Claim No: 2301112/2019

# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms Elena Alegado**

**Respondents:** **Guy's and St Thomas' NHS Foundation Trust (1)**
**Ms Manda Mootien (2)**

**Heard at:** **London South Employment Tribunal**

**On:** **12-15 October 2020**

**13 November (In Chambers)**

**Before:** **Employment Judge Webster**

**Ms H Carter**

**Ms N Beeston**

**Representation:**

**Claimant:** Mr D Lanyado (Lay representative and Claimant's partner)

**Respondent:** Ms J Danvers (Counsel)

## RESERVED JUDGMENT

1. The Claimant's claims for 'whistleblowing' detriments under s 47B Employment Rights Act 1996 against both respondents are not upheld.

2. The Claimant's claims for detriments under the National Minimum Wage Act 1998 are not upheld.

## REASONS

### The hearing

3. The claimant was ably represented by her partner Mr D Lanyado. Mr Lanyado wanted to provide the best representation possible for the claimant and the tribunal took considerable time to explain various aspects of the process to him as the hearing progressed.

4. Due to the pandemic, it was agreed that one of the respondents' witnesses, Ms Osman, need not attend the tribunal to give evidence as her witness statement was largely uncontested. We have therefore accepted it. The tribunal thanks the parties for working together to enable this matter to be dealt with constructively.

5. Mr Lanyado made an application to amend the claim on the first day of the hearing which was partly allowed and partly not. The amendment is reflected in the list of issues below. Reasons for the decision were given on the day and are not repeated here. Mr Lanyado made another application to amend the claim on the final day of the hearing which was not allowed. Reasons for the decision were given at the hearing and are not repeated here.

6. Following the evidence from the second respondent, the claimant withdrew several of her detriment allegations. This means that they are not set out in the List of Issues below. For the avoidance of doubt, the detriments no longer alleged were, from the List of Issues at pgs 47-59 of the bundle;

   (i) 7.4 (unlawful deduction of one week's wages)
   (ii) 7.7 (deduction of award ticket price from C's wages)
   (iii) 7.8 (underpayment for a bank shift worked)
   (iv) 7.9 (the claimant being sent home early from work)

7. On the final day of the hearing, unfortunately, Mr Lanyado became unwell towards the end of questioning the final witness. After a break, he insisted that he was well enough to complete the questioning of the final witness (there were only 3 questions remaining). Thereafter the tribunal agreed with the parties that in the circumstances they would accept written reasons submitted by the parties within a week of the hearing. The respondent provided written submissions on the day and the claimant provided them within the ordered time frame and we have considered them carefully in reaching our judgment.

8. We were provided with witness statements for the claimant, Mr Lanyado, the second respondent**,** Ms Pido Solinap, Mr Shipkolye, Ms Osman and Ms Gyimesi**.** Although available to give evidence, we did not hear from Mr Lanyado or Ms Osman as the other side accepted their evidence. We have therefore accepted their evidence and given their statements the same weight as those who were cross examined.

The Issues

9. A full list of issues was set out in the bundle pages 47-59. Given its length we do not set it all out here. However, for the purposes of this Judgment we have set out the disclosures that are relied upon by the claimant and the subsequent alleged detriments. We have also recorded, next to each detriment, which disclosure the claimant says caused the detriment. This refers to the handwritten document which Mr Lanyado prepared at the outset of the hearing at the tribunal's request.

10. To avoid confusion, we have kept the numbering of the alleged detriments the same as those in the List of Issues.

**Protected Disclosures (S43B ERA 1996)**

11. The claimant says she disclosed the following matters, in the manner indicated:

Disclosure 1

11.1 Deficiencies in the First Respondent's payroll and associated payment administration systems; in a chance of emails dated between 6 September and 9 November 2018, including emails to her line manager Eliza Harmon (which were copied to the Second Respondent) of 10 September 2018 and emails to Daniella Osman (Which were copied to the Second Respondent an Eliza Harmon) of 21 September 2018 and 10 October 2018.

The email of 10 September 218 contained the following passage:
"Payroll will require confirmation that I did work on that day. Can Rosalyn confirm directly the Payroll that I did in fact work that day? Or can you do this please? or does Rosalyn need to confirm to Manda first, and then Manda to Payroll?" [The claimant was unable to provide the confirmation required by Payroll because of the Dermatology Department's practice of not sending text or email confirmation to a worker after booking that worker for a Bank shift.]

The email of 21 September 2018 contained the following passage:
"My weekly payslips show only the total number of hours for which payment is being made. They do not show the days or duration of the individual shifts for which payment is being made. I submit that this is a serious deficiency with the existing payslip system."

The email of 1 October 2018 contained the following passage:
In my opinion, the root of the problem is the present unsatisfactory method of administering payment for Bank workers. To my mind, there would appear to be two separate problems. The first is that the Dermatology Department does not send a confirmatory text or email when they book a worker for a shift, so the worker has no written record to which to refer. The second is that the worker's weekly payslip only records the total number of hours (and not the specific shifts) worked. In combination, these two failures mean it is often virtually impossible for a worker to check which shifts have been paid."

Disclosure 2

11.2 A worker's right, enforceable in the Employment Tribunal to claim for unpaid wages, and the time limits attached to the exercise of such a right; in an email of 1 October 2018 to Eliza Harmon (which was copied to the Second Respondent) and a telephone conversation with Miss Harmon the same day.

The email of 1 October 2018 contained the following passage:

"I'm sorry to have to press for a response but please could you reply to this email tonight, or latest tomorrow AM, as I would like to know where I stand and whether or not the Dermatology Department intends to pay me for this shift. If it does not, then I have to consider taking action in the Employment Tribunal, and there are very strict time limits for making ET claims for unpaid wages, namely 3 months less one day from the day of unpaid labour."

The telephone conversation of 1 October 2018 contained words by the Claimant to the effect of: "Nobody works for free. There are laws about that."

Disclosure 3

11.3 Clinical and health and safety issues in relation to the Crash Trolley, Southwark Wing Clinic; in oral discussions with Tracy Lavelle, Eliza Harmon, the Second Respondent and others between 1 and 6 February 2018; in emails to the same persons and others between 4 and 6 February 2019; and in an Incident Report form (IR1 submitted around 8 February 2019.

The email of 4 February 2019 contained the following passage:
"If possible, I'd like to discuss responsibility for stocking the crash trolley in the Southwark Wing Clinic…. It seems no 'named person' is responsible. If there isn't one already, I think it might be a good idea to have a named person responsible – please may we meet at some stage today to discuss."

The email of 6 February 2019 contained the following passage:
"When I started work at the Southwark Wing Clinic on Friday, I inspected the crash trolley and found two defib pads that had expired the previous day i.e. when I was not on duty."

**12. Detriments – to avoid confusion we have used the same numbers for the alleged detriments as appear in the List of Issues in the Bundle**

7.1 - 1 October 2018 (text message on a day when the claimant was not at work). Eliza Harmon required the Claimant to prove that she had worked on 4 July 2018.
**Disclosure 1**

7.2 - 1 October (telephone conversation with Eliza Harmon). Eliza Harmon angrily accused the Claimant of making disrespectful and threatening comments in her email of 1 October 2018.
**Disclosures 1 and 2**

7.3 - 4 October 2018 (meeting). The Second respondent and Eliza Harmon required the claimant to attend an unlawfully constituted meeting. Only one subject was discussed at the meeting, namely the claimant's allegedly rude and disrespectful behaviour, the nature of which was expressly stated to be (i) the claimant's disclosures about the payment system and (ii) the claimant's threats [sic] of action in the Employment Tribunal.
**Disclosures 1 and 2**

During the meeting the second respondent and Eliza Harmon by turns humiliated, threatened and bullied the claimant; and accused her of shaming the department by her disclosures about the pay system. They also accused her of disrespect and striking the wrong tone in her emails ('You don't talk to your managers like that'). The Second respondent told the claimant in terms: 'If this department isn't good enough for you you should leave.' The meeting ended with the second respondent ordering the claimant not to write any more emails to anyone, on pain of disciplinary proceedings.

At no point was the claimant given a chance to defend herself, or to raise any matter in relation to the missing bank shift, which was not mentioned at all.

7.5 Friday 9 November 2019 (telephone conversation with the Second respondent on a day when the claimant was not at work). The Second respondent was very angry because she had just received an email in which the claimant's email of 10 October 2018 to Daniella Osman was embedded. She subjected the claimant to an extended harangue on the telephone for over an hour. She again ordered the claimant not to write any emails to anyone ('this time you will definitely be disciplined'). Other comments during the conversation: "You're not good enough for your job." You should move to another Department." "You're not fit to be a Band 6 nurse." "You should be a Band 5".
**Disclosures 1 and 2**

7.6 Monday 12 November 2018 (email). The Second respondent sent the claimant an email which subjected her to a triple detriment. First it repeated the earlier accusations of disrespect and added a new one: writing unfriendly and abrupt [sic] emails. Second it materially misrepresented what was said at the meeting of 4 October 2018 and what the claimant had or had not done in order to secure payment for her bank shift. Third the claimant was not allowed to respond to the email to set the record straight because the second respondent had on earlier occasions (most recently the previous Friday) forbidden her from writing emails.
**Disclosures 1 and 2**

7.10 Monday 4 February 2019 (meeting and email). The Claimant reported an incident concerning expired defibrillator pads on the crash trolley which she had discovered and resolved the previous Friday and thereafter received contradictory instructions from Eliza Harmon and the second respondent as to the writing of an incident report.

7.11 Monday 4 February 2019 meeting and email). The second respondent asked the claimant to w rite an incident form as why the crash trolley contained expired defibrillator pads. The pads had expired on a day when the claimant was not on duty.

**Disclosure 3 plus collective effect of Disclosures 1 and 2**

7.12 Tuesday 5 February 2019 (oral comments). The Second respondent publicly shamed the claimant after the Huddle was over by telling the claimant in a voice not sotte voce: "You're rubbish." You're struggling." "You're not fit to be a Band 6 nurse". You'll be Band 5." "I've been receiving lots of complaints about you."

The Second respondent has never every particularized the alleged complaints she has received about the claimant much less opened any investigation into them formal or informal. Accordingly, the second respondent has subjected the claimant to a double detriment. First her comments are detrimental in and of themselves. Second, if they were true then the failure to hold an investigation into them and/or support the claimant to improve her performance in accordance with the first respondent's guidance and protocols constituted a further detriment; and deprived the claimant of the opportunity to give her side of the story and/or improve her performance. Conversely, if the comments were not true, then in making them the second respondent was not just subjecting the claimant to reputational damage by was deliberately undermining her in the performance of her duties.

**Disclosure 3 plus collective effect of Disclosures 1 and 2**

7.13 Wednesday 6 February 2019 (email). The Second Respondent publicly shamed the claimant be sending her an email which she copied to the entire photopheresis team as well as senior members of the medical dermatology department which accused the claimant of deflecting responsibility for the crash trolley incident of Friday 1 February 2019 and conspicuously failed to recognize the leadership and pro-active behaviour shown by the claimant in resolving that incident.

**Disclosure 3 plus collective effect of Disclosures 1 and 2**

7.14 Thursday 7 February 2019 (meeting). Eliza Harmon failed to offer any meaningful protection to the claimant from the bullying and undermining behaviour of the second respondent or to support her in any meaningful way.

**Disclosure 3 plus collective effect of Disclosures 1 and 2**

8.1 The Second Respondent and Eliza Harmon failed to help the claimant in her attempts to find the missing bank shift for which she had not been paid.

**Disclosure 1**

8.2 The second respondent and Eliza Harmon failed to arrange prompt payment once the missing bank shift had been identified as the shift of 4 July 2018. The claimant was finally paid only on 22 November 2018.

**Disclosures 1 and 2**

8.3 The Second respondent and/or Eliza Harmon rostered the claimant to spend a disproportionate amount of time working in the dermatology clinic (staff rotate between the dermatology clinic and the ECP; most staff including the claimant prefer working in the ECP. This is well known to management.)

**Disclosures 1 and 2**

8.4 Feedback. The Second respondent and/or Eliza Harmon never, or hardly ever, provided the claimant with positive feedback concerning her performance but were quick to provide her with negative feedback. They delivered potentially helpful feedback regarding clinical practice in a negative rather than instructive way. It seemed to the claimant that their intention was to undermine her and cause her to lose confidence in herself.

**Disclosures 1 and 2**

8.5 Lack of support/training/mentoring. The second respondent (who frequently told the claimant that was 'struggling') and/or Eliza Harmon consistently failed to provide the claimant with any meaningful support or training or mentorship to alleviate or remedy her alleged performance issues.
**Disclosures 1 and 2**
**Disclosure 3 plus collective effect of Disclosures 1 and 2**

8.6 Contradictory instructions. The second respondent and Eliza Harmon provided the Claimant with contradictory instructions regarding department practice on several occasions, for example concerning (i) addressing managers by their first name; (ii) writing Incidence reports and (ii) referring to the WHO checklist during the Huddle.
**Disclosures 1 and 2**
**Disclosure 3 plus collective effect of Disclosures 1 and 2**

8.7 Unpleasant work atmosphere. The second respondent created an unpleasant atmosphere for the claimant to work in, y frequently lettering her know she was 'being watched', threatening her with disciplinary action, blowing up trivial incidents and repeatedly making demeaning and humiliating comments. The claimant felt she was being set up to fail.
**Disclosures 1 and 2**
**Disclosure 3 plus collective effect of Disclosures 1 and 2**

8.8 Procedural unfairness. The second respondent (and through her the first respondent), by frequently mentioning but never particularizing the claimant's alleged performance issues and other deficiencies, behaved in a way that was fundamentally unfair, for at least two reasons.

First it is a basic principle of fairness that the claimant should know what she is being accused of, so that she may have the opportunity of responding effectively. Accordingly, it was not enough for the second respondent to tell the claimant simply that there had been a complaint; the claimant was entitled to know the basis of the complaint.

Second it is also a basic principle of fairness that the claimant should be given an opportunity to tell her side of the story. If the second respondent truly believed there was prima facie case for the claimant to answer whether of respect, performance, competence or other matter, then she was required by the rules of natural justice as well as the first respondent's protocols and procedures to open an investigation to determine whether there was any truth or substance in the allegations, followed by remedial measures if necessary.
**Disclosures 1 and 2**
**Disclosure 3 plus collective effect of Disclosures 1 and 2**

## 13. National Minimum Wage Action Detriment claim

13.1 Protected employment right (s1 and s 23 NMWA 1998)

Did the claimant indicate that action was proposed to be taken in the Employment Tribunal with a view to enforcing or otherwise securing the benefit

of, the right to be paid at least the national minimum wage for work carried out under contract; in an email of 1 October 2018 to Eliza Harmon (which was copied to the Second Respondent) and a telephone conversation with Miss Harmon the same day?

13.2 The claimant says she was subjected to the detriments set out in paragraph 11 above. For each detriment that the claimant is found to have suffered was the claimant subjected to such detriment by any act, or any deliberate failure to act, by the first respondent?

13.3 If so was any such detriment done on the ground that action was proposed to be taken by or on behalf of the claimant with a view to enforcing or otherwise securing the benefit of a right under NMWA 1998?

13.4 Was there any other way in which the first respondent subjected the claimant to detriment?

13.5 If so was any detriment done on the found that action was proposed to be taken, by or on behalf of the claimant with a view to enforcing or otherwise securing the benefit of a right under the NMWA 1998?

The Law

14. Employment Rights Act 1996 ('ERA')

**(i) s43A Meaning of "protected disclosure".**

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.

(ii) **43B Disclosures qualifying for protection.**

(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)that a criminal offence has been committed, is being committed or is likely to be committed,

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

(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,

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

(e)that the environment has been, is being or is likely to be damaged, or

(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2)For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3)A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4)A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5)In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

***(iii) S47B Protected disclosures.***

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

(1A)A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a)by another worker of W's employer in the course of that other worker's employment, or

(b)by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B)Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C)For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D)In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a)from doing that thing, or

(b)from doing anything of that description.

(1E)A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a)the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b)it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).**]**

(2) This section does not apply where—

(a)the worker is an employee, and

(b)the detriment in question amounts to dismissal (within the meaning of **[**Part X**]**).

(3)For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K.

**(iv) S48 Complaints to employment tribunals**

(1A)A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(3)An employment tribunal shall not consider a complaint under this section unless it is presented—

(a)before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4)For the purposes of subsection (3)—

(a)where an act extends over a period, the "date of the act" means the last day of that period, and

(b)a deliberate failure to act shall be treated as done when it was decided on;

15. National Minimum Wage Act 1998

**s1 Workers to be paid at least the national minimum wage.**

(1)A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.

(2)A person qualifies for the national minimum wage if he is an individual who—

(a)is a worker;

(b)is working, or ordinarily works, in the United Kingdom under his contract; and

(c)has ceased to be of compulsory school age.

(3)The national minimum wage shall be such single hourly rate as the Secretary of State may from time to time prescribe.

(4)For the purposes of this Act a "pay reference period" is such period as the Secretary of State may prescribe for the purpose.

(5)Subsections (1) to (4) above are subject to the following provisions of this Act.

**S 23 The right not to suffer detriment.**

(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer, done on the ground that—

(a)any action was taken, or was proposed to be taken, by or on behalf of the worker with a view to enforcing, or otherwise securing the benefit of, a right of the worker's to which this section applies; or

(b)the employer was prosecuted for an offence under section 31 below as a result of action taken by or on behalf of the worker for the purpose of enforcing, or otherwise securing the benefit of, a right of the worker's to which this section applies; or

(c)the worker qualifies, or will or might qualify, for the national minimum wage or for a particular rate of national minimum wage.

(2)It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above—

(a)whether or not the worker 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, if applicable, the claim that it has been infringed must be made in good faith.

(3)The following are the rights to which this section applies—

(a)any right conferred by, or by virtue of, any provision of this Act for which the remedy for its infringement is by way of a complaint to an employment tribunal; and

(b)any right conferred by section 17 above.

Facts

**General observations**

16. The evidence we heard from all the respondent witnesses was such that we find that the dermatology ward was a very supportive place of work and that the second respondent took her role as manager and supporter of her staff very seriously and took great care in it. It is of note that despite these proceedings and the allegations she makes within them that the claimant continues to work for the respondent and has not, as far as we're aware, sought to leave.

17. The respondent witnesses, Ms Gyimesi, Ms Solinap Pido and Mr Shipkolye all gave evidence about the steps that were taken by the second respondent and them to assist the claimant when she was new to the role of a Band 6 nurse. Despite some discrepancies in Ms Solinap Pido's evidence, the overall impression given by them was that the ward was a supportive place where any performance issues were dealt with a view to help an individual improve and fulfil their roles as opposed to a formal disciplinary style process of performance improvement.

18. In contrast, the claimant presented as someone who found any criticisms of her work either untrue and therefore unjustified or interpreted them as a personal attack as opposed to a professional critique with a view to getting her to improve. She has presented a case where she appears to suggest that everything anyone says to her that differs to her view of a situation is a direct criticism of her. During the hearing all the respondent witnesses were consistent in saying that they were not criticising her performance. They all acknowledged that she was, at the relevant time, new to the role and that stepping up to a Band 6 role required additional skills and competencies. They had concerns regarding the claimant's performance that they needed to address but they did not view this as a disciplinary matter and it was approached with a view to enabling her to improve and remain in role.

19. The claimant has sought to challenge the veracity of the diary entries made by Mr Shipkolye and the second respondent. We accept that the diaries were both reliable and almost contemporaneous notes of what had happened at work. We do not accept the claimant's submission that they have been manufactured or augmented for the purposes of defending this claim. There was no plausible or credible evidence to suggest fabrication. The claimant raised the fact that her name had been spelled incorrectly on some occasions but correctly on others. However given the level of information about other issues included in the diaries and the short note format of some of the relevant incidents with the claimant reflects that the two individuals used their diaries as a management tool on a daily basis. It seems plausible and fits with the other notes that they made that such notes about the claimant in all the circumstances.

<u>General approach</u>

20. The number and detail or disclosures and detriments and their interrelationship means that for the purposes of finding facts we have, where possible, followed events in a roughly chronological order.

21. We have only considered the facts necessary for deciding the claim as it is pleaded.

<u>Payroll Issues</u>

22. The claimant had to claim payment for her shifts worked on the Bank system. We had a large amount of evidence from the claimant and Mr Lanyado about the way that the payroll system worked. Essentially, the issues in this case arise from the fact that when a bank work pay slip is received, it does not set out the dates or duration of the shifts for which individuals are being paid, it just confirms the total number of hours being paid for. The difficulty in identifying

what you have been paid for is further compounded by the fact that the booking system used by different wards differs from each other meaning that the claimant did not always have written confirmation (whether by email or text) as to where or for whom she had worked certain shifts. This was particularly the case with the Dermatology ward who appear not to have any consistent system for confirming the booking of a bank nurse with some managers sending texts, others emails and sometimes nothing at all.

23. Mr Lanyado kept detailed spreadsheets for Ms Alegado because he is (or was) an actuary and wanted to help her in this way. Ms Alegado understandably relied upon his spreadsheets and calculations to keep track of her pay.

24. What this difficult system meant for the claimant was that she was unsure, in August 2018, whether she had been paid for a particular shift. Mr Lanyado's calculations, showed that she had not been paid as much as she was expecting and appeared to be one shift short. She then had the difficult task of identifying which shift this might have been from her records and Mr Lanyado's spreadsheets. The tribunal accepts that this was a difficult and time-consuming task and that the payroll system was opaque and difficult to interrogate in these situations.

25. Subsequently Mr Lanyado and Ms Alegado, by a process of elimination decided that the money owed had occurred from the shift worked on 15 August 2018.

26. All Ms Alegado's correspondence thereafter with the Trust and bank payroll administrator, between August 2018 and 27 September 2018 focused on the shift of 15 August. It was for this reason that the claimant wrote to Ms R Dona who had been the person who had booked the claimant for the 15 August shift.

27. Ms Dona then forwarded that email to Ms E Harmon who was the claimant's line manager now that the claimant had become a permanent member of staff.

28. The claimant's email of 10 September 2018 (p209) says as follows:

*"Payroll will require confirmation that I did work on that day. Can Rosalyn confirm directly to payroll that I did in fact work that day? Or can you do this please? Or does Rosalyn need to confirm that with Manda first and then Manda to Payroll?"*

There is no suggestion in this email that the claimant believes that she is not going to be paid for the shift. She herself has identified that this appears to be an administrative error. We do not accept that at this point it was in the claimant's mind that she was thinking about the respondent's apparent failure to keep proper records of days and hours worked. This email suggests nothing of the sort.

29. It then transpired that the claimant had in fact been paid for the shift of 15 August and this came out as the result of several emails between the claimant and Ms Osman who was the payroll coordinator for Bank staff. Prior to this being worked out by Ms Osman and the claimant (and no doubt with Mr

Lanyado's help) the claimant was absolutely adamant in her emails that the missing shift was the 15 August. She was utterly inflexible in accepting any explanation from anyone, that the shift of 15 August had in fact been paid. For example she said:

*"If my data were wrong, then every singly payslip of mine going back to 28 June 2018 would have to be wrong too."*

30. She then sends an email dated 21 September stating as follows:
*"My complaint is that I have not been paid for a shift I have worked. To be specific, my complaint is that I have worked a total of 26 shifts between 12 June and 15 August, but have to date only been paid for 25 shifts. …. My weekly payslips show only the total number of hours for which payment is being made. They do not show the days or duration of the individual shifts for which payment is being made. I submit that this is a serious deficiency with the existing payslip system."*
At the time of sending the email we believe that the claimant was genuinely concerned that she might not be paid for the shift because it was so difficult to ascertain whether she had been paid or not and the information being provided by Ms Osman suggested that she had been paid for the shift of 15 August (which it turns out she had). So, we accept that she reasonably believed at this point that she might not be paid because of the system in place.

31. However on the same day, she received an email from Ms Osman attaching a list of all the shifts that she had worked during this period and from that Mr Lanyado and the claimant were able to ascertain that the missing shift was in fact the 4 July 2018.

32. Once the shift had been identified as 4 July Ms Osman quickly accepted that the claimant ought to be paid it and put in place the steps that needed to be taken to get the payment made. We therefore believe that from 21 September 2018, the claimant had no reason whatsoever to believe that she would not be paid her shift. Ms Osman, by the claimant's own evidence and Mr Lanyados comments during the trial, was the saviour and did nothing but help the claimant. Once she had accepted, in writing, that the Trust owed the claimant for that shift she had no reason to believe that she would not be paid it.

33. We accept as a general observation regarding the bank payroll that it was difficult for nurses to ascertain what shifts they had been paid for because of the lack of transparency on the payslips. We base this conclusion on Ms Osman's evidence and emails that this sort of problem had arisen before and others had voiced their concerns to her.

34. The claimant's second concern about the payroll system was based on the fact that different wards operated different systems in terms of confirming once shifts were booked. It was not in dispute that in the case of the dermatology ward, they did not always send out confirmatory texts or emails once a shift had been booked. There was therefore nothing on record or in writing to confirm that the claimant had worked on 4 July.

35. Once the shift had been correctly identified the second respondent asked Ms Harmon to organise payment on 1 October 2018. There was therefore little or no delay in her doing this.

36. On 1 October Ms Harmon sent the claimant the message at page 308 requesting confirmation from the claimant that she had worked the 4 July as she could not find evidence of that. Attached to the message was a screen shot of the crash trolley record in a different ward. The claimant states that Ms Harmon's messages asking for confirmation was a request for proof and therefore by implication called her honesty into question. We disagree. It was clear from the context that in fact, the issue of requiring confirmation arose from the fact that the claimant had previously been inflexibly adamant that the missing shift had been on 15 August. This level of inaccurate certainty about the missing shift meant that, when her calculations turned out to be wrong, her manager understandably wanted to check whether she was right about the 'new' date.

37. Unfortunately, at the time the claimant took great umbrage at the message. She responded to Ms Harmon with an email on 1 October 2018 (pg 311-312). That email is part of Disclosure 2. It included the following passage:

    "*Thank you for your text messages of today. It seems you would like me to produce evidence that I did in fact work on Wednesday 4 July 2018. I must say I am rather hurt and disappointed that I am being to proof…..*

    *I'm sorry to have to press for a response but please could you reply to this email tonight, or latest tomorrow AM, as I would like to know where I stand and whether or not the Dermatology Department intends to pay me for this shift. If it does not, then I have to consider taking action in the Employment Tribunal, and there are very strict time limits for making ET claims for unpaid wages, namely 3 months less one day from the day of unpaid labour."*

38. It is clear here that the claimant thought that she may not get paid. We think it was reasonable, given her interpretation of the text from Ms Harmon that she believed she may not get paid if there was some doubt over whether she had worked the shift particularly in circumstances where she did not have a text message or similar confirming that she had been asked to work that shift.

39. The assertion that she might to go tribunal led Ms Harmon to call the claimant and we believe that a fairly difficult conversation transpired though we did not hear from Ms Harmon as she no longer works for the Trust. We accept that it is more likely than not that Ms Harmon was upset by the claimant's email which referred to tribunal proceedings and it is plausible that she was angry and said that the email was disrespectful. The second respondent confirms in her witness statement as well that Ms Harmon had been upset by the email and confirms that they subsequently told the claimant that the email was disrespectful.

40. A meeting was called on 4 October with the second respondent, Ms Harmon and the claimant. The claimant has stated that this was an unlawful meeting.

We disagree. It is not clear what law would be breached by managers having a meeting with their employee. No formal process was being followed – this was not a disciplinary meeting and no disciplinary measures were handed out or intended to be handed out. We accept The second respondent's evidence that she had suggested to Ms Harmon that she have a meeting to resolve the situation herself but that Ms Harmon wanted support in the meeting because she was new to her role. In our view this was a reasonable attempt by the second respondent to resolve the tensions that had clearly developed between Ms Harmon and the claimant. We find that it was understandable that Ms Harmon had been shaken by the reference to an employment tribunal in circumstances where she had asked someone to confirm that they had worked a shift in the context of that person having previously been adamant about a different shift. It was a sensible management step by the second respondent to have a meeting to see if those concerns could be allayed.

41. We found the second respondent to be a credible witness throughout the proceedings. She presented to us as a sensitive manager who had concern about her staff who was interested in ensuring that there were clear lines of responsibility but was also incredibly supportive of her staff throughout their time. We base this on her evidence at the tribunal, the majority of her correspondence with colleagues and the claimant, her diary entries which corroborated her version of events and the opinion of the other respondent witnesses who all unequivocally stated that this was their experience of working with her. The other respondent witnesses also confirmed the clear steps she took to support the claimant when she stepped up to working as a Band 6 nurse. We make those findings in full below.

42. We therefore accept the second respondent's account of the 4 October meeting. She accepts that they told the claimant that her emails had been disrespectful and that she was emailing the wrong people as they were not her line manager. We do not criticise those opinions. The claimant had been emailing several different people, there had been significant confusion caused by the identification of the wrong date and the whole situation appeared to have blown out of proportion and taken up quite a lot of time and effort from others. We understand that the claimant had initially emailed Ms Dona in good faith because she had been the manager that booked the claimant for the 15 August shift. However, that does not detract from the confusion and wider than necessary impact that the situation was clearly having on various members of staff and the second respondent's ability to manage good relations between her staff.

43. We also accept that at the meeting the second respondent apologised to the claimant about the missed shift and the difficulties that she had experienced in identifying it. The second respondent was honest in her evidence in saying that she would not have asked the claimant to prove that she had worked the 4 July shift and that she had asked Ms Harmon to pay it without that step being necessary. We accept that The second respondent would have outlined that over the previous few months there had been a significant amount of movement regarding management of the wards including The second respondent becoming matron and Ms Harmon being appointed as sister. We accept

paragraph 24 of the second respondent's witness statement where she sets out that she explained the context to the claimant but also took personal responsibility for the fact that the shift had fallen through the gaps.

44. We do not find that the claimant was told to call her managers by their title or that she ought not to send emails at all. Both instructions are implausible and we prefer the second respondent's evidence in this regard.

45. We also accept The second respondent's evidence that the claimant the following day had approached The second respondent to say that she was sorry and had not understood about the high turnover in management and how this may have led to the original payment of the shift being overlooked. We rely upon the second respondent's evidence and her corroborating diary entry to reach this conclusion.

46. In that context we believe that it was clear to the claimant that whilst Ms Harman and The second respondent disagreed with the way that the claimant had been trying to obtain payment for the missed shift, but that everyone accepted that she ought to be paid for the shift and was owed the money.

47. The claimant raised further concerns about the bank payroll system in her email dated 10 October 2018 (pg244) as follows:

*In answer to your question, I'm not sure whether payment for my unpaid bank shift has been actioned as yet*. … *I was basically required to prove that I did in fact work on the day in question. I replied with an email providing the requested proof, which concluded by asking whether it was intended to pay me for the shift. This email of mine was judged to be inflammatory and I was subsequently required to attend a meeting with Sister Eliza and Matron Manda. At that meeting I was accused, completely unfairly in my opinion, of being "disrespectful". And that was where matters were left ... so I don't know whether or not the Dermatology Department has actioned payment for my shift.* [p244]

48. It is not clear why the claimant felt it was appropriate to send this email to a third party and be rude about her managers. Particularly in a context where only 3 days earlier she had been apologised to and assured that the shift would be paid. We accept it may have been appropriate for her to check with Ms Osman whether the payment had been properly approved but we do not accept that she reasonably believed at this stage, following that meeting, that the Trust was intending not to pay her or that there was any risk that she would not be paid.

49. The claimant then queried why she had still not been paid on 8 November and it transpired that although Ms Harmon had filed the request, the system would not pick it up because it had been more than 10 weeks since the shift had been worked and this meant that a manual approval was needed. The claimant had been told that her shift had been entered onto the system by Ms Harmon as set out in the email on pg 242. There was therefore no inaction by Ms Harmon and the second respondent. We accept from the email evidence at the time (e.g. p342) that neither Ms Harmon nor the second respondent were aware of the

10-week rule and we accept the second respondent's evidence about this to the tribunal.

50. As soon as the manual requirement was identified to Ms Harmon she sent the relevant paperwork to payroll as per page 342 confirms.

51. There was a further conversation about the matter on 9 November was about the email of 10 October because this was the first time that 2nd respondent became aware of the email. Both the claimant and the second respondent accept that this was a lengthy call lasting over an hour. Both accept that they talked at length about the management difficulties and the unpaid shift. The claimant says at paragraph 154 of her statement that she saw things from the second respondent's point of view. She felt bad for her and apologized to her. The second respondent states that she felt it necessary to make this call because of the email of 10 October and the fact that it did not reflect her understanding of or intention at 4 October meeting.

52. We conclude that the intention of the second respondent in making this call was to clarify things as much as possible given the very different interpretation of events that the claimant had to her. We do not accept the claimant's interpretation that the call was intended to scare her or that she felt scared at any stage. She says at paragraph 155 of her witness statement that they parted reasonably amicably.

53. It is more likely than not that the second respondent suggested to the claimant that sending emails of that tone was not helpful and asked her not to do so. We conclude that she may asked the claimant to come and speak to her managers in the first instance if she had a problem as opposed to sending emails first and speaking second because of the significant difference between the emails that the claimant was sending and what she was saying or being told in the meetings. Whilst this was a long conversation that was no doubt difficult for both parties, we do not conclude that the second respondent behaved inappropriately or unfairly in that call. We also understand why she followed it up with the email dated 12 November given the misconceptions the claimant had formed about the meeting on 4 October.

54. She felt that she needed to clarify, what had happened because the words that the claimant had been using were 'strong' (her word) and there needed to be something in writing refuting them. She needed to record what she felt was appropriate in terms of communication from the claimant to try and avoid any future misconceptions and also that she wanted to be clear that she was sorry about the situation and that is very clear from her opening sentence which says:

"Firstly we both would like to apologise for the delay and thank you Danielle for sorting this out."

55. The claimant criticizes that sentence and says that it does not acknowledge the efforts that she (the claimant) had made in sorting the situation out and only acknowledges Ms Osman. Everyone agreed at tribunal that Ms Osman had

worked hard to sort the situation out particularly when the claimant had caused such confusion at the beginning by asserting that the missed shift was on 15 August. Therefore whilst we accept that there were problems with the payroll system that led to the claimant misidentifying the shift, it is also clear that this misidentification and the absolute certainty which she attributed to it, caused a significant amount of confusion at the outset. This is the first of two instances in this claim where the claimant has interpreted a lack of express thanks or praise as a sleight. This confirms our overall view of the claimant as someone who was unable to take constructive criticism and overly sensitive regarding comments or the lack thereof regarding her behaviour.

56. In the circumstances that the requests regarding how the claimant should raise concerns in the future and the tone of any emails, were unreasonable in the circumstances.

57. We do not accept the Claimant's statement that she was told by the second respondent, at any stage, that she must not at any stage send any more emails. This is not plausible. It is clear from the email on 12 November that the second respondent is asking her to watch the tone of her emails and to speak to her managers first. This is not the same as suggesting that she could never send emails again.

58. Overall, we observe that it was understandably a frustrating and difficult process for the claimant to go through. She ended up waiting almost 6 months to receive payment for the shift and there were several aspects of the system that were beyond her control. However her accusations against her managers at the time were unfounded and turned what was a difficult situation into a hostile one.

Health and safety Issues

59. The claimant relies on 5 separate occasions to make up her third qualifying disclosure. We accept that in the course of those 5 occasions, the claimant disclosed to managers that the defibrillator pads had expired and that she had replaced them. We accept that this was specific information and was a serious incident because as was confirmed by all the witnesses those pads being out of date could result in a serious medical incident.

60. The first occasion she says was an oral disclosure to Tracey Lavelle which we accept happened. It was followed up by an email to Ms Harmon dated 4 February 2019 (pg 433). In that email the claimant clearly identifies the facts of the situation and that the pads had almost expired and that there is no named person for taking responsibility for checking the crash trolley and that this therefore meant that it could fall through the gaps. We find that it was reasonable that at the time she sent this email, the claimant could be concerned that firstly this incident had happened and that it could have led to a health and safety breach and secondly, that her understanding at the time of the lines of accountability regarding the pads meant that the lack of a named person could be likely to result in a further health and safety breach.

61. When the claimant initially emailed Ms Harmon about the pads on 4 February 2019 she was told that she did not need to write a report because the pads had not in fact expired and the situation was 'sorted'. Subsequently Ms Lavelle sent an email that was copied to, amongst others, The second respondent. Having seen that email the second respondent asked the claimant and Ms Harmon to write an incident report form.

62. In evidence she explained that this was because she did view it as a serious incident and that the incident form was not intended as an accusation it was used to identify a problem and learn a lesson. She said that they were used to safeguard patients and educate the nursing team and that it was viewed as shared learning. It was not viewed as a punishment. We conclude that the claimant and her manager were asked to write the form for precisely those reasons and because the incident had happened not because the claimant had disclosed it. The claimant was expected to disclose it and indeed to fix it as part of her job. As were other members of the team hence the need to share the situation with others.

63. The claimant's report is in the form of an email dated 4 Feb (pg 444). The claimant in that report restates her concerns about the situation. She also at the end adds the following paragraph:

*"I trust that Matron Manda, Sister Eliza and my other esteemed colleagues will be pleased with the way that I, as a new member of the team, dealt with the situation last Friday. I believe I acted promptly and responsibly to avert all safety issues."*

64. There followed an email from the second respondent at page 443. That email said:

*"Thank you for your email. A gentle reminder that whoever is in charge of the shift that day is in charge of the crash trolley despite which area. Please do not keep responding it as the 'other team' responsibility, if CQC came this would be a major incident and this does compromise patient safety. As you say lesson learned so let's aim to ensure that this does not happen again in either areas."*

65. The claimant then responded and said that she had not made reference to the other team and that she took responsibility as the nurse in charge.

66. We make the following observations:
    (i) Firstly, we accept all the respondent witnesses' evidence that there was not a blame culture within the management of the ward. We find that the managers worked together to ensure that the teams did not blame each other if possible but that there was a tendency between the teams to ascribe blame.
    (ii) We do not find it plausible that either respondent looked negatively on the claimant for finding the expired pads or reporting it. In fact, the second respondent asked the claimant to formalise her report because she wanted to ensure learnings were made from it for the whole team.

(iii) The claimant has interpreted the second respondent's request for her to write a report as a negative. We consider that this shows that her raising concerns was welcomed, viewed as important and taken seriously.

(iv) The fact that the second respondent sent an email to all was accepted by her as unfortunate. However, we accept that she intended it to be a reminder to the whole team to take responsibility for the trolley. It may have been further prompted by the claimant's concluding paragraph which appeared to suggest that the claimant ought to be singled out for praise for doing her job.

Performance management

67. The respondent witnesses, Ms Gyimesi, Ms Solinap Pido and Mr Shipkolye all gave evidence about the steps that were taken by the second respondent and them to assist the claimant when she was new to the role of a Band 6 nurse.

68. Despite some discrepancies in Ms Solinap Pido's evidence, the overall impression given by them was that the ward was a supportive place where any performance issues were dealt with a view to help an individual improve and fulfil their roles as opposed to a formal disciplinary style process of performance improvement.

69. We accept that the claimant initially struggled to step up to her Band 6 role and that various measures were put in place to support her. This was not considered unusual by any of the respondent witnesses. The claimant had previously only had experience of working at Band 5 and needed to grow into her Band 6 responsibilities. However, we also accept that the issues were serious enough that they required training and development.

70. We were given specific examples of how the claimant struggled by Ms Gyimesi, Ms Solinap Pido and Mr Shipkolye. They included but were not limited to:

(i) Lack of leadership skills
(ii) Lack of knowledge of commonly used medication in ECP
(iii) Not flushing the IV line with Saline
(iv) Not releasing the Tourniquet on a patient's arm following cannulation, resulting in the patient's arm turning blue
(v) Taking lunch breaks that were too on and impinged on others' lunch breaks
(vi) Not ensuring the appropriate skills mix in the ward
(vii) Refusing to mentor student nurses

71. All 3 witnesses confirmed that they would give the claimant feedback on the spot as well as letting Ms Harmon know about any concerns. All 3 witnesses indicated that the claimant found any critical feedback hard to accept and it took her time to take it on board and change her behaviour. However, Ms Pido Solinap confirmed that she did improve and all witnesses in evidence to us confirmed that they expected her to continue to improve but that she needed quite a lot of support to get there.

72. We accept the respondent witnesses' evidence that various supportive management processes were used to enable the claimant to work at a Band 6 level. These included:

    (i) A series of mentors
    (ii) Regular supervision by Mr Shipkolye and the other mentors which included practical assistance such as doing practice huddles and demonstrating good practice
    (iii) Regular feedback on her performance
    (iv) The meeting on 5 February 2019 with Mr Shipkolye and the second respondent to discuss how best to support the claimant
    (v) Moving the claimant to work on ECP at her request

73. Mr Lanyado appeared to want to have it both ways. He indicated that the claimant did not accept that she was doing anything wrong at all and therefore the mentoring and support that was given to her was wholly inappropriate and created a hostile environment. We consider that the evidence shows that the claimant did have performance issues and that they were appropriately managed through a series of measures.

74. In the alternative however he said that that if she had been struggling as suggested then it was a detriment by the respondent and the second respondent not to have formally performance managed her.

75. It is difficult to understand how managers using an informal, yet supportive, mentor-led coaching management style as opposed to a formal disciplinary process could be interpreted as a detriment. The claimant states that it meant that she was not given an opportunity to rebut the allegations about her performance. We can see that this may be possible – if for example it resulted in disciplinary sanction and the claimant had not been given proper opportunity to improve or address the concerns. However, the claimant was clearly present at the meetings with the second respondent and Mr Shipkolye and was in regular contact with Mr Harmon. She did say that she disagreed with their assessment of her performance, hence Mr Shipkolye's evidence that he found her defensive and unwilling to take on his requests that she conduct the huddle in a certain way. This is why he involved the second respondent. Secondly the claimant was never given a performance related sanction. Any criticisms or concerns regarding her from other staff were fed back to her in the format of a supportive management process seeking to get her to work in a certain way.

76. On 5 February the claimant alleges that she was spoken to by the second respondent loudly in front of colleagues and told that she would never be a Band 6. The respondents state that Mr Shipkolye was at the meeting which the claimant denies.

77. We accept Mr Shipkolye's evidence and the second respondent's evidence that the meeting took place as they describe. Their diary entries support this. Mr Shipkolye's diary at pg 549.81 confirms that the claimant was told what she needed to do to carry out the huddle and that should she need support she could have it. In response the claimant said she would like more support and

asked to be moved to ECP. We do not accept that the instructions regarding the huddle was contradictory.

78. We do not accept that the second respondent said to the claimant either in front of others or at all that she would never be a Band 6. We accept that as the respondent witnesses stated, the claimant was asked how she was doing in Band 6 given that she had relatively recently stepped up to the role. Mr Shipkolye stated that the claimant was struggling with various aspects of her role and he had asked for support in managing that from the second respondent because his input was not leading to a change in the claimant's behaviour.

79. We accept his evidence that the claimant was generally defensive when any concerns were raised with her but that people were raising concerns about the way that the claimant was not changing her behaviour from when she had been a Band 5 nurse. During the claimant's evidence to the tribunal she entirely refused to accept any shortcomings whatsoever on her part. The suggestion of her work requiring improvement resulted in Mr Lanyado suggesting through his questioning that all the respondent witnesses were fabricating their concerns and that there was a group of employees watching the claimant to make her feel uncomfortable. Given that The second respondent wanted the claimant's position to work as she had recruited her, and given that at no point was the claimant performance formally managed so as to result in any type of sanction being applied this interpretation of the evidence is implausible.

80. The second respondent asked various mentors to support the claimant with stepping up and this included agreeing to move the claimant to doing more ECP work as she had requested. This is confirmed at page 549.81 in any entry in her diary.

81. We were provided with no evidence whatsoever to link the measures taken to manage the claimant (whether that be the assertion that they were inadequate or caused by fabricated concerns or too much) to any of the claimant's alleged disclosures about the payroll system or health and safety. The respondent has provided clear evidence that management decisions regarding the claimant were made, at all times, based on the claimant's actual performance and their concerns about it.

82. We were given very little evidence to understand what Ms Harmon felt about the situation given that she was no longer employed by the trust. However given that we have found that The second respondent was not bullying the claimant (something which the claimant accepted in cross examination), nor displaying any negative behaviour towards her, it is difficult to see how Ms Harmon could have or should have protected the claimant from The second respondent. The claimant accepted that during her meeting with Ms Harmon to discuss this matter Ms Harmon listened to what the claimant had to say about the second respondent and did not dismiss her concerns. We accept that it would have been better if Ms Harmon had escalated the email at page 451 to HR so that it could have been properly considered and investigated. However, there is no evidence to suggest or infer that this occurred because of any of the disclosures upon which the claimant relies.

83. We do not find that the claimant was rostered to spend a disproportionate amount of time on the dermatology ward as opposed to on ECP. After she requested to work more on ECP the second respondent agreed to do this. One of the claimant's applications to amend her claim included the allegation that in fact she had been moved to ECP as a detriment. This is a direct contradiction to her pleaded claim that the claimant was not given enough work on the ECP.

84. At the meeting on 5 Feb the claimant asked to spend more time on ECP as evidenced by Mr Shipkolye's diary entry. We understand that ECP was easier because of the seniority mix which meant that the claimant would not have been the nurse in charge in the same way as if she was working in the other ward.

85. At no point in any of the documents or evidence we were taken to was the National Minimum Wage referred to. When questioned as to whether she was thinking about the NMW when she raised her concerns about the missing shift, the claimant said that she was thinking about the fact that there was a law than meant that she needed to be paid for work that she had done. In the absence of any documents referencing the NMW, or any evidence from the claimant that she understood the NMW or what it meant, we find that none of her allegations or disclosures were intended to or did include any information which tended to show that she was not going to be paid an amount equivalent to the NMW or that she thought this was likely.

## Conclusions

### Time Limits

86. Taking into account the ACAS Early Conciliation legislation, and the 3 month time limit at s48 ERA, any detriments that occurred before 8 November are out of time unless the claimant can show that any events that occurred before 8 November are part of a continuing series of events or that it was not reasonably practicable for her to have submitted her claim earlier.

87. The claimant has not put forward any arguments as to why it would not have been practicable for her to submit her claim earlier and as she was clearly considering the possibility of a tribunal claim against the respondent at an early stage we find that it would have been reasonably practicable for her to submit any claim earlier.

88. However we think it is arguable that given that the claimant asserts a link between the detriments in that they most, at least partly, occur on grounds of the issues regarding her pay we conclude that it is possible that they form part of a series of incidents that and have gone on to consider them.

### National Minimum Wage Act Detriment claim

89. As per our factual findings above we conclude that the claimant has put forward no case or facts to demonstrate that she asserted that her rights under the

National Minimum Wage Act were being contravened nor that she believed that they were being contravened at the time.

90. We accept the respondent's submissions that there is little or no case law that addresses the issue of what amounts to any action being taken or being proposed to be taken with a view to enforcing or otherwise securing the benefit of a relevant right but that there must be something more asserted than just that an employer has not paid someone their wages. If just asserting that there is a shortfall in pay potentially engages this liability then any employee, regardless of income, who says that they are owed pay could be making an assertion that they have not been paid the NMW. We accept that s23(2) NMWA says that it is immaterial as to whether the right has been infringed or not provided the claim that there has been an infringement is made in good faith. However we still consider that taking action or proposing action to enforce the NMW must contain some reference to the NMW or the individual's right to it.

91. We therefore conclude that the claimant has made no claim to the respondent that engages the protection of s23 NMWA 1998.

92. The claimant's claims for detriment under NMWA are not upheld.

**S43B Employment Rights Act 'Whistleblowing' Claim**

**Disclosures**

93. The Employment Rights Act 1996 s 43B, as amended, provides:

(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) that a criminal offence has been committed, is being committed or is likely to be committed,

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

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

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

Case law has established that there are a number of requirements to establish a qualifying disclosure:

- **Disclosure of information.** The worker must make a disclosure of information. Merely gathering evidence or threatening to make a disclosure is not sufficient.
- **Subject matter of disclosure.** The information must relate to one of six types of "relevant failure".

- **Reasonable belief.** The worker must have a reasonable belief that the information tends to show one of the relevant failures.
- **In the public interest.** Further, the worker must have a reasonable belief that the disclosure is in the public interest

**94.** When considering whether a disclosure contains information or just an allegation, the case of Kilraine v London Borough of Wandsworth UKEAT/0260/15 confirms that there should not be a rigid dichotomy between the two. Whether the disclosure relied upon tends to show a breach of a legal obligation or a criminal offence is assessed by considering whether the claimant had a reasonable belief in the information and a reasonable belief that the information tended to show a breach of that obligation or law. (Babula v Waltham Forest College [2007] IRLR 346 (CA) and Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979).

The case of Ibrahim v HCA International Ltd UKEAT/0105/18 and Chesterton established that there was a two stage test in assessing whether the disclosure was in the public interest –

(1) Did the claimant believe that the disclosure was in the public interest? and
(2) Was that belief reasonable?

95. The claimant's disclosure one is made up of a series of emails. When taking them as a whole they do include information and not just an allegation. The claimant clearly identifies that she has not been paid a particular shift and that she is owed money for that. She also clearly identifies that she believes there are serious concerns regarding the transparency of the payroll shift and that it is this that has led to a failure to pay her but could also lead to other members of bank staff missing payments and not being able to keep track of them.

96. We conclude that initially, and certainly up to 21 September, the claimant could reasonably believe that she may not get paid for the missing shift. This would tend to show that the respondent was going to breach its contractual obligation to pay her for work done which is a relevant failure. We do not believe at this point that the claimant believed that the respondent was going to commit a criminal offence by not paying her the NMW as there is absolutely no evidence to suggest that she was aware of the NMW provisions or whether they applied to her position. She knew that she needed to be paid for work done and that was the total of her thoughts at the time.

97. From 21 September the claimant has in writing that the first respondent accepts that it owes her for the unpaid shift on 4 July. That may have been thrown into doubt by Ms Harmon's message asking her to confirm that she did genuinely work that shift. However, subsequently, at the meeting on 4 October the claimant is told, unequivocally that the second respondent and her line manager also agree that she ought to be paid for that shift. Therefore, after 4 October any belief that the claimant may have had that the respondent was not going to comply with its legal obligation to pay her for that shift was objectively unreasonable.

98. Following the case of Chesterton it is possible that disclosures regarding the weaknesses of an entire payroll system and the possible repercussions on other bank staff could be in the public interest. Although the concerns are limited to this employer the employer is a public body and there are sufficiently high number of bank staff working for the Trust that we accept that the claimant could reasonably consider that her concerns regarding the opaqueness of the payroll system might be in the public interest.

99. The second disclosure contains information namely that she has still not been paid for her shift and is concerned that she will not receive that payment in breach of the respondent's legal obligation. She states that she will enforce her rights in an employment tribunal. We accept that she reasonably believes at this point that she may not get paid for the shift and reasonably believed that a failure to do so would tend to show a breach of a legal obligation. We do not accept that either in the email or the phone call she believed that the respondent's actions tended to show that they were about to commit a criminal offence as she was not even considering the National Minimum Wage Regulations at this stage and had no concept of any potential criminal liability.

100. The wording of the email suggests that the claimant did not consider her threat to enforce her rights in the employment tribunal was in the public interest. Her email is only about her unpaid shift. It does not mention anyone else or the vagaries of the respondent's payroll system. We do not accept that this email or the phone call were in the public interest. This was a statement by an employee that she was going to enforce her contractual right to be paid for a shift. It had no implications for the wider public, even when the public is limited to those who did bank work shifts. We also do not accept that the claimant believed that this email and phone conversation was in the public interest. She was just focused on the fact that she had not been paid.

101. We therefore do not conclude that Disclosure 2 is a qualifying disclosure for the purposes of s 43 ERA 1996.

102. Disclosure 3 discloses specific information regarding the expiry of crash pads on a particular crash trolley and the problems of there being no named person who was responsible for ensuring that new ones were ordered. We accept that the claimant reasonably believed that this information tended to show a breach of health and safety legislation. We also accept that this information was in the public interest and the claimant reasonably believed that the expiry of such crucial equipment and the potential for it to happen again under the current system would be a breach of the first respondent's obligations to its patients and the public.

103. We conclude that Disclosure 3 is a qualifying disclosure for the purposes of s43 ERA 1996.

Detriments and Causation

104. The term "detriment" is not defined in *ERA 1996. The case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*, held that

a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An "unjustified sense of grievance" is not enough.

105. In *Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73*, the Court of Appeal held () that letters sent by the employer to various third parties in an attempt to "set the record straight" following media disclosures by the employee, amounted to a detriment. The purpose of the letters was immaterial. A detrimental observation about a whistleblower in a letter did not cease to be detrimental just because the purpose of the letter was to tell the employer's side of the story. Nonetheless, the purpose was relevant to causation.

106. We have also considered the *Whistleblowing Commission Code of Practice* (see *Guidance for employers and Code of Practice*) sets out the following examples of disadvantages that could amount to a detriment:

- Failure to promote.
- Denial of training.
- Closer monitoring.
- Ostracism.
- Blocking access to resources.
- Unrequested reassignment or relocation.
- Demotion.
- Suspension.
- Disciplinary sanction.
- Bullying or harassment.
- Victimisation.
- Dismissal.
- Failure to provide an appropriate reference.
- Failure to investigate a subsequent concern.

107. Whether a detriment is "on the ground" that the worker has made a protected disclosure involves an analysis of the mental processes (conscious or unconscious) of the employer or fellow worker. It is not sufficient to demonstrate that, "but for" the disclosure, the employer's act or omission would not have taken place.

108. In the case of a detriment, the tribunal must be satisfied that the detriment was "on the ground that the worker has made a protected disclosure" (section 47B(1), ERA 1996). In NHS Manchester v Fecitt and others [2012] IRLR 64, the Court of Appeal held that the test in detriment cases is whether "the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. The test is therefore similar to that in discrimination cases (see Igen Ltd and others v Wong and other cases [2005] IRLR 258 (CA), in which the Court of Appeal has held that the discriminatory factor must be a "significant influence", in the sense of "an influence which is more than trivial").

109. We take each alleged detriment in turn. We use the same numbering as in the List of issues and above.

(i) **7.1** We conclude that given the context that the claimant had so vigorously asserted that she had not been paid for an entirely different shift, it was not a detriment to ask the claimant to confirm that she had indeed worked that shift. The message was not rude, and we consider that the claimant's objection to this message demonstrates an unjustified sense of grievance on the part of the claimant.
We also do not consider that this occurred on grounds of the disclosure. This occurred because there had been difficulties in working out which shift the claimant had worked, not on grounds that the claimant had raised concerns about it. No objective intention to impugn the claimant's honesty. In any event we don't believe that this was caused by the disclosure that there were problems with the bank payroll system, it occurred because of the confusion the claimant had created by so adamantly insisting that the payment applied to a different shift.

(ii) **7.2.** The claimant alleges that this occurred on grounds of Disclosure 2 which we have found not to be a qualifying disclosure.
We have found that the phone call with Ms Harmon was professional and was focused on trying to assuage the claimant's concerns regarding the non-payment of the shift. We have taken into account the low bar required for what amounts to a detriment and the fact that the motivation of the respondent does not matter when considering whether it could amount to a detriment. We accept that it is possible that having an angry call with your manager could reasonably be interpreted as a detriment. However the motivation is important when considering causation. We conclude that the call occurred on grounds of the claimant's misinterpretation of Ms Harmon's message which was unreasonable in all the circumstances and on grounds that Ms Harmon was trying to explain to the claimant that her wages would be paid. It did not occur because she threatened legal action it occurred because she fundamentally misunderstood Ms Harmon and the respondent's actions.

(iii) **7.3** The claimant alleges that this occurred because of Disclosure 2 which we have found not to be a disclosure.
In any event, we do not accept the claimant's version of what happened at the meeting and the majority of what is alleged under this detriment in the pleadings did not occur. It was a professional management meeting during which the claimant received an apology regarding her unpaid shift and an explanation as to what had happened. She was asked to refrain from sending inappropriate emails and reminded of

how best to communicate with her managers. She clearly accepted that apology and the basis of the meeting because she subsequently approached the second respondent and apologised to her. A reasonable meeting with a member of staff cannot amount to a detriment.

(iv) **7.5** The content and tone of the call was not as described by the claimant. As per our conclusion regarding the meeting at 7.2 above we do not consider that an entirely reasonable conversation with a manager can amount to a detriment.
We also consider that it occurred on grounds that the claimant had fundamentally misunderstood and misrepresented to another member of staff the content and intent behind the meeting on 4 October. It did not occur because of either Disclosure 1 or 2.

(v) **7.6** We do not accept that this email is as the claimant alleges. It is a management email asking the claimant to adhere to certain basic rules of politeness in an email, it does not misrepresent what occurred at the meeting on 4 October and at no point does it ask the claimant to refrain from ever sending emails. We therefore conclude that it does not amount to a detriment.
It does not occur on grounds of Disclosure 1 (or 2), it occurs because the claimant has emailed a third party and materially misrepresented what happened at the meeting on 4 October.

(vi) **7.10 and 7.11** We have concluded that the claimant did not receive contradictory instructions. The second respondent decided that a serious incident had occurred and required a report. She was more senior to Ms Harmon and decided that the initial decision was not correct. The writing of a report is not a detriment. It is a normal part of the claimant's role when mistakes by anyone occurs.
In any event the request to write a report occurred because of the potential seriousness of the incident not because the claimant had reported it. Ms Harmon was also asked to write a report and she had made no such disclosure. The claimant was asked to write the report because she had been party to fixing it and it was part of her job to ensure shared learning occurred when such oversights occurred.

(vii) **7.12** We conclude that the alleged comments on Tuesday 5 February 2019 did not occur as described.
**7.13** The second respondent accepted that in hindsight she would have worded the email differently and would not have replied all. We conclude that it did say that the claimant had blamed the other team when she had not done so in her report. However we do not accept that the email "conspicuously failed to recognize the leadership and pro-active behaviour shown by the claimant in resolving that incident". The claimant had already done that. There was nothing conspicuous about the second respondent not adding to the claimant's own praise of herself.

Whilst we do not accept that it was a severe as being a public shaming of the claimant, we accept that the sending of this email could amount to a detriment because it was sent to others and nothing in the email said that there should be no blaming of the other team when the claimant's email did not include such an allegation.

However, we conclude that this did not occur on grounds that the claimant had made Disclosure 3. It occurred because the incident had occurred in the first place and the second respondent wanted to ensure that the wards shared responsibility for ensuring that the crash trolleys were properly stocked. We accept the second respondent's explanation that the claimant had previously objected to having to write a report at all and that there was a general tendency between the staff on the different wards to blame each other which she and the other ward's manager wanted to stop. It was not ideal that it was sent as a reply to the claimant's report but it did not occur on grounds of Disclosure 3.

(viii) **7.14** We do not accept that the claimant was being bullied by the second respondent and therefore there cannot have been a failure by Ms Harmon to protect the claimant from it. By the claimant's own evidence, Ms Harmon listened to the claimant at the meeting and in subsequent emails the claimant accepted Ms Harmon's comments regarding the tone of her emails. This meeting does not amount to a detriment.

**(ix)** **8.1** The second respondent and Ms Harmon did help the claimant in her attempts to find the missing bank shift to the extent that they were able given that the claimant wrongly asserted that the missing shift was on 15 August.

**(x)** **8.2** The second respondent and Ms Harmon did arrange payment as soon as the correct shift was discovered. The second respondent understandably wanted to check whether the 'new' shift date had been worked but the second respondent asked her to organise payment as soon as she became aware of the new date. It was not their fault that there was a 10-week rule. As soon as they became aware of the 10 weeks rule they submitted the manual paperwork required.

**(xi)** **8.3** The claimant was not rostered to spend a disproportionate amount of time in the dermatology clinic.

**(xii)** The claimant was not performing up to the standard of a Band 6 nurse at the relevant time and was receiving mentoring and on the job training to correct that. We have accepted the evidence from all 4 of the respondent witnesses that the claimant did get positive feedback when appropriate but that they also appropriately fed back to her when her performance was not up to standard.

There is no basis on which this could be said to have occurred on grounds of any of the disclosures. Any feedback, positive or negative, was given on grounds of the claimant's performance.

**(xiii)** The claimant received adequate training, support and mentoring and was not told by her managers that she was struggling.

**(xiv)** The claimant did not receive contradictory instructions regarding department practice. She was never told to address managers by their title. She received consistent instructions regarding the huddle and WHO guidance. We have dealt with the incident report above.

**(xv)** We do not accept that there was an unpleasant work atmosphere. We found each and every respondent witness was clear and plausible when they described the management style of the second respondent and the no blame culture amongst the managers on the ward. The claimant was not 'being watched' she was being supervised due to her performance. She was never threatened with disciplinary action and the respondent did not blow up trivial incidents or make demeaning or humiliating comments. The claimant was being supported to succeed not set up to fail but she could not accept any form of criticism either during her employment or during this tribunal.

**(xvi)** There was no procedural unfairness. The claimant was not disciplined or subjected to any formal capability or performance processes by the respondent that resulted in a sanction or was intended to result in a sanction of any kind.

110. We therefore conclude that the claimant's claims that she has been subjected to any detriment in contravention of s43B Employment Rights Act 1996 fail.

Employment Judge Webster

Date: 27 November 2020