Case No. 1404363/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Marc Harris	AND	Ordnance Survey Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY ON 29 and 30 November and 1 and 2 December 2021
By Cloud Video Platform and in Chambers 3 December 2021

EMPLOYMENT JUDGE N J Roper **MEMBERS** Ms F Robertson
Mr J Shah MBE

Representation

For the Claimant: Mr R Wayman of Counsel
For the Respondent: Mr O Isaacs of Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:
1. The Claimant's claim for automatically unfair dismissal under s103A of the Employment Rights Act 1996 is dismissed on withdrawal by the claimant; and
2. The claimant's claim for detriment on the ground of having made public interest disclosures is dismissed; and
3. The claimant's claim for disability discrimination is dismissed; and
4. The claimant was unfairly dismissed.

REASONS

1. In this case the claimant Mr Marc Harris claims that he has been unfairly constructively dismissed, that he suffered detriment on the ground that he had made protected public interest disclosures, and that he was discriminated against because of a protected characteristic, namely his disability. The discrimination claim is limited to the respondent's alleged failure to make reasonable adjustments. The claimant's claim for automatically unfair dismissal for the principal reason that he had made protected

public interest disclosures was withdrawn at the commencement of this hearing. The respondent denies that the claimant was dismissed, denies that he made protected public interest disclosures and/or that he suffered detriment on that ground, does not concede that the claimant is disabled, and denies that there was any discrimination.

2. This hearing was to determine liability only in the first instance.
3. We have heard from the claimant, and from Mr Dave Cassidy on his behalf. For the respondent we have heard from Mrs Julia Painter, Mr Steve Douch, Mrs Balvinder Pahal and Mrs Hazel Hendley.
4. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. 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.
5. **The Facts:**
6. The respondent is Ordnance Survey Ltd which creates, maintains and distributes detailed location information for Great Britain. It records and keeps geospatial features and information which are used for example in satnav devices in phones and in cars. The respondent also keeps the Ordnance Survey master map up to date. The respondent was previously a public sector organisation, but it is now a private limited company.
7. As is to be expected with a large employer the respondent has a number of policies and procedures in place. It has a Well-being Policy; a Bullying and Harassment Policy; and a Whistleblowing Policy. It also has grievance and disciplinary policies and procedures which are referred to respectively as the Resolution Policy and the Discipline Policy. These policies were readily available to all employees.
8. The claimant Mr Marc Harris is a software engineer. He started with the respondent as a contractor in 2008 and commenced employment with the respondent on 13 October 2014. He resigned his employment on notice at the end of June 2020 and having served out his notice his employment terminated on 29 September 2020.
9. The claimant was promoted to Principal Engineer in April 2018. The respondent has a pay grading system which is linked to agreed targets and objectives through Personal Development Plans. Performance Ratings are on a scale from 1 down to 5, and a score of 3 indicates in general terms that performance objectives have been met, and this then qualifies employees for an annual performance related bonus. The annual bonus is paid at the end of June. A lower score of 4 does not qualify for the annual bonus. The claimant was a well-regarded and well-respected employee, and he was repeatedly rated as 3 with positive feedback from managers, and he earned a bonus in respect of each of his six years of employment ending in the year 2019/2020. In his last year of employment the claimant earned £71,059.00 gross and was paid a bonus of £4,588.00 at the end of June 2020.
10. The claimant's line manager from mid-2017 was Ms Neelima Mamidanna, a Delivery Manager, and she met with the claimant regularly and set his objectives and reviewed his performance. He received positive performance reviews resulting in the performance related bonuses mentioned above. During this period the respondent had been moving from a public sector organisation to one with a more commercially driven ethos. The claimant suggests that from mid-2018 he began to notice a tendency by senior management to criticise employees unduly if they believed projects were not performing. The three senior managers in question were Ms Jo Shannon, the Director of Technology & Design; Mr Mark Goodrich the Head of System Development & Maintenance, and Mr Matt Maiden the Head of Programme Delivery.
11. In addition, there was a senior Project Manager recruited as a consultant namely Ms Helena Reid-Beviere. Ms Reid-Beviere joined the respondent in June 2018 and took over the GeoProd department where the claimant was working. The claimant accuses Ms Reid-Beviere of having an autocratic and master/servant management style which offended against the respondent's hitherto recognised agile way of working. There appears to have been something of a cultural shift as the respondent moved from a

public sector organisation to one with a more commercial approach and a more defined hierarchy. The claimant felt that Ms Reid-Beviere imposed plans which disregarded the technical reality of developments and subjected both him and his team to unrealistic demands. The claimant also perceived that Ms Reid-Beviere acted in a way which was inconsistent with the respondent's practices and policies, and that there was an inappropriate closeness between her and the other three senior managers in the Department namely Ms Shannon, Mr Goodrich and Mr Maiden.

12. In August 2018 the claimant was unilaterally moved at short notice from the GeoProd project to the Sensed Data project (which was later subdivided into Sensed Data A, and Sensed Data B). Although moving departments within the respondent was not uncommon, particularly because different projects require different technical skills, the claimant was concerned about the timing and the manner of the move and the lack of consultation.
13. In November 2019 Ms Reid-Beviere took over management of the Sensed Data A project, and she became concerned about the performance of the team. It seems that there was something of a lacuna between what had been promised on the project, and its likely delivery, referred to in the respondent's jargon as a "Delta". The claimant was then moved again, this time to the Sensed Data B project, again with short notice and with limited consultation. Although the claimant does not seem to dispute that there was a performance differential, he objected to the criticism of the team's performance. When the claimant was asked to move to Sensed Data B he was given the explanation that his senior skills were more valuable elsewhere.
14. A meeting then took place on 18 December 2019 to discuss the Sensed Data A project in which it was accepted that there was a "Delta" between what was delivered and what should have been delivered. The claimant was on leave and was not at that meeting. The claimant concluded that blame had been assigned at that meeting and that it was inappropriate and unreasonable to have done so in his absence.
15. The claimant's case is that he suspected these moves and any criticism were related to tensions between himself and Ms Reid-Beviere, and that his treatment amounted to harassment. He raised informal concerns with his line manager Ms Mamidanna, and with his senior managers Mr Maiden and Mr Goodrich. He says that he felt unsupported and that he was being singled out and ultimately suspected that he was being managed out of the organisation. The claimant asserts that he complained of bullying and harassment but we find that there was no evidence of any such assertions. We do find however that he did complain about his perception of the unreasonable behaviour which resulted in an agreement between Mr Goodrich and the claimant that both sides would seek to put more effort into the working relationships. In any event the claimant raised no complaint at that time under either the Bullying and Harassment Policy, nor the Resolution Policy.
16. On 13 January 2020 the claimant raised a formal Request for Resolution under the respondent's Resolution Policy which is referred to in this judgment as the First Grievance. This was a very detailed document which ran to 18 pages, consisting of three pages of the request, and the remaining pages contained a detailed chronology of the preceding 18 months. This document is relied upon by the claimant as the first of two public interest disclosures. The respondent makes the point that the claimant was well aware of the respondent's policies; he is an intelligent and thoughtful man; his wife is a solicitor; his grievance was clearly considered at length; but that he chose to use neither the Bullying and Harassment Policy, nor the Whistleblowing Policy.
17. The claimant set out a summary of the treatment which he says caused him to raise this First Grievance. The claimant complained of seven matters which he said had eroded his trust and confidence in the respondent and which had caused him stress and anxiety. In short, they were as follows: 1 Unilateral decisions made without consultation to move me from project to project … unduly influenced by Helen Reid-Beviere; 2 No real support from senior management in OS Engineering in particular Mark Goodrich and Matt Maiden in respect of concerns raised over the last 18 months or in respect of the new role of Principal Engineer; 3 A loss of trust in my employer's

ability and willingness to support me in what I consider to be unreasonable, controlling, harassing behaviour; 4 Despite years of dedicated and high level performance … my performance has been questioned in an unprofessional manner without consultation and without following any proper process; 5 Loss of faith in senior management; 6 An operating environment where I've been treated with little dignity and respect, an environment which is non-supportive, harbouring harassing behaviour and is blameful; and 7 Extremely low confidence that anything can or will be done to protect my position or future career at OS. He concluded that section by commenting: "I feel that the above has collectively resulted in a clear intention to push me out of the business and as a result I find my position untenable …" At the end of this document the claimant also included a Conclusion in which he commented: "the purpose of this statement is to raise a formal grievance into the way I have (over the last 18 months) and continue to be treated … I also seek an assurance that (i) I will not be the subject of any further project moves without proper consultation; (ii) that my move to the current project be properly discussed … (iii) that there will be no performance management imposed on me … without proper recourse to the company's policies."

18. During the following week a number of other matters arose. The claimant's line manager Ms Mamidanna requested a copy of the claimant's objectives for the year despite the fact that she had not set agreed objectives with the claimant. In addition, the Sensed Dated A project on which the claimant worked and which had recently been taken over by Ms Reid-Beviere, had had its status changed from amber to red signifying the respondent's concern with the project. The claimant also felt that he had been summoned to meetings with insufficient time to prepare and that his performance had been called into question. The claimant therefore raised another formal Request for Resolution which complained of these additional matters, and which is referred to in this judgment as the Second Grievance. It seems initially this may have been submitted on 21 January 2020 but in any event it was clarified in detail on 22 January 2020.
19. This Second Grievance is relied upon by the claimant as his second of two protected public interest disclosures. Again, there was no mention of the respondent's Whistleblowing Policy.
20. The respondent then appointed Mrs Julia Painter, from whom we have heard, to investigate the claimant's grievances. She is employed by the respondent as Head of Professional, Technical & Bid Services. She held investigation meetings with a number of individuals including the senior managers. The claimant suggested a large number of other people whom he wished her to interview, including Mr Dave Cassidy (from whom we have heard), Mr Matt Bull and Mr Miles Hitchen. Mrs Painter decided not to interview these people because she already had a good range of views and information on the working environment in question. She believed that she had interviewed all of the relevant parties.
21. During her investigation she became concerned what appeared to be striking similarities in the evidence and language of Ms Reid-Beviere, Mr Maiden and Mr Goodrich. She formed the view that there might well have been collusion between them prior to their interviews which would have represented a clear breach of the confidentiality required under the Resolution Procedure. When Mr Noel Clark was interviewed he also confirmed that he had been briefed by Ms Reid-Beviere regarding the substance of the claimant's grievance prior to his prospective interview.
22. On 21 February to 20 Mrs Painter produced her Investigation Report. She made a number of findings which included tension between Ms Reid-Beviere and the claimant; the fact that Ms Reid-Beviere had a different style of working as compared to other project managers; and the perception of staff that there was a very close relationship between Ms Reid-Beviere Mr Maiden and Mr Goodrich. She was unable to make findings of fact on the specific issue of whether Ms Reid-Beviere had bullied or otherwise behaved inappropriately towards the claimant and whether there was a blame culture within the Engineering Department.

23. Shortly after receiving the Investigation Report, the claimant was signed off work for two weeks by his GP for "low mood, stress and anxiety". More detailed findings of fact are set out below with regard to the claimant's illness. He remained absent from work on certified sick leave until the termination of his employment.
24. The respondent's Resolution Policy requires a Resolution Hearing Manager to progress the matter of the Investigation Report, and Mr Steve Douch was appointed. He chaired a resolution meeting with the claimant on 12 March 2020. The claimant conceded that Mrs Painter had done a good job, and Mr Douch agreed to interview the three colleagues Mr Cassidy Mr Bull and Mr Hitchen whose evidence had been requested by the claimant. Following these further interviews Mr Douch met with the claimant again on 22 April 2020 before writing to him by letter dated 1 May 2020 with the outcome of the Formal Resolution Hearing. This is referred to as the First Outcome Letter. The claimant sought clarification as to exactly what Mr Douch's decision was in respect of his points of grievance. Mr Douch confirmed the position by letter dated 5 May 2020, in his Second Outcome Letter.
25. Meanwhile, the claimant had provided Mr Douch with further information before the meetings, which included his proposed "Resolution Points". In this document the claimant set out that his position was untenable and that "Trust has been destroyed (completely diminished) in OS Engineering with Mark, Matt, Helena and Neelima …" There were nine bullet points setting out his required resolutions. They included: "Given the gravity of the situation and OS's stance/zero tolerance, if I were to remain in OS Engineering in any capacity, MG, MM, HRB would need to be removed from OS and even then Jo Shannon's influence remains. Should Neelima remain, then no longer as my line manager … HS [Ms Slawson, another senior manager] would need to be retrained/disciplined for her actions … Steve Blair our CEO to be involved as clear breach of trust, confidentiality and process is being walked all over by HRB, MG, MM as such I'm fearful that 1 nothing will be done, 2 my position is not being protected and my career at OS is in tatters." In short therefore the claimant's proposed resolution required the removal of the three named senior managers, Ms Lawson to be disciplined, and Mr Blair the CEO to be personally involved.
26. The conclusions in Mr Douch's Second Outcome Letter by reference to the claimant's points of grievance were in summary as follows: 1 Unilateral decisions made without consultation to move me from project to project on multiple occasions and in my view unduly influenced by Helena Reid-Beviere - Partially Upheld; 2 No real support from Senior Management in OS Engineering, in particular Mark Goodrich and Matt Maiden in respect of concerns raised over the last 18 months or behaviour displayed by Helena Reid-Beviere – Upheld; 3 Loss of trust in OS ability and willingness to support me on what I consider to be unreasonable, controlling and harassing behaviour - "this is not a point I can come to a resolution on as loss of trust is subjective."; 4 Questioning of my work performance in what I consider to be an unprofessional manner and outside of a structured process - Partially Upheld; 5 A loss of faith in senior management in OS engineering after multiple attempts made to build support - "This is not a point I can come to a resolution on as loss of faith in Senior Managers is subjective"; 6 An operating environment where I have been treated with little dignity and respect, an environment which is non-supportive, harbouring harassing behaviour and is blameful – Upheld; 7 Extremely low confidence that anything can or will be done to protect my position or future career at OS - "I acknowledge that you state that your confidence is low, however this is not a point I can come to a resolution on."
27. On the same day, 5 May 2020, Mrs Hazel Hendley the respondent's People Director, from whom we have heard, also wrote to the claimant. She confirmed that she was "fully committed to our zero tolerance of harassing or bullying behaviours in the workplace … I will be taking steps to address the concerns raised and contained within the findings of the investigation of the outcome letter … I report directly into Steve Blair, our CEO, who has the same commitment to zero tolerance of this behaviour, and I will escalate this matter to him if and when the need arises."

28. On 19 May 2020 the claimant emailed Mrs Hendley to complain that although a number of his grievances have been upheld, he had still not been provided with any indication as to how the respondent intended to resolve the grievances. He reminded her of the respondent's zero tolerance policy in relation to bullying and harassment. Mrs Hendley then wrote to the claimant on 21 May 2020 setting out what she described to be an "action plan to address the working environment in Technology & Design". This included "1:2:1 Discussions" with Ms Reid-Beviere, Mr Maiden and Mr Goodrich, individual coaching, and "self reflection." She also offered the claimant the opportunity to take up a different role if he did not wish to return to his existing role. The claimant confirmed on 4 June 2020 that he had received these proposals and that he would subsequently respond in full. These matters were not being imposed on the claimant, and we accept Mrs Hendley's evidence that she genuinely wished to engage with the claimant to seek to resolve the matter.
29. In the meantime, by letter dated 11 May 2020 the claimant appealed the two points in his grievance which Mr Douch had only partially upheld. These related to whether Ms Reid-Beviere had "unduly influenced" the two project moves; and whether his performance had been questioned "in an unprofessional manner without consultation and without following any proper process". The respondent appointed Mrs Balvinder Pahal, from whom we have heard, to conduct the appeal. At that time she was employed by the respondent as Geospatial Solutions Operational Manager. She did not carry out any further investigations, and held an appeal hearing with the claimant on 8 June 2020.
30. Mrs Pahal decided to uphold the claimant's appeal. In accordance with the policy she initially communicated her decision orally to the claimant, which was on 10 June 2020. On 17 June 2020 Mrs Hendley wrote to the claimant to invite into a meeting to discuss his concerns so that she fully understood the position. Mrs Pahal then confirmed her appeal decision in writing by way of her letter dated 18 June 2020. She confirmed that both of the claimant's points of appeal had been upheld and informed the claimant that Mrs Hendley would be informed of her conclusions with a view to achieving a resolution. The claimant subsequently accused Mrs Pahal of inappropriate questioning, and effectively doubting his credibility with regard to the failure to set appropriate performance targets. We prefer Mrs Pahal's version, and we accept her evidence, that she did not doubt his credibility, but was merely seeking to ensure that she understood all of the relevant facts.
31. By email dated 23 June 2020 the claimant sought details of his contractual bonus from the respondent's HR department. His email reads: "As we discussed on Friday and from reading the latest comms from the CEO indicating that bonus details will be emailed today. Please can you ensure that I receive this information today with a breakdown of the reward. I had a letter back in September 2019 from Lisa Marshall confirming my Bonus Potential for the year (assuming my score was three or above overall). Lisa Marshall responded immediately to the effect that the claimant's performance rating was still 3, and that the bonus payment would amount to £4,588.00 and she explained the rationale behind the award. The claimant was then paid his normal monthly salary and that bonus in the June payroll.
32. There is a dispute as to the extent to which the three senior managers who had breached confidentiality and colluded in their versions faced formal disciplinary proceedings. The respondent's position is that they were advised that their behaviour was unprofessional and that they were issued with a written "management rebuke", which was to be retained on the personnel files for 12 months. The letters to Mr Goodrich and Mr Maiden were identical and were dated 24 June 2020, and the letter to Ms Reed-Beviere was almost identical and was dated 29 June 2020. The claimant suspects that these were only prepared after his resignation and wrongfully dated with an earlier date to assist the respondent's case, but we do accept that these conversations at least were held with these managers before the claimant's resignation.

33. These letters are all headed "Conclusion to Appeal and Confirmation of Professional Advice". They each included the comment: "… you will recall meeting with Jo where the overall conclusions from both the investigation and hearing were discussed, you were advised that you had breached the confidentiality of this matter in discussion with others and the importance and expectation of preserving confidentiality in any complex employee relations case was outlined … You agreed to reflect on how projects are managed, your involvement and influence in that, and the way you communicate with and encourage employees in your teams." Mrs Hendley as Director of People and Ms Shannon the Director of Technology and Design decided that these discussions and subsequent letters were a proportionate means of dealing with this matter given that the three managers had accepted that they had behaved inappropriately, and that the respondent was entitled to deal with the matter by way of this informal disciplinary process.
34. The point is made on behalf of the claimant that this is in breach of the respondent's own Disciplinary Policy, and effectively there was no disciplinary process commenced against these three individuals which the claimant had always demanded. Under the Disciplinary Policy an investigation is required to establish facts which must then result in an outcome, of which there are three options: no case to answer and no further action; professional advice or management instruction with the record retained for 12 months; or finding that there is a case to answer with a move to a formal disciplinary process. The respondent contends that in circumstances where the facts had already been established under the grievance process, and accepted by the three individuals, it thought it appropriate and proportionate to issue the letters of Professional Advice which is consistent with one of the outcomes under the policy.
35. In any event the claimant then resigned his employment by letter dated 27 June 2020. This was a detailed letter which ran to nearly three pages, and which included the following statements: "I write to give you notice of my resignation from my position as Principal Engineer at Ordnance Survey (OS). I am required to give three months' notice and, therefore, my last day of employment will be 29 September 2020. As you are aware, I am currently signed off work due to anxiety and depression which is caused by my work-related stress … I have been treated appallingly by management at OS for the last 18 months and this situation has escalated since raising my grievance. I have lost all faith, trust and confidence in OS and its ability to protect me as an employee and, therefore, I feel that I'm left with no alternative but to resign … The majority of my complaints (including that I had been subjected to a bullying and harassing environment) have been upheld and yet nothing has been done to resolve these … The resolution letter only mentions breach of confidentiality. There is nothing in the letter to address the serious issues of bullying and harassment which were upheld … suggest that anyone will be asked to apologise … [no] offer to mediate … [no suggestion] that the matter has been (or will be) referred to the CEO which I specifically requested …"
36. Mrs Hendley continued to seek to engage with the claimant and by letter dated 2 July 2020 expressed her disappointment at the claimant's decision, and she sought to persuade him to retract his resignation. She stated: "I would wish to offer you the opportunity to reconsider your decision in light of my response below and reassurances provided. At the very least I would hope that we can have an opportunity to discuss this further so that we can fully understand the specific resolutions that you are seeking in order to explore whether these are in any way achievable and which would go some way to facilitate a return to work for you." The claimant replied by letter dated 3 July 2020 rejecting that approach and complaining that the respondent did not make any attempt to put any tangible resolutions in place and that he was not prepared to reconsider his decision or to discuss the matter further.
37. The claimant remained on certified sickness absence and his three months' notice expired on 29 September 2020 which is the effective date of termination of his employment. The claimant had already made contact with ACAS under the Early Conciliation provisions on 26 June 2020 (Day A) and the Early Conciliation Certificate

was issued on 24 July 2020 (Day B). The claimant commenced these proceedings on 21 August 2020. There was then a case management preliminary hearing before Employment Judge Livesey on 6 April 2021 at which he made various directions and orders. These were confirmed in an order on 6 April 2021 which was sent to the parties on 12 April 2021. This is discussed further below and is referred to as "the Case Management Order." It included an Agreed List of Issues.

38. Findings of Fact Relating to Disability:
39. We make the following additional findings of fact in connection with the claimant's disability.
40. The claimant asserts that he has suffered from a mental impairment being a combination of stress anxiety and depression since July 2018, and that this impairment has had a substantial adverse effect on his normal day-to-day activities, including disturbed sleep, headaches, low mood, erratic behaviour and impaired concentration. However, these assertions are inconsistent with the relevant medical records to which we were referred. In particular there is no medical evidence to support the contention that the claimant had any medical condition, nor any adverse effect on his normal day-to-day activities in the period between July 2018 and January 2020.
41. The claimant submitted an electronic consultation form to his GP on 28 May 2020 in which he confirmed that his depression had not started until age 43 (which was August 2019 at the earliest) and that he had felt like this for 3 to 6 months. This conflicts with an earlier consultation on 10 March 2020 in which the claimant indicated that anxiety had started "possibly a few years ago, 40-ish" and that it had lasted for more than six months. At a meeting on 22 January 2020 the claimant informed Mrs Painter that his anxiety and stress levels had increased significantly with effect from the start of that year. The extracts which we have seen from the claimant's GP notes show that the claimant consulted his GP on 29 January 2020 in connection with a knee injury but made no mention of any mental impairment or suggested disability in that respect. The entry for 26 February 2020 refers to "Stress at work (First)", which indicates that this was the first occasion on which the claimant had raised this condition with his GP. The entry also records: "Ongoing problems at work since raised a grievance 18 months ago. Find it incredibly stressful and now starting to affect him generally. Feels low in mood, no motivation, struggling to concentrate at work …"
42. The claimant did not commence any certified sickness absence until 26 February 2020, and he remained on certified sickness absence until the termination of his employment. The original certificate dated 26 February 2020 confirmed that the claimant was signed off work for two weeks for "low mood, stress and anxiety." The second certificate was dated 11 March 2020 for a further two weeks, this time for "stress at work". The next certificate we have seen is dated 1 May 2020 for four weeks, again for "stress at work". There was then a further certificate on 29 May 2020, again for "stress at work". A further certificate dated 14 August 2020, again for "stress at work" covered the period to 29 September 2020 when the claimant's employment terminated.
43. During this process the respondent referred the claimant to its Occupational Health advisers. Dr Pearce prepared a report dated 30 April 2020 (the First OH Report"). This reports that the claimant had robust mental health until the onset of work-related stress which "reached its nadir in January 2020". The claimant describes suffering with work-related stress which had degenerated into a moderate depressed episode with associated anxiety. Symptoms included low mood, disturbed sleep, and altered appetite. The doctor was asked to report on what if any reasonable adjustments the respondent should consider in order to facilitate a return to work. The recommendation was that the grievance situation should be resolved as soon as practically possible to restore confidence, and then a return to work on a phased basis might well be required. In reply to the specific question as to whether the claimant was disabled under the statutory provisions Dr Pearce commented that the condition must have the potential to last longer than 12 months (if not treated) and stated: "It is my opinion that his condition is likely to fall under the Act, however, this remains a legal rather than a medical decision."

44. Dr Roberts prepared a subsequent report on 15 June 2020 ("the Second OH Report"). He reported "… He is not yet satisfied that his grievance with the organisation is fully resolved. Specifically this has had an ongoing impact upon him. This impact has been to cause him changes in mood and anxiety. His mood and anxiety to some extent have mirrored the difficulties with his work situation. I do think they are related however: I also feel that he is suffering from a health condition … Mr Harris is suffering from symptoms of mild-to-moderate low mood with associated anxiety … Symptoms continue to include low mood, reduced energy and motivation, decreased pleasure with initial difficulty getting off to sleep and mid wakening … I do not feel that he is currently fit to return to work and feel that the resolution of matters of conflict with the organisation will be a critical part of the resolution of his health … I would ordinarily suggest that with this component (resolution of difficulties with his employer) that he would be able to recover over the next 2 to 3 months alongside effective treatment being available in normal circumstances."
45. Having established the above facts, we now apply the law.
46. **Disability Discrimination Claim:**
47. 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 failure by the respondent to comply with its duty to make adjustments.
48. 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.
49. 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. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.
50. 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.
51. We have considered the cases of SCA Packaging v Boyle [2009] ICR 1056; McDougall v Richmond Adult Community College [2008] ICR 431; Environment Agency v Rowan [2008] IRLR 20 EAT; Ishola v Transport for London [2020] ICR 1024 CA; Nottinghamshire City Transport Ltd v Harvey [2013] EqLR 4 EAT; Newham Sixth Form College v Sanders EWCA Civ 7 May 2014; Archibald v Fife Council [2004] IRLR 651 HL; General Dynamics Information Technology Ltd v Carranza [2015] ICR 169 EAT; We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
52. The Claimant's Disability:

53. The claimant asserts that he has been a disabled person by reason of a mental impairment from 2018, with the impairment being anxiety and depression, and more latterly stress at work. However, these assertions are simply not borne out by the contemporaneous documents, including the relevant GP records which we have seen. We are reminded that the burden of proof falls on the claimant to establish that he is disabled for the purposes of the EqA.
54. We refer to our findings of fact above on the matter of disability, and it seems clear to us that the claimant began to report symptoms which were having a substantial adverse effect on its normal day-to-day activities only with effect from early January 2020. He reported the symptoms to his GP for the first time on 26 February 2020 saying that his condition was "now" affecting him. He was then signed off as being unfit for work, and as we know remained too unwell to return to work. Meanwhile, the First OH Report on 30 April 2020 confirmed that the condition had the potential to last longer than 12 months and was likely to fall under the Act.
55. We bear in mind that the statutory definition of disability includes the requirement that a condition must be long-term in the sense that a long-term effect is one that has lasted or is likely to last for at least 12 months. In considering whether a condition is likely to last for at least 12 months we have to consider whether "it could well happen" (applying SCA Packaging v Boyle). In addition, it is necessary to decide whether the definition of disability is met at the time of the alleged discrimination (applying McDougall v Richmond Adult Community College).
56. Bearing all the above in mind, we conclude that the claimant was suffering from a mental impairment which began to have a substantial adverse effect on his day-to-day activities, in the sense that the effects were more than minor or trivial, with effect from the end of January 2020. At some stage the impairment became a long-term condition in the sense that it could well happen that it would last for 12 months. That is not clear from the initial sickness certificates, but it is indicated as at 30 April 2020 at the time of the First OH Report. That was some 3 to 4 months after the substantial adverse effects arose, and we now know that they continued thereafter.
57. For these reasons we conclude that the claimant was a disabled person, but only with effect from the date of the First OH Report on 30 April 2020, because at that stage the claimant was suffering from a mental impairment which had a substantial adverse effect on its normal day-to-day activities, and the condition was long-term in the sense that it could well happen that it was going to last for 12 months or more.
58. The Respondent's Knowledge:
59. As noted above, under paragraph 20(1)(b) of Schedule 8 of the EqA the respondent is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the substantial disadvantage relied upon.
60. As to knowledge of the claimant's disability, we find that the respondent was on notice that the claimant was a disabled person with effect from the First OH Report on 30 April 2020. The condition cannot really be said to have been a long-term impairment until such time as it could well happen that it would last for 12 months. There was no indication of this before the First OH Report, and although the respondent has criticised the wording in some respects, in our view it is clear that this Report informs the respondent the claimant is likely to fall within the statutory provisions relating to disability.
61. The second element required before the respondent is under the statutory duty to make reasonable adjustments is knowledge that the claimant is likely to be placed at the substantial disadvantage relied upon. This was confirmed in the Agreed List of Issues set out in the Case Management Order as follows: "Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability in that they exacerbated the claimant's condition?" In the claimant's pleaded case this includes that he was prevented from returning to, and ultimately forced out of, a job that he enjoyed. In our judgment this second element causes insurmountable problems for the claimant in this case simply because no substantial disadvantage is relied upon

other than the very vague allegation of exacerbation of the claimant's condition, and his being prevented from returning to work, and no oral evidence was given to support any such assertion. None of the respondent's witnesses were asked as to the nature of any substantial disadvantage to the claimant and/or whether they knew about any such disadvantage. We also address this in considering the PCPs relied upon, as follows.

62. Reasonable Adjustments:
63. 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.
64. 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.
65. As per HHJ Richardson at para 37 of General Dynamics Information Technology Ltd v Carranza UKEAT/0107/14 KN: "The general approach to the duty to make adjustments under section 20(3) is now very well-known. The Employment Tribunal should identify (1) the employer's PCP at issue; (2) the identity of the persons who are not disabled with whom comparison is made; and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the Employment Tribunal is in no position to find what, if any, step it is reasonable for the employer to have to take to avoid the disadvantage. It is then important to identify the "step". Without identifying the step it is impossible to assess whether it is one which it is reasonable for the employer to have to take".
66. In addition, it is clear from Ishola v Transport for London, that although a PCP will not be narrowly construed, nonetheless the concept does not apply to every act of unfair treatment of a particular employee. It must be capable of being applied to others, and it suggests a state of affairs which indicates out similar cases are generally treated or have a similar case will be treated if it occurred again. This is consistent with Nottinghamshire City Transport Ltd v Harvey which states "practice connotes something which occurs more than on a one-off occasion and which has an element of repetition about it".
67. The claimant relies on the following nine PCPs which he asserts placed him at a substantial disadvantage compared to employees who do not have his disability in that his injury was exacerbated and he was prevented from returning to, and ultimately forced out of, a job that he enjoyed. We deal with each of these in turn.
68. PCP 1 is Not applying its own zero tolerance policy to senior managers. We find that there was no such PCP. The respondent asserts that the did apply it zero tolerance policy, which is disputed by the claimant, but even so there is no evidence of any practice of the respondent failing to do so.
69. PCP 2 is Not involving the CEO in HR matters and/or this matter. We find that there was no such PCP. Mrs Hendley indicated that she would involve the CEO if and when the need arises and there is no evidence of any practice of the respondent failing to involve the CEO in HR matters generally.
70. PCP 3 is Maintaining set reporting lines. The respondent accepts that it had set reporting lines and that this was a practice, and therefore a PCP. However, there is no evidence that any such PCP caused the substantial disadvantage relied upon by the claimant. The claimant's desired resolution involved the dismissal or removal of the named senior managers above him. We do not accept that this was a reasonable

requirement for the claimant to insist upon by way of potential resolution, but be that as it may, it was the respondent's failure to meet the claimant's personal demands to remove the named individuals, and not the general practice of set reporting lines, to which he objected in which he says increases stress or meant he was unable to return.

71. PCP 4 is Approaching the grievance and/or grievance appeals in an accusatory manner or otherwise the approach to those meetings. We find that there was no such PCP. There is no evidence to suggest that the respondent generally approaches grievance or appeal hearings in an accusatory manner. On the individual circumstances of this case there is no evidence to conclude that either Mr Douch or Mrs Pahal were accusatory or otherwise unreasonable in the manner in which they investigated (and of course upheld) the claimant's grievances.
72. PCP 5 is Not holding senior managers to account for their actions. Again, we find that there was no such PCP. There is no evidence that the respondent generally does not hold senior managers to account for their actions. There is in this case a dispute as to the extent to which the three named senior managers who received the professional Advice letters were subject to an informal disciplinary process or not. Either way the respondent asserts that they were held to account. The claimant disagreed with the sanction because his desired resolution was their dismissal. That is an individual complaint, and it does not amount to a PCP to the effect that senior managers are not held to account.
73. PCP 6 is Allowing managers to move staff from projects unilaterally with no explanation. Again, we find that there was no such PCP. On the facts of this case the claimant may have been moved at short notice, but an explanation was provided. He may well have doubted the motives, but that does not mean that the respondent had a practice of moving staff unilaterally with no explanation.
74. PCP 7 is Not setting performance targets. Again, we find that there was no such PCP. It is correct that the claimant did not have his targets set for the year 2019/2020, but he did have one set for 2018/2019 and for previous years. There is no evidence that this was anything other than an oversight for the year in question, and no evidence that the respondent has a practice of not setting performance targets. Indeed, the opposite is the case.
75. PCP 8 is Basing performance ratings on personal feeling rather than objective performance targets, and PCP 9 is Management practice of scrutinising performance based on personal feeling. Again, we find that there were no such PCPs. There is simply no evidence that performance ratings or scrutiny of performance were based on personal feelings. The usual practice was that performance targets were discussed with individuals and agreed on an objective basis. To the extent that the claimant alleges that this did not happen to him towards the end of his employment does not give rise the existence of these PCPs.
76. In conclusion therefore the only PCP relied upon which we have found to exist is PCP 3 in that the respondent maintained set reporting lines. However, we reject the claimant's assertion that any such PCP caused him the substantial disadvantage relied upon. In any event, even if it did, there is no evidence that the respondent knew of any such substantial disadvantage. In these circumstances the statutory duty to make reasonable adjustments simply did not arise, and we have no hesitation in rejecting the claimant's claim for disability discrimination in this respect.
77. **<u>Public Interest Disclosure Detriment Claim:</u>**
78. Under section 43A of 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.

79. 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.
80. 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.
81. 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.
82. We have considered the cases of Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT; Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436; Fecitt and Ors v NHS Manchester [2012] ICR 372 CA; Kuzel v Roche Products Ltd [2008] ICR 799 CA; 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 Ibrahim v HCA International Ltd [2019] EWCA Civ 2007.
83. 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.
84. [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).
85. 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. See Ibrahim v HCA International Limited [2019] EWCA Civ 2007.
86. The statutory framework and case law concerning protected disclosures was also summarised by HHJ Tayler in Martin v London Borough of Southwark (1) and the Governing Body of Evelina School UKEAT/0239/20/JOJ. He referred to the dicta of HHJ Auerbach in Williams v Michelle Brown AM UKEAT/0044/19/00 at para 9: "it is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information.

Secondly the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in subparagraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

87. It was confirmed in the Case Management Order that the claimant relies on two disclosures, namely his grievances of 13 and 21 January 2020. The second is clearly a misprint because the Second Grievance was submitted as amended on 22 January 2020. The claimant asserts that he set out information that tended to show that the respondent (a publicly funded company) was failing to protect the health and safety of the claimant and his colleagues in the wider engineering department by subjecting them to a bullying and toxic working environment. The respondent disputes that either of these was a protected public interest disclosure.
88. We find that the claimant's First Grievance, which ran to 3 pages with 15 supporting pages of notes, disclosed information to the respondent (his employer) that there had been a breach of a legal obligation, namely that the health or safety of an individual was being endangered. He gave clear information as to the allegations which he was raising including that his performance had been wrongly questioned, that other employees were in breach of the respondent's policies and his own legal rights, that as a result he was suffering from anxiety and stress, and that have been subject to unreasonable, controlling and harassing behaviour. Given that his grievances were upheld, that belief was clearly reasonable.
89. We find that with regard to the First Grievance, which is the first disclosure relied upon (i) there was a disclosure of information; (ii) the claimant believed that the disclosure indicated that the health or safety of an individual was being endangered; and (iii) that belief was reasonably held. As to whether this was a protected public interest disclosure, this goes some way towards satisfying the test in section 43B(1) of the Act, and the disclosure was made to the claimant's employer, which would satisfy section 43C(1)(a) of the Act. Similarly, the claimant's Second Grievance dated 22 January 2020, which is the second disclosure relied upon, gives further information which in the reasonable belief of the claimant tended to show that the respondent's managers continued to act in breach of the claimant's legal rights causing him increased stress and worry.
90. The missing constituent element before we can conclude that the claimant made protected public interest disclosures is the extent to which the claimant believed that the disclosure was made in the public interest, and that if he did hold such a belief, it was be reasonably held.
91. We accept that during the course of the grievance and Resolution process, to include the claimant's appeal and its subsequent resignation, the claimant developed his general complaint to include one of the culture of the Engineering department, and the effect which the respondent's alleged actions might have had on others as well as himself. However, in our judgment, this was not the case at the time of the claimant's two grievances.
92. The First Grievance in our judgment is clearly a personal grievance raised by the claimant against his employer. It records: "I am lodging a grievance … I have continued to be treated with no dignity or respect … I have suffered and continue to suffer from harassment … I fully anticipate that my position will be made further difficult on the filing of this statement … I now suffer from anxiety and stress … A loss of trust in my employer's ability and willingness to support me in what I consider to be unreasonable controlling harassing behaviour … I feel that the above was collectively resulted in a clear intention to push me out of the business and as a result I find my position untenable". In item 6 of the matters complained of the claimant does mention the operating environment, but in the context of: "an operating environment where I have been treated with little dignity and respect". Similarly, the Second Grievance merely added to the personal examples raised by the claimant including that this "further

supports my feeling that there is a driver to performance manage me out of OS and upset me further".

93. We do not accept the claimant's assertion, which we consider to be a retrospective gloss on affairs, that the claimant was raising a grievance about the wholesale culture of the Engineering department, and the effect that this was allegedly having by way of a breach of legal obligations owed to other employees generally. The two grievances were a combined personal complaint under the Resolution Policy about the way the claimant individually had been treated which included allegations of a breach of legal obligation against him.
94. We do not accept that at the time these grievances were made that the claimant believed that these were complaints or disclosures being made which were in the public interest. In addition, even if the claimant did believe this, we find that this would not have been a reasonable belief. In circumstances where we find that the claimant did not believe that his disclosures were in the public interest, and in any event that any such belief would not have been reasonable, we find that these disclosures were not protected public interest disclosures. In these circumstances the detriment claim under section 47B of the Act is not supported by protected public interest disclosures, and that claim is therefore dismissed.
95. In any event, even if we are wrong on this point and the claimant's disclosures were protected public interest disclosures, we would have dismissed the detriment claim for the following reasons.
96. The claimant asserts that he has been subjected to the following 10 detriments as a result of raising his grievance, and we deal with each of them in turn.
97. Detriment 1: Being called to meetings without sufficient notice or with time to prepare. There is simply no evidence that any meetings were called without sufficient notice or without giving the claimant time to prepare, nor that any such alleged detriment was on the ground that the claimant had made a protected public interest disclosure.
98. Detriment 2: Being subjected to inappropriate review of his objectives and competencies by his line manager who had omitted to set them in the first place. There is no evidence that the relevant line manager Ms Mamidanna was aware of the disclosures at the time she made her request to review the claimant's objectives, and accordingly any such alleged detriment cannot be on the ground that the claimant had made any disclosures.
99. Detriment 3: Being subjected to an unreasonable and inappropriate grading of his most recent project. Again, there is simply no evidence that any individual alleged to have been responsible for an unreasonable or inappropriate grading had any knowledge of the protected disclosures and/or was materially influenced by them.
100. Detriment 4: Further attempts to change his duties. The claimant has not satisfied us in his evidence that there was any attempt to change his duties which took place after the disclosures, and that they can therefore be said to have been on the ground of his disclosures and/or materially influenced by them.
101. Detriment 5: the failure to handle the grievance investigation fairly, appropriately and neutrally. We reject the assertion, and the alleged detriment, that the claimant's grievance investigation was not handled fairly appropriately and neutrally. On the contrary, the claimant accepted that he had thanked Mrs Painter and believed that she had done a good job. There was no such detriment.
102. Detriment 6: the significant breaches of confidentiality, lying and colluding committed by the senior management team during the grievance investigation. There were no allegations of lying established by the claimant during this process, although the three senior managers were accepted by the respondent to have breached confidentiality and colluded in their responses. It is not clear the extent to which this amounts to a detriment against the claimant, but that point aside, the claimant accepted that they acted in that way to protect each other, and there is no evidence that they acted in that way on the ground of, or because they were materially influenced by, the disclosures made.

103. Detriment 7: Persistent attempts to unreasonably grade his performance as a "4". We find that as a matter of fact this alleged detriment did not arise, in that there was no persistent attempt to downgrade the claimant's performance to the level of 4. There was a discussion about whether the claimant should be at level 4 but that was soon accepted as inappropriate, and this was remedied. There is no evidence that there were persistent attempts as alleged, nor that they were on the ground of, or materially influenced by, the disclosures.

104. Detriment 8: HR being aware of the above and failing to take any action. This alleged detriment is factually incorrect. It is clear that the HR Department did take action to remedy any suggested downgrading and to ensure that the claimant maintained his level 3.

105. Detriment 9: The failure to handle the grievance appeal appropriately, fairly and neutrally, including failing to undertake any investigation and unreasonably questioning the claimant's credibility. We do not accept that this alleged detriment was in place. In the first place it was never put to Mrs Pahal that she was not neutral, and it seems bizarre that the claimant is suggesting that the appeal was not dealt with appropriately or fairly in circumstances where it was upheld. The claimant did complain that he felt Mrs Pahal was doubting his credibility when she questioned him as to the background and did not accept at first blush the information with which he had presented her. However we accept her evidence that she wanted to ensure she had an accurate picture of the background, and there is simply no evidence to suggest that if she did question the claimant inappropriately (which we do not accept) that this was on the ground of, or materially influenced by, any disclosure.

106. Detriment 10: The persistent failure to consider the claimant's suggested resolutions or put any or any reasonable resolutions in place, preventing the claimant from returning to work. Again, we do not accept that this alleged detriment was in place. It is not true that there was any persistent failure as alleged to consider the claimant's resolutions. The respondent did consider the claimant's resolutions and given that these required an insistence that several senior managers were disciplined and/or dismissed it is unsurprising that the respondent did not readily agree with them. This does not mean that there was a persistent failure to consider them. In addition, Mrs Hendley clearly made repeated attempts to engage with the claimant to discuss her suggested resolutions further, but the claimant refused to engage.

107. In conclusion therefore we find that the claimant did not make protected public interest disclosures, but in any event, we find that the claimant did not suffer any detriment on the ground of either alleged disclosure. For these reasons we dismiss the claimant's detriment claim under section 47B of the Act.

108. <u>The Respondent's Late Application to Amend:</u>

109. This application relates to the extent to which the respondent is able to argue a positive case that the claimant affirmed his contract of employment after the alleged fundamental breaches and is therefore precluded from relying on those alleged breaches. The circumstances relate to the claimant's positive request at the end of June 2020 that the respondent should honour its contractual obligations with regard to his performance bonus, and the assertion that he only resigned his employment following receipt of that confirmation.

110. In the first place, the respondent did not plead any positive case of affirmation in its Grounds of Resistance which supported its Notice of Appearance in response to this claim. Thereafter, the Case Management Order addressed this issue in confirming the Agreed List of Issues to be determined by this tribunal. In the paragraph headed Constructive Unfair Dismissal at paragraph 1.4 Employment Judge Livesey included the usual preamble "Did the claimant tarry before resigning and affirm the contract?" This was immediately followed by "The tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation. The respondent is not running a positive case in that respect."

111. It is clear to us therefore that the time of the Case Management Order the parties had agreed and it was recorded that the respondent would not be running a positive defence of affirmation.

112. On the second day of this hearing questions were put to the claimant in cross examination about his attempts to secure his bonus and I made the comment at that stage that there was no apparent case of affirmation within the Agreed List of Issues. This was confirmed as the claimant's understanding on his behalf, and no application was made by the respondent at that stage.

113. It was only after the conclusion of the evidence in this case, and after each party had agreed that their case was concluded, that we proceeded on the fourth day of this hearing to hear submissions on behalf of each party. During his submissions on behalf of the respondent, Mr Isaacs sought to rely on an argument that the claimant had affirmed his contract. In the first place, Mr Isaacs asserted that affirmation was a live issue simply because Employment Judge Livesey had asked the question at the start of paragraph 1.4 "Did the claimant tarry before resigning and affirm the contract?" We reject that argument and agree with Mr Wayman on behalf of the claimant that the absence of any positive case in the Grounds of Resistance, coupled with the comment at the end of paragraph 1.4 in the Case Management Order that "the respondent is not running a positive case in that respect", makes it clear in the List of Issues that the respondent was simply not arguing this point and it was not an issue to be determined by this tribunal. Accordingly, the parties had prepared their witness and documentary evidence without this being a live point.

114. It was argued secondly by Mr Isaacs on behalf of the respondent that if we did not agree with that primary submission, then he wished to make an application to amend the List of Issues in order to be allowed to make that positive case. Mr Wayman on behalf of the claimant objected to that application.

115. Mr Wayman has drawn our attention to <u>Scicluna v Zippy Stitch Ltd & Ors</u> [2018] EWCA Civ 1320 in which Longmore LJ held: "In paragraphs 32 to 33 of <u>Land Rover v Short</u> [2011] UKEAT/0496/10/RN Langstaff J approved the submission of counsel that: "It was trite law that it was the function of an Employment Tribunal to determine the claims which the claimant had actually brought, rather than the claims which he might have brought and that accordingly the claimant was limited to the complaints set out in the agreed list of issues." So likewise, must the respondent be limited to the defences set out in the agreed list of issues." Underhill LJ agreed with this and held that: "There are exceptional cases where it may be legitimate for a tribunal not to be bound by the precise terms of an agreed list of issues; but this is not one of them."

116. For these reasons alone we refuse the respondent's application to extend the ambit of the Agreed List of Issues to include a positive defence of affirmation.

117. We should also add that following the conclusion of this hearing and confirmation that judgment was to be reserved the respondent's solicitor submitted a copy of the case management agenda which had been agreed by the parties before the case management preliminary hearing. This indicated that the normal principles were in play, namely a query as to whether the claimant had affirmed the contract. Mr Wayman on behalf of the claimant responded to the effect that any such agreed points of discussion have clearly been superseded by the Case Management Order which followed it, and in respect of which there was no application for variation or reconsideration.

118. We also make the comment that we were not invited to consider this application to amend by reference to the principles arising from <u>Selkent Bus Co Ltd v Moore</u> [1996] ICR 836 EAT. In general terms an Employment Tribunal has jurisdiction to determine the case before it, and not some other case (per Gibson LJ at paragraph 42 of <u>Chapman v Simon</u> 1994 IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added. In <u>Cocking v Sandhurst (Stationers) Ltd and anor</u> [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments. The key principle was that in exercising their discretion, tribunals must have regard to all the circumstances, in particular any

injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in Selkent, which approach was also endorsed by the Court of Appeal in Ali v Office of National Statistics 2005 IRLR 201 CA.

119. We do not see this application as being on all fours with an application to amend to be considered under Selkent principles. Rather it is effectively an application to withdraw a concession made during the course of proceedings to the effect that the respondent would not advance a positive case of affirmation. The main difficulty which the respondent faces is that the application was only made after the evidence had been concluded and both parties had confirmed that they had closed their cases. The claimant had prepared and given his evidence on the basis that affirmation was not a live point. Either way we have to consider and balance the relative injustice and prejudice which might apply to either party.

120. In this case we do not consider that it would be in the interests of justice, or in accordance with the overriding objective, to allow such a late amendment to the Agreed List of Issues. This case was prepared thoroughly for trial on the basis of that Agreed List of Issues. That is one of the primary purposes of holding case management preliminary hearings. The application was only made after the conclusion of the hearing and after all of the evidence had been completed. To allow the application would incur additional consequences with both parties having the right and presumably wishing to have the opportunity to present further evidence. That would inevitably have incurred further directions and further delay in circumstances where Tribunal resources are very hard pressed, and further hearing allocations and further delays have a knock-on effect for other Tribunal users as well as the parties in this case. Increased costs and further delay are not in the interests of justice nor in accordance with the Overriding Objective. On balancing the hardship and prospective prejudice to both parties, we unanimously decide to reject the respondent's application.

121. Unfair Constructive Dismissal Claim:

122. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

123. If the claimant's resignation can be construed to be a dismissal, then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

124. We have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT; and Upton-Hansen Architects ("UHA") v Gyftaki UKEAT/0278/18/RN.

125. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v

Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

126. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

127. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.

128. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

129. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."

130. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and

that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).

131. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust. Having reviewed the case law on the “last straw” doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer’s acts notwithstanding a prior affirmation by the employee.

132. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.

133. The claimant asserts that the respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. There are seven alleged breaches of contract relied upon, and we deal with each of these in turn.

134. Breach 1: The wholly unreasonable, unjustified and bullying conduct of the senior management team. The respondent does not dispute that there was a finding of bullying and the lack of support by the senior management team, and we so find.

135. Breach 2: The total failure to deal with the claimant’s persistent attempts to raise his concerns informally. We do not accept that the claimant persistently attempted to raise his concerns informally and accordingly do not accept that the respondent failed to deal with informal concerns. Once the Formal Grievances were raised, these were dealt with reasonably and responsibly by the respondent.

136. Breach 3: The claimant’s mental health which was a direct result of the senior management’s conduct and which would have been entirely preventable if the claimant’s concerns had been dealt with informally (or when the respondent’s HR Business Partner raised them prior to the claimant’s grievance). Whilst we accept that the claimant was suffering from stress at work, as recorded in his sickness certificates, there is no medical evidence to the effect that the claimant’s mental health was caused as a direct result of the conduct of the respondent’s senior management. Similarly, there is no evidence to suggest that the claimant’s ill health was “entirely preventable” if only the matter been dealt with informally. Obviously, it would have been preferable for all concerned if any informal complaint had been addressed and resolved, but we do not accept this alleged breach of contract occurred.

137. Breach 4: The detrimental treatment he has been subjected to since raising his first grievance in January 2020. To the extent that this alleged breach of contract amounts to the breach of confidentiality and/or collusion by the three senior managers in question, we accept that there was a fundamental breach of contract in this respect.

138. Breach 5: The poor and biased handling of his grievances. We reject this allegation of breach of contract. We do not accept that the claimant’s grievances were handled poorly or in a biased way. They were thoroughly and responsibly investigated, and the claimant’s grievances were upheld.

139. Breach 6: The failure to implement any resolutions preventing the claimant from returning to work. We do not accept that this is a fundamental breach of contract on the part of the respondent. It is true that the respondent failed to implement the resolutions which the claimant was insisting should be implemented. That does not mean that it was a breach of contract just because they did not agree with the

claimant's view. Given that it involved an insistence that three senior managers should be dismissed, and one other should be subject to disciplinary proceedings, we do not accept that it was reasonable of the claimant to insist on that course of action. In addition, it is clear that Mrs Hendley repeatedly attempted to engage with the claimant to discuss her proposed resolutions, but the claimant refused to engage.

140. Breach 7: The poor and biased handling of his grievance appeal. Similarly, we reject this alleged breach of contract. We do not accept that the grievance appeal was handled in a poor or biased manner. Mrs Pahal dealt with it responsibly and reasonably, and she upheld the claimant's appeal.

141. Despite the length of, and to be frank what seems to us to be the unnecessary complications brought to this case, the position to us seems straightforward. The respondent accepts that the claimant was subjected to a course of bullying and lack of support by its senior management team. In addition, following the claimant's grievance, three senior managers were guilty of a breach of confidentiality and collusion which the claimant reasonably concluded had undermined his position. We have no hesitation in finding that this was in breach of the implied term in the claimant's contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Applying Meikle, Abbey Cars and Wright, the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.

142. We find that this repudiatory breach of contract was an effective cause of the claimant's resignation, and that he resigned in response that breach. We therefore find that the claimant's resignation can be construed to be his dismissal, and we find that the claimant was dismissed by the respondent with effect from 29 September 2020.

143. To the extent that the claimant's resignation is construed to have been his dismissal, the respondent does not seek to rely on any potentially fair reason for dismissal. As re-emphasised by the EAT in the decision of Upton-Hansen Architects ("UHA") v Gyftaki, it is for the employer to advance in pleadings, assert in evidence, and prove a potentially fair reason for the dismissal, and a failure to do so may preclude them from a defence to a claim of constructive dismissal.

144. Accordingly, we find that the claimant was dismissed by the respondent and that bearing in mind the size and administrative resources of the respondent it cannot be said that his dismissal was fair and reasonable in all the circumstances of the case. We declare that the claimant was unfairly dismissed, and he succeeds in his claim for unfair dismissal.

145. Further case management directions will now be made in connection with a potential hearing to determine remedy. It is noted that the claimant does not seek reinstatement or re-engagement, and the claimant's remedy is therefore limited to compensation for unfair dismissal.

Employment Judge N J Roper
Dated: 3 December 2021

Judgment sent to parties: 20 December 2021

FOR THE TRIBUNAL OFFICE