EMPLOYMENT TRIBUNALS

Claimant: **Mr R Proctor**

Respondent: **(1) Warwick Estates Property Management Limited**
(2) Verto HR Ltd

Heard at: **Cardiff** **On: 26 and 27 October 2020 and 30 October 2020 (in chambers)**

Before: **Employment Judge S Moore**

Members: **Mr M Lewis**
Ms H Mason

Representation:
Claimant: Ms Millin (Counsel)
Respondents: Ms H Cotton (HR Manager for Second Respondent)

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:-

1. The Claimant's claim for unfair dismissal contrary to Section 98 of the Employment Rights Act 1996 ("ERA 1996") fails and is dismissed.
2. The Claimant's claim that he was subject to detriments contrary to Section 47(B) ERA 1996 on the basis he had made protected disclosures fails and is dismissed.
3. The Claimant's claim that he was automatically unfairly dismissed contrary to Section 103(A) ERA 1996 fails and is dismissed.
4. The Claimant's claim that he was subjected to direct disability discrimination contrary to Section 13 of the Equality Act 2010 fails and is dismissed.
5. The Claimant's claim that he was subjected to discrimination arising from disability contrary to Section 15 of the Equality Act 2010 fails and is dismissed.

6. The Claimant's claim that there was a failure to make reasonable adjustments contrary to Section 20 and 21 of the Equality Act 2010 succeeds and a Remedy Hearing will be listed to determine remedy.
7. The Claimant's claim that he was subjected to unlawful discrimination and victimisation on the grounds of his disability contrary to Section 27 of the Equality Act 2010 fails and is dismissed.
8. The Claimant's claim for failure to inform and consult contrary to Regulation 15 of TUPE Regulations 2006 is dismissed upon withdrawal by the Claimant.

REASONS

Background and introduction

1. The ET1 was presented on 19 July 2019 following a period of early conciliation with Day A being 23 May 2019 and Day B being 19 June 2019.

2. The Claimant had initially brought claims against three Respondents, on the basis there had been a TUPE transfer to the third Respondent. The day before the Preliminary Hearing listed on 7 November 2019 the Claimant withdrew his claim against the Third Respondent and a separate Judgment dismissing the claims against that Third Respondent was issued.

3. However it was unclear whether the TUPE claim (alleged failure to inform and consult) remained live against the first and second Respondent and this was raised with Ms Millin at the outset of the Hearing on 26 October 2020. Ms Millin confirmed after taking instructions that this claim was withdrawn.

4. The Claimant was represented by Ms Millin of Counsel and the Respondent was represented by Ms H Cotton who is a HR Manager for the Second Respondent. There was an agreed bundle which ran to 361 pages. The Tribunal heard evidence from the Claimant whose witness statement ran to 165 paragraphs which also incorporated another document as part of his witness evidence described as a second statement which was contained in the bundle at page 220 – 236. This attached a number of documents reproduced as 23 attachments.

5. The Tribunal also heard evidence from Ms H Cotton, HR Manager and Mr Dominic Rossi, Managing Director of the Respondent. The Respondents sought to rely on written witness statements provided by Mr Reid of the First Respondent and Ms S Williams, Associate Director also of the First Respondent but neither Mr Reid nor Ms Williams attended the Tribunal to give evidence. As they were not available to have their evidence challenged, we determined not to attach any weight to the evidence in their statements.

The Issues

6. The issues in the claim were as set out in the Case Management Order following a Preliminary Hearing before Employment Judge Jenkins on 7 November 2019. The issues set out by Judge Jenkins were clarified with the parties at the outset of the hearing and these were agreed as the relevant issues in the claim. One matter that had to be determined by the Tribunal as a preliminary issue was whether or not the Claimant was a disabled person. The Tribunal found he was a disabled person and reasons were given orally with a Judgment dated 30 October 2020.

Findings of Fact

7. We have made the following findings of fact on the balance of probabilities.

8. The Claimant commenced his employment as a Gardener at Prospect Place in Cardiff on 24 November 2014. Prospect Place is a development of nearly 1,000 residential flats in Cardiff Bay. The Claimant was jointly employed by the First and Second Respondent under a contract of employment dated 3 November 2014.

9. The arrangements in respect of the joint employment came about as follows. The Second Respondent provides services to property management companies with the employment of site-based staff such as caretakers, cleaners and gardeners. The Second Respondent enters into joint ventures with property management companies such as the First Respondent and subsequently jointly employs the site-based staff. Accordingly, the Claimant had two employers and the First and Second Respondents have joint and several liability for the findings of this Employment Tribunal. The way the relationship works is as follows. The First Respondent had an on-site presence at Prospect Place and answered to the management committee of Prospect Place which were the lease holders of the various apartments and flats. The Second Respondent would provide the administrative services of employing the employee and the First Respondent would give the Claimant the operational instructions on the ground and liaise with the committee members or the Company Directors of the committee for Prospect Place.

10. Prior to 2018 there was an arrangement in place whereby the joint employment model described above meant that VAT only needed to be charged to the Second Respondent’s profit margin rather than the entirety of employment costs.

11. The Second Respondent was appointed by the First Respondent to manage the staff at Prospect Place from June 2013. Prospect Place have what was described to the Tribunal as a 'vocal and active residents management committee' known as Prospect Place (Cardiff) Management Ltd ("PPCM"). PPCM instruct the First Respondent and have always taken a direct role in overseeing the budget for the estate. Prospect Place has a high percentage of owner occupiers and a low percentage of investment properties, in other words the majority of the properties at Prospect Place are owned by people that live in them. The residents of Prospect Place gained the right to manage the development from the original property developer. When the Second Respondent were first appointed by the First Respondent PPCM instructed the Respondents to make redundancies and cost savings were achieved by reducing of the number of concierges on site. Further savings were made for Prospect Place by employing a direct Caretaker instead of having a maintenance contract.

12. In 2018 the VAT arrangements described above changed. This resulted in a rise of the cost of staffing at Prospect Place from £250,000 to £300,000 and as a result PPCM instructed the Respondents to make further cost savings.

13. Returning now to the Claimant's employment and his duties. The Claimant was employed as a Gardener. The purpose of his role was to maintain the grounds and gardens. The main duties were to mow and keep large areas of lawn weeded, maintain flower beds, maintain and operate mowers and other equipment, maintain and clip small trees and hedging, clear weeds and create maintenance plans as well as a budget for purchasing plants equipment and fuel.

14. The Claimant's Line Manager was Ms Morgan-Knight and she in turn reported to K Reid. It was common ground that the Claimant was an excellent gardener, highly skilled and qualified. He had spent hours outside of his contracted hours designing planting schemes and also established a gardening club for the residents of Prospect Place in which the Claimant had volunteered.

15. Prospect Place is a residential development set in 16.2 acres, there are many lawns of various sizes to mow regularly and different gardens to maintain, some of which are at ground level and other gardens are elevated. Within the gardens are a variety of trees, shrubs and plants to maintain, prune, water and feed along with hedges and borders.

16. It was clear from the documents before the Tribunal that the Claimant had consistently raised concerns about the volume of work that he was required to undertake alone and achieving the level of maintenance required in the gardens at Prospect Place. He also raised numerous concerns about his level of pay which he maintained was insufficient given the volume and

responsibilities within his role. In June 2016 the Claimant requested and PPCM were recorded as agreeing to purchase a ride on mower in the sum of approximately £4000.00. We saw that in July 2017 the committee agreed to additional costs of £21152 for planting projects and the purchase of further equipment at a cost of £1582 with a total budget of £58089.36 for landscaping allocated in 2017/2018. The committee also specified that the Claimant should always have sufficient manpower to assist him in his role and cover annual leave / sickness.

17. In the Claimant's appraisal document dated 13 July 2018 which was subsequently relied on as one of the qualifying disclosures, the Claimant stated as follows: *"An ongoing and serious concern is the insufficient level of labour needed for me to perform my job effectively. I believe it is unrealistic to expect one person to be able to cover an area of 16 acres and keep up with the continual amount of work without there being a decrease in standards please see attached".* Ms Morgan-Knight had commented as follows: *"Richard has major concerns regarding expectation and area of land to be covered. Employer has tried to support but due to client relations this is a decision which only Warwick/Verto is to make".*

18. There had been a long standing arrangement for the Claimant to have assistance from a seasonal gardener. In the summer of 2018 this was revoked by PPCM due to costs basis. The Claimant was very unhappy about this decision which would mean more work for him despite him having raised concerns that the work even with this assistance was too much for one person. He therefore decided to look for another job and was successful in securing another role. However before accepting the role he put together a document entitled *"Recent Job Offer and Salary Increase".*

19. This document was provided to Ms Morgan-Knight during the Claimant's appraisal meeting that actually took place on 8 August 2018. It was relied on as qualifying disclosure 50 (f). The part that was asserted to amount to the qualifying disclosure (it ran to two pages of A4 typed texts) was the section quoted below at (ii). The Claimant requested three things in that document in order for him to stay in his employment with the Respondents which were:

i. an increase in his salary quoting a recommended band for role of Head Gardener as between £29,000 and £39,000;

ii. "Sufficient level of labour to be provided in order for me to do my job effectively[1]".

[1] i. ." There is no mention in the text of the word **safely** as pleaded.

iii. career development (acquire further skills and qualifications suggested as being tree surgery, chain saw licence, first aid).

20. Ms Morgan-Knight clearly did not want the Claimant to leave and raised the issue on his behalf with PPCM in a strongly worded email which was fully supportive of the Claimant's requests. The Respondents were not prepared to fund these requests out of their own costs and the additional costs would have to be met by PPCM.

21. Representations were made to PPCM by Ms Morgan-Knight in support of the requests by the Claimant. She described the Claimant as an exemplary member of staff who would not be easy to replace. She relayed that concerns had been raised by both K Reid and Sarah Williams regarding the reductions in the budget and the impact on the lawns presently and long term. The Claimant was cited as having raised *"huge workloads"* and *"vast areas of responsibilities for over two years"* and Ms Morgan-Knight said that she had personally raised that reducing the seasonal help concerned her, as their dedicated Development Manager. The Claimant was managing 16 acres with only 3 months of seasonal help. The additional costs per property were cited at £7.39.

22. After a vote between the directors of Prospect Place the majority agreed to all three conditions and in reliance of this knowledge the Claimant turned down the other job offer and offered the full time role to the previous seasonal member of staff, Mr Daly who had been 'let go'. He was authorised to do so by Ms Morgan-Knight.

23. However later that day he was called back to the office by Ms Morgan-Knight and informed that the vote had been rescinded as it had been vetoed by one of the directors at PPCM. None of the three requests were granted.

Qualifying disclosures

24. The Claimant relied upon the following disclosures in respect of his protected disclosure claims. These are set out in his ET1 at paragraph 50(a) – (g).

25. Qualifying disclosure 50(a). This was set out as follows: that on 25 May 2016 the Claimant spoke with K Reid and highlighted the impact on health and safety due to the high frequency and extended use of vibrating machinery. He raised concerns about possible hand arm vibration syndrome if this was not rectified.

26. The Claimant's evidence regarding this protected disclosure was contained in his second statement at page 224 of the bundle. He repeated that he had

made a disclosure to K Reid in late May 2016 and had followed it up in an email of 6 June 2016 in which he attached health and safety documents. We do not repeat the entirety of the email but the following relevant parts in relation to the qualifying disclosure. *"You may recall that due to decisions made I immediately highlighted that there could be a direct impact on my health and safety due to high frequency and extended use of vibrating machinery. The condition I am concerned about is called hand arm vibration syndrome (HAVS)."* The document went on to expand on the information being provided by the Claimant. The Claimant said in the email that he felt he was at great risk of developing HAVS or carpel tunnel syndrome due to his extended use of vibration tools especially when having to use the pedestrian mower to mow all the lawn areas on ground level and the elevated gardens. This had come about because the Claimant did not have a ride on mower and therefore was having to mow all of the lawned areas within the development using a pedestrian mower. It cited the Control of Vibration at Work Regulations 2005 and went on to quote the number of specific products which attracted a number of HSC points that could cause vibration injury and that he should not exceed 400 points in a day. The Claimant described that after 2 hours of continual use of a pedestrian mower this would equate to 575 points, already 175 points over the recommended number of points in any one day. There were further calculations about how many points would be attracted if he used the mower for 6 hours per day and he requested that a purchase of a ride-on mower and additional labour.

Qualifying disclosure 50(b)

27. This was described as follows: "On many occasions between March -April 2017 and 2018 the Claimant raised concerns about the lack of support and heavy workload verbally with Ms Morgan-Knight when preparing the budget for the year".

28. We were unable to locate any evidence from the Claimant that dealt specifically with this disclosure in respect of the period March to April 2017 and it was not specifically dealt with in the Claimant's witness statement under any particular heading. It remained unclear exactly what words were relied upon in respect of the 2017 disclosures either oral or written. With reference to the 2018 concerns we find these were the concerns raised and set out at paragraphs 17 (the appraisal) and 19 (ii) (the document titled *Recent Job Offer and Salary Increases*)

Qualifying disclosure 50(c)

29. This was described as follows. "In a letter to Ms Morgan-Knight dated 8 August 2018 headed *"Work area agreed at interview to present day*

(Justification for additional labour) in which the Claimant highlighted the increase in his job duties and the need for additional support."

30. There was no specific letter dated 8 August 2018. There was a document in the bundle (document 3 at pages 239-240) with the title *"Work area agreed at interview to present day (Justification for additional labour)* but this was undated. The Claimant's second statement references this document at paragraph 12 (page 225) but does not state when he sent it.

31. This document runs to two pages. It was not clear which part of the document was relied upon as amounting to a qualifying disclosure. The document sets out the work area that had been agreed at interview in comparison to the areas the Claimant was actually covering and highlights the need for additional help in order to maintain the gardens to a high standard. It does not however set out any specific health and safety concerns other than the high workload placed on the Claimant.

Qualifying disclosure 50(d)

32. This was described as follows: "On 13 July 2018, in his appraisal the Claimant raised ongoing and serious concerns about the insufficient level of labour support and the difficulty he had in covering 16 acres by himself."

33. This was the same information relied upon in protected disclosure 50(b) (2018). Our findings as to the words used in the qualifying disclosure are at paragraph 17 above.

Qualifying disclosure 50(e)

34. This was described as follows: "On or around October or November 2018 the Claimant spoke with Ms Morgan-Knight and raised concerns about having to lift heavy bags without support and the relevant equipment."

35. We accept that Claimant's evidence that during this period he made numerous requests for support on an almost daily basis with Ms Morgan-Knight.

36. The heavy bags (leaves and later mulch) situation was dealt with in the Claimant's witness statement at paragraphs 107. The Claimant had been made to feel uncomfortable when he raised his condition. Some tasks were too big to undertake alone. The Claimant described that he had collected tonnes of wet leaves from around the site and carried the bags himself even though it had been agreed in a risk assessment (see below) this should not happen. Ms Morgan-Knight was fully aware of what he was doing. He also had to shift heavy bags of decorative bark mulch.

Qualifying disclosure 50 (f)

37. This was described as follows: “In his letter to Ms Morgan-Knight which he supplied at his 2018 appraisal headed *Recent Job Offer and Salary Increases.* The Claimant requested sufficient level of labour support in order to enable him to fulfil his job effectively and safely.”

38. What was actually said in this document was as set out at paragraph 19 (ii). The Claimant did not use the words “safely” contrary to the pleaded disclosure.

Qualifying disclosure 50 (g)

39. This was described as follows: “On or around July/August 2018 following the removal of seasonal support the Claimant spoke with Ms Morgan-Knight and Charlie Noakes (HR advisor for the second Respondent) raising concerns about managing the property on his own.

40. There was no witness evidence that set out the actual words that the Claimant used during this discussion with the two individuals cited. We accept he did raise such concerns as this led to the writing of the *Recent Job Offer and Salary Increases* letter but we did not have any evidence as to exactly what words were used other than as set out in the pleaded detriment.

41. The Claimant’s evidence did not address two key issues. Firstly how these disclosures tended to show that the health and safety of an individual was likely to be endangered. Secondly it did not address at all why the Claimant believed the disclosures were made in the public interest.

42. In the absence of any evidence on these points these were raised with the Claimant by the Judge at the stage where the Tribunal can ask questions. The Claimant explained the public interest element as follows by way of a hypothetical scenario example rather than any actual incident that had occurred or was related to his disclosures. If he were working at height alone cutting a branch from a tree and the branch fell it could have injured a member of the public who was present in the gardens at Prospect Place.

Ostracising behaviour by Directors of Prospect Place

43. The Claimant relied upon ostracising and ignoring behaviour by the Directors of Prospect Place in respect of his detriment claim for protected disclosures and his victimisation claim. The Claimant’s evidence, which we accepted, was that this took place over a period of time. He described it first starting as noticing a distinct change in attitude following the vetoing of the Claimant’s

three suggestions in the summer of 2018 and following the Claimant turning down the job offer that he had received. The Claimant had previously been greeted by various Directors whilst working in the garden but they would no longer approach him to chat and would purposely avoid his gaze or ignore him completely. He described this as happening on occasions when he was gathered with work colleagues and his input would be met with complete silence. Shortly after that the decision was taken to withdraw his temporary labour in August 2018 rather than November 2018 at the height of the Claimant's busiest workload. This particular behaviour complained of came before the Claimant was diagnosed with his hernia which we found amounted to a disability.

44. On or around 28 September 2018 the Claimant came upon a meeting between the Directors of Prospect Place and Ms Morgan-Knight. When the Claimant walked in he attempted a smile at one of the Directors which we will refer to as Director A as his identity is not relevant and he has not had the opportunity to rebut these allegations. Director A responded to the Claimant with a stare of disdain. A further Director who we shall to as Director B gave him a similar look of disdain and again openly ignored the Claimant's greeting of when he said hello and turned his back on him. Afterwards Ms Morgan-Knight told the Claimant that their behaviour had been disgusting and apologised to him on their behalf.

45. In November 2018 during a conversation between the Claimant and Ms Morgan-Knight Director A came into the business hub to ask about what was happening with the plants that required removal. The Claimant explained to the Director it was a very large task and that he would need support given his medical condition to which this Director shook his head to indicate he was unhappy, rolled his eyes and walked out of the business hub. This was the only evidence we had that the PPCM directors had awareness of the Claimant's disability. It was not until this incident that the Director was aware of the Claimant's medical condition and we find would have been on notice that the Claimant would require adjustments in the form of assistance.

46. There was another occasion that the Claimant complained about the behaviour of the Directors at Prospect Place. In December 2018 the Claimant was provided with assistance of 4 other men to dig out and remove large mature plants, transport them down external stairways and dispose of them. Two Directors of PPCM visited the task where the men were at work and asked questions about what was happening. When the Claimant started to explain what they were doing he was cut off mid-sentence by one of the Directors who steered the conversation towards the maintenance team instead. The Claimant found it to be extremely rude and embarrassing and it was noticed by his work colleagues who raised their eyebrows.

47. The ET1 also referred to being ignored in January 2019 but we did not hear any evidence on a January 2019 incident.

Disability

48. From 2016 the Claimant began to notice a bulge in his left side of his groin.

49. On 11 September 2018 the Claimant attended his GP regarding the bulge was diagnosed with an inguinal hernia. The Claimant reported this to his Line Manager, K Reid and informed him that he would be referred for surgery which would happen some time next year based on current NHS waiting times. He informed Mr Reid he had been advised to refrain from any heavy lifting until after the recovery from the operation, but up until then he could carry out lighter duties. He received a Fit Note which said he was maybe fit for work taking into account amended duties and workplace adaptions. The GP specifically stated that the Claimant was to avoid heavy lifting as he would be awaiting surgery.

50. On 12 September 2018 the Claimant reported to work as usual when he received a telephone call from Mr Reid who informed him that he was going to be medically suspended pending an Occupational Health Assessment. The Claimant wanted to carry on working mowing the lawns, but Mr Reid insisted that he left the premises. The Claimant was suspended on full pay pending urgent referral to an Occupational Health Advisor.

51. The Claimant attended this appointment on 27 September 2018 and underplayed his pain and issues he was having because he did not want to be deemed unfit for work. There followed an Occupational Health Report by the doctor which was dated 30 September 2018. The Report stated that he had been diagnosed with the left inguinal hernia and he was on the waiting list for a surgical operation but had not received a date for the surgery. It went on to say that the Claimant had a recurrent bulging in his groin area but he did not report any significant pain. It was reported that activities such as straining, lifting, coughing which involves the muscles near the groin, can aggravate the hernia. Depending on the size of the hernia the surgery may be open surgery or a laparoscopic operation (keyhole). The Occupational Health Advisor stated that the Claimant was fit for work as a gardener provided he avoided certain activities until he completed his operation and the recovery period. He was to avoid carrying and lifting heavy items and undertaking strenuous activities for a long period, e.g. shovelling and digging. He was also fit to work with gardening equipment and ride on mower and to use a harness when carrying gardening tools to spread the weight and reduce pressure on lower abdominal muscles.

52. The doctor stated the Claimant did not report any long standing impairments that affected his day to day activities and that in his opinion the hernia was unlikely to fall within the definition of disability under the Equality Act 2010. He did not say why he had formed this view and whether or not it was because of his anticipation that the hernia would be repaired under surgery within a period of time. He also advised that following the surgery he would require a further six weeks off work before he could return to any labour intensive work.

53. The Claimant attended a return to work risk assessment meeting on 4 October 2018, this was conducted by Ms Morgan-Knight, K Reid and Heidi Cotton from the Second Respondent. The main points of the risk assessment agreed at that meeting and later confirmed in a Risk Assessment Report was that it was the responsibility of Ms Morgan-Knight and K Reid to ensure the following:

    (a) Garden waste. The Claimant would not lift garden waste bags and additional help would be organised to move and lift heavy duties, for example, collection of heavy leaves
    (b) Spraying of surfaces. It was agreed that a member of staff would assist to lift the knapsack onto the Claimant's back. It should be noted that on 8 October 2018 the Claimant informed Ms Morgan-Knight that he was going to be spraying although he did not directly say that he would be using the knapsack, it must have been implicit and Ms Morgan-Knight did not ask if he needed support or organise support in lifting the knapsack
    (c) Prolonged duties. Spacing out the Claimant's duties to not be doing a task for a prolonged period of time
    (d) Weekly catch ups with Line Managers
    (e) Additional help. Either caretakers would help the Claimant or an outside contractor would be put in to assist the Claimant.

The Claimant subsequently received the risk assessment in writing from Ms Cotton in a cover letter of 24 October 2018. We therefore find that a plan was put in place by the Respondents to make the adjustments required and that these adjustments were reasonable in all the circumstances.

54. However, following that risk assessment none of the adjustments agreed were actually implemented. We accept the Claimant's evidence that he requested support on an almost daily basis from his Line Manager, Ms Morgan-Knight. At first he was told they were waiting on a decision by the First Respondents Director, Ms Williams and then he was told there was no money in the budget to hire contractors to tackle the heavy lifting and prolonged weeding and that he was told he would "have to manage."

55. We refer to our findings at paragraphs 35 – 36 above as they are relevant here.

56. In addition, we had sight of photographs of the work undertaken by the Claimant following the risk assessment of him collecting heavy wet leaves and moving bark and mulch. The last photograph was taken on 31 January 2019.

57. It was important to identify the point at which the Claimant became aware or should have become aware that no reasonable adjustments were going to be made. The Claimant stated in evidence that it had become clear to him that no help was going to be forthcoming so he carried on with his duties, but the Claimant did not say when this had become clear to him. There were two occasions when he was assisted with heavy duties which was one of the adjustments that had been agreed. The first was on 25 October 2018 when a temporary member of staff helped him with a heavy garden task for 3.5 hours. The second occasion was the moving of the mature plants in December 2018 which took 4 men 5 days to complete. We did not have the exact date as to when in December this work took place.

58. Other than this help we find that no other adjustments were put in place as had been agreed to assist the Claimant. The weekly catch ups with Ms Morgan-Knight did not take place. In addition, we accept the Claimant's evidence that he was made to feel uncomfortable and responsible for pulling his work colleagues away from their roles to assist the Claimant as this placed them under pressure.

59. Between December 2018 and January 2019 the Claimant took a period of leave during which he discovered that some gardening contractors were being shown around the Prospect Place. In early January 2019 emails between Heidi Cotton and Sarah Williams confirmed that discussions had started to take place about the Claimant's role. In an email dated 18 January 2019 Ms Cotton emailed Ms Williams following up "options with Richard the Gardener" and stated that she confirmed that redundancy would apply as the full-time gardening role was being eliminated. Ms Cotton informed Ms Williams she needed to know the exact reason his role was being considered for redundancy and that reason must be agreed on.

60. Ms Cotton asked to meet with the Claimant on 29 January 2019 and visited the site in Cardiff. We had sight of a note of the consultation meeting with the Claimant. The note states that Ms Cotton had informed the Claimant that the role of full-time gardener was being reviewed due to economic reasons and explained this was due to the recent VAT increases introduced by HMRC and as such the site budget and costs were under review. It was stressed that no formal decision had been taken, and they would be looking at alternative roles within their portfolio. Ms Cotton had arranged another consultation meeting

via phone call for later in the week and a formal letter was issued on 29 January 2019 confirming that his job was at risk.

61. At this time Ms Morgan-Knight was actively seeking tenders from gardening contractors. We had sight of an email in the bundle which confirms that by 4 February 2019 Ms Morgan-Knight had been informed by PPCM that they wanted to outsource based on the present indication suggesting the service change would save money and that three more tenders were due around the week of 4 February 2019.

62. Ms Morgan-Knight informed Ms Cotton in an email of 4 February 2019 that she had informed the Claimant of the VAT impact and that they had received tenders lower than the cost to employ him and that he was aware that tendering was going to take place formally over the next few weeks.

63. In terms of the consultation that took place following that one to one meeting between Ms Cotton and the Claimant, there was a dispute about whether or not there was formal meaningful consultation. This took place by a series of telephone calls between Ms Cotton and the Claimant the first of which took place on 4 February 2019 and it was clear from the transcript of the call (which was the subject of a complaint to the ICO as the Claimant was unaware he was being recorded, but this is not within the jurisdiction of the Tribunal) that the Claimant was not expecting this call. Following the initial surprise there was a discussion that we accept amounted to attempts to consult with the Claimant about the redundancy situation and it was further arranged for a call to take place the following week. There was subsequently further telephone calls on 7 February, 15 February and 25 February 2019. Ms Cotton did not follow up the telephone calls or put in writing what had been discussed but having regard to the contents we find that it was clear that the purpose of the calls was to continue the consultation and we note that the Claimant himself referred to being in consultation period in one of the telephone calls.

64. The Respondent had searched for alternative roles within their portfolio but did not have any gardening roles available. The Claimant confirmed he would only be interested in a gardening role. The Claimant had suggested that he be permitted to tender for the maintenance contract which he did do so, but his tender was not successful. On 25 February 2019 the Claimant was informed that he was being made redundant with an effective date of dismissal of 28 February 2019, with notice paid in lieu. He was given the opportunity to appeal his dismissal but chose not to as he believed it would be futile.

65. On 27 February 2019 the Claimant sent an email to the first and second respondent, including Ms Cotton attaching a detailed complaint about the

absolute failure to adhere to the risk assessment and asserted his extra needs had led to the decision to make him redundant.

66. Ms Cotton replied on 7 March 2020. We accepted her evidence that prior to receipt of the email above she had been unaware that there had been a failure to implement the reasonable adjustments. Ms Cotton maintained that the Claimant should have informed her of this and that it was his responsibility. We find that the Claimant reasonably and properly raised this with his line manager and nothing was done and there was no responsibility on the part of the Claimant to have informed Ms Cotton.

67. In respect of the tender process it was clear from the papers that the tender was being sought for a maintenance only contract. The outline of the tender was involving general gardening including cutting of hedges, cutting of grass, cutting back of herbaceous plants, cutting hedges, planting new herbaceous plants, dividing plants, planting bulbs. On 20 February Ms Morgan-Knight emailed the PPCM and set out the tenders that had been received. They had received 7 tenders between £27,600 and £43,480. The tender was awarded on a 3 month basis to a company called TR33 at a cost of £28,800 including VAT. The Claimant's tender had come in at £37,000 without VAT.

The Law

Unfair dismissal

68. The relevant law in relation to the unfair dismissal claim is set out in Section 98 of the Employment Rights Act 1996. Redundancy is a potentially fair reason for dismissal. S98(4) provides that the employer must act reasonably which in a redundancy situation means the employer should consult meaningfully with the employee and search for alternative employment before reaching the decision to dismiss.

69. The definition of redundancy is set out in S139 (1) (a) and (b) ERA 1996. S139 (1) (b) envisages the situation where work has not diminished but fewer employees are needed to do it.

Protected disclosure claim

70. The qualifying disclosure relied upon under S43B was (d) that the health or safety of any individual has been, is being or is likely to be endangered.

71. In **Kilraine v Wandsworth London Borough Council [2018] ICR 1850**, the Court of Appeal held that the concept of information in S43B (1) was capable of covering statements which might also be allegations. In order for a statement to be a qualifying disclosure it had to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed

in subsection (1) and this was a question of fact for the Tribunal. The disclosure should be assessed in the light of the context in which it is made.

72. **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2018] IRLR 837)** sets out the approach to be followed when considering reasonable belief. The tribunal has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

73. Public interest is not defined in ERA. The question is whether in the worker reasonably believed the disclosure was in the public interest, not whether objectively it can be seen as such.

74. Under S47B ERA 1996 the employee has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

75. A detriment will exist if by reason of the act or acts complained of a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he thereafter had to work. An unjustified sense of grievance cannot amount to a detriment but it is not necessary to demonstrate some physical or economic consequence **(Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11).**

76. If the employee establishes that they made protected disclosures and there were detriments , S48(2) ERA 1996 provides it is for the employer to show the ground on which any act or deliberate failure to act was done, only by showing that the making of the protected disclosure played no part whatsoever in the relevant acts or omissions. The standard of the burden of proof required is if the protected disclosure materially influences (in the sense of more than a trivial influence) the employer's treatment of a whistle-blower **(Fecitt v NHS Manchester [2012] ICR 372).**

77. An employer will not be liable if they can show the reason for the act or failure to act was not the protected act but one or more features properly severable from it **(Martin v Devonshires Solicitors [2011] ICR 352, Panayiotou v Kernaghan [2014] IRLR 500).**

78. S48(3) ERA 1996 provides that the Tribunal shall not consider a complaint unless it is presented before the end of three months beginning with the date of the act or failure to act to which the complaint relates, or where that act or failure is part of a series of similar acts or failures, the last of them. If the claim is presented out of time the test is one of reasonable practicability.

79. S48(4) provides that where an act extends over a period, the "date of the act" means the last day of that period and a deliberate failure to act shall be treated as done when it was decided on.

80. Time will start to run from the date of the act or failure to act, not the date on which the employee becomes aware **(McKinney v Newham London BC [2015] ICR 495).**

81. It is important not to confuse the act with the effects of the detriment if they continue to be felt. Furthermore, the meaning of "series of similar acts" in S48(3) (a) differs to the meaning of an act extending over a period of time in S48(4) (a). We note the guidance in **Arthur v London Eastern Railway Ltd [2007] ICR 193**.

S103A Unfair Dismissal

82. An employee has the right not to be unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure. There is a different causation test to the detriment claim as the disclosure must be the primary motivation rather than a material influence.

Discrimination claims - Who is protected?

83. Part 5 of EQA 2010 prohibits discrimination by employers against employees as well as protection to a wider category of individuals such as contract workers.

S41 EQA provides:

41 Contract workers
(1) A principal must not discriminate against a contract worker—
(a) as to the terms on which the principal allows the worker to do the work;
(b) by not allowing the worker to do, or to continue to do, the work;
(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
(d) by subjecting the worker to any other detriment.

(2) A principal must not, in relation to contract work, harass a contract worker.

(3) A principal must not victimise a contract worker—
(a) as to the terms on which the principal allows the worker to do the work;

(b) by not allowing the worker to do, or to continue to do, the work;
(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;
d) by subjecting the worker to any other detriment.

(4) A duty to make reasonable adjustments applies to a principal (as well as to the employer of a contract worker).

(5) A 'principal' is a person who makes work available for an individual who is—
(a) employed by another person, and
(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6) 'Contract work' is work such as is mentioned in subsection (5).

(7) A 'contract worker' is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

84. In **Leeds City Council v Woodhouse and another [2010] IRLR 625** the Court of Appeal considered the issue of liability for acts of discrimination (under the previous equivalent meaning of a contract worker under the Race Relations Act 1976).

Direct Disability Discrimination

85. The relevant time limits are set out in S123 EQA 2010. Sub sections (3) and (4) provide:

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

86. In **Hull City Council v Matuszowic 2009 ICR 1170, CA**, the Court of Appeal held in terms of the duty to make reasonable adjustments that required an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. The person in question was to be treated as having decided upon the omission as a deliberate omission at the time when he might reasonably have been expected to have done the thing omitted. In **Abertawe Bro Morgannwg University Local health Board v Morgan [2018] IRLR 1050** the Court of Appeal held the Tribunal had

correctly approached the issue of time by asking itself at what point it became clear or should have become clear to the Claimant that the employer was not complying with its duty to make reasonable adjustments.

87. Section 13(1) of the Equality Act 2010 provides that direct discrimination takes place where a person treats the claimant less favourably because of disability (the relevant protected characteristic) than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

88. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in **Igen Ltd v Wong [2005] IRLR 258** regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975).

Discrimination Arising from Disability

89. Section 15 EQA 2010 provides that a person discriminates against a disabled person if they are treated unfavourably because of something arising in consequence of the disabled person's disability and the employer cannot show the treatment is a proportionate means of achieving a legitimate aim.

90. There is no requirement for a comparator for a S15 claim.

S20/S21 Failure to make reasonable adjustments

91. Sections 20 and 21 of the Equality Act 2010 set out the duty to make reasonable adjustments. In this case, it is the duties arising under S20 (3) EQA 2010. The Tribunal must consider first of all the PCP applied by the employer, secondly the identity of non-disabled comparators (where appropriate) and thirdly the nature and extent of the substantial disadvantage suffered by the Claimant. (**Environment Agency v Rowan 2008 ICR 218, EAT**).

92. Under paragraph 20, Schedule 8 EQA 2010, the Respondent (A) is not subject to a duty to make reasonable adjustments if they do not know and could not reasonably be expected to know that the [interested disabled person] has a disability and was likely to be placed at a disadvantage. This is referred to as constructive knowledge. The EHRC Code of Practice on Employment gives guidance on this issue in paras 5.13 – 5.19.

Victimsation

93. Section 27 EQA 2010 provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Conclusions

Unfair Dismissal

94. Ms Millin submitted that there cannot have been a redundancy situation as the Respondents still needed the gardens to be maintained and pointed to the fact that contractors were brought in to undertake these tasks after the Claimant was made redundant.

95. This submission does not however address the type of redundancy as set out in S139 (1) (b) (ii). We have concluded that the Respondent has shown that there was a genuine redundancy situation insofar as there was a diminishing need for work of a particular kind, that is an in-house gardener.

96. We make this finding on the evidence we heard that by moving to contractors PPCM would not have to fund future plant costs and maintain and repair equipment as the contractors would be in a position to supply their own equipment which would be used across all of their contracts. This is a different situation to what was in place when the Claimant was employed “in house”. We saw that PPCM had funded the cost of purchasing new equipment such as a ride on mower at some considerable expense.

97. We also accepted the Respondent has showed there was a move towards a more general low-level maintenance for the primary reason of reducing costs. This was in our judgment motivated by the changes in the VAT rules rather than the costs of funding the Claimant’s reasonable adjustments.

98. For these reasons we find that the reason for dismissal was redundancy and this was a potentially fair reason.

99. We also find that there was a reasonable procedure followed under Section 98(4). There was an initial consultation meeting in person. Although the second consultation meeting was not formally arranged the content of the discussion did move the consultation forward. The remainder of the consultation meetings were understood to be as such by the Claimant. Whilst we observe that the meetings ideally would have been minuted and followed up in writing we do not think the failure to do so undermined the overall fairness of the procedure. The right to be accompanied at formal meetings and the Acas Code of Practice on disciplinary and grievance procedures did not apply to the redundancy consultation process.

100. There was also a search for alternative employment with the Second Respondent suggesting they could look for other roles however the Claimant wished only to be considered for a gardening role and none were available.

101. A right of appeal was afforded.

Protected Disclosures

102. We first of all set out our findings in respect of the detriments relied upon and time limits. In respect of the detriment claim there were two detriments relied upon. The first detriment complained of was the ostracising behaviour by the directors of Prospect Place. Ms Millin conceded, rightly so, that this claim could not succeed as the directors were neither the Claimant's employer nor were they agents or workers of the Respondents (S47B) (1) and (1A) ERA 1996. As such even if they behaved in this way there was no claim that could be brought about their behaviour under S47B. Even if there had been this claim was out of time. The behaviour complained of took place in August 2018 (prior to the Claimant's hernia diagnosis), 28 September 2018, November 2018 and December 2018. We do not know the exact date in December 2018 but the Claimant took leave from mid December 2018 so the latest it could have been would have been on or around 15 December 2018 giving a primary limitation date of 14 March 2019. The Claimant contacted ACAS to start the early conciliation process on 23 May 2019.

103. The second detriment was pleaded as being placed at risk of redundancy. This happened on 29 January 2019 providing a primary limitation date of 28 April 2019. This claim was also out of time. S48 (4) ERA 1996 does not apply as the actual redundancy dismissal had not been pleaded as a detriment.

104. There was no evidence on whether it would not have been reasonably practicable to have presented the detriment claims earlier.

105. Therefore the Claimant's claims under S47B fail.

106. As the S103A claim was presented in time we have gone on to consider whether firstly the disclosures relied upon were qualifying disclosures and then whether they were in the public interest. Lastly we consider the reason or principal reason for the Claimant's dismissal.

107. We have concluded that only two of the seven protected disclosures amounted to qualifying disclosures.

50(A) – The HAVS disclosure

108. This disclosure amounted to a qualifying disclosure. It had sufficient factual content and detail so as to have conveyed information that the Claimant reasonably believed his health and safety was being endangered. It gave reasons as to why he believed this to be the case, citing the statutory requirements for the level of vibrations and how and why this was being breached.

50 (b) and (d)

109. In our judgment these did not amount to qualifying disclosures. In relation to 50 (b) we did not have any evidence about what was said in 2017. It was not sufficient to state the Claimant had "raised concerns about the lack of support and heavy workload" and at best this amounted to an allegation rather than relaying information. In relation to the 2018 information (see paragraph 17) we have concluded this was the same words used as set out in 50 (d) which were the words used by the Claimant in his 2018 appraisal.

110. We have carefully considered what was set out by the Claimant in that appraisal. These were as follows: *"An ongoing and serious concern is the insufficient level of labour needed for me to perform my job effectively. I believe it is unrealistic to expect one person to be able to cover an area of 16 acres and keep up with the continual amount of work without there being a decrease in standards please see attached"*. We are prepared to accept that this conveyed information but it does not in our judgment amount to information that tends to show there has been, is being or is likely to show the health and safety of an individual was likely to be endangered. We accept it shows that there was insufficient labour to keep the gardens at a certain level of standard but the clear focus by the Claimant is on standards rather than health and safety.

50 (c)

111. This was the information contained in the document at pages 239-240. Although there is some issue over the correct date of that document this does not make any difference on the question was to whether there was a qualifying disclosure. We find there was not. Whilst we accept the Claimant raised he generally had a high workload there was not sufficient factual information or specificity detailing how a high workload meant the information tended to show that his health and safety was being endangered.

50 (e)

112. The Claimant had informed Ms Morgan-Knight that tasks were too big to be undertaken alone due to his condition. This should be evaluated in the context of the situation at the time. Ms Morgan-Knight was well aware that a risk assessment and occupational health doctor had advised the Claimant should not undertake such duties and was also well aware of his condition and the risk of heavy lifting associated. We find this did amount to a qualifying disclosure which tended to show the Claimant's health and safety was or was likely to be endangered.

50 (f)

113. We have considered the words used in the document "Recent Job Offer and Salary Increases". The findings of fact are set out in paragraph 19. As with 50 (b) and (d) we are prepared to accept that this conveyed information but it does not in our judgment amount to information that tends to show there has been, is being or is likely to show the health and safety of an individual was likely to be endangered. We accept it shows that there was insufficient labour to keep the gardens at a certain level of standard but the clear focus by the Claimant is on standards rather than health and safety. We therefore do not find this was a qualifying disclosure.

50 (g)

114. We did not have sufficient evidence to evaluate the words used to Ms Morgan-Knight and Ms Noakes other than what we have referenced above in our findings regarding discourse (b), (d) and (f) which are said to have taken place in the same period. The qualifying disclosure is not specific and vague. We therefore find the Claimant has not led sufficient evidence on what was said to enable us to find this was qualifying disclosure.

115. In conclusion, apart from 50 (a) and 50 (e) disclosures relied upon effectively concentrated on there not being enough time to complete tasks in a timely manner the consequence of which would have been under maintained gardens rather than any health and safety related issue.

116. We go on to consider if the two qualifying disclosures were disclosures of information which the Claimant reasonably believed were made in the public interest having regard to **Chesterton**. In relation to the HAVS disclosure in 2016 this was in our view solely about the Claimant's working conditions and use of vibrating machinery. There was simply nothing about that disclosure that could suggest a wider public interest. We find the same in respect of the 50 (e) disclosure. Again it was specifically relating to the Claimant's own personal situation. The Claimant's evidence regarding the working at height to saw a tree branch did not assist with this issue. He had never made a disclosure that lone working might be a health and safety danger to members if the public or residents using the grounds at Prospect Place.

117. For these reasons automatic unfair dismissal claim fails.

Section 13 EQA - Direct Disability Discrimination

118. There were four acts of less favourable treatment relied upon Paragraph 42 of the ET1). Two (being ignored and ostracised by the Directors of PPCM) were acts committed not by the Respondents but the Directors however there was no claim brought against the Directors of PPCM under s41 EQA 2010. As such, these claims must fail.

119. The third act of alleged less favourable treatment of being placed at risk of redundancy was out of time for the reasons we have set out at paragraph 103. We did not hear any evidence on why it would be just and equitable to have extended time. We are prepared to accept that the act of being placed at risk of redundancy and then being made redundancy could have been conduct (in relation to the fourth act see below) extending over a period of time (S123 (3) (a) EQA).

120. The fourth act of less favourable treatment was being made redundant which was presented in time. The Claimant's case was that PPCM did not want to pay for the necessary reasonable adjustments he needed and this is why the decision to bring in external contractors was made.

121. We have therefore had to consider the conflicting reasons put forward by the Claimant and the Respondent as to why his redundancy came about.

122. Whilst we accept the Claimant's evidence as to the behaviour of the PPCM Directors, even on the Claimant's own evidence this change in attitude happened before the Directors could have had any knowledge about his disability (see paragraph 43). We also take into account the vetoing of the Claimant's "three requests" in 2018, also pre dating knowledge of the

Claimant's disability and the background of PPCM wanting to save costs generally along with the change in the VAT rules meaning an extra £50,000 wage bill for the residents of Prospect Place to have to fund.

123. There was a long history, pre dating the Claimant's history of a difference of opinion as to how the gardens should be maintained between the Claimant and PPCM. The Claimant was motivated by his high standards to maintain the gardens to a high standard. However the directors of PPCM did not want to fund gardens to this high standard. They wanted the gardens to be maintained in terms of the grass being cut and shrubs and plants pruned. For these reasons we have concluded that the decision to make the Claimant redundant was not because of his disability but rather it was due to the cost cutting exercises and the change of position in respect of the VAT. We find it more plausible reason for the selection for redundancy given the previous steps taken to reduce the costs of running the development. (For these reasons we would have found that the reason or principal reason for the Claimant's dismissal was not that he had made those protected disclosures but was because there was a redundancy situation).

Section 15

124. We also reject that the unfavourable treatment was something arising from the Claimant's disability. If we are wrong about that then we have concluded the Respondent has shown a proportionate means of achieving a legitimate aim namely to maintain the grounds within an affordable budget for the residents. See our findings at paragraphs 67 regarding the outsourcing of the contracts.

Section 20/21 Reasonable adjustments claim

125. Firstly we deal with whether this claim was presented in time and in doing so had regard to our findings of fact set out at paragraphs 54 – 58 above. We have concluded the point at which it became clear or should have become clear to the Claimant that the Respondent was not going to comply with their duty to make reasonable adjustment was when his dismissal was confirmed namely 25 February 2019. We have reached this conclusion for the following reasons.

126. No date was asserted by the Respondent. The Respondent's case appeared to be that the production of the risk assessment was sufficient to discharge the duty and the fact that none of the adjustments were actually implemented was in some way the Claimant's fault for not informing Ms Cotton. We reject this contention entirely.

127. In December 2018 the Claimant had been provided with assistance when the large plants had been dug out with the other men. Therefore at this point we did not think it should have become clear that the Respondent was not going to comply with their duty as assistance had been provided.

128. The Claimant was then on a period of annual leave until January 2019. The Claimant photographed himself moving leaves on 31 January 2019. However we do not find that this was sufficient to conclude that by this point the Claimant should have known he was not going to receive any assistance.

129. The Claimant had turned down a number of roles in the hope that he would not be made redundant. He submitted a tender for the contract to continue with the maintenance. We have concluded that right up to the point he was informed he was being made redundant the Claimant hoped and believed that the adjustments would be made. It only became clear was only when his redundancy was confirmed. For these reasons, we find that time began to run on 25 February 2019 and the claim was therefore presented in time.

PCP

130. The PCP was *"the requirement to lift and move garden waste, use a "nap sack" for spraying and surfaces, use heavy machinery and equipment, conduct work for prolonged periods and conduct work himself without labour support."* There was no dispute that this PCP applied to the Claimant and that it put him at a substantial disadvantage in comparison with a non-disabled person. This can be evidenced by the Respondent's very own risk assessment which set out the steps that needed to be taken to remove the disadvantages identified. The risk assessment must also suffice as the reason we have concluded it was reasonable to have taken those steps the Respondent themselves identified they were needed to remove the disadvantage.

131. We heard no evidence or submissions that the steps they had identified to remove the disadvantage were not reasonable. They simply were not actioned or progressed by the Claimant's line managers within the First Respondent. It was not, as we observed above, the Claimant's responsibility to be identifying the adjustments or contacting the Second Respondent to complain. He rightly took these concerns to his line management team and they were ignored.

Knowledge of Disability

132. The employer is not subject to the duty to make reasonable adjustments if they did not know and could not reasonably be expected to know the

Claimant has a disability and is likely to be placed at the disadvantage referred to.

133. The Respondent's response asserted that no discrimination could have taken place as the Claimant was not disabled. The hearing commenced with the preliminary issue about whether the Claimant was a disabled person, which is a different question to the issue of knowledge.

134. We have taken into account that the Occupational Health Report advised the Respondent that the Claimant did not have a disability and also the Claimant's evidence that he downplayed his symptoms to the OH doctor.

135. We have also considered all of the surrounding circumstances. The Claimant had been diagnosed in September 2018 and placed on medical suspension by the Respondent following receipt of the fit note from the GP which specifically stated he required adjustments. Ms Cotton gave evidence that they took the diagnosis very seriously and undertook a risk assessment and drew up reasonable adjustments that should have been implemented which were not. Furthermore, at the time the failure to make the reasonable adjustments crystallised the Respondents were aware that no surgery had happened and they had no idea when the surgery could happen. They also were aware that there was a recovery time after the surgery took place.

136. For these reasons we find that the Respondent should have been reasonably expected to know that the Claimant had a disability at the relevant time and the claim for failure to make reasonable adjustments succeeds. A remedy hearing will be listed in due course.

Victimisation

137. The protected act was set out in paragraph 49 of the ET1 as the Claimant's request for reasonable adjustments in October 2018.

138. We noted that the Claimant had deliberately downplayed his symptoms during the OH appointment. The original catalyst for the reasonable adjustments was the fit note provided by the Claimant's GP. However by October 2018, following the risk assessment we accepted the Claimant's evidence that he raised the need for reasonable adjustments constantly with his line manager and these requests were ignored or "fobbed off". These constant requests amounted to a protected act.

139. Turning now to the detriments relied on for the victimisation claim.

140. Firstly, the detriment of being ignored and ostracised by the Directors of PPCM must fail as the Claimant has not brought a claim against PPCM as a

principal. Secondly, such a claim would be out of time for reasons set out at paragraph 102 above.

141. Secondly the detriment of being selected for redundancy. We have concluded this claim could also fails as it is out of time (see paragraph 103 above). Even so, we concluded above that the selection for redundancy was not because he had raised a request to have reasonable adjustments but due to the reasons we found also above (paragraph 120- 123). Therefore the victimsation claim fails as the detriment was not because the Claimant had done a protected act.

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Employment Judge S Moore
Dated: 7 December 2020

JUDGMENT SENT TO THE PARTIES ON 8 DECEMBER 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS