EMPLOYMENT TRIBUNALS

Claimants: **Mrs. N Osagiobare**

Respondent: **Anchor Hanover Group**

Heard at: **Nottingham**

On: **26th September 2024 & 11th October 2024**

Before: **Employment Judge Heap (sitting alone)**

Representation

For the Claimant: **Mr. K David – Unregulated Barrister**
For the Respondent: **Miss. T Sandiford - Counsel**

JUDGMENT

1. The Claimant is permitted to amend the claim to advance the allegations made as set out at schedule one to this Judgment.

2. The complaint of breach of contract with regard to the provision of training is struck out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 is struck out as having no reasonable prospect of success.

3. The complaint of wrongful dismissal will proceed to a full hearing.

4. Deposit Orders are made separately in respect of all other complaints advanced in these proceedings.

REASONS

BACKGROUND & THE ISSUES

1. This is a claim brought by Mrs. Nosakhare Osagiobare ("The Claimant") against her former employer, Anchor Hanover Group ("The Respondent") presented by way of a Claim Form received by the Employment Tribunal on 1st March 2024 following a period of early conciliation which took place between 28th January 2024 and 15th February 2024.

2. The claim came before Employment Judge Ahmed for a Preliminary hearing for case management on 9th July 2024. At that hearing Employment Judge Ahmed identified the complaints that were being advanced by the Claimant as being the following:

    a. Unfair dismissal under Section 100(1)(a) Employment Rights Act 1996 ("ERA 1996") (although the Claimant does in fact advance this relying on more than just sub-section (a) as detailed further below);

    b. Unfair dismissal under Section 103A ERA 1996;

    c. Direct race discrimination;

    d. Victimisation; and

    e. Breach of contract.

3. Having identified the complaints advanced, he listed this Preliminary hearing to deal with the following issues:

    a. To determine whether any of the Claimant's complaints should be struck out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("The Regulations") if they have no reasonable prospect of success;

    b. To determine whether any of the Claimant's complaints should be made subject to a Deposit Order/Orders if they have little reasonable prospect of success and, if so, to determine the amount of the deposit(s); and

    c. To identify the issues and make any further necessary case management Orders.

4. The Claimant via Mr. David applied for a reconsideration of the decision of Employment Judge Ahmed to list this Preliminary hearing on the basis that it was asserted that matters should simply proceed to a full hearing. That application was refused by Employment Judge Ahmed.

5. The Claimant subsequently appealed the decision to list the Preliminary hearing to the Employment Appeal Tribunal ("EAT").

6. Given the issue of a live appeal I raised with the parties at the outset what the position was and what impact, if any, that should have on this Preliminary hearing proceeding. Mr. David was of the view that I should not deal with the question of whether to strike out any part of the claim or make Deposit Orders and that all complaints advanced by the Claimant should simply proceed to a full merits hearing. Miss. Sandiford took the opposite view. I have not rehearsed here the full arguments that each made but they can be assured that I considered them carefully before determining whether to continue to deal with all issues as directed by Employment Judge Ahmed.

7. I reminded myself when considering the issue of the appeal that I am not entitled to go behind the decisions of another Employment Judge absent a material change in circumstances (see **Serco v Wells [2016] ICR 768)**. Ultimately, I did not consider the appeal to amount to a material change in circumstances. If it was then in any case where a party was dissatisfied and chose to appeal that would open up the decision with which they were unhappy to further determination by a Judge at the same level as the one who made the decision. The proper course is that a Judge at EAT level revisit the terms of the Orders previously made by way of appeal and not for me to take a differing view to that of Employment Judge Ahmed.

8. However, even if I had taken the view that the appeal amounted to a material change in circumstances, I would nevertheless have continued to deal with the matters directed by Employment Judge Ahmed. That is because the appeal had only very recently been lodged and was not yet past the sift stage. It was in reality no different a position than when an appeal is lodged against a liability decision to the Tribunal going on to deal with the question of remedy. If I was to make any Orders adverse to the Claimant and the appeal was successful then I could of course revisit those by way of Reconsideration. However, if the appeal was not successful then inevitably this Preliminary hearing would have to be relisted and the parties would have been put to unnecessary time and costs in respect of having two hearings when matters could be addressed today. I therefore determined that I would proceed to deal with the matters identified by Employment Judge Ahmed.

9. I also raised with the parties the question of hearing witness evidence. Both parties had prepared witness statements in accordance with Orders made by Employment Judge Ahmed and had anticipated that those witnesses would be giving oral evidence and being cross examined. However, I raised some concern with that course because it would invariably mean that I would be making findings of fact that would bind a later Tribunal in the event that the claim or part of it proceeded after this Preliminary hearing. The hearing would in that regard be a mini-trial that would bind the hands of the Tribunal dealing with the full merits hearing.

10. Having heard from both parties I determined that I would not hear live evidence. I would simply take note of the witness statements that that would be their evidence at the hearing (albeit as I shall come to below the Claimant's has somewhat evolved during the course of this hearing) and take the Claimant's case at its highest.

11. As I have already observed, the Claimant's case has evolved and in some areas Miss. Sandiford contends that she will need leave to amend the claim. Those areas include the person to whom she contends that she made protected disclosures – which has changed from that information set out in the Claim Form – and additional information about what she now says that she said. Having considered the **Selkent** guidance I have taken the view that those are minor clarifications or corrections which do no more than place the meat on the bones of an inadequately pleaded case. The prejudice falls on the Claimant in not allowing them than on the Respondent is they are permitted.

12. The Claimant therefore has leave to amend the claim to advance the case as it is now set out at schedule one to this Judgment.

THE HEARING

13. The claim was listed for one day of hearing time. Unfortunately, that listing proved insufficient because the claim was not adequately pleaded and required a number of adjournments in order for Mr. David to obtain instructions from the Claimant so that the complaints could be clarified and properly understood. That was required before any determination could be made of the issues that Employment Judge Ahmed had set down to be dealt with at the hearing. Whilst Mr. David's view was that the claim should simply proceed to a full hearing and that the evidence would come out that way, I could not agree that that was a suitable way forward. The issues in the claim need to be clear from the outset so that the Respondent knows the case that it needs to meet and the Tribunal knows the case that it is being asked to determine. As it was, the Claimant's case evolved as the hearing progressed, in some cases significantly, from what was pleaded and what was contained in her witness statement so that proceeding straight to a final hearing would have proved inherently problematic.

14. Given the time that was taken up identifying the issues in the claim a further day of hearing time was required as we were not able to get to the question of whether permission to amend the claim might be needed or the issues identified by Employment Judge Ahmed. A further day of hearing time was therefore listed to deal with those remaining issues. As it was, there was a need for further adjournments on the Claimant's side for Mr. David to obtain instructions such that submissions did not conclude until late afternoon and with insufficient time to consider and deliver my decision. Accordingly, Judgment was reserved.

15. Between the two hearing dates it was agreed that I would write to the parties to set out what the Claimant's position had been as to the basis of each of the complaints advanced so that that was clear for the resumed hearing. Mr. David and the Claimant were asked to check that document carefully to ensure that it accurately recorded what her position had been at the hearing. Mr. David sought two clarifications to the document prior to the hearing, albeit after discussion those were identified as being more issues of chronology and/or for witness evidence at a full hearing. However, one further complaint that had been missing from the document was identified at the hearing in that the Claimant was also contending that her dismissal was an act of victimisation. The final list of the complaints which it is now agreed set out the Claimant's case is attached at the end of this Judgment. I have made it plain to Mr. David and to the Claimant that this now stands as the case that the Tribunal will determine at the final hearing (absent one complaint of breach of contract which I have struck out and for any complaints which fall away as a result of the non-payment of any deposits Ordered) and there must be no further evolution of the basis upon which the case is advanced as time goes on.

16. Having heard submissions from both parties and also considered their helpful skeleton arguments I have therefore now set out below in respect of each of the claims my conclusions in respect of them. Whilst I have not recorded in detail the arguments advanced by the parties they should be assured that I have considered carefully each of the positions advanced on each side.

17. I should observe that close to the end of the hearing Mr. David sought to apply for a Deposit Order in respect of the Respondent's Response. I indicated that I was not prepared to hear that application because it was only made at 4.15 p.m. on the second day of the hearing at a time when Ms. Sandiford was not on notice of it and would not have the opportunity to take instructions. It would essentially have resulted in the need to attend for a third day which was not proportionate.

THE LAW

Striking out a claim or part of it – Rule 37 Employment Tribunal Constitution and Rules of Procedure Regulations 2013

18. Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 when considering whether to strike out a claim.

19. Rule 37 provides as follows:

> *"At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds:*

(a) That it is scandalous or vexatious or has no reasonable prospect of success.
(b) That the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(b) For non-compliance with any of these Rules or with an order of the Tribunal;
(c) That it has not been actively pursued;
(d) That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)"

20. The only consideration for the purposes of this Preliminary hearing is whether the claim, or any part of it, can be said to have no reasonable prospect of success.

21. In dealing with an application to strike out all or part of a claim a Judge or Tribunal must be satisfied that there is "no reasonable prospect" of success in respect of that claim or complaint. It is not sufficient to determine that the chances of success are remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and for it to appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (see paragraph 6):

> *"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"*

22. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal at a full hearing will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested (see **Anyanwu v South Bank Student Union [2001] ICR 391** and **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126**.

Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013

23. The Tribunal has a discretion to make Deposit Orders made under Rule 39 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("The Regulations"). Rule 39 provides as follows:

> *"(1) Where at a Preliminary Hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*
>
> *(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."*

24. Thus, a Tribunal may make a Deposit Order where a claim or part of it has little reasonable prospect of succeeding. However, this is not a mandatory requirement and whether to make such an Order, even where there is little reasonable prospect of success, remains at the discretion of the Tribunal to determine whether or not one should be made.

25. The Tribunal is required to have regard to the means of a paying party both as to whether to make an Order and, if so, the amount of that Order. Otherwise, the setting of a Deposit which the paying party is not able to pay will amount to a strike out by the back door (see ***Hemdan v Ishmail & Anor 2017 ICR 468***).

CONCLUSIONS

Unfair dismissal – Section 100 ERA 1996 ("ERA 1996")

26. Before dealing with the specifics of this part of the claim it is worth setting out the chronology and a few of the undisputed facts.

27. The Claimant was employed by the Respondent as a care assistant. At the time of her dismissal she had less than two years continuous employment and as such cannot advance any "ordinary" unfair dismissal claim. On 30th September 2023 she was suspended by the Respondent as a result of – on the Respondent's case – incidents that had happened with a resident, AR, on 19th September 2023. The allegations against the Claimant were, in short terms, a breach of manual handling procedures. The Claimant attended a disciplinary hearing on 13th December 2023 and was sent a letter terminating her employment on 19th December 2023. That dismissal was without notice.

28. The Respondent also took disciplinary action against two other members of staff, MB and MP. Their circumstances were not identical to that of the Claimant but they were similar. MB was given a final written warning which would remain live

for a period of 12 months (see page 152 of the Preliminary hearing bundle). MP was, like the Claimant, dismissed with immediate effect and without notice or payment in lieu of notice (see page 150 of the Preliminary hearing bundle).

29. The Claimant firstly relies on Section 100(1)(a) ERA 1996. She contends that she had been designated by the Respondent to carry out activities in connection with preventing or reducing risks to health and safety at work and that she carried out such activities. The Claimant says that she had been designated to carry out those activities by the Respondent because she was required to undertake regulated activities. The Claimant says that she was carrying those activities with resident AR. The activities relied upon are safeguarding which included looking after AR, moving AR, making sure that she was safe, cleaning up after her and adhering to her care plan all of which it is said amounted to health and safety prevention activities. The activities relate only to AR. The Claimant says that the reason or principal reason for her dismissal was that she carried out those activities for AR and not because she was in breach of manual handling procedures in moving AR.

30. I have firstly considered whether the Claimant is likely to be able to establish that she was designated by the Respondent to carry out activities in connection with preventing or reducing risks to health and safety at work. I consider it highly unlikely that the Claimant will be able to do so. The Claimant had not been designated to carry out activities connected with reducing health and safety risks such as conducting risk assessments or the like but simply with doing her job. Whilst that was in part dealing with patient safety, that was simply keeping the patient safe in the way that she performed her duties and not specifically carrying out any duties aimed at reducing or preventing risks to health and safety. I accept the submission of Miss. Sandiford that if that was not the case then every care worker, nurse and doctor would fall under this category.

31. However, the more flawed part of this allegation is that the Claimant's case essentially is that she was dismissed for merely doing her job as she should have and not because she had done anything wrong. That simply does not make sense and it flies in the face of all of the contemporaneous documentation that I have seen.

32. I have considered carefully whether to strike out this part of the claim because I do take the view that is has no reasonable prospect of success. However, as I have gone on to make a Deposit Order concerning the remaining sub-section relied on I consider that it is better to include this aspect of the claim as part and parcel of that Deposit Order. In reality it will add little or nothing to the evidence that will be ventilated should the Claimant pay the deposit nor add to the hearing time and so, albeit by a very small margin, I will not strike this part of the claim out but make it subject to the overall Deposit Order for the Section 100 ERA complaint as a whole.

33. The Claimant also relies on Section 100(1)(e) ERA 1996. She contends that in circumstances of danger which she reasonably believed to be serious and

imminent, she took appropriate steps to protect AR from the danger. The circumstances of danger were said to be finding AR on the floor on 19th September 2023 when she had fallen from her bed. The appropriate steps which the Claimant says that she took was to move AR back onto the bed with the assistance of a colleague, MB. The Claimant alternatively says that the reason or principal reason for dismissal was because she had taken those steps of moving AR back onto the bed.

34. I do not consider it likely that the Tribunal will conclude that the Claimant reasonably believed the circumstances of finding AR on the floor were such as to amount to serious and imminent danger. The Claimant's witness statement did not deal with the way in which she reasonably believed that the circumstances were of serious and imminent danger and I can take notice of the fact that a fall in a care home dealing with elderly residents of this nature is relatively commonplace and nothing in the Claimant's actions suggested a belief of anything more serious or amounting to imminent danger if action had not been taken to lift AR onto the bed using anything other than the accepted techniques.

35. For those reasons my view is that this part of the claim has little reasonable prospect of success. I have then gone on to consider whether a deposit should be Ordered to be paid. I see no reason not to Order a deposit to be paid given that the complaint has little reasonable prospect of success and it should serve as a marker for the Claimant to consider if she should continue with this part of the claim.

Unfair dismissal – Section 103A ERA 1996

36. As I have already touched upon above, the Claimant's case in some areas has evolved during the course of the hearing. That was a matter that I observed to Mr. David at the hearing because it did appear that when difficulties appeared to arise with the basis of a complaint which he was articulating and an adjournment was granted to take instructions, the basis of what the Claimant had previously said then changed to fit the narrative. Although as Miss. Sandiford not unreasonably points out that may well give rise to issues as to credibility, that has not fed into my decision because those are matters for the full hearing and which will have to be put to the Claimant in evidence.

37. There are now two protected disclosures that the Claimant relies upon for the purposes of this part of the claim. The first was initially said to be – as set out in the Claimant's witness statement prepared for this hearing – a disclosure to Bethany Owen, her line manager, on 4th August 2023 that she "was not ok/satisfied with the moving and handling training that she had received and that she would need another training". That evolved after an adjournment which was given to take instructions as to how what had been said at that stage to be the words spoken could fall within Section 43B(1)(f) ERA 1996 which the Claimant was relying on. The position then changed that the protected disclosure was said to be "that she was not ok/satisfied with the moving and handling training that she had received and that she would need another training, that she had not received

falls training and that she felt that it was deliberate that falls training had not been given and that it was being concealed from people higher up". Although as I have already observed there are likely to be credibility issues, I have taken the Claimant's case at its highest that that is what she said.

38. The Claimant relies on what she now says that she told Bethany Owen as being information which showed or tended to show that there was a breach of a legal obligation (Section 43B(1)(b) ERA 1996); that the health and safety of residents was being or was likely to be endangered (Section 43B(1)(d) ERA 1996) and that there was a concealment of those matters from those "higher up" (Section 43B(1)(f) ERA 1996).

39. I consider that there are inherent difficulties with this part of the claim. Firstly, I consider it highly unlikely that what the Claimant said – again taking the case at its highest – would be said to amount to a protected disclosure. What the Claimant was saying was that she was not satisfied with the training that she had had and would need more, that she had not had falls training and that that was being concealed from those "higher up". None of that in my view shows or tends to show any breach of a legal obligation to provide training or that the health and safety of any residents was being endangered. If the Claimant had said words to the effect that she had not received adequate training and was concerned about the impact that was having on her ability to care for residents I could see that that might engage but even at its highest what she said was a far cry from that.

40. The second problem is that Bethany Owen was not involved in the disciplinary process that led to the Claimant's dismissal. There is also no evidence that she told anyone that was involved with that process what the Claimant had said. If the person does not know about the protected disclosure then that cannot be the reason or principal reason for it and there is nothing to say that this was a tainted information case led by Ms. Owen.

41. The third difficulty is that it is difficult to see what basis the Claimant has for saying that the disclosure was the reason or principal reason for dismissal and again there had to be an adjournment to deal with that. The burden of proof will be on the Claimant to establish that causal link and not on the Respondent to establish a potentially fair reason for dismissal. That is because the Claimant does not have the qualifying service to advance an ordinary unfair dismissal claim and so the burden of proof does not fall on the Respondent (see **Ross v Eddie Stobart UKEAT/0068/13/RN**).

42. The Claimant's position are articulated at the hearing was that this was because Jo Farmer – the person who dismissed her – threatened her on 15th December 2023 with the disciplinary allegations against her negatively effecting her DBS check. The Claimant says that the implication is that if she "kept pushing" that she would be dismissed. Again, taking the Claimant's case at its highest and assuming that a finding was made that that threat was made, there is nothing at all to imply that the Claimant would be dismissed if she "kept pushing", no reference was made to the substance of what she said was a protected disclosure nor had she

"pushed" anything else on her own case since what she says was said to Ms. Owen some weeks before her dismissal.

43. The final difficulty is that if the real reason or principal reason for dismissal was the protected disclosure, that does not explain why MP who had not made any such disclosure was also dismissed without notice in the same way as the Claimant was. Mr. David's position was effectively that MP had been thrown under the bus by the Respondent, but it appears inherently unlikely that the Respondent would have dismissed for gross misconduct someone that had not done anything wrong simply to mask any impropriety about the Claimant's dismissal.

44. For all of those reasons I also consider that this part of the claim has little reasonable prospect of success and that a Deposit Order should be made if the Claimant wishes to pursue it. It is by the narrowest of margins that I have not struck out this part of the claim for having no reasonable prospect of success but I cannot say with one hundred percent certainty that it is absolutely doomed to failure. I am satisfied, however, that it is inherently problematic for the reasons that I have given such that it has little reasonable prospect of success and I see no reason why a Deposit Order should not be made.

45. There is a second part to this complaint as the Claimant also relies on a second alleged protected disclosure. That disclosure has also evolved from what was within the Claimant's witness statement and what was originally said to be the words spoken and that was again on a similar basis after an adjournment that it evolved to seek to bring the disclosure within Section 43B(1)(f) ERA 1996. However, whilst again that will be a potential credibility issue, I have taken the Claimant's case at its highest and proceeded on the basis that that is what she said.

46. Originally, the disclosure was said to be that AR had been given the wrong medication and that her daughter was furious. This then evolved to include a reference to the Claimant not thinking that people higher up were being made aware of it. The Claimant contends that that showed or tended to show that a criminal offence was being committed, a legal obligation to give the correct care had been breached, that the health and safety of residents/AR was being endangered and that there was being concealment. I consider it unlikely that there will be a finding that what the Claimant relies on would fall within Section 43B(1)(a), (b) or (f) but there is a potential to fall within Section 43B(1)(d) ERA 1996 given that the wrong administration of medication would potentially pose a risk to the health and safety of AR on the occasion(s) that it had happened.

47. However, there are again inherent difficulties in respect of this part of the claim in the Claimant establishing that it was the reason or principal reason for dismissal. It has all the same difficulties in that regard as the first disclosure. The disclosure relied on is said to have been made on 27th September 2023 to Bethany Owen. She was not the dismissing officer, that was Jo Farmer and there is no evidence that she was involved in the process, told Jo Farmer what the Claimant had said or offered up tainted information. It also has the same difficulties in relation to

what it is alleged was said by Jo Farmer on 15th December 2023 somehow inferring that the Claimant should "stop pushing" this issue and the conclusion that MP had been thrown under the bus.

48. This part of the claim also faces an additional difficulty because the Claimant's position is that MB had also made the same disclosure upon which she relies and she was of course not dismissed.

49. I also consider that to be a claim which has little reasonable prospect of success and again one by a narrow margin that I have not struck out because I cannot say with absolute certainty that it has no reasonable prospect of success. I consider it appropriate in the circumstances to make a Deposit Order in respect of this part of the claim and see no reason not to do so.

Direct race discrimination

50. The Claimant relies on two acts which are said to amount to direct race discrimination. The first of those is what the Claimant terms as tampering with her witness statement although whilst she has termed it that way and does not resile from that, what is at best the basis of the allegation is the mis-recording of what she had said at an investigatory meeting on 27th September 2023 and not correcting that when she brought it to the Respondent's attention.

51. Leaving aside the question that it is questionable whether this would amount to detriment because the Respondent did not take into account what was recorded in the investigatory notes in taking the decision to dismiss, there is nothing that the Claimant is able to point to so as to say that this was done because of her race.

52. None of the facts relied upon by the Claimant give any hint that race was the reason for the treatment complained of. The position of the Claimant was that that would not have happened to anyone who was not black but a mere assertion to that effect will not be enough.

53. It is also worthy of note that the account of MP was not – as the Claimant says – deliberately mis-recorded but it was clearly not accepted as being an answer to the allegations against her because she was also dismissed.

54. I cannot say that this part of the claim has no reasonable prospects of success because I take account of the fact that in discrimination cases evidence as to the conscious and subconscious thought processes is key, I do consider that it has little reasonable prospects of success because other than an assertion that the act complained of would not have happened if the Claimant was not black, there is not currently any evidential or factual basis for that and a mere assertion will not be enough.

55. This is again an allegation which I consider has little reasonable prospect of success and I also consider it appropriate to make a Deposit Order. Again, I see no reason not to do so.

56. The second act which is said to amount to direct race discrimination is said to be the account of MB and MP being accepted over that of the Claimant even when she had made it clear that corrections needed to be made to the notes. The same issues arise that other than the Claimant asserting that someone who was not black would be treated more favourably there are no facts advanced that support that. Assertion is not enough. There is also an inherent difficulty in suggesting that anyone who was not black would have had their account accepted because again the account given by MP was clearly not accepted as an answer to the allegations against her because she was also dismissed in exactly the same way as the Claimant.

57. This is therefore again also an allegation which I consider has little reasonable prospect of success and I also consider it appropriate to make a Deposit Order. Again, I see no reason not to do so.

Victimisation

58. The Claimant relies on what was said at a disciplinary hearing on 13th December 2023 as being a protected act for the purposes of this part of the claim. It is not in dispute that the Claimant said the words that she relies on (albeit that the Respondent actually says that she went further and said made a reference to people being racist but the Claimant denies that and it is not relied on) and that she said:

> *"It's like they are putting the blame on me it's because of my colour the statement has been tampered with".*

59. I can see on the face of it that the Claimant may well establish that the words spoken amounted to the doing of a protected act. The Claimant relies on the same conversation with Jo Farmer on 15th December 2023 as for the whistleblowing claim for the first allegation of victimisation which is a reference to the allegations against the Claimant affecting a subsequent DBS check.

60. This complaint faces much the same problem as the whistleblowing allegation in that it relies on some sort of implied suggestion that Jo Farmer was telling the Claimant to "stop pushing", albeit this time in the context of a complaint about race discrimination rather than a protected disclosure. There is again no evidential basis for that. It would also be odd if that had been the intent because Ms. Farmer had contacted the Claimant the very day before this conversation to seek additional details about the race discrimination allegation so that she could look into it as part of the disciplinary process. It was also addressed in the outcome letter.

61. The second complaint of victimisation is the Claimant's dismissal. Again, the burden of proof will be on the Claimant to show facts from which the Tribunal could infer that the words relied on as a protected act were something that materially influenced Ms. Farmer to take the decision to dismiss.

62. There are again inherent difficulties with that. Firstly, far from seeking to sweep the matter under the carpet it is common ground that Jo Farmer contacted the Claimant on 14th December 2023 to obtain further details of the allegation of discrimination so that it could be looked into. Nothing that it is said that Jo Farmer said the following day appears to have any link to the Claimant's statement about her race.

63. Moreover, the Claimant was already well down a disciplinary route when she made that statement. This part of the claim pre-supposes that Ms. Farmer would not have dismissed the Claimant had she not made that comment in the disciplinary hearing but there are no facts at all to support that and mere assertion will not be enough. It also faces the same difficulties that MP was also dismissed in the same way as the Claimant and had not raised any issues about her race. The Claimant again therefore relies on the argument, which appears inherently unlikely, that MP was thrown under the bus to mask any wrongdoing against the Claimant.

64. Again, this is a claim which is such that the inherent difficulties that it has mean that it has little reasonable prospects of success and again one by a narrow margin that I have not struck out. I consider it appropriate in the circumstances to make a Deposit Order in respect of this part of the claim and see no reason not to do so.

Breach of contract

65. The first complaint of breach of contract is in respect of notice pay. It is common ground that the Claimant was dismissed without notice. The Respondent contends that it was entitled to do so because the Claimant had committed acts of gross misconduct. That will be a matter which the Respondent will be required to prove at the full hearing and after hearing of all the evidence. Therefore, the complaint is not apt either to be struck out or made subject to a Deposit Order.

66. There is a second complaint of breach of contract which is that it is said that the Claimant was not provided with training. The Claimant relies on the content of Clause 13 of her Contract of Employment which provides as follows:

> ***"Training***
>
> *During the course of your employment you must complete training required and provided by Anchor Hanover (the cost of which is borne by Anchor Hanover). Details of the relevant training specific to your role is set out in Schedule 1 attached to this contract. The training you will receive is specific to your job, and as your employment progresses your skills may be extended to encompass new job activities within the business. It is a condition of your employment that you participate in any training deemed necessary by Anchor Hanover.*
>
> *You may be entitled or required to take part in various other training courses which Anchor Hanover may provide from time to time. Details of specific courses that might be available can be found on the My Learning section of the intranet site".*

67. Schedule 1 to the contract provides for manual handling and falls awareness training. The Claimant says that the former was insufficient and the latter was not provided at all.

68. There are in my view two inherent and insurmountable difficulties with this part of the claim. In order to advance a breach of contract claim the Claimant must be able to firstly point to some term of the contract that places an obligation on the Respondent to provide training and secondly to show that it was breached.

69. The first difficulty that the Claimant has is that the term of the contract which has been identified places no obligations on the Respondent. The obligation is firmly on the Claimant to undertake what training the Respondent requires her to undertake. There is therefore no contractual term which imposes any obligation on the Claimant which the Respondent could be said to have breached. All obligations under that clause rest solely on the Claimant and not the Respondent.

70. However, even if that was not the case the Claimant would need to prove a breach on the part of the Respondent. Whilst schedule 1 which I have referred to above lists manual handling and falls training, there is nothing which firstly dictated what the former training should involve (and thus nothing to contractually oblige the Respondent to provide it in a form that the Claimant would deem sufficient) and secondly there is no time frame by which the latter training should be provided. Whilst Mr. David contends that that should have been within the induction period, the fact is that the contractual term on which the Claimant relies simply does not say that.

71. There is therefore in my view and for those reasons no reasonable prospect of this part of the claim succeeding. The threshold test having been met I have then gone on to consider whether I should strike out this complaint. I have determined that I should. It serves no one, the Claimant included, to continue to advance to trial a complaint which has no reasonable prospects of success. It will simply waste time and resources and the complaint is therefore struck out.

The amount of the Deposit Orders

72. In the event that I might determine that Deposit Orders should be made, I heard submissions from the parties as to the amount of those Orders. Ms. Sandiford does not propose a figure for any Deposit Order made but submits that it should be in a sum such as to act as a deterrent to the Claimant pursuing weak claims.

73. The Claimant's position via Mr. David was that she was essentially in such a precarious financial position that she would not be able to pay any deposit at all.

74. I have in mind when considering the amount of the Deposit Orders the decision of the Employment Appeal Tribunal in **Hemdan v Ishmail & Anor 2017 ICR** 468 and that if I were to make Orders that she was unable to pay then that is effectively tantamount to striking out the claim.

75. I am conscious that I have not had any documentary evidence about the Claimant's means. It is unusual that nothing has been provided in that regard when the Claimant is legally represented and it would have been known that her representative that means were going to be a relevant consideration.

76. Nevertheless, Mr. David tells me that the Claimant has not found alternative employment since the termination of her employment although she does have a second job from which she earns approximately £250.00 per week. The Claimant is not claiming benefits – although it may well be open to her to do so given her reduced income – and I am told that all of her disposable income is expended on rent, food and bills but as I have already observed I have no documentation dealing with that as I would have expected.

77. Ultimately, I cannot make Deposit Orders of such a significant sum that it may render the Claimant unable to pay them. That would cause injustice.

78. However, a Deposit Order, even of a modest level, should be enough to make the Claimant seriously reflect on the complaints that she is advancing and to evaluate whether she really wants to pursue them in view of what I consider the likely outcome will be.

79. I am satisfied that a Deposit Order of £10.00 in respect of each of the complaints that have little reasonable prospect of success will be sufficient and will nevertheless be something that the Claimant will be able to meet if she does want to continue with the matter. I have also fixed a longer period for payment than I would ordinarily have done to allow the Claimant to take stock and gather the necessary funds if she decides to pay the deposits. That should allow the Claimant time to save the necessary funds from her earnings to pay the deposits if she chooses to do so.

80. The Claimant's attention is however drawn particularly to the note accompanying the Deposit Orders for the repercussions of what may follow if she pursues the complaints and they do not succeed for substantially the same reasons as I have given in this decision.

Case Management

81. Whilst I have not struck out the majority of the Claimant's complaints that should not be taken as a green light to suggest that I believe, as Mr. David submits, that the claim is a very strong one. It is in my view for the reasons that I have given anything but.

82. I have not at this stage revisited the dates for compliance with Orders for preparation for the full hearing – which had previously been stayed by Employment Judge Ahmed – or taken a view on whether the existing listing is sufficient because I consider it appropriate to wait until the date for payment of the Deposits has passed as it may be that the Claimant elects not to pay them or some of them. If

the deposits, or some of them, are paid then I will make further Orders for preparation for the full hearing or list a further short telephone Preliminary hearing.

83. However, given the observations that I have made, if the Claimant does elect to pay the deposits and the matter reaches a full hearing then I have recused myself from hearing it. That is not because I do not consider that I could deal with the matter fairly on the evidence but simply because I want the Claimant to have every confidence that she will receive a hearing before a Judge looking at matters with a fresh pair of eyes.

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Employment Judge Heap

Date: 11th November 2024

JUDGMENT SENT TO THE PARTIES ON

.....15 November 2024.....

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FOR THE TRIBUNAL OFFICE

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

SCHEDULE ONE

The Claimant's position at the hearing after discussion was as follows:

Section 100 Employment Rights Act 1996 ("ERA 1996")

Section 100(1)(a) ERA 1996 – The Claimant contends that she had been designated by the Respondent to carry out activities in connection with preventing or reducing risks to health and safety at work and that she carried out any such activities. The Claimant says that she had been designated to carry out those activities by the Respondent because she was required to undertake regulated activities. The Claimant says that she was carrying those activities with resident AR. The activities relied upon are safeguarding which included looking after AR, moving AR, making sure that she was safe, cleaning up after her and adhering to her care plan all of which amounted to health and safety prevention activities. The activities relate only to AR.

The Claimant says that the reason or principal reason for her dismissal was that she carried out those activities for AR and not because she was in breach of manual handling procedures in moving AR.

Section 100(1)(d) ERA 1996 – there is now no reliance on this provision.

Section 100(1)(e) ERA 1996 – The Claimant contends that in circumstances of danger which she reasonably believed to be serious and imminent, she took appropriate steps to protect AR from the danger. The circumstances of danger were said to be finding AR on the floor on 19th September 2023 when she had fallen from her bed. The appropriate steps which the Claimant says that she took was to move AR back onto the bed with the assistance of a colleague, MB.

The Claimant alternatively says that the reason or principal reason for dismissal was because she had taken those steps of moving AR back onto the bed.

Section 103A Employment Rights Act 1996

The Claimant contends that she made two protected disclosures to the Respondent within the meaning of Section 43B Employment Rights Act 1996.

The first disclosure that the Claimant relies upon is that on 4th August 2023 she says that she said to Bethany Owen that she was not ok/satisfied with the moving and handling training that she had received and that she would need another training, that she had not received falls training and that she felt that it was deliberate that falls training had not been given and that it was being concealed from people higher up.

The Claimant relies on **Section 43B(1)(b) ERA 1996**. The legal obligations relied upon are said to be:

(a) An obligation under clause 13 of her contract of employment to provide training; and

(b) An obligation to provide specific training for those undertaking regulated activities under the Safeguarding Vulnerable Groups Act 2006. The

Claimant says that she had a reasonable belief that that fell within Sections 7(3)B(c) and 7(5) to Part 2 of Schedule 4.

The Claimant also relies on **Section 43B(1)(d) ERA 1996**. The Claimant says that the disclosure showed or tended to show that the health and safety of residents was being or was likely to be endangered.

The Claimant also relies on **Section 43B(1)(f) ERA 1996**. The Claimant says that the disclosure showed or tended to show that the breach of legal obligation or risk to health and safety was being concealed by her words that "this was being concealed from people higher up".

The second disclosure that the Claimant relies upon is an oral disclosure on 27th September 2023 to Bethany Owen where it is said that she said that AR had been given the wrong medication (lantac), that AR's daughter was furious about it and that she did not think that people higher up were aware of it.

The Claimant relies on **Section 43B(1)(a) ERA 1996**. The Claimant says that in her reasonable belief a criminal offence had been committed by the administering of the wrong medication (Lantac).

The Claimant also relies on **Section 43(B)(1)(b) ERA 1996**. The Claimant says that the legal obligation that was breached was the Respondent's duty of care towards AR and to act in the best interests of residents and the obligations when undertaking regulated activity to deal with patients in the right manner and to give the right care.

The Claimant also relies on **Section 43B(1)(d) ERA 1996**. The Claimant says that the disclosure showed or tended to show that the health and safety of AR/residents was being or was likely to be endangered.

The Claimant also relies on **Section 43B(1)(f) ERA 1996**. The Claimant says that the disclosure showed or tended to show that a criminal offence, the breach of legal obligation or risk to health and safety was being concealed by her words that "I did not think that people higher up were aware of it".

The Claimant's position is that both disclosures were made in the public interest because people need to know what is going on in care homes and if people are not trained properly and are given the wrong medication then it is a national health issue.

The Claimant says that the reason or principal reason for dismissal was those disclosures and the basis for that is that it is said that on 15th December 2023 the Claimant received a telephone call from Jo Farmer threatening her with regard to the disciplinary allegations against her negatively affecting her DBS check. The Claimant says that the implication from that was that if she "kept pushing" with regard to the matters that she had raised that she would be dismissed and that those things would be "considered in determining her fate". The Claimant says that her position is that she made protected disclosures, was threatened and then dismissed a few days later and then by implication the disclosures must be the reason or principal reason.

Direct race discrimination – Section 13 Equality Act 2010

There are two acts of direct race discrimination.

The first act is what is said to be the tampering with the Claimant's witness statement. This is in fact the recording by Rachael Fisher ("RF") of the Respondent in some investigatory notes of a meeting with the Claimant on 27th September 2023 that the Claimant had said that she had found AR half on half off the bed. The Claimant says that that was that she had said that AR was found on the floor and that RF had deliberately recorded something incorrect and that she had refused to change it when that error was raised by the Claimant. The part of the notes that the Claimant relies upon as being deliberately incorrect and which amounted to tampering with her witness statement is the 9th entry down on page 112 of the Preliminary hearing bundle.

The Claimant relies on actual comparators, MB and MP as they did not have their account given at their investigatory meetings changed.

Alternatively, the Claimant relies on a hypothetical comparator. The facts that the Claimant will rely on in that event and generally are said to be:

(a) That she was subjected to unfair treatment;
(b) That she was not treated with the same dignity and grace as MP and MB;
(c) The way in which the Claimant felt that the investigatory interview was going and the way that she was spoken to at that interview; and
(d) The way in which the Claimant was made to look like a liar and that in the dismissal letter it referred to the Claimant having given one account and then given another.

The second act which is said to amount to direct race discrimination is said to be the account of MB and MP being accepted over that of the Claimant even when she had made it clear that corrections needed to be made to the notes. The same issues are relied upon to say that that was done because of race.

The Claimant is not sure of MP's race but that it is "probably Eastern European or Asian or something". MB is said to be white.

Victimisation – Section 27 Equality Act 2010

The Claimant relies on one protected act which it is said she did on 13th December 2023. The words said to have been used are as follows:

"It's like they are putting the blame on me it's because of my colour the statement has been tampered with".

The acts of victimisation that the Claimant says occurred because she did a protected act are

(i) A conversation that she had with Jo Farmer of the Respondent on 15th December 2023 when she was told that she was going to be referred to the Disclosure & Barring Service; and

(ii) Her subsequent dismissal.

Breach of contract

The first complaint of breach of contract is that the Claimant was not paid the four weeks notice of termination of employment that she was entitled to under clause 21 of her contract of employment.

The second complaint is that the Respondent was in breach of contract for not providing the Claimant with training/adequate training. The training that it is contended should have been provided was falls training and that there had been inadequate training in respect of manual handling. The Claimant relies on clause 13 of her contract of employment and the list of training which appears at page 86 of the Preliminary hearing bundle. Although there is no date for that training to be provided the Claimant's case is that it is implicit that it should be done during induction.