Case No: 2417013/2018

EMPLOYMENT TRIBUNALS

Claimant: Miss M Knowles

Respondent: Manone Medical Limited

Heard at: **Liverpool** **On:** **18 19 20 November 2019 & 17 June 2020 (in chambers)**

Before: **Employment Judge Benson**
Members: **Mr M Gelling**
Mr W K Partington

Representation
Claimant: Mr B Henry - counsel
Respondent: Miss S Murphy - solicitor

JUDGMENT

1. The claimant was subjected to a detriment by the respondent under sections 44(1)(c) and section 47B of the Employment Rights Act 1996.

2. The claimant was unfair dismissed contrary to sections 100(1)(c); section 103A and section 104(1)(b) of the Employment Rights Act 1996.

3. The respondent has made an unauthorised deduction from the claimant's wages in respect of:
    a. The claimant's last month's pay;
    b. The claimant's travel time between her base and her first client; and
    c. The claimant's holiday pay.

4. The respondent has breached the claimant's contract by not providing notice.

5. The respondent has not made an unauthorised deduction from the claimant's wages in respect of time she was 'on call'. This claim fails and is dismissed.

6. The matter will be set down for a remedy hearing to determine compensation.

REASONS

Claims and Issues

1. The claimant brings claims of:
    a. automatic unfair dismissal under:
        i. section 100(1)(c) Employment Rights Act 1996 ('ERA') (health and safety);
        ii. section 103A ERA (public interest disclosure); and
        iii. section 104(1)(b) ERA (asserting a statutory right)
    b. being subjected to a detriment under:
        i. section 44(1)(c) ERA (health and safety);
        ii. and section 47B ERA (public interest disclosure)

    The detriments which the claimant alleges are that she was threatened with performance management/ disciplinary action and/or provided with a reference that was not accurate.
    c. Wrongful dismissal (being notice pay); and
    d. Unlawful deductions from pay under section 13 ERA; these being:
        i. her last month's wages
        ii. her initial travel time from Wallasey station to the first client
        iii. whilst she was on call
        iv. underpayment of holiday leave taken
        v. accrued but taken holiday leave

2. The parties had agreed a list of issues which are set out as follows:

<u>Detriment as a health and safety reasons (section 44(1)(c) Employment Rights Act 1996 (ERA)</u>

3. Was the claimant subject to a detriment by the respondent for having raised health and safety issues namely:
    a. had she brought to the respondent's attention, by reasonable means, circumstances connected with her work that she reasonably believed were harmful or potentially harmful to health and safety?
    b. If so, what were the circumstances at work that the claimant believed were harmful or potentially harmful?
    c. Was the claimant's belief reasonable?
    d. As a result of having brought this information to the respondent's attention, did the respondent subject the claimant to a detriment, such as being threatened with performance management/ disciplinary action and/or being provided with a reference that was not found accurate?

<u>Detriment as a result of making a public interest disclosure (Section 47B ERA).</u>

4. Was the claimant subject to a detriment by the respondent on the ground that she had made a protected disclosure as defined by section 43B of the ERA, namely:
    a. Had the claimant disclosed information to David Marland on 20 August 2018 that tended to show that the health and safety of any individual was likely to be endangered and/or that the respondent

was failing in its legal obligation, namely the claimant's rights to rest breaks pursuant to rule 10 Working Time Regulations 1998?

b. Did the claimant have a reasonable belief in this information?
c. Was the disclosure in the public interest?
d. Was the disclosure to David Marland, a disclosure made to the respondent in accordance with section 43C of the ERA?
e. As a result of having made a protected disclosure to the respondent, did the respondent subject the claimant to a detriment, such as being threatened with performance management/disciplinary action and/or being provided with a reference that was not found accurate?

Automatic Unfair Dismissal for a Health and Safety Reason (section100(1)(c) ERA).

5. Was the sole or principal reason for the claimant's dismissal:
    a. That she had brought to the respondent's attention, by reasonable means, circumstances connected with her work that she reasonably believed were harmful or potentially harmful to health and safety?
    b. If so, what were the circumstances at work that the claimant believed were harmful or potentially harmful?
    c. Was the claimant's belief reasonable?

Automatic unfair dismissal for making a protected disclosure (section 103A ERA)

6. Was the sole or principal reason for the claimant's dismissal:
    a. the fact that she had raised a protected disclosure?
    b. If so what was that disclosure?

Automatic unfair dismissal for asserting a statutory right (section 104(1)(b) ERA

7. Was the sole or principal reason for the claimant's dismissal:
    a. that she had alleged to her employer that it had infringed a relevant statutory right?
    b. If so what is the statutory right relied upon?
    c. Did the claimant make the claim in good faith?
    d. Without specifying the rights did the claimant make it reasonably clear to the respondent what the right was that she was claiming was infringed?

Wrongful dismissal (section 86 ERA)

8. Is the claimant entitled to notice pay or was the contract of employment terminated without notice due to the conduct of the claimant?

Unlawful deductions of wages (section 13 ERA)

9. The claimant claims unlawful deduction of wages in respect of:
    a.
        i. her last month's wages
        ii. the initial travel time from Wallasey station to the first client
        iii. whilst she was on call
        iv. underpayment of holiday leave taken
        v. accrued but taken holiday leave
    b. Did the respondent make such deductions?
    c. If so, (a) were they required or authorised by virtue of a statutory provision or relevant provision of the claimant's contract, or (b) did the claimant previously signify in writing her agreement or consent to the making of the deductions?

d. Was the total amount of wages paid on any occasion by the respondent to the claimant less than the total amount of wages properly payable by it to the claimant?

Evidence

10. During the hearing we heard evidence from the claimant Ms Knowles and on her behalf; Ms S Webster, her partner and her ex colleagues Ms L Porter and Ms T O'Gorman (duty manager). Mr D Marland (Operations Manager), Ms J Cornah (Director) and Ms S Carroll (HR Consultant) gave evidence on behalf of the respondent. There were clear conflicts of evidence between Mr Marland on the one part and the claimant, Ms Porter and Ms O'Gorman on the other in respect of the events of 20 August 2018 which led to the claimant's dismissal. Further in parts, Ms Cornah's evidence contradicted that of Mr Marland. Where there were such disputes, we have considered the oral evidence given by the witnesses together with the documentary evidence to which we were referred and have reached findings on the balance of probabilities.

11. We were referred to an agreed joint bundle of documents together with a supplementary bundle which contained some disputed documents. This did not become an issue in the hearing. During the course of the hearing, it was clear that there was missing documentation from the respondent relating to the claimant's pay and hours of work. There had been a request for specific disclosure of such documentation prior to the hearing but it had not been produced. Although some additional documentation was provided by the respondent during this hearing, relevant documentation was still outstanding. On the final day of the hearing and in preparation for this reserved decision we made an order that the respondent produce to the Tribunal and to the claimant the copies of the documents and information which the respondent sent to their third party payroll provider for the purposes of calculating the claimant's pay between 28 June 2017 and 21 August 2018. Regrettably the respondent has not complied with this order and has provided no explanation for its failure to do so.

Findings of Fact

12. The claimant was employed as an Ambulance Care Assistant with the respondent. She was employed from 30 June 2017 to 21 August 2018 when she was dismissed. Her role involved transporting patients in an ambulance.

13. The respondent company is a CQC Registered Ambulance service which provides services, including non-emergency patient transport and specialist secure transport for mental health patients. It also provides non-urgent care services on behalf of the NHS and medical repatriation companies.

<u>The claimant's contract</u>

14. At her interview the claimant agreed to work a shift pattern of four days on, two days off. She was employed for a minimum of 86 hours per month, but she would regularly work more hours. She was provided with a contract of employment dated 28 July 2017. The relevant terms of that contract state as follows:

10. *Hours of Work: Your hours of work are variable as the nature of the role requires. This appointment guarantees a fixed number of part time hours per month with targeted hours as stated in Schedule A. In addition to your normal hours of work, you are required to work any necessary additional hours for the performance of your duties.*

…….

13. *Remuneration: Schedule A, Remuneration Schedule sets out the terms of remuneration for this appointment. This includes a fixed period of 'on call' time during which you must remain available for work.*

…….

16. *Holidays: As your hours may be variable any holiday pay will be calculated as the average pay received during the preceding 12 weeks.*

……..

28. *Termination of employment: Following successful completion of your probationary period, you are entitled to receive the following written notice of termination of employment from the company: End of probationary period but less than 5 years continuous service - One month.*

…….

30. *Termination without notice: The company may also terminate the Appointment with immediate effect without notice and with no liability to make any further payments to you (….) if you: (d) are guilty of any gross misconduct affecting the business of the Company; (e) commit any serious or repeated breach or non-observance of any of the provisions of this agreement or refuse or neglect to comply with any reasonable and lawful direction of the company.*

15. Schedule A includes the following terms:

<u>Hours of Work.</u>

You are contracted to a minimum of 86 hours per month.

Your rota will be agreed in advance and will be recorded on Parim. You will be entitled to every fourth weekend off and this will be from Friday to Monday.

Where a day is specified as on-call 'day' means 24 hours from commencement.

Once your hours are confirmed on Parim, these are your contracted available hours and must be honoured. All absences should be covered by either authorised annual leave, medical certificates, or authorised emergency leave.…

Employees are responsible for ensuring that all contact information is up-to-date and accurate. Furthermore, employees are a responsible for ensuring that their mode of contact is available. i.e. mobile phones charged sufficiently.

Failure to respond to allocated shifts and / or telephone contact whilst on-call will be dealt with under the formal performance management procedures and may result in disciplinary action.

During busy periods we may contact employees to offer additional shifts. If you do not wish to be offered any additional shifts you need to advise by email to the Hub [email address].

Shift Allocation
Shifts will be allocated via Parim to any employee who is available on [rosta].
Where the shift is allocated with less than 2 hours' notice or is out of hours, Manone will call/text employees to confirm receipt and acceptance of the shift.
Staff who are called for an immediate response should be at the station within 30 minutes of being activated.
Where you are unable to comply with the 30 minute response time you should immediately notify the Hub via phone.
Failure to attend a shift whilst on-call will trigger an investigation and may result in disciplinary action.

Vehicle checks and cleaning services
Employees must complete vehicle and equipment safety checks at the commencement of every shift.
Employees must fully complete the vehicle check folder ensuring it is correct and ledger.
Employees must restock and clean the vehicle at the end of every shift.
Employees must report any defects, stock requirements and/or issues in writing by the Hub [email address].

16. The company's Vehicle Rules at page 45 of the Employee Handbook state the following: *"DO NOT DRIVE if tired".*

17. The respondent states that it has a Health and Safety representative. There is no reference to this person in the claimant's Health and Safety policy. The claimant was unaware that there was a Health and Safety representative and in the absence of any evidence how the identity of such person was brought to her attention, we accept her evidence.

The claimant's pay

18. During the claimant's shift, there would be work which was arranged in advance and work which was ad hoc. The respondent uses a cloud based system known as Parim for its staff rotas. This is accessible from an employee's mobile phone and requires a staff member to 'clock on' when they arrive at work and clock off when they leave. The claimant would log onto the Parim system when on shift and see what work she had been allocated during the shift period, though this was also available to be viewed in advance. A shift would start at 8am and the claimant would be available for work throughout the following four days.

19. There was an obligation upon the claimant to attend for all shifts which were arranged in advance during the period which she was on shift. For ad hoc work, the respondent would call the claimant to see whether she would accept the job. She had a choice whether to do so or not. Reference in the claimant's contract to disciplinary action being considered if an employee did not attend a shift whilst on call relates to the work arranged in advance. The claimant had previously turned down ad hoc shifts and had not been subjected to disciplinary action. Although 24 hours on each of the 4 days on shift is referred to as 'on call', this is more appropriately referred to as 'available for work'. The claimant could pursue her own activities during any period when she was not rostered for a job in advance. In practice, if the claimant was wanting additional ad hoc jobs, she would ensure she was

ready to work at any time during her shift, but this was not a requirement of the respondent. If she wanted to accept any ad hoc work, her contract required her to be able to travel to the base within 30 minutes, be in or ready to change into her uniform and other requirements.

20. When the claimant had a job, either prearranged or ad hoc, she would be required to travel to the company's base in Wallasey to meet her colleague and collect the vehicle. Before she could take the vehicle out, she was required to carry out a vehicle safety check which would involve checking the vehicle and equipment, checking any drugs and completing the vehicle check ledger. This took approximately 30 minutes.

21. The claimant alleges that she was paid from when she pressed the start button on Parim which she did when she arrived at her first job as listed on the system. She alleges that she was not therefore paid for the time she spent carrying out the vehicle check or the travel time to the first job. The respondent disputes this. The contractual documentation does not specify when an employee is paid from but the respondent accepts that the claimant should be paid from arrival at the base, but contends that was what happened and the claimant did receive such pay.

22. The respondent says the Parim system is not used for payroll and is essentially a safety check when starting or finishing work so that they can monitor who accesses the ambulance station. Ms Cornah says that the timeclocks are geofenced and will send an email alert if someone tries to punch in whilst not being within a defined distance of the ambulance station. Further that when calculating staff hours and pay, they use a variety of documents. These are the document completed at the start and end of shift by the employee when carrying out the vehicle and other checks, the Patient Journey logs which time when patients are picked up or collected and the vehicle tracking reports. All of these documents together create a log of activity during the shift which is provided to the company's payroll providers who then pay the employees according to the hours worked.

23. There has been an issue in this case with the documentation which has been provided by the respondent relating to pay and hours worked. The respondent has not produced the activity log which they passed to their payroll provider or all of the documents which support it.

24. The documentation which the respondent has produced is the time sheet summary for the claimant and the clocking in and out sheets. Having reviewed these, so far as we can see taking sample dates, the information is the same. We assume therefore it comes from the same source. We also have the Parim report for the months of July and August (which is difficult to read and show the jobs which were booked in for a particular shift rather than the time the employee started work), the payroll activity which is the monthly number of hours worked and how much the claimant has been paid and the claimant's pay slips. We have the vehicle tracking records for one day, 20 August 2018, the date which led to the claimant's dismissal and no others.

25. During the hearing, it was clear that the activity log provided to the payroll adviser was an important document, together with the information used to collate the log, including the vehicle tracking for dates other than the 20

August 2018. These had not been disclosed and despite Ms Cornah confirming that she would arrange for their disclosure and the Tribunal making an order at the end of the hearing for specific disclosure, the respondent has failed to do this. The respondent has disclosed an email sent to her representative dated 20 December 2019 described as payroll summary, but not the documentation which was ordered.

26. From this email, the respondent says the claimant was paid more hours than she had clocked in on the following occasions: The pay slip dated 1 September 2017 (12.5 additional hours x £8.00), dated 1 March 2018 (1.25 additional hours x £8.50), dated 1 April 2018 (36.75 additional hours x £8.50); dated 1 July 2018 (8 additional hours x £8.50) and dated 1 September 2018 (51.75 additional hours x 8.50). In 8 of the remaining 9 months, the claimant's clocked hours equate with her paid hours and on one pay date (1 June 2018) the claimant clocked hours were 30 minutes more than she was paid.

27. The claimant's final pay slip however does not reflect the claimant's clocked hours. Between 21 June 2018 to the date of the claimant's dismissal, she clocked 275 hours. The respondent says on its email that she was paid for 282.25 hours, but the claimant's final two pay slips says she has been paid for 169.25 hours.

28. One of the documents produced by the respondent is the copy of the contents of an email from the respondent to the claimant relating to arriving late at a pick up on 23 October 2017. This includes the following wording: *'Crew left at 7.00 to be in Blackburn for 8.15 and arrived at 8.45'*. On that date in the respondent's records, it records that the claimant clocked on at 8.00, not 7.00 and during that month, no additional hours were paid to the claimant according to the claimant's pay slip. On that date therefore, the claimant was not paid from when she left the base, nor indeed from when she arrived at the base to do her vehicle checks. The respondent referred us to the claimant's shifts on 2 to 5 July 2018 and further shifts on 17 August 2018, 15 June 2018 and 31 May 2018 as demonstrating that the claimant was paid from when she arrived at her base.

29. During the evidence of Ms O'Gorman, she confirmed that jobs for different clients were paid differently. For instance, the contracts which the respondent had with the Lancashire Mental Health Trust and the work with NEWAS in Wales and Lancashire were originally paid from arrival at the first job. This had changed during the course of her employment to being paid from arriving at the base, but she was unclear when this had occurred.

Holiday Pay

30. From the claimant's contract, holiday is calculated based upon average pay during the preceding 12 weeks. From the claimant's pay slips, when she took leave she was paid at a basic 8 hours pay regardless of the hours which she worked in the previous 12 weeks. The respondent's pay and holiday records were inaccurate. For example, the claimant gave evidence that she was absent in January 2018 for 6 days but was only paid for 3, and in April 2018, she was absent for 5 days but paid for 4 and in June she took one day off but was only paid for one hour. In August 2018 she had 8 days holiday but was paid nothing.

Rest breaks

31. The claimant's contract of employment states that if an employee works for more than six consecutive hours per day, they are entitled to a daily 20 minutes rest break. It confirms that the nature of the role is such that meal breaks need to flexible and must not be taken with patients on board. The nature of the claimant's work was that they took breaks when they had 'down time', that is that they were on a job, but they did not have a patient on board.

The claimant's disciplinary record

32. The claimant was spoken to at times about work issues which arose and had live written warnings on her file.

Events of 20 August 2018

33. The claimant had ambitions to be a paramedic and applied to be an Ambulance Care Assistant with North West Ambulance Service. Shortly before she was dismissed, she accepted their offer of a job. The job was subject to satisfactory references. This was a more stable job and she hoped there would be opportunities to progress. In the offer letter she was advised not to resign until all of the checks had been completed.

34. The claimant worked her normal four day shift from 17 to 20 August 2018. By the end of her third day, she had worked 30.5 hours. Although the claimant was not driving or on the road for all of that period and there would have been down time, she was in the ambulance and at work.

35. 20 August was the last of her four day shift. She had a booked job on Parim from 14.00 to 23.00. She was working with Lisa Porter. This was a set shift to transport patients on behalf of Wrexham Maelor Hospital. This involved travelling to Wrexham from base and at the direction of the hospital staff, transporting patients to and from the hospital during the course of the shift. They were required to be at Wrexham by 14.00.

36. The claimant says that on that day she arrived at the base in Wallasey at 9.30 to carry out the vehicle check and they left the base to travel to Wrexham at 11.00. At the hearing, although the claimant was adamant on those timings, it is not corroborated by the documentation we had access to. The vehicle tracker shows that the vehicle left the base at 13.15 and arrived at Wrexham at 13.57. The Parim system shows that the job at Wrexham was due to start at 14.00 and there would therefore have been no need for the claimant to have been in the base so early. We consider that the claimant is mistaken about the timings on that day and indeed Lisa Porter, who also thought they had started at 9.30 has accepted that may have been the case. We do not consider that this affects the credibility of the claimant.

37. The claimant and Ms Porter having arrived at Wrexham commenced the transport of patients. Ms Porter was driving. At 15.14, Mr Marland send a message via the Parim system, referred to as a 'ping' to the claimant and Ms Porter. It added another job at the end of the existing shift from 23.00 to 02.00. The job was a repatriation which involved collecting a patient from Manchester airport and transporting them to the Royal Liverpool hospital. Mr Marland also messaged them saying:

38. *"How are you getting on with transfers – I've had to put a repat on from Manchester to Royal Liverpool, plane landing at 23.55, so you'll be able to go from Wrexham straight to Manchester, then over to Liverpool"*

39. At 15.15 Mr Marland then sent another message reminding them to take a break as they would now be working a full 12 hours shift. In fact, they would have been working more than 12 hours, having left the base at 13.15.

40. At approximately 16.00 the claimant and Ms Porter had a conversation with Mr Marland about the additional job. That call was on speakerphone.

41. In that call the claimant told Mr Marland that she wouldn't do the extra job. When Mr Marland asked why, the claimant said she was already tired and that she didn't want to put Ms Porter or herself or the patient at risk and that she was concerned that the plane might be delayed which would result in her working over the 12 hour shift. Mr Marland told her that if she refused, he would put it down as a performance failure. The claimant responded saying that she "didn't give a shit". Mr Marland suggested that he had referred to a performance review as opposed to a performance failure and therefore it was not something of concern, but we do not accept this was the case.

42. Mr Marland then asked Ms Porter if she would do it. She asked who with and he said he would do the job with her. She agreed to do the job. At this time there was no patient in the ambulance as any patients had already been dropped off. That was the only conversation which Mr Marland had with the claimant that day.

43. Mr Marland's version of this conversation was at odds with the claimant and Ms Porter. We preferred the evidence of the claimant and Ms Porter. We found that they were clear in their evidence about this conversation and although they could not recall the exact words used, we find that the claimant did make it clear to Mr Marland her reasons why she did not want to carry out the additional job. In cross examination, Mr Marland accepted that the claimant had referred to her having to work over 12 hours if the plane was delayed. In coming to this view, we have also taken into account that Mr Marland also directly contradicts the evidence of Ms O'Gorman in respect of a further call that afternoon, and indeed the respondent's other witnesses.

44. Mr Marland accepted in cross examination that the only reason he told the claimant that she would be put down for a performance [failure] was because the claimant turned down a job which Mr Marland thought she had time to do.

45. The claimant had the right under her contract to reject this job and was upset by this exchange with Mr Marland and his threat of a performance failure, which she saw as bullying. She was concerned about the job offer she had with North West Ambulance and the risk that if Mr Marland proceeded with his performance management threat, it might affect her reference. She called her partner and decided that she did not want to continue to work for the respondent. At 18.09 she messaged Mr Marland on the Employee Portal saying:

" Hi David, to save all the hassle of performance failures and getting me into Sheena, I will write out my notice this evening and hand it in to u on Thursday. Thank you."

46. Unfortunately, the claimant replied to all on the system, rather than just Mr Marland as she had intended. By this email, the claimant was giving notice of her intention to resign.

47. Having seen this message, Mr Marland contacted his duty manager, Ms O'Gorman who was taking over from him that evening and instructed her to contact the claimant and Ms Porter and arrange their return to base. He told Ms O'Gorman to tell them that they should return directly to the station from their location, and for the claimant to leave the premises as she had stated she was handing in her notice, that Ms Porter should lock up the station and ensure the vehicle was secure before she could head home to return for another job later. She was also instructed to call Wrexham hospital and tell them that they were leaving because of sickness.

48. There was a clear dispute on evidence in respect of the instruction given to Ms O'Gorman between Ms O'Gorman and Mr Marland**.** Mr Marland denied that he had given that instruction. We prefer the evidence of Ms O'Gorman. She attended on the third day of the hearing not having heard any of the earlier evidence. She had no reason to give false evidence. When challenged under cross examination she was clear on her recollection of what she had been told to do and she did it.

49. Ms O'Gorman therefore called the claimant and Ms Porter and passed on Mr Marland's instructions. They did as they were instructed and at 18.54 left Wrexham hospital and arrived back at the base at 19.44. Ms Porter later accompanied another member of staff on the repatriation from Manchester airport. She arrived back at the base around 3.00.

50. After the claimant and Ms Porter had left Wrexham, Ms Cornah had a call from Wrexham hospital about the staff leaving. She spoke with Mr Marland who told her that the claimant and Ms Porter had abandoned their shift and returned to the base. He said that he had only found this out as he had seen them travelling back to Wallasey when he passed them on the motorway.

51. According to Ms Cornah he told her that he had been subjected to a three hour torrent of abuse and disruption from the claimant, which ended by her sending her message that she was resigning. That message was sent at 18.09. He told her that the claimant told him that she was going home and that she was going to drive the ambulance back to Liverpool. He had responded by telling her that if she walked off shift, she would be invited to a performance meeting. He alleged she had used abusive language in front of a patient. Mr Marland told Ms Cornah that there had been a series of telephone calls and it seemed to her that Mr Marland was very upset about the way he had been spoken to. Mr Marland told Ms Cornah that he had arranged for someone to join Ms Porter in Wrexham to finish the work but in the interim the claimant had persuaded Ms Porter to drive her back to the station.

52. In Mr Marland's statement he makes no reference to what he told Ms Cornah and in cross examination his evidence was that he told Ms Cornah "what had happened".

53. Based upon the information provided by Mr Marland, Ms Cornah discussed matters with her HR Consultant and decided to dismiss the claimant and Ms Porter. Although Ms Cornah says this was a joint decision, she accepts that she was responsible for it.

54. Prior to making that decision, there was no discussion with the claimant or Ms Porter. No written statement was taken from Mr Marland. No investigation was carried out. Ms Cornah simply relied upon what Mr Marland had told her and Ms Carroll.

55. Ms Cornah's reason for the claimant's dismissal was that she had abandoned a shift without any regard for the service users or the respondent's clients. She considered that this amounted to gross misconduct. In cross examination, Ms Cornah confirmed that she also relied upon the claimant's conduct in her conversation with Mr Marland, as reported by him. On 21 August, the HR Consultant wrote to the claimant dismissing her without notice. The letter of dismissal was not seen by Ms Cornah. The relevant section stated:

    "Dear Michelle,

    Further to your communication with the office yesterday and your subsequent actions, I am writing to inform you of the decision made in relation to your employment with Manone.

    There have been several matters of concern regarding your conduct and this culminated in your behaviour yesterday when you refuse to finish/carry out a booked job.

    Further you placed a notice on the employee campfire which was both inappropriate and unacceptable.

    Having considered your actions I have decided that they amount to gross misconduct and that your employment should be terminated with immediate effect.".

    …….

56. The letter dismissing Ms Porter of the same date, makes no reference to Ms Porter leaving her shift as a reason for the dismissal.

57. The claimant and Ms Porter were offered a right of appeal which they exercised by lodging a letter of grievance. This was drafted by Ms Porter. After originally arranging a meeting, their appeals/grievances were never considered as there were difficulties with Ms Cornah's availability**.**

58. The claimant had provided the respondent's details to North West Ambulance Service for the purposes of providing a reference. When they wrote to the respondent, a reference was provided which confirmed that the claimant had been dismissed. North West Ambulance thereafter withdrew

the offer of employment. When the claimant enquired why, she was told that it was withdrawn because the respondent had failed to provide further information which they had requested.

The Law

Public Interest Disclosures – Protected Disclosures

59. A protected disclosure is governed by Part IVA of the Employment Rights Act 1996 ("the Act") of which the relevant sections are as follows:-

"s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of Sections 43C to 43H.

s43B(1): in this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:

(a) …

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…

(c) …

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

60. The Employment Appeal Tribunal ("EAT") (HHJ Eady QC) summarised the case law on section 43B(1) as follows in Parsons v Airplus International Ltd UKEAT/0111/17, a decision of 13 October 2017:

"23. As to whether or not a disclosure is a protected disclosure, the following points can be made:

23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.

23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.

23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may

include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT."

61. The decision of the EAT in Kilraine was subsequently upheld by the Court of Appeal at [2018] EWCA Civ 1436. The concept of "information" used in section 43B(1) is capable of covering statements which might also be characterised as allegations.

62. The worker need only have a reasonable belief that the information tends to show the matter required by Section 43B(1) and that the disclosure is made in the public interest. A subjective belief may be objectively reasonable even if it is wrong, or formed for the wrong reasons. In Chesterton Global Ltd and anor v Nurmohamed [2017[IRLR 837 the Court of Appeal approved a suggestion from counsel as to the factors normally relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest.

63. In Chesterton Underhill LJ addressed the question of the motivation for the disclosure in paragraph 30, saying that:

"… while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."

64. Sections 43C – 43G address the identity of the person to whom the disclosure was made. In this case it was accepted that the alleged disclosures were made to the employer (section 43C).

Detriment – Public Interest Disclosure

65. If a protected disclosure has been made the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

"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."

Section 47B(2) states that;

"This section does not apply where:

(a) the worker is an employee; and
(b) the detriment in question amounts to a dismissal."

66. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in Shamoon v The Royal Ulster Constabulary [2003] ICR 337: the test is whether a reasonable employee

would or might take the view that he had been disadvantaged in circumstances in which he had to work. An unjustified sense of grievance cannot amount to a detriment.

67. In detriment cases, the claimant has to establish that the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the employee. Fecitt v NHS Manchester [2012]ICR 372 (paragraph 45) :

68. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".

69. In International Petroleum Ltd and ors v Osipov and ors UKEAT/0058/17/DA the EAT (Simler P) summarised the causation test as follows:

"...I agree that the proper approach to inference drawing and the burden of proof in a s.47B ERA 1996 case can be summarised as follows:

(a) The burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.

(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight [[2003] IRLR 140]at paragraph 20.

(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."

70. The case came before the Court of Appeal in October 2018 (Timis and Sage v Osipov and Protect [2018] EWCA Civ 2321). The main point in the appeal was that of vicarious liability, and the approach of the EAT to causation was not disturbed.

Automatic Unfair Dismissal – Public Interest Disclosure

71. Section 103A of the Act deals with protected disclosures and reads as follows:-

"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".

72. An employee will only succeed in a claim of unfair dismissal if the tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure.

73. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, Cairns LJ said, at p. 330 B-C:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

74. Lord Justice Elias confirmed in Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA, the causation test for unfair dismissal is stricter than that for unlawful detriment: the latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas S.103A ERA requires the disclosure to be the primary motivation for a dismissal.

75. In Royal Mail Group Limited v Jhuti [2019] UKSC 55, the Supreme Court considered situations where others are said to have influenced the decision maker. It held that if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason. (paragraphs 60 and 62).

76. At paragraph 60, Lord Wilson stated:

" In searching for the reason for a dismissal for the purposes of section 103A of the Act, and indeed of other sections in Part X, courts need generally look no further than at the reasons given by the appointed decision maker.....If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures) the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision maker adopts (here the inadequate performance), it is the court's duty to penetrate through the invention rather that to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision maker."

77. In a case within section 103A the Tribunal has jurisdiction over the claim even though the employee has not been employed continuously for two years: section 108(3). However, in such cases it is for the claimant to establish that the Tribunal has jurisdiction, so the claimant bears the burden of showing that the sole or principal reason for dismissal was the protected disclosure: Jackson v ICS Group Ltd UKEAT/499/97.

Detriment - Health and safety cases

78. Section 44 of the ERA states:

(1) An employee 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:

…….(c) being an employee at a place where—

(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

……..

(4) This section does not apply where the detriment in question amounts to dismissal (within the meaning of Part X).

Automatic Unfair Dismissal - Health and Safety Reason

79. Section 100 renders a dismissal automatically unfair if the reason or principal reason is within the following:

(1) 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—

(a)…,

(b)….

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

80. In Balfour Kilpatrick Ltd v Acheson and ors 2003 IRLR 683, EAT, the EAT identified three requirements that need to be satisfied for a claim under S.100(1)(c) to be made out. It must be established that:
    a. it was not reasonably practicable for the employee to raise the health and safety matters through the safety representative or safety committee
    b. the employee brought to the employer's attention by reasonable means the circumstances that he or she reasonably believes are harmful or potentially harmful to health or safety, and
    c. the reason, or principal reason, for the dismissal was the fact that the employee was exercising his or her rights.

81. Where an employee does not have enough qualifying service to bring an ordinary unfair dismissal claim, the burden of proof is on the employee to

show an automatically unfair reason for dismissal for which no qualifying service is required. This was decided by the Court of Appeal (by a majority) in Smith v Hayle Town Council 1978 ICR 996, CA, again in relation to a claim under S.152 TULR(C)A, and was applied in relation to what is now S.100 in Tedeschi v Hosiden Besson Ltd EAT 959/95 and Parks v Lansdowne Club EAT 310/95.

Automatic Unfair Dismissal – Assertion of a Statutory Right

82. Section 104 of the ERA states:

(1) 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

(a) …….
(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)
(a) whether or not the employee has the right, or
(b) whether or not the right has been infringed;
but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(2) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—
(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,
(b) the right conferred by section 86 of this Act,
…. .
(d) the rights conferred by the Working Time Regulations 1998……., and
(e) the rights conferred by the Transfer of Undertakings (Protection of Employment) Regulations 2006.

(5)…..

Notice Pay

83. Subject to certain conditions and exceptions not relevant here, the Tribunal has jurisdiction over a claim for damages or some other sum in respect of a breach of contract which arises or is outstanding on termination of employment if presented within three months of the effective date of termination (allowing for early conciliation): (Articles 3 and 7 of the Employment Tribunals (England and Wales) Extension of Jurisdiction Order 1994.)

84. An employee is entitled to notice of termination in accordance with the contract (or the statutory minimum notice period under section 86 ERA if that is longer) unless the employer establishes that the employee was guilty of gross misconduct. The measure of damages for a failure to give notice of termination is the net value of pay and other benefits during the notice period, giving credit for other sums earned in mitigation.

Unlawful Deductions from Pay

85. The right not to suffer unlawful deductions from pay arises under Part II of the ERA. Section 13(3) deems a deduction to have been made on any occasion on which the total amount of wages paid by an employer is less than the amount properly payable by him. That requires consideration of contractual, statutory and common law entitlements. Such a deduction is unlawful unless it is made with authority under section 13(1), or exempt under section 14.

Decision

86. Applying the law to the findings of fact and considering the issues which it was agreed at the outset the Tribunal must determine, we find as follows:

The Detriment claims

Detriment as a result of making a public interest disclosure (Section 47B ERA).

87. We must first consider whether the claimant made a protected disclosure within the meaning of section 43A ERA. This is relevant to both the claim of detriment and of dismissal.

88. During the conversation with Mr Marland in the ambulance on 20 August, the claimant explained her reason for not wanting to carry out the job later that night to Manchester airport. She told Mr Marland that she was already tired and that she didn't want to put Ms Porter or herself or the patient at risk and that she was concerned that the plane might be delayed which would result in her working over the 12 hour shift. The claimant's job was driving which she shared with Ms Porter. Ms Porter had been driving during the early part of the shift and it was likely to be the claimant who would drive later. The claimant was concerned that if she accepted the extra job, she may be driving at a time when she was too tired to do so.

89. We find that the information she disclosed was in the public interest and which tended to show one of the requirements of section 43B(1) being that the health and safety of any individual was likely to be endangered (section 43B(1)(d) and that the respondent was failing in its legal obligation, namely the claimant's rights to rest breaks pursuant to Regulation 10 of the Working Time Regulations 1998 (section 43B(1)(b)). The respondent's Company Vehicle policy makes it clear that if an employee is tired, they should not drive. A policy of this type is to ensure the safety of the driver, passenger and other road users and the claimant's disclosure was in the public interest. The statutory requirement to have rest breaks under the Working Time Regulations 1998 is a health and safety measure and again was disclosed in the public interest.

90. Ms Murphy did not seek to dispute this in her arguments before us, but the respondent did contend that the claimant did not have a reasonable belief in these disclosures. The claimant was on the fourth 24 hour shift in 4 days. In the first three days she had worked for 30 or more hours. Although the respondent suggests that she could not have been as tired as she suggested because portions of the time she was working, was 'down time', ie that they were waiting for patients rather than driving, this is still working time and can be tiring. We accept that it was the claimant who best knew whether she was tired and whether she believed at that time that if she accepted the extra job, she would be tired to the extent that she could potentially endanger the health and safety of others. We accept her evidence and find that the claimant's belief was reasonably held.

91. Further the claimant would be working for more than 12 hours, particularly if the plane was delayed and as such she believed that would be in breach of her rest requirements. The Working Time Regulations at Regulation 10 refers to rest breaks. The claimant relies upon the regulation 10(1) which requires a worker to have a rest break of at least 11 hours in any 24. The claimant had started the drive to Wrexham at 13.15 and as such would have been at the base station at about 12.45 that day. The additional job was from 23.00 to 2.00 the following day. It was reasonable therefore that the claimant considered that even without any plane delays, she would be working more than a 12 hour shift and in that 24 hour period starting at 12.45, having less than a 11 hour rest break. In fact, Ms Porter carried out the extra shift and the plane was indeed delayed. The claimant's belief was reasonably held.

92. As the claimant made her disclosures to her employer, through Mr Marland, her disclosures were made in accordance with section 43C ERA.

93. The claimant's disclosures were therefore protected disclosures within the meaning of section 43A.

94. We go on to consider whether as a result of having made a protected disclosure to the respondent, the respondent subjected the claimant to a detriment, such as being threatened with performance management or disciplinary action and/or being provided with a reference saying that she was dismissed.

95. We find that the threat of performance failure and the reference saying that the claimant was dismissed, amounted to detriments. Mr Marland threatened the claimant with a performance failure. Whatever this may have been termed by the respondent, we consider that there was no doubt either in the claimant's mind, or indeed in that of Mr Marland's that this was a threat of a sanction or a process which was detrimental to the claimant. She had the right to reject the Manchester airport job and considered that Mr Marland's behaviour amounted to bullying. The claimant was so concerned that it would go on her record, such that it might affect the job offer from North West Ambulance Service, having spoken with her partner, she resigned.

96. A reference request was made by North West Ambulance Service. The respondent provided a reference which stated that the claimant was dismissed. This was detrimental to the claimant. The North West

Ambulance Service asked for more information from the respondent which was not provided, and we accept on the balance of probabilities that it was the reference and the lack of response from the respondent which resulted in the claimant's job offer being withdrawn.

97. The question we must then consider is whether the respondent subjected the claimant to these detriments on the grounds that she had made protected disclosures. We have guidance from Simler J in International Petroleum Ltd and ors v Osipov and ors.

98. The burden of proof lies with the claimant to show that a ground or reason (that is more than trivial) for the detrimental treatment to which she was subjected is the protected disclosure. We find that the claimant has discharged that burden in respect of both detriments.

99. The timing of the threat of the performance failure was important. It was made immediately after she made the protected disclosure. Her complaint materially influenced Mr Marland who reacted by issuing his threat.

100. Having been threatened by Mr Marland, the claimant gave notice of her resignation. Having sent her message, Mr Marland was annoyed and instructed Ms O'Gorman to tell the claimant and Ms Porter to leave Wrexham and return to base immediately. They followed his instruction. Mr Marland then gave a false version of events to Ms Cornah. Relying upon that false version she dismissed the claimant without carrying out any further investigation. The reference provided to the North West Ambulance Service therefore stated dismissal which led to the request for further information which was not provided. For these reasons although this detriment was not so close in time as the threat of the performance failure, the protected disclosure materially influenced the respondent in their decision to issue the reference saying the claimant was dismissed.

101. By virtue of s.48(2) ERA, the respondent must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them. We do not consider that the respondent has provided any other cogent explanation for Mr Marland threatening the claimant with a performance failure or providing the reference. Ms Cornah accepted that it was the claimant's walking off the shift and abandoning her patients, together with her behaviour towards Mr Marland which caused her to dismiss. This was not investigated at the time. She did not speak to the claimant and ask for her version of events. She relied upon what Mr Marland had said and he had misled her as to the events of that afternoon. The reason therefore that the claimant was given the reference stating the claimant was dismissed was because Mr Marland had misled Ms Coranah and Mr Marland was materially influenced by the protected disclosures.

102. This claim therefore succeeds.

103. As there are both claims of detriment and unfair dismissal, we need to consider whether the detriments which the claimant was subjected to amounted to the dismissal as set out in section 47B(2) ERA. We note the guidance at paragraph 28 of the judgment on Jhuti, which points out that there is a difference between "amounts to" and "caused". In light of our findings of the sequence of events described at paragraph 100 above, we

find that the detriments did cause the claimant's dismissal but did not in themselves amount to the dismissal.

Detriment as a health and safety reasons (section 44(1)(c) Employment Rights Act 1996 (ERA)

104. Was the claimant subjected to a detriment by the respondent for having raised health and safety issues? In view of our findings in respect of the conversation with Mr Marland on 20 August, we find that the claimant brought to the respondent's attention circumstances connected with her work that she reasonably believed were harmful or potentially harmful to health and safety, namely that she was already tired and that she didn't want to put Lisa or herself or the patient at risk by accepting the Manchester airport job.

105. For the reasons stated above that belief was in our view a reasonable one to hold. Further we find that the claimant also brought this to the respondent's attention by reasonable means in circumstances where it was not reasonably practicable for the employee to raise the matter with the respondent's health and safety representative. We accept that she was unaware that the respondent had a safety representative and in any event did not know his name. She was also being asked for a response from Mr Marland while he was on the phone. As such it was not reasonably practicable to raise her concerns with the representative.

106. For the reasons stated above in paragraphs 99, 100 and 101 above, we find that the respondent subjected the claimant to both detriments, the threatening of the performance failure and the provision of reference saying the claimant was dismissed, also on the grounds that she had brought this information to the attention of the respondent.

107. This claim succeeds.

The dismissal claims

108. As the claimant has less than two years continuous employment, the burden lies upon her to show the reason or principal for her dismissal. Mr Henry disagreed with this proposition. He says that the correct approach is that set out by the Court of Appeal in Kuzel v Roche Products Limited [2008] EWCA Civ 380. In support of this view he refers to paragraph 30 of the judgment of Lord Wilson in the very recent decision of the Supreme Court in Jhuti. We have considered these authorities and disagree with him. Although Kuzel is the correct approach where a claimant has the necessary service to bring a claim under section 98 ERA, where a claimant does not have the requisite service to bring such a claim, the burden is on her. Lord Wilson is in our view simply stating the general position where a claimant has the requisite service.

109. In Jhuti, the Supreme Court determined that if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision maker adopts, the reason for the dismissal is the hidden reason

rather than the invented reason. In that judgment, Lord Wilson makes the point that there will be very few situations where this may apply.

110. This case is in our view one of those few. Mr Marland provided a false version of events to Ms Cornah who (with the company's HR consultant) made the decision to dismiss. Based upon Mr Marland's version and without asking the claimant for her version, Ms Cornah dismissed the claimant as she considered that her conduct in leaving her shift and returning to the base on 20 August and her behaviour towards Mr Marland, amounted to gross misconduct.

111. This falls squarely within the situation described in Jhuti. Mr Marland was the claimant's manager, so above the claimant in the hierarchy. He hid the real reason that the claimant had left the shift from Ms Cornah and exaggerated the claimant's behaviour from one short telephone conversation where she had refused the offer of a shift and swore when he threatened her with a performance failure, to a three hour torrent of abuse in front of a patient.

112. We must therefore consider Mr Marland's hidden reason. Although Jhuti was a claim of unfair dismissal for making a protected disclosure, Lord Wilson commented that the wording which the Court was being asked to consider being "the reason (or if more than one, the principal reason) for the dismissal" appeared in numerous other sections in Part X of the ERA and as such, the court's answer in relation to section 103A must equally relate to the other sections in Part X. As such it is the hidden reason we must consider in respect of each of the claims of unfair dismissal which the claimant brings.

113. We find that the claimant has provided sufficient evidence to show on the balance of probabilities, that it was her refusal to carry out the additional job to Manchester airport for the reasons she gave to Mr Marland at the time which was the principal reason for her dismissal. That refusal set in train a sequence of events which resulted in her dismissal. The reason for her refusal was that she was already tired and that she didn't want to put her colleague or herself or the patient at risk and that she was concerned that the plane might be delayed which would result in her working over the 12 hour shift. She gave that reason to Mr Marland. It was this which was Mr Marland's primary motivation for threatening the claimant with the performance failure which resulted in the claimant sending her notice of resignation. This led to Mr Marland telling Ms O'Gorman to instruct the claimant and Ms Porter to leave their shift early and return to the base, which in turn resulted in Ms Cornah dismissing the claimant.

114. Having found that this was the principal reason, we turn therefore to the three claims of automatic unfair dismissal:

Automatic unfair dismissal for making a protected disclosure (section 103A ERA)

115. Having already found that that the disclosures made to Mr Marland were protected disclosures, for the reasons stated above we find that what motivated Mr Marland was that the claimant had made those protected

disclosure. As such that was the principal reason for the claimant's dismissal and the claim succeeds.

Automatic Unfair Dismissal for a Health and Safety Reason (section100(1)(c) ERA).

116. We have found that it was not practicable for the claimant to raise her health and safety concerns with any safety representative and that she brought to the respondent's attention, through Mr Marland, by reasonable means, circumstances connected with her work that she reasonably believed were harmful or potentially harmful to health and safety. We must then consider whether the reason or principal reason for her dismissal was the fact that she exercised those rights. As set out above it was Mr Marland's motivation which we must consider and in respect of which we have made the findings at paragraphs 113 above. For the reasons described, we find that the claimant has shown this was the principal reason. As such this claim succeeds.

Automatic unfair dismissal for asserting a statutory right (section 104(1)(b) ERA

117. We find that in raising with Mr Marland her concerns about her tiredness and the risks to patients, her colleague and herself, the claimant was alleging that the respondent had infringed a relevant statutory right, that being a breach of the requirement to have a rest period of 11 continuous hours in any 24 hour period as provided by Regulation 10 of the Working Time Regulations 1998.

118. We accept that the claimant made that allegation in good faith, being concern for her own, her colleague's and patient's health and safety. It is irrelevant whether the claimant had that right or whether it in fact had been infringed. Although the claimant did not specify the particular statutory right, we consider that, in referring to working over a 12 hour shift and that she was and would be tired, it was clear to Mr Marland that her concern was about having sufficient rest and which statutory right she was referring to.

119. Again, we must consider Mr Marland's motivation and for the reasons set out in paragraph 113 above we conclude that the claimant has shown that the principal reason for her dismissal was that she asserted a statutory right.

120. This claim therefore succeeds.

Wrongful dismissal (section 86 ERA)

121. The claimant was dismissed without notice as the respondent considered that her conduct was such that it amounted to a fundamental breach of contract. There were no grounds in our view to dismiss the claimant for her conduct and we do not consider that any of her actions gave the respondent the right under her contract to dismiss her without notice. As such the respondent has breached the claimant's contract by not providing her with her contractual notice period.

122. This claim succeeds.

Unlawful deductions of wages (section 13 ERA)

The last month's wages

123. We find that that the respondent did not pay to the claimant her final month's pay. The claimant was entitled to be paid for the hours which she worked, but from the document provided most recently by the respondent and the payslips to which we have been referred, the claimant was not paid for the full hours which she worked in July and August 2018. We cannot at this stage quantify the amount which was unlawfully deducted and will leave that amount to be determined at a remedy hearing, if it cannot be resolved between the parties.

124. This claim succeeds.

The initial travel time from Wallasey station to the first client.

125. The pay and hours worked records provided by the respondent are incomplete and unclear. The claimant alleges that she was not paid from when she arrived at work, but from when she arrived at her first job. The respondent accepts that she was entitled to be paid from when she first arrived at the base and contends that this was what happened.

126. From our findings as set out above, there are some dates when the claimant was paid from the base and other dates when she was not. We consider that the answer lies in the evidence provided by Ms O'Gorman. She states that the position changed part way through the claimant's employment and was different for different clients of the respondent. The burden is on the claimant to show that the respondent has made deductions without authority. There are some instances as we have described in our findings of fact when the claimant has shown this and she has suffered unauthorised deductuions. The extent of those unlawful deductions is however unclear as the respondent has failed to date to provide the documents required and further disclosure and evidence will be needed. We cannot therefore quantify the amount which has been unlawfully deducted until the respondent provides such further disclosure. This will need to be resolved at a remedy hearing if the parties are unable to resolve it between themselves.

127. This claim succeeds.

Whilst the claimant was on call

128. We do not find that the time which the claimant was available for work, being the 24 hour periods for the four day shifts was time which she was contractually obliged to be 'on call' and accept any work provided by the respondent. We have considered the authorities referred to by Mr Henry and Ms Murphy, but do not consider that the obligations put on the claimant during the 24 hour periods could be described as working time.

129. The references in the claimant's contract to being within a certain distance of the station, always having the app on, being in or ready to

change into uniform and not drinking alcohol are for the ad hoc jobs which the claimant had the contractual right to turn down and at times did so. There was a difference between planned work which was put on Parim in advance and which the claimant was obliged to accept if it fell within the four 24 hour periods of the claimant's shift, and the ad hoc work such as the Manchester job which she had a choice whether to accept. This is a different situation from the authorities referred to by Mr Henry. Once the claimant had completed any planned work, which would usually comprise at least her guaranteed hours, the rest of the time was her own. We do not accept that there was a contractual obligation to be 'on call' in the sense that she had to accept any work offered during this time or that it amounted to working time, such that she should have been paid for it. There has therefore been no unauthorised deduction in respect of this time.

130. This claim fails.

Holiday Pay

131. The claimant's payslips reflect that she was paid 8 hours for each day of holiday which she took. Her contractual entitlement is to be paid for each day of holiday based upon the average of her previous 12 weeks pay. The respondent alleges that she was paid all holiday pay due and based it upon the calculation of 12.07% of her salary. That calculation however is not based upon average pay as required in her contract. She has referred us to a detailed schedule of the hours which she worked, the holiday entitlement she therefore accrued and the holiday which she has taken. From her schedule which was unchallenged by the respondent she has holidays which had accrued at the date of her termination in respect of which she was not paid.

132. The claimant further contends that if she had been underpaid in respect of her travel time from arriving at her base, she will also have been underpaid in respect of her holidays. In view of our finding above, we find that the claimant has had unauthorised deductions from her pay in respect of holidays taken, but the amount of such unlawful deductions cannot be quantified until the respondent has made further disclosure.

133. This claim succeeds.

National Minimum Wage

134. The claimant contends that the respondent has failed to pay the claimant the national minimum wage. Until such time as a determination is made at a remedy hearing of the hours worked for which the claimant has not been paid during her employment, the Tribunal cannot determine whether or not she has been paid in accordance with the national minimum wage.

135. This matter will now be listed for a remedy hearing with a time estimate of one day.

136. The Tribunal is conscious of the considerable delay in the promulgation of this judgment. Regrettably, the date of 6 January 2020 initially set for the in chambers hearing could not proceed as the Tribunal was awaiting submissions from the respondent, who had not complied with the Tribunal's order. Thereafter difficulties with availability of the Judge and Tribunal

members and the Covid 19 situation was such that the first available date that the Tribunal could next convene was 17 June 2020.

Employment Judge **Benson**
Dated 22 June 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

1 July 2020

FOR EMPLOYMENT TRIBUNALS