EMPLOYMENT TRIBUNALS

Claimant: Mr H Jones

Respondent: Andros UK Limited

Heard at: Bristol **On:** 15, 16, 17 and 18 June 2026
Deliberations on 19 June 2026

Before: Employment Judge Leverton
Ms S Maidment
Mrs M Metcalf

Representation

Claimant: In person
Respondent: Mrs I Shankar, solicitor

RESERVED JUDGMENT

1. The complaint of harassment related to race in respect of the comment made about Mr Cardosa at the meeting on 29 January 2024 is well-founded and succeeds.

2. The remaining complaints of harassment related to race are not well-founded and are dismissed.

3. The complaints of detriment/dismissal for making protected disclosures, detriment/dismissal for asserting a statutory right, harassment related to age, direct race and age discrimination, discriminatory constructive dismissal, refusal of the right to rest breaks and breach of contract in relation to notice pay are not well-founded and are dismissed.

REASONS

Claims and issues

1. By a claim form dated 29 April 2024, the Claimant brought claims for direct race/age discrimination and harassment related to race/age; detriment and/or automatically unfair dismissal on the grounds of public interest disclosure (whistleblowing); and detriment and/or automatically unfair dismissal for asserting his statutory right to a rest break.

2. Case management hearings took place on 10 April 2025 before Employment Judge (EJ) Bax, and on 14 July 2025 before EJ Woodhead, who rejected an amendment application by the Claimant and finalised the list of issues for this hearing. The list of issues set out in EJ Woodhead's case management order is reproduced as an appendix to this judgment. Further case management directions were made by EJ Smail on 11 March 2026 following a dispute resolution appointment.

Evidence and procedure

3. The final hearing had been listed for six days but it was completed within five, with the first morning set aside for reading and the fifth day reserved for panel deliberations. The Claimant appeared in person and the Respondent was represented by Mrs Shankar, solicitor. Both parties advised us at the outset of the hearing that they did not require any reasonable adjustments.

Witness evidence

4. We heard oral evidence from the following witnesses, all of whom had provided written statements (witnesses b–f all gave evidence for the Respondent):

    a. the Claimant

    b. Lucian Paduraru, Health, Safety and Environment Manager

    c. Larry Knowles, Site Services Supervisor

    d. Kieran Stokes, Maintenance Manager

    e. Samantha Moore, Head of Technical

    f. Dan Scrivens, HR Manager.

5. The panel allowed Mr Scrivens to give evidence in place of the Respondent's original HR witness, Stephanie Little, who had left the company in March 2026 and could not be contacted. The Claimant did not object. The Respondent submitted a witness statement from Ms Little, but the panel attached limited weight to it given that Ms Little did not attend the hearing and the Claimant did not have the opportunity to cross-examine her. Mr Scrivens was not employed by the Respondent during the relevant period. As a result, his evidence was of limited assistance; he could only speak in general terms about the

Respondent's HR practices and policies, having no personal knowledge of the matters of which the Claimant complains.

Bundle and additional documents

6. We were provided with a hearing bundle (482 pages) in paper and electronic format. Where we consider it would be helpful, we have included page references to documents in the hearing bundle in square brackets. The Respondent had also prepared a chronology and cast list.

7. At the start of the hearing, the Claimant handed up an eight-page skeleton argument. He also wanted to submit some additional medical evidence. However, it was agreed in our preliminary discussions with the parties that the hearing would deal with liability only. On the basis that the new medical evidence was relevant to mitigation of loss and/or injury to feelings, the tribunal advised the Claimant that he would be able to include it in the bundle for a separate remedy hearing if he succeeded in all or some of his substantive claims.

Missing documents

8. The Claimant was concerned that certain documents were missing from the hearing bundle. He had raised a similar concern before EJ Smail. In his case management order dated 11 March 2026, EJ Smail accordingly directed: 'By 25 March 2026 the Claimant may send to the Respondent a supplemental bundle containing documents not also in the primary bundle.' No such supplemental bundle was provided by the 25 March deadline. However, the Claimant sent some documents to the Respondent after the deadline, and Mrs Shankar told the panel that she had included them in the bundle.

9. The panel observed that certain documents – listed as appendices C, E and G to the letter to the Claimant communicating the outcome of his grievance appeal meeting [161] – had not been included in the bundle. We considered that these documents were relevant and indeed might support the Claimant's case. Mrs Shankar said that they had been omitted in error. At our request, she supplied them as a supplementary bundle on the second day of the hearing, with the page numbering running on from the end of the main bundle, and we accepted them as late evidence.

10. The additional documents provided by Mrs Shankar for the supplementary bundle were as follows:

    a. Forklift truck test sheet, 26 June 2023 [483]

    b. Grievance hearing meeting notes, Lucian Paduraru, 28 February 2024 [485]

    c. Grievance hearing meeting notes, Larry Knowles, 29 February 2024 [490].

11. We could find no other relevant material on the tribunal file that had been omitted from the bundle, nor did the Claimant identify any.

Previous versions of witness statements

12. The Claimant raised a concern that the Respondent's witness statements had been modified in light of the contents of his own statement. He told the panel that the Respondent had sent him earlier versions of its witness statements which it had subsequently revised, and that there were material discrepancies between the different versions. He had raised similar objections before EJ Smail, whose case management order dated 11 March 2026 directed that the witness statements bundle for the substantive hearing 'must include all versions of statements the Respondent has sent to the Claimant'.

13. Mrs Shankar's explanation, which we accepted, was that the Claimant sent his own witness statement to her before she had finalised the tribunal bundle. She said that she did not read the Claimant's statement until both the bundle and the Respondent's statements had been finalised. The reason why she did not include any earlier versions of the Respondent's witness statements in the witness statements bundle was that none existed. The Claimant was unable to provide us with any evidence that he had received previous versions of the Respondent's witness statements, nor could we find any such correspondence on the tribunal file.

Claimant's closing submissions

14. On the fourth day of the hearing, the parties were due to start their closing submissions at 10 am. The Claimant telephoned the tribunal at approximately 10.10 am to advise the clerks that he would be there within the hour. At 10.24 am, he emailed a 70-page written submission to the tribunal. He arrived at approximately 11.40 am. He explained that he was on medication and had been unwell the previous evening. That morning, he had got up to start work on his written submission but had fallen asleep again; he said this was a side-effect of his medication.

15. The Claimant had arrived late on the first three days of the hearing without volunteering any apology or explanation. He had provided a written skeleton argument on the first day of the hearing; at no point did he indicate that he intended to submit an additional document. We accept that the Claimant was experiencing the side-effects of his medication but there was no obvious reason why he had left the preparation of his final written submission so late, and we consider 70 pages to be excessive.

16. Mrs Shankar's position was that she could not be expected to address the Claimant's latest written submission in any detail at such short notice, but she was content for him to summarise the main points in his oral submissions. The panel decided to adopt that course of action. In response to our enquiries, the Claimant stated that he felt well enough to proceed with his closing submissions and did not require an adjournment.

17. The Claimant's closing submissions took longer than anticipated, exceeding the time limit (45 minutes each) that had been discussed and agreed with the parties on the previous day. The judge had to warn the Claimant about timings and impose a strict cut-off of 3.30 pm.

Findings of fact

18. We find the following facts on the balance of probabilities, based on the evidence we heard and the documents before us. Additional findings of fact relevant to the issues we need to decide are included under the heading 'Discussion and conclusions' below.

Technical administrator trial

19. On 12 July 2022 the Claimant started work for the Respondent on a one-year fixed-term contract in the production team. The Respondent is a food manufacturer; it describes itself as a global leader in fruit transformation and chilled dairy products. In 2023, a couple of months before the Claimant's fixed-term contract was due to end, Malgorzata Mrozik (Technical Manager) and Sam Moore (Head of Technical) discussed the possibility of his moving to a technical administrator role. Ms Mrozik was positive about allowing the Claimant to try out the role. Miss Moore had reservations because she did not think he had the necessary skills, but she agreed to give him a trial period.

20. The Claimant started a two-week trial period in the technical administrator role in May 2023. He was given basic training in the use of an Excel spreadsheet. After a week, Ms Mrozik approached Miss Moore and told her that the trial was not working out. For that reason, it was brought to an end after the first week. In an email dated 2 April 2024, Ms Mrozic gave the following account:

> *I found [the Claimant] to be very friendly and a very nice guy, but not suited to office work or technical work. He made multiple mistakes in the work that we set him, he was very very slow and did not seek additional work. When we set him a task, he would do just this task, nothing more, nothing less, but did not tell us when he had finished, and would just sit and wait for the next task to be given to him, obviously we are very short staffed, and don't have time to [be] babysitting someone. On several days he would post just one complaint onto the system in the whole day (there was a huge backlog to get through after he left) and do nothing else. Responses weren't sent, vouchers weren't sent, and inbox was a disaster. Maybe this was because we didn't have the time to sit with him all day, but he should have asked if he didn't know something, not just ignore that email. In short, he was a nice guy, but not suited to our department.* [222]

21. The Claimant says that his training for the technical administrator role was inadequate and the trial was a sham. He denies that there was any issue with his performance. He points out that Ms Mrozic's email was written nearly 12 months after the event, in connection with the grievance appeal, and that there was no contemporaneous evidence of any performance issues.

22. We accept Ms Mrozic's explanation as to the reason why the trial period ended. The Respondent was being supportive by attempting to slot the Claimant into a different role when his fixed-term contract expired. It was also in the Respondent's interests to retain competent staff, thereby avoiding the need to go through a recruitment process. In our view, the Claimant's poor performance

is the most plausible reason for cutting the trial period short, and the lack of any contemporaneous documentation is explained by the fact that this was an informal trial to see whether the role might be a good fit.

HR vacancy

23. In May 2023, the Claimant made enquiries about a vacancy in the Respondent's HR department. He had seen the vacancy advertised on a website. The advertisement mentioned a salary of up to £35,000 and stipulated '3+ years' experience within a HR generalist or hands-on people management role' [259]. The Claimant approached Stephanie Little, the then HR Manager, with a view to being taken on as a trainee. The Claimant's account is that Ms Little said she wanted a graduate for the role. He told her that he had a law degree, to which she replied, 'I'm not looking for someone who can recite the Employment Rights Act 1996.' We accept the Claimant's evidence about this conversation.

24. According to the Claimant, the advertisement was taken down from the website shortly after he spoke to Ms Little. He said it was reposted a couple of days later with a requirement for five years' experience instead of three. The previous person in the post had been a young white woman, and the Claimant did not think that she could have had three years' experience, let alone five. The Claimant felt discouraged and did not apply for the role, although he accepts that he was not prevented from doing so.

25. In her witness statement, Ms Little said that the Respondent always asked for two to three years' experience for HR roles; that the requirement was not increased from three years to five on this occasion; and that the Respondent could not have demanded five years' experience, given the salary on offer. She stated that the Respondent would not have accepted a graduate with no experience of people management and there was no evidence that the Claimant had any relevant HR experience.

26. We conclude that the Respondent imposed a requirement for three years' practical HR experience, which the Claimant lacked, and that there were valid business reasons for doing so. We have treated Ms Little's witness statement with caution because she did not give evidence. Nevertheless, there was other evidence that supported her account. Dan Scrivens, the new HR Manager, said that the Respondent's HR team is small, consisting of four people, so there is a need for employees who can work autonomously and effectively from the outset. We also note that there is no mention of any relevant HR experience in the Claimant's CV [255]. In cross-examination, the Claimant accepted that he did not know the age of the previous HR officer and that he had no evidence that she lacked experience; it was an assumption he had made based on her youthful appearance.

27. We do not accept the Claimant's assertion that the Respondent altered the job advertisement after he enquired about the role. The Claimant says this was done in order to discourage him from applying or to rule him out as a candidate. There was no evidence to support this, and we accept that a salary of £35,000 would be on the low side for an HR officer with five years' experience in a

business similar to the Respondent's. If the Respondent's aim had been to discourage the Claimant from applying, as he asserts, there would have been no point in increasing the requirement from three years' experience to five, because the evidence indicates that the Claimant lacked *any* relevant experience.

Site services role

28. An alternative position within the company was identified and the Claimant started a new role in the site services team on 26 June 2023. He passed his initial trial in August 2023 and signed a permanent contract. This was subject to a six-month probation period that was due to end on 26 February 2024. His duties included driving a forklift truck; taking the refuse out; disposing of liquids and solids; weighing milk lorries on their arrival at the depot and recording their weight; testing the milk; pumping milk into a silo; and washing moulded plastic box pallets known as dolavs.

29. The Claimant passed his forklift truck driving test in June 2023. The test sheet was signed by Lucian Paduraru (Health, Safety and Environment Manager) [483]. We accept Mr Paduraru's evidence that the Claimant took longer than usual to obtain his licence and was only allowed to drive with restrictions in place because he did not demonstrate the necessary confidence and competence. The test sheet indicates that the Claimant was not authorised to stack goods in the warehouse, and a handwritten comment by Mr Paduraru states: 'Very uncomfortable on the truck. Needs more time to practise.'

30. On 12 July 2023 Mr Paduraru sent an email to Larry Knowles (Site Services Supervisor) about the Claimant's forklift truck driving. The email refers to the Claimant's lack of confidence and the need for supervision, and indicates that the Claimant was subject to speed restrictions. It concludes: 'I would not ask him to load and unload pallets at least until he demonstrates some confidence and control over the truck and his brain (he overthinks a lot).' [177]

Dead pigeon

31. The Claimant's case is that he told Mr Paduraru in early October 2023 that there was a dead pigeon in the netting above the milk reception bay and that there was a risk of maggots falling onto the milk tankers. He says that he complained again to Mr Paduraru on 11 October 2023 about birds becoming trapped in the netting and dying there, and the health risk posed by maggots. According to the Claimant, Mr Paduraru shrugged and said, 'It does happen,' or words to that effect. Mr Paduraru and Mr Knowles did not recall the Claimant telling either of them about this matter, but they both accepted that he could have done so. We accept the Claimant's evidence on this point. We find that these two conversations with Mr Paduraru did take place and that a tanker driver had also complained about the dead pigeon (although not directly to a member of management).

32. The netting to which the Claimant referred was three or four metres above the milk delivery bay and it was necessary to use a mobile elevated platform to reach it. Problems of this sort would usually be reported to the Respondent's

technical team, who would pass them on to Rokill, an external contractor responsible for pest control. However, neither Mr Paduraru nor Mr Knowles reported the dead pigeon to the technical team. Mr Paduraru did not regard the dead pigeon as part of his role. His position was that the specialist contractor would deal with it, hence his apparent lack of interest in the matter. The Claimant could have reported the matter to the technical team himself but he did not do so. The dead pigeon remained there for several months. Rokill spotted it during a site audit on 7 December 2023, and it was eventually removed on 26 February 2024 [230].

33. The Claimant says he was concerned that maggots from the dead pigeon would fall into the bay directly below and contaminate the milk. In fact, there was no such risk because the milk was transported in closed, sterile tankers. The Claimant accepted this in cross-examination, but he said there was still a risk because pipes were used to empty the tankers and the maggots could crawl up the pipes. We accept the Respondent's evidence that the pipes were not left lying around loose in the milk bay. When they were not being used for milk deliveries, the loose end was looped and placed in a 'cleaning in progress' system, meaning that no contaminants could enter. We note that an Environment Agency EPR Compliance Assessment Report dated 6 February 2024 (i.e. before the dead pigeon was removed) recorded no breaches and gave the Respondent a Band A rating [288]. The premises and systems were also audited by the British Retail Consortium and there were no reported concerns. Customers also undertook site inspections and had raised no issues. We consider there to have been no real risk of maggots contaminating the milk.

Rodents and plastic deposits

34. The Respondent's factory is in a rural location between two rivers, surrounded by fields. There is known to be some rodent activity and pest control measures are in place. The Claimant says that in October 2023 he told Mr Paduraru that rodents were chewing plastic packaging that had been left outside and that small pieces of plastic were being washed into the river. He asked Mr Paduraru if he was aware of the trouble Thames Water were in for polluting rivers. He says that Mr Paduraru responded dismissively, stating 'We are not dealing with that,' and directed him to go and cut back some bushes. Mr Paduraru accepted that the Claimant might have mentioned this issue to him, although he had no specific recollection of the conversation.

35. The external pest control team carries out audits and completes regular reports, and the Respondent follows its recommendations. Any plastic remnants should have been brushed away by the operatives so that they did not end up in the drains and clog the pumps. The area containing the plastic debris was 30 to 50 metres away from the river. The river is protected by a net fence and a sluice gate, and Mr Paduraru himself carries out daily inspections of the area around the river. The site is regulated by the Environment Agency, which carries out unannounced inspections, and there are visits by the Health and Safety Executive and the local authority environmental officer. The netting and sluice gate protecting the river were visible and the Claimant could have seen them.

36. We find that the Claimant did raise a concern with Mr Paduraru in October 2023 about rats chewing plastic debris and small pieces of plastic being washed into the river. There was photographic evidence of the area showing fragments of blue plastic, although these photographs were taken in March 2024, after the Claimant had resigned [270–271]. We accept that the Claimant mentioned Thames Water and that Mr Paduraru indicated that it was not their issue to deal with and sent him away to cut some bushes. Mr Paduraru gave that response because he knew that protective measures were in place and he did not consider there to be any real risk to the environment. We heard limited evidence relating to the Claimant's other allegation – that he reported an increase in the rat population around the factory – and we do not accept that he raised this specific concern with Mr Paduraru.

Potholes

37. The Claimant also made a series of verbal complaints to Mr Paduraru about potholes around the site and the danger they posed to drivers; Mr Paduraru did not dispute that this matter was raised repeatedly by the Claimant. The relevant complaints were made on 11 October 2023, on 24 November 2023, and on 19, 25 and 30 January 2024. There was photographic evidence of the uneven road surfaces in the bundle [269; 272–273].

38. It was not an immediate priority for the Respondent to repair uneven road surfaces. There was a need to minimise disruption to production, and budgetary considerations also had to be taken into account. A planned maintenance programme was in place and in the meantime the risks were mitigated to some extent. Drivers knew that clear corridors existed and they were aware of the location of the potholes, so they were generally able to avoid them even if a load obstructed their view. They were instructed to modify their route, adapt their speed and adjust the seat suspension on the forklift trucks. Mr Paduraru had commissioned a whole-body vibration assessment in 2018 to assess the health risk when driving forklift trucks on an uneven road surface, and the report concluded that the drivers were not at risk [342]. The Claimant's own exposure was negligible because he was driving a newer truck with extra features for comfort and vibration attenuation, and pedestrians were not at risk because they used dedicated footpaths to access the site.

Performance issues

39. Meanwhile, concerns arose about the Claimant's performance in the site services role. The Claimant was slow to learn and pick up basic instructions. Mr Paduraru's evidence was that 50–60 per cent of the Claimant's work was left undone and that the Claimant received daily instruction, mainly from Mr Knowles but also from Mr Paduraru himself. We accept this evidence, and we reject the Claimant's assertion that the performance criticisms were unfounded. The lack of contemporaneous written evidence is accounted for by the nature of the workplace: it was unskilled work, and both Mr Paduraru and Mr Knowles tended to issue informal instructions and feedback verbally rather than set matters out in writing. In any event, the operatives did not have company email addresses.

40. On 19 January 2024, the Claimant says he was unfairly challenged by Mr Paduraru as to why a skip was full when in fact he had already emptied and refilled it. Mr Paduraru had no clear recollection of this incident, but he said that if the Claimant had failed to empty the skip that would have had a negative impact on production. We are satisfied that the Claimant was fairly criticised for not emptying the skip. If the skip was full, it evidently needed to be emptied, regardless of whether it had previously been emptied and refilled. The Claimant had originally worked in production and he should have been aware of the impact of a full skip.

41. The Claimant was also criticised by Mr Paduraru on 19 January 2024 for not having washed sufficient dolavs. The Claimant's account was that there were not enough dolavs on site and some of them leaked, whereas Mr Paduraru said that functioning dolavs were left unwashed by the Claimant on several occasions and he and Mr Knowles sometimes had to step in and wash them themselves. On this point, we accept the evidence of Mr Paduraru and Mr Knowles. By leaving dolavs unwashed, the Claimant created a bottleneck that affected production. This is supported by an email dated 4 April 2024 from Connor Mitchell, who worked with the Claimant:

> *When [the Claimant] was working here I would have to leave the compactor and come up to empty dolavs on multiple occasions due to them not being done. This put a lot of pressure on the rest of us meaning we had to work at double the speed to keep up, we were doing his job and our own. I think that [Mr Knowles] and [Mr Paduraru] were very fair on him and gave him multiple warnings / had multiple conversations with him on the subject. I don't think he could keep up with the workload but he also refused to go any faster.* [225]

42. This email was sent from Mr Knowles' email account in connection with the Claimant's subsequent grievance. We accept the Respondent's explanation that Mr Mitchell did not have his own work email address so he had to use Mr Knowles's account; this was corroborated by Miss Moore. There was no evidence that the Respondent fabricated the email, as the Claimant asserted.

43. The Claimant was also told off by Mr Padararu on 19 January 2024 for not leaving the taps slightly dripping to prevent the water supply from freezing in the area used to wash dolavs. There was a special mechanism on the taps to allow this, but the Claimant was said to have shut them off completely, causing the pipes to freeze. It was not the first time that the taps had been found closed after the Claimant had used them. The frozen water prevented dolavs from being washed for several hours; despite this, no formal action was taken against the Claimant.

44. The Claimant says that the taps must have been turned off by someone else. However, we accept that the dolav wash was not generally used by anyone outside the small site services team, especially after 4 pm when the shift ended. In all the circumstances, we consider it was reasonable for Mr Paduraru to suppose that the Claimant was the person most likely to have last used the taps.

45. The Claimant said that Mr Padararu became aggressive about the taps and shouted at him. When giving evidence at the hearing, Mr Paduraru came across for the most part as calm, measured and professional. His role as Health, Safety and Environment Manager carried significant responsibility and he was required to follow the IOSH Code of Conduct. Nevertheless, we detected some suppressed irritation when he gave evidence about the frozen pipes. In our view, that would hardly be surprising: production was affected and he had to ask the engineering team to step in and resolve the issue. We consider it likely that a degree of annoyance, frustration and irritation crept in when Mr Paduraru was reprimanding the Claimant for leaving the taps on. That is consistent with a text message from the Claimant to Mr Knowles in February or March 2024 referring to 'the way he [i.e. Mr Paduraru] would speak to me about the freezing pipes' [120].

46. There were other concerns about the Claimant's performance. On 26 January 2024, Mr Paduraru asked him why he was spending so long with a milk tanker driver and whether he was 'entertaining' the driver. We accept that he raised this issue with the Claimant and that it was a legitimate concern. Mr Paduraru's evidence was that the Claimant was seen chatting with contractors on several occasions and guiding people around the site, and that he had to be reminded repeatedly to focus on his job. The Claimant did not seem to appreciate the urgency of certain tasks.

47. The Claimant says that Mr Paduraru told him to work faster on 29 January 2024, when the workload had significantly increased owing to a flood and an electrical problem. Mr Paduraru could not recall this incident but he told the tribunal that he frequently instructed the Claimant to focus on the task in hand. On the balance of probabilities, we think he did ask the Claimant to work faster on this occasion. It is understandable that he would have said this in a crisis and we consider the instruction to have been legitimate.

48. Finally, there was an incident when Mr Paduraru is said to have shouted at the Claimant, in the presence of Mr Knowles, for failing to salt the pavement in icy weather. This is not one of the detriments on which the Claimant relies but it is relevant as background evidence. Mr Knowles had instructed the Claimant to salt the pavement the previous day and had supervised him as he did so. Mr Knowles' evidence was somewhat contradictory: he said that he had never known Mr Paduraru to shout but he also acknowledged that Mr Paduraru had possibly shouted on this occasion. On the balance of probabilities, taking into account Mr Paduraru's demeanour at the hearing, we consider that he did not shout but that he did raise his voice and display a degree of annoyance at the Claimant's lack of initiative. If the pavement was icy, it needed to be salted, regardless of whether it had been salted the day before. We do not accept the Claimant's assertion that Mr Paduraru's conduct towards him was aggressive or abusive.

Rest breaks

49. On 23 and 25 January 2024, the Claimant was called back from his morning break by Mr Paduraru, who came to fetch him from the changing room because there was work for him to complete. The Claimant was required to be

contactable at all times on his work mobile phone for safety reasons, but Mr Paduraru had been unable to get a response from him. When Mr Paduraru asked the Claimant to return to work on 23 January, the Claimant told him that he had a right to a rest break and it was not a privilege.

50. The company handbook provided, under the heading 'Breaks and lunchtime':

> *Your breaks are defined in your contract and are subject to change. Employees working an 8 hour shift are entitled to a 35 minute paid break, and those working a 12 hour shift are entitled to a 35 minute and a 15 minute paid break… The lunch period at Head Office is one hour to be taken between 12.00pm – 2.00pm unless by prior arrangement between you and your manager.* [405]

51. The employment contract in the bundle relates to the Claimant's fixed-term production operative role, which ended in July 2023. It provides for one 35-minute paid break during the working day, with timings to be agreed with and authorised by the Claimant's manager. It is stated that the timings might vary on a daily basis, depending on business needs, and that unauthorised or additional breaks are not permitted [476].

52. The site services team did not work in the same way as the production team; they had more flexibility. The Respondent did not keep any record of their breaks because the team worked with a large degree of autonomy. Each member of the team had their own forklift truck and they could go anywhere they needed on site, including the toilet or canteen. They managed their own work and they took breaks around the milk delivery schedule. They were expected to be flexible in terms of timing and duration of their breaks. Deliveries were scheduled to take place at 8 am, 10 am and 12 noon. The drivers were sometimes delayed but it was only possible for one tanker to be pumped out at a time, so even if more than one tanker arrived, the team knew that they would have up to 50 minutes to take a break once they had set up the pump for the first tanker. It was sometimes possible for them to take an extended break, or to take more than one break each day.

<u>*Broken cryoscope*</u>

53. In an undated email to Mr Paduraru, presumed to have been sent on 29 January 2024, Joanna Jablonska (Laboratory Manager) reported that the Claimant had broken a probe on the cryoscope which was used to analyse milk samples. She asked Mr Paduraru to make his team aware that the equipment in the laboratory was very expensive and needed to be handled with care [197]. The cryoscope had been calibrated and was working at 6 am on the day of the incident. The Claimant was the only person who had used it that morning and he admitted to Ms Jablonska that he had broken it [236–237]. The quote for a new probe came to £698.50 [252]. Later that day, the Claimant received an informal reprimand from Mr Paduraru for breaking the cryoscope.

54. The Claimant's account was that the spring on the cryoscope was already broken and he had reported it as faulty. However, an email from Ms Jablonska dated 30 September 2025 indicates that there had been no previous reported

issues concerning the cryoscope. We do not discount the possibility that the Claimant had previously mentioned a broken spring and that this was never formally recorded, but Ms Jablonska's email confirms that a missing spring would not have affected the functionality of the equipment.

55. The Claimant also makes the point that the copy of Ms Jablonska's email to Mr Paduraru is undated. We do not think this indicates that it is a fabrication, as he asserts. It appears that the email was originally sent as an attachment to Ms Little's email to Mrs Shankar dated 30 September 2025 [236]. The absence of a date on the version in the bundle is more likely to be accounted for by a printing or formatting issue (for example, a collapsed or truncated header) than an attempt to mislead the tribunal.

PIP meeting

56. The broken cryoscope prompted Mr Paduraru to escalate his concerns about the Claimant's performance. On 29 January 2024, he consulted Ms Little and the two of them drew up and signed a performance improvement plan (PIP) for the Claimant [196]. The PIP describes the issue as follows: 'Serious underperformance causing department resource depletion (others have to do your work).' It sets out a range of improvement objectives and provides for daily review, with an end date of 29 February 2024.

57. After the PIP was drawn up, the Claimant was called into a meeting by Mr Knowles. He was told that it was an informal meeting. He was not given any notice, nor was he afforded the opportunity to bring a companion; the Respondent's case is that this was because it was not a disciplinary hearing. The attendees were Mr Paduraru, Mr Knowles and the Claimant. There was nobody from HR in attendance and no minutes were taken.

58. The Respondent's staff handbook makes a brief reference to performance reviews [402]. There is also a section headed 'Discipline and grievance' which states that employees are expected to maintain a good standard of work and demonstrate the skill or aptitude required for the job, and that 'demonstrable inefficiency' may result in disciplinary measures [460/461]. Mr Scrivens confirmed that the Respondent did not operate a separate performance policy or procedure, and that it was normal practice for employees not to be afforded the right to bring a companion to PIP meetings.

59. At the PIP meeting, the concerns about the Claimant's performance were discussed and the Claimant was given a copy of the PIP to sign. There was a dispute between the parties as to whether the meeting took place on 29 or 30 January 2024. The significance is that the Claimant signed the PIP on 30 January. He asserts that the PIP meeting took place on that date and that he was made to sign the PIP there and then, without any opportunity to reflect on its contents. He says that he felt under pressure to sign because he was scared of losing his job. The Respondent asserts that the meeting took place on 29 January, and that the Claimant took the PIP away with him and signed and returned it the next day.

60. There was conflicting documentary evidence as to the date of the meeting. The Claimant's grievance letter dated 12 February 2024 and the grievance outcome letter dated 4 March 2024 both state that the PIP meeting took place on 30 January [124/135]. However, it is possible that the date recorded in the outcome letter merely reflects an incorrect date given by the Claimant in his grievance letter. The letter dated 8 April 2024 communicating the outcome of the grievance appeal records the meeting date as 29 January [161], as does the statement provided by Mr Knowles in connection with the grievance investigation [202]. 29 January is also the date given in a text message from the Claimant to Mr Knowles [120]. We think the weight of the evidence points towards the PIP meeting having taken place on 29 January 2024. It follows that the Claimant had the opportunity to consider the contents of the PIP overnight before he signed and returned it.

61. The Claimant had received informal feedback throughout his six-month probation period in the site services role, which was due to end on 26 February 2024, and the PIP was intended to give him a further opportunity for improvement. Mr Paduraru viewed it as a positive management tool rather than the first step in a formal capability or disciplinary process. He thought that the Claimant responded well in the meeting, and both he and Mr Knowles observed some improvement in the Claimant's performance in the days that followed. The Claimant's view of the process was different: he felt ambushed by the criticisms of his performance and his self-image was undermined. We observe that it is not unusual for those attending a performance meeting to have different perspectives.

<u>Site tour guide</u>

62. The Claimant alleges that, during the PIP meeting on 29 January 2024, Mr Paduraru unfairly criticised him for acting as the 'site tour guide'. Mr Paduraru accepted that he probably made this criticism: his view was that the Claimant filled his time with meaningless, irrelevant tasks in order to avoid work. The Claimant denied that he chatted to people; he said in his evidence that he was not friendly at work.

63. We have concluded that Mr Paduraru did make the 'site tour guide' comment and that he had reasonable grounds for doing so. His comment is consistent with the wording of the PIP, which refers to the Claimant engaging in 'unnecessary chatter or acting as the site guide'. It is also consistent with Mr Paduraru's previous criticism of the Claimant for entertaining a tanker driver.

<u>Monkey comment</u>

64. The Claimant alleges that, at the PIP meeting on 29 January 2024, Mr Paduraru referred to an employee named Joaquim Cardosa who had recently left the business. Mr Paduraru is said to have compared the Claimant's performance unfavourably with Mr Cardosa's, stating that Mr Cardosa was 65 years old (i.e. older than the Claimant) and would 'run around like a little monkey to get things done'. The Claimant and Mr Cardosa are both black and the Claimant considers that the word 'monkey' has negative racial connotations. He says he found the word deeply offensive.

65. The monkey comment was mentioned by the Claimant in a telephone conversation with Ellie Peters (HR Officer) on 9 February 2024 [121]. It was also mentioned in a text message sent by the Claimant to Mr Knowles in February or March 2024 (Mr Knowles did not reply to the message):

> *Hi Larry, please give me a call when you can. I did not explain my reason for leaving and [am] going through a grievance procedure with HR. I have put your name forward as a witness in the meeting on 29th January. I have said to HR that [Mr Paduraru] made a statement that Joaquim would run around like a little monkey and get things done and that he was 65. They will contact you to confirm that what I said took place in the meeting was true. I did not want to continue working after that. There are some other events that I have mentioned to HR like the way he would speak to me about the freezing pipes etc so just tell them as it is. Call me anytime you can.* [120]

66. In his witness statement, Mr Paduraru said that he could not recall Mr Cardosa being mentioned at the PIP meeting, but if he was it would not have been in any negative way as he was a highly respected team member. Mr Paduraru made the point that the Respondent's workforce is ethnically diverse and that two out of the four members of the site services team are black; the diversity of the workforce was corroborated by the evidence of Mr Scrivens. Mr Paduraru also stated that he could not recall using the word 'monkey'. When questioned by the panel, he said that he thought he had mentioned Mr Cardosa in the PIP meeting, and then that he could not remember.

67. Mr Paduraru holds dual British/Romanian citizenship. He was born in Romania and moved to the UK 20 years ago. He asserts that in Romania the word 'monkey' is used without any negative intention to refer to a person's physical ability, agility or energy; and that it does not have the racial connotations that it does in the UK. In cross-examination, he added that the word might be used in Romania to describe a restless child or an agile person, and that it tends not to be used of an adult.

68. In a grievance investigation meeting on 28 February 2024, Kieran Stokes (Maintenance Manager) asked Mr Padararu whether any reference was made at the PIP meeting to past employees. The minutes record that Mr Paduraru replied as follows: 'We gave him examples, so we gave the example of Joaquim Cardosa, yeah we did on the grounds that said "he was not slow" so we gave that example.' Mr Stokes then asked Mr Padararu whether the monkey comment was made. Mr Paduraru's response was: 'I cannot remember, if I did say this it was not meant in that context, but I am not sure that was part of the meeting.' Mr Stokes asked, 'That was not part of the meeting then?', to which Mr Paduraru replied, 'I cannot remember' [486].

69. The Claimant accepts that Mr Paduraru had not made any previous comments to him about race (or indeed age) apart from asking him where he came from, why he had moved to the UK and whether he had any problems getting work in Jamaica. These questions arose in the context of a friendly conversation about the Claimant's background, his family and his legal training. We recognise that

the question ‘Where do you come from?’ can imply racial stereotyping but we do not think it carried any such negative connotations in this instance.

70. During cross-examination, Mr Paduraru said that Mr Cardosa was Portuguese and questioned whether he was in fact black. We do not think there is anything in this point. Nobody else has suggested that Mr Cardosa might be white or that he could be perceived as such. Significantly, the possibility was not addressed in the Respondent’s pleadings. The Claimant perceived Mr Cardosa to be black, believing him to be of Cape Verdean heritage. Mr Knowles described Mr Cardosa as ‘dark, not black’, adding nonetheless that ‘he wasn’t white’.

71. In his witness statement, Mr Knowles said that he did not recollect Mr Cardosa being mentioned at the PIP meeting and that he did not hear the word ‘monkey’. The statement he gave in connection with the Claimant’s grievance says: ‘I did not hear that word mentioned at all’ [202]. The minutes of a grievance investigation meeting with Mr Stokes record that Mr Knowles was asked whether a comparison was made between the Claimant and Mr Cardosa, and that he replied, ‘I don’t think so, not that I can remember. No, I don’t think so.’ [490]

72. When pressed by the Claimant in cross-examination, however, Mr Knowles accepted that it was possible that Mr Cardosa was mentioned at the PIP meeting. Regarding the alleged monkey comment, he stated variously that he did not hear it; that it could have been said; that he didn’t recollect whether it was said; that it wasn’t said; that if it had been said he would remember; that it would be shocking if the word had been used; and that he would not remember if it had been used.

73. Pulling together the various strands of evidence, we have concluded on the balance of probabilities – and not without a degree of hesitation – that Mr Paduraru did state at the PIP meeting that Mr Cardosa was 65 and would still ‘run around like a little monkey to get things done’. We find that this was said as a way of complimenting Mr Cardosa’s performance and with no discernible racist intent. Nevertheless, the Claimant was offended by the term ‘monkey’ being used to describe a black colleague.

74. We have reached this conclusion for the following reasons:

   a. The minutes of the grievance investigation meeting on 28 February 2024 record Mr Paduraru saying that he cited the example of Mr Cardosa to the Claimant at the PIP meeting. We consider this to be more reliable than subsequent statements from Mr Paduraru and Mr Knowles to the effect that they did not remember Mr Cardosa being mentioned at the meeting.

   b. The monkey comment was mentioned by the Claimant in a telephone conversation with HR on 9 February 2024, and in a text message to Mr Knowles sent in February or March 2024. We considered the possibility that the Claimant was attempting to coach Mr Knowles as to the evidence he should give in the grievance investigation but, ultimately, we did not think that such an inference could legitimately be drawn from the wording of the Claimant's message.

c. The Claimant's clear evidence was that the monkey comment was made, and neither Mr Paduraru nor Mr Knowles could rule out that possibility. Mr Paduraru's evidence was that he could not remember saying it; at the grievance investigation meeting on 28 February 2024, he accepted that he might have said it but stated that, if he did, it was not meant in a discriminatory way.

d. Even accepting Mrs Shankar's point about the fallibility of memory, we found Mr Knowles' oral evidence as to what was said at the PIP meeting to be muddled and contradictory. Mr Knowles continues to work closely with Mr Paduraru and might therefore be inclined to be less than candid about exactly what was said.

e. After the PIP meeting on Monday 29 January 2024, the Claimant came to work for the rest of the week. He went off sick from the following Monday (5 February) and he formally resigned on 9 February. We do not think the short delay before resignation should be taken as an indication that the monkey comment was not made. It is plausible that an employee who was offended by a comment of this nature, and who had also been asked to sign a PIP, might need to take a few days to absorb events and reflect on his or her options.

f. If we were to find that the monkey comment was not made, that would imply that the Claimant was mistaken or that he made it up. It is hard to imagine what other word or phrase might have been used by Mr Paduraru that could have been misunderstood or misinterpreted by the Claimant. We considered whether the Claimant might have heard the phrase 'running around' and somehow extrapolated from that, but we considered this to be speculative.

g. If the Claimant had been minded to invent a spurious allegation of racism, it seems likely that he would have alleged something more obviously impactful or egregious. While the comment was clearly capable of causing offence, the underlying intent was to compliment Mr Cardosa's productivity, not to malign the Claimant.

h. Most people in the UK who approached the matter with any degree of reflection could reasonably be expected to be aware of the negative connotations of the term 'monkey' when used in relation to a black person. However, we accept Mr Paduraru's evidence that the word is used differently in Romania and does not have these overtones. We regard it as plausible that Mr Paduraru continues to be subject to certain linguistic and cultural influences from Romania, despite having lived in the UK for 20 years. Mr Paduraru's failure to attach any racial significance to the word would account for his inability to recall whether he used it at the PIP meeting.

<u>Lawyer comment</u>

75. The Claimant alleges that, at the PIP meeting on 29 January 2024, Mr Paduraru said that the Claimant had told him he had been a lawyer. Mr Paduraru's evidence was that he recalled the Claimant telling him at one point that he had a legal qualification but that this was not relevant and did not influence his view of the Claimant in any way. We have concluded that Mr Paduraru did make a reference at the PIP meeting to the Claimant being a lawyer and that this was said in a neutral or factual way, based on information that the Claimant had previously shared with him.

Resignation

76. Following the PIP meeting on 29 January 2024, the Claimant worked for the rest of the week. Both Mr Paduraru and Mr Knowles noticed an improvement in his performance.

77. On Monday 5 February, the Claimant texted Mr Knowles to say that he was sick, and on 7 February he texted Mr Paduraru to say that he was resigning. On 8 February he called HR stating that he wished to resign. Later that day, Ms Peters called the Claimant to discuss the matter. The Claimant said that he was having second thoughts about resigning and Ms Peters therefore agreed to call him back the following day.

78. On 9 February, Ms Peters made another telephone call to the Claimant, who confirmed that he wished to resign. He told Ms Peters about the monkey comment and he said that he considered the concerns about his performance to be unfounded [121].

79. The Claimant confirmed his resignation in a letter to Ms Peters dated 9 February, which stated:

> *I have expressed a wish to discontinue working with the company as from Wednesday February 7 2024. It is not an environment within which I am satisfied to work and have no alternative but to terminate my employment. In our telephone conversation I have elaborated more as to the reasons. I do not believe that any reasonable person would expect me to continue in this job where the relationship between my manager and myself has been damaged to this extent.* [122]

Internal grievance and appeal

80. On 12 February 2024, the Claimant sent Ms Peters a grievance letter raising several allegations: the monkey comment; unfair criticism of his performance; harassment or victimisation for raising legitimate concerns about safety at work, public health and the environment; and harassment or victimisation for insisting on the right to a rest break. The Claimant expanded on these matters in a further letter dated 26 February 2024 [124/129].

81. The Respondent's grievance policy is set out in the staff handbook [115]. A grievance meeting was scheduled to take place on 20 February 2024 but the Claimant arrived nearly an hour late and the meeting did not go ahead; the Claimant apologised for wasting Ms Peters' time [132/206]. On 28 February

2024, Ms Peters and Mr Stokes met to discuss the grievance in the Claimant's absence and to decide what evidence they would need to obtain [133]. Mr Stokes conducted investigation interviews on 28 February with Mr Paduraru [485] and on 29 February with Mr Knowles [490]. He and Ms Peters met to review the evidence and decided to reject the grievance. The outcome was communicated to the Claimant in a letter dated 4 March 2024 [135].

82. On 7 March 2024 the Claimant appealed against the grievance outcome [137]. The appeal process was handled by Miss Moore. The Claimant was invited to an appeal hearing but he declined to attend, choosing instead to provide written submissions. Miss Moore obtained further information in writing from several people, including Mr Paduraru [140], Mr Knowles and Mrs Mrozik. The hearing took place before Miss Moore on 5 April 2024 in the Claimant's absence, with Ms Little in attendance. Miss Moore found no evidence to support the Claimant's allegations and she upheld the grievance outcome [145]. This decision was communicated to the Claimant by letter dated 8 April 2024 [161].

Legal framework

<u>Protected disclosures (whistleblowing)</u>

83. Section 43B of the Employment Rights Act 1996 (ERA) provides (in so far as material):

> *(1) In this Part 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, […]*
>
> *(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 […].*

84. A qualifying disclosure for the purposes of the public interest ('whistleblowing') provisions is defined in s.43B(1) ERA as 'any disclosure of information' relating to one of the specified categories of relevant failure. In **Kilraine v Wandsworth London Borough Council** [2018] ICR 1850, the Court of Appeal held that, in order for a disclosure to be a 'qualifying disclosure', it must have sufficient factual content and specificity. Protection is not denied simply because the information being communicated was already known to the recipient – **Parsons v Airplus International Ltd** EAT 0111/17.

85. In order for any disclosure to qualify for protection, the disclosure must, in the 'reasonable belief' of the worker, be made in the public interest and tend to

show that one of the relevant failures has occurred, is occurring, or is likely to occur. In **Durey v South Central Ambulance Service NHS Foundation Trust** [2025] ICR D5, EAT, His Honour Judge Auerbach observed that the words 'tends to show' in s.43B(1) 'can make a real difference in some cases, because, for example, an employee may reasonably believe that a certain piece of evidence "tends" to support the conclusion that a certain state of affairs exists or is likely to occur, even though it would not be reasonable to believe that it definitely does exist'.

86. The focus of s.43B(1) is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. However, there should be some objective basis for the worker's belief – **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4, EAT. There can be a qualifying disclosure of information even if the worker is in fact wrong in his or her belief – **Darnton v University of Surrey** [2003] ICR 615, EAT. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is 'probable or more probable than not' that the employer will fail to comply with the relevant legal obligation – **Kraus v Penna plc and anor** [2004] IRLR 260, EAT.

87. In **Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)** [2018] ICR 731, the Court of Appeal made the point that tribunals should be careful not to substitute their own view of whether the disclosure was in the public interest for that of the worker. This does not mean that it is illegitimate for the tribunal to form its own view on that question as part of its thinking – indeed, that is often difficult to avoid – but only that that view is not, as such, determinative. The Court also stressed that the necessary belief is simply that the disclosure is in the public interest – the particular reasons why the worker believes that to be so are not of the essence. Raising a concern about the endangerment of health and safety will usually impute an element of public interest – **Dobbie v Felton t/a Feltons Solicitors** [2021] IRLR 679, EAT.

88. In order for a qualifying disclosure to attract statutory protection, it must be made by one of the methods set out in ss.43C–43H ERA. S.43C(1)(a) provides that a qualifying disclosure is protected if the worker makes the disclosure to his or her employer.

Whistleblowing detriment

89. Section 47B(1) ERA provides:

> *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.*

90. The test of detriment has both subjective and objective elements, in that the situation must be looked at from the claimant's point of view, but the claimant's perception must be reasonable in the circumstances. In **Ministry of Defence v Jeremiah** [1980] ICR 13, CA, Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage', while Lord Justice Brightman stated that

a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'.

91. The case of **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337, HL, establishes that a detriment exists if 'by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work' (para 34). Lord Hope continued: 'This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment"' (para 35). In **Derbyshire and ors v St Helens Metropolitan Borough Council and ors** [2007] ICR 841, HL, Lord Neuberger stated: 'An alleged victim cannot establish "detriment" merely by showing that she had suffered mental distress: before she could succeed, it would have to be objectively reasonable in all the circumstances.' (para 68)

92. In **Warburton v Chief Constable of Northamptonshire Police** [2022] EAT 42 the EAT confirmed that, although the test is framed by reference to 'a reasonable worker', it is not a wholly objective test. It is sufficient that a reasonable worker might take the view that the conduct in question was detrimental. If a reasonable worker (even if not all reasonable workers) might take the view that, in all the circumstances, the conduct was to the worker's detriment, the test is satisfied.

93. For a claim under s.47B(1) to succeed, there must be a causal link between the protected disclosure and the detriment. It is for the employer to show the ground on which any act, or deliberate failure to act, was done – s.48(2) ERA. The EAT summarised the proper approach to drawing inferences in a detriment claim in **International Petroleum Ltd and ors v Osipov and ors** EAT 0058/17.

94. The protected disclosure has to be causative in the sense of being 'the real reason, the core reason, the causa causans, the motive for the treatment complained of' – **Aspinall v MSI Mech Forge Ltd** EAT 891/01. Lord Justice Elias's formulation of the causation test in **Fecitt and ors v NHS Manchester (Public Concern at Work intervening)** [2012] ICR 372, CA – i.e. whether the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower – has come to be seen as the authoritative statement of what is required.

<u>*Whistleblowing dismissal*</u>

95. Section 103A ERA provides:

> *An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.*

96. Protection against dismissal under s.103A ERA is available to all employees regardless of their length of service. However, if the employee lacks sufficient qualifying service to claim ordinary dismissal, the onus of proof is on him or her

to show that he or she was dismissed by reason of making a protected disclosure.

97. In **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA, Lord Justice Cairns referred to the reason for dismissal as the 'set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'. In **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Lord Justice Underhill stated that 'the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision maker which cause them to take the decision – or, as it is sometimes put, what "motivates" them to do so'.

98. The causation test for unfair dismissal under s.103A is stricter than that for unlawful detriment under s.47B. The latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision maker (i.e. is an effective cause), whereas s.103A requires the disclosure to be the primary motivation for a dismissal – **Fecitt and ors v NHS Manchester (Public Concern at Work intervening)** [2012] ICR 372, CA.

99. 'Dismissal' for the purposes of s.103A ERA includes a constructive dismissal, arising where the employee terminates the contract, with or without notice, in circumstances in which he or she is entitled to terminate it without notice by reason of the employer's conduct – s.95(1)(c) ERA. In **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221, the Court of Appeal ruled that the employer's conduct which gives rise to a constructive dismissal must involve a repudiatory (i.e. fundamental) breach of contract. In addition, the employee must establish that the employer's breach caused the resignation, and the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal. In a claim brought under s.103A, the question for consideration is whether the protected disclosure was the principal reason for the fundamental breach of contract that precipitated the resignation.

100. In **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)** [1997] ICR 606, HL, their Lordships held that it was a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. A breach of the implied term of trust and confidence can be relied upon in a constructive dismissal claim.

Detriment for asserting a statutory right

101. Section 45A ERA provides:

> *(1) 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 –*

(f) alleged that the employer had infringed […] a right [conferred on him by the Working Time Regulations 1998].

(2) It is immaterial for the purposes of subsection (1)(e) or (f) –

(a) whether or not the worker has the right, or

(b) whether or not the right has been infringed,

but, for those provisions to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1)(f) to apply that the worker, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) This section does not apply where a worker is an employee and the detriment in question amounts to dismissal within the meaning of Part X.

102. The employer does not actually need to have infringed a statutory right in order for the claim to succeed. It is sufficient that the employee genuinely believes that an infringement has occurred – **Mennell v Newell and Wright (Transport Contractors) Ltd** [1997] ICR 1039, CA.

103. 'Detriment' potentially covers a wide range of unfavourable treatment. There is no need to show any physical or economic consequence, and the detriment has to be looked at from the point of view of the employee – **Shamoon v Chief Constable of the Royal Ulster Constabulary** (above). There must be a causal link between the employee's allegation that the employer has infringed a statutory right and the imposition of the detriment.

<u>*Dismissal for asserting a statutory right*</u>

104. Section 104 ERA provides:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee […]

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1) –

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section […]

(d) the rights conferred by the Working Time Regulations 1998 […].

105. The assertion of the relevant statutory right must be the reason, or the principal reason, for the employee's dismissal. The burden of proof is on the employee to establish the reason for dismissal, on the balance of probabilities. In a constructive dismissal case, the employee must demonstrate that he or she resigned in response to the employer's repudiatory breach of contract, and that that breach was committed because the employee asserted a statutory right under s.104 ERA.

Harassment related to race or age

106. By virtue of s.40 of the Equality Act 2010 (EqA), an employer must not harass an employee. S.26 EqA provides:

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. […]

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are –

age; […]

race […].

107. 'Unwanted' conduct means conduct that is unwanted by the employee – **Thomas Sanderson Blinds Ltd v English** EAT 0316/10. The Equality and Human Rights Commission's Code of Practice on Employment makes it clear

that the conduct does not have to be directed specifically at the complainant for it to be unwanted by him or her (para 7.10).

108. Conduct that has the *effect* of violating an employee's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her, will be unlawful even if that was not the perpetrator's intention. However, in **Richmond Pharmacology v Dhaliwal** [2009] ICR 724, EAT, Mr Justice Underhill, then President of the EAT, said: 'Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended.'

109. The adverse purpose or effect can be brought about by a single act – **Reed and anor v Stedman** [1999] IRLR 299, EAT. The EHRC's Code of Practice states that 'a serious one-off incident can… amount to harassment' (para 7.8). The question whether an act is sufficiently serious to support a harassment claim is a question of fact and degree – **Insitu Cleaning Co Ltd v Heads** [1995] IRLR 4, EAT.

110. In **Pemberton v Inwood** [2018] ICR 1291, CA, Lord Justice Underhill gave the following guidance:

> *In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider* ***both*** *(by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question)* ***and*** *(by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.*

111. In **Richmond Pharmacology v Dhaliwal** (above), Mr Justice Underhill, then President of the EAT, held that, in assessing effect, 'one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt'.

<u>*Direct race or age discrimination*</u>

112. Section 13 EqA provides:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

113. In **Gould v St John's Downshire Hill** [2021] ICR 1, EAT, Mr Justice Linden stated:

The question whether an alleged discriminator acted 'because of' a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the 'reason why' question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of. It need not be the sole ground for the decision… [and] the influence of the protected characteristic may be conscious or subconscious.

114. In **Nagarajan v London Regional Transport** [1999] ICR 877, HL, Lord Nicholls stated: 'If racial grounds… had a significant influence on the outcome, discrimination is made out.' The crucial question, in every case, was 'why the complainant received less favourable treatment… Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'.

115. When determining whether the claimant has been treated less favourably than an actual or hypothetical comparator, there must be 'no material difference between the circumstances relating to each case' – s.23(1) EqA. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** (above) Lord Scott explained that this means that 'the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class'.

116. Direct discrimination claims are subject to a shifting burden of proof. Once a claimant proves facts from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of direct discrimination, the tribunal is obliged to uphold the claim unless the employer can show that it did not discriminate – s.136 EqA.

117. Direct age discrimination – unlike other forms of direct discrimination – is capable of justification under s.13(2) EqA. In **Chief Constable of West Yorkshire Police and anor v Homer** [2012] ICR 704, SC, Baroness Hale stated that 'to be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so'.

Discriminatory constructive dismissal

118. Section 39(2)(c) EqA provides that an employer must not discriminate against an employee by dismissing him or her. This includes a constructive dismissal – s.39(7)(b). However, 'discrimination' does not include harassment, which is dealt with separately in s.40 EqA. S.39(2)d) provides that an employer must not discriminate against an employee by subjecting him or her to 'any other detriment'. 'Detriment' does not include conduct which amounts to harassment – s.212(1).

119. An employee who resigns in response to an act of discrimination will be taken to be constructively dismissed if the discrimination amounts to a breach of trust and confidence by the employer. In **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)** (above) their Lordships confirmed that the duty is that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Lord Nicholls confirmed that this is assessed objectively. Any breach of the implied term of trust and confidence is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract – **Woods v WM Car Services (Peterborough) Ltd** [1981] ICR 666, EAT.

120. A finding of unlawful discrimination does not inevitably mean that the employer has committed a repudiatory breach of contract – **Amnesty International v Ahmed** [2009] ICR 1450, EAT. In **Wainwright v Cennox plc** [2023] EAT 101 the EAT held that an employment tribunal had erred in failing to analyse whether an employer's acts of discrimination also amounted to potentially repudiatory breaches of the implied term of mutual trust and confidence; and whether the breaches had a material influence on the employee's decision to resign.

Rest breaks

121. Regulation 12 of the Working Time Regulations 1998 (SI 1998/1833) provides:

> *(1) Where a worker's working time is more than six hours, he is entitled to a rest break.*
>
> *(2) The details of the rest break to which a worker is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement.*
>
> *(3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.*

122. In **Gallagher and ors v Alpha Catering Services Ltd t/a Alpha Flight Services** [2005] ICR 673, the Court of Appeal held that a worker must know at the start of a rest break that it is such – i.e. that he or she has 20 minutes free from work to do with as he or she pleases. It follows that a period of downtime

cannot retrospectively become a rest break only because it can be seen after it is over that it was an uninterrupted period of 20 minutes.

123. In **Grange v Abellio London Ltd** [2017] ICR 287, the EAT held that an employer's failure to make provision for rest breaks can amount to a 'refusal' to permit them, even in the absence of an express request by the worker. According to the EAT, employers have an obligation to afford rest breaks and the entitlement to such breaks will be 'refused' if they put into place working arrangements that fail to allow such breaks. If, on the other hand, employers take active steps to ensure working arrangements that enable workers to take rest breaks, they will have met their obligations: workers cannot be forced to take rest breaks but they are to be positively enabled to do so.

Discussion and conclusions

Whistleblowing – protected disclosures

124. The Claimant asserts that he made qualifying disclosures relating to three matters for the purposes of s.43B(1) ERA, and that his disclosures were protected because they were made to his employer. He relies on:

a. two disclosures to Mr Paduraru in October 2023 concerning the presence of a dead pigeon in the netting above the milk delivery bay;

b. one disclosure to Mr Paduraru in October 2023 concerning an increase in the rodent population and plastic fragments chewed by the rodents being washed into the river; and

c. five disclosures to Mr Paduraru during the period October 2023 – January 2024 concerning the presence of potholes around the site.

(a) Dead pigeon

125. The Claimant told Mr Paduraru on two separate occasions in October 2023 that there was a dead pigeon in the netting above the milk delivery bay and that this gave rise to a risk of maggots falling onto the milk tankers and contaminating the milk. This was a disclosure of information, containing sufficient factual content and specificity. It was communicated to the Claimant's manager and must therefore be regarded as having been made to his employer.

126. In reality, there was no appreciable risk of contamination because the milk was transported in closed, sterile tankers and the pipes used to drain those tankers were part of a closed system. The Claimant was familiar with the milk bay and the system for draining the tankers: it was an important part of his job and he must have been fully aware of the level of risk. Furthermore, Mr Knowles had told him it was a closed system. In these circumstances, we do not think the Claimant genuinely believed that the disclosure was made in the public interest or that it tended to show that health and safety was being endangered. The lack of any genuine belief on the Claimant's part is consistent with the fact that he did not escalate the matter to the technical team when Mr Paduraru failed to report it.

127. If we are wrong about that and the Claimant did genuinely hold such a belief, we do not consider his subjective belief to have been reasonable. There was a system in place to prevent the milk from being contaminated. Having regard to working practices and to the various auditing and inspection measures, which revealed no health and safety breaches, there was no objective basis for the Claimant's belief. We note that the Respondent received a Band A rating from the Environment Agency after an inspection that was carried out in February 2024, at a time when the dead bird was still present in the netting.

128. It follows that the Claimant's complaints to Mr Paduraru about the dead pigeon did not amount to qualifying disclosures.

(b) Plastic fragments

129. The second matter relied upon is the Claimant's complaint in October 2023 about rats chewing plastics and fragments of plastic being washed into the river. We have rejected the assertion that he also complained about an increase in the rat population around the factory and the traps not working.

130. The Claimant raised a concern with Mr Paduraru about rats chewing plastic packaging and the fragments of chewed plastic being washed into the nearby river. We consider that this was a disclosure of information to the employer, that it contained sufficient factual content and that it was sufficiently specific.

131. In our view, the environmental risk posed by the plastic fragments was not as great as the Claimant supposed it to be. The outdoor area where the plastics accumulated was at some distance from the river and there was a range of preventative measures in place. The river was protected by a net fence and a sluice gate; Mr Paduraru conducted daily inspections of the area; and there were frequent visits by the pest control team, the Environment Agency and the local authority environmental officer. However, the Claimant cannot be expected to have been aware of these matters or to have fully appreciated their significance. The netting and sluice gate fell outside his area of operation, and there is no reason why he would have known whether they were effective in filtering small fragments of waste out of the river. From his perspective, the presence of plastic fragments in an outdoor area not far from a river created a genuine environmental risk. He thought the environment was being damaged; this was a reasonable perception on his part.

132. We have concluded that the Claimant reasonably believed that his disclosure was made in the public interest. He also held a reasonable belief that it tended to show that the Respondent was failing to comply with its legal obligation to protect the environment and was committing a criminal offence. The Claimant's reference to the environmental failings of Thames Water demonstrates that he had these considerations in mind at the time he raised the matter. The actual danger was somewhat overstated; nonetheless, we consider there to have been at least some objective basis for the Claimant's belief.

133. Accordingly, the Claimant's complaint to Mr Paduraru about plastic fragments being washed into the river amounted to a protected disclosure.

(c) Potholes

134. Finally, the Claimant relies on five disclosures made to Mr Paduraru during the period October 2023 – January 2024 concerning the presence of potholes (Mr Paduraru's preferred term was 'uneven road surfaces') around the site. We are satisfied that these were disclosures of information; that there was a sufficient factual basis for them; that they were sufficiently specific; and that they were communicated to the Claimant's employer.

135. From the Respondent's viewpoint, there were practical and logistical reasons for delaying repairs to the road surfaces, and mitigating measures had been put in place until a full programme of works could be undertaken. Drivers were instructed to modify their route, adapt their speed and adjust their seat suspension, and a 2018 study had assessed the risk to drivers from vibration caused by (among other things) driving over uneven surfaces – although the condition of the roads around the site is likely to have changed since 2018.

136. Nevertheless, potholes inevitably present a hazard and they tend to get worse over time. We consider that some element of risk must have remained, despite the mitigating measures in place – otherwise, why would the Respondent have been planning repairs? We accept that the Claimant believed there to be a risk of injury to people driving around the site (although not to pedestrians, given the presence of dedicated walkways) and we think his belief was reasonable.

137. Furthermore, the Claimant believed that his disclosures were in the public interest and tended to show that the Respondent was failing to comply with its legal obligations towards its staff, and that the health and safety of the drivers was likely to be endangered. There was some objective basis for this belief and it was therefore reasonable.

138. It follows that the Claimant's complaints to Mr Paduraru concerning the presence of potholes around the site amounted to protected disclosures.

Whistleblowing detriment – s.47B ERA

139. The Claimant asserts that he was subjected to ten detriments by the Respondent on the ground that he had made protected disclosures. The detriments he relied on were:

a. Mr Paduraru calling him back from breaks on 23 and 25 January 2024;

b. Mr Paduraru brushing off his complaint about the plastics being washed into the river in October 2023 and instructing him to cut bushes;

c. Mr Paduraru unfairly blaming him on 19 January 2024 for not washing dolavs and for allowing the pipes to freeze;

d. Mr Paduraru telling him to work faster on 29 January 2024;

e. Mr Paduraru unfairly blaming him on 29 January 2024 for breaking a cryoscope;

f. Mr Paduraru unfairly criticising his performance and supervising him in an overbearing way on the following occasions:

    i. on 19 January 2024, criticising him for not emptying a skip;

    ii. criticising him for not being confident enough;

    iii. on 26 January 2024, asking him why he was with the tanker driver for so long and whether he was ‘entertaining’ the driver;

    iv. on 30 January 2024, accusing the Claimant of being the ‘site tour guide’.

g. Mr Paduraru and Mr Knowles calling the Claimant into a PIP meeting on 30 January 2024 without prior notice and without affording him the right to bring a companion;

h. Mr Paduraru commenting at the PIP meeting that Mr Cardosa was 65 and would ‘run around like a little monkey’ to get things done;

i. Mr Paduraru stating at the PIP meeting that the Claimant had told him he was a lawyer;

j. Mr Paduraru and Mr Knowles putting the Claimant on a PIP on 30 January 2024.

140. Dealing with these matters in turn:

a. The Claimant was called back from his breaks on 23 and 25 January 2024. A break is designed to allow a worker temporary respite from the pressures of work and an opportunity to attend to his or her personal needs. The Claimant habitually used his breaks to eat and to look at his phone in the changing room. He considered an interrupted break to be a detriment or disadvantage, and we think that it was objectively reasonable for him to do so. Nevertheless, we have concluded that there was no causal link between Mr Paduraru’s actions and the Claimant’s protected disclosures. The reason why the Claimant was asked to come back to work was simply that there were tasks that needed to be completed. It was well understood that this was how things worked within the site services team. All employees were required to be on hand at certain times to deal with urgent tasks such as milk deliveries; the quid pro quo was that there were times when they could take an extended break, or more than one break in a day. Mr Paduraru was becoming increasingly concerned about the Claimant’s productivity and his propensity to leave tasks undone, and his actions must be viewed in that context. Furthermore, several months had elapsed since the Claimant’s protected disclosure about plastic debris in October 2023; in our view, the passage of time makes it less likely that there was a causal link between that disclosure and the detriments connected with the two breaks in January 2024. Two of the protected disclosures about potholes were made on 19 and 25 January, but despite this temporal proximity, we could find no basis for inferring a causative link. Mr Paduraru was not particularly concerned about the potholes: from his perspective, a programme of repairs was planned and there were mitigating measures in place. He knew that the matter was in hand, and this makes it less likely that he would have subjected the Claimant to a detriment for raising the issue. We conclude that the Claimant was not called back from his breaks on the ground that he had made protected disclosures about plastics and/or potholes.

b. We do not accept that the Claimant was subjected to a detriment in October 2023 when he complained about plastic fragments being washed into the river and Mr Paduraru indicated that it was not their issue to deal with and sent him away to cut bushes. Mr Paduraru gave that response because he knew that protective measures were in place and he did not consider there to be any real risk to the environment. In directing the Claimant to go and cut bushes, he was issuing a reasonable management instruction. It was unreasonable for the Claimant to regard this brief exchange as subjecting him to any detriment or disadvantage. In any event, this complaint would appear to be out of time.

c. The Claimant says that he was subjected to a detriment by being unfairly blamed for unwashed dolavs and frozen pipes on 19 January 2024. Central to this allegation is the assertion that these matters were out of his control and the criticism was therefore unwarranted. We have found that he was not unfairly criticised. It was reasonable for Mr Paduraru to take the view that he was creating a bottleneck in production by leaving dolavs unwashed. It was also reasonable for him to conclude that the Claimant had caused the pipes to freeze by closing off the taps. Mr Paduraru was understandably annoyed but he did not shout. Any criticism was entirely justified. The Claimant was not reprimanded for things that were outside his control and he has therefore failed to establish this element of his claim.

d. Mr Paduraru told the Claimant to work faster on 29 January 2024, when the workload had significantly increased owing to a flood and an electrical problem. We consider this to have been a reasonable management instruction that fell within the Claimant's job description. There was a temporary crisis and the whole team was expected to pull together. In these circumstances, it was not reasonable for the Claimant to regard the instruction as subjecting him to a personal detriment or disadvantage.

e. The Claimant asserts that he was subjected to a detriment by being unfairly blamed for breaking a cryoscope on 29 January 2024. However, the evidence indicates the Claimant was at fault. The cryoscope was working at 6 am on the day of the incident, the Claimant was the only person who had used it that morning and he admitted that he had broken it. The new probe was expensive, costing nearly £700. We do not accept the Claimant's assertion that the informal reprimand was unfair or unwarranted. This alleged detriment is not established.

f. The Claimant says that Mr Paduraru unfairly criticised his performance and supervised him in an overbearing way, giving four specific examples. We have found that the Claimant was at fault for failing to empty a skip on 19 January 2024, for spending too long chatting to a tanker driver on 26 January 2024, and more generally for chatting to people around the site. The observation that he was not sufficiently confident is borne out by the comments on his forklift truck test sheet, by the fact that restrictions were imposed on his driving, and by the email sent by Mr Paduraru to Mr Knowles on 12 July 2023 referring to his lack of confidence and the need for supervision. None of Mr Paduraru's criticisms was unfair or unwarranted and therefore this allegation is not made out.

g. The next alleged detriment relates to Mr Paduraru and Mr Knowles calling the Claimant into a PIP meeting on 30 January 2024 (we have found that in fact the meeting took place on 29 January) without prior notice and without affording him the right to bring a companion. The statutory right to be accompanied under s.10 of the Employment Relations Act 1999 arises in relation to a 'disciplinary hearing', defined in s.13(4) as a hearing that could result in the administration of a formal warning or the taking of 'some other action'. We consider that an informal PIP meeting of this nature, which is not capable of resulting in any sort of warning, does not attract the right to be accompanied. Denying the Claimant the right to bring a companion did not amount to a detriment and could not reasonably be regarded as doing so. However, the absence of notice did give rise to a detriment. Although the PIP meeting was intended as a supportive measure, it came as a surprise to the Claimant and he felt ambushed by it. If he had been given notice and an indication of the purpose of the meeting, he would have felt better prepared to engage with the performance discussion. He regarded the lack of notice as a detriment and, in our view, it was reasonable for him to do so. Nevertheless, he was not subjected to that detriment on the ground that he had made any protected disclosures. He was summoned to the PIP meeting because there were concerns about his performance, and the reason for the lack of notice was that he had broken an expensive cryoscope that morning, bringing matters to a head and prompting Mr Paduraru to escalate matters. There was no causative link between the protected disclosures and the detriment of failing to give notice of the PIP meeting. The catalyst was the broken cryoscope, viewed against the backdrop of the other performance concerns.

h. The next detriment relied upon by the Claimant is the comment by Mr Paduraru, made at the PIP meeting, that Mr Cardosa was 65 and would 'run around like a little monkey' to get things done. We have found that this comment was made and we consider that it amounted to a detriment. The Claimant, as a black man, found it deeply offensive for his manager to compare a black colleague to a monkey. It was not Mr Paduraru's intention to cause offence, but that was the effect of his comment, and we think it was reasonable for an employee in the Claimant's position to view the comment in that way. However, we cannot infer any causal link between the comment and the earlier protected disclosures. The intention was to highlight the disparity between the Claimant and Mr Cardosa. There was no retaliatory intent: Mr Paduraru's point was simply that the Claimant needed to speed up and match the workrate of his colleagues. We have also taken into account the passage of several months since the Claimant's first disclosure. We conclude that the Claimant was not subjected to this detriment on the ground that he had made protected disclosures about plastics and/or potholes.

i. The next alleged detriment is Mr Paduraru stating at the PIP meeting that the Claimant had told him he was a lawyer. This was said in a neutral or factual way, based on information that the Claimant had previously shared; it was not said mockingly and Mr Paduraru did not attach any particular significance to it. The Claimant draws a distinction between academic legal training and legal practice. He says that he has a law degree but has never been a practising lawyer, and he claims that it is a detriment for Mr Paduraru to suggest that he falsely holds himself out as one. We do not accept this: the term 'lawyer' can be used to describe a person with academic legal training as well as a person professionally qualified to practise law, and many people outside the legal profession would not make such a distinction. The comment, in our view, was not capable of amounting to a detriment and it was not reasonable for the Claimant to regard it as such.

j. Finally, the Claimant says that it was a detriment to put him on PIP. We accept that the imposition of the PIP amounted to a detriment. It was intended as a supportive measure; nevertheless, it necessarily entailed criticism of the Claimant's performance and meant that he would be subject to greater scrutiny by his managers, with the possibility of a formal performance procedure if he failed to make the necessary improvements, and with dismissal as the ultimate sanction. Most employees would reasonably regard this as a detriment. However, we are unable to ascertain or infer any causative link between the earlier protected disclosures and the imposition of the PIP. There were numerous performance issues relating to the Claimant over a period of several months, with consistent themes developing regarding his lack of productivity and initiative. The evidence indicates that these concerns were legitimate. Mr Paduraru sought to address them in a positive and supportive manner through the medium of a PIP, having taken advice from HR. The Claimant was coming to the end of his six-month probation period in the site services role and it would have been open to Mr Paduraru simply to inform him that he had failed his probation and terminate the contract, but he chose instead to put a PIP in place and offer an opportunity for improvement. The Claimant was not placed on the PIP on the ground that he had made protected disclosures about plastics and/or potholes.

141. With regard to matters (b), (c), (d), (e), (f) and (i) above, if we had concluded that these matters were established and/or that they did amount to detriments,

we would have found that they were not done on the ground of any protected disclosure.

Whistleblowing dismissal – s.103A ERA

142. The Claimant contends that the ten detriments set out above, and the communication to him in June 2023 that his trial in the technical administrator role had been unsuccessful, gave rise to a fundamental breach of the implied term of trust and confidence. He says that this cumulative breach by the employer led to his resignation, giving rise to a constructive dismissal for the purposes of s.103A ERA.

143. We have concluded that six of the ten alleged detriments on which the Claimant sought to rely either were not established in the terms in which they were pleaded by him, or did not amount to detriments. We do not think that the Claimant can rely on any of those matters, either individually or cumulatively, as giving rise to a breach of trust and confidence by the Respondent. The Claimant was not unfairly blamed or held accountable for any of the performance issues that Mr Paduraru raised with him. The instructions given by Mr Paduraru to cut back the bushes and to work faster were reasonable management instructions that fell within the scope of the Claimant's job description. These matters are not capable of breaching trust and confidence, either individually or in combination with other matters.

144. That leaves the four matters that did amount to a detriment for the purposes of s.47B ERA. In our view, asking the Claimant to cut short his breaks on two occasions in January 2024 did not breach the relationship of trust and confidence, either individually or cumulatively. It was accepted that employees were required to adjust the timing of their breaks when there was urgent work to be done. On this occasion, there was reasonable and proper cause for Mr Paduraru's request. The quid pro quo was that the site services team worked with a degree of autonomy and could take extended or multiple breaks during quieter periods.

145. Nor do we think that the lack of notice of the PIP meeting on 29 January 2024 breached trust and confidence. It was not a formal disciplinary or capability meeting; it was an informal discussion designed to give the Claimant a chance to improve, prompted by the broken cryoscope incident. As a matter of good practice, it might have been preferable to give the Claimant some notice so that he could have felt better prepared, but the failure to do so cannot be seen as calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties, either individually or cumulatively when combined with other incidents.

146. The decision to place the Claimant on a PIP did not amount to a breach of trust and confidence, either individually or cumulatively. There were numerous concerns about the Claimant's performance and the PIP was seen as a constructive means of addressing them by setting out clear expectations and areas for improvement. The Respondent had reasonable and proper cause for putting a PIP in place.

147. That leaves the 'monkey' comment made by Mr Paduraru at the PIP meeting. We consider that this incident did not, in the circumstances, give rise to a breach of trust and confidence entitling the Claimant to resign. Our reasons for reaching that conclusion are set out below under the heading 'Discriminatory constructive dismissal'. In any event, the Claimant's protected disclosures about plastics and potholes were not the reason (or even the principal reason) for the comment. Mr Paduraru's intention was to use Mr Cardosa as a positive example of an older employee who worked productively and to convey to the Claimant that he needed to speed up. There was no subjective racial intent. The comment was directed at the Claimant's performance issues, and we can ascertain or infer no causative link with the Claimant's earlier protected disclosures.

148. The other matter relied on was the decision to end the Claimant's trial period in the technical administrator role and the communication of that decision to the Claimant in the presence of Mrs Mrozik. This took place in June 2023, eight months before the Claimant resigned. We do not think that it gave rise to a breach of trust and confidence, either individually or cumulatively. The trial period was cut short because the Claimant did not perform well in the role and was not suited to the work. Mrs Mrozik was the Claimant's supervisor and it was appropriate for her to be present when the decision was conveyed to the Claimant. The circumstances that led to the decision to terminate the trial a week early were explained in Miss Moore's evidence and in the email sent by Mrs Mrozik. In any event, the protected disclosures were made months later and cannot therefore have played any causative role in the decision to terminate the Claimant's trial period.

149. It follows that the claim of automatically unfair dismissal for making protected disclosures under s.103A ERA does not succeed.

Detriment or dismissal for asserting a statutory right – ss.45A and 104 ERA

150. The Claimant contends that, when he was called back from his rest break on 23 January 2024, he stated to Mr Paduraru that his right to daily rest breaks under reg 12 of the Working Time Regulations 1998 had been infringed. We have found that the Claimant told Mr Paduraru that he had a right to a rest break and breaks were not a privilege. Viewed in the context of the Claimant being called back to work, that is sufficient to amount to an allegation of an infringement of a statutory right for the purposes of ss.45A and 104 ERA. It was clear from this comment that the Claimant was referring to a legal right; he did not need to cite the Working Time Regulations. The assertion was made by him in good faith. He genuinely believed that an infringement had occurred and it is immaterial for these purposes whether the right to rest breaks had actually been infringed.

151. However, the Claimant was not subjected to any detriment on the ground that he had asserted his statutory right to rest breaks. The Claimant relies on detriments (c)–(j) set out under the heading 'Whistleblowing detriment – s.47B ERA' above. For the reasons given above, the only matters that amounted to a detriment were summoning the Claimant to the PIP meeting with no notice on 29 January 2024; the comment made in the PIP meeting about Mr Cardosa;

and the decision to implement a PIP. There was no causal link between these matters and the Claimant's assertion of the right to rest breaks. The relevant detriments were all connected with his poor performance in the site services role. Concerns had emerged over a period of several months, and the broken cryoscope on 29 January finally prompted Mr Paduraru to take action. The words used at the PIP meeting in relation to Mr Cardosa caused unintentional offence, but this example was used to reinforce the need for the Claimant to speed up and be more productive. The Claimant's assertion of the right to rest breaks on 23 January was not a material factor in the imposition of these detriments by the Respondent. None of the detriments had anything to do with the Claimant's assertion of a statutory right. His claim under s.45A ERA does not succeed.

152. The Claimant also says that the detriments set out above, together with the communication to him in June 2023 that his trial in the technical administrator role had been unsuccessful, amounted to a fundamental breach of the implied term of trust and confidence, entitling him to resign. He contends that he resigned in response to that breach and that the principal reason for the breach was that he had asserted his statutory right to rest breaks. Under the heading 'Whistleblowing dismissal – s.103A ERA' above, we explain why we do not consider that any of these matters, viewed individually or cumulatively, gave rise to a breach of trust and confidence. Further reasons relating to the 'monkey' comment are set out under the heading 'Discriminatory constructive dismissal' below.

153. It follows that the Claimant has not succeeded in establishing that he was constructively dismissed for asserting his statutory right to rest breaks contrary to s.104 ERA. Even if we had found that there was a constructive dismissal, we would have concluded that Claimant's assertion of the statutory right to rest breaks was not the principal reason for the Respondent's cumulative breach of trust and confidence. The reason was the Claimant's poor performance. In any event, the technical administrator trial was terminated many months before the Claimant asserted any statutory right.

Notice pay

154. The Claimant resigned with immediate effect. He asserts that he should have received statutory or contractual notice pay. His claim for notice pay depends on his having been constructively dismissed by reason of the Respondent's fundamental breach of contract. Because we have found that there was no breach of trust and confidence entitling the Claimant to resign, we conclude that there was no constructive dismissal and no right to notice pay.

Harassment related to race and age – s.26 EqA

155. The Claimant alleges that the comment made at the PIP meeting on 29 January 2024 amounted to racial harassment. The Claimant is a black man; he describes himself as African-Caribbean. At the PIP meeting, Mr Paduraru said that the Claimant's colleague Mr Cardosa, who is also black, was 65 and would 'run around like a little monkey' to get things done. Mr Paduraru made the

comment without any discernible racial intent; nevertheless, the Claimant was offended by the use of the term to describe a black employee.

156. The word ‘monkey’, when used in relation to a black person, is a widely recognised racial slur. It is used as a term of racist abuse. We consider that the comment amounted to unwanted conduct that was related to the protected characteristic of race.

157. The comment was not made with the *purpose* of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Mr Paduraru was born and raised in Romania, and we accept his explanation that the word ‘monkey’ does not have the same racial connotations there as it does in the UK. Furthermore, viewed in the context in which it was used, the word was intended as a way of complimenting Mr Cardosa’s work performance and highlighting the disparity between him and the Claimant. It was not intended as a racial insult and Mr Paduraru did not use it as such.

158. In our view, however, the comment clearly had the *effect* of violating the Claimant’s dignity, and that is enough to bring it within the scope of s.26 EqA. It was more than trivial or transitory. The Claimant, as a black man, found it deeply offensive for his manager to compare a black colleague to a monkey. It was not Mr Paduraru’s intention to cause offence, but that was the undoubted effect of the words that were spoken. We think it was reasonable for someone in the Claimant’s position to view the comment in that way, notwithstanding the lack of intent.

159. We prefer to base our conclusion on s.26(1)(b)(i) (violation of dignity) rather than s.26(1)(b)(ii) (creation of an intimidating, hostile, degrading, humiliating or offensive environment). This was a one-off remark and the Respondent’s workforce is ethnically diverse. There was no indication that any similar issues had occurred previously or that Mr Paduraru, in particular, had made any other unwelcome comments related to race. It would be problematic, in our view, to describe the use of the word on this occasion as creating a hostile (etc.) *environment*, a word that implies a pervasive or ongoing state of affairs relating to an individual’s working conditions.

160. For the above reasons, we conclude that the ‘monkey’ comment amounted to harassment related to race contrary to s.26 EqA.

161. We do not consider that Mr Paduraru’s comment amounted to age-related harassment. It was intended to convey the message that a colleague who was 65 was more productive than the Claimant, who was in his early sixties at the time. The implication was that the Claimant’s age was irrelevant and should be no barrier to his productivity. There was no aspersion cast on employees in any age group, old or young. The word used to describe Mr Cardosa, while clearly capable of causing offence for other reasons, did not relate to age.

162. In so far as the Claimant alleges that the decision to summon him to a PIP meeting without prior notice, and the denial of the right to bring a companion, amounted to race- or age-related harassment, that claim is not well-founded.

There is no evidence to suggest that these matters were related to race or age, nor would it have been reasonable for the Claimant to regard them as having the proscribed effect of violating his dignity (etc). The purpose of the PIP was to address legitimate performance concerns in a constructive manner by setting out the required standards of performance. Mr Paduraru called the meeting without notice because the cryoscope incident that morning had brought matters to a head, prompting him to act with a degree of urgency, and because it was not a formal capability hearing. He reasonably took the view that this was an informal performance discussion and that there was no need for the Claimant to bring a companion along.

163. The Claimant also says that the Respondent's decision in May 2023 to change the experience requirement for the HR role from three years to five years amounted to race- or age-related harassment. We do not uphold this element of the claim. There is no evidence to support the Claimant's assertion that the requirement was increased to five years' experience after he expressed an interest in the role, and it follows that the factual elements of the pleaded claim are not made out. Furthermore, the Respondent had valid business reasons for requiring three years' practical HR experience, which the Claimant accepts he lacked. In any event, it is unclear how this incident is said to relate to the protected characteristics of race or age, and the claim appears to have been brought many months out of time (on the time point, see further 'Direct race or age discrimination – s.13 EqA' below).

Direct race or age discrimination – s.13 EqA

164. Because we have found that the 'monkey' comment amounted to harassment related to race, it must be dismissed as an allegation of direct race discrimination. The definition of 'detriment' for the purposes of direct discrimination does not include conduct that amounts to harassment – s.212(1) EqA.

165. We do not accept that the comment amounted to direct age discrimination. The Claimant was in his early sixties at the time and he compares himself with a person in his or her twenties or thirties. We are satisfied that if Mr Paduraru had been conducting a PIP meeting with an employee in the 20–30 age group who – like the Claimant – worked slowly and left tasks undone, he would have made the same comment. His intention was to hold Mr Cardosa out as a positive example of an older employee who worked efficiently. His point was that, if a 65-year-old was able to complete tasks on time, the younger members of the site services team could also be expected to do so. In that respect, the Claimant was treated no less favourably than a hypothetical younger employee would have been treated.

166. The Claimant also alleges that the decision to summon him to a PIP meeting without prior notice, and the denial of the right to bring a companion, amounted to direct discrimination because of his race or age. We have already indicated that the PIP meeting was arranged because there were legitimate performance concerns; that no notice was given because the cryoscope incident had prompted urgent action and it was not a formal meeting; and that the Claimant was denied the right to bring a companion because this was not a disciplinary

or capability hearing that could result in a formal warning. We do not consider that the Claimant's race or age played any part in these matters.

167. The Claimant also relies on the way in which the HR vacancy was handled in May 2023 as amounting to direct race or age discrimination. This element of the claim is substantially out of time. The HR vacancy was advertised in May 2023. It was a discrete matter involving Ms Little; there was no conduct extending over a period. The medical evidence provided by the Claimant in connection with remedy relates to a later period and cannot support a 'just and equitable' extension. In all the circumstances, we decline to extend time for the purposes of s.123(1)(b) EqA.

168. In any event, we have rejected the Claimant's assertion that the experience requirement was changed from three years to five years after he expressed an interest in the role. The Respondent had sound business reasons for demanding three years' practical HR experience; it was a small HR department and a 'hands-on' position. A white employee, or an employee in his or her twenties or thirties, would have been subject to the same requirement. We do not accept the Claimant's suggestion that the woman who had previously carried out the HR role was so young that she could not have had three (let alone five) years' experience: there was no evidence to support this assertion and the Claimant accepted that it was purely speculative, based on her youthful appearance.

169. If the requirement for three years' practical HR experience had given rise to direct age discrimination, and if the claim had been in time, we would have found that the requirement was justified as a proportionate means of achieving a legitimate aim. The Respondent's aim was to recruit someone to the HR role who did not require intense supervision or training. The role required three years' experience because it was a 'hands-on' HR officer role in a small team of four employees. It was not practicable to train somebody up from scratch. The requirement was both appropriate and necessary.

170. For all these reasons, the claims of direct race and age discrimination are not well-founded and must be dismissed.

Discriminatory constructive dismissal

171. The Claimant asserts that the monkey comment amounted to a fundamental breach of the implied term of trust and confidence; that he resigned in response; and that the resulting constructive dismissal was itself discriminatory contrary to s.39(2)(c) and (7)(b) EqA because of the nature of the underlying breach.

172. The difficulty with this argument is that s.39, which deals with discriminatory constructive dismissal, does not include acts that amount to harassment under s.26 EqA. We have found that the monkey comment was an act of harassment, and it cannot also give rise to direct race discrimination. The remedy hearing will address the extent to which the Claimant's financial losses (including any loss of earnings following his resignation) can be recovered as part of his compensation for harassment.

173. In any event, supposing that the monkey comment had amounted to direct race discrimination under s.13 EqA instead of harassment under s.26 (the two are mutually exclusive), we note that the legal test for constructive dismissal is separate and distinct from the test for direct discrimination. That is illustrated by the case of **Wainwright v Cennox plc**, to which Mrs Shankar referred us. The question is whether the employer, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. This is an objective test. If so, it must be shown that the employee resigned in response to the breach. In that respect, it is sufficient that the breach had a material influence on the employee's decision to resign.

174. We readily accept that a manager comparing a black employee to a 'monkey' will usually amount to a breach of the implied term of trust and confidence. In so far as it carried a racial meaning, there was no reasonable and proper cause for Mr Paduraru's comment, and the Claimant subjectively and reasonably found it offensive. Nevertheless, in the unusual circumstances of this case, we have concluded that the comment did not cross the threshold such as to breach trust and confidence. It was said by a manager with a non-UK linguistic and cultural background, who failed to appreciate the racial connotations of the word. It is likely that Mr Paduraru's lack of racial intent would have been apparent to an objective observer. The comment was spoken about Mr Cardosa – not the Claimant – and it was clear from the context that it was intended as a compliment about Mr Cardosa's energy and efficiency. Many employees in the Claimant's position would have made a formal complaint without resigning. The remark unintentionally and understandably caused offence but, in the circumstances, it was not objectively likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The absence of any such breach means that there was no constructive dismissal, discriminatory or otherwise.

Rest breaks – reg 12 WTR

175. The Claimant contends that he was denied the right to take a daily rest break on 23 and 25 January 2024. On both those dates, Mr Paduraru came to find him and called him back from his breaks because there was work to be done.

176. Under reg 12 WTR, the Claimant had a statutory entitlement to an uninterrupted 20-minute daily rest break. Furthermore, he was entitled to know at the *start* of a rest break that it would be an uninterrupted period of 20 minutes (a 'Gallagher' rest break). The Respondent did not seek to rely on the 'continuity of service or production' exemption in reg 21 WTR; in our view, it was right not to do so because the focus of that exemption is on the activities of the worker, not those of the employer.

177. The Claimant was contractually entitled to a paid 35-minute daily rest break. This exceeded his minimum statutory entitlement under reg 12. We have found that the site services team worked flexibly and autonomously, with the ability to take their breaks during periods of downtime, such as when a tanker had arrived and was parked in the milk bay being pumped out. In practice, it was sometimes possible to take multiple or extended breaks in the course of a day.

178. In our view, the Respondent had put adequate arrangements in place to ensure that the Claimant had the opportunity to take daily rest breaks. There were periods during each working day when he knew that he could take a break without being interrupted. The onus was on him to manage the timings of his breaks by ensuring that a milk tanker was not due to arrive and that any other urgent work had been completed (such as washing dolavs where there would otherwise be an adverse impact on production). Subject to that, he could take a break free of any risk of interruption. The Respondent did not infringe the Claimant's right to rest breaks under reg 12 WTR.

Acas Code of Practice

179. We are entitled to increase or decrease any award payable to the Claimant by up to 25 per cent if we are satisfied that either party has unreasonably failed to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures – s.207A Trade Union and Labour Relations (Consolidation) Act 1992.

180. The Respondent's grievance procedure is set out in the company handbook. There was no evidence to suggest that the Claimant was unaware of it. The handbook states that a grievance relating to the employee's line manager can be raised with the next level of management or with HR. If the matter cannot be resolved through informal discussions, the employee is required to provide a written statement to HR.

181. Paragraph 32 of the Acas Code states: 'If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance.' The Claimant first contacted HR on 8 February 2024, and he submitted a written grievance on 12 February. However, he had told Mr Paduraru on 7 February that he wanted to resign, and he confirmed that decision to HR on 9 February. By the date on which he submitted his written grievance, it was therefore beyond doubt that his resignation had already taken effect. In these circumstances, we think there was an unreasonable delay in lodging a grievance. The Claimant should have contacted HR *before* he resigned; he could have remained absent on sick leave while the grievance was being dealt with. We think there would have been a better chance of resolving the issue to his satisfaction if he had taken this course of action.

182. Paragraph 34 of the Acas Code states: 'Employers, employees and their companions should make every effort to attend the meeting.' The Claimant failed to attend any of the grievance meetings that were arranged. To the extent that he was experiencing ill health, that cannot be regarded as unreasonable. However, we note that he attempted to attend an initial meeting to discuss the grievance on 20 February 2024 but arrived nearly an hour late, with the result that the meeting could not go ahead. He had confirmed that he would be attending and he clearly felt well enough to do so. When he arrived, he apologised for wasting Ms Peters' time, indicating that he acknowledged he was at fault for his lateness. We have concluded that the Claimant unreasonably failed to comply with the Acas Code on that occasion.

183. The Claimant made various criticisms of the way in which the Respondent conducted the grievance process. We accept that Mr Stokes lacked experience as an investigator and that he acted as both investigator and decision maker in the matter. However, we cannot see that these matters breached any provision of the Acas Code. The Acas guidance ‘Investigations at work’ – which is separate from the Code – states: ‘For a grievance investigation, it is usually best for the person hearing the grievance to investigate the issue.’ We do not accept the Claimant’s assertion that the Respondent should have interviewed Mr Cardosa. There was no suggestion that Mr Cardosa, who had left the business, was aware of the relevant matters.

184. In these circumstances, we consider that it is appropriate to reduce the Claimant’s compensation by up to 25 per cent by reason of his failure to comply with the Acas Code. We will hear submissions at the remedy hearing as to the appropriate percentage reduction.

Polkey reduction

185. We have concluded that the Claimant was not automatically unfairly dismissed. It is therefore unnecessary for us to consider a Polkey reduction based on the chances that a fair dismissal could have taken place.

Conclusion

186. For the reasons set out above, the Claimant’s complaint of harassment related to race succeeds in relation to the comment made about Mr Cardosa at the PIP meeting on 29 January 2024. A remedy hearing will take place on **6 November 2026** and directions will be sent to the parties.

187. The Claimant’s other complaints are not well-founded and are dismissed.

Approved by:
Employment Judge Leverton
15 July 2026

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
31 July 2026

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Appendix – list of issues from case management order dated 14 July 2025

1. Time limits

1.1 The claim form was presented on 20 April 2024 **[note – this should state 29 April 2024]**. The claimant commenced the Early Conciliation process with ACAS on 6 March 2024 (Day A). The Early Conciliation Certificate was issued on 12 April 2024 (Day B). Accordingly, any act or omission which took place before 13 January 2024 **[note – this should state 7 December 2023]** (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

1.2 Were the discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the detriment complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

1.4 Was the claim in relation to daily rest breaks within the time limit in reg. 30 of the Working Time Regulations 1998? The Tribunal will decide:

1.4.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date the right should have been permitted?

1.4.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.4.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Protected disclosure ('whistleblowing')

2.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 What did the Claimant say or write? When? To whom? The Claimant says he made disclosures on these occasions:

2.1.1.1 In about early October 2023, orally to Mr Paduraru and Mr Knowles, that there was a dead pigeon above the milk reception bay and one of the tanker drivers had been complaining about it and there was a risk of maggots falling on the tanker.

2.1.1.2 On 11 October 2023, orally to Mr Paduraru that more birds were being trapped in the wire and would starve to death and the maggots would pose a health and safety risk;

2.1.1.3 In about October 2023, orally to Mr Paduraru that rodents were chewing the plastics which were put outside and the small pieces were being washed into the river. The Claimant asked if Mr Paduraru was aware of the trouble Thames Water had got in for polluting rivers. Further there was an increase in rats and the rat traps were not working properly.

2.1.1.4 On 11 October 2023, 24 November 2023, 19, 25 and 30 January 2024 orally to Mr Paduraru state that there were potholes on site and they were posing a risk to staff.

2.1.2 Were the disclosures of 'information'?

2.1.3 Did he believe the disclosure of information was made in the public interest? The Claimant said that the matters in relation the rodents chewing plastics were in the public interest because the need to protect the rivers and the environment. In relation to the pigeons due to the risk to the health the public. In relation to the potholes because people driving or walking around had a risk of injury.

2.1.4 Was that belief reasonable?

2.1.5 Did he believe it tended to show that:

2.1.5.1 a criminal offence had been, was being or was likely to be committed, namely allowing plastic to wash into the river, risk to public health by reason of the dead birds contaminating the milk, criminal reckless in relation to potholes;

2.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation, to protect the environment and the health and safety legislation for food stuffs and workers;

2.1.5.3 the health or safety of any individual had been, was being or was likely to be endangered (all disclosures);

2.1.5.4 the environment had been, was being or was likely to be damaged (in relation to the plastics);

2.1.6 Was that belief reasonable?

2.2 If the Claimant made a qualifying disclosure, was it a protected disclosure because it was made to:

2.2.1 the Claimant's employer?

3. Detriment (Employment Rights Act 1996 section 47B)

3.1 Did the Respondent do the following things:

3.1.1 After making the disclosures, Mr Paduraru called Claimant back from breaks. This happened:

3.1.1.1 at 1.05pm on 23 January 2024 (the Claimant having started his break at 1pm and being in the changing room. On this day the Claimant started work at 8am.

3.1.1.2 on the 25 January 2024 when the Claimant he was in the changing room about to have a drink and some food and to use the toilet.

3.1.2 When the Claimant explained about the plastics, Mr Paduraru brushed it off said they were not dealing with that and showed him some bushes which needed cutting.

3.1.3 The Claimant was blamed for matters over which he had no control, namely:

3.1.3.1 On 19 January 2024 Mr Paduraru told the Claimant off for not having sufficient dolaves washed for use in the factory;

3.1.3.2 On 19 January 2024 Mr Paduraru had a go at the Claimant about the fact that pipes which pump milk and that wash the dolaves had frozen solid and blocked (these are outdoor pipes and the Claimant says he had no control over whether they froze).

3.1.4 The Claimant was told to work faster by Mr Paduraru on 29 January 2024, when the workload had significantly increased due to a flood and an electrical power problem and the workload was overwhelming.

3.1.5 On 29 January 2024 a probe on a cryoscope broke when he tried to take a test tube out. The Claimant had already reported that the cryoscope was faulty. The Claimant says Mr Paduraru told him off for breaking it. He then asked him to attend the next day for an informal chat about how things were going.

3.1.6 The Claimant's performance was unfairly criticised and he was supervised in an overbearing way by Mr Paduraru, namely:

3.1.6.1 On 19 January 2024 Mr Paduraru criticised the Claimant for the fact that the Claimant had not arranged for the a skip to be emptied, when it had in fact already been emptied and then had been refilled by the Claimant.

3.1.6.2 That he was not confident enough.

3.1.6.3 On the 26 January 2024 Mr Paduraru verbally asked the Claimant why the Claimant was with the milk tank driver for so long and whether he was entertaining the driver. The Claimant alleges that Mr Paduraru said this to the Claimant in the presence of the driver.

3.1.6.4 On the 30 January 2024 Mr Paduraru verbally accused the Claimant of being the site tour guide.

3.1.7 On 30 January 2024 called the Claimant into a meeting with Mr

Paduraru and Mr Knowles, without prior notice and being told that he could not bring a companion.

3.1.8 At the meeting Mr Paduraru said that the Claimant did not work fast enough Claimant's colleague, Mr Cardosa, who was also black, would run around like a little monkey to get things done and he was 65 years old.

3.1.9 At the meeting Mr Paduraru said that the Claimant had told him he had been a lawyer, which was untrue.

3.1.10 Put the Claimant on a performance improvement plan.

3.2 By doing so, did it subject the Claimant to detriment?

3.3 If so, was it done on the ground that he had made the protected disclosure(s) set out above?

4. Dismissal (Employment Rights Act s. 103A)

4.1 Were (i) the allegations of detriment and (ii) the Claimant's assertion that in June 2023 and one week into a two week trial, the Claimant was told by a senior technical manager, in the presence of Goshia (another manager), that his trial in the role of technical administrator had been unsuccessful and that he could not challenge this decision ("**the Tech Administrator Complaint**"), a fundamental breach of the implied term of trust and confidence?

4.1.1 The Tribunal will need to decide:

4.1.1.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end; and

4.1.1.2 Whether it had reasonable and proper cause for doing so.

4.2 Did the Claimant resign because of the breach? The Respondent says he resigned because of his own volition and he was not performing.

4.3 Did the Claimant wait too long before resigning and affirm the contract?

4.4 Was the Claimant dismissed as a consequence?

4.5 Was the making of any proven protected disclosure the principal reason for the Claimant's dismissal?

4.6 The Claimant did not have at least two years' continuous employment and the burden is therefore on him to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosure(s).

5. Assertion of a statutory right (s. 45A and 104 of the Employment Rights Act 1996

5.1 Did the Claimant allege that the Respondent had infringed his rights to daily rest breaks (reg. 12 Working Time Regulations 1998). The Claimant says this was raised on:

5.1.1 On 23 January 2024 the Claimant said to Mr Paduraru *"I have a right to a break, it is not a privilege that you are offering me, and you should remind yourself of the company policy on breaks".*

5.2 Was the allegation that the right had been infringed made in good faith?

6. Detriment (Employment Rights Act 1996 section 45A)

6.1 Did the Respondent do the following things:

6.1.1 The Claimant relies on the matters at **3.1.3**.

6.1.2 The Claimant was told to work faster by Mr Paduraru on 29 January 2024, when the workload had significantly increased due to a flood and an electrical power problem and the workload was overwhelming.

6.1.3 On 29 January 2024 a probe on a cryoscope broke when he tried to take a test tube out. The Claimant had already reported that the cryoscope was faulty. The Claimant says Mr Paduraru told him off for breaking it. He then asked him to attend the next day for an informal chat about how things were going.

6.1.4 The Claimant relies on the matters at **3.1.6**.

6.1.5 On 30 January 2024 Mr Paduraru called the Claimant into a meeting with Mr Paduraru and Mr Knowles, without prior notice and was told that he could not bring a companion.

6.1.6 At the meeting Mr Paduraru said that the Claimant did not work fast enough Claimant's colleague, Mr Cardosa, who was also black, would run around like a little monkey to get things done and he was 65 years old.

6.1.7 At the meeting Mr Paduraru said that the Claimant had told him he had been a lawyer, which was untrue.

6.1.8 Put the Claimant on a performance improvement plan.

6.2 If so, was it done on the ground that he had asserted the statutory set out above?

7. Automatically unfair dismissal for asserting a statutory right (s. 104 Employment Rights Act 1996)

7.1 Were the allegations of detriment and **the Tech Administrator Complaint** a fundamental breach of the implied term of trust and confidence?

7.1.1 The Tribunal will need to decide:

7.1.1.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end;

and

7.1.1.2 Whether it had reasonable and proper cause for doing so.

7.2 Did the Claimant resign because of the breach? The Respondent says he resigned because of his own volitation and he was not performing.

7.3 Did the Claimant wait too long before resigning and affirm the contract?

7.4 Was the Claimant dismissed as a consequence?

7.5 Was the assertion of the statutory right the sole or principal reason for the Claimant's dismissal?

7.6 The Claimant did not have at least two years' continuous employment and the burden is therefore on him to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was the assertion of a statutory right.

8. Constructive wrongful dismissal; notice pay

8.1 What was the Claimant's notice period?

8.2 Was the Claimant paid for that notice period?

8.3 Was the Respondent in fundamental breach of contract entitling the Claimant to resign by reason of that conduct.

9. Direct age and/or race discrimination (Equality Act 2010 section 13)

9.1 The Claimant describes himself as an Afro-Caribbean black man. The Claimant's age group is early sixties and he compares himself with people in the age group 20s to 30s.

9.2 Did the Respondent do the following things:

9.2.1 In May 2023, the Claimant spoke to Ms Little, HR manager about an vacancy in HR (for HR administrator) and she said she was looking for someone with 3 years' experience, this was subsequently changed to 5 years' experience. (race and age) ("**Direct Act 1**")

9.2.3 On 30 January 2024 Mr Paduraru called the Claimant into a meeting with Mr Paduraru and Mr Knowles, without prior notice and being told that he could not bring a companion. At the meeting Mr Paduraru said that the Claimant's colleague, Mr Cardosa, who was also black, would run around like a little monkey to get things done and he was 65 years old. (race and age) ("**Direct Act 2**")

9.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. ~~The Claimant says he was treated worse than Mark who worked in technical administration.~~ Otherwise he relies upon a hypothetical comparator.

9.4 If so, was it because of age and/or race?

9.5 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to age and/or race?

9.6 **AGE** Was the treatment a proportionate means of achieving a legitimate aim?

9.6.1 **Direct Act 1:**

The aim: The Respondent says that its aim was to recruit someone to the HR role with the required level of experience for that role.

That it was reasonable because: The role being recruited for required a degree of experience (namely 3 years) in order to be effective, it as it was a 'hands on' HR officer role in a small team.

That it was proportionate because: The Respondent was looking for an experienced HR officer to join a small HR team, a degree of competency is required to carry out the role and in this team the Respondent does not have the capacity to provide significant on the job training. Additionally the requirement was only for 3 years' experience to be demonstrated.

9.6.1.1 Achieving business objectives

9.6.1.2 not pleaded

9.6.1.3 not pleaded

9.6.2 **Direct Act 3:** no justification advanced because the Respondent says that the comment alleged was not made.

9.7 The Tribunal will decide in particular:

9.7.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

9.7.2 Could something less discriminatory have been done instead;

9.7.3 How should the needs of the claimant and the respondent be balanced?

10. Harassment related to race and/or, age (Equality Act 2010 s. 26)

10.1 Did the Respondent do the following things:

10.1.1 The matters alleged as direct discrimination

10.2 If so, was that unwanted conduct?

10.3 Did it relate to the Claimant's protected characteristic, namely race and/or age?

10.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

10.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

11. Duplication of Harassment and Direct Discrimination

11.1 The claimant's complaints relating to race and age are presented as both harassment and/or direct discrimination. The tribunal will determine these allegations in the following manner.

11.2 In the first place the allegations will be considered as allegations of harassment. If any specific factual allegation is not proven, then it will be dismissed as an allegation of both harassment and direct discrimination.

11.3 If the factual allegation is proven, then the tribunal will apply the statutory test for harassment under s. 26 Equality Act. If that allegation of harassment is made out, then it will be dismissed as an allegation of direct discrimination because under s. 212 (1) Equality Act the definition of detriment does not include conduct which amounts to harassment.

11.4 If the factual allegation is proven, but the statutory test for harassment is not made out, the tribunal will then consider whether that allegation amounts to direct discrimination under the relevant statutory test.

12. Discriminatory Constructive Dismissal (ss 39(2)(c) and 39(7)(b) EqA)

12.1 Was any proven discrimination or harassment an effective cause of the Claimant's resignation.

12.2 Did the claimant delay before resigning and therefore affirm the contract?

12.3 Was the Claimant dismissed and was that dismissal discriminatory within the meaning of s. 39(2)(c) and (7)(b) of the Equality Act 2010.

13. Rest breaks (reg 12 and 30 Working Time Regulations 1998

13.1 Did the Respondent (Mr Paduraru) refuse to permit the Claimant to take a daily rest break on 23 January 2024 and 25 January 2024.

13.1.1 This will involve consideration of whether the Respondent proactively ensured working arrangements to allow workers to take daily rest breaks (see Grange v Abellio London Limited [2017] ICR 287)

13.2 Should an award be made to the Claimant pursuant to reg. 30(3) and (4), and if so how much?

14. Remedy

<u>Unfair dismissal</u>

14.1 The Claimant does not wish to be reinstated and/or re-engaged.

14.2 What basic award is payable to the Claimant, if any?

14.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

14.3.1 What financial losses has the dismissal caused the Claimant?

14.3.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

14.3.3 If not, for what period of loss should the Claimant be compensated?

14.3.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

14.3.5 If so, should the Claimant's compensation be reduced? By how much?

14.3.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it by not telling him how to pursue his grievance? If so is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

14.3.7 Does the statutory cap of fifty-two weeks' pay apply?

<u>Detriment</u>

14.4 What financial losses has the detrimental treatment caused the Claimant?

14.5 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

14.6 If not, for what period of loss should the Claimant be compensated?

14.7 What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?

14.8 Has the detrimental treatment caused the Claimant personal injury (psychiatric harm) and how much compensation should be awarded for that?

14.9 Is it just and equitable to award the Claimant other compensation?

14.10 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

14.11 Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

Discrimination or harassment

14.12 What financial losses has the discrimination caused the Claimant?

14.13 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

14.14 If not, for what period of loss should the Claimant be compensated for?

14.15 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

14.16 Has the discrimination caused the Claimant personal injury (psychiatric injury) and how much compensation should be awarded for that?

14.17 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

14.18 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

14.19 Should interest be awarded? How much?