read in conjunction with all the findings of fact which we made in 2020, all of which remain untouched by the judgment of the EAT.

19 At the time the claimant joined the respondent, the respondent had in place a business recovery plan (236). As staff cost was the respondent's largest single recurrent overhead, the recovery plan, and guidance from Ms O'Connor's predecessor, Mr Rees, focused on the need to impose structure and discipline on staff costs, including recruitment (256).

20 We repeat and remind ourselves that discussion of budget and staff and

staff costs were what we have described as the daily vocabulary of the business (paragraph 49).

21 Mrs Cranfield's evidence shed more detailed light on paragraph 38 of our first judgment. Mrs Cranfield was the claimant's line manager, and she in turn reported to her own line manager, Ms O'Connor.

22 Mrs Cranfield gave evidence, which we accept, that as part of their regular process of keeping informed and catching up, Mrs Cranfield reported to Ms O'Connor in general terms about the claimant's progress. Ms O'Connor thereby acquired a general understanding of how the claimant was progressing through her probation.

23 The claimant's probation went well initially. At the end of October Mrs Cranfield recorded in her notes that things were going well (467), and her witness statement (WS14) confirmed the point.

24 There should have been at least two or three catch-up meetings of the claimant and Mrs Cranfield in November, but in the event only one took place (467-468). Mrs Cranfield explained in her witness statement that the other meetings did not take place because of other work commitments and priorities affecting the claimant, some of which we have referred to in the earlier judgment. In particular, the claimant was heavily engaged with the CQC reports, which interfered with her availability for catch-up meetings.

25 Separately, other problems arose during November, which are also referred to in our earlier judgment: Mrs Earl complained of communication issues involving the QA Team; and there were problems with two routine tasks which the claimant had been tasked with doing, but was resistant to undertaking (paragraph 39 of the first judgment): those were to meet the GP for the Haven Home, and completing a routine report for the Nursing and Midwifery Council.

26 Mrs Cranfield also noted at about that time that the claimant appeared to have difficulty in adhering to deadlines, and in maintaining a timely and up to date working routine.

27 On 4 December, Mrs Cranfield emailed Ms Earl (378) to report that the claimant was doing well. The claimant was not at that point doing well, and that remark may have been written in a misplaced wish to protect a direct report during her probationary period, and to avoid expressing any pre-judgement about the probationary review, which was imminent.

28 We heard some evidence about a concern raised by the London Borough of Greenwich about the extent of service available through the respondent to a resident who was supported by the borough. On the evening of 12 December the claimant sent Mrs Cranfield an email about that issue (422) which appeared to entail a request for an additional member of staff to look after that resident.

29 Just under an hour (54 minutes) later Mrs Cranfield emailed the claimant (441) an invitation to attend a probationary review. The email set out in writing and for the first time that Mrs Cranfield had concerns about the claimant's performance, and listed a number of examples. The email

advised the claimant that her employment might be at risk at the probationary review.

30 The claimant focused considerably at this hearing on two points which arise from these events. As she put it, it was inconceivable that she had been competent on 4 December but had become incompetent eight days later. We agree. We find that Mrs Cranfield's email to Ms Earl of 4 December was not a complete or accurate statement of matters as Mrs Cranfield then saw them, but we attach no greater weight to it than that.

31 Of much greater importance to the claimant were the two events on 12 December: She reported that LBG wanted an additional member of staff, and within the hour was called to a probationary review. She was adamant in asserting that the former event was the cause of the latter; we firmly disagree. We find that the claimant has made the mistake of confusing chronology with causation. We do not find that the invitation to probationary review was sent in response to or because of the claimant's LBG letter. We say so because it is inconceivable that the invitation to review could have been written in retaliation in a period of 54 minutes. It was written because the period for the claimant's probationary review had overrun, and the outcome of probation needed to be dealt with.

32 In our judgment, and also in the judgment of the EAT, there is reference to the 'report' (483-485) which Mrs Cranfield then wrote. That was our word, and it was mistakenly used. We now know and find that Mrs Cranfield wrote a lengthy aide memoire. It was not a report to Ms O'Connor to enable Ms O'Connor to conduct the claimant's probationary review; it was her own note, which she wanted to have in front of her in preparation for the probationary review which she (Mrs Cranfield) at that time expected to conduct.

33 That explains its slightly headline style. It also explains a matter which concerned the claimant, which was that the attached documents (94 pages) were a selection, and did not always include the claimant's replies. We find that the reason was that Mrs Cranfield knew what the claimant had written in reply about the points in question; and that she expected to be able to discuss the documents if need be face to face with the claimant, and hear what she had to say in reply.

34 We find that the aide memoire set out Mrs Cranfield's genuine opinion, based on the evidence of her own observation. That included her own knowledge of the CQC reporting problems, along with what she had been told by others who had helped resolve the problems; her own experience of reminding the claimant of the importance of deadlines and chasing the claimant to meet them in administrative and managerial tasks; her experience of having to press the claimant to arrange and manage her annual leave; her dealings with Ms Earl about the claimant's relationships with the QA Team and her (the claimant's) communication style with the team; and her own involvement with The Haven and NMC points, which she saw as matters of everyday professional routine which the claimant had permitted to become inflated into issues of much greater importance and complexity than they actually were.

35 It is also notable that the report dealt with budget issues (485). It pressed

the claimant to address budgetary points and issues, and referred to her having fallen behind timetable and expectations in doing so, but it said nothing whatsoever about the issue of staffing, or associated costs which the claimant claimed was central to the document. There was nothing in it which suggested that by requesting more staff the claimant had in any way stepped beyond the normal bounds of her role and responsibilities.

36 As written in our earlier judgment, Mrs Cranfield was for personal reasons then unexpectedly unavailable to conduct the probationary review, which was conducted by Ms O'Connor.

37 We found in 2020 that when Ms O'Connor came to the probationary review meeting, dismissal was "likely." We also found that events at the meeting confirmed that likelihood. Ms O'Connor told us at this hearing that while she had read Mrs Cranfield's report, she did not bring it to the meeting, because she did not think it was necessary to do so. She wanted to hear what the claimant had to say.

38 We find that the claimant's dismissal was not predetermined, and we accept the answer given in evidence by Ms O'Connor as to the reason for dismissal, of which the judge's note reads as follows:

> "I made the decision about half way through the meeting, solely based on how she presented at the meeting, which was disorganised, erratic, when asked direct questions she could not say, giving an impression of a person who cannot manage herself. We had a big business and 11 home managers relying on someone to give clear thought and clear direction, and there was nothing in that meeting which left me confident that she could do that."

39 We add that Ms O'Connor's next answer was to say that the claimant did deliver some good work, and that her opinion was that she would have been a capable home manager, but not a regional manager.

40 When the claimant asked Ms O'Connor if she had been influenced at the meeting by Mrs Cranfield's report, Ms O'Connor denied it. We think that that answer turns on the meaning of the word "influenced." If Ms O'Connor understood the question to ask whether the decision to dismiss was hers alone, or was one which endorsed Mrs Cranfield, we find that the decision to dismiss on 9 January was that of Ms O'Connor and Ms O'Connor alone, and that it was made that day and not before. To that extent, Mrs Cranfield's document did not influence her.

41 However, we also find that Mrs Cranfield's report set the scene which created a real possibility of dismissal in Ms O'Connor's mind, and that she found that the claimant's response at the 9 January meeting was consistent with what Mrs Cranfield had written; to that extent, the report played a part in the decision to dismiss.

42 We accept that some of the criticisms and comments made by the claimant about management, and about the management of her probation, were, in principle, well made. We accept that the role which she undertook was demanding. We also accept that in the honest professional assessment of those above the claimant in line management, the role was not beyond the capabilities of a competent performer. It was, in short, a job which was

capable of being done.

43 The claimant repeated some of the criticisms which she had made in the 2020 hearing, and we do not repeat our earlier comments or findings. A recurrent point, with which we had some sympathy, was that at the meeting on 9 January, she did not have the documentation which had informed Ms O'Connor's approach to the meeting. In principle, in any dismissal, we would accept that if there were 100 pages of evidence before the decision maker, which had not been disclosed to the employee, that would be almost inevitably an unfair dismissal.

44 In this case, this point did not assist the claimant or advance her case. The reasons for this were (1) this was a case of automatically unfair dismissal, and the failure to disclose the documents was, in our view, nothing whatsoever to do with the claimant's protected disclosure; (2) Ms O'Connor gave evidence that she did not have Mrs Cranfield's report with her at the meeting, although she had read it; and (3) it was not the sole or main determinative consideration at the meeting.

Conclusions

45 In the tribunal's order of June 2023, we set out the four questions to be answered at this hearing. At the start of the hearing, Mr Edwards agreed with our formulation, and the claimant did not disagree.

46 The first question was: "Was Mrs Cranfield's reporting about the claimant "tainted" by the claimant's protected disclosure?"

47 Our finding and conclusion in reply are that Mrs Cranfield's reporting was in no respect whatsoever tainted by the claimant's protected disclosure of 13 September 2017. It was her honest and genuine assessment, based on her observation of the claimant's work, and on the opinions and assessments of other, senior colleagues.

48 The second question was: "If so, what was the effect, if any, of the taint on the decision to dismiss?"

49 Our conclusion and finding are that we cannot answer the question in that precise formulation. We do find that the decision to dismiss the claimant was that of Ms O'Connor alone, and that Ms Cranfield's report set the scene for the meeting, and gave rise to a real possibility of dismissal. That possibility materialised when Ms O'Connor interpreted the events of 9 January at the meeting as consistent with what Mrs Cranfield had written, and with her own understanding of the claimant's capabilities.

50 The third question was: "If the decision to dismiss was tainted, does the claim of automatically unfair dismissal succeed, bearing in mind that in a claim of automatically unfair dismissal, the protected disclosure must be the only or main reason for the dismissal?"

51 Our finding and conclusion in answer are no. The protected disclosure of 13 September 2017 played no part whatsoever in the claimant's dismissal, and formed no part whatsoever of the reason for dismissal.

Remedy

52 The fourth question which we identified was remedy. At the start of this hearing remedy was agreed to be dealt with on the third and final day, and after we had given judgment we of course did not come to remedy. The fourth question is not answered, because it did not arise.

53 We did however make one comment to the claimant when giving judgment, which we here set out. We set it out as a footnote, although it played no part whatsoever in our conclusions on any of the first three questions.

54 The claimant's witness statement and schedule of loss claimed career loss of earnings for the claimant from her dismissal by the respondent in January 2018 onwards. We refer to paragraphs 79 to 81 of our first judgment. While we accept that we have heard neither evidence nor submission directly on the point, it appears to us on what we have read that the claim for full career loss after dismissal was unsustainable. The claimant had several months employment with another employer after her dismissal by the respondent, and was then dismissed by that other employer. We have rejected the claimant's submission that the respondent brought about her second dismissal, and that finding was untouched by the EAT.

55 It seems to us that the period of loss for which the claimant would have been compensated for dismissal would have been the period between date of termination with the respondent, and date of commencement with the next employer, which we understand to be no more than a matter of weeks. In our 2020 judgment we mentioned the unrealistic expectations of the claimant. We repeat that point here, in the hope that the claimant's disappointment at the outcome before may also tempered with realism as to the value in money terms of what she has in fact lost.

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Employment Judge R Lewis

Date: …29 December 2023….

Judgment sent to the parties on
4 January 2024

For the Tribunal office