# EMPLOYMENT TRIBUNALS

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| **Claimant:** | **Mr. C Lloyd** |
| **Respondent:** | **Ezec Medical Transport Services Limited** |
| **Heard at:** | **Midlands West - Birmingham** |
| **On:** | **2 – 5 and 8 – 9 April 2024.** |
| **Before:** | **Employment Judge Smart**<br>**Miss S Outwin**<br>**Mr. J Reeves** |

**Representation**

| | |
|---|---|
| Claimant: | For Himself |
| Respondent: | Miss Grace Corby (Counsel) |

# RESERVED JUDGMENT

The Judgment of the Tribunal is:

1. The Claimant's claims for breach of contract succeed.

2. The Claimant's claims for detriment because of making protected disclosures are not well founded and are dismissed.

3. The Claimant's claim for automatic unfair dismissal for making protected disclosures is not well founded and is dismissed.

4. The Claimant's claim of ordinary unfair dismissal is well founded and succeeds.

# REASONS

## The hearing

1. The Claimant attended the hearing as a litigant in person.

2. We were presented with a bundle of documents in three binders totaling 930 pages.

3. We heard evidence from three witnesses for the Respondent, namely Ms. F Downes, Mrs. A Finney and Mr. W Spedding, who were the investigation manager, dismissal manager and appeal manager.

4. We also heard evidence from the Claimant.

5. The hearing ran relatively smoothly. At one point the Claimant applied to strike out the case which was refused. Reasons were given at the hearing that will not be repeated here.

6. On occasion, the Claimant became upset. We organised for the clerk to sit with him when he was upset because for most of the hearing the Claimant was alone. This was with consent from the Respondent.

7. We heard submissions on day 5 but there was insufficient time for us to complete our deliberations and come to a safe judgment by 15.00 on the final day of the hearing so the decision was reserved.

8. An additional document was requested form the Respondent, which was adduced into evidence, namely the email chain of 4 February 2020 containing a measures letter about the TUPE transfer relevant to his case and an email chain of 29 March 2021 containing an email the Claimant said was offensive as part of the factual matrix to his claim.

9. Other than this there were no other major issues in the case at hearing.

## Background

10. The Claimant was employed by the Respondent as a Non-Emergency Patient Transport Driver.

## The Claimant's employment with West Midlands Ambulance Service

11. The Claimant started his employment at West Midlands Ambulance Service ("WMAS") on 10 June 2015 as per his contract at page 98 in the bundle.

12. The Claimant said in evidence that he used to do both solo and dual crew transport when working for WMAS.

13. He was based at the Worcester Hub and it was common ground that he was employed onto "Agenda for Change" terms and conditions, which meant that his terms and conditions were nationally negotiated.

### *The Claimant's contract of employment with WMAS*

14. The Claimant's contract of employment is in the bundle at pages 98 – 115. The relevant clauses in it are as follows:

*"4.2 in the course of your duties you will be required to travel and/or spend temporary periods working in other NHS and non-NHS premises. At such times you will be entitled to travelling and subsistence expenses in accordance with agenda for change terms and conditions, as varied from time to time."*

*"12.7 it is a condition of employment that during the course of your employment the trust has the right to require any of its employees to attend for one or more medical examinations by a medical practitioner or consultant employed or nominated by the Trust this will include satisfactory medical clearance for new appointments. Failure to attend a medical examination will result in disciplinary action against you"*

*"16.1 a copy of the Trusts Disciplinary Policy and Procedure can be obtained from your line manager, the intranet or the Human Resources Department. You must ensure that you have read and fully understand the Disciplinary procedure and you are expected to comply with all the rules set out in the Procedure."*

*"17.1 if you have a grievance relating to your employment you should, in the first instance, raise the matter with the person to whom you are directly responsible, or their manager if the grievance raised is against your line manager, either verbally or in writing.*

*17.2 if the matter is not resolved at this level, you may pursue it in accordance with the Trust's Grievance Policy, which may be revised from time to time. The prime objective of the procedure is to settle all grievances without delay at the lowest possible level.*

*17.3 a copy of the Trust's Grievance Policy can be obtained from your line manager, the Internet or the Human Resources Department."*

*"18.1 certain terms and conditions of your employment are contained in agreements negotiated and agreed with a specified trade union or unions recognised by the trust for collective bargaining purposes listed in the recognition and facilities agreement (obtainable from the Human Resources Department).*

*18.2 until such time as local agreements are reached, conditions not specifically mentioned in this statement shall be determined by reference to nationally negotiated conditions for employees in the NHS."*

*"19.1 your attention is drawn to and you should familiarise yourself with policies. Unless otherwise stated these policies and procedures are not incorporated into this contract:*

- *Disciplinary rules and procedures*
- *Grievance procedures*
- *Any requirements and conditions arising out of the trusts standing orders and other published documents which may be issued from time to time*
- *Documented procedures forming parts of the accredited quality system and which relate to relevant activities and duties within the employee's responsibilities, e.g. ISO 9001 quality systems*
- *all relevant instructions regarding the supply and wearing of standard uniform/corporate*
- *Retirement policy and procedure*
- *Health and safety policy*
- *No smoking policy*
- *Drug and alcohol policy."*

*"35 STAFF EXPENSES*

*35.1 claims should be submitted on the appropriate claim form to the line manager. Reimbursement will be made at the appropriate rates via the Salaries/Wages Payroll System.*

*Unsubstantiated or incorrect claims may be regarded as fraudulent, and may constitute grounds for summary dismissal."*

***Relevant Agenda for Change terms***

15. The part of the Agenda for Change terms and conditions is part 18 entitled *"Subsistence Allowances"* starting in the bundle at page 823. The relevant parts of this document are as follows:

*"18.1 where locally, staff and employer representatives agree arrangements which are more appropriate to local operational circumstances or which provide benefits to staff beyond those provided by this section, or are agreed as operationally preferable, those local arrangements will apply.*

*18.2 the purpose of this section is to reimburse staff for the necessary extra costs of meals, accommodation and travel arising as a result of official duties away from home. Business expenses which may arise, such as the cost of a fax or official telephone calls, may be reimbursed with certificated proof of expenditure."*

*"18.11 a meal allowance is payable when an employee is necessarily absent from home on official business and more than five miles from their base, by the shortest practicable route, on official business. Day meals allowance rates are set out in paragraph five of annex N. These allowances are not paid where meals are provided free at the temporary place of work.*

*18.12 a day meals allowance is payable only when an employee necessarily spends more on a meal/ meals then would have been spent at their place of work. An employee shall certify accordingly, on each occasion for which day meals allowance is claimed but a receipt is not required.*

*18.13 normally, an employee claiming a lunch meal allowance would be expected to be away from his/ her base for a period of more than five hours and covering the normal lunchtime period of 12:00 PM to 2:00 PM…."*

*"18.14 the scope and level of any other payments will be determined by the employer, according to local needs, on a vouched basis."*

*"ANNEX N: subsistence allowances*

*Schedule of recommended allowances*

*5. Day meals subsistence allowance*
*Lunch allowance (more than five hours away from base, including the lunchtime period between 12:00 PM to 2:00 PM) £5.00*

*…"*

16. So having looked at these contractual terms, we note the following:

16.1. First, the Agenda for change terms are expressly included in the Contract if employment. There is reference to them and they bind all Agenda for Change employees nationwide.

16.2. Secondly, if there is a local agreement formed between the employees in the NHS and the employer via its representatives as per clause 18.1, then the local arrangements will apply.

16.3. Thirdly, it discusses "local arrangements". It does not discuss Local Agreements which are usually negotiated with the Unions in question. If you marry the term "local arrangements" with the fact that these arrangements need only be agreed between the employer and the staff, the use of local arrangement fits.

16.4. Fourthly and consequently, if a local arrangement is in place, it supersedes the agenda for change terms and conditions and replaces them with the terms of the local arrangement where that was intended to be the case.

***The local arrangement for rest and meal breaks***

17. A local arrangement was in place for subsistence allowances. This appears to be in the bundle at pages 841 onwards. It is entitled *"West Midlands ambulance service NHS Foundation Trust policy rest/meal breaks for all PTS staff".* It goes on to say that the policy was approved by the trust board with an implementation date of the 10 July 2013. It appears that the intention of the trust was to review the policy annually because the version of the policy in the bundle has a review month of July 2014.

18. The relevant parts of the local arrangement are as follows:

*"1.1 with effect from 1 August 2012, the following guidelines will apply to all PTS staff on West Midlands ambulance service WMAS (the Trust) agenda for change terms and conditions across W Midlands ambulance service NHS Foundation Trust. This policy supersedes all previous policies (see appendix 1).*

*1.2 the aim of this document is to provide an agreed understanding of how rest/ meal breaks should be managed by the Trust."*

*"2.1 the main objective is to ensure that all PTS staff receive an uninterrupted unpaid rest/meal break within a specified time frame or window, in accordance with the working time regulations 1998.*

*2.2 to ensure that the health and safety risks to employees of the trust are reduced to their lowest practicable level as a result of not having an appropriate rest/ meal break when carrying out their duties."*

*"3.1 all PTS staff as described in paragraph 1.1 will be entitled to the following unpaid rest/ meal breaks:*

| *Length of shift* | *Break window (hour)* | *Break Length* |
|---|---|---|
| *6 to 8 Hours* | *3 - 5* | *1 x 30 minutes* |
| *9 to 11 hours* | *4 - 7* | *1 x 37.5 minutes* |
| *12 hours* | *4 - 7* | *1 x 45 minutes"* |

*"5.1 when the rest/ meal break window expires any staff that help in unable to take their rest/ meal break within the meal break window will be allocated a rest/ meal break as a matter of priority. They will not be tasked with any further work until they have taken their break, unless by mutual agreement. In this situation, staff will also automatically become eligible to claim the compensatory payment.*

*5.2 the compensatory payment that staff will receive is £15….."*

*"6.2 NEOC (Non-Emergency Operation Centre) will endeavour to ensure that breaks will be taken at base stations, however due to operational reasons; this may not always be possible. In such circumstances, staff may be requested to take their break away from the base station, at a suitable alternative location, by mutual agreement, see appendix 2.*

*6.3 if staff are asked to take their break at any place other than their base station they will be entitled to claim a payment of £5 to reimburse them for financial loss.*

*6.4 cruise may initiate a request to take their break at another location other than their base station. Requests should be made known to the controller at the earliest opportunity. In these circumstances no claim for reimbursement can be made.*

*6.5 staff who choose to leave their allocated brake location for the duration of their break are responsible for ensuring that they return promptly for duty on the expiry of the break period."*

*"7.1 NEOC staff must maintain accurate meal break records for payroll purposes and supply reference numbers to the appropriate staff.*

*7.2 all employees must record their working time and meal breaks clearly on any appropriate time recording system or payment record as appropriate."*

*"10.6 it is the joint responsibility of individual operational and NEOC staff to ensure an appropriate break is taken within specified windows, as set out in paragraph 3.1."*

*"**Appendix one***

*West Midlands Ambulance Service NHS Trust*
*Local agreement for the PTS meal breaks"*

*"1 the trust is worked through various consultation machinery to harmonise the payments and practises enjoyed by patient transport services staff in relation to meal breaks.*

*2 this proposal harmonises the payments made to staff who are unable to start a meal break within an agreed meal break window.*

*3 this agreement applies to all current employed staff on patient transport services, with the exception of staff currently employed on contracts within the BBC(Birmingham Black Country) area, who will maintain their current agreement.*

*4 staff appointed to the patient transport service within the trust following the date of this agreement will be covered by this local agreement."*

*"7 There is a requirement for one meal break policy to span all WMAS PTS services.*

*8 until the formulation of the new policy, a new rate of allowance of £15 compensatory payment will apply, when a meal break had not started within the break window below.*

*9 Break window:*

| *Length of shift* | *Break window (hour)* | *Break Length* |
|---|---|---|
| *6 to 8 Hours* | *3 - 5* | *1 x 30 minutes* |
| *9 to 11 hours* | *4 - 7* | *1 x 37.5 minutes* |
| *12 hours* | *4 - 7* | *1 x 45 minutes"* |

*10 arrangements for recording, checking and payment of claims should be as arranged by the local management teams.*

*11 practises not expressly varied above remain extant.*

*12 the principles within their agreement should be built into the PTS meal break policy, which should be amended, finalised and considered by the regional partnership forum no later than 12 months from the signing of this agreement.*

*13 this agreement will apply from: <<Date>> [Handwritten] 1st August 2012 [signature of Kim Nurse Director of Workforce and OD].*

*14 this agreement will be reviewed annually by the Regional Partnership Forum."*

*"**Appendix 2***
*Suitable alternative meal break locations should have the following facilities:*

*Toilets*
*Catering/ dining facilit[ies]*
*rest areas*

*Examples of suitable locations include:*

*WMAS locations*
*Commercial locations by mutual agreement"*

19. So, from the above clauses of this policy:

19.1. There are a number of places where the policy even though it is labelled as a policy, suggests that the intention of WMAS and the staff was to incorporate the meal breaks and subsistence payments into their terms and conditions of employment. These are:

19.1.1. At clause 3.1 I states that the tabulated meal break times and lengths *"will apply"*. There appears to be no discretion.

19.1.2. The policy states that if a break has not been able to take place then they *"will not be tasked with any further work until they have taken their break unless by mutual agreement".* This appears to give the employees the power to say no to work if they haven't had a break because unless they have a break later by mutual agreement, the policy *"will"* mean that the employer will not allocated further work. This fits with what Ms. Finney said in her evidence about how the WMAS meal breaks worked when she was a controller for WMAS.

19.1.3. Again at clause 6.2, the document purports to give the employees the power to take their breaks at their base even if this was not operationally favourable. It is again said that breaks away from base should be mutually agreeable and this is how Mrs. Finney described they were organised in practice at WMAS in her oral evidence.

19.1.4. The document gives entitlements to money both for meal allowances away from base and also if breaks are taken outside of the usual break windows. The compensation payment for out of window breaks is automatic and the document does not give the Company a discretion. In appendix 1 paragraph 8 says *…"a new rate of allowance of £15 compensatory payment will apply, when a meal break had not started within the break window below."* Again this is certain puts the employer under an unfettered obligation to pay compensation according to the wording of it.

19.1.5. At paragraphs 1 and 2, the employer gets the benefit of harmonising its break payments and practices across the whole of PTS. We note how the paragraph doesn't simply refer to practices. It refers to *"payments and practises"*. The two appear to be separate considerations. This seems to make sense to us because the parties to this agreement could just harmonise the payments, but leave local practices the same or vice versa. They can be mutually exclusive or dealt with together depending on the intentions of the parties at the time of the negotiation or consultation.

19.1.6. Paragraph 7 of appendix 1 states *"There is a requirement for one meal break policy to span all WMAS PTS services."* We not the word 'requirement'. Not wish, not aim, not understanding, but requirement.

19.2. Other factors point away from the policy being contractual as follows:

19.2.1. It is described as a policy;

19.2.2. The main document refers to guidelines rather than conditions at clause 1.1.

19.2.3. Clause 1.2 refers to an "*agreed understanding"* of how breaks should be managed by the Trust

19.3. If the Claimant started work at 08.30am for the 08.30 – 16.30 shift, his break window was between 11.30 and 13.30 which would be hours 3 – 5 of the shift.

19.4. If the Claimant has been unable to take his break between those hours because of his work schedule or any unexpected jobs, he is automatically entitled to a £15 payment. This is not a reimbursement and no claim needs to be made.

19.5. When considering meal breaks away from base, if the Claimant were to unilateral take his break away from base, no meal payment entitlement accrues.

19.6. Where the crew agree to take their meal break off base, they are entitled to claim a payment of £5.00 to reimburse them for financial loss.

20. The policy was unsigned in the main part of the document. However, the appendix 1 is signed by Kim Nurse mentioned earlier in two places and by Stuart Gardiner who was the Staff Side Chair.

21. The policy appears to be of particular importance to both sides of it as follows:

21.1. The Employer gets the benefit of a reduced administrative burden and more clarity for its management team by harmonising practices and payment amounts;

21.2. The policy in part supported the health ad safety of employees and tries to ensure that appropriate rest breaks are taken by the employee and organised by the employer in compliance with the Working Time Regulations 1998 as enshrined in EU law as a fundamental employment right;

21.3. The document seems to cement the intention of the parties to be bound by the agreement because if the employer does not keep to its end of the bargain, then compensation is due to the employee or the employees have the power, and a rare power it is in our experience, to be able to refuse to comply with employer requests to take their break away from base or to carry out any further work until they had taken their break. This could only be varied by mutual agreement and Mrs. Finney's important evidence on this point was that controllers at WMAS used to follow this policy in practice too.

21.4. Consequently, it appeared to us that the policy reflected what actually happened in practice as well as what was simply written down. This agreement cannot be said to be a sham and all evidence before us points to the words of this agreement being the actual way the crews were managed for their breaks and subsistence.

22. It is also important to note that whilst not signed by them, the policy does have the Chief Executive of the Trust as a proposed signatory to the policy.

**The Recognition Agreement**

23. Then there is the Recognition Agreement contained in the bundle at pages 828 onwards. This appears to cover both WMAS and Staffordshire Ambulance NHS Trust.

24. The key parts of it are as follows:

*"3.7 those matters covered by this recognition agreement are:*

*3.7.1 terms and conditions of employment.*

*3.7.2 Health, safety, welfare and other issues relating to the physical working environment.*

*3.7.6 Any other matters which the Trust and the recognised Unions agree as appropriate from time to time.*

*3.7.7 those specified under "Functions and Scope" of the negotiating machinery of this agreement [see 11.1 and 11.2]*

*3.7.8 those specified under "Consultation Procedure" as set out in this agreement [see 14]"*

*"10.3* ***Machinery***

*10.3.2 trust wide consultations and negotiations will be conducted through the strategic Joint Negotiation and Consultation Committee [JNCC] and any subgroups set up by the Joint Negotiation and Consultation Committee [JNCC]."*

*"(Locality Partnership Forum) 11.1.1 to establish and maintain regular methods of negotiation and consultation between the trust and its employees at locality level so as to maintain and improve employee relations"*

*"11.2.1 the locality partnership forum will meet at least monthly and consist of staff representatives from the locality agreed by the trade unions and management representatives."*

*"(Joint Negotiation and Consultation Committee [JNCC]) 12.1.1 to establish and maintain regular methods of negotiation and consultation between the trust and its employees so as to maintain and improve employee relations."*

*"12.1.4 to undertake policy review"*

*"12.1.7 to establish and maintain machinery for the promotion and encouragement of measures affecting the health, safety and welfare of the Trust's employees."*

*"(Constitution) 13.2 Chairperson - the Joint Negotiation and Consultation Committee [JNCC] will be chaired by the Chief Executive."*

*"(Consultation Procedure) 14.1 the JNCC will act as a consultative and negotiating body."*

*"14.3 consultation may be used as a means of providing early information on matters, which may later become the subject of negotiation."*

25. From this document we can determine as follows:

25.1. This is in our judgment a pretty standard recognition agreement;

25.2. The policy relied upon by the Claimant for rest breaks is within scope of the aims of the recognition agreement.

25.3. Consultation appears to be a method of early provision of information, rather than final agreement on matters being discussed as per clause 14.3.

25.4. The Local forum does not have as part of its remit policy review like the JNCC does at clause 12.1.4. Similarly, the Local forum has management representatives o it where as the JNCC is chaired by the CEO. This is why it is significant that whilst unsigned, the policy relied upon by the Claimant has the CEO as a proposed signatory to it.

25.5. Given the above, we conclude on balance that this policy was negotiated rather than part of a consultation and that negotiation was conducted by the JNCC chaired by the Chief Executive. This clearly heightens the importance of this policy to the employer and the staff affected by it.

25.6. It therefore seems to us that the appendix to the policy was first discussed a local level in the local Forum and then raised up to the JNCC which would explain why appendix 1 mentions the local forum and the policy itself has the CEO as a proposed signatory to it.

**Relevant law – was the policy incorporated into the Claimant WMAS contract of employment**

26. In **Marley v Ford Trust Group Ltd [1986] IRLR 369** in which the Court of Appeal stated *"…the courts on a number of occasions have had to consider whether, when there is an unenforceable collective agreement incorporated into a contract of personal service, the terms of it, or some of them, can be incorporated into that contract of personal service. We found it unnecessary to go into all the cases because, as recently as 1983, this Court considered the problem in* ***Robertson v British Gas Corporation [1983] IRLR 302****. This Court decided that such terms can be incorporated into contracts of personal service and, when they are so incorporated, they are enforceable".*

27. Although a local agreement might be referred to in a contract in a general sense and negotiated through the union, that does not mean the clauses and benefits within it are automatically incorporated. The question remains as to whether the clause is apt for incorporation following **Alexander and others v Standard Telephones and Cables Limited (No. 2) [1991] IRLR 286**. Here Hobhouse J said:

*"The principles to be applied can therefore be summarised. The relevant contract is that between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained. In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from the other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employee. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form*

*part of the individual contract is central to the decision whether or not the inference should be drawn."*

28. This decision was approved in **Sparks v Department for Transport [2016] ICR 695.**

29. The factors to be taken into account about incorporation of collective agreement terms that are apt for incorporation is contained with the case of **Hussain v Surrey & Sussex Healthcare NHS Trust [2011] EWHC 1670 (QB)** as follows at paragraphs 168 and 169:

*"168 There is no single test as to whether an employer and employee intended to agree that provisions of an agreement such as the Practitioners Disciplinary Procedure should be contractual between them (rather than advisory or hortatory or an expression of aspiration), and if so which provisions. The indicia that a provision is to be taken to have contractual status which are, I think, of some relevance to this case include these:*

*i) The importance of the provision to the contractual working relationship between the employer and the employee and its relationship to the contractual arrangements between them…*

*…As Auld LJ said in* ***Keeley v Fosroc International Ltd, [2006] IRLR 961*** *(which concerned whether provisions relating to enhanced redundancy payments in a Staff Handbook were enforceable as part of individual contracts of employment),*

*"Highly relevant in any consideration, contextual or otherwise, of an "incorporated" provision in an employment contract, is the importance of the provision to the over-all bargain, here, the employee's remuneration package – what he undertook to work for. A provision of that sort, even if couched in terms of information or explanation, or expressed in discretionary terms, may still be apt for construction as a terms of his contract … ." ( at para 34).*

*ii) The level of detail prescribed by the provision: as Penry-Davey J said in* ***Kulkarni v Milton Keynes Hospital NHS Trust, [2008] IRLR 949*** *at para 25, the courts should not "become involved in the micro-management of conduct hearings", and the parties to the contract of employment are not to be taken to have intended that they should be. (In the Court of Appeal in Kulkarni, (loc cit) at para 22, Smith LJ endorsed this observation of Penry-Davis J.)*

*iii) The certainty of what the provision requires: as Swift J observed (in **Hameed** (loc cit) at para 68), if a provision is vague or discursive, it is the less apt to have contractual status.*

*iv) The context of the provision: a provision included amongst other provisions that are contractual is itself more likely to have been intended to have contractual status than one included among other provisions which provide guidance or are otherwise not apt to be contractual.*

*v) Whether the provision is workable, or would be if it were taken to have contractual status; the parties are not to be taken to have intended to introduce into their contract of employment terms which, if enforced, not be workable or make business sense: see **Malone v British Airways, [2010] EWCA Civ 1225** at para 62.*

*169. This is not, of course, an exhaustive list of considerations which might bear upon whether a provision in a collective agreement is apt to have contractual status. In particular, the wording of the provision is also of significance…"*

30. It is also true that policies that truly are policies or amount simply to "work rules" are not generally contractual unless and until they are expressly incorporated into the contract of employment for example see **Dryden v Greater Glasgow Health Board [1992] IRLR 469.**

31. Similarly, an agreement not formally recorded as a collective agreement can constitute one, particularly if concluded via negotiation with a union after **City of Edinburgh Council v Brown [1999] IRLR 208 EAT.**

**Conclusion and analysis contractual incorporation**

32. The Respondent has argued the following:

32.1. That this is not a contractual meal and rest break policy it is non contractual.

32.2. That it was not contractual because:

32.2.1. there is no evidence that it was negotiated through the collective consultation machinery in place at WMAS.

32.2.2. it was supposed to be reviewed and wasn't and therefore it is not binding and

32.2.3. The use of the word 'guidelines' in clause 1.1 point away from it having contractual force.

33. All of those submissions are rejected. We say so because:

33.1. It is clear from the agenda for change contact terms that all local agreements for subsistence replace the relevant parts of the agenda for change contract terms so long as they are agreed between employer representatives and the staff. It says so clearly, expressly and unambiguously at clause 18.1.

33.2. Appendix 1 signed by the Trust and Staff Chair of the negotiation forum sets out why the policy is needed, the fact it has been agreed through the usual consultation machinery with a view to harmonising meal break policies across the entire service. It is also labelled as a Local Agreement again evidencing in our view the involvement of the Unions in the consultation. Even if we are wrong in that and we have heard no evidence to the contrary, it is still an agreement made between a senior person for the Trust at Director level and the staff side chair. It therefore fits the requirements for a local arrangement under agenda for change clause 18.1.

33.3. Just because a contract isn't reviewed, doesn't mean it ceases to exist unless the express terms of the agreement say so. There are no words to that effect anywhere in the agreement. Unless the contract is therefore terminated in some way, it continues to exist and bind the parties until it is ended either by breach, mutual agreement, frustration or in accordance with its terms.

33.4. It is correct, the agreement uses the words guidelines in it. However, the remainder of the terms are clear, set out rights and liabilities of both the employer and employee and in our view on balance have been negotiated both locally and under the JNCC.

33.5. Turning to **Hussain:**

33.5.1. The meal break policy is clearly of importance because its terms try to ensure compliance with health and safety and working time obligations. It is therefore highly important to the working relationship between WMAS and the employees it affects. It also forms part of the remuneration package available to the staff including meal allowance payments and compensation payments for out of window breaks that are automatic.

33.5.2. The policy taken with appendix 1 is detailed and clearly sets out what the entitlements are and how they should be implemented. The only

thing it does not specify is how claims for the meal allowance payments are to be checked.

33.5.3. The provisions are certain. Out of window breaks caused by operational needs trigger an automatic compensation payment to the staff of £15. The meal allowance amount is a reimbursement of £5 for off base breaks about which the staff can refuse to acquiesce.

33.5.4. The context of the provision is to harmonise terms for the benefit of the employer so that its meal breaks are clear and payments are clear in one policy. Local agreements about breaks are referred to in the Agenda for change terms that are incorporated into the contract of employment, the latter of which is common ground.

33.5.5. The provisions of the policy are clearly workable and have been for years. Both the Claimant and the Respondent's witness Mrs. Finney, describe how the policy worked at WMAS in like terms and clearly this was the way daily operations were managed for all staff on agenda for change terms and conditions of employment.

33.6. Looking at the intention of the parties, clearly the employer intended to be bound by the terms of the policy because it agreed that if out of window breaks were caused by operational needs, the employer would automatically pay compensation to the employees or would temporarily fetter its right to instruct the employees to undertake another patient pick up until the staff member had taken their break. Mrs. Finney said this is what happened in practice.

34. Consequently, it is our unanimous view that this document has contractual force and is not simply a non-contractual policy. It is made contractual because of the agenda for change terms saying that the local arrangement will apply instead.

35. That is not the end of what was in place at WMAS. It is important to note that meal allowances for off base breaks are not said to be an automatic payment of £5 in any of the local arrangements. They are all couched in terms of "reimbursement" rather than being akin to an automatic compensation payment for out of window lunch breaks. The respondent argues this means the Claimant had to prove he was out of pocket and prove the amount he was out of pocket with receipts.

36. The closest any of the agreements get to saying how these meal claims are to be reimbursed is Appendix1 to the local agreement. This is ambiguous as it simply states that checking of claims will be by local management teams at paragraph 10 of that appendix. In addition, the local agreement says that the

meal allowance is there to reimburse the worker for financial loss at clause 6.3. These suggest that receipts are required.

37. However, as the local agreement does not cover how to claim, in our view, we should revert back to the Agenda for Change terms about how to claim because there is no local agreement covering how to claim meaning the agenda for change terms then apply for that part not covered by the local agreement.

38. This is covered by clause 18.12 which clearly states that a receipt is not required and the worker just needs to certify they have spent more away from base on their food than they would have done had they been present at base. Clause 18.14 mentions a vouched basis, but upon interpreting that cause, this says to us that if the employer agrees additional payments to those standard agreed subsistence rates, either locally or in accordance with Agenda for Change terms, then it is the additional amounts that need to be on a vouched basis.

39. In his evidence under cross examination, the Claimant said that at WMAS staff didn't need to provide receipts for subsistence allowances off base, they simply had to certify. Whilst this has been challenged by the Respondent, the Claimant's oral evidence seems to fit the general thrust of the documents relevant to the meal break policy when analysed in a methodical way.

40. We therefore believe the Claimant when he said that he did not have to provide receipts for the meal allowances.

41. Therefore, simply based on the construction of the documents, applying an objective test and based on standard contract principles, we conclude:

    41.1. The meal and rest break Local Agreement had contractual force.

    41.2. The break compensatory payment of £15 was automatic provided a break was not taken within the right window because of operational requirements; and

    41.3. The meal allowance needed no receipts to be claimed just a certification from the employee.

    41.4. Consideration can be identified in the employees forgoing breaks at their bases or within a their usual time windows, the employer gets the benefit of getting more transport jobs completed. Intention to be bound is found for the employer in the agreement to fetter its rights to insist on further work

until a break is had and for compensation payments if the employee agrees to forego the usual break times and locations.

41.5. Similarly, a meeting of the minds can be identified in the compensation payment/meal allowance payment from the Employer and the fact the payments are only triggered via mutual agreement between the employer and employee to vary the usual break locations or timings.

41.6. Effectively, whenever the employer needs a crew to go onto a job, they are effectively making an offer saying if you agree to go out of the usual arrangements, we will pay you compensation for the out of break window breaks and/or a meal allowance for increased cost of meals away from base. The employee accepts that by agreeing to go outside the normal arrangements knowing they will receive an additional payment for it.

42. This now brings us on to consider the TUPE transfer.

**Transfer of the Claimant's employment from WMAS to the Respondent – factual background**

43. By 13 December 2019, the respondent had been successful in a tendering process winning the contract to which the Claimant was assigned. Approximately 80 staff were within scope to transfer to the respondent, but eventually only approximately 8 staff did transfer. The rest were redeployed within WMAS. The Claimant was assigned to the Worcester contract. This was common ground amongst the parties.

44. On 13 December 2019, a measures letter was sent to the WMAS staff which is in the bundle at pages 137 – 139.

45. The gist of the letter is that the respondent was giving advanced notice to the affected employees at WMAS that post transfer it would be taking measures for ETO reasons and it listed those measures. The relevant measures here are as follows:

45.1. The crew will use a new PDA system and new vehicles.

45.2. Base locations could change.

45.3. Agenda for change pay scales will no longer be used or implemented b the rest of the agenda for change terms would be honoured.

45.4. Local agreements that are non-contractual would be re-visited, reviewed and or cancelled.

46. On 29 and 30 January 2020, there was a consultation presentation to staff members who would be in scope for transferring to the respondent. The slides for the presentation appear at pages 140 onwards.

47. The presentation provides information about the Company, its leadership and its business as well as the specific contract and transfer proposals.

48. Significantly, the presentation refers to *"any noncontractual meal break policy/payments"* may be revisited, reviewed and or cancelled at page 155.

49. On 20 February 2020, pre- transfer there is an all colleague letter stating the name of the bases the Claimant and others would be required to work out of. The third base is named the "Kidderminster base" at page 159, which becomes significant later on.

50. As referred to in paragraph 16 of the Claimant's statement, at page 160 in the bundle, in response to a query from the Claimant about the union agreements and information contained on his personal file. The email confirms that the only information of note about any disciplinary and grievance procedures was an outstanding stage 3 grievance that was still in the process of being considered.

51. On 1 April 2020, it was common ground and in fact conceded by both parties that after a consultation period, the Claimant and about 8 of his colleagues TUPE transferred across to the Respondent.

52. Whilst TUPE transfers occur by law and cannot occur simply because they are conceded or agreed between the parties, given the evidence we have seen and the fact that an entire service delivery contract was taken over from WMAS by the Respondent, we are content that a TUPE transfer did occur as the parties have described, conceded and agreed. We therefore need not consider the actual transfer further.

53. We now discuss what transferred under TUPE.

**Relevant law - what transfers under TUPE**

54. The starting point for what transfers is always the EU Acquired Rights Directive and TUPE regulations. Regulation 4 of TUPE states:

*"4.—(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.*

*(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—*

> *(a)all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and*
>
> *(b)any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.*

*(3) …*

*(4) Subject to regulation 9, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the sole or principal reason for the variation is the transfer.*

*(5) Paragraph (4) does not prevent a variation of the contract of employment if—*

> *(a)the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or*
>
> *(b)the terms of that contract permit the employer to make such a variation.*

*(5A) In paragraph (5), the expression "changes in the workforce" includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act).*

*(5B) Paragraph (4) does not apply in respect of a variation of the contract of employment in so far as it varies a term or condition incorporated from a collective agreement, provided that—*

*(a)the variation of the contract takes effect on a date more than one year after the date of the transfer; and*

*(b)following that variation, the rights and obligations in the employee's contract, when considered together, are no less favourable to the employee than those which applied immediately before the variation.*

*(5C) Paragraphs (5) and (5B) do not affect any rule of law as to whether a contract of employment is effectively varied.*

*(6) …*

*(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.*

*(8) Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.*

*(9) Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.*

*(10) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.*

*(11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer.*

55. The EU acquired rights directive says:

*"Article 3*

1. *The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee."*

56. Clearly because of the words *"or from an employment relationship"* as well as standard wording for the contract of employment itself, rights and obligations was envisaged to cover both contractual and non-contractual rights and obligations. **Martin v Lancashire County Council and another [2001] ICR 197 CA.**

**Contractual arrangements**

57. All contractual terms in the contract of employment itself or in connection with it such as contractual policies, any other contracts that aren't employment contracts, but arose because of the employment relationship (e.g. share purchase schemes, employee shareholder arrangements, partnership agreements in some circumstances…) automatically transfer unvaried.

**Non-contractual arrangements**

58. The key wording is in Regulation 4 (1). It says all rights, liabilities, duties and powers arising Under or *"in connection with"* the contract of employment. Therefore, even though a policy or local agreement may not have contractual force, if it gives an employee rights and is in connection with the contract of employment then it can transfer.

59. This is also so under regulation 4 (2) (b) which states that acts or omissions of the transferor can also be attributed to the transferee either under the contract or *"in respect of a person assigned to the organised grouping of resources"* so could include non-contractual arrangement **Secretary of State for Employment v Spence and others 1986 ICR 651 CA.**

60. This is also supported by the case of **Martin** above. Here Peter Gibson LJ said:

> *'rights etc are not limited to those under the contract but include those "in connection with" the contract. That prepositional phrase is far wider and it does not suggest that the rights etc need be contractual. That is supported by sub-paragraph (b) of Reg 5(2) [now Reg 4(2)(b)]. It is not just what is done by the transferor in respect of the contract that is deemed to have been done by the transferee but also anything done by the transferor in respect of the employee. That does not suggest that it is limited to what will result in contractual rights and liabilities.'*

61. A more recent approach to this is in the case of **Ponticelli UK Limited v Gallagher [2022] IRLR 1031 EAT.** In that case a separate partnership share agreement transferred because it was an agreement no open to the public, it arose only by virtue of the Claimant being an employee. Therefore even though the agreement did not arise under the contract of employment it arose in connection with it. This therefore cements the approach of the previous case law decided under the old 1981 Regulations as being the same under the current 2006 Regulations as amended by the 2014 amendment regulations.

62. Consequently, if any non-contractual policy, procedure or other rule or practice arises from the employment relationship, then it will transfer.

63. In addition, if the policy etc. is non contractual, then regulation 4 (5) does not apply because there will be no variation of a contract. Therefore the non-contractual policy will be treated in the same way as any other non-contractual policy would be under normal principles in a way not to breach the implied term of trust and confidence and not in a capricious way.

**Collective agreements**

64. The starting point here is regulation 5 of the TUPE regulations, which states:

*" 5. Where at the time of a relevant transfer there exists a collective agreement made by or on behalf of the transferor with a trade union recognised by the transferor in respect of any employee whose contract of employment is preserved by regulation 4(1) above, then—*

*(a)without prejudice to sections 179 and 180 of the 1992 Act (collective agreements presumed to be unenforceable in specified circumstances) that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if made by or on behalf of the transferee with that trade union, and accordingly anything done under or in connection with it, in its application in relation to the employee, by or in relation to the transferor before the transfer, shall, after the transfer, be deemed to have been done by or in relation to the transferee; and*

*(b)any order made in respect of that agreement, in its application in relation to the employee, shall, after the transfer, have effect as if the transferee were a party to the agreement."*

65. This implements article 3 (3) of the Acquired rights directive which states:

*"Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.'*

66. Article 3(4) states:

"*Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year'.*

67. This has been implemented in Regulation 4 (5B) allowing for the variation, but only if rights and obligations when considered together after renegotiation of the agreement are no less favourable than those which applied before the variation.

68. Sections 179 and 180 of TULRCA 1992 say:

***"179 Whether agreement intended to be a legally enforceable contract.***

*(1)A collective agreement shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement—*

*(a)is in writing, and*

*(b)contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract.*

*(2)A collective agreement which does satisfy those conditions shall be conclusively presumed to have been intended by the parties to be a legally enforceable contract.*

*(3)If a collective agreement is in writing and contains a provision which (however expressed) states that the parties intend that one or more parts of the agreement specified in that provision, but not the whole of the agreement, shall be a legally enforceable contract, then—*

*(a)the specified part or parts shall be conclusively presumed to have been intended by the parties to be a legally enforceable contract, and*

*(b)the remainder of the agreement shall be conclusively presumed not to have been intended by the parties to be such a contract.*

*(4)A part of a collective agreement which by virtue of subsection (3)(b) is not a legally enforceable contract may be referred to for the purpose of interpreting a party of the agreement which is such a contract.*

***180 Effect of provisions restricting right to take industrial action.***

*(1)Any terms of a collective agreement which prohibit or restrict the right of workers to engage in a strike or other industrial action, or have the effect of prohibiting or restricting that right, shall not form part of any contract between a worker and the person for whom he works unless the following conditions are met.*

*(2)The conditions are that the collective agreement—*

*(a)is in writing,*

*(b)contains a provision expressly stating that those terms shall or may be incorporated in such a contract,*

*(c)is reasonably accessible at his place of work to the worker to whom it applies and is available for him to consult during working hours, and*

*(d)is one where each trade union which is a party to the agreement is an independent trade union; and that the contract with the worker expressly or impliedly incorporates those terms in the contract.*

*(3)The above provisions have effect notwithstanding anything in section 179 and notwithstanding any provision to the contrary in any agreement (including a collective agreement or a contract with any worker).”*

69. Therefore, if the collective agreement was unenforceable, then that will be the case after the Transfer.

**Analysis and conclusion – transfer of terms**

70. The Claimant claims that his meal and out of window break payments had contractual force and therefore transferred automatically by operation of the TUPE regulations. He relied on clauses 5 and 6 of the meal/rest breaks policy.

71. We agree with the Claimant. The local agreement had contractual force and transferred with his contract of employment under Regulation 4(1) and (2) (a).

72. The Agenda for change terms and conditions were nationally negotiated and are expressly incorporated into the contract of employment, which the respondent conceded.

73. Even if the policy wasn't incorporated by the agenda for change terms and the Local Agreement is said to be a separate contract, it still arises out of the employment relationship between the Claimant and the Respondent and is therefore a contract "in connection with the employment" under regulation 4 and it would have transferred even if it was not contractual.

74. To the extent that the meal rest break policy was negotiated under a collective agreement that might be unenforceable, the collective agreement would also transfer by virtue of Regulation 5 and therefore the terms of the policy would bind the Respondent as if agreed with it in the first place under Regulation 5 (a) and/or (b).

75. Consequently, in all the key possible outcomes of envisaged in this case, the meal and rest breaks policy transfers. We have found it was contractual. This now brings us onto the breach of contract claims made by the Claimant, which we will decide first for reasons that will become clear later.

**Breach of contract – the law**

76. The jurisdiction given to an Employment Tribunal to hear breach of contract claims in contained within the Industrial Tribunals Extension of jurisdiction (England and Wales) Order 1994 as follows:

> ***"Extension of jurisdiction***
>
> ***3.*** *Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*
>
> *(a)the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*
>
> *(b)the claim is not one to which article 5 applies; and*
>
> *(c)the claim arises or is outstanding on the termination of the employee's employment."*

*"**5.** This article applies to a claim for breach of a contractual term of any of the following descriptions—*

*(a)a term requiring the employer to provide living accommodation for the employee;*

*(b)a term imposing an obligation on the employer or the employee in connection with the provision of living accommodation;*

*(c)a term relating to intellectual property;*

*(d)a term imposing an obligation of confidence;*

*(e)a term which is a covenant in restraint of trade.*

*In this article "intellectual property" includes copyright, rights in performances, moral rights, design right, registered designs, patents and trade marks."*

*"**Time within which proceedings may be brought***

***7.** Subject to article 8B, an employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—*

*(a)within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or*

*(b)where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or*

*(c)where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable."*

*"**Extension of time limit to facilitate conciliation before institution of proceedings***

***8B.**—(1) This article applies where this Order provides for it to apply for the purposes of a provision of this Order ("a relevant provision").*

*(2) In this article—*

*(a)Day A is the day on which the worker concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and*

*(b)Day B is the day on which the worker concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*

*(3) In working out when the time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.*

*(4) If the time limit set by a relevant provision would (if not extended by this paragraph) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.*

*(5) Where an employment tribunal has power under this Order to extend the time limit set by a relevant provision, the power is exercisable in relation to that time limit as extended by this regulation."*

## Breach of contract – conclusion

### *Time limits*

77. In its ET3 the respondent initially took issue with the incorrect ACAS conciliation certificate number being placed with in the ET1 claim form.

78. By the time of submissions, following the case of **Clark and others v Sainsbury's Supermarkets Ltd [2023] EWCA Civ. 386.** the respondent no longer pursued that argument and conceded the breach of contract claim was in time and ACAS requirements had been met.

79. The Claimant's effective date of termination was 24 February 2022. This is confirmed by the PILON payment made as mentioned in the termination of employment letter at page 507 in the bundle and was common ground between the parties.

80. The Claimant presented his claim to the Employment Tribunal for the breach of contract claim on 23 May 2022.

81. The primary time limit for the breach of contract claim expired on 23 May 2022.

82. Consequently, all the Claimant needed to do was to undergo the ACAS conciliation process, which he did do.

83. Having gone through the ACAS certificate that did apply, and the usual time limits, we too conclude that the claim is in time with the final day for submission being 23 May 2022 when the ET1 was presented by the Claimant.

84. The Respondent conceded that it did not pay the Claimant the meal allowances and out of window break payments he claims with the exception of a few that the Claimant submitted by mistake.

85. It has pleaded no ETO reason entailing changes in the workforce as justification for being able to amend the TUPE transferred meal and rest break policy.

86. Consequently, the Respondent has no defence to the breach of contract claim and the Claimant's claims for breach of contract for meal allowances and out of window rest breaks succeeds.

87. We now move to the backdrop for the protected disclosures and alleged detriments.

**The Claimant's job role and duties post transfer**

88. The Claimant's main duties involved working as a solo ambulance driver to pick up and drop off patients who needed assistance with attending appointments due to physical or mental needs who could not get to appointments themselves without assistance. This involved following correct and safe procedures about infection control, manual handling, using equipment on the ambulance both for driving it and also for loading patients who may be using equipment such as wheelchairs, walking frames or similar walking aids, ensuring they were secure during transit and then safely disembarked when they arrived at their destinations.

89. The role also included cleaning the inside of the ambulance daily and the outside of the ambulance less frequently approximately once a week.

90. The Claimant would be given a daily itinerary of planned work from the control room of the ambulance stations and he would be expected to pick up and drop off patients at numerous hospitals in Worcestershire including Malvern, Worcester, Redditch and Kidderminster. There would also be unplanned journeys which were more urgent or were late bookings.

91. The Claimant and his colleagues used a handheld device called a PDA. This was a GPS device with a screen that acted as the ambulance crew's travel log. They would input onto the device when they had set off for a job, when they had picked up the patent and when they had dropped off the patient. This would feedback real time travel and location data to the control room in a limited way. The in depth real time data down to the level of whether the ignition of the vehicle was switched on or off was captured by another website, the name of which is not important.

92. The Respondent's PDA devices had their limitations. For example, there was no button or item to press on the device to let control know that the crew were on a break or had finished their break. There had been this feature at WMAS, but not at the respondent.

93. In addition, just because a crew had logged that they had arrived at a hospital to drop off the patient, that did not automatically man that the crew were then free for another job.

94. The way the control screens worked, in a nutshell, is jobs would be listed on the controllers screen for the crews. All controllers shared all the crews and journeys. Phone calls from crews would go to one controller and if that controller didn't answer, then the phone call would automatically transfer to another controller and so on until the calls were answered. The job started off as green for a scheduled in KPI (Key Performance Indicator) job, or purple where it looked like the KPI was not going to be met for some reason. Jobs could then be prioritised accordingly. When the crew had accepted a job, the job on the control room turned amber when the vehicle was on the road to the appointment destination. When the ambulance arrived at the destination with the patient, the job would turn grey. This meant simply that the patient had arrived. The crew were then meant to disembark the patient, get them to where they needed to be at the appointment location, make them comfortable and then contact the control room to state when they were ready for work as per the evidence of Ms. Downes. Indeed, the Claimant accepted in his evidence that this is what he needed to do and we therefore concluded that there was a great deal of trust placed in the crews whilst they were working away from base.

95. This meant that, because of these limitations and the way the communication with the control room worked, when the WMAS staff had transferred to the Respondent, and also because WMAS had only informed the respondent 4 weeks before the go live date for the contract that out of the 80 staff in scope only 10 percent of those would actually be arriving so the staff team in control and crew were virtually brand new (which was common ground), a notice was said by the respondent to have been put up in every base on the notice board and sent out with staff pay slips. This is in the bundle at pages 907 – 908.

96. This documents states that when crews are ready to work, they need to inform control. This was alleged to have been produced to proactively manage the limitations of the PDA devices when they were unable to log break times and also because the drop off log didn't always mean that the drew were then immediately ready for another pick up when they had to potentially disembark and for example push a patient in a wheelchair to their appointment building at the hospital.

97. We believe the respondent. No evidence was put forward to doubt it and whilst the Claimant suggested he had not received it, if such guidance was not in place, we believed the ambulance service provided by the respondent would have descended into unworkable confusion. Whilst the Claimant can be seen to criticize control, he does not go as far as to say that the Respondent's service was chaotic or unworkable about this issue alone.

98. We therefore believe that in the factual back drop of this case the Claimant knew this procedure and what he should have been doing.

**The claimant's base of work post transfer**

99. The Claimant was originally going be based at a site in Stourport upon Severn, which is very close to Kidderminster, close to Kidderminster hospital and close to the Claimant's home address.

100. Unfortunately, just a few weeks before the go live date for the contract and the transfer date under TUPE, the River Severn burst its banks and flooded the base. This was essentially a disaster for the respondent. It was a few weeks before taking on a big contract and one of its bass was overnight completely unusable. It therefore had to find a site quickly and go through the often tedious and lengthy process of getting a new leased property to act as a base in Stourport.

101. The Respondent found one, luckily, just up the road from the flooded base at the top of the hill rather than at the bottom. However, the previous occupiers had failed to keep up with or resolve the dilapidations to the property before they moved out. It was therefore fully accepted by the respondent, and was indeed common ground between the parties, that the new base was in a poor state and was not satisfactory.

102. In addition, to make matters worse, the contract commenced in April 2020. This was just a couple of weeks after the first nationwide lockdown for the covid-19 pandemic was announced. Infection control, was therefore on the minds of all NHS and equivalent workers.

103. Mr. Spedding in his oral evidence, explained that despite its best efforts, because the covid-19 pandemic and lockdowns had just commenced, they had extreme difficulty in getting anyone to be able to renovate the base to make it satisfactory. He explained that there were difficulties in sourcing companies to do it because they did not want to take on new work at that time.

104. Eventually, Mr. Spedding said they managed to obtain the assistance of one of the management team's husbands who was Steve Morris. He was a builder and they knew he provided an excellent building service. Unfortunately, Mr. Morris caught covid part way through renovations and was absent for weeks.

105. There was also difficulty obtaining materials he requested and it meant the renovations weren't completed at all. The Respondent had to make do with ad hoc repairs. Mr. Spedding readily admitted, to his credit, that if they had reviewed things now in hindsight they would have been better prepared and done things differently. However, they were facing a once in a lifetime event.

106. We readily accept these explanations as being entirely true and frank.

107. Mr. Spedding also stated that when the pandemic was looming and because of the flooded base, they tried to negotiate with the NHS CCG to suggest that they couldn't provide the service, however, the CCG insisted, which doesn't surprise us given the pandemic was about to hit and they would need as many services on the ground as possible. WMAS had also commenced decommissioning.

108. Because of the problems with the base, the Claimant made a number of complaints about it some of which were concede as being protected disclosures, for example protected disclosures 1 – 3 and 5. These complained about the state

of the toilets, the lack of changing facilities and the general condition of the premises.

109. As a result, despite asking for permission to use his home as his base, which was not at any point granted, the Claimant unilaterally decided to go home for his breaks. He informed the respondent about this and there were numerous emails to Mrs. Finney and others about the situation. However, significantly these conversations by email did not take place with the Claimant's direct supervisors at the base.

110. After submitting a grievance about the situation, there were numerous discussions about it. As follows:

110.1. At page 168 in the bundle, the Claimant complains to Mrs. Finney about the state of the base on 20 April 2020 (PD1). This ends with the statement from the Claimant *"Thankfully I have put measures in place which include taking meal breaks at my home address"*;

110.2. Mrs. Finney responds to the email saying that she will organise for a compliance manager to be at the base to complete a full audit at each base at page 168a in the bundle. Mrs. Finney remains silent about the home working. She said in her oral evidence this was because it was a statement rather than a question, which it was, and that in her role as National Operations Support Manager, it was not for her to get involved in day to day running of the base and control and that she had assumed that this had been approved with the Claimant's direct supervisors.

110.3. Significantly on 26 May 2020, the Claimant again emails Mrs. Finney and says *"In light of the current situation I am proposing that I be allowed to take the ambulance home and be home based. This is actually in Kidderminster where the original station was so closer to the original base."* We note the key words 'proposing that I be allowed'. Clearly by this time, the Claimant knows he is not allowed to take his vehicle home unless he has permission to do so otherwise he would not be using these words at page 196 in the bundle.

110.4. In her response some weeks later, Mrs. Finney again remains silent on the issue of the Claimant's proposal. The Claimant asks directly whether the Company is asking him to continue using the base until the issues are remedied at page 199 in the bundle. Mrs. Finney did not respond to this email at all and without explanation, which was not satisfactory.

110.5. The Claimant commences a period of sick leave shortly after this email and on 2 July 2020, he emails the new contract manager for Worcester, Veronica Balestra, to explain his situation. He explains that the lack of response from Mrs. Finney is making him feel like he is being ignored. This appears to us to be a reasonable view. He explains about the problems with the base and Ms. Balestra organises a meeting with him and HR to discuss things.

110.6. By 3 July 2020, the Claimant has stated directly in another email to Ms. Balestra that he is not prepared to work out of the Stourport base "in its current condition" and that he had asked for alternative arrangements to be made and they had not been considered an option. The email chain is at pages 212 – 221 in the bundle.

110.7. A welfare meeting took place on 9 July 2020 with Ms. Balestra and Angela Britton from HR. the Claimant attended. The base was discussed. When the Claimant mentions taking the ambulance home, Ms. Britton said she would need to look at whether the ambulance would be insured for that. Reasonably, Ms. Balestra offered for the Claimant to work out of the Worcester base with any additional travel costs being funded by the Company for a set period of time. The Claimant refused that offer.

110.8. In our view, the Claimant's refusal of that offer was unreasonable for the following reasons:

110.8.1. The situation was only likely to be temporary until the Kidderminster/Stourport base was rectified.

110.8.2. The situation was not of the respondent's making. It had been hot with a flooded base and covid all at the same time with very little warning.

110.8.3. The Claimant use to work on the Worcester contract hub pre-transfer.

110.8.4. There was only a 6-mile travelling distance change, which would have resulted in negligible additional costs and these had been offered to be paid for by the respondent for a set period of time.

110.8.5. The Respondent was trying to offer a reasonable solution to the problem in the circumstances, which was refused unreasonably by the Claimant.

110.9. The meeting ended with Ms Balestra saying she would look into the alternatives of working from home at page 225.

110.10. On 17 July 2020, Ms Balestra wrote the Claimant a letter to set out the Company's position about the base situation. Because the Claimant had declined the alternative offered, the letter stated, *"Therefore you will be expected to work out of the Kidderminster base as contracted".*

110.11. This is clearly an instruction not to work from any other base, including from home at page 229 in the bundle. In addition, the letter stated *"…you wished to base yourself from your home address. You requested to park the company ambulance outside your home at night and start your journey from your home address. This arrangement is not acceptable to the business and all company vehicles are required to be parked on the company premises overnight, and insured as such. Therefore you will be required to work out of the Kidderminster base as contracted."* This is at page 230 in the bundle.

110.12. Also of relevance here is the fact that the Claimant stated that if the Company had provided him with an instruction to continue working from the Kidderminster base in Stourport, he would have resigned. We do not accept that. Clearly here, the Claimant is being instructed to work out of the Kidderminster Base and he did not resign.

110.13. Afterwards, Ms Balestra keeps the Claimant informed of the works taking place to resolve the base dilapidations. Whilst communicating with Ms Balestra he does not then refuse to work out of the Kidderminster base.

110.14. Later on, in a grievance meeting about another issue, the Claimant is told by Ms Balestra on 27 October 2010 in response to his comment *"Would be ok, would prefer to keep the vehicle at home but previously told not an option."* She responds *"No its absolutely not an option…"* at page 296.

111. The poor state of the base the Claimant was asked to work out of, combined with the fact the Respondent erroneously considered the meal breaks policy to be non-contractual and the start of the covid-19 pandemic, were the main triggers for the dispute giving rise to this claim.

**The Claimant's protected disclosures**

112. In total, the Claimant alleged he made 18 protected disclosures to the respondent. By day two of the final hearing, the Respondent had conceded that all the disclosures relied upon by the Claimant with the exception of disclosure number 4 were protected disclosures. The Claimant then withdrew protected disclosure 4.

113. We therefore did not need to consider if any of the disclosures made were protected, we simply needed to focus on causation, detriment and dismissal.

**The disclosure to CQC PD 18**

114. Because of the issues at the base, on 4 October 2020, the Claimant reported things to CQC the regulatory body the respondent's ambulance service was registered with.

115. This triggered a focused inspection of all the contract sites in Hereford, Worcester and Kidderminster om 29 October 2020.

116. The report is in the bundle at pages 794 – 823. The report highlighted a number of infection control failures, at all three sites, and resulted in the contract being placed in special measures with an enforcement warning.

117. Verbal feedback was given to the Company according to Mr. Spedding, within a few days of the inspection.

118. A more formal written report was then sent to the respondent in draft form with the option to go back to CQC about any factual inaccuracies. The report was published on 12 January 2021.

119. The Respondent accepted the findings and put measures in place to resolve the concerns raised.

120. The Claimant has tried to argue that this report justified his decision in not wanting to transfer to the Worcester hub whilst the dilapidations were addressed at the Kidderminster site. However, in our view, he would not have known about these failings at the time of the CQC inspection and only came to know about the findings about Worcester when the report was published in January 2021. The infection control issues spotted in Worcester, were therefore not in his mind when he made the decision to decline the alternative base of work.

121. Similarly, Mr Spedding stated in his witness statement at paragraph 11 that the Claimant could not have been victimised because of the report, when his conduct

investigation commenced in December 2020 because the report was not published. However, that cannot be right either because the Company had received verbal feedback in November 2020.

**The continuing meal break issues**

122. Post transfer the Claimant essentially queried the entitlement to his breaks overlapping with his complaints about the base and proposals to be based at home. The break issues were discussed as follows:

122.1. These issues form part of the Claimant's protected disclosures namely PDs 9 – 10 and 15 – 16.

122.2. At page 170 in the bundle, the Claimant sets out his position that his breaks and allowances are contractual and his is working under protest about them until the issue can be formally resolved.

122.3. In May 2020, it was common ground that over a lunch break, the Claimant spoke with Mrs Finney about the WMAS allowances issue and informed her that he would still be putting in the expenses claims when he was entitled to them despite the Company's stance.

122.4. Mrs Finney said she understood his view and said that he'd got to do what he'd got to do, which was common ground between both witnesses. Mrs Finney stated that to try to resolve things, she would ask control to try where possible to ensure that the Claimant was given his meal break between 11.30 and 13.15 on a shift documented at page 177. Mrs Finney agreed in evidence this was said and done. We believe her.

122.5. By 18 May 2020, the Respondent had been sent a copy of the local agreement by WMAS as evidenced at page 182 in the bundle.

122.6. The respondent and Claimant tried to resolve things informally, but this had failed by 18 May 2020. The Claimant had submitted a formal grievance about it and the Respondent was looking into matters.

122.7. On 10 August 2020, the Respondent's HR Director wrote to the Claimant stating that the policy had never been considered to be contractual. They had made several attempts to gain evidence of how this policy was negotiated at WMAS, but WMAS had failed to provide them with any evidence. The Company therefore stayed with its position the policy was

non contractual and had been disapplied post transfer in accordance with the measures letter sent to all staff at page 243.

122.8. A grievance meeting was held on 12 October 2020 by Ms Balestra who was again accompanied by Angela Britton. The Respondent would look into it further at pages 272 – 273 in the bundle.

122.9. At page 286 in the bundle, on 22 October 2020, Ms Balestra writes to the Claimant with the outcome of his grievance. The grievance was rejected. The Company relies on the Agenda for Change terms and conditions and says the Claimant did not fulfil the requirements of section 18 (mentioned previously) and therefore is not entitled to any meal break payments.

122.10. Significantly, at no time was the Claimant instructed not to submit expense claims to the Company for these breaks.

122.11. On 12 October 2020, the Claimant appealed against the decision of Ms Balestra.

122.12. On 1 November 2020, the Claimant writes a letter to Mr. Spedding who conducted the grievance appeal at page 306. In his letter the Claimant goes into detail about his position and stated that he did not wish to attend a face-to-face grievance appeal meeting.

122.13. Consequently, on 9 November 2020, Mr. Spedding responds to the grievance appeal in writing. He rejects the appeal and says that in his view the Company's stance is correct. The meal break policy is not contractual and the Company was not bound by it. He concludes the applicable clauses are the agenda for change terms and conditions and that to meet the criteria for payment under those terms, he needed to prove he had spent more on the meal/meals than would have been spent at their place of work at pages 317 – 318 in the bundle.

122.14. The appeal outcome letter was the final stance of the company before the disciplinary investigation was commenced culminating in this case.

123. It is in this backdrop that the detriment claims need to be considered.

## The law – Protected disclosure detriments

124. Workers and employees are protected from being subjected to a detriment if they make a protected disclosure under section 230 (3) Employment rights Act 1996.

125. The Respondent conceded all bar one of the protected disclosures which was then withdraw (PD4).

**Knowledge of the protected disclosure**

126. For a person to be liable for detriment or dismissal as a result of a worker making a protected disclosure, they need to know not only of the fact of the disclosure but also at least some of the content of it following **Nicol v World Travel and Tourism Council and others [2024] EAT 42.**

127. It is also the case that if a decision maker is kept deliberately in the dark about the content of a disclosure and a reason for dismissal is invented, then the tribunal can penetrate through the invention after **Juthi v Royal Mail Group Limited [2020] ICR 731.**

128. The employer also does not need to know or believe that the disclosure was protected to be liable for adverse behaviour as a result of it. The first question is whether the decision maker knew of the content of the disclosure of information (not that it was protected), requiring a subjective analysis of what the decision maker knew. Then it the tribunal should determine if that disclosure was protected. If it was a protected disclosure then so long as the disclosure was a material influence on the decision maker's decision, that will fix both the decision maker and Respondent with liability after **Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401.**

**Burden of proof**

129. Following ***Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT*** and **Blackbay Ventures Ltd v Gahir [2014] IRLR 416, EAT**, the burden of proof is on the Claimant to prove they made a protected disclosure.

130. In **Korashi** EAT stated:

> '*As to any of the alleged failures, the burden of proof is upon the Claimant to establish upon the balance of probabilities, any of the following, (a) there was in fact, and as a matter of law, a legal obligation or other relevant obligation on the employer in each of the circumstances relied on; (b) the information disclosed tends to show that a person has failed, is failing, or is likely to fail to comply with*

*any legal obligation to which he is subject.*' The Court continued, '*Belief seems to us to be entirely centred upon a subjective consideration of what was in the mind of the discloser. That again seems to be a fairly low threshold. No doubt because of that Parliament inserted a filter which is the word 'reasonable'.*

131. It is for the Claimant to show that he was subjected to a detriment by an act or a deliberate failure to act by his employer or co-worker. The claim would only be made out if the Claimant was subjected to the detriment on the ground that he had made the protected disclosure.

**Initial burden**

132. The Court of Appeal decision in **Jesudason v Alder Hay Childrens NHS Foundation Trust [2020] IRLR 374** stated '*It is now well established that the concept of a detriment is very broad, and must be judged from the view point of the worker. There was a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment*'.

133. Detriment has been held to be analogous with placed at a disadvantage after **Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230** albeit under the Equality Act instead of the Employment Rights Act 1996.

134. So, summing these cases up an employee is subjected to a detriment if a reasonable employee might consider the relevant treatment to place them at a disadvantage from their viewpoint.

**The shifted burden**

135. Section 48(2) of the Act states that the onus is then on the employer to show the ground on which the act or deliberate failure to act is done. The 'on the ground that' test focuses on the relevant decision-makers mental processes. The test is not satisfied merely because there was some relationship between the protected disclosure and the detriment complained of, or because the detriment would not have been imposed but for the disclosure (**London Borough of Harrow v Knight [2003] IRLR 140**).

136. If a detriment is made out it is for the employer to show that the reason for the treatment was in no way whatsoever materially influenced by the protected disclosure. The relevant test is whether the protected disclosure materially influenced, in the sense of being more than a trivial influence, the treatment of the Claimant (**Fecitt & Others v NHS Manchester [2011] IRLR 111**).

**Causation**

137. Like in discrimination law, the key question is what was the real reason for why the decision maker treated the person making the disclosure in an adverse way after **Kong v Gulf International Bank UK Ltd [2022] EWCA Civ 941.** Here the court of appeal said at paragraphs 59 and 60:

*"59 The statutory question to be determined in these cases is what motivated a particular decision-maker; in other words, what reason did he or she have for dismissing or treating the complainant in an adverse way. This factual question is easy to state; but it can be and frequently is difficult to decide because human motivation can be complex, difficult to discern and subtle distinctions might have to be considered. In a proper case, even where the conduct of the whistle-blower is found not to be unreasonable, a tribunal may be entitled to conclude that there is a separate feature of the claimant's conduct that is distinct from the protected disclosure and is the real reason for impugned treatment.*

*60 All that said, if a whistle-blower's conduct is blameless, or does not go beyond ordinary unreasonableness, it is less likely that it will be found to be the real reason for an employer's detrimental treatment of the whistle-blower. The detrimental treatment of an innocent whistle-blower will be a powerful basis for particularly close scrutiny of an argument that the real reason for adverse treatment was not the protected disclosure. It will "cry out" for an explanation from the employer, as Elias LJ observed in [**Fecitt v NHS Manchester [2011] EWCA Civ 1190, [2012] IRLR 64, [2012] ICR 372],** and tribunals will need to examine such explanations with particular care."*

**Adverse treatment of detriment or dismissal**

138. A Tribunal must determine the issue of adverse treatment as a result of whistleblowing in the following way following **Blackbay** with the relevant factors quoted given the respondent has conceded the disclosures**:**

*"98 It may be helpful if we suggest the approach that should be taken by employment tribunals considering claims by employees for victimisation for having made protected disclosures.*

*1. Each disclosure should be identified by reference to date and content.*

*7. Where it is alleged that the claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be*

*ascertained by direct evidence the failure of the respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act."*

## Findings of fact about the alleged detriments

### The disciplinary investigation

139. In Late November 2020, a new contract manager Fay Downes had taken over from Veronic balestra who had now left the respondent's employment.

140. On 1 December 2020, according to the unchallenged statement of the Claimant at paragraph 219, he had a conversation with Jack Alexander (Hereford Contract manager) and Liz Kelly complaining that he had not had a break the day before on 30 November 2020. He said:

*"I spoke to Jack Alexander at the Stourport base on the evening of the 1st December to complain that I had not had a meal break at all on the previous day. Liz Kelly stood to the side as I spoke to him . He was absolutely clear that I was to stop and go for a break. He said that it was dangerous to work without a break. He said that if I had any problems, I was to get control to speak to him. He went on to say "What are they going to complain about - the fact that they don't want to give you a break." He added that it was dangerous because being tired put me and my patients at risk. He said that I was unable to legally work 6 hours without being given a break. He continued to say that they had been "given the order." But this clearly had not filtered through to the control room staff."*

141. On 1 December 2020, the Claimant sent two text messages to his supervisor Liz Kelly, asking for him to be paid for a half an hour meal break that he said he did not have one the day before namely 30 November 2020. The text chain is at pages 327 – 333 in the bundle. The text message said:

*"Dear Liz/Luke. I had no meal break at all yesterday. I will be booking half an hour as overtime because my breaks are unpaid. If there are any issues with this the please refer me to your new manager. Regards, Chris"*
and

*"Would you please confirm that you are willing to put 0.5 hours onto GRS for yesterday before it goes to payroll. Regards Chris".*

142. Ms Kelly responded by saying *"Hi Chris I was just checking your break yesterday and it was allocated to you at 13 and 1330?"*

143. In response the Claimant said *"There was no break allocated and there was nothing on PDA. No request was made to me by control. My patient that was a car walker was in at 13.00 and the pick up was 13.15, the fact that she was late made no material difference. I did not have lunch yesterday and I took her back when she came ready. AN I spoke to Gary in the morning to highlight that I had food to heat for my lunch. I don't carry a microwave around with me Liz."*

144. She responded *"you are on about yesterday Chris the 1st"*

145. The Claimant replied *"you mean Monday. Sorry, I thought you wer querying the half hour I have asked for."* In response, Ms Kelly says *"You said you hadn't had a break yesterday. Are you saying about 30 min for yesterday?"*

146. The Claimant then messages *"I messaged you an Luke about Monday."* Ms Kelly responded, *"I will get bk to you tomorrow as I'm having to look into this with HR regarding the rule".*

147. On 8 December 2020 as per para 11 of Ms Downe's statement, Ms Kelly then looked into the claim by looking at the GPS data for his ambulance and other data on the PDA and scheduling systems. Upon looking into this situation, it soon became evident that:

    147.1. The Claimant was regularly taking his vehicle home.

    147.2. He was submitting claims for payment that did not appear to be warranted and

    147.3. On the date of the claim she was looking into the Claimant seemed to have taken two breaks.

    147.4. It also appeared that these irregularities in location may have caused delays in patients being picked up.

    147.5. The Claimant was also making expenses claims for outside window lunch breaks.

148. The Claimant then went on a period of sick leave and did not return to work until 5 January 2022.

149. The investigation into the irregularities discovered was conducted by both Fay Downes and Liz Kelly as confirmed by Ms Downes' oral evidence.

150. On 5 January 2022, Ms Downes took the decision to suspend the Claimant.

**Detriment 1 – the suspension decision**

151. The Claimant alleges that this is the first detriment he suffered as a result of making the 17 protected disclosures conceded by the respondent.

152. Ms Downes made the decision to suspend the Claimant.

153. We therefore need to consider what Ms Downes knew at the time she made that decision. We have concluded as follows:

153.1. Ms Downes said in her evidence that her start date post dated all of the protected disclosures relied upon by the Claimant. That is correct. This was not disputed by the Claimant.

153.2. She claims that she knew nothing about the disclosures until she read the bundle for the tribunal back in September 2023 when the first final hearing was listed to take place. Ms Britton was not called as a witness, and Ms Downes' statement is conspicuous by its lack of detail about the investigation and how she obtained information about the Claimant's grievance processes about his meal breaks.

153.3. We reject that evidence for the following reasons:

153.3.1. Whilst Ms Downes investigation report was concluded by approximately 2 November 2021, which appears to be the latest information date recorded within it at page 566 in the bundle, it talks about the following facts:

153.3.1.1. It stated *"A copy of Chris Lloyd's expenses claims submitted for having his lunch break outside of his assigned lunch break window of 11.30am to 1.15pm. These timings were based on what he used to work during his employment with WMAS however Chris has been advised on multiple occasions including during the grievance and .grievance appeal process that the WMAS meal break policy did not transfer under TUPE. Chris was advised that E-zec do not have a meal break policy, we do not work to set meal break*

*windows nor do we pay any additional money for having late lunch breaks."*

153.3.1.2. We think this information will have come from Angela Britton HRBP who attended all of those meetings because she authorised the investigation at page 565 in the bundle. We therefore conclude that Ms Downes would have known at the time she wrote the investigation report about disclosures 9, 10, 15 and 16. Ms Britton was copied into disclosures 9, 10 and 15 and the other occasion was discussed with Ms Downes' direct reports. Indeed, with PD16, Liz Kelly assisted Ms Downes with the investigation into the very same conversation had with Ms Kelly which triggered the investigation Ms Downes was tasked to conduct.

154. However, that said, looking at the date of the suspension being 5 January 2021, as it was very early in the investigation, at the time the suspension decision was made combined with the fact that the suspension letter at page 333C states that one of the allegations was *"fraudulent submission of an expenses claim"* in the singular, we conclude on balance that this is simply referring to the issue that was raised with Liz Kelly about 30 November 2020 break not being provided.

155. We believe the other issues were identified later on 8 January 2020 which triggered Angela Britton's involvement.

156. Therefore, at the time of suspension, Ms Downes knew of PD16.

157. The Claimant only mentions PD18 as the possible disclosure that influenced the suspension decision.

158. We must then decide whether PD16 and/or PD18 was the reason for the suspension. We conclude it was not.

159. The weight of the evidence here suggests that the trigger for the suspension was apparent irregularities initially discovered by Liz Kelly when she provisionally reviewed the last month's data on its real time tracking website. That identified irregularities and that triggered the suspension as soon as the Claimant returned to work on 5 January 2020.

160. Ms Downes was clear in her evidence that the suspension was triggered by the results of the initial investigation and the Claimant provided no evidence to disprove that. There is simply insufficient evidence to show that disclosure 16 affected Ms Downes' mind in any way.

**Detriment 2 – False allegations in the suspension confirmation letter dated 5 January 2021**

161. The suspension letter lists the following allegations at page 333C:

161.1. Fraudulent completion of your timesheet on numerous occasions in relation to claiming for hours you were not entitled to.

161.2. Fraudulent overtime claim in relation to claiming for overtime you were not entitled to.

161.3. Fraudulent submission of an expenses claim.

161.4. Using a company vehicle without permission in relation to taking the vehicle home.

161.5. Bringing the company into disrepute regarding picking patients up late and compromising the company's reputation with our clients.

162. The letter was drafted and sent out by Ms Downes.

163. The Claimant alleges that these were false claims and that the false claims in the suspension letter dated 5 January 2024 were because he had disclosed his concerns to CQC (PD18) as per paragraph 85 of the Grounds of Complaint.

163.1. Against that allegation we make the following factual conclusions:

163.1.1. Ms Downes said in oral evidence, that she did not become aware of the warning notices or outcome of the CQC report until it was published on 12 January 2021. No evidence has been led or documents referred to, which cause us to doubt what Ms Downes says about her knowledge of the CQC report.

163.1.2. Whilst some of the allegations were false (see below under detriments 3 and 4) they weren't false because of protected disclosures 16 and/or 18.

**Detriment 1 and 2 - Outcome**

164. Consequently, given these findings of fact, the allegations at paragraph 4.3.1 and 4.3.2 of the list of issues fails on the facts.

165. Applying **Nicol,** Ms Downes had no knowledge of disclosure 18.

166. Applying **Kong,** the real reason why Ms Downes made the allegations in the letter, is because she truly believed that these were allegations the Claimant had potentially committed even if that belief was mistaken. He decisions were not because of any protected disclosures.

167. Applying **Fecitt,** PD 18 could not have influenced Ms Downes' mind at all and PD16 did not materially influence Ms Downes' mind at all. It was the possibility of the break claim being false in PD16 that influenced part of Ms Downes' decision to suspend the Claimant.

**Detriment 3 - False allegations during the disciplinary investigation and Detriment 4 – the outcome of the investigation report**

168. Here the Claimant relies upon paragraphs 89, 90, 103 and 110 of his Grounds of Claim. These refer to the investigation meetings on 29 January 2021 and 14 October 2021. Paragraph 110 refers to the investigation report.

169. Here, because the detrimental treatment is alleged to be the making of false allegations, we need to look into whether the allegations made actually took place. This is not the same test as for unfair dismissal. For ordinary unfair dismissal purposes, we are not to consider what actually happened, we are to consider whether the decisions makers had a genuine belief of guilt based upon reasonable grounds. It makes no difference if the misconduct alleged never actually in fact took place. We have proceeded accordingly and discuss unfair dismissal later on.

170. On 29 January 2021, an investigation meeting into the allegations being investigated. The notes of the meeting are in the bundle at pages 339 – 353.

171. In the meeting the following allegations were discussed:

171.1. Taking the ambulance home during the day for breaks when they should have been at the Kidderminster base.

171.2. Taking too long for meal breaks.

171.3. That the Claimant had been late for patients.

172. The investigation notes from 14 October 2021 are in the bundle at pages 432 – 437. The same issues were discussed just in a bit more detail.

173. Although fraud appears in three of the allegations in the suspension letter, fraud is not verbally alleged at the investigation meetings by either Ms Britton or Ms Downes, it is the Claimant who discusses fraud. Other than on the invite letters and written documents, at no time during the investigation meetings is the Claimant accused of being fraudulent.

174. Therefore, taking each of these allegations in turn, we conclude as follows:

174.1. The Claimant admitted at the time that he was taking his ambulance home for breaks. He did so without permission and was instructed to take his breaks at one of the Company's bases.

174.2. For example at page 433, the Claimant stated in that investigation meeting *"since April 2020 I have gone home every single day".* In addition, the Claimant as instructed on at least two separate occasions by Veronica Balestra that he must not take the ambulance home because it will not be insured. We easily find that this allegation was not a false one.

174.3. Then we come to the allegation that he had taken too long for meal breaks. The Claimant says he did not know he had to contact control to tell them he was free for another job because he did not receive the guidance document at pages 907 and 908 about this. We doubt that.

174.4. When the Clamant was questioned about this issue in cross examination he said that calling control to let them know you were ready to work after a job didn't happen at WMAS and there was no policy about it at the Respondent. We reject the Claimant's evidence here. It is plainly obvious that if you are working solo with a guidance document and when the meal breaks policy the Claimant says he was working to says *"6.5 staff who choose to leave their allocated break location for the duration of their break are responsible for ensuring they return to work promptly for duty on the expiry of the break period"* then he knew that is what he should have done and it was in writing.

174.5. In addition, at the time of the investigation, the Claimant stated when asked: *"FD: Went home for 3 occasions and over 100 mins. CL: Same as I did at West Mids, relax, watch tv."* We therefore conclude that the Claimant was going home to watch TV and relax without informing control what he was doing. He was therefore getting extra break time.

174.6. What's worse is, the Claimant was informing control that he was going to "Kidderminster" when he was in fact going home. He did not use the word 'home' to control, and we have already seen that the Stourport site was known by control as the Kidderminster base. The Claimant knew that, and we reject any evidence he gave to the contrary. The Claimant therefore, in our judgment, deliberately misled control about his whereabouts and was therefore disingenuous. He was essentially using "double talk" because on the one hand the Claimant knew he was going home to Kidderminster and he knew, if he said to control he was going back to Kidderminster, the Respondent would think he was referring to the Kidderminster base. This allegation was therefore not a false one.

174.7. Then there was the allegation raised that the Claimant had been late for picking up some patients. The Claimant's case, which was accepted by the respondent for some of the allegations raised, was that there was good reason for being late to some patients.

174.8. However, on other occasions, because the Claimant was at home when he should have been at the Worcester base after a training course. Again, he had chosen to go home for his break without permission without informing control which meant control thought he was in Worcester. They therefore allocated him a job near to Worcester after the course had finished, yet the Clamant was in Kidderminster. This is discussed at page 345 in the bundle. This delayed the pick-up.

174.9. This is only one example, but in our judgment, the allegation is factually made out. This too was in fact not a false allegation at all. No mention of disrepute is made in these meetings by the Respondent, the Claimant raised it.

175. Then we come onto the investigation report as the final part of this allegation. The report raises again the main charges, but were any of them false charges?

176. We conclude that the allegation of the Claimant somehow bringing the Company into disrepute was a false allegation in part. Now let us be clear, we do not mean fabricated, we mean there was no evidence supporting it at any material time, so the allegation was incorrect. There was evidence of the first part of that allegation, namely the Claimant sometimes picking up patients late. However, we have been taken to no evidence whether in statements or documents or otherwise, showing that at any point the Claimant brought the Respondent into disrepute for being late for patients.

177. With the other allegations, the Claimant conceded at the hearing that he had made some mistakes on at least one of his expenses claims and accepted that at investigation stage that might have been viewed as possible fraud.

178. Ms Downes wrote a detailed report with supporting evidence attached to it. She decided that all the allegations had a case to answer and should go forward to a disciplinary meeting at page 576 in the bundle.

179. By the time the investigation report was concluded, we find that Ms Downes would have known of the content of PDs 9, 10, 15, 16 and 18. By this time she would have been briefed fully by Ms Britton about all the break issues. There is insufficient evidence that she knew of the fact of the other disclosures.

180. Despite finding one allegation was false, again, we do not doubt Ms Downe's evidence that she made the decision to put forward the charges and recommend they go to a formal disciplinary meeting was because of a real belief that the Claimant had a case to answer for all the allegations even if that belief was mistaken.

**Detriments 3 and 4 - outcome**

181. Applying **Jesudason,** taking the false allegation we found were made in the investigation report from the Claimant's point of view, this was clearly a detriment to him. He was reasonable to think this was disadvantageous to him and unreasonable.

182. However, applying **Kong**, the real reason for Ms Downes' decision was her genuine belief that the allegations against the Claimant were potentially correct.

183. Applying **Fecitt,** the disclosures did not materially influence the decision to make the allegations or suggest they be considered at a disciplinary meeting. There is insufficient evidence to support that claim.

184. Consequently, the allegations at 4.3.3 and 4.3.4 fail.

**Detriment 5 – failure to consider mitigation at investigation stage and obtaining selective witness statements**

185. During the investigation meetings that have already been discussed above in January and October 2021, the Claimant mentioned a number of points that could be considered to be mitigation against the allegations if they were proven against the Claimant:

185.1. In all of the investigation meetings and since he was placed at the Kidderminster base, the Claimant argued that he could not work from the Kidderminster base because of the state of its repair, and it was not clean. He considered it to be an infection control risk within the context of the coronavirus pandemic just starting. Whilst the Claimant actively avoided saying he was working from home, he made no secret of the fact he wasn't happy with the state of the Kidderminster base's cleanliness, repair or general workability.

185.2. He also mentions in response to the expenses claims for out of window breaks and meal allowances that he is standing by what he considered to be his terms and conditions from WMAS that he says transferred across with him. He has made no secret of this.

185.3. The Claimant also mentioned on a number of occasions that there was no meal break policy at the Respondent which meant there were no clear rules about breaks.

185.4. He also put forward explanations for why he says the late pick up of a patient on Worcester following a training session. He stated that the patient was ready whilst he was on the training course and that meant that the patient would have been picked up late anyway, regardless of the Claimant going home for a meal break.

186. When looking at the report, some of these explanations are mentioned in it such as the Claimant's position on meal breaks (at page 568). However, in the box entitled *"Mitigating factors"* there is one word 'none' at page 575 in the bundle.

187. Ms Downes was questioned about this and she said very clearly that the reason why she had put none in the box was because she had been advised by HR that there were no mitigating circumstances.

188. When considering what influenced Ms Downes' mind, it is significant that she said she had received no training for how to conduct investigations at the Respondent. We believe her because there is no reason not to, counsel did not re-examine her on this point and made no submissions about it. Consequently, if she had no training about these things, it is likely that she would have taken HR's advice when it said there were no mitigating circumstances.

189. Of course, in our view for HR to have advised her in this way went outside their remit. It was not for HR to determine what was considered by the investigation

manager to be mitigation and what isn't. HR should limit their remit to advice about procedures, consistency and best practice. It is not for HR to steer the decision makers towards any decision or sanction or to advise what decisions must be made about which pieces of evidence should be considered or discounted.

190. However, given that we have no reason to disbelieve Ms Downes about what HR advised her to do, clearly, she made the decision to discount possible mitigation from the Claimant because she was advised to by HR, not because of any protected disclosures.

191. Coming onto the statements, the Claimant alleges that the information taken from the witnesses in response to questions asked was selective and did not ask about or include evidence of mitigation the Claimant put forward at paragraph 111 of his grounds of complaint page 56 in the bundle.

192. If we look at the allegations, the information these witnesses were likely to be of assistance with was whether the supervisors were either aware of, or gave permission for, the Claimant to take his break from home, have longer breaks than was allowed, whether he called control to tell them he was on standby waiting for a job or that his break had finished, or in a more general sense about what was or was not the usual ways of working for all crews.

193. During the investigation, the Claimant stated his work practices about taking breaks and going home were done with the full knowledge of the supervisors. Consequently, Ms Downes decided to interview those witnesses and she effectively asked both open and closed questions of the witnesses as part of the investigation. The questions she asked the witnesses were in response to the points put forward by the Claimant to investigate his points further.

194. Consequently, in our judgment, the reason why Ms Downes asked the questions she did and whey she spoke to the supervisors about these questions was because of what the Claimant raised in the investigation meetings. It is not because of the protected disclosures the Claimant made.

**Detriment 5 - outcome**

195. Applying **Kong,** there is insufficient evidence to suggest that the real reason why Ms Downes interviewed those particular supervisors and asked those particular questions is because of the points put forward by the Claimant in his defence

against the allegations and because he said he had gone home with full knowledge of the supervisors.

196. The selection of the questions and who was interviewed were not done because of any protected disclosures. Applying **Fecitt,** the protected disclosures in no way whatsoever influenced these decisions.

197. This means that all the Claimant's detriment claims fail and are dismissed.

198. As a result of finding that none of the detriments alleged were either made out at all on the facts or were done because of protected disclosures, whether they were in time or not is academic.

## AUTOMATIC AND ORDINARY UNFAIR DISMISSAL – THE LAW

### Automatic Unfair Dismissal

199. Section 103A of the Act states '*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*'.

200. The statutory question is what motivated a particular decision maker to act as they did? (**Kong**).

201. This can be the reason of the dismissing officer after **CLFIS (UK) Ltd v Reynolds [2015] IRLR 562**, but the inquiry may be a broader one **Royal Mail v Jhuti [2019] UKSC 55** if there is a hidden improper motive of a person senior to the decision maker so that knowledge is imputed to the innocent decision maker to prevent injustice.

**Burden of proof**

202. The reason or principal reason for the dismissal means the employer's reason. The burden of proof lies with the employer to prove the principal reason for the dismissal. However, the Tribunal must find the real principle reason and is therefore not limited to find that the principal reason is only within the list of reasons put forward by the Claimant and/or Respondent.

203. On the issue of the burden of proof the Court of Appeal stated in **Kuzel v Roche Products Limited** [2008] IRLR 530:

> *'The Employment Tribunal must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not*

*show to the satisfaction of the Tribunal that the reason was what he asserted it was, it is open for the Tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that if the reason was not that asserted by the employer, that it must have been for the reason asserted by the employee. That may often be the outcome in practise but it is not necessarily so. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for the dismissal was not that advanced by either side. In brief an employer may fail in its case for fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason'.*

204. A case of whistleblowing dismissal is not made out simply by a 'coincidence of timing' between the making of disclosures and termination (**Parsons v Airplus International Ltd [2017] UKEAT/0111/17**).

**Ordinary unfair dismissal**

205. The relevant law of unfair dismissal for this case is summarised in section 98 of the Employment Rights Act 1996, which says:

***"98 General***

*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

*(a)the reason (or, if more than one, the principal reason) for the dismissal, and*

*(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

*(2) A reason falls within this subsection if it—*

*(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

*(b)relates to the conduct of the employee,*

*(c)is that the employee was redundant, or*

*(d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

*(3) In subsection (2)(a)—*

*(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*
*(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*

*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

*(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

*(b)shall be determined in accordance with equity and the substantial merits of the case.*

*(5) ……*
*(6) Subsection (4) is subject to—*
*(a)sections 98A to 107 of this Act, and*
*(b)sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action)."*

206. The Tribunal must also focus on the following key principles:

206.1. The Tribunal must focus on the reasonableness of the decision, based upon what the Tribunal finds the reason for the Respondent dismissing the Claimant was **(Beaumont v Costco Wholesale Limited EAT UKEAT/0080/15/DA).**

206.2. The Tribunal should decide whether the action or inactions of the Respondent, including the dismissal, fell within the band of reasonable responses open to a reasonable employer. This includes all procedural steps and decisions **(British Leyland v Swift [1981] IRLR 91** and **Sainsburys Supermarkets limited v Hitt [2002] EWCA Civ 1588).**

206.3. When considering any decisions made, the Tribunal must focus on what information and circumstances were present and in the mind of the dismissal and appeal managers at the time they made their decisions **(West Midlands Coop v Tipton [1986] IRLR 112 HL)**

206.4. The Tribunal must also not fall into the trap of substituting its view for that of the disciplinary and appeal decision makers, unless there is only one possible outcome from the application of the relevant legal principles to the case **London Ambulance Service v Small [2009] EWCA Civ 220).**

206.5. Recently in **Vaultex UK Limited v Bialas UKEAT [2024] 19,** this issue was revisited. The tribunal should approach identifying the reason for the dismissal on the basis of *"'the set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee', to adopt the timeless definition of the reason for dismissal formulated by Cairns LJ in **Abernethy v Mott, Hay and Anderson [1974] ICR 323"*** as per the court of appeal in **Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401** discussed in **Vaultex.**

206.6. In a conduct case, the Respondent must also prove that it's decision makers at the time the dismissal or appeal outcome decision was made, had a genuine belief of guilt, based upon reasonable grounds after conducting as sufficient an investigation as was reasonable in all the circumstances **British Home Stores Limited v Burchell [1978] IRLR 379.**

206.7. If the Burchell test is overcome by the Respondent, the burden of proving whether the dismissal was fair under section 98 (4) is neutral **Boys and Girls Welfare Society v McDonald [1996] IRLR 129.**

206.8. It is important that at the disciplinary meeting stage the allegations made against the employee are known. The Employer must put the allegation clearly to the employee so that on a fair and common sense reading of the relevant documentation, the employee could be expected to know what charges he or she has to address. This duty is not satisfied if the Employee has to speculate what may be in issue and what may not be **Sattar v Citibank NA [2020] IRLR 104.**

206.9. Whether misconduct is labelled as gross misconduct for the purposes of determining if a dismissal is fair or unfair under the Employment Rights Act 1996 is not relevant. The question is not whether the dismissal was wrong or wrongful in any way, that is a common law concept. The correct question is whether the dismissal was unfair in accordance with section 98 of the 1996 Act, **Weston Recovery Services v Fisher UKEAT/0062/10/ZT.**

206.10. A single serious act of misconduct can be a sufficient reason to terminate an employee's contract of employment as can a series of acts that would not necessarily amount to gross misconduct either individually or

cumulatively. It is whether the totality of the conduct was a sufficient reason to dismiss that is relevant not whether the misconduct was "gross" **Beardwood Humanities College Governors v Ham UKEAT/0379/13/MC.**

206.11. When considering the fairness of a disciplinary procedure, the Tribunal must look at the whole process from start to finish and decide whether the procedure was unfair overall **Taylor v OCS Group Limited [2006] ICR 1602.**

206.12. In a case of a misconduct dismissal, the Tribunal should decide what the Respondent thought the facts were after the investigation, the decide whether those grounds for belief in the misconduct were reasonable after **The Post Office (Consignia plc) v Burkett [2003] EWCA Civ 748.**

206.13. We also think that it is important in the context of this case to consider the case of **Robinson v Tescom Limited UKEAT/0567/07/JOJ.** In that case, it was found that where a respondent had thrust a unilateral variation of contract onto a Claimant, the Claimant had agreed to work under it albeit under protest, he had refused to comply with instructions of the Respondent under the new contract and was dismissed as a result, that dismissal was found to be within the band of reasonable responses. Effectively it found that the Claimant's options in those circumstances were to agree to the contract and work under it without complaining, resign and claim constructive unfair dismissal, refuse to work under the contract and inform the respondent that it should do what it thinks necessary in response or to stand and sue by claiming a breach of contract in the county court whilst still employed but continue to work under the contract.

206.14. Similarly, we think that the principles in **A v B Limited [2003] IRLR 405** as cited in **Yeung v Capstone Care Limited [2013] 0161/13/1302** also need to be considered because of the allegations of fraud. In **A v B**, the EAT decided that when conducting an investigation that involves disputed allegations of serious criminal activity, the standard of reasonableness for the investigation and the gravity of the effect of upholding those allegations must be taken into account when assessing the reasonableness of the investigation. In addition, the case made findings that the same factors will also need to be considered if relevant evidence has not been provided to an employee accused of serious misconduct.

206.15. However, that said, an employer does not need to investigate every line of enquiry put forward by an employee. It only has to behave reasonably

in the circumstances and make decisions within the band of reasonable responses **Shrestha v Genesis Housing [2015] IRLR 399.**

206.16. When considering procedural unfairness and substantive unfairness, these issues are to be considered together to see whether a decision to dismiss the Claimant was fair or not and whether the reason for the dismissal as put forward by the Respondent was a sufficient reason to dismiss. If a flaw is identified in the reasoning or process followed by R, which in virtually all cases there will be, the Tribunal has to assess whether that flaw or combination of flaws is significant enough to make the decision to dismiss an unfair one falling outside the band of reasonable responses **Sharkey v Lloyds Bank Plc EATS 0005/15.**

206.17. Where multiple reasons for the dismissal are put forward as being reasons for the dismissal, in identifying whether the dismissal was fair or unfair, the Tribunal must consider the totality of the reasons of the dismissal as a composite and if any one of those reasons was unreasonable for example if the investigation into it was seriously flawed, that must be taken into account. Simply finding that the process for the other allegations was fair and therefore the overall decision to dismiss was fair without due regard to other reasons being potentially unfair was an error of law. The tribunal should have considered not what it would have been reasonable and fair for an employer to have thought, but what the employer actually thought and whether, having regard to the totality of its reasons, dismissal was reasonable **Robinson v Combat Stress UKEAT (2014) 0310/14**.

206.18. However, if an employer looks at each ground independently and would have dismissed for one serious ground alone but disregarded the others, then such a dismissal should be looked at by the Tribunal as the employer looked at it and from the decision the employer made and why **Tayeh v Barchester Healthcare Ltd 2013 ICR D23, CA.**

206.19. We also think it relevant that we consider the decision on **Ramphal v Department for Transport UKEAT/0352/14/DA.** This case decided that human resources involvement should be limited to advice about law, procedure, clarity and ensuring that all relevant matters have been addressed.

**Findings of fact – unfair dismissal**

207. We refer to the timeline of events decided for the detriment claims above including the events of text messages on or about 1 December 2020, which triggered the disciplinary investigation.

208. After sick leave, on 22 December 2020, the Claimant was due to return to work.

209. Upon notifying the Respondent of this, he was provided with his rota for the Christmas period.

210. The Claimant was surprised and upset to notice that he had been rota'd on to work Christmas day upon his return to work. In our view, this was understandable. The Claimant had been on sick leave since on or around 4 December 2020, no prior discussion about Christmas arrangements had taken place and he was effectively given 2 days' notice of having to work on Christmas day when he had already made plans for Christmas.

211. The Claimant phoned to speak to Ms Kelly and was eventually handed to Ms Downes. It was suggested by s Downes, given how upset the Claimant was, that he might not be well enough to return to work. The Claimant agreed.

212. Following the call, the claimant went to see his GP who signed the Claimant off for a further two weeks. The claimant emailed Ms Downes with a copy of the footnote to that effect at page 333A in the bundle.

213. On 4 January 2021 the claimant emailed Ms Downes again, informing her that he was due to return to work in a few days' time I'm notifying her, he says out of courtesy, that he had started the early conciliation process about the withholding of subsistence payments for meal breaks taken away from base or out of window at page 333B in the bundle.

214. On 5 January 2021, we remind ourselves that the Claimant was suspended. The claimant says he was suspended almost immediately upon entering the Kidderminster base, where he was met by Ms Downes and handed the suspension letter to read there and then at paragraph 228 in the bundle. This version of events is not challenged by the respondent.

215. 6 January 2021, the claimant emailed Ms Downes to inform her he had again gone to see his GP and enclosed a fit note. He claimed the suspension had caused a further negative impact on his depression at page 334 in the bundle.

216. On 19 January 2021, the Claimant was invited to an investigation meeting listing the same 5 allegations as before at page 336 in the bundle. The Claimant was offered the right to be accompanied at the meeting.

217. On 29 January 2021, the first investigation meeting took place led by Ms Downes and she was assisted by Ms Britton. The Claimant attended with his union representative Kirsty Hackney present via video link.

218. The investigation meeting needed to be ended early, because the Claimant became distressed.

219. Later that day, the Claimant emailed Ms Downes to say he had looked into one of the concerns about him being late for a client and had the following to say:

*"Dear Fay*

*I have now had the opportunity to look at one of the numerous concerns that you have raised today regarding journey times/delays. This relates to the gentleman that was 10 minutes fate into the Covid Swab pod at WRH. At the time of asking I was unable to recall the circumstances around this journey.*

*Thankfully I am now able to recall what happened.*

*The reason that this man was late is because I spent a significant amount of time at his property because of the appalling state that it was in and he had fallen over his cluttered belongings. I had a lengthy conversation with Harry in Control about whether he should be taken in given the fact that he had been drinking and was living in squalor. I suggested a safeguard with control and discussed this with the patient, to which he agreed. I also discussed the overriding objective of his need to go to hospital as he was having an operation in a few days. I also had the return journey for him. So it was agreed to proceed as he had not injured himself and he was already on the ambulance before I determined that he had been drinking. I also requested that his mobility be changed to a C2 (2 person) going forward.*

*Upon my return to Kidderminster I did a safeguard referral for him through the E-Zec safeguarding line.*

*I trust there will be 2 phone records for that day (one to control and one to the safeguarding line) which will confirm that the delay was a welfare issue and I had spoken at length with control before taking this gentleman to hospital.*

*This was one of 2 or 3 safeguards that I have done in my time with E-Zec."*

220. On 1 February 2021, the Claimant emailed again to request what conversations were held with control. To this email he received a response from Ms Britton that the information would be looked into as part of the ongoing investigation at pages 354 – 356 in the bundle.

221. At this point we note that we have seen no statement from "Harry" in control about this. No transcripts have been disclosed about calls to control and we were not asked to listen to any recordings about any allegations.

222. On 2 February 2021, the claimant was signed of as unfit for work until the 29 March 2021 for a depressive disorder.

223. On 4 February 2021, the Claimant was invited to a reconvened investigation meeting at page 358 in the bundle.

224. On 8 February 2021, the Claimant's union representative emailed on his behalf to say he would not be able to attend the investigation meeting as the Claimant's GP had advised against it. The company offered an occupational health appointment, use of the Employee Assistance Programme ("EAP") and sent a consent form for the Claimant to complete at pages 360 – 362.

225. On 22 February 2021, Ms Britton confirms the Claimant's next OH appointment will be on 9 March 2021 at page 363.

226. On 9 March 2021, the OH Doctor Dr Westlake gave his opinion. He made the following key findings at pages 365 - 367:

    226.1. The Claimant was suffering from depression which affected his concentration.

    226.2. He was not fit for work.

    226.3. He was not fit to attend an investigation meeting and restoring harmonious working relationships would be the route to the Claimant becoming fit for work.

    226.4. The Claimant had engaged with the EAP process.

227. The respondent then tried to organise a welfare meeting with the Claimant and the Claimant queries why it had taken so long to do so at pages 368 – 370.

228. On 29th March 2021 the claimant was signed off as unfit for work until the 24 May 2021 with a depressive disorder. On the same date, the Claimant emailed those involved with his disciplinary investigation including Ms Britton and Ms Downes sending a copy of the fit note. This started a chain of emails added to the bundle at pages 933 – 937.

229. In response, Ms Britton acknowledged receipt. However, Ms Downes' response was as follows:

*"I replied to him 😂 lol I bet he has never felt do popular".*

230. Unfortunately for Ms Downes, she copied the Claimant into that email by mistake. In response, he said *"I am in receipt of our email which is unfortunate given the content".*

231. Ms Downes responded *"I did not mean that in a negative way. I meant it in the context to everyone else of how you stated you had not had communication off anyone when replying back to Jason and then today you received a reply off not only myself, but also Jason and Angela which seemed to of all been sent at the exact same time. I do apologise if the email upset you in any way. I would never go out of my way to cause you any upset or to make you current medical condition worse. I am truly sorry if I offended you I did not mean to. I do genuinely mean that I am here to support you and help you in any way I can. I understand how you may think different now but I can assure you this is not the case. I am sorry".*

232. When considering the email Ms Downes sent, we can see why the Claimant took offence to it. Ms Downes said she didn't mean it in a negative way. However, that is not a reasonable view to have in the circumstances. Ms Downes' email was sent whilst the Claimant was absent on sick leave in the context of him being concerned that no one from the company had checked to see how he was. This has been interpreted by the Claimant as bullying and showing a negative attitude towards him at the time at paragraph 298. This was not challenged by the respondent. In our view, the email was not a seriously offensive email, but the email was negative, sarcastic and we find it did show a negative attitude towards the Claimant by the manager who was investigating serious concerns into the Claimant's conduct.

233. Consequently, Ms Downes' email response was not a satisfactory one to being sent a fit note to keep her updated.

234. For the respondent overall, this does need to be looked at in context. The Respondent had, at this point offered the Claimant assistance through 6 paid for counselling sessions. Ms Downes' email alone, in our view, does not prove an overall company-wide negative attitude towards the Claimant.

235. The Respondent then attempted to organise a welfare meeting with the Claimant.

236. On 10 May 2021, the Claimant was invited to a welfare meeting at page 384 in the bundle. The meeting was to be conducted by Mrs Finney.

237. On 11 May 2021, the Claimant wrote an email to Mrs Finney statement very clearly his feelings about how he had been treated by Ms Dowes and in general. In this written complaint he complains about the following issues:

237.1. The email from Ms Downes mentioned earlier and how he felt she was mocking him;

237.2. Lack of contact from the company for four months whilst off sick with depression;

237.3. Complaining that he had made protected disclosures and was being treated badly as a result;

237.4. The state of the Stourport changing facilities and in general;

237.5. His breaks and meal arrangements;

237.6. The fact that there was some retaliation about reporting a co-worker for being drunk at work;

237.7. The fact that it has been communicated to him that should he return to work he will be suspended and Ms Britton let him know that;

238. In the end the Claimant said that attending a welfare meeting would not be good for him and he wanted the email he had written to be instead of the welfare

meeting. He said he wanted a resolution to get back to doing the job he loved at page 387.

239. On 25 May 2021 the claimant was signed off as unfit for work without a return to work date - again with a depressive disorder.

240. Also on 25 May 2021, Mrs Finney responded to the concerns the Claimant had raised. Mrs Finney mentioned that a lot of the issues raised had been dealt with in previous grievances and the remainder were the subject of the ongoing investigation at pages 391 - 395.

241. On 22 July 2021 the claimant was signed off as unfit for work until 20 September 2021 with a depressive disorder.

242. On 21 September 2021 the claimant was signed as possibly fit for work with a phased return to work and/ or altered hours following a depressive disorder. The statement of fitness for work expired on 26 October 2021.

243. On 23 September 2021, the Claimant returned to work and had a return to work interview with Ms Downes.

244. On the same date, the Claimant was suspended again and this was confirmed in a letter at page 412 in the bundle. The allegations in this letter were the same as before.

245. On 29 September 2021, the Claimant was invited to attend a further investigation meeting by letter at page 422 in the bundle.

246. On 12 October 2021, two days before the investigation meeting was due to start, the Claimant was sent an email by Angela Britton, enclosing information relevant to the Claimant travelling home to have his break.

247. The respondent had chosen to limit the occasions for discussion to October, November and December 2020 *"due to the time that has passed"* at pages 425 – 429 in the bundle.

248. On 13 October 2021, the Claimant took issues with the fact the Respondent had waited until 48 hours before the meeting to supply the Claimant with the information at page 430 in the bundle. He also requested that telephone recordings be made available.

249. On 14 October 2021, the reconvened investigation meeting took place. The Claimant attended again with his Union representative Ms Hackney. The meeting was conducted by Ms Downes and Ms Britton. The meeting was adjourned pending further investigation and an outcome to the investigation.

250. On 2 November 2021, Ms Downes interviewed all of the supervisors the Claimant would be working with. The Claimant criticizes the length of time it took to obtain these statements. Ms Downes said that the reason she spoke to the supervisors when she did was because the Claimant had informed her that in his view, he was going home in full knowledge of the supervisors at base.

251. In our view, the first time the Claimant mentioned that he was going home with full knowledge of the supervisors was on 14 October 2021 at that investigation meeting. In response Ms Downes' spoke to the supervisors and took statements from them about the issue of the Claimant going home. In our view, that was a reasonable response to what appeared to us to be new information. At the original investigation meeting, the Claimant was arguing that there was no break policy and he was not informed he couldn't go home to have his breaks. He raised new arguments at the second investigation meeting.

252. On 25 November 2021 the claimant was signed as possibly fit for work with a phased return to work following depressive disorder with the note expiring on the 23 December 2021.

253. In December 2021, Ms Downes' completed her investigation report. As part of the investigation, it was not disputed by the respondent that despite the Claimant's request to look at specific recordings from the dates he was alleged to have done things wrong, Ms Downes' had taken a random sample of calls from control.

**The disciplinary meeting**

254. On 29 December 2021, the Claimant was invited to attend a disciplinary meeting due to take place on 7 January 2022 at page 452 in the bundle. This was later postponed to 8 February 2022.

255. On 7 January 2022 the claimant was signed off as unfit for work until 6 February 2022 with depression.

256. On 17 January 2022, the Claimant was invited to the postponed disciplinary meeting on 8 February 2022 at page 479 in the bundle.

257. The charges in that letter were the same as in the investigation meeting invite letters sent at various times.

258. On 8 February 2022, the Claimant attended the disciplinary meeting. It is significant that at that hearing, the Claimant said at page 499 *"Angela Britton and Fay Downes should be ashamed, for this investigation, they bullied".* In response Mrs Finney said *"I am not going to comment on that".*

259. Throughout the investigation, the Claimant has also used strong language to describe how he felt the allegations were made up. The Claimant appeared to be angry that he had been accused of fraud and if he genuinely believed he hadn't committed any fraud we can understand that.

**The outcome of the disciplinary meeting**

260. These were as follows with the broad result underneath as decided by Mrs Finney as per her outcome letter at page 506 in the bundle:

260.1. *"fraudulent completion of your timesheet on numerous occasions in relation to claiming for hours you were not entitled to".* The use of the term 'fraudulent' for completion of timesheets was found to be 'excessive' but the Claimant had requested payment for hours not worked and therefore was 'fraudulently claiming wages'. We note here that the charge that was upheld is not the same charge as was stated in the invite letter.

260.2. *"fraudulent overtime claim in relation to claiming for overtime you were not entitled to".* This allegation was 'disregarded' because the decision maker believed the Claimant's explanation that the claim for the overtime payment was a 'genuine error.'

260.3. *"fraudulent submission of an expenses claim".* This was about the meal allowance and out of window break claims. Fraud was again decided to be 'excessive given the circumstances'. Mrs Finney concluded that the Claimant '*genuinely believed [he was] entitled to this money*.'

260.4. Mrs Finney went on *"however, the business could not have been any clearer with you in terms of the WMAS meal break not transferring and the fact you are not legally entitled to these monies. Therefore, whilst we are disregarding the allegation of fraudulent submission of expenses we*

*believe your actions, and the fact that you have confirmed you will continue to attempt to claim money that you are not legally entitled to results in a breach of trust and failure to comply with a reasonable request for some other substantial reason.'* We note here, that the charge upheld by Mrs Finney, is not the charge stated in the Claimant's invite letter. That letter and indeed all the meetings he attended, were silent on SOSR or breach of trust and confidence issues or that he failed to comply with any reasonable instructions.

260.5. *"using a company vehicle without permission in relation to taking the vehicle home".* This was upheld simply as gross misconduct by Mrs Finney in her conclusions.

260.6. *"bringing the company into disrepute regarding picking patients up late and compromising the company's reputation with our clients".* This was not upheld by Mrs Finney. She said that given the Claimant's length of service they believed that the Claimant did not deliberately intend to bring the Company into disrepute by his actions in picking up patients late. This allegation was therefore dropped.

260.7. Mrs Finney then said this in her conclusions:

*"some of the substantial reason. Your opinions of your contract manager and other staff have made it clear to us that there is a breakdown in the working relationship. You have clearly lost trust and confidence in your local management team. Your continued insistence that you will attempt to claim monies that you are not legally entitled to concerns us and by continuing to make such claims after being repeatedly informed you are not entitled to it is considered a failure to comply with a reasonable request and a breach of trust. This demonstrated A blatant disregard for business decisions and the process is already followed which also demonstrates a breakdown of the working relationship."*

261. We consider it noteworthy and significant that no SOSR allegations, breakdown in relationship allegations or breach of reasonable instruction allegations appear in either the invite to disciplinary meeting letters, the investigation documents, the investigation meetings or the disciplinary meetings.

262. When looking at the letter and the decisions made for the dismissal, we conclude that the allegations upheld by Mrs Finney or used as justifying dismissal were made by her as a composite decision to dismiss. This is because they are all

discussed under the following sentence *"I therefore concluded your actions that day constituted gross misconduct in line with the Company's disciplinary policy under the following points….".*

263. Mrs Finney continues at page 507: *"At your request to confirm the outcome of this hearing in writing I can confirm that I'm issuing a dismissal on the grounds of some other substantial reason, the misuse of company property, time and fuel without permission and fraudulently claiming wages for times you were not working. As we accept the failings of the business in terms of the state of your local base and the one occasion we could find where you may not have had a lunch break, this is not a summary dismissal and he will be provided with six weeks' notice."*

264. The claimant is then given the right of appeal.

265. It is also significant in evidence that when asked by the tribunal whether she would have stopped short of dismissal for any of the individual grounds the Claimant was dismissed for, Mrs Finney said *"taking the vehicle home without permission".* She said she would have given him a written warning for that. Mrs Finney clearly therefore upheld the decision to dismiss the Claimant at the time for a reason that she did not think was a sufficient reason to dimiss the Claimant by itself.

266. Given the outcome letter and Mrs Finney's evidence, we find that the principal reason for the dismissal was the Claimant's conduct due to a mistaken but genuine belief that the Claimant was "blatant[ly]" disregarding a reasonable company request by claiming money and hours he was not entitled to under the meal and break policies that the Respondent believed did not TUPE transfer to it.

267. There was not one sole reason for the dismissal, it was a composite of a number of reasons including a breakdown of trust, a breakdown of the working relationship between the Company and the Claimant, misuse of company property in the Claimant taking his ambulance home without permission, the Claimant claiming wages for time not worked and him having poor opinions of his contract manager and other colleagues.

**The Claimant's appeal**

268. On 2 March 2022, the Claimant appeals against his dismissal. He alleges a number of things including detriments for making protected disclosures, an unfair investigation process, a failure to try to find or consider mitigation, that it was not

unlawful for him to claim meal allowances he was contractually entitled to and that the Respondent seems to be annoyed that the Claimant has complained to CQC. In particular, he argues that *"to suggest as an employer that you have grounds to terminate my contract for some other significant reason due to the fact that I have pointed out the clear failures as a business during your disciplinary process is incredulous."* At page 514.

269. On 23 March 2022, the appeal was forwarded to Mr Spedding at page 515. Mr Spedding had previous involvement in the Claimant's grievance in November 2020 where Mr Spedding had already rejected the Claimant's arguments that he was entitled to the meal allowances he had been claiming. In our judgment, he was not therefore an independent manager to be dealing with this appeal.

270. On 24 March 2022, the Claimant is invited to attend an appeal meeting on 1 April 2022 and is given the usual right of accompaniment at page 520.

271. On 28 March 2022, the Claimant responds arguing that the delay in organizing the appeal meeting of 3 weeks has affected his mental health. He is content with the detail in the appeal letter and therefore wants the appeal to be determined without the need for him to attend an appeal meeting at page 521.

272. The Claimant also says that if the respondent wanted any additional information or clarification about his dismissal then this should be put in writing to him for him to consider.

273. On 1 April 2022, Mr Spedding provides his outcome to the appeal via an email from HR at page 523 in the bundle.

274. The appeal letter itself is at page 524 – 527 in the bundle. The ultimate result of the appeal was to dismiss all the grounds of appeal.

275. The appeal was undertaken as a paper exercise. We do not think Mr. Spedding was unreasonable for continuing on that basis given the Claimant's letter requesting there to be no appeal meeting itself.

276. He also states that he has based his decision on the information he currently had at that time at page 524.

277. In his letter Mr Spedding says that he was the manager tasked with overseeing the Kidderminster site. The criticisms of the site and the fact it hadn't been dealt

with in a satisfactory way were therefore, it appeared to us, to be criticisms of Mr. Spedding's management.

278. Mr. Spedding accepts the criticism in the letter, and also indicates that where he accepts the standards of the site have fallen below what is expected then employees have the right to report these to the regulator and he also says the Claimant was not the only employee complaining and the majority of Kidderminster employees were complaining about the state of the site.

279. Mr Spedding concluded about the specific points of appeal as follows:

279.1. He concludes that there is no evidence to support the claim that the investigation and the Claimant's dismissal were because of the Claimant complaining to CQC.

279.2. He concluded that Mrs Finney and the HR representative at the disciplinary meeting were *"were neutral parties looking at the overall evidence."*

279.3. There was no evidence that Mrs Finney was aware of the CQC disclosure.

279.4. He said that the Claimant had disregarded a reasonable management request not to return to his home address.

279.5. Mr Spedding had no concerns about the investigation other than the fact at investigation stage mitigation was not taken into account and it should have been. However, he concluded that because this had been taken into account by Mrs Finney at disciplinary stage, then that had rectified the situation especially as those allegations with any doubts were discounted at page 526.

279.6. He concluded that there was no collusion about the witness statements. He accepted the people these statements were taken from were at the same base, but that was all.

279.7. When considering the Claimant's criticism that he notes of the disciplinary meeting were not sent to him sooner, Mr Spedding says the Claimant had two opportunities to visit the notes one on 8 February 2022 following his hearing and the other on 11 February 2022. Of particular note he said was the email of 11 February 2022 from Ms Hennessy, she gave the Claimant a copy of the notes, asked him to sign them and provide a different version

of the notes of the Claimant disagreed with them. This can be seen at page 501 in the bundle.

279.8. When considering the point about expenses and the meal policy, he said that they tried to get a copy of the policy, but they were not provided with one and that the company made its position clear to the Claimant on multiple occasions at page 527.

279.9. Mr Spedding also concluded that the overtime allegation and the expenses allegation were not considered to be fraud, but there was evidence a fraudulent claim for wages about the Claimant going home or to the shops on 123 occasions where company time, fuel and vehicles were used without permission.

279.10. He then moved onto the SOSR allegation. He avoids responding to the allegations that Ms Downes and Ms Britton were making inappropriate comments about him. He says as follows:

*"In respect to your points regarding Fay Downes and Angela Britton's previous comments, these are not relevant to this process in any way, nor is evidence of this included within the pack as far as I can see. Whilst I do not condone any alleged comments of this kind, I can only comment on the facts I can see which is that you, on multiple occasions, use words like disgusting, their attitudes were disgusting, they should be ashamed and you were disappointed.*

*In conclusion, this does demonstrate a breakdown of the working relationship, and I do agree with Adele's conclusion. For this reason, I have no option but to rule this point of appeal as not upheld."*

280. Mr. Spedding's appeal decision was final.

281. Whilst not mentioned in his witness statement, Mr Spedding said in cross examination that he considered the Claimant's clean disciplinary record before making his final decisions about the appeal. There is no reson to disbelieve him on this point. His evidence on this point appeared to be credible.

**The Claimant's criticism of the dismissal and process in his claim**

282. The Claimant makes the following criticisms of the dismissal, dismissal procedure and general fairness:

282.1. The investigation:

282.1.1. Mitigation was not taken into account;

282.1.2. Ms Downes was selective in the witnesses she spoke to and the questions she asked of them;

282.1.3. The allegations were false;

282.1.4. that he was sent an offensive e-mail by Ms Downes during the investigation whilst he was absent from work with depression;

282.1.5. That specific recordings were not used about the dates of the allegations, rather, a random sample of calls to control were used;

282.1.6. the witness statements have been taken 12 months after the respondent started to investigate him

282.2. The disciplinary meeting and outcome:

282.2.1. That because he had been critical in the manner in which Ms Downes had conducted the investigation, that was to his detriment;

282.2.2. But to give notice was to admit it was misconduct rather than gross misconduct he had been dismissed for;

282.2.3. the dismissal was unfair generally and because he had a clean disciplinary record;

282.2.4. the respondent did not follow its own disciplinary policy by paying him notice making the decision to uphold gross misconduct confusing and by not giving him some sort of warning first;

282.2.5. the manager involved in the decision to dismiss the claimant have been involved in the factual circumstances of the dismissal;

282.2.6. Dismissal was not within the band of reasonable responses for an employee for long service and a clean disciplinary record;

282.3. The Claimant criticises the appeal in one respect and that was whether Mr Spedding was an appropriate appeal manager given his past involvement in the grievances about the meal breaks issues.

**Analysis and conclusions – ordinary unfair dismissal.**

283. When considering the criticism of the investigation, we agree that the investigation was a flawed one in a number of respects. These were:

283.1. Ms Downes did not appear to have an open mind about the investigation. She appears to be cynical about the Claimant and that is evidenced by the inappropriate email she sent about his being popular whilst he was absent on sick leave.

283.2. Applying **Ramphal**, we are satisfied that HR stepped outside their remit when they advised Ms Downes that there was no mitigation during the investigation. That advice was not, in our view, advice about the law, advice about including everything or about procedure and/or consistency. Consequently, that advice was unreasonable. It was Ms Downes who should have decided whether the investigation showed evidence of mitigation or not and what that mitigation was to assist the disciplining manager in identifying factors for the Claimant if there was a case to answer. It was then for any future disciplinary manager to decide whether there was mitigation when coming to their decision, not before.

283.3. Ms Downes concluded that there was a case to answer for bringing the Company into disrepute. Given that there was no evidence of that and that disrepute was not investigated, that decision was not satisfactory.

283.4. Finally, the allegations against the Claimant were very serious involving allegations of fraud in the context of a job role trusted to provide services to vulnerable people. Following **A v B** and **Yeung,** in our view, this was a case that whilst police weren't involved, required the Respondent to take a more careful view of requests for evidence that might exonerate the Claimant whether wholly or partially. When the Claimant requested recordings for the specific dates he was alleged to have misbehaved, Ms Downes decided to provide only a random sample of calls. In our view, that decision was not satisfactory for a fraud allegation. The Claimant had not asked for all and any calls, only those which were relevant to the dates he was accused of

behaving improperly. Ms Downes could no doubt have refused to provide them if there was a good reason for doing so, but no good reason has been put forward for rejecting or failing to respond positively to the Claimant's request.

284. Analysing these flaws within the principles of **Sharkey,** we are not persuaded that these issues by themselves are significant enough to make the process unfair on their own. We say this because it is clear from both the disciplinary meeting and the appeal meeting that these issues were resolved in favour of the Claimant by the allegations being dropped and mitigation being taken into account causing some allegations being dismissed.

285. We then move onto the dismissal decision itself. In our judgment, the decision to dismiss the Claimant was flawed in a number of respects:

285.1. First, the Claimant was dismissed for a composite reason of conduct issues, where the dismissal manager said in evidence that on its own, one of those reasons (taking the ambulance home without permission) would have simply given rise to a first written warning. Consequently, to use that allegation as part of the reason to dismiss the Claimant for gross misconduct was not reasonable.

285.2. Mrs Finney appears to have dismissed the Claimant for reasons that were not put in any invite letter or discussed at any disciplinary meeting, namely the way the Claimant has described the managers who conducted the investigation, for failing to follow a reasonable instruction where we can see no evidence that any reasonable instruction was in fact given, for a breakdown in trust and confidence, for insisting to claim money that the Company says he is not entitled to and for a blatant disregard for business decisions and process already followed, which she decided demonstrated a breakdown in the working relationship.

285.3. It is clearly unsatisfactory to dismiss an employee for an allegation mentioned for the first time in the dismissal letter. To decide to do that was unreasonable.

285.4. The respondent has labelled the breakdown of the relationship as being an SOSR reason and we accept that it can be. However, although we have decided that the real reason permeating the whole decision is the Claimant's conduct, if we are wrong and this really is correctly labeled as an SOSR situation, then the process and decision of Mrs Finney would still be flawed because there has been no consultation and no evidence of any meaningful consideration of alternatives to dismissal.

285.5. Mrs Finney herself was involved, as was common ground, in the factual backdrop to this case. The Company chose her to be the disciplinary manager. Consequently, for the Company to believe that Mrs Finney was an appropriate person to do the disciplinary meeting, we consider to be unsatisfactory and outside the band of reasonable responses in the circumstances of this case. It also had the effect of causing Mrs Finney to take an exaggerated view of the word the Claimant used to describe colleagues, which was part of the reason for his dismissal. Clearly, Mrs Finney has taken exception to the Claimant describing the behaviour of Ms Downes and Ms Britton as disgraceful or that they should be ashamed of themselves and similar words to that effect.

285.6. In addition, we conclude that to consider the words used by the Claimant about his managers as sufficient to dismiss was not reasonable in the circumstances of this case, especially when one of the managers in question sent an inappropriate email about the Claimant whilst he was absent with clinical depression and when Mrs Finney conceded at the outcome to the disciplinary process, that many of the allegations of fraud were excessive and that mitigation had not been taken into account or investigated properly, which the disciplinary and appeal manager both accepted occurred.

286. We then considered whether any of these flaws in the disciplinary process had been resolved on appeal. We find they were not for the following reasons:

286.1. First, Mr Spedding upholds the decision of Mrs Finney that the Claimant's description of the disciplining managers suggested a break down in the employment relationship. It might have done. The failure on the one hand to identify this as an issue, and on the other to not discuss it with the Claimant, was unreasonable.

286.2. In addition, we agree with the Claimant, that given a big part of his appeal was about the meal allowances and claiming money for these. Given that Mr Spedding had already been heavily involved in the decisions about this issue in the past, the decision of the Respondent to allocate the appeal to Mr Spedding was in our view unreasonable. He was not independent and we believe this led him to the exaggerated view of the Claimant's language being upheld as an acceptable reason to dismiss him.

287. The flaws we found above about both the disciplinary and appeal processes fell outside the band of reasonable responses and the flaws in the dismissal decision and subsequent appeal have not been remedied.

288. Consequently we conclude, the Respondent had a potentially fair reason for the dismissal namely the Claimant's conduct.

289. The principal reason for dismissal did fall within the category of the conduct of the Claimant.

290. Applying **Burchell,** we find that both Mrs Finney and Mr Spedding had a genuine belief of guilt in the allegations they upheld.

291. Whilst we have found that the meals and breaks policies did transfer under TUPE and had contractual force, we are persuaded that both Mr Spedding and Mrs Finney had a genuine belief that the Claimant was not entitled to claim under those policies because in their view they did not transfer albeit that their belief was mistaken.

292. In addition, when considering the other reasons for the dismissal, we consider that both Mrs Finney and Mr Spedding had a genuine belief in all the other reasons for the Claimant's dismissal that the employment relationship had broken down and that there was a breach of trust, misuse of company property fuel and time with the Claimant taking his ambulance home and that he claimed for hours not worked.

293. We are not persuaded that the belief in there being a relationship breakdown based on the Claimant's opinion of managers or that he had failed to follow an instruction not to put in expenses claims for meals was based upon reasonable grounds. The Claimant was not asked to comment on those allegations and there was insufficient evidence to show that an instruction not to put in the wage claims for the meal allowances had actually happened and been disobeyed.

294. We are also not persuaded that the investigation was reasonable in all respects, although we are persuaded that the flaws in the investigation were resolved at disciplinary meeting stage and therefore did not contribute to any unfairness to the Claimant.

295. When considering the question of whether the Respondent behaved reasonably or unreasonably in treating the principal reason to dismiss as a sufficient reason for dismissal, we consider the respondent behaved unreasonably because:

295.1. Its decision to add the additional conduct charges labelled as SOSR, was not in line with the principles in **Sattar.** It was outside the band of reasonable responses to add a charge to the dismissal letter that had not been raised or discussed with the Claimant beforehand.

295.2. Considering **Robinson,** this was a composite reason case and one of the reasons relied upon for dismissal the dismissing manager admitted would not have been sufficient to dismiss on its own (taking the ambulance home). Consequently, to use this as a ground for dismissal was therefore outside the band of reasonable responses. Also, to have upheld allegations not forming part of the investigation, disciplinary invite letter or discussed in any meeting during the process was also unreasonable.

295.3. When applying **Taylor,** we have looked at the disciplinary procedure from investigation to appeal as a whole. We have found some flaws were not remedied by the outcome of appeal, such as those above or the fact that we are not persuaded that either Mrs. Finney or Mr. Spedding were independent managers when making these decisions. In our view, this explains why they decided the words used by the Claimant about managers in the circumstances of this case were sufficient grounds for termination of employment, when we consider those decisions to be unreasonable both in the way they were arrived at without asking the Claimant for comment, and in the exaggerated view of the severity of the language they relied upon.

295.4. We therefore find the Respondent's decision to dismiss the Claimant was not only procedurally unfair but also substantively unfair.

296. We have considered the Claimant's criticism of the Respondent, noting him when claiming this decision was gross misconduct. However, after **Fisher and Beardwood,** the tribunal needs to simply consider whether the Respondent behaved reasonably or unreasonably in treating the allegations as sufficient to dismiss the Claimant, not whether it was "gross" or not. We have found the Respondent behaved unreasonably in treating its reasons as sufficient and, therefore, the notice issue is now relevant simply to remedy.

297. We also took into account any other cases we were referred to by the parties in their submissions or afterwards in coming to our decision.

## Automatic unfair dismissal

298. We are not persuaded that the principal reason for the dismissal or indeed any effective cause or part of the reason for dismissal was because the Claimant made any of the protected disclosures he relied upon.

299. Consequently, the claim for automatic unfair dismissal under s103A Employment Rights Act 1996 fails and is dismissed.

## Polkey and contributory fault

300. At the full merits hearing we had decided that we would consider submissions about Polkey and contributory fault. However, we do not feel we have sufficient argument or submissions from either side on these points and they will therefore be considered again and in more detail at the remedies hearing.

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Employment Judge G Smart
9 July 2024