Neutral Citation Number: [2026] EAT 134

Case No: EA-2023-000426-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 September 2026

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MS EMMAH MUCHERERAH

Appellant

- and –

RUSHCLIFFE INDEPENDENT HOSPITALS (KEGWORTH) LTD

Respondent

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- -

Emma Darlow Stearn (instructed by Free Representation Unit) for the **Appellant**
Lisa Hatch (instructed by Markel Law LLP) for the **Respondent**

Hearing date: 28 July 2026

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JUDGMENT

SUMMARY

PROTECTED DISCLOSURES

The claimant was employed by the respondent as Clinical Lead at one of its hospitals from April 2020 until she was given notice of dismissal in November 2020 for the given reason that she had not passed her probation. Her complaints that she was unfairly dismissed for the sole or principal reason of having made two protected disclosures, asserted a statutory right relating to working time, or raised health and safety concerns, all failed. A complaint that she was entitled to additional wages in respect of additional or on-call hours worked above 40 per week was also dismissed.

The tribunal found that neither of the claimed protected disclosures was in fact made. The appeal contended that this conclusion was perverse, as it drew upon two statements by the tribunal about the content of the claimant's evidence that were demonstrably wrong. In respect of the other complaints, the appeal contended that findings of fact relied upon by the tribunal were also perverse, as they were contrary to the contemporary documentary evidence.

All of these grounds of appeal failed.

Guidance in **Yeboah v Crofton** [2002] EWCA Civ 794; [2002] IRLR 634 and **Stewart v Cleveland Guest (Engineering) Limited** [1996] ICR 535 (EAT) considered and applied.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal is a nurse. After working for the respondent as a senior staff nurse, and then a bank nurse, she was employed as Clinical Lead at Mill Lodge Hospital, a hospital for patients with mental health needs, from 26 April 2020. At a meeting on 20 November 2020 she was told she had not passed her probation, and dismissed with effect on 7 December 2020.

2. The claimant presented an employment tribunal claim, acting as a litigant in person. At a case-management preliminary hearing (PH) on 8 February 2022 her specific complaints, and how they were put, were clarified. The respondent thereafter put in an amended response.

3. The matter then came to a full merits hearing, before EJ M Butler, at Leicester, in January 2023. The claimant was in person. The respondent was represented by Lisa Hatch of counsel. In a reserved decision the tribunal, so far as relevant to this appeal, dismissed complaints of automatic unfair dismissal and of unlawful deduction from wages. As to the former, the claimant had contended that she had been dismissed for the reason or principal reason: that she had made protected disclosures; or that she had asserted a statutory right; or that she had raised concerns about health and safety (invoking sections 103A, 104 and 100(1)(c) **Employment Rights Act 1996**).

4. The claimant appealed. At a rule 3(10) hearing I permitted three grounds to proceed. At the full hearing of the appeal, which came again before me, the claimant was represented by Emma Darlow Stearn of counsel, and the respondent, as before the tribunal, by Lisa Hatch of counsel.

The Complaints

5. As to unfair dismissal by reason of protected disclosures, the minute of the PH in February 2022 recorded that it was the claimant's case that she had made two protected disclosures, which I will call PD1 and PD2. PD1 was described as follows:

> **"In August 2020, the Claimant disclosed to Dr Singh, Medical Director, that the Respondent's consultant psychiatrist Dr Okoko was carrying out duties in contravention of restrictions on his practicing certificate. The disclosure was made to Mr Singh in the meeting room."**

6. PD2 was said to have been made by an email sent in October 2020 to "NHS Derbyshire" (a reference to Derbyshire Healthcare NHS Foundation Trust) concerning the alleged maltreatment of a particular patient.

7. As for assertion of a statutory right, the PH minute set out the claimant's case that, although contracted to work a 40-hour week, she worked much longer hours and was on call one week in three. Her case was that she had complained that her hours breached the **Working Time Regulations 1998**, in respect of both overall weekly hours worked and rest breaks, and that she was entitled to be paid for the excess hours above contracted hours, but was not being so paid. The claimant claimed to have raised these concerns on a number of occasions, but specifically at a meeting with her manager, Rachel Martin, on 28 August 2020. Relevantly to the wages claim, she also claimed that she was told by Mrs Martin to submit overtime forms, which she did, but that no payment was received. The minute of the PH recorded that the wages claim was for 223 excess hours and 200 on-call hours.

8. In relation to health-and-safety-related dismissal, the PH minute identified that the claimant's case was that she had complained to Mrs Martin that her long hours were risking her health and safety – in particular that she was concerned about driving to work tired and having an accident, or falling asleep on duty. She claimed that she raised this concern each time she was on call, but specifically at the 28 August 2020 meeting with Mrs Martin.

The Tribunal's Decision

9. In opening sections of its decision the tribunal described the factual context and the complaints and the issues, as well as identifying the witnesses from whom it heard live evidence. It summarised the parties' cases concerning the reason why the claimant was dismissed in this way:

> **"8. The Respondent, through its witnesses, gave evidence that, during her employment as Clinical Lead and within her probationary period, the Claimant was considered abrasive towards her colleagues, often shouting at them, criticising Doctors with whom she worked both to patients and other staff, refused to follow instructions and work in a collegiate way and worked with a sense that her way was the only way things should be done.**
>
> **9. The thrust of the Claimant's argument before me was that she was never provided with any detail of complaints made against her by other staff members and consequently was unable to either defend herself against those complaints or adjust her behaviour accordingly. Since no details of these complaints were ever made known to her, they did not happen and she was dismissed for making protected qualifying disclosures, raising health and safety issues and asserting a statutory right.**
>
> **10. The Respondent's answer to these allegations is that details of the complaints made against the Claimant, largely in respect of her conduct towards others, came from those of her colleagues who did not wish to formalise their complaints meaning that the Respondent, mainly through Mrs Martin, was unable to give details to the Claimant. The Respondent denies that the Claimant ever made protected qualifying disclosures and this aspect of the claims before me is discussed further below."**

10. After summarising the issues relating to the wages complaint the tribunal continued:

> **"12. I had a number of concerns about the credibility of the Claimant's evidence. Much of what she alleged was not supported by documentary evidence and, when such evidence was relied on, it was often taken out of context. Further, she clearly had great difficulty in seeing the Respondent's point of view on any matter raised before me and on one occasion attempted to change the evidence given by a witness when recounting, wrongly, what that witness had said. More specifically, her account of making protected disclosures was particularly inconsistent. She gave different accounts as to whom the disclosures were made between the first preliminary hearing, her witness statement and her oral evidence. She also persisted in her argument that her colleagues had never complained about her treatment of them despite this having clearly been raised with her in her supervision meetings with Mrs Martin (pages 125 and 127) and despite her own evidence in paragraph 34 of her witness statement where she specifically said Mrs Martin had told her that staff were complaining about her."**

11. The tribunal found the respondent's witnesses to be honest in their recollection and straightforward. Where there was a dispute the tribunal preferred their evidence. The tribunal also explained why it was not assisted by the evidence of the claimant's two supporting witnesses.

12. At [15] the tribunal set out its findings of fact, in paragraphs sub-lettered (i) to (xii). I will return to aspects of these, but note at this stage that, for reasons that it gave, it found that neither PD1 nor PD2 factually occurred. It also made findings of fact, in summary, that the claimant was only entitled to pay additional to her salary if she claimed on a timesheet for working excess hours above her minimum 40-hour week, and that was signed off by Mrs Martin. But this only happened once.

13. The tribunal referred to the submissions and set out relevant statutory provisions. The section

headed "Conclusions" opened by reiterating that the claimant's main argument was that she performed to a high standard, was the subject of untrue and at times malicious comments by colleagues about her attitude "and therefore, the reason for her dismissal could not have been because of her poor performance but must have been because she blew the whistle, complained about health and safety or asserted a statutory right."

14. The tribunal then set out its substantive conclusions, which clearly drew on its earlier findings of fact, in a passage that I will set out in full:

> **"19. Dealing firstly with the protected disclosures, I have made findings of fact that they were never actually made. The Claimant's explanation of her disclosures at the previous preliminary hearing was different to those made before me. Did she make the first alleged disclosure concerning Dr Okoko, to Dr Singh or to the Trust? Dr Singh categorically denied the Claimant's assertion that she blew the whistle to him. There is no evidence that she blew the whistle to anyone at the Trust in relation to this issue. In relation to the disclosure to Mr Day which concerned the forced sedation of a patient, she says this was made by email but that email was not produced. Whilst the Claimant will no doubt assert that her evidence should be believed, especially in relation to the first alleged disclosure, her evidence is inconsistent between the preliminary hearing and this hearing. But, more importantly, when dealing with patients with mental health issues, safeguarding is a priority (as with most other patients). Had these disclosures been made to the Trust medical alarm bells would have rung and further enquiries would have been made immediately. We do not know whether Mr Day was contacted and asked to give evidence or provide documents but there is, unfortunately for the Claimant, absolutely no reliable evidence before me that she ever made a protected disclosure. The Claimant also now says that she blew the whistle about Dr Okoko to Ms K Allen at the Trust and a witness order was made to compel her attendance at this hearing. She did not attend and there is no evidence that the Claimant contacted her to try to obtain a witness statement in advance of the hearing. Accordingly, since I do not conclude that the Claimant ever made protected disclosures, they could not have been a reason for her dismissal. Whilst I bear in mind the requirements to be met as set out in Williams v Michelle Brown UKEAT/0044/19, since the first is that there must be a disclosure of information and I find there was none, the claim of suffering the detriment of dismissal after making a protected disclosure falls at the first hurdle.**
>
> **20. In order to succeed in a claim for automatic unfair dismissal for health and safety reason under section 100 of the Employment Rights Act 1996, the Claimant must establish that the reason or principal reason for the dismissal fell within the provisions of section 100(1)(a)-(e). It is clear that the Claimant discussed her on-call duties with Mrs Martin in her supervision meeting on 28 August 2020 (page 128). She was told that should she feel tired the morning after being called upon the night before, she should rest at home before driving to work or work at home. Whilst the Claimant does not specify the provision in s. 100 ERA upon which she relies, I assume it to be s.100(1)(c). The burden of proof rests with the Claimant to show her dismissal was for this reason. Her claim in this regard must fail. She seems to have raised the issue once only. Mrs Martin proposed ways in which any danger whilst driving could be eliminated and even changed the on-call rota (which turned out to be impracticable). The Claimant was not required to be on call every night and, even though she could rest and come in to work later or even work from home, she continued to work as before. This suggests she had no real concerns and, having continued to work as before without raising the issue again, the Respondent clearly did not have the issue in mind when the Claimant's employment was terminated.**
>
> **21. Regarding the claim for automatic unfair dismissal for asserting the statutory right under the Working Time Regulations 1998, there is simply no evidence that the Claimant ever acted in any way which amounted to such an assertion. Further, the documentary evidence produced does not**

> **support her claim that she regularly worked 50 or 60 hours per week (page 229). S.104(3) ERA provides that the employee must at least make it reasonably clear that what right has been infringed (Armstrong v Walter Scott Motors (London) Ltd EAT 766/02). There is no evidence before me that the Claimant, even by her own account, connected the hours she said she was working with the 48 hour week under the Working Time Regulations. It is for this reason that the Respondent relies on the contract of employment in relation to working such additional hours necessary for the business. It is clear to me that the Claimant has not asserted a statutory right and cannot, therefore, succeed in her argument that this was a reason for her dismissal.**
>
> **22. In relation to the claim for unpaid wages or an unlawful deduction from wages, this claim cannot succeed. The Claimant submitted one time sheet claiming an overtime payment. This was considered and approved by Mrs Martin. This is entirely in accordance with Mrs Martin's evidence and establishes that any sums reasonably due to the Claimant would be paid. The Claimant's oral evidence in relation to overtime was unconvincing. She did not mention in her witness statement that she had handed in many overtime sheets to the receptionist but heard nothing further. To then suggest this had happened when giving her evidence and yet had not raised a single query as to why none of the additional hours had been paid is not credible. I conclude, therefore, that she made no such claim for payment, the Respondent did not agree to pay her for all additional hours worked and this claim is dismissed."**

Ground 1 – Unfair Dismissal By Reason of Protected Disclosures

15. For the purposes of the rule 3(10) hearing, the claimant had an ELAAS adviser, Matt Jackson of counsel. Although he did not appear at the hearing itself, he had drafted a proposed amended ground of appeal which I will call ground 1. It relates to the complaint of unfair dismissal for the reason or principal reason of having made protected disclosures.

16. As I have set out, the tribunal found that neither PD1 nor PD2 was in fact made. So the section 103A complaint failed "at the first hurdle". Ground 1 challenges the tribunal's finding that the claimant did not factually make PD1. It asserts that the tribunal reached "two perverse conclusions" in paragraphs [15(vi)] and [15(vii)]. At [15(vi)], after setting out how PD1 was described in the PH minute, the tribunal said:

> **"In her evidence before me, she gave no information about this disclosure. Dr Singh denies it was ever made and, for reasons stated above, I prefer his evidence especially since the Claimant gives no detail as to precisely what was said and the date on which it was said."**

17. At [15(vii)] the tribunal said:

> **"Since the Claimant's witness statement in this hearing says that this disclosure was not made to Dr Singh but to Derbyshire NHS Trust ("the Trust"), I find her evidence to be so confused and inconsistent that I conclude no disclosure was made to either Dr Singh or the Trust. Further, I bear in mind that the Claimant failed to adduce any detailed evidence of the alleged verbal disclosure she made to Ms K Allen of the Trust and Ms Allen did not attend as a witness."**

18. The statements by the tribunal at [15(vi)] that the claimant "gave no information" about this disclosure, and "gives no detail as to precisely what was said" are said to have been simply wrong, because, it is contended, she *did* give such information and detail. Specifically, the ground cites the following passage from [106] of her witness statement (referring also to Mrs Martin):

> **"When I met with Dr Singh, I told him that I was raising serious concerns under the whistleblowing policy. I demanded that he took action with regards to Dr Okoko's breach of GMC conditions and that they recruit a Manager with nursing knowledge because the service was not safe. Dr Singh said he would speak to Dr Okoko and Rachel. After seeing no change, I reported it to the NHS under whistleblowing."**

19. The ground also refers to paragraphs [51] and [94] of the claimant's witness statement. At [51] she stated that the GMC had prohibited Dr Okoko from working on call / out of hours, and that he was supposed to work under supervision at all times. She also, in summary, said that the respondent did not enforce those restrictions, because they wanted Dr Okoko to work on-call hours, rather than incur the cost of employing an external doctor to do so. She also alleged that he was permitted to work alone, which posed a risk to patient safety. She also said that after repeatedly asking for measures to be put in place, she had escalated her concerns "to NHS".

20. The claimant said at [94] of her witness statement that she had to whistle-blow in relation to Dr Okoko, because his non-compliance with GMC conditions put staff and patients at risk, and she gave examples of particular alleged matters relating to his performance. She had reported these to "Rachel and Robert" (referring to Mrs Martin and the Director of Commissioning, Robert Tamirepi) and that she had "whistle-blown to the Medical Director (Dr. Singh)." She also referred to a statement of her further evidence on this subject, that was among the annexes to her witness statement.

21. As to [15(vii)] the ground specifically challenges as "unsustainable" the tribunal's conclusion that the claimant's witness statement stated that this disclosure was made "not to Dr Singh". It cites [94] of her witness statement, referring to her having "whistle-blown to Dr Singh" about Dr Okoko,

and [106] of her statement, in which she wrote that, when she met with Dr Singh "I told him that I was raising serious concerns under the whistleblowing policy" and that "[a]fter seeing no change, I reported it to the NHS under whistleblowing." It also refers to [37] of her witness statement. In that paragraph she stated that "after raising concerns internally repeatedly, I made my 1st whistleblowing report in August to Derby NHS".

22. The ground asserts that the claimant's evidence in her statement was that she raised the matter internally before *also* making a disclosure to the Trust; and that no fair reading could have led to the conclusion that she had in her witness statement disclaimed having made PD1 to Dr Singh at all. That conclusion was "unsustainable". The ground contends that this defective conclusion was the primary basis for the tribunal's adverse assessment of the claimant's credibility at [12].

23. Finally, the ground contends that, as the tribunal dismissed the section 103A claim for this reason alone, and did not consider how matters might have stood had it found that PD1 *was* factually made (and amounted to a protected disclosure), and gave no reasons for accepting the respondent's case as to the reason for dismissal, its decision rejecting the section 103A complaint cannot stand.

24. Ms Hatch reminded me of the high threshold which a perversity challenge faces, as discussed in **Yeboah v Crofton** [2002] EWCA Civ 794; [2002] IRLR 634. In particular, at [93] Mummery LJ (Brooke LJ and Sir Christopher Slade concurring) said:

> **"Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has "grave doubts" about the decision of the Employment Tribunal, it must proceed with "great care", *British Telecommunications PLC –v- Sheridan* [1990] IRLR 27 at para 34."**

25. Ms Hatch also reminded me of well-known *dicta* in various authorities over the years warning appellate courts against an over-critical analysis of isolated passages in a tribunal's reasoning, the need for a benevolent reading of the decision as a whole, and the fact that the tribunal does not need

to refer to every feature of the evidence, but must be presumed to have taken it all into account.

26. Ms Darlow Stearn referred to the observations of the EAT (Mummery J and members) in **Stewart v Cleveland Guest (Engineering) Limited** [1996] ICR 535, 542F-G, drawing on previous authorities, that the EAT should only interfere with the tribunal's conclusion on the evidence before it where "it is "irrational", "offends reason", "is certainly wrong" or "is very clearly wrong" or "must be wrong" or "is plainly wrong" or "is not a permissible option" or "is fundamentally wrong" or "is outrageous" or "makes absolutely no sense" or "flies in the face of properly informed logic"." She also referred to Mummery LJ's statement in **Yeboah** at [95] that there will from time to time be cases where the tribunal has "unfortunately erred by misunderstanding the evidence, leading it to make a critical finding of fact unsupported by evidence or contrary to uncontradicted evidence."

27. Ms Darlow Stearn made clear in oral submissions that she was not contending that this was a case where, on the issue of whether the claimant did or did not as a matter of fact raise concerns about Dr Okoko with Dr Singh on the claimed occasion of PD1, all of the evidence went one way. She was not contending that it would have *necessarily* been perverse for the tribunal to have made a finding of fact that there was no such disclosure at all. Rather, the contention is that the tribunal's *particular reasoning* rested on flawed logic, and premisses about the evidence that were patently incorrect.

28. In addition to the passages from the claimant's witness statement cited in the ground, Ms Darlow Stearn referred to the further statement annexed to her witness statement, in which she gave an account of having raised her concerns about Dr Okoko with Mrs Martin, and continued that, when she noticed that Mrs Martin was not going to address the issues she had about Dr Okoko, she spoke to Dr Singh, and referred to the whistleblowing policy; and she gave an account of that (undated) meeting. Further on in that document the claimant gave examples of matters that she said she had raised, in relation to Dr Okoko, which she said gave rise to concerns about patient safety. Ms Darlow Stearn submitted that she had set out the matters she raised in the August meeting with Dr Singh in

[106] of her witness statement in sufficient detail to be capable of amounting to a protected disclosure.

29. Ms Darlow Stearn also argued that the tribunal's conclusions challenged by this ground were contradicted by its own factual findings in earlier paragraphs, including that the claimant had, during her employment "openly criticised some of the Doctors, in particular, Dr Okoko" [15(ii)] and made "critical and untrue statements", including that "Dr Okoko was practising in breach of the GMC restrictions imposed upon him" [15(iii)]. Ms Darlow Stearn submitted that the point was not about what the tribunal made of what the claimant had said, or whether what she had said was in fact true, but that it had found that she *had* raised concerns about Dr Okoko internally; and it is well-established that a putative whistleblower may reasonably hold a particular belief, even though they are mistaken.

30. Ms Hatch submitted that it was important to keep in mind that the *only* specific claimed relevant protected disclosure was PD1, which was, specifically, a claimed disclosure to Dr Singh in August 2020 in the meeting room, about Dr Okoko being in breach of GMC restrictions. The various paragraphs in her witness statements, relied upon in support of this ground, did not show that she had given the tribunal information or detail about what she claimed she had specifically said to Dr Singh *on that particular occasion* and on that particular subject.

31. Ms Hatch submitted that it was not clear what the "concerns" referred to at [37] of the witness statement were; [94] was about why the claimant *felt* that she had to whistle blow about Dr Okoko, not about what she actually said; [96] referred to a conversation with Dr Singh about Dr Okoko, but not what she said; [106] said that when the claimant met with Dr Singh she "demanded that he took action with regards to Dr Okoko's breach of GMC conditions" but not what she actually said about how he was (on her case) breaching them; [51] was the claimant's account of what was actually happening on the ground, and that, after asking for measures to be put in place, she had escalated her concerns to the NHS; but it still did not say what she *said to Dr Singh*. The various passages in the annexed statement also nowhere gave a clear account of that specific alleged conversation.

32. Ms Hatch also submitted that paragraph [15(vii)] of the tribunal's reasons meant not that the claimant had not said anything at all in her statement about raising the subject of Dr Okoko with Dr Singh, but that the thrust of her evidence at the full merits hearing was that the *protected disclosure* about Dr Okoko was made by her to the Trust. The tribunal then properly found, for reasons that it set out at [19], that no such disclosure was made to the Trust. Ms Hatch submitted that the tribunal had also been entitled to take the view that the claimant's evidence about the specific claimed disclosure to Dr Singh in August fell short, and to prefer his evidence that no such disclosure was made. Nor was that inconsistent with its more general findings earlier in [15] that the claimant had openly criticised Dr Okoko and made untrue statements about him being in breach of GMC restrictions. Its conclusions that there were no disclosures at all were also amply supported and explained by the various features of the evidence referred to in the course of [19].

33. Finally, Ms Hatch submitted that the respondent had in any event advanced a positive case as to the reason for dismissal, which the tribunal had factually accepted, when it said at [15(xii)]:

> **"I find that the principal reason for the Claimant's dismissal was her poor performance illustrated by her poor leadership skills and her treatment of her colleagues as set out by the Respondent in the letter terminating her appointment (page 186)."**

34. My conclusions on this ground follow.

35. I have kept firmly in mind the familiar authorities and principles of which Ms Hatch properly reminded me, regarding the high hurdle faced by a perversity challenge to findings of fact or evaluative conclusions, and the appropriate approach towards reading a tribunal's decision. It also bears repeating that, as Ms Darlow Stearn confirmed, it is accepted that there was a factual dispute about whether the claimant made a disclosure to Dr Singh, as claimed by PD1, at all, about which there was a conflict of evidence. It is not said that it was not open to the tribunal to disbelieve the claimant's evidence and to make a factual finding that the claimed PD1 was not made at all.

36. It is said that the challenge is, rather, to the *reasoning process* by which the tribunal came to its conclusion, because it relied upon incorrect premisses about the claimant's written evidence. But that challenge in this case, based as it is on the text of three phrases in the tribunal's decision and certain particular paragraphs of the claimant's written evidence, poses the same dangers for an appeal body. I did not hear the claimant's oral evidence, tested in cross-examination. I did not read, or hear, the evidence of Dr Singh, though it is clear from the tribunal's decision that he denied that PD1 factually occurred as claimed, at all. I did not have, or hear, the evidence of the other witnesses. I only had some of the documents. I must also beware of an over-literal reading, in isolation, of what may, on a more generous reading, be an infelicitous or potentially ambiguous phrase in the decision.

37. What the tribunal said at [15(vi) and (vii)] must be read as a whole, and in the context of its findings of fact, and wider decision, as a whole. The clear sense of the tribunal's overall reasoning is that the claimant had shifted her ground, and her account, in relation to PD1, from the PH, where she simply identified a claimed disclosure to Dr Singh as described there, to the full merits hearing, where she introduced the claim that she had made the same protected disclosure about Dr Okoko to the Trust. The tribunal also expressly indicated at [12] that it considered that there were material differences between the case as framed at the PH, *and* her account in her written evidence, *and* her account in oral evidence. It also clearly considered that its conclusions that there was no disclosure to the Trust about Dr Okoko (nor did the separate claimed disclosure to the Trust that was PD2 take place) further undermined the credibility of her claim to have made PD1 to Dr Singh as claimed.

38. As to the tribunal's observations at [15(vi)] that are challenged by this ground, and the passages in the claimant's written evidence that are relied upon in support, Ms Hatch's points are well made. These passages do not show that it was perverse of the tribunal to consider that she had not given a clear or specific account of what she had actually said to Dr Singh on the specific claimed occasion of PD1. These observations by the tribunal were also about her "evidence before me", as a

whole, and the tribunal was entitled to take into account in its assessment, both her written statements and what it made of her oral evidence on this subject, to which it had referred at [12].

39. Turning to the challenge to [15(vii)], the tribunal did refer there expressly to the claimant's witness statement and it used the phrase "not made to Dr Singh but to Derbyshire NHS Trust". But this phrase must be read in its wider context. This paragraph followed [15(vi)]. In these paragraphs together the tribunal reached factual conclusions about whether each of PD1, and PD2, was in fact made. PD2, as noted, was an alleged disclosure to the Trust by email, in respect of which neither the email to the Trust, nor any reply, had been produced, and which the tribunal did not accept was made. The tribunal's conclusions that neither of the claimed disclosures were factually made, and material parts of its reasoning, were repeated in its conclusions at [19].

40. In these paragraphs, read as a whole, the tribunal did consider the case identified at the PH, that PD1 was made to Dr Singh, as alleged there, and concluded that no such disclosure was made. The tribunal first set out that conclusion at [15(vi)]. It then went on to consider at [15(vii)] the case, which it considered was new, as it had not been identified at the PH, that this disclosure was made to the Trust, and it set out why it did not consider that any such disclosure to the Trust was made.

41. I consider that, reading these paragraphs as a whole, what the tribunal was saying was that the claimant was maintaining that she had raised concerns about Dr Okoko internally, but *now* arguing that, if her having done so did not amount to a protected disclosure, then the further verbal disclosure that she said had been made to Ms Allen at the Trust certainly did. I do not think the tribunal meant to say that her evidence was to the effect that she was now saying that she had never raised the subject with Dr Singh at all. Rather, as it put it at [19], she "now says" that there was a further formal disclosure to the Trust, using its whistleblowing policy, which amounted to a protected disclosure on which she now sought to rely for the purposes of her section 103A complaint. Having found that she had not made a protected disclosure to Dr Singh at all, as originally identified as PD1, the tribunal

turned to consider her case that she had made a protected disclosure to the Trust, but also rejected it.

42. I do not think that these passages in the tribunal's decision bespeak an error of any of the types that it was contemplated in either **Yeboah** or **Stewart** might surmount the high hurdle of a perversity appeal. The *dicta* in those two authorities, unsurprisingly, coming from an EAT panel of Mummery J and members, and then from Mummery LJ, are all of a piece. The tribunal's reasoning that is impugned by this ground was not reasoning which "flies in the face of logic", nor was this a case where the tribunal has "unfortunately erred by misunderstanding the evidence, leading it to make a critical finding of fact unsupported by evidence or contrary to uncontradicted evidence". There was a conflict of evidence, and there was evidence to support the finding that the tribunal made, that PD1, as claimed, did not occur. These passages in the tribunal's decision might not be perfectly expressed, but the overall meaning and conclusions are clear enough. They do not present an overwhelming case of perversity, nor do they warrant any of the epithets collated in **Stewart**.

43. Nor do I consider that the tribunal's findings at [15(ii) and (iii)] were contradictory of its conclusions about the claimed protected disclosures. It was not the respondent's case that the claimant had never said a critical word to anyone about Dr Okoko. It was its case that she did say things about him that were critical and untrue. It was also its case that she made unwarranted criticisms of Mrs Martin. The fact that, as a matter of law, the raising of a criticism *may* amount to a protected disclosure, and *may* do so even if it is mistaken, does not mean that these findings contradicted the tribunal's conclusion about whether PD1 or PD2 were factually made. They did not.

44. I note also that the claimant's case was that her having blown the whistle to Dr Singh about Dr Okoko, on the occasion alleged in PD1, led in turn to Dr Okoko giving a malicious report about her in November 2020, when feedback was sought by Mrs Martin. But the tribunal concluded at [15(v)] that this was not a malicious report, but a reasonable assessment of the claimant's skills.

45. It also appears to me that the tribunal had a clear evidential and factual basis to support its positive finding about the principal reason for dismissal at [15(xxi)], having regard to what it said about the evidence of the respondent's witnesses at [8], the respondent's case that some colleagues did not wish to formalise their complaints at [10], documentary evidence that colleagues' concerns had been raised with her in supervisions by Mrs Martin at [12], and the reference to the contents of the dismissal letter at [15(xxi)] itself. While the tribunal did not spell out the reasons for this conclusion in that paragraph, it is clear enough, reading the decision as a whole, why it reached it.

46. For all of these reasons, ground 1 fails.

Ground 2 – Unfair Dismissal for Health and Safety Reasons or Asserting a Statutory Right

47. Ground 2 relates to the tribunal's rejection of the complaints that the claimant was unfairly dismissed for a reason or principal reason relating to health and safety, within scope of section 100 of the **1996 Act**, and that she was dismissed for the reason or principal reason of having asserted a statutory right (section 104). These overlap in terms of subject matter, and the error is once again said to be an error in reasoning, having regard to the evidence that was presented to the tribunal.

48. I have earlier set out paragraphs [20] and [21] of the tribunal's decision, in which it set out its conclusions on these two complaints. This ground contends that the tribunal erred in holding that the claimant had raised health and safety concerns "once only" (on 28 August). It also contends that it erred in stating that there was no evidence that she had ever asserted her working time rights. At the rule 3(10) hearing the claimant told me that emails before the tribunal showed both those conclusions to be plainly wrong. I permitted this ground to proceed on that basis, but directed the claimant to identify the particular emails that she relied upon. While the claimant did send further material to the EAT following the rule 3(10) hearing, she did not identify the specific emails relied upon. However, Ms Darlow Stearn did so in her skeleton argument, and Ms Hatch was able to, and did, respond to her case on this material.

49. In summary, in support of the first limb of this ground, to the effect that the tribunal was wrong to say that the claimant raised her health and safety concerns "once only", Ms Darlow Stearn relied upon the following contemporaneous documents, all of which were in the tribunal's bundle:

(a) An email of 20 February 2020 headed "time owing" referring to having worked 20 hours with no break and not being paid for working through breaks;

(b) A spreadsheet, which I was told was compiled by the respondent from the claimant's swipe card records, showing the hours she had worked throughout the entire period of her engagement as Clinical Lead from April 2020;

(c) A text message from Mrs Martin on 3 June 2020 referring to the claimant having dealt with 3 admissions in one night;

(d) An email from the claimant to Dr Singh of 20 June 2020 referring to the claimant having worked seven hours attempting to refer a patient on her day off, because her contracted hours were not enough to complete her tasks;

(e) Notes of a 7 July 2020 supervision in which the claimant described her work as "interesting but challenging";

(f) An email of 23 August 2020 to Mrs Martin stating that the claimant had worked two extra days to get everything done;

(g) The notes of the supervision meeting on 28 August 2020 – this being the one occasion where the tribunal found that she had raised health and safety concerns following on-call working;

(h) An email from Mrs Martin referring to that discussion and proposing to trial on-calls being booked on a 3-day, rather than a 7-day, rotation;

(i) A note of a supervision meeting on 12 October 2020 referring to the rota being amended from 3 to 7 days, and the claimant still working above contracted hours;

(j) An email from the claimant to Mrs Martin of 13 October raising on-call duties, excessive

workload and weekend working;

(k) An email from the claimant to Mrs Martin of 20 October asking to put in time sheets for additional hours if she cannot take them as study days; and

(l) An email from the claimant to Mrs Martin of 23 October requesting to use accrued overtime hours as time off in lieu.

50. Ms Darlow Stearn said that some, though not all, of these were referred to by the claimant in her witness statement, and some were referred to in the statements of one or other of the respondent's witnesses. She contended that they showed that the conclusion that the claimant only raised health and safety concerns on one occasion was simply wrong. Ms Hatch noted that the February email dated from the period when the claimant was working as a bank nurse, not when she was in the Clinical Lead role. A number of the other emails were not referred to in the claimant's witness statement, and, she submitted, the tribunal could not be criticised for not considering them.

51. Ms Hatch further submitted that, while these documents showed the claimant raising the fact that she was putting in long hours, they did not specifically evidence her raising concerns that her health and safety was being endangered. The tribunal properly found that when, following a particular episode of on-call working, the claimant did raise a specific health and safety concern at the 28 August meeting, the evidence showed that Mrs Martin was responsive, taking steps to trial a change to the rota cycle, and counselling the claimant to rest before driving, come in late or work from home the day after a heavy on-call. The emails in October did not show the claimant raising any fresh health-and-safety concern. The spreadsheet did show her doing regular on-call and additional hours, but not the 50-60 hours on site "most weeks" that she had claimed in evidence. The tribunal was right to say at [21] that the documentary evidence did not support that.

52. My conclusion in relation to this limb of this ground follows.

53. The PH had identified that the claimant's particular case was that she had raised concerns about driving to work tired and having an accident or falling asleep on duty, each time she was on call, but specifically at the supervision meeting on 28 August 2020. The thrust of the legal complaint was not that the claimant was dismissed for complaining generally that she was working long and arduous hours, over and above 40 per week, but that her health and safety was put at risk in the particular way described. The tribunal properly found that she raised the issue, framed in that particular way, once only. It also properly made a positive finding at the end of [20] that the respondent clearly did not have the issue in mind when the claimant's employment was terminated.

54. The material relied upon in support of this limb does not show that the tribunal's findings and conclusions about this particular complaint were plainly flawed or otherwise perverse, in the sense that would surmount the high hurdle for such a challenge.

55. I turn to the limb of this ground concerning the complaint of unfair dismissal for asserting a statutory right, pursuant to the **1998 Regulations**.

56. Section 104(3) provides that it is sufficient if the employee, without specifying the right "made it reasonably clear to the employer what the right claimed to have been infringed was". The tribunal expressly referred to that test at [20]. Ms Darlow Stearn noted that the PH identified that the claimant was relying upon her **1998 Regulations** rights in respect of both weekly hours and rest breaks. However, she did not identify any documentary evidence that showed the tribunal's conclusion that the claimant had not raised her **1998 Regulations** rights regarding the length of the working week to be wrong. As to rest breaks, she relied upon the 20 February 2020 email. But, given that it dated from when the claimant was a bank worker, and sought payment for working through her rest break, and that the claimant did not specifically refer to it in her witness statement, and that the complaint was that she was dismissed in November 2020 from the Clinical Lead job that she began in April, for the sole or principal reason of having asserted her statutory rights, I do not think that the presence of

this particular email in the tribunal's bundle shows that it erred in rejecting that complaint.

57. For all of these reasons ground 2 fails.

Ground 3 - Wages

58. The tribunal's findings of fact at [15] included the following passage:

> **"(ix) Under the terms of her contract of employment, the Claimant was required to work a minimum of 40 hours per week under clause 9 (page 66) and clause 11 provides that she may be required to work additional hours "at your normal rate of pay". It is not disputed that the Claimant worked additional hours including from time to time completing the admissions process for patients during the night. It was agreed with Mrs Martin that, although some additional hours fell within her salary, if excessive hours were declared to Mrs Martin and authorised by her, the Claimant could either be given time off in lieu or, again subject to approval by Mrs Martin, an overtime payment. In this regard the Claimant was to complete an overtime sheet to be countersigned by Mrs Martin and payment would be authorised. The Claimant did this on one occasion (page 124) and I do not find that, as she suggests, she filled in a number of such forms and handed them in to the receptionist. Consequently, the Respondent was never given a detailed record of the hours the Claimant allegedly worked therefore, nor did she act in accordance with the agreement with Mrs Martin as regards payment or time off in lieu. The only time that on call hours were raised by the Claimant with Mrs Martin is recorded at page 128 and I do not accept that this shows the Claimant complained about health and safety as a result of working excessive hours. The Claimant produced a time sheet for the whole period of her employment (pages 328-9) but did not submit claims for overtime other than the one at page 124. This further corroborates the Respondent's account that no other claims were made.**
>
> **(x) I do not find that the Claimant ever asserted a statutory right in relation to excessive hours under the Working Time Regulations 1998. There is no evidence that she ever did this other than asking to be paid for on call hours worked in a supervision meeting with Mrs Martin on 28 August 2020 (page 128). I find that the Claimant did not pursue this request nor did she ever ask Mrs Martin to counter-sign an overtime payment request after the first one she submitted (page 124). Indeed, Mrs Martin offered to look at payment for additional hours worked (page 521) but it seems the Claimant did not follow this up at the time.**
>
> **(xi) There was no agreement between the Claimant and any one at the Respondent that she would be paid an additional 223 hours in overtime payments and the failure to pay this payment was not an unlawful deduction from wages nor did the Claimant assert a statutory right in relation to the alleged non-payment."**

59. This ground contends that the tribunal erred in rejecting the wages complaint, as there was email evidence before it that the claimant had emailed a colleague on reception in November 2020 in respect of overtime worked in October 2020, and evidence before it that Mrs Martin had agreed that she would be paid overtime at the rate of £20 per hour.

60. Again, my rule 3(10) hearing order required the particular emails relied upon to be identified. The claimant had not herself done so, but Ms Darlow Stearn relied in her skeleton argument upon the

minute of the supervision of 28 August 2020, in which it was noted that where there are issues that require the claimant to stay behind "this can be taken as time owing or can be claimed via a time sheet at £20 per hour." She also referred to an email of 25 November 2020 (after the claimant had been given notice) from her to the reception desk, asking them to put in a timesheet for her last Saturday, and stating that she did not get paid "for my nursing shift" for which she had submitted a timesheet, and complaining that she just got paid her basic hours despite working round the clock. In oral argument she also submitted that some of the other emails in the list that I have set out earlier provided evidential support for the wages claim.

61. It was common ground that the claimant was paid a fixed annual salary of £45,000. The outcome of the wages claim did not turn on what hours or shifts the claimant in fact worked, as such, but on what her contractual entitlement was, to receive any further pay over and above her salary, and whether she acquired any right to payment in accordance with any such contractual provision.

62. It appears to me that, on a fair reading, the tribunal's salient findings of fact were that (a) while her contract provided for a minimum 40-hour week, the claimant was expected to work additional hours as necessary without additional pay – which was the meaning of "at your normal rate of pay"; that (b) Mrs Martin however agreed that, if the claimant considered that she had worked excessive hours, she could put in a timesheet for extra hours, and take them as time off in lieu, or, if authorised by Mrs Martin countersigning, be paid for them; but that (c) only one such time-sheet was ever submitted by the claimant and countersigned by Mrs Martin in that way. I do not think the 28 August 2020 minute shows that this conclusion was wrong. It only clearly adds what the hourly rate would be for any such overtime payment as was claimed and authorised – that is: £20.

63. The tribunal repeated at [22] its conclusion that the claimant had only ever submitted one timesheet that had been considered and approved by Mrs Martin. It considered that that conclusion accorded with Mrs Martin's oral evidence. It found the claimant's oral evidence on this topic

unconvincing, for the reasons that it gave. The content of the 25 November 2020 email, which is in some respects opaque, does not in my view demonstrate that these conclusions were perverse.

64. Ms Darlow Stearn acknowledged in oral argument that this ground did not challenge, as such, the tribunal's finding as to what the contractual agreement was. But she told me that the claimant understood from the 28 August 2020 minute that she could claim payment for excess hours, and that she gave up putting in timesheets because she was not getting paid. She submitted that what the claimant understood was relevant, as was the fact that the spreadsheet produced by the respondent showed that it did have access to an electronic record of what hours the claimant had put in. She also noted that the one timesheet referred to at [15(ix)] was actually dated 3 July, predating the 28 August meeting with Mrs Martin, which, she submitted, also undermined the respondent's case. However, I do not think that any of this material shows that the tribunal's conclusions about what was actually agreed, and what was or was not claimed and authorised in the agreed way, were perverse.

65. I appreciate that the claimant maintains that the evidence showed that she persistently worked long hours, above 40 per week, and that she ought to have been paid over and above her annual salary. But the claim before the tribunal was not for fair compensation, however judged. It was a statutory complaint of unlawful deduction from wages, which turned purely on what were her contractual rights. The tribunal did not err in dismissing that complaint, as contended by ground 3.

Outcome

66. The appeal is dismissed.