EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Marcelino Lewis	AND	Aeropark Development Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY	**ON**
By Cloud Video Platform	22, 23 and 24 March 2021

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mr P Bompas
Mr N Knight

Representation

For the Claimant: In person
For the Respondent: Ms P Hall, Litigation Executive

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are all dismissed.

REASONS

1. In this case the claimant Mr Marcelino Lewis claims that he has suffered detriment and been unfairly dismissed because he made protected public interest disclosures, and that he was discriminated against because of two protected characteristics, namely race and disability. The claim is for direct discrimination and harassment on the ground of race, and discrimination arising from disability, and because of the respondent's failure to make reasonable adjustments. He also brings a claim of victimisation, and a claim for breach of contract in respect of his lost notice period. The respondent defends the claims: it concedes that the claimant is disabled, but it contends that the reason for the dismissal was gross misconduct and that the dismissal was not unfair, and that there was no discrimination. It also asserts that it was not required to pay the claimant's contractual notice pay because he was summarily dismissed for gross misconduct.

2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by video. A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents to which we referred are in a bundle of 580 pages, the contents of which we have recorded. The orders made are described at the end of these reasons.

3. We have heard from the claimant. We were also asked to consider a statement from his now estranged wife Mrs Siema Stinson on his behalf, but we can only attach limited weight to this because she was not present to be questioned on this evidence. For the respondent we have heard from Mr Andy Dack, Mr Martin Rustell, Mr Simon Hillier, Mrs Emily Horton, and Mr Michael Kerr.

4. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence. We found that the claimant was genuinely trying to give his best account of events which occurred as long ago as the end of 2017 and early 2018, but on occasions his evidence was confusing, and was not consistent with the contemporaneous documents to which we were referred. In addition, some of his evidence did not support the allegations in the Agreed List of Issues to be determined by this tribunal which he had previously agreed. On the other hand, the respondent's evidence was measured and credible, and consistent with the contemporaneous documents. Bearing all of this in mind, we found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

<u>The Facts:</u>

5. The respondent is a building and development company which specialises in ground works. It employs about 300 operatives who are usually deployed over seven to eight sites. The claimant Mr Marcelino Lewis commenced employment with the respondent as a ground worker on 8 August 2016. He describes himself as Afro-Caribbean. He had a residency permit to remain in the UK which was due to expire in February 2018. The claimant had limited experience and no qualifications, but the respondent agreed to employ him and wished to allow him to progress and to support his family. He remained employed by the respondent until his summary dismissal by reason of gross misconduct on 6 March 2018.
6. The claimant was involved in an accident on site on 10 January 2017 when he was struck on the head by a falling scaffolding pole. Thankfully he was wearing a hard helmet, but nonetheless it was a serious incident. The respondent was not the Principal Contractor on the site, and the

accident was reported to the Health and Safety Executive by the Principal Contractor, and any potential claim on the part of the claimant was not therefore against the respondent, and he pursued his enquiries against the Principal Contractor.

7. As a result of the accident the claimant began to suffer from a bad back, as well as anxiety, depression, post-traumatic stress disorder and post-concussion syndrome. These impairments had a substantial adverse impact on the claimant's ability to carry out his normal day-to-day activities, including concentration and mobility. The respondent has conceded that the claimant became a disabled person at all material times thereafter by reason of both the physical impairment of his bad back, and the mental impairments referred to.

8. Mr Andy Dack, from whom we have heard, is a Contracts Manager with the respondent. The claimant then had a number of well-being meetings which initially were with Mr Dack, and which also subsequently involved Mrs Emily Horton, from whom we have heard, who became the respondent's HR manager in early 2017. They discussed his recovery and his imminent return to work. The claimant continued to experience headaches and was prescribed strong painkillers. The respondent has a policy concerning drugs and alcohol, which also requires employees to inform the respondent if they are on strong prescription medicine because of the potential health and safety consequences of employees being drowsy or otherwise affected by such medication whilst at work. During this time the respondent assisted the claimant by way of loans to the value of £400, and it agreed to pay fees for chiropractic treatment. In addition, the respondent instructed the claimant to complete light duties only until he was fully recovered. On occasions the claimant did not do so, and on 28 March 2017 the respondent wrote a letter of concern to the claimant informing him that he was required to comply with management instructions regarding the correct sickness reporting procedures, and regarding the adjustment which had been made by way of light duties.

9. The claimant received another informal warning in August 2017 after he had left the site without notifying the respondent, and he was reminded of the relevant requirements for health and safety reasons. In addition, although the claimant had advised the respondent during April and May 2017 that he was recovered and that his duties should be returned to full capacity, it seemed clear that the claimant was still experiencing pain and discomfort. The respondent was concerned that the claimant might be withholding information concerning his capability, and therefore wished to refer him for an Occupational Health assessment. Mr Dack and Mrs Horton met with the claimant in early August 2017 and the claimant advised that he was still taking medication for headaches and was due to see a back specialist. The respondent was not aware of this

because they had been led to believe that he had made a full recovery. The claimant agreed to the referral to Occupational Health. The claimant agreed to the suggestion that he would move from the current site where the respondent was working at Nursling, to a new site at Waltham Chase, and undertake light duties until he had fully recovered. The respondent also provided training for the claimant by way of a CSCS Health, Safety and Environment Test for operatives (H,S & E), but the claimant failed this test on 23 October 2017. This is a standard qualification for operatives, and most developers insist on all operatives having this qualification before they are allowed on site.

10. Mr Martin Rustell, from whom we have heard, is a self-employed foreman who is contracted by the respondent to oversee the daily running of its sites. He took over at the respondent's Nursling site in May 2017. He had a good relationship with the claimant, and he had been informed that the claimant was on light duties, but given that the claimant willingly joined in with the other operatives he did not see this as an ongoing issue.

11. There was then an occasion when the claimant witnessed Mr Rustell removing building materials from site, and he assumed that Mr Rustell was stealing the same. He disclosed that allegation to Mr Dack of the respondent. Mr Dack investigated that complaint, and he confirmed that Mr Rustell had already arranged for the building material to be delivered to the site, so that he could remove it to his home, and had obtained authority from the respondent to do so, and had personally paid for the building material. The respondent was fully aware of the arrangement, and there were receipts available to show that he had paid for the material. Nonetheless the claimant genuinely believed that Mr Rustell was committing a criminal offence and initially there were reasonable grounds for holding that belief. The claimant believes that Mr Rustell took a dislike to him and started treating him disadvantageously after he had made this disclosure. However, we accept the evidence of both Mr Dack and Mr Rustell that Mr Dack did not even tell Mr Rustell about the allegation and his investigation, and that Mr Rustell was therefore unaware that the claimant had raised this complaint.

12. At the end of October 2017, the claimant then informed Mrs Horton that he wished to raise concerns about how Mr Rustell was treating him. They had a meeting on 1 November 2017 and the claimant raised three complaints. The first was that Mr Rustell had put him on traffic management duties; the second was not being allowed to work Saturdays; and the third was the way in which Mr Rustell had spoken to him. The claimant wished to raise a formal grievance. The grievance was then investigated promptly by Mrs Horton and on 15 November 2017 she emailed the claimant to inform him of the outcome.

13. One allegation raised by the claimant was that Mr Dack had wrongly discussed personal and confidential information concerning his affairs with Mr Rustell, in connection with the loans which the respondent had made to the claimant. We accept Mr Rustell's evidence that it was in fact the claimant who told him about this, (and not Mr Dack), and that the claimant had also discussed with other workmates the fact that the respondent was supporting him by way of loans.

14. The grievance was rejected save that it was upheld partly on the third point, which related to the manner in which Mr Rustell had spoken to the claimant. The claimant had alleged that he had baited and goaded the claimant and had sworn at and laughed out loud at and/or had belittled the claimant. However, Mr Russell denied this at the time, and again at this hearing, and there was no evidence at all to substantiate the fact that Mr Rustell had been bullying the claimant as alleged. In addition, some of the decisions regarding the claimant's work had been made by Mr Dack, and not Mr Rustell, and Mr Rustell had to manage these decisions with the claimant and the other operatives. In addition, Mr Rustell had not instructed the claimant to do tasks requiring two people, and he was aware that the claimant was on lighter duties. Mrs Horton felt that there was a lack of specific detail from the claimant which made it difficult to investigate and uphold these elements of the grievance. It was partially upheld to the extent that Mr Rustell had used normal industrial language to the claimant and other operatives on site, but this was not found to be in a way which had either singled out or bullied the claimant personally. The claimant did not appeal this outcome.

15. As part of the well-being arrangements to assist the claimant after his accident, the respondent then suggested, and the claimant readily agreed, that he would transfer to another site where the respondent was undertaking groundworks. This was at Waltham Close from the beginning of November 2017, and it presented an opportunity for the claimant to undertake light duties.

16. The respondent then received its occupational health report and an agreed risk assessment was produced to assist the claimant. In addition, the respondent continued to offer training and towards the end of November 2017 the respondent arranged training in both Manual Handling, and as a Banksman. The claimant also requested that the respondent pay for training to use an excavator, but the claimant was not permitted to operate heavy machinery under his agreed light duties, so the respondent did not agree. The respondent also reminded the claimant to retake his CSCS HS&E training certificate, but he did not do so. After 3 January 2018 the respondent was no longer the Principal Contractor on the Waltham Chase site, and the Principal Contractor that took over would not allow employees on site who did not have the CSCS

HS & E training qualification. For this reason, the claimant had to return to the respondent's Nursling site.

17. Mr Dack and Mrs Horton held another weekly well-being meeting with the claimant on 10 January 2018. The claimant confirmed that the agreed light duties were helpful although he was still in some pain. He again requested training for the excavator and felt that Mr Rustell was holding him back from this. However, Mr Dack explained to the claimant that he was on light duties and this was not suitable. The claimant advised that he was still taking tramadol occasionally, and another painkiller amitriptyline. Mr Dack then agreed to issue a new risk assessment bearing this information in mind, and the claimant was not to undertake any duties beyond those authorised. The claimant was also told that he had been seen using his phone on site, and that he was not permitted to do this. They discussed a fatality which their client had suffered on a different site where a banksman was killed because he was on his phone when a lorry backed over him. The claimant understood this and was happy with the arrangements which the respondent had made. This was consistent with an earlier management meeting in 2017 at which banksman and traffic management duties and instructions were discussed in detail, together with the health and safety ramifications of the same, which the claimant assigned to confirm he had attended and understood.

18. During that meeting the claimant also raised a concern about some comments which he thought Mr Rustell had made to a hod carrier (referred to as "hoddy") who was working for one of the bricklayers. The claimant thought that Mr Rustell had said to the hoddy that now that the claimant was back on the Nursling site, he (the hoddy) would be able to get drugs again, thus implying that the claimant was dealing in drugs. Mr Rustell strongly denies this allegation and has no idea whether the hoddy ever made the suggestion, and if he did, where the source of that information came from.

19. During that same meeting the respondent reiterated its concerns with the claimant about further failures to notify the respondent about appointments and his whereabouts. This was the third time that the claimant had been reprimanded for this. On one occasion the claimant had falsified the time when he had signed into site and the claimant was informed that if it happened again he was likely to face disciplinary action.

20. At about the same time the claimant's visa which authorised him to remain in the UK was about to expire. By email dated 23 January 2018 he asked Mrs Horton to provide a letter on company headed notepaper confirming his employment details and his salary and other details. Mrs

Horton did this by way of a letter addressed to the Home Office giving the relevant information to assist the claimant to renew his visa.

21. On 22 January 2018 Mr Dack was attending a site meeting at the respondent's client Bloor Homes with the senior site agent Shahram. They witnessed the claimant doing a "wheely" meaning riding on the back wheel only of his bicycle at high speed, and showing off to the other operatives. Mr Dack was shocked by the claimant's conduct because this was extremely dangerous and contravening health and safety requirements on site, but also because the claimant was on gateman and banksman duties and should not have left his post at all. The site was a building site in which some houses had been completed, and some owners with their children had moved in. The claimant's role of gateman and banksman was critical to health and safety reasons so as to assist in the safe control of traffic on the site. On discussing this with Shahram, he (Shahram) advised Mr Dack that about two weeks previously he had to reprimand the claimant for falling asleep at his post as gateman and banksman and that he had had to instruct a labourer to wake the claimant. The claimant had headphones in and had shown obvious signs of being asleep. Mr Dack then challenge the claimant about his conduct and told him that he would be taking advice from the respondent's HR department. As a result of this advice Mr Dack decided to suspend the claimant on 26 January 2018. On 28 January 2018 the claimant's wife then emailed Mrs Horton to suggest that he had taken tramadol during working hours which had made him drowsy. Mrs Horton then wrote to the claimant to confirm the reasons for his suspension on 30 January 2018.

22. At about the same time Mrs Horton continued to support the claimant in connection with the possible expiry of his visa. The claimant's residence permit was only valid until 7 February 2018 and she discovered it was possible for an employer to assist with further information which might result in an extension of 28 days, but that would only extend the right to employ the claimant until 7 March 2018. She took advice from the Home Office employers' helpline who advised that if she completed a Positive Verification Check this would provide (if the check were passed) an additional six months extension. She therefore emailed the claimant on 5 February 2018 to ask for further information so she could perform the necessary check. As a result of these efforts Mrs Horton was able to receive a positive check which enabled the respondent to continue to employ the claimant for a further six months until 7 August 2018. Mrs Horton was therefore disappointed to receive communication from the claimant's wife on the evening of 6 February 2018 accusing the respondent of suspending the claimant because of his visa application and not because he had fallen asleep.

23. Mr Dack then held an investigation meeting with the claimant on 9 February 2018, and Mrs Horton was also present. Mrs Horton felt that the claimant's tone and body language became aggressive and intimidating. The claimant recorded that meeting surreptitiously. He subsequently produced notes of the meeting from his recording which the respondent was clear the claimant had edited to his own advantage. Both Mrs Horton and Mr Dack recall that the claimant admitted to "nodding off" but this only appears in the respondent's minutes. Effectively the claimant admitted that he had fallen asleep, but he later denied this. In addition, the claimant admitted to performing wheelies and admitted to taking amitriptyline before attending the site which had had a sedative effect. This conflicted with his wife's earlier suggestion that he had taken tramadol. The respondent remained concerned about continuing health and safety issues, including the claimant not signing in and out properly and the fact that he had been wearing earphones on the site. The claimant raised again that he was concerned that Mr Rustell had implied that he was dealing drugs. The claimant suggested he was intending to raise a further complaint, and he was reminded of the formal grievance procedure if he wished to do so.

24. By letter dated 23 February 2018 the claimant was invited to a disciplinary hearing to be heard by Mr Simon Hillier, one of the respondent's Contracts Managers, from whom we have heard. He was informed of the allegations which he had to meet, and informed that he could be represented by a fellow employee or trade union representative. The disciplinary hearing took place on 5 March 2018. The claimant was accompanied by his chosen accredited trade union representative. The claimant admitted to Mr Hillier that he had "nodded off" and fallen asleep at work, and that he had performed wheelies on his bicycle on the site, and that he had taken prescribed medication which might result in him not being able to carry out his duties. Mr Hillier also discussed with the claimant his failure to achieve the CSCS HS & E Accreditation.

25. Mr Hillier considered the claimant's responses overnight, and he met with him again on the following day. Based on the claimant's responses Mr Hillier decided that the claimant had not taken the health and safety issue sufficiently seriously. He did not feel the claimant had understood the seriousness of his actions. The claimant has simply failed to demonstrate or understand that the respondent had a duty of care to all of its employees, and anyone else that might be affected by the works, which were being undertaken. The claimant did not appear to understand that any of the instances to which he had admitted were a serious breach of health and safety working practices. In addition, given his failure to achieve a pass in the CSCS HS & E Test, the respondent was not able to place him on any other site. In addition, the client on the site where he worked, namely Bloor Homes, was the only developer for

which the respondent worked which did not insist on all operatives having CSCS accreditation. Bloor Homes also requested that he be removed from their site. This left no alternative for the claimant to be placed on any other site, even if he passed his CSCS HS & E Test and could be employed elsewhere in a less high-risk environment. Bearing all of the above in mind Mr Hillier decided that the claimant should be dismissed summarily by reason of gross misconduct. Mr Hillier confirmed the reasons in a detailed outcome letter dated 7 March 2018. We accept Mr Hillier's evidence that he was unaware that the claimant had raised any previous complaints or lodged any grievance alleging discrimination.

26. Shortly after the invitation to the disciplinary hearing, the claimant had raised his second grievance. This was by way of an email from the claimant to Mrs Horton on 26 February 2018, which attached a letter of grievance which the claimant had pre-dated 20 February 2018. Mrs Horton investigated this grievance (despite the fact that the claimant was dismissed shortly afterwards), and she confirmed the reasons why it was not upheld on 11 April 2018. The second grievance came as something of a shock to Mrs Horton because in their previous meeting on 10 January 2018 the claimant had confirmed that he did not wish to put in a written complaint but just wished to raise a concern about the allegation that Mr Rustell had implied he was dealing with drugs. The second grievance as raised listed 19 issues, most of which had already been dealt with in the first grievance, and some of which had never been raised previously even though the claimant had had the opportunity to do so. Mrs Horton was concerned that despite the help which had been extended to the claimant, and his previous confirmation of how grateful he was to the respondent for supporting him, his attitude to the respondent had now changed substantially for the worse.

27. The claimant was afforded the right of appeal against his dismissal, and the claimant's appeal was dealt with by Mr Michael Kerr, the managing director of the respondent, from whom we have heard. The appeal hearing took place on 17 April 2018 and the claimant was again accompanied by his chosen trade union representative. The main gist of the appeal as presented was that the site agent Shahram had already spoken to the claimant about falling asleep, but it was only two weeks later that the respondent itself had acted on this information, and the claimant argued that this was because of a grudge which Mr Rustell held against him which resulted in him being removed from their site. It was argued on behalf of the claimant that the matter should have been treated as a capability and contractual issue given that the client had instructed the respondent that the claimant was no longer allowed on site. The claimant and his representative then requested that the matter should be dealt with otherwise than a gross misconduct dismissal without notice and that the claimant wanted to have a clean record, and

for it not to be known that he had fallen asleep and had lost his notice pay. Mr Kerr agreed that the notice pay could be paid and agreed to enquire how the respondent could achieve a termination which was satisfactory to all concerned and they agreed to reconvene the following week after Mr Kerr had spoken with Mrs Horton in the HR department. The appeal hearing ended on that basis, which Mr Kerr thought was an amicable resolution. However, the claimant subsequently emailed the respondent to complain about the fact that the respondent had changed the reason for termination, and the claimant went on to make allegations that the respondent had arranged secret meetings with his trade union representative without his knowledge. Mr Kerr saw that allegation as completely unfounded, and then the claimant's trade union representative emailed Mr Kerr to express his concern at the confusion and confirmed that the claimant had rejected what he thought had been agreed. He explained that the claimant no longer wished to have any representation from him, but he thanked Mr Kerr for his assistance.

28. Mr Kerr therefore reviewed the position and concluded that the claimant had admitted on several occasions that he had nodded off and effectively had fallen asleep. He also admitted taking medication which he knew would make him drowsy and was not paying the required due care and attention and had posed a significant risk to the health and safety of both himself and others. The claimant also suggested that the disciplinary hearing was the direct result of his second grievance being raised which Mr Kerr counted because the invitation to the disciplinary hearing was dated on 23 February 2018, and the claimant emailed his grievance subsequent to that invitation on 26 February 2018. Mr Kerr saw the two issues as unrelated and they were handled separately.

29. Mr Kerr had concluded that the respondent had acted in the claimant's best interests throughout his employment and had supported him well after his accident. The respondent had provided financial support when they were not required to do so. The respondent had paid for medical treatment, and subsequently created a role for the claimant and had made reasonable adjustments and had undertaken weekly reviews. Despite this Mr Kerr's clear view was that the claimant had committed gross misconduct, and he rejected his appeal for that reason. We accept Mr Hillier's evidence that he rejected the appeal for these reasons, not because the claimant had made any earlier disclosures or complaints.

30. Having established the above facts, we now apply the law.

<u>The Agreed List of Issues.</u>

31. This case has been the subject of a number of case management preliminary hearings and postponements for a variety of reasons, not least including the Covid-19 pandemic. The issues to be determined by

this Tribunal were agreed by the parties and set out by Employment Judge Dawson in a Case Management Summary and Order dated 13 June 2019. These are referred to in this judgment as the Agreed List of Issues, and we now deal with these in turn below.

Protected Public Interest Disclosures and Unfair Dismissal

32. Under section 43A of the Employment Rights Act 1996 ("the Act") a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

33. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

34. Under section 103A of the Act, an employee is to be regarded 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.

35. Under section 47B of the Act, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

36. Under section 48(2) of the Act, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

37. The claimant does not have sufficient qualifying service to complain of unfair dismissal generally under the provisions of section 98 (4) by reason of section 108(1) of the Act, but is not thereby precluded from pursuing a claim under section 103A of the Act.

38. We have considered the following cases: Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT; Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436; Blackbay Ventures Limited t/a Chemistree v Gahir UK/EAT/0449/12/JOJ. Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] EWCA Civ IDS 1077 p9; Underwood v Wincanton Plc EAT 0163/15 IDS 1034 p8 Parsons v Airplus International Limited EAT IDS Brief 1087 Feb 2018 Ibrahim v HCA International Ltd [2019] EWCA Civ 2007.

39. The statutory framework and case law concerning protected disclosures was helpfully summarised by HHJ Eady QC in Parsons v Airplus International Limited UKEAT/0111/17 from paragraph 23: "[23] As to whether or not a disclosure is a protected disclosure, the following points can be made - This is a matter to be determined objectively; see paragraph 80 of Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT.

40. [24] "As for the words "in the public interest", inserted into section 43B(1) of the ERA by the 2013 Act, this phrase was intended to reverse the effect of Parkins v Sodexho Ltd [2002] IRLR 109 EAT, in which it was held that a breach of legal obligation owed by an employer to an employee under their own contract could constitute a protected disclosure. The public interest requirement does not mean, however, that a disclosure ceases to qualify for protection simply because it may also be made in the worker's own self-interest; see Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] IRLR 837 CA (in which the earlier guidance to this effect by the EAT ([2015] ICR 920) was upheld).

41. In whistleblowing claims the test of whether a disclosure was made "in the public interest" is a two-stage test which must not be elided. The claimant must (a) believe at the time that he was making it that the disclosure was in the public interest, and (b) that belief must be reasonable. In addition, the claimant must give evidence on the alleged belief that the disclosure in question was in the public interest: see Ibrahim v HCA International Limited [2019] EWCA Civ 2007.

42. In this case the disclosures relied upon by the claimant are set out in paragraph 8.1 of the Agreed List of Issues. In the first place the claimant alleges that he raised issues of race discrimination and disability discrimination, and the fact that Mr Rustell had stolen material from site, on 1 November 2017 and also between September 2017, January 2018 to Mr Dack. Secondly, he asserts that he raised his grievances at various times on 16 August 2017, September 2017, 1 November 2017, 4 January 2018, 10 January 2018, and on appeal from dismissal on 17 April 2018.

43. In the first place we accept that the claimant raised with Mr Dack his suggestion that Mr Rustell was stealing material from the site. As it happens this allegation was not true because Mr Rustell had informed the respondent and paid for the material in advance. Nonetheless we accept that the claimant reasonably believed this to be true. This was specific information given to Mr Dack, a manager employed by the claimant's employer, to the effect that Mr Rustell was committing a criminal offence. For that reason, it is potentially a protected public interest disclosure under sections 43B(1)(a) and 43C(1)(a) of the Act. However, we do not accept that this disclosure was made in the public interest because it relates to a private matter between the claimant, Mr Rustell and the claimant's employer. In addition, the claimant has given no evidence as to whether or not he believed the disclosure to be in the public interest, and, if he did hold that belief, why he believed the disclosure to be in the public interest and/or why it was reasonable to hold that belief.

44. Secondly, we do not accept that the claimant raised complaints that he had been discriminated against either because of his race or disability at the time suggested. He did complain about the treatment which he asserted he was receiving from Mr Rustell, but at the relevant times that was not said to be related to race or disability discrimination. To the extent that any complaints relate to his contractual relationship with the respondent any such complaints would not be in the public interest, as indicated by the statutory reversal of the Sodexho decision. Again, the claimant has given no evidence as to whether or not he believed these disclosures to be in the public interest, and, if he had done so, why he believed the disclosures to be in the public interest and/or why it was reasonable to hold that belief.

45. We therefore find that the claimant did not make any protected public interest disclosures as alleged. Accordingly, we dismiss his complaints of detriment under section 47B of the Act, and for automatically unfair dismissal under section 103A of the Act.

Race Discrimination

46. This is also a claim alleging discrimination on the grounds of the protected characteristic of race under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination, harassment; and victimisation.

47. The protected characteristic relied upon is race, as set out in sections 4 and 9 of the EqA.

48. As for the claim for direct discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

49. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

50. The definition of victimisation is found in section 27 of the EqA. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The following are all examples of a protected act, namely bringing proceedings under the EqA; giving evidence or information in connection with proceedings under the EqA; doing any other thing for the purposes of or in connection with the EqA; and making an allegation (whether or not express) that A or another person has contravened the EqA.

51. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

52. We have considered the cases of; Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen v Wong [2005] IRLR 258 CA; and Madarassy v Nomura International Plc [2007] ICR 867 CA.

53. The claimant's claims for harassment and direct discrimination on the grounds of race are set out in paragraphs 10 and 11 of the Agreed List

of issues. The allegations are as follows: (i) dismissing the claimant; (ii) failing to uphold or investigate his grievances with professionalism; (iii) not giving the claimant a shed to shelter in; (iv) inexperienced staff being paid more than the claimant; (v) disclosing the claimant's private discussion with Andy Dack to Mr Rustell; (vi) Mr Rustell baiting the claimant and goading him between September 2017 and January 2018, and requiring the claimant on his own to do tasks requiring two people; and swearing at him and laughing at him; and (vii) on 22 January 2018 (having requested a letter from the respondent to send to the Home Office about his visa) this led to the claimant's suspension.

54. Allegation (i) relating to his dismissal is said to be direct discrimination only, whereas the remaining six allegations are said to be both harassment and direct discrimination on the grounds of race. During cross examination the claimant accepted that allegations (iii) and (iv) were not allegations which related to the claimant's race, and these allegations are therefore dismissed.

55. We reject Allegation (i) that the claimant was dismissed on the grounds of his race. The claimant was dismissed for a combination of misconduct, including performing "wheelies" on his bike in front of his colleagues, falling asleep, and failing to inform the respondent that he was or medication that was likely to make him drowsy, when he should have been safely supervising as a banksman. The claimant has never denied doing the "wheelies" on his bike, and although he now denies having fallen asleep, he did accept at the time that he had taken drugs which were likely to make him drowsy, and that he had "nodded off". These were all breaches of health and safety requirements which could have had potentially serious consequences. We accept the evidence of Mr Hillier the dismissing officer and Mr Kerr on the appeal that these were the reasons for the claimant's dismissal, and why the appeal was not upheld.

56. We find that Allegation (ii) is simply untrue. It cannot be said that the respondent failed to uphold or investigate his grievances with professionalism. We find that Mrs Horton undertook prompt and reasonable investigations in reply to the claimant's grievances and acted with due professionalism throughout.

57. We also find that Allegation (v) is untrue. We accept Mr Rustell's evidence that it was the claimant who had told him about the fact he was being supported with loans by the respondent, and it was not by way of any release of personal or confidential information by Mr Dack. It was also the case that the claimant had discussed with other workmates the fact that the respondent was supporting him by way of loans. The information was in the public domain as a result of the claimant's own

discussions, and there was no breach of confidentiality on the part of the respondent.

58. We also find that Allegation (vi) is untrue. We accept Mr Rustell's evidence that he did not bait and goad the claimant as suggested and he did not swear out, laugh out or belittle the claimant. He did not instruct him to do tasks requiring two people, and he was aware that the claimant was on lighter duties.

59. Finally, we reject Allegation (vii). It is fanciful to say the least for the claimant to allege that he was suspended simply because he had requested the respondent to send a letter to the Home Office. It is clear from Mrs Horton's explanation that the respondent had gone to considerable lengths to assist the claimant when his visa and residency was about to expire. The respondent could in reality have done nothing, and then would have been acting unlawfully by continuing to employ the claimant if it had not dismissed the claimant. Instead of adopting this course of action, the respondent actively tried to assist the claimant so that he would be available for work for a further six months. To suggest as the claimant does that he was suspended on the grounds of race because he requested that the respondent write to the Home Office is in our view nonsensical.

60. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the claimant.
61. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.

62. In this case, we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from

the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and it is hereby dismissed.

63. With regard to the claim for harassment, similarly we find that no facts have been established upon which the tribunal could conclude that the respondent had engaged in unwanted conduct which was related to the relevant protected characteristic of the claimant's race, and which conduct had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for the claimant. In the circumstances the claimant's claim of harassment on the grounds of his race is also dismissed.

Disability Discrimination:

64. This is also a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination arising from a disability, a failure by the respondent to comply with its duty to make adjustments, and victimisation.

65. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
66. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

67. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

68. The definition of victimisation is found in section 27 of the EqA. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The following are all examples of a protected act, namely bringing proceedings under the EqA; giving evidence or information in connection with proceedings under the EqA; doing any other thing for the purposes of or in connection with the EqA; and making an allegation (whether or not express) that A or another person has contravened the EqA.

69. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

70. We have considered the cases of Environment Agency v Rowan [2008] IRLR 20 EAT; Newham Sixth Form College v Sanders EWCA Civ 7 May 2014; Archibald v Fife Council [2004] IRLR 651 HL.

71. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").

The Claimant's Disability:

72. As a result of his accident at work the claimant began to suffer from a bad back, as well as anxiety, depression, post-traumatic stress disorder and post-concussion syndrome. These impairments had a substantial adverse effect on the claimant's normal day-to-day activities. The respondent has conceded that the claimant became a disabled person at all material times thereafter by reason of both the physical impairment of his bad back, and the mental impairments referred to, and we so find. In addition, the respondent was aware of these impairments.

Discrimination Arising from Disability section 15 EqA:

73. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in

the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links … the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

74. The claimant raises four allegations of unfavourable treatment in section 12 of the Agreed List of Issues. These are: (i) withholding the claimant from completing further training on 31 October 2017; (ii) failing to uphold or investigate his grievances with professionalism; (iii) Mr Rustell making fun of the claimant because he was on light duties; and (iv) Mr Rustell deliberately giving the claimant duties that would put a strain on his back.

75. We reject Allegation (i) that the respondent withheld training from the claimant as at 31 October 2017. We accept Mrs Horton's evidence that on 18 October 2017 she booked the claimant's CSCS HS&E Test for operatives which was due to take place on 23 October 2017. The claimant then failed that test. Mrs Horton then asked the claimant if he wished her to book him on another one and the claimant confirmed on 27 October 2017 that he wanted the respondent to book another test and that he would need to study for it. When the claimant met with Mrs Horton on 1 November 2017 to raise his grievance, he did not raise the matter of any training which had allegedly been withheld. On 3 November 2017 Mrs Horton booked another CSCS HS & E Test for him in any event, which was due to take place on 13 November 2017. The respondent therefore actively encouraged and provided training which was relevant to the claimant's duties. It is true that the claimant had enquired about training on an excavator and training on a heavy roller, but it was explained to the claimant that he was not able to operate this heavy machinery whilst he was on light duties as he had requested. This training was therefore not appropriate or required for the duties which the claimant had agreed to undertake. To the extent that this allegation now relates to the respondent's failure to provide training on an excavator or a heavy roller (which is not clear because no such complaint was raised in the grievance process), we do not accept that this was a detriment or less favourable treatment, simply because the claimant had requested and agreed to lighter duties which meant that

this training was not necessary or appropriate for the roles which he had agreed to undertake.

76. We reject the remaining allegations (ii), (iii), and (iv). In the first place it is simply not the case that the respondent failed to uphold or investigate the claimant's grievances with professionalism. The opposite is the case. Secondly, we accept Mr Rustell's evidence that he did not make fun of the claimant simply because he was on light duties. The claimant has not discharged the burden of proof to persuade us that he suffered this less favourable treatment. Finally, we reject the suggestion that Mr Rustell deliberately gave the claimant duties which would put a strain on his back. Again, the opposite is the case. The respondent supported the claimant after his accident, and effectively created a job for him to do so that he could continue in employment with light duties. It is simply not the case that the claimant was given duties which would put a strain on his back.

77. In circumstances where the allegations of less favourable treatment are not founded, the claimant's claim for discrimination arising from his disability is also dismissed.

Reasonable Adjustments

78. The constituent elements of claims in respect of an alleged failure to make reasonable adjustments are set out in Environment Agency v Rowan. Before considering whether any proposed adjustment is reasonable, the Tribunal must identify: (i) the provision, criterion or practice applied by or on behalf of the employer; (ii) the identity of the non-disabled comparators (where appropriate); and (iii) the nature and extent of the substantial disadvantage suffered by the claimant.

79. Environment Agency v Rowan has been specifically approved by the Court of Appeal in Newham Sixth Form College v Sanders - the authorities make it clear that to find a breach of the duty to make reasonable adjustments, an employment tribunal had first to be satisfied that there was a PCP which placed the disabled person at a substantial disadvantage in comparison with persons who were not disabled. The tribunal had then to consider the nature and extent of the disadvantage which the PCP created by comparison with those who were not disabled, the employer's knowledge of the disadvantage, and the reasonableness of proposed adjustments.

80. The claim in respect of reasonable adjustments is set out at paragraph 14 of the Agreed List of Issues. There is one provision, criterion and/or practice relied upon namely "requiring the Claimant to do more than light duties" (the PCP). However, under cross-examination the claimant conceded that the respondent did not at any stage have a practice or

policy which required him to do more than light duties. In other words, on the claimant's own evidence, the PCP upon which he relies did not exist. In circumstances where the claimant has not established the existence of any PCP which caused him substantial disadvantage by reason of his disability, his reasonable adjustments claim must fail, and is hereby dismissed.

Victimisation:

81. The allegation of victimisation is contained at paragraph 13 of the Agreed List of Issues, and is not limited to either race discrimination or disability discrimination. The Protected Acts relied upon the same as the alleged protected public interest disclosures referred to in paragraph 8.1 of the Agreed List of Issues, which are dealt with under that claim above. In the first place the claimant alleges that he raised issues of race discrimination and disability discrimination, and the fact that Mr Rustell had stolen material from site, on 1 November 2017 and also between September 2017, January 2018 to Mr Dack. Secondly, he asserts that he raised his grievances at various times on 16 August 2017, September 2017, 1 November 2017, 4 January 2018, 10 January 2018, and on appeal from dismissal on 17 April 2018.

82. Although we accept that the claimant raised with Mr Dack his suggestion that Mr Rustell was stealing material from the site, this is not an allegation which relates to the EqA and is not therefore a protected act for the purposes of the victimisaion provisions under section 27 EqA. With regard to the remaining alleged protected acts, we do not accept that the claimant raised complaints that he had been discriminated against either because of his race or his disability at the times suggested. He did complain about the treatment which he asserted he was receiving from Mr Rustell, but at the relevant times that was not said to be related to race or disability discrimination. To the extent that any complaints relate to his contractual relationship with the respondent these were not in relation to any complaints or alleged claims of discrimination under the EqA.

83. We therefore find that the claimant did not make any protected act for the purposes of section 27 EqA, and accordingly we dismiss his claim for victimisation.

Claims Out of Time

84. The claimant first consulted ACAS under the Early Conciliation provisions on 25 April 2018 (Day A). The Early Conciliation certificate was issued by ACAS on 10 May 2018 (Day B). The claimant presented these proceedings on 23 May 2018. The claims are clearly within time to the extent they relate to the claimant's dismissal. However, the effect

of the Early Conciliation provisions is that any matters which arose on or before 25 January 2018 were presented out of time. In the absence of any continuing act of discrimination or discriminatory conduct extending over a period, and/or in the absence of any successful argument by the claimant that it would be just and equitable to extend time, the claims appear to be out of time.

85. We did not have to address these issues because we have dismissed the claims in any event. However, it is worth recording that despite the fact that time and limitation issues were raised in paragraph 16 of the Agreed List of Issues, the claimant adduced no evidence as to why he did not issue these proceedings earlier, nor did he argue at any stage that it would be just and equitable to extend time for doing so. For these reasons we would have dismissed the claim for harassment on the grounds of race, and the claim for direct discrimination on the grounds of race (with the exception of the act of dismissal) because all of the allegations were out of time and there was no continuing act or discriminatory conduct extending over a period. Similarly, the claims under section 15 EqA, although vague, also appear to be out of time in any event.

Breach of Contract/Wrongful dismissal

86. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") and the claim was outstanding on the termination of employment.

87. The claimant was dismissed for a combination of misconduct, including performing "wheelies" on his bike in front of his colleagues, falling asleep, and failing to inform the respondent that he was on medication that was likely to make him drowsy, when he should have been safely supervising as a banksman. The claimant has never denied doing the "wheelies" on his bike, and although he now denies having fallen asleep, he did accept at the time that he had taken drugs which were likely to make him drowsy, and that he had "nodded off". These were all breaches of health and safety requirements which could have had potentially serious consequences. On balance we find that the claimant had committed gross misconduct, and that the respondent was entitled to dismiss him without notice. We therefore also dismiss his claim for breach of contract (wrongful dismissal) in respect of his unpaid notice period.

88. Before concluding we would also add that we have no hesitation in accepting the respondent's evidence that these were the real reasons for the claimant's dismissal. It is appropriate to put on record that the respondent bent over backwards to assist the claimant during his

employment and following his accident. This included making him loans, paying for medical treatment, having weekly well-being meetings, agreeing lighter duties, providing training, creating a job with light duties when arguably one never existed, assisting with complications over the claimant's residency status, and taking a thoroughly lenient approach throughout to the claimant's persistent minor breaches of sickness, recording and health and safety procedures. We have no hesitation in concluding that the claimant's allegations that his dismissal was somehow related to earlier disclosures, complaints, or allegations of discriminatory treatment, are completely unfounded.

89. Accordingly, the claimant's claims are all hereby dismissed.

90. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraphs 1 and 31; the findings of fact made in relation to those issues are at paragraphs 5 to 28; a concise identification of the relevant law is at paragraphs 33 to 44, 50 – 56, and 69 - 76; how that law has been applied to those findings in order to decide the issues is at paragraphs 45 to 48, 57 to 67, and 78 to 100.

Employment Judge N J Roper
Date: 24 March 2021

Judgment and Reasons sent to the parties: 31 March 2021

FOR THE TRIBUNAL OFFICE