EMPLOYMENT TRIBUNALS

Claimant: Mrs T Penicela

Respondent: HC-One Limited

Heard at: Watford Employment Tribunal **On:** 8, 9, 10, 11 July 2024

Before: Employment Judge Tuck KC
Mr P Maclean
Mr P Miller

Appearances
For the claimant: In person.
For the respondent: Mr Singer, counsel.

Reserved Judgment

The claimant's claims fail and are dismissed.

Reasons

Procedural history

1. By an ET1 presented on 17 December 2018, following a period of early conciliation between 17 and 18 September 2018, the claimant presented complaints of unfair dismissal for making a protected disclosure, detriments for making protected disclosures, victimisation, wrongful dismissal and unlawful deductions from wages.

2. The claimant was employed by the Respondent as an Area Quality Director between 12 or 13 March 2018 and August 2018 (the effective date of termination being said by the Claimant to have been 22 August and by the Respondent to have been 16 August 2018). The claimant says that she was dismissed and subjected to detriments because she had made a protected disclosure to, and complaint of discrimination

against, her previous employer, Sanctuary Care Limited ("Sanctuary"). Sanctuary had provided a reference to the Respondent relating to the claimant on 21 February 2018 saying that she had been employed by them from 14 August 2017 until 9 January 2018, and under a heading of "reason for leaving" Sanctuary said that the claimant was "dismissed".

3. The procedural history of this claim is lengthy. On 23 April 2019 Judge Henry directed that a Preliminary Hearing listed for 26 September 2019 be converted to consider whether the claimant's claims had been presented in time such that the tribunal had jurisdiction to hear them, and whether they should be struck out or a deposit order made because they had no or little prospect of success. In a judgment dated 18 October 2019 EJ Bloch QC held that they were out of time and that any complaint of race discrimination should be struck out as having no reasonable prospect of success.

4. The claimant appealed to the EAT by a Notice of Appeal presented on 28 November 2019. Permission to appeal was not granted and a hearing under rule 3(10) of the EAT Rules 1993 took place on 22 April 2021. Amended grounds of appeal were served on 30 April 2021, and permission was given for the matter to be set down for a full appeal hearing. On 2 August 2021, HHJ Stacey (as she then was) ordered, by consent, that the appeal be allowed on all grounds and the judgment of Judge Bloch QC be set aside. This tribunal understands (on the basis of submissions from the Respondent) that essentially the Respondent agreed that Judge Bloch, in considering time limits, had failed to consider the dates of post termination case complained of when ruling the complaint was out of time.

5. The matter was therefore remitted to the ET. A Preliminary Hearing took place (by telephone) on 17 January 2023, and the case summary and orders were sent to the parties on 20 January 2023.

Other litigation

6. The claimant pursued proceedings against Sanctuary and a substantive hearing took place over seven days in February and October 2020 (case number 3304195/18). Judge Lewis (sitting with members) found that the claimant had made a qualifying protected disclosure to Sanctuary on 13 September 2007 when she set out concerns that the level of senior staff on duty was such that it was unsafe and an additional appointment was required. That tribunal also found the claimant had made a complaint of race discrimination on 11 January 2018 when she reported that her manager had said to her that she did "not look like a Regional manager". The claimant's claims that her dismissal was because of the protected disclosure or because of the protected act were dismissed.

7. The claimant appealed that judgment to the EAT and on 6 October 2022 (2022 EAT 181) one ground of appeal was allowed and the case was remitted back to the Lewis tribunal to give further consideration to whether a manager's report about the claimant had been tainted by the protected disclosure and if so, whether that taint

impacted on the dismissal such that the decision to dismiss was tainted. A remitted hearing took place from 1 – 3 November 2023.

8. Following the further hearing after remission the claimant's claim of automatically unfair dismissal was again dismissed as the tribunal concluded that the protected disclosure of 13 September 2017 played no part whatsoever in the claimant's dismissal.

9. The claimant told us in this hearing that the second Lewis judgment is currently the subject of an appeal before the EAT.

Application to amend

10. At the outset of this Hearing, the tribunal went through, with the parties, the issues as recorded in the Case Management Summary prepared by EJ Maxwell after a Preliminary Hearing on 17 January 2023 (at which the Claimant was represented by counsel). The tribunal sought clarification on a number of factual matters.

11. The tribunal then retired to commence reading, whereupon the tribunal noted that the Claimant's statement contained a brief paragraph alleging direct race discrimination. The statement read "I was treated less favorably than a comparator in the same role (another Quality Assurance Director for the East region) who left after what she claimed as unfounded capability issues a few months before (June 2018) but was called back and reinstated which never happened with me". There are no further details of the complaint.

12. The tribunal asked the parties to return, and the claimant was asked if she considered this complaint to be contained within the ET1; save for having ticked the box on the ET1 form indicating a complaint of race discrimination, the claimant referred to nothing more.

13. There being no complaint of direct race discrimination before the ET, Judge Tuck KC told the claimant that if she sought to pursue such a claim, she would need to make an application to amend. She did so.

14. The Claimant told us that she was the only black quality assurance manager at the Respondent, and that her counterpart in the East region, at a team meeting, complained that untruthful concerns about her performance had been raised, leading, in around June 2018, to her resigning. The claimant said that some time after the comparator's circumstances were "looked into" and she was reinstated. The claimant was unable to tell us the name of the comparator but said it would be known to the Respondent. While she had not raised this matter in her ET1, she had mentioned it in an email sent to the tribunal on 18 December 2018. The claimant did not have a copy of that email on day one; she provided the email and substantive document to us on the third day of the hearing -after the application to amend had been determined by us. (Having the full document earlier would have made no difference to the outcome of this application.)

15. In his judgement following a hearing on 26 September 2019, Judge Bloch QC had recorded the following:

> "5.15 Before me today the claimant said she had been subject to no incidents of direct race discrimination during her employment by HC One and added, that but for the relaying of the whistleblowing by Sanctuary to HC One (which, as set out above, she had herself communicated to JC One before employment by them) she would still be working with HC One today.
>
> 5.16 The claimant however also referred me to an email dated 18 December 2018 sent at 12.20 which is sub headed "statement in addition to original statement on ET1". This was not on the tribunal file and after enquiries were made of the tribunal staff during the hearing no such email could be found on the system. In that statement the claimant identified herself for the first time as a Black African, employed in a senior role and she made generalized points of unfair treatment in comparison to two others who she said had been treated more favourably than herself. However, the race of these two others is not identified and the circumstances she describe do not seem comparable with hers :
>
> 5.16.1 ....
>
> 5.16.2 an Area Quality Director who resigned and was invited back into her role.
>
> 5.17 .....
>
> 5.18 Even if I were to take the additional document into account as part of her claim, it does not (either alone or together with the ET1) provide the most basic particulars of a race discrimination claim or even the clear allegation that she had been unfairly treated in comparison to the identified comparators (or at all) on grounds of race."

16. The claimant told us (and while she had no evidence of the same, we accept) that her complaint of direct discrimination was mentioned when this matter went to the EAT. As set out above, the judgment on appeal was by consent and no reasons were given.

17. The claimant did not know why a complaint of direct discrimination was not raised at the PH in January 2023. The order sent on that date stated at paragraph 6m "the claims and issues as discussed at this preliminary hearing are listed in the Case Summary below. If you think the list is wrong or incomplete, you must write to the Tribunal and the other side by 31 January 2023. If you do not, the list will be treated as final unless the tribunal decides otherwise." The Claimant told us that she did not notice the omission of any complaint of direct discrimination, having noted that the Equality Act was mentioned (which it was in relation to the complaint of victimisation.)

18. The respondent resisted the application, reminding the tribunal of the approach set out in *Vaughan v Modality Partnership* [2021] ICR 535, particularly paragraphs 12-27, and of the fact that date of the application to amend is the date to consider in relation to time limits, as per *Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634. Mr Singer submitted that the nature of this amendment was significant and bore little relationship to the facts already in issue. He said that the amendment was being made only when the matter was raised by the Tribunal, on the first day of the hearing when there is no reason why it could not have been dealt with very much earlier in these protracted proceedings. Most fundamentally however, he said that the prejudice to the respondent was significant because it was still not aware of the identity of the alleged comparator (enquiries made since receiving the claimant's statement last Thursday had not cast any light on this), and that in the six years since the time on which the act is alleged, there have been significant changes to management and HR teams which made it difficult to take instructions. Furthermore the factual witness who will appear in this hearing on behalf of the Respondent who might have some knowledge of this matter is on holiday and out of the country until tomorrow.

Determination of the application to amend

19. The claim form does not contain any allegation of direct race discrimination. That the tribunal would not consider the form to contain any such allegation was made clear in the Preliminary Hearing on 26 September 2019. Furthermore, Judge Bloch QC in that hearing explained that the brief reference to this allegation in the email of 18 December 2018 failed to give sufficient particulars of the case.

20. The tribunal notes that the claimant has represented herself in substantive hearings (against Sanctury Care Limited) in January and October 2020 and again in a remitted hearing following a successful appeal to the EAT in November 2023. The tribunal infers from this that the claimant is aware of the importance of accurate lists of issues in preparing for and conducting hearings. The tribunal considers that at the very latest, an application to amend to make clear any claim of direct discrimination which the claimant wanted to pursue, should have been made in advance of or alternatively at the case management Preliminary Hearing of 17 January 2023. Moreover, the omission ought to have been obvious to the Claimant when she received the record of the case management hearing and she should have set out in writing her view that there was an omission – or made the amendment application – by 31 January 2023. The claimant has however done nothing about this for the last 18 months, and even in her statement has not given full particulars of her complaint. She says nothing whatsoever as to who is alleged to have made a decision in relation to the comparator, who made the decision/s in relation to her and how they were materially influenced by race.

21. The tribunal accept that the Respondent would suffer significant prejudice in having to reply to an unparticularised allegation dating from six years ago. It accepts that there have been changes of management and HR personnel (noting that both the

witnesses who are due to appear before us in this hearing are now former employees).

22. Whilst the claimant would suffer prejudice in not being able to pursue a complaint of direct discrimination, we do not consider that prejudice to be significant. The primary complaints relate to how the claimant was treated in having her employment terminated and not being permitted an appeal or grievance hearing. These are matters which will be aired fully in considering her complaints of whistleblowing dismissal and detriments, and victimisation. We consider had the treatment of the other Quality Assurance Director been a central complaint, it would have been in her ET1 and she would certainly have noticed its omission from the hearing on 17 January 2023 and the case summary prepared thereafter.

Evidence and documents

23. We heard evidence from Mrs Amanda Scott who worked as Managing Director for the South Region with the Respondent between 2017 and 2019, Mrs Samantha (Sam) Jacob who was employed by the Respondent from November 2017 until October 2019 and was the Claimant's line manager from July 2018, and from the claimant.

24. The claimant wanted additional time on the first day of the hearing to ensure she had read all the bundle which she had received in its final format late the previous week. In order to accommodate this, and have Mrs Scott's evidence on Tuesday and Mrs Jacob's evidence on Wednesday (each only being available for a single day); the claimant's evidence was therefore given on Tuesday afternoon and Wednesday morning. We were grateful to the parties for agreeing to this pragmatic timetabling.

25. We were provided with a joint bundle of documents consisting of 236 pages to which the Respondent added pages 237 – 247. On days two and three the claimant provided us with additional clips documents which we labelled C1, C2 and C3. The Respondent also provided a brief chronology and cast list.

26. We read such documents as we were directed to and were referred to in the statements. Where we have not made reference to matters about which we heard evidence, it is not because of oversight, but because we have set out herein the matters required to determine the facts before us.

27. We note the observation made by the Lewis tribunal that in her case against Sanctuary the claimant appeared to believe that as she had been dismissed for, in effect, incapability, she needed to prove her competence to the tribunal. We have found the same to be true in the hearing before us. As we expressed to the parties, we were not determining a claim of 'ordinary' unfair dismissal. The issues require us to consider whether the claimant has proven, on a balance of probabilities, that her dismissal was because she had made a protected disclosure, whether she had suffered detriments because of a protected disclosure and/or whether her

dismissal was because she had done a protected act. (This summary does not of course replace the full list of issues to which we have had careful regard).

28. Having finished the evidence on the afternoon of day 3, we permitted the parties to return at lunch time on day 4 so that written submissions could be produced. Both parties produced written arguments and made oral submissions for which we are grateful. We were particularly grateful to the claimant for the manner in which she conducted the hearing with diligence and curtesy in the face of evident strain.

Claims and Issues

29. At a case management preliminary hearing on 17 January 2023 Judge Maxwell identified the issues to be determined by us; these were in our bundle at pages 34-36. We sought further clarification at the outset of the hearing. In relation to the protected disclosure made to Sanctuary Care on 13 September 2017, the Respondent expressly accepted the finding of the Lewis Tribunal in case number 33041/95 that this was a qualifying protected disclosure.

30. In relation to the victimisation claim the protected act relied upon was the complaint to the ET against Sanctuary - that the provision of the "dismissal" reference by Sanctuary to this Respondent on 21 February 2018 was an act of victimisation. The claimant gave further particulars to Sanctuary of that allegation in the course of her litigation against them on 8 August 2018. It was unclear as to the precise date in February 2018 on which that claim of victimisation against Sanctuary was presented to the ET, but nothing turned on this difference.

31. In relation to the claim for unauthorized deductions from wages, the parties agree that the sum in dispute was £456.56.

32. Finally in relation to the claim of wrongful dismissal, the claimant accepted that she had been paid her salary and a sum in lieu of her benefit of the provision of a car for her notice period. While she did not formally consent to withdrawing this claim, she accepted that it had been fully satisfied.

33. The tribunal directed the parties to address the issues relating to liability in their evidence before us, with the issue of remedy to be determined thereafter if necessary. We did however give permission to Mr Singer to call some evidence relating to mitigation during Mrs Scott's evidence as it was not clear that she would be available on any later date.

FACTS

34. The Respondent operates a large number of care homes nationally, offering residential, nursing and specialist dementia care – mostly for older people. The claimant has a long history of managerial positions in the care sector, and is educated to masters level.

35. Having applied for employment with the respondent, the claimant attended a face to face interview with Mr Liam Jennings, then a Regional Quality Manager and Ms Jo Needs, an Area Manager on 8 February 2018, and then a second telephone interview with Mrs Amanda Scott on 13 February 2018. After these interviews the Respondent made an offer to the claimant of employment in the position of Area Quality Director "subject to the Company obtaining a satisfactory DBS/PVG along with satisfactory references". The offer was confirmed in a letter of 14 February 2018.

36. On 21 February 2018 the Claimant's former employer, Sanctuary Care provided a reference confirming that she had been employed as a Regional Manager from 14 August 2017 until 9 January 2018. As set out above, under "reason for leaving" it said "dismissed". The Respondent's "on boarding" team emailed the claimant upon receipt, and on 22 February 2018 the claimant replied saying "I can confirm that I resigned from Sanctuary on 9th January 2018 due to the dispute which remains as I refused to sign a settlement agreement." The claimant told us that she told the respondent's HR that the dispute was about disclosures.

37. The Sanctuary reference was sent by the respondent's HR team to Mrs Scott, who had a telephone call with the claimant on 28 February 2018, following which Mrs Scott emailed HR saying "I have spoken with Tee this afternoon to understand this better. She is planning to send over some of the detail that support that she had resigned rather than being dismissed". The claimant emailed on the same day including a redacted copy of her resignation letter to Sanctuary care which the claimant had submitted on 9 January 2018. The claimant provided to the tribunal a full, unredacted version of the resignation letter in the course of this hearing. The redacted copy of the letter retained information about having made reports about staffing levels (it did not say they were "disclosures" or complaints); it redacted the sentence which said that the claimant considered the information about staffing to be a "disclosure" which had led to a "detriment". The resignation letter made no reference to race discrimination.

38. Mrs Scott on receipt of this document asked the claimant for a face to face meeting. This took place on 6 March 2018 at a respondent care home in Tower Bridge. The claimant says that she told Mrs Scott at the meeting on 6 March 2018 that she had made a protected disclosure at Sanctuary, and that she had complained that in her final meeting at Sanctuary she had received a comment she considered to be discriminatory on grounds of race. Mrs Scott says that the claimant did not tell her either that she had made a protected disclosure nor that she was "litigating against them" or had race discrimination complaints. We note that the Claimant did not assert that she told Mrs Scott that she had complained that the reference which Sanctuary had provided to the respondent was an act of victimisation.

39. Mrs Scott's evidence to this tribunal was that there is a reasonably high turnover in the care sector, and that employees may move around before finding an employer which is a good "fit" for them, such that there is no stigma about not fitting in with a particular employer. She also referred to the acute shortage of staff in this sector, not only nursing and caring employees, but also more broadly.

40. Mrs Scott was satisfied after the meeting on 6 March 2018 that it was appropriate to continue with the Claimant's recruitment; she emailed HR saying "I have a much clearer understanding of the events leading up to her probationary period not being extended and feel satisfied with these additional references that it is safe and appropriate to go ahead and hire".

41. We do not accept the claimant's evidence that she expressly told Mrs Scott on 6 March that she had made a protected disclosure about staffing levels to Sanctuary, nor that she had suffered a racially discriminatory comment. We note that the claimant redacted from her resignation letter the words "protected disclosure" and "detriment", and that it made no reference to race discrimination. Orally she told us that she was careful not to be critical of her former employer, a position reflected in her correspondence with the respondent. We find this to be more consistent with the account Mrs Scott gave, that while she was aware that the claimant considered she had been treated unfairly by Sanctuary and was in dispute with them about her dismissal – but that she did not expressly say she considered herself to have been unfairly dismissed due to protected disclosures or to have suffered discrimination. To the extent that there may have been a discussion about staffing levels during the 6 March interview, we accept that Mrs Scott took from this that the claimant was asserting that she had not been treated fairly by Sanctuary, and that the claimant had a "good understanding of care".

42. In any event, the tribunal accept the evidence of Mrs Scott that knowing that a protected disclosure had been made would not have resulted in her refusing to employ the claimant – that it is the duty of nursing staff to make protected disclosures when necessary. We accept this because there was written reference in email exchanges about the claimant not having signed an "agreement" with sanctuary, and it was evident from the resignation letter and "dismissal" reference that there was some dispute between the claimant and Sanctuary. While Mrs Scott wanted to know about this, she nevertheless went on to confirm the claimant's recruitment once satisfied that the claimant had a "good understanding of care" and would be a safe practitioner.

43. The Claimant says her employment commenced on 12 March 2018 and Respondent says 13 March 2018 (nothing turns on this difference which we have not therefore considered necessary to resolve). The claimant had a two week induction period, and initially reported to the Regional Quality Director, Mr Liam Jennings.

44. The Respondent has a probationary procedure which states that all new employees will be subject to a probationary period of six months. In relation to monitoring it states that "supervision / probationary review meetings.. should take place at intervals of not less than two months". The policy expressly states that the company's capability procedure does not apply during the probationary period. At approximately six months into an employee's employment their line manager should invite them to a 6-month probationary appraisal meeting and carry out a full performance review. The three possible outcomes are, for employment to be confirmed, a further probationary period of up to 3 months be set with required

standards being made clear, or probation being unsuccessful and employment terminated on notice.

45. On 3 July 2018 a "Supervision/1:1 Record" was completed by Mr Jennings, which starts saying "Tee commenced with HC-One on March 12th, this meeting was requested by RQD to review performance to date". RQD stands for Regional Quality Director – i.e. indicating that Mr Jennings had requested the performance review meeting as he was about to leave his role in the South region to take up a different post in the company.

46. The notes of supervision prepared by Mr Jennings were, according to the claimant, provided to her by email two weeks later, and she told us that she took issue with a number of the matters recorded therein on 19 July 2018 by sending an email. We did not have a copy of that email before us despite the claimant specifically having requested a copy of this from the Respondent. The record we find, indicates a balanced review giving specific instances of work which was being done well and areas where improvement was needed based on feedback from home managers and the Area Director. (The working relationship between the Area Director and Area Quality Director was described by Mrs Scott as being like a work 'marriage' requiring close co-operation; a description which the claimant agreed with). It is apparent that the claimant's communication with her AD, and her balance between administrative tasks and being seen on the floor supporting and mentoring the team were both recorded as areas where the claimant needed to improve. The claimant was specifically noted as giving good clinical support.

47. While the probationary policy says that there should be supervisions / performance reviews at least every other month, the one of 3 July 2018 is the only document produced by the Respondent covering the five months of the claimant's employment.

48. At some point in July 2018 Mrs Sam Jacob took over Mr Jenning's role as RQM. Mrs Jacob told us that she had a handover from Mr Jennings – though we have no notes of this. Mrs Jacob had an initial meeting with the claimant in July 2018 (neither were able to recall the date). There is a stark dispute of fact as to the content of that meeting, and no contemporaneous record was made.

    a. The claimant's account of this meeting was that Mrs Jacob said "she had been informed about my situation with my previous employer and went on to explain how we have all been there". The claimant said that Mrs Jacob told her that her previous employer had believed a complaint made against her by Coventry Local Authority which had led to her employment of 10 years' being terminated and her signing an agreement. The claimant said that Mrs Jacob started asking why the claimant had not signed an agreement with her former employer – but at that point they were interrupted by the arrival of the Home Manager. Whilst no information about this July meeting is in the Claimant's ET1, it is included in the "additional information" which the claimant sought to email to the ET on 18 December 2018 in which she says

that Mrs Jacob said she had been "automatically and unfairly dismissed" and had been "very bitter" about this.

b. Mrs Jacob denied entirely that she had said this: her account was that prior to taking up employment with the Respondent in November 2017, she had 26 years' service. Her former employer was facing some financial difficulties and she was headhunted by the Respondent, so she resigned – and there was no settlement or compromise agreement. Mrs Jacob told us that while she had worked with Coventry local authority (and many others having worked all over the country) she has never been subject to a complaint by that authority or any other. She was adamant that she was completely unaware of the Claimant's work history / whether the claimant had been offered an "agreement" by a former employer, or what any dispute with a former employer might have been about. When asked by the judge why she could be certain of this when she had been frank in not recalling various details from 6 years ago, she said that after the claimant's dismissal by the Respondent, she was told (she does not recall by whom) that the claimant had also made a claim against her previous employer. Mrs Jacob very clearly recalled being very surprised and not having known of this before.

49. As to the content of this meeting we prefer the evidence of Mrs Jacob. We accept that Mrs Jacob worked for the employer before the respondent for some 26 years', and her account that she had been headhunted at a time when the employer was facing financial stresses. She had no reason to be untruthful about this. Nor did the tribunal think it likely she would have used the specific language of "automatically unfairly dismissed" and demonstrated that she was "very bitter" about her former employer. She struck this tribunal as a frank witness who admitted when she could not recall matters and was clear about what working practices she followed, and had a tendency to very much favour seeing substance over form (at one point telling the claimant "potato / patato" when the claimant pointed out a difference in language. Furthermore she was candid about having entered into a settlement agreement after 2019 – information she did not have to volunteer. We inferred from this that had she left her post of 26 years under a settlement agreement she would have told us this was the case. We also accepted Mrs Jacob's evidence that she did not access the personnel record of the claimant and was completely unaware of the exchanges about the recruitment process the claimant had undergone.

50. The claimant did not persuade us, on a balance of probabilities, that she had told Mrs Jacob either about her protected disclosure made to Sanctuary, nor about her complaint of victimisation concerning the reference Sanctuary had provided to the Respondent.

51. Mrs Jacob was only the claimant's manager for around 5 weeks. In this period she reached a decision that concerns Mr Jennings had raised about the claimant's lack of skills in communication and ability to coach and mentor home managers, and her attitude toward work (for instance in leaving home walk arounds mid way through and spending too much time in the office / too little on the 'floor') were mirrored in her own interactions with the claimant. Mrs Jacob said she was in the presence of the claimant on a number of occasions at different care homes and that they spoke

regularly on the telephone, between 3 and 5 times per week. She also said that she had received feedback about the claimant from the Area Director who worked closely with the Claimant and from home managers. She said she would ask open questions of the home managers about their week and the support they had received, and that she received a pattern of negative feedback about the Claimant from them, and from the Area Director. Mrs Jacob discussed her concerns with Mrs Scott – her manager whom she had phone calls with several times per day. Mrs Jacob considered that the claimant had valuable skills around report writing and analysis, and in August 2018 made enquiries as to whether there were any vacancies within the audit team, but there were not. Mrs Scott in her evidence also told us that she considered the claimant's report writing to be strong and encouraged enquiries to be made within audit.

52. The claimant said that the only one to one meeting she had during her employment with Mrs Jacob was their introductory meeting in July 2018, and that she received no other feedback from her– formal or otherwise. The claimant is clearly correct that she did not have any scheduled, formal one to one meetings with Mrs Jacob other than their introductory meeting; we do not however accept that there was no feedback whatsoever.

53. On 10 August 2018 Mrs Jacob wrote to the claimant inviting her to attend a probationary review meeting on 16 August 2018. By this date Mrs Jacob had agreed with Mrs Scott, and taken advice from HR, that the claimant's employment would be terminated prior to the end of the probationary period.

54. The letter of invitation to the meeting of 16 August 2018 said that the meeting was scheduled to take place in the Tower Bridge care home at 11.30am. The accounts of the meeting from the claimant and Mrs Jacob differ significantly.

    a. The claimant says that Mrs Jacob arrived late at Tower Bridge so they agreed to meet at 12.30pm; at that point the claimant offered her the loan of her umbrella as Mrs Jacob went outside for a cigarette. While Mrs Jacob was outside the claimant received a call from her 14 year old son saying he had a stomach ache. The claimant decided she had to go home to her son and left the building. She told Mrs Jacob on her way out of the building that she had to go home, retrieved her umbrella and left saying she would contact Mrs Jacob that afternoon. At 11.58 she sent a text to Mrs Jacob saying "I'm getting on the train now but will call once I have dealt with my child emergency. I'm sorry and hope we can still do this meeting".
    b. Mrs Jacob prepared a note of the meeting of 16 August 2018 shortly thereafter, and emailed it to HR on 23 August 2018. Mrs Jacob said that this was the best account of the events, having been prepared at the time. She said that when she arrived at Tower Bridge the claimant was in a resident lounge (clarified to us as being empty of residents) working on her laptop, and that after exchanging pleasantries:

        "I informed Tee that I was not there to give her good news and that she had unfortunately not been successful in her probation. I informed Tee that I would like to give her some feedback as there were some positives

> along with some constructive criticism that I would like to discuss, however from today she would no longer be employed by HC -One.
> I informed Tee that it had been agreed that she would receive one month's pay to give her the opportunity to find another job. At this point Tee requested that I give her ten minutes to 'gather her emotions' I agreed and told her I would go outside for a cigarette – Tee offered me her umbrella as it was raining to which I thanked her. I informed Tee that when she was ready to receive the feedback to call me and I would come back up for further discussion.
> Approximately 2 minutes later whilst stood outside Tee came out and informed me that she had an emergency – that her child was unwell and she had to leave. I informed Tee that I was very sorry about her child and enquired as to the age and what the problem was – she stated that her child was 14 and had a stomach ache. I asked Tee if she lived locally and she informed me she lived at Potters Bar. Having no knowledge of the area I was asked if she would be returning as I would really like to give her feedback face to face, to which she told me should would ring me. I then re-iterated "Tee you do understand that as from today you will not be employed by HC-One, could we not just have the conversation before you go …. "

55. The claimant denies that the meeting started on 16 August 2018 and denies that she was told she was dismissed. She says that she had no idea of her dismissal until receiving, on 22 August 2018, a letter of dismissal dated 20 August 2018; her car had been repossessed by the lease company the previous day (a Tuesday) but she had been given no reason for this repossession.

56. Both Mrs Jacob and Mrs Scott told us that Mrs Scott arrived at the Tower Bridge home (co-incidentally, not by design) shortly after the claimant had left, and while Mrs Jacob was still outside. Mrs Jacob expressed her shock to Mrs Scott about the claimant leaving so abruptly in the circumstances she had, describing her view of the claimant's behaviour as being "bizarre" in leaving because of a "stomach ache" of a 14 year old, when she had just told the claimant her employment was to terminate. Mrs Jacob had formed a view that a stomach ache of a 14 year old did not seem to her to be such an acute emergency as to require an immediate return home, in the middle of such an important meeting.

57. Mrs Jacob's note goes on to record receiving the message at 11.59 from the claimant about "getting on the train now", and says she received a text later saying "I cannot ring for feedback now as I am not very well and have a headache", and the next morning a text saying "unfortunately didn't have a good night still not feeling well today I have made a GP appointment." The claimant provided copies of the first and third of these messages, but categorically denied sending the second.

58. At 13.55 hrs on 16 August 2018 the claimant emailed Mrs Jacob and the Area Director saying "just got back, sorry we couldn't do the performance review meeting today. Unfortunately I cant work today and cant do our meeting today. I am also now feeling unwell and will need to get back to tomorrow once I'm feeling better. I have

cc'd [the AD] to let her know of my unavailability today". The claimant provided a copy of the text sent on Friday 17 August 2018 about having made a GP appointment, and on Monday 20 August sent a further text to Mrs Jacob saying "the GP took my BP on Friday and it was very high and was given a new prescription and told to rest..... I will let you know on Wednesday, apologies, Tee".

59. The tribunal spent time reviewing these starkly differing accounts and looking at the very limited contemporaneous messages and the accounts both Mrs Jacob and the claimant each wrote in the days after 16 August 2018. Ultimately, there was a direct conflict of the oral evidence each gave, and both were very confident in the accuracy of their own accounts. There was no room for misunderstanding; one or the other was providing an account to the tribunal which was inaccurate. We concluded that we preferred the account of Mrs Jacob; she asked rhetorically why she would lie about this. It is clear from her evidence and that of Mrs Scott that she had made the decision to terminate the claimant's employment, and had also checked that with HR prior to 16 August 2018. It is also clear that she attended the Tower Bridge home on that day in order to deliver that message. From the tenor of her evidence we did not form the view that she would have avoided delivering a difficult message or delivered the message in a manner which was ambiguous. It is clear that she had two exchanges with the claimant on 16th August – on her arrival and in the car park as the claimant was leaving. We considered it more likely than not that she did tell the claimant that her employment was to end that date, and consider it likely that the claimant felt somewhat shocked and possibly traumatised by receiving that message – because this was very reminiscent of what had happened to her at Sanctuary. This circumstance, in the view of the tribunal, may well have led to the claimant being 'in denial' as to what she had been told.

60. On Monday 20 August 2018 Mrs Jacob wrote a dismissal letter to the Claimant. She stated therein "At the meeting yesterday [sic] I confirmed that you have not successfully completed your probationary period and would be put on gardening leave with immediate effect. You then left the meeting as you said your son was poorly. I am sorry you had this family emergency and hope that your son is feeling better." Mrs Jacob acknowledged that the reference to "yesterday" was an error – she had prepared a first draft on 17 August; and also that "gardening leave" was a mistake as payment would be made in lieu of notice – as set out later in the letter. The letter gave details of how to appeal the decision to terminate employment.

61. The claimant received this letter on Wednesday 22 August 2018; she emailed Mrs Jacob at 17.26hrs attaching a sick note to the period up to 5 September, and also "acknowledging receipt of your dismissal letter dated 20 August." She said that the meeting had never happened, and that when Mrs Jacob had arrived them had agreed to start the meeting at 12.30 whereupon Mrs Jacob took her umbrella and went outside to smoke. She then records having left "due to a family emergency".

62. Mrs Jacob was asked by the tribunal why she had not replied to the Claimant's texts between 16 and 22 August 2018 confirming that she had been dismissed. She told us that she found the Claimant's behaviour to be "bizarre" and that in her career she had encountered many responses to dismissing staff, from arguing to accepting, but

never a complete denial when she had stated clearly, at least twice, that the claimants' employment was terminating. She said that she found the claimant to be disingenuous such that she thought communication should go from HR / in formal letters.

63. Mrs Jacob replied to the email of 22 August by letter of 24 August. This repeats her account of 16th August (including receiving the message about the claimant having a "headache". She repeats that any appeal should go to HR. This effectively ended Mrs Jacob's involvement with the Claimant. We accept her evidence that as at 24 August 2018, she was completely unaware of the Claimant having worked for Sanctuary, or of any dispute the claimant was in with her previous employer.

64. The claimant also emailed HR on 22 August 2018 with various attachments asking them to be considered as part of her appeal, saying "I will send the full appeal letter in due course." The claimant emailed on 27 August 2018 including various attachments including a letter of appeal dated 26 August 2018. The appeal letter takes issue with the assertion that she was told of her dismissal on 16 August 2018, but also says "most importantly, although I had been given quite vague feedback in my previous review with Liam which I thought had been cleared (my email to Liam dated Thursday 19 July – no response was given), no SMART objectives were set, no performance improvement plan was in place and at no point have I been provided with support to help me improve in respect of any alleged shortcomings. …". The claimant chased on 27 August for an acknowledgement of receipt of her appeal documents, and received a reply from HR on 28 August "I can confirm that this has been forwarded to the appropriate person".

65. On 3 September 2018 the claimant emailed "additional information for my appeal" – largely about the events of 16 August. On 5 September 2018 the claimant emailed the respondent saying that she had undergone a review with her GP and was fit to return to work, asking this be passed on to the person dealing with her appeal. The same day an HR administrator replied saying that Amanda Scott was handling the appeal, and telling her "you should receive a letter shortly inviting you to an appeal hearing". The manager of that administrator emailed her by return asking "have you sent this letter yet as we are not holding an Appeal – we are responding in a letter". Mrs Scott told us that the advice she received from HR was that there was no obligation to hold a meeting, and she could respond in writing.

66. On 10 September 2018 Mrs Scott wrote to the claimant, saying that she was responding to letters of 22nd and 24th August 2018, and that the "only reason given for the appeal is that you deny a meeting took place" on 16 August 2018. Mrs Scott found that the meeting had taken place as described by Mrs Jacob and therefore dismissed the appeal. There was no engagement whatsoever about performance concerns; it is not clear to this tribunal whether Mrs Scott in fact had sight of the letter of appeal dated 26 August 2018 – a document not listed in the letters she was responding to. In evidence before us, some six years after the events in question, she could not specifically recall what had been before her.

67. On 17 September 2018 the claimant sent to the respondent a detailed letter of complaint. She said in that "when I joined HC -One I was very open at both interview and my meeting with you that I did not leave Sanctuary care on good terms. I was very clear at interview with Liam and Jo that I would not speak negatively about other organisations but did mention there was a disagreement around my leaving …" and she goes on to describe the 6 March 2018 meeting. She does not in this letter mention either having passed on details of protected disclosures or having made a claim of victimisation or race discrimination against Sanctuary. She ends the letter saying that she felt strongly that "something must have triggered that need and urgency for my immediate dismissal", and states "I strongly feel that I suffered continued detriment I had sustained with Sanctuary due to the negative reference including any new information received/ accessed by HC-One during my employment which then triggered an immediate need to dismiss me". This mirrored in fact what the claimant had submitted in the (original) Lewis tribunal, paragraph 81 of which says the following:

    "81. The claimant's case, which was that the apparent similarity in circumstances 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 or 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."

68. The claimant told us that her application for discovery of phone records against Sanctuary had been unsuccessful such that she had no evidence to provide. Mrs Scott said that she did not speak to anybody from Sanctuary – about the claimant or at all, either in March 2018 or thereafter. Mrs Jacob denied even knowing that the claimant had ever been employed by Sanctuary until seeing documents for these proceedings – even when told the claimant had a claim against a former employer, she did not know their identity. The claimant did not put questions to either Mrs Scott or Jacobs that they had spoken to or been in contact with Sanctuary, and she could give no evidence of the same.

69. By letter dated 21 September 2018 Mrs Scott replied to the claimant's letter which had been sent by email on 17 September, reiterating that she was dismissed due to "performance and capability issues" on 16 August 2018. She says "you seem to feel that the reason you have been dismissed by HC One is somehow linked to a detrimental reference from a previous employer. I can assure you that this is not the case". Finally she also reiterated that the sole ground of appeal had been the dispute about whether a meeting had taken place on 16 August 2018.

70. None of the HR advice given to either Mrs Jacob or Mrs Scott was recorded in writing; the sole piece of evidence about HR advice before us was the comments HR made to the claimant's email of 22 August 2018 which included asking whether there were notes of the meeting of 16 August 2018, and commenting "the sole ground of appeal seems to be the fact that TP says the meeting did not take place. I would recommend no Appeal Hearing and response in writing as discussed with LF earlier.

TP has no employment right to unfair, constructive or automatically unfair dismissal. We need to confirm that we have full notes of probationary milestone / review meetings."

Law

71. The claimant's claims are:
    a. Automatically unfair dismissal contrary to section 103A ERA 1996
    b. Detriment for making a protected disclosure contrary to section 47B ERA 1996
    c. Victimisation contrary to section 27 EqA 2010
    d. Unlawful deductions from wages contrary to section 13 ERA 1996
    e. Wrongful dismissal – i.e. in breach of contract.

72. In circumstances where it is agreed that the disclosure made by the claimant to Sanctuary on 13 September 2017 was a protected disclosure – as found by the Lewis tribunal, we have not analysed the provisions as to when a disclosure of information will be protected. As Mr Stringer accepted in his written submissions, a disclosure made to a previous employer can be relied upon in proceedings against a subsequent employer (*BP plc -v-Elstone and anor 2010 ICR 879, EAT*).

73. Section 103A ERA provides:

> "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."

74. It is well established (for example – see judgment of Court of Appeal, in the case of *Abernethy -v- Mott Hay and Anderson* [1974] ICR 323) that the reason is to be determined by considering the set of facts which led to the decision to dismiss.

75. As Mr Singer set out in his written submissions:

> "Where a Claimant lacks the requisite two years' continuous service to claim ordinary unfair dismissal, she will acquire the burden of showing, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason — *Smith v Hayle Town Council 1978 ICR 996, CA* (a trade union case), and *Tedeschi v Hosiden Besson Ltd EAT 959/95* (automatically unfair dismissal for health and safety reasons). The EAT in *Ross v Eddie Stobart Ltd EAT 0068/13* confirmed that the same approach applies in whistleblowing claims.
> ...
>
> In *Nicol v World Travel and Tourism Council and ors 2024 EAT 42*, the EAT considered a decision-maker's knowledge of a protected disclosure in the context of dismissal, holding that where a disclosure was made to one person (A) and then transmitted to the decision-maker (B), B needed to be aware of some of the detail of what the whistleblower had disclosed to A in order for the claim to succeed."

76. Mr Stringer also drew attention to the judgment of Mummery JL in *ALM Medical Services Ltd -v- Bladon 2002 ICR 1444, CA* in which he held

> '[T]he alleged unfairness of aspects of [the employee's] dismissal, which would be central to a claim for "ordinary" unfair dismissal, are of less importance in a protected disclosure case. The critical issue is not substantive or procedural unfairness, but whether all the requirements of the protected disclosure provisions have been satisfied on the evidence.'

77. Section 47B ERA provides:

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

78. The issue of detriment has arisen regularly in relation to claims under anti-discrimination legislation. The Court of Appeal, in *Ministry of Defence -v -Jeremiah* [1980] ICR 13, confirmed that it meant "putting under a disadvantage", and, in *Shamoon -v- Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, that it involved "a disadvantage of some kind".

79. Both the claims arising from alleged protected disclosures involve consideration of the issue of causation. The claim under Section 47B relates to detriment "on the ground" of the disclosure, and the claim under Section 103A involves the "reason or principal reason" for the dismissal. With regard to claims under Section 47B, the Court of Appeal. in *NHS Manchester -v- Fecitt* [2012] IRLR 64, noted that causation involved something which materially influenced the treatment, and, in Section 103A claims, the Supreme Court, in the case of *Royal Mail Limited -v- Jhuti* [2019] UK SC 55, indicated that ordinarily Tribunals would look no further than the reasons of the decision maker, but that where the reason was hidden from the decision maker they could look behind that invention.

80. Section 27 EqA 2010 provides:

> "(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."

81. There is no dispute in this case that the protected act relied upon by the Claimant is within section 27(1)(a) EqA. The question which is in issue is causation. In considering this the tribunal considered section 136 EqA in relation to the reversal of the burden of proof. The claimant in this case has established both a protected act, and "detriments". This alone however will not shift the burden of proof; something more is required because the mere fact of a protected act and a detriment is not sufficient. [*Madarassy -v- Nomura International plc 2007 ICR 867, CA*]. In the context of victimisation Mr Singer submitted that there would need to be some evidence from which the tribunal could infers a causal link between the protected act and the detriment. We agree that with that submission.

82. Section 13 ERA 1996 provides that if any pay period the sum received is less than that due, it will constitute an unlawful deduction from wages. In this case it is agreed that if the EDT was 22 August 2018 the claimant will be due sick pay for the period between 16th and 22nd August in the amount agreed.

Conclusions

Automatically unfair dismissal

83. The burden of establishing that the principal reason for dismissal was a protected disclosure is on the claimant. We have concluded that she is unable to satisfy this burden.

84. In considering this complaint we have adopted the finding of the Lewis tribunal (undisturbed by the EAT) that the communication made by the Claimant to Sanctuary Care on 13 September 2017 amounted to a protected disclosure under section 43B ERA 1996. The live issues were whether this Respondent had knowledge of that disclosure, and if so whether it was the reason, or principle reason for dismissal.

85. In relation to both knowledge and causation, the claimant has not made out her case.

86. The primary decision maker as to dismissal was Mrs Jacob; but she had "checked" this with Mrs Scott. The claimant appeared to the tribunal to be inviting us to infer that Mrs Scott could / did influence the decision of Mrs Jacob, and we accept this was the case.

87. We have found as a fact that Mrs Jacob knew nothing of the Claimant's employment with / termination from Sanctuary until after she had made the decision to dismiss. What precisely she knew thereafter seems to have been limited to the fact of the

claimant having a claim against 'a former employer'. She did not therefore have the requisite knowledge to have been motivated by the protected disclosure / act.

88. While Mrs Scott was made aware on 6 March 2018 that the Claimant had a dispute with Sanctuary and had refused to sign a settlement agreement with them, we have not found, as a matter of fact, that Mrs Scott knew either of the protected disclosure that had been made in September 2017, nor that the Claimant had made a complaint of victimisation against Sanctuary relying on the detriment of their reference provided to HC One.

89. As to causation, even if we accepted the Claimant's evidence as to the knowledge of Mrs Scott (that she had told Mrs Scott of the protected act and protected disclosure on 6 March 2018), it is clear that the Claimant was nevertheless still hired by her. We consider the submission of the respondent - that this fundamentally undermines the claimant's claim that this same information then motivated Mrs Scott to dismiss her and subject her to detriments - had considerable force. The claimant when asked about this suggested that from day 1 the Respondent had no intention of retaining her, and when asked why then they had employed her at all, she answered it was because "they thought I would settle with Sanctuary". However, this is not a complaint of being dismissed because of continuing to pursue litigation against a former employer, and in any event there was no evidence whatsoever which would support such a contention – particularly given that we reject the factual assertion that Mrs Jacob asked in July 2018 why the claimant had not signed an agreement with Sanctuary.

90. Furthermore, neither Mrs Scott nor Mrs Jacob were challenged in their evidence that they had looked for an alternative role for the claimant in the audit department as they considered she had considerable strengths in report writing and analysis. This too suggests that the Respondent was not seeking to exit the claimant from the organisation motivated by protected disclosures/acts.

91. The tribunal note that the claimant's criticisms of the respondent of having failed to undertake probationary review meetings with her, and if it considered she was falling short of what it expected, to have set her targets which it could then review, are, in our view, well founded. Liam Jennings had just one review meeting which resulted in a written record, and that as he was about to leave his post. Even taking Mrs Jacob's evidence at its highest, her interactions in the five weeks of managing the claimant – and accepting the Claimant's submission that she was one of five Area Quality Directors who reported to Mrs Jacob - was fairly limited. Whilst Mrs Jacob said that she received oral feedback from home manager(s) and the Area Director, there was no evidence whatsoever of any negative feedback being put to the claimant to allow improvement. Mr Singer submitted that as a senior employee the claimant ought not to have expected such feedback – but the Respondent's probationary policy applied to the claimant and expected meetings every other month. It did not say they should be more scant for more senior employees – and the very brief comments from the HR department about needing records of the probation "milestones / reviews" indicate that HR expected there to be more records than we have seen in this matter.

92. While the tribunal accept the evidence of Mrs Scott and Jacobs that the period of the claimant's employment with the respondent was a very busy period, with a large number of homes having been acquired and a new role of AQDs being recruited to, this does not, particularly in an organisation of this size, exempt them from following their own policies and procedures. The Claimant said that she felt her performance review was being conducted in an employment tribunal; we understand why she felt this way in circumstances where she had never been given an opportunity in the course of her employment to address any performance concerns other than at the single meeting with Mr Jennings. Nor was this an opportunity which was being offered to her on 16 August 2018 as that meeting was to explain the decision to dismiss.

Detriments for making a protected disclosure

93. Whilst the test as to causation differs in a claim for detriments, the claimant must still establish knowledge of the protected act. For the reasons set out above, she has failed to do this and therefore this claim is dismissed.

94. The tribunal would in any event not have accepted that the failure to hold a probation review meeting or "confiscating the company car" before being told of dismissal were factually made out as detriments. The claimant was invited to, and we find, started her probationary review meeting. She then left the meeting. We have found as a fact that she was told of her dismissal on 16 August 2018, before her car was collected on 21 August.

95. We would have accepted that the failure to have hearings before determining the appeal and grievance amounted to detriments. In the fairly unusual circumstances of the Claimant not having completed her probationary review meeting on 16 August, and then disputing that it had started, we accept her submission that for a company which prides itself on the value of "kindness", not having a face to face meeting was a matter she considered to be detrimental. Particularly after her very full letter of 17 September 2018 when she highlighted the similarities of how she had been treated by Sanctuary, including not being afforded an appeal, it was still open to Mrs Scott to meet the claimant prior to her final determination on 24 September 2018. Whilst we do not find that these detriments were because of a protected disclosure, we do consider it to have been poor industrial practice on the part of the respondent.

Victimisation

96. The protected act relied upon is the claim of victimisation against Sanctuary for the reference of 21 February 2018 that they provided to the Respondent. Whilst there was some confusion as to the precise date of this protected act, it is clear that this was an issue before the Lewis tribunal and the protected act is made out. As to the claimant's reference in her statement to August 2018, we accept that she provided further particulars of this claim to Sanctuary in her claim against them, on 8 August 2018.

97. There is no evidence whatsoever that the Respondent knew of that provision of further information, or that there was any communication between Sanctuary and the Respondent after her recruitment process.

98. For the reasons set out above, the claimant fails in this claim.

    a. The failure to hold a probation review meeting and having her car removed were not detriments.
    b. In relation to the dismissal and failure to hold meetings, the decision makers had no knowledge of the protected act.
    c. There are not facts from which we could conclude that the burden of proof shifts in this matter. She has failed to show that the detrimental treatment was because of the protected act, nor were there facts from which such an inference could be drawn.

Unauthorised deductions

99. We concluded that the claimant was told by Mrs Jacob on 16 August 2018 that her employment was terminating. Her effective date of termination was therefore 16 August 2018 and her claim for wages between then and 22 August 2018 when she received the letter confirming the same, is dismissed.

Wrongful Dismissal

100. The claimant accepted that she was paid in lieu of notice, including a car allowance. This claim is therefore dismissed.

Employment Judge Tuck KC

12 July 2024

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Send to the parties on: 6 August 2024

For the Tribunal