THE INDUSTRIAL TRIBUNALS

CASE REFS: 271/12
767/12
1262/12
1549/12

CLAIMANT: **Gael Mejury**

RESPONDENTS: **1. Dr K E Clarke and Others, t/a Carryduff Surgery**
2. Peninsula Business Services Ltd

DECISION

The unanimous decision of the tribunal is that the claimant was constructively dismissed by the first-named respondent and was subjected to unlawful disability discrimination by the first-named respondent and is entitled to a total award of £26,098.34 as set out in the conclusions. The claim against the second-named respondent is dismissed.

Constitution of Tribunal:

Chairman: **Mr S A Crothers**

Members: **Mr A Crawford**
Mr A Henry

Appearances:

The claimant was represented by Mr N Richards, Barrister-at-Law, instructed by McGrady Scullion, Solicitors.

The respondents were represented by Mr T Grady, Barrister-at-Law, of Employment Law Chambers.

THE CLAIM

1. The claimant claimed that she had been the subject of direct discrimination and harassment by the first-named respondent ("the surgery"), that the surgery had failed to comply with its duty to make reasonable adjustments for her, and that her dismissal had also been discriminatory. She also claimed constructive dismissal against the surgery and alleged that the second-named respondent ("Peninsula"), had knowingly aided the surgery in committing an unlawful act contrary to Section 57 of the Disability Discrimination Act 1995 as amended ("The Act"). The

respondents denied the claimant's allegations in their entirety. The claimant's counsel withdrew the claims of victimisation and disability related discrimination at the end of the hearing.

THE ISSUES

2. The remaining issues before the tribunal, as agreed at a Case Management Discussion on 10 September 2012, were as follows:-

   (1) whether the claimant was directly discriminated against on the ground of her disability;

   (2) whether the claimant was subjected to harassment in that, for a reason relating to her disability, the surgery engaged in unwanted conduct which had the purpose or effect of:-

      (a) violating the claimant's dignity; or

      (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

   (3) whether the surgery was under a duty to make reasonable adjustments for the claimant and if so, whether it failed to comply with that duty;

   (4) whether the claimant was constructively unfairly dismissed by the surgery and whether that dismissal was also an act of discrimination contrary to the Act;

   (5) whether Peninsula had knowingly aided the surgery in committing any unlawful act contrary to Section 57 of the Act.

SOURCES OF EVIDENCE

3. The tribunal heard evidence from the claimant and, on behalf of the surgery, from Dr Ursula Mason and Dr Patrick Sharkey. The tribunal also received bundles of documentation and took into account the documentation referred to it in the course of the hearing. The representatives also agreed a chronology of events which is appended to this decision ("the chronology"). A schedule of alleged loss was also agreed by the representatives subject to liability, and as specified therein.

FINDINGS OF FACT

4. Having considered the evidence insofar as same related to the remaining issues before it, the tribunal made the following findings of fact, on the balance of probabilities:-

   (i) The claimant commenced employment with the surgery on 1 December 2001 and held the position of Practice Manager in a busy practice with around 10,000 patients until the effective date of termination of her employment on 4 July 2012. The tribunal considers it appropriate, at this stage, to set out the claimant's resignation letter to Dr Karen Clarke, dated 4 July 2012, in full:-

“Dear Dr Clarke

I refer to my letter of 28th June 2012 and note I have not received any outcome to my grievance. As you are aware, I have been unable to return to work since 20th January 2012. My treatment by the Practice since I had cancer and your treatment of me following my return has been deeply hurtful and constituted unlawful discrimination.

In raising the grievance I had hoped that you could have addressed the matters and restored a proper working relationship. However, in that time since 23rd January 2012 no steps have been taken by the Practice to redress my grievance, prevent further harassment by the partners or to restore a suitable working environment which will not be intimidating, hostile, degrading, humiliating or offensive for me.

I have waited patiently for an outcome to the appeals process (not withstanding that I have no confidence in it) as I wanted to allow the Surgery every opportunity to resolve my grievance before turning my back on a job I held and loved since December 2001.

However, in light of the latest correspondence from Peninsula (received 2nd July 2012) it is apparent that you have no intention of addressing my Appeal or of putting in place any Policies and Procedures which are binding on the Partners. The questions which asked about the Appeals process merely sought to blame me for the Surgery’s failure to deal with the grievance appeal fairly and quickly and were duplicitous in seeking to attribute the Partners’ failure to have proper procedures in place to deal with discrimination by them to me, as if I was your Line Manager. It is now apparent that the employment relationship has broken down irretrievably.

I further believe that the failure to make the Partners properly subject to investigation and disciplinary sanction and to expeditiously resolve my grievance has been an on-going failure to make reasonable adjustment on your part.

I have also spoken to my GP and he has confirmed that the on-going stress caused by your failure to speedily resolve my grievance and my on-going financial loss is not good for my health. In these circumstances, I have no option but to tender my resignation with immediate effect.

Please forward my P45 and unused accrued holiday entitlement.

Yours sincerely

Gael Mejury"

(ii) The claimant had informed the surgery of a diagnosis of cancer in December 2009. She also had a clear disciplinary record although the surgery alleged that certain performance and conduct issues had arisen spanning the period of over one year prior to the diagnosis in December 2009. The tribunal was shown documentation prepared by a member of staff, Jude Pollock, which he forwarded to Dr Sharkey on 20 November 2009. However, no disciplinary action had been taken by the surgery prior to the diagnosis, and, on perusal of the documentation and having considered the evidence, the tribunal is not persuaded that there were any substantial performance or conduct issues relating to the claimant. The claimant was consulting with an adviser from Peninsula on 19 January 2012 in relation to developing a new handbook for the surgery, when she accessed and printed off exchanges of correspondence and advice notes between the surgery and Peninsula relating to her employment situation.

(iii) The claimant commenced a substantial period of sickness absence in March 2010 and, on 24 March 2011, Dr Sharkey wrote to her in the following terms:-

> "Dear Gael
>
> I am sure the last twelve months have been very trying for you and further to our recent telephone conversation I am pleased to hear that you are making a progressive recovery.
>
> Further to this I am writing to see how you are and if there is anything we can do to assist you in returning to work. I would like to invite you to an informal meeting on Tuesday 5th April at 12:30 at Carryduff Surgery to discuss the above. If you would prefer to arrange an alternative date or location please do not hesitate to contact me either by telephone at the surgery ….., mobile ….., letter or email ….. so that we can make the appropriate arrangements.
>
> Yours sincerely
>
> P J Sharkey"

(iv) On 5 April 2011 three of the partners, including Dr Sharkey, met with the claimant and her partner to assess the claimant's progress and current well-being, to ensure that all actions were in place, to ensure a rapid return to good health and well-being, and to give the surgery guidance regarding a possible return plan. The tribunal was shown notes of this meeting which included a reference to the claimant's willingness to attend an Occupational Health Doctor or allow a medical report to be obtained from her general practitioner if required. Dr Mason subsequently telephoned the claimant to obtain her consent for a medical report from her General Practitioner.

(v) The telephone call was followed by correspondence from Dr Mason on 21 June 2011 as follows:-

> "Dear Gael
>
> Further to my telephone contact, I have not, as yet, received a response from you regarding consent to obtain a medical report from your doctor. This means that we may now have to make decisions concerning your circumstances without the benefit of appropriate medical evidence and advice.
>
> Because of the importance of such medical guidance to both you and us, I would ask you to notify me by 30.06.2011 of your final decision regarding access to a medical report.
>
> Please feel free to contact me to discuss this matter if you wish or if you have mislaid the paperwork. I look forward to hearing from you.
>
> Yours sincerely
>
> Ursula Mason"

The tribunal does not regard this correspondence as being too formal or in any way threatening.

(vi) The claimant subsequently signed a consent form on 28 June for the provision of a medical report by her GP and/or a specialist and/or her employer's occupational health adviser/practitioner, and expressed her wish to see any such report before it was sent to the surgery. The tribunal was shown the management request for advice from the Occupational Health Service and does not regard any of the questions therein as being inappropriate or exceptional in the circumstances. The claimant suggested that all such matters should be addressed by the Occupational Health Doctor, Dr Connolly, in the course of her consultation with Dr Connolly. However, this approach does not make sense to the tribunal as an employer is entitled to raise relevant questions material to its consideration as to how and in what manner an employee such as the claimant, who was suffering from a serious condition, should return to work.

(vii) Importantly, however, Dr Connolly's report dated 16 September 2011 opines that the claimant should be fit to return to work from the first week in October. She recommended a phased return over a six week period to help facilitate a successful return to work if that could be accommodated. She was hopeful that after the initial rehabilitation period of six weeks the claimant would be fit to carry out a full range of duties. She also recommended that heavy manual handling should be avoided and that manual handling training should be updated. This recommendation was not implemented by the surgery and the indication given in the respondent's evidence, that the claimant, as Practice Manager, should have taken the initiative to organise such updated training

without direction from the surgery, is not reasonable. The claimant was also responsible for all computer systems technology within the surgery. There were in excess of 25 PCs and printers and when a system failed the claimant needed to move a computer or printer from one place to another. Although the respondent denied that there was any heavy manual handling the tribunal was satisfied that on occasions the claimant may have had to lift a computer or printer and is satisfied that she had to carry files, some of which were substantial. It was in this context the claimant alleged a failure by the surgery to make reasonable adjustments.

(viii) The claimant had previously indicated that she may return to work in July 2011. At that stage, she had informed the surgery of her general practitioner's opinion regarding her ability to return to work, without furnishing any report from him. Initially, an Occupational Health Assessment was arranged for 12 August 2011 with Dr Connolly, but this was rearranged, following a telephone message from the claimant, for 15 September 2011. The claimant although having indicated that she wished to return to work on 15 September 2011, subsequently returned to work on 4 October 2011. As referred to above, the claimant accessed advice files on the computer system on 19 January 2012. One of these advice files pertained to advice sought from Peninsula by Emma Spies, on behalf of the surgery, on 19 August 2011. Emma Spies who was not called to give evidence was Acting Practice Manager at this time. She was junior to the claimant and reported to the partners on a regular basis. The advice note itself illustrates that Emma Spies was indeed authorised by the partners to obtain advice from Peninsula. Dr Mason, and later Dr Sharkey, sought to persuade the tribunal that some of the instructions for advice referred to in the notes were either wrong or overstated. However, as referred to in paragraph (x) below, Dr Mason confirmed that the surgery did not want the claimant to return to work.

(ix) Having carefully considered the evidence, together with the relevant advice note, prepared by Peninsula, the tribunal is satisfied that it accurately represents both the instructions authorised by and provided on behalf of the surgery together with the advice given, and that the evidence of both Dr Sharkey and Dr Mason lacks consistency, plausibility, and credibility in this regard. The tribunal considers it appropriate to set out the relevant sections of the advice note [with spelling errors corrected in brackets], as follows:-

> "Employee called last [Friday] and stated that they want to return to work on 15 September and to not attend the OHP appointment on this day.
>
> The client wants to not allow the employee to return to work due to her rudeness towards the partners and the situation before the employee went off on sick leave. Advised the client that this would be a very big commercial decision, as the employee could claim for unfair dismissal, discrimination in terms of the potential disability due to the employee having cancer although she has now been clear for 4 months, the client is currently covering her role but is herself going off on

> maternity leave and they want to offer the position to a candidate. Advised client that the [indemnified] approach would be to advise [Gael] that they would require a signing off note for her doctor due to the period of absence and they they would wish her to attend the OHP appointment to ensure that she is fit to return to work and whether there is any adjustments [necessary]. Asked the client are they wanting to enter into a compromise agreement, this can be done through the LRA through conciliation(sic), client wants to issue a letter to the employee, advised the client to hold off as I wish to discuss this further with a colleague.
>
> Strongly, strongly advised Emma that Gael could pursue a number of claims, disability discrimination, victimisation, unfair dismissal up on £70,000,(sic), discrimination is uncapped, loss of earnings, hurt feelings, it could cost them a lot of money. Advised the client to advise [Gael] that they would rather the employee went to the occupational health appointment to assess if there is any adjustments necessary, and to get a fitness note from her doctor due to the period of absence. Gael works 25 hours, can they bring an employee [in] for the other hours, advised yes, but Gael must return to the same terms and conditions and job role, client wants to take away the financial element as they do not trust her, advised that they would need to consult with the employee, if they are wanting to share the workload between the two employees then they need to discuss this. Advised client to let the employee settle back in, and to address any issues later on, but need to be careful with the employee as it would be clear that she may try to make any claims if they try to treat her differently in any way. Advised client to send through the letter they are proposing to send."

(x) Prior to 19 August 2011, Dr Mason recounted how the partners had had a frank discussion, and that they did not want the claimant to return to work as they preferred those who were already fulfilling the role of Office Manager, namely Heather Neill (now Office Manager) and then Emma Spies. It is clear to the tribunal that the advice given by Peninsula was also considered subsequent to the claimant's return to work on 4 October 2011. During the claimant's absence the surgery had retained the services of a new specialised firm of accountants. Heather Neill was however brought into the practice to deal with certain financial aspects of the Practice Manager's role on a monthly basis and the claimant was not allowed to return to her full range of duties as referred to in Dr Connolly's report. Moreover, the six week rehabilitation period was not strictly adhered to, although the tribunal is mindful that in recommending the rehabilitation plan, Dr Connolly prefaces that recommendation by the following:-

> "I recommend a phased return over a six week period to help facilitate a successful return to work if this can be accommodated."

(xi) Whilst not accepting that the correspondence to the claimant referred to above, dated 23 June 2011, was too formal in its tone, or that it implied a threat of dismissal, or that the meeting held on 5 April 2011 together with the return to work interview on 30 September 2011 were both hostile and formal, the tribunal does accept that after the claimant's return to work, the financial element of her role was reduced and that she was expected to report daily to Dr Sharkey. The tribunal is satisfied that at the return to work meeting held on 30 September 2011 Dr Sharkey did state that her role would be a more managed role and that she would be required to report to him on a daily basis. The tribunal also considered the evidence surrounding the formal appraisal held on 29 November 2011 by Dr Sharkey. His own notes of the appraisal are dominated by what he terms conduct and performance issues. However, these are not reflected in the formal appraisal record signed by the claimant and Dr Sharkey and dated 30 November 2012. The claimant did nevertheless acknowledge in the signed appraisal record that she needed to maintain a professional distance from the staff in order to achieve the respect required for directing the team. The tribunal is satisfied that in the three and a half month period preceding 19 January 2012, the surgery was clearly mindful of the advice sought and obtained from Peninsula on 19 August 2011. The surgery was compelled by the circumstances, including the advice given, not to act in a precipitate manner towards the claimant. The tribunal is also not convinced that it had fundamentally changed its intentions as reflected in the advice file note of 19 August 2011. Furthermore, and consistent with the advice given by Peninsula, the surgery resurrected the conduct and performance issues, which the claimant denied in her evidence, and in her grievance letter referred to below.

(xii) On 20 January 2012, (and following her accessing the advice files on the previous day), the claimant went on a period of sickness absence due to stress, until her resignation on 4 July 2012. The tribunal accepts that this stress arose as a direct result of what she discovered on 19 January. She did however manage to articulate a lengthy grievance letter dated 23 January 2012 which the tribunal carefully considered. It includes the following:-

> "I was devastated to learn that the Practice wished to prevent my return to work. I note the allegation that I was rude to the Partners; I am unaware of ever having been rude to my employers, co-workers or staff within the practice. I am unaware of any situation before I went on sick leave. It appears to me that the Practice no longer feel any loyalty to me since I have been unfortunate enough to have had Cancer and subsequent treatment, and simply wished to dispense with my services. This is confirmed by reference to a compromise agreement and LRA conciliation which is contained in the document. I have done nothing wrong in my employment and always enjoyed good working relationships with staff and partners alike. I have been very hurt and upset to see the true context and rationale of the changes in management of me and my duties since my return to work. I believe these changes are because the Practice wishes to dispense with me after ten years of loyal service because I had Cancer and may have a further recurrence and on-going health problems.

Most hurtful of all is that despite the Partners having been clearly and unambiguously told that their proposed course of action was discriminatory and unlawful, and that I was entitled to return to the same terms and conditions and job role, that the Partners have proceeded to undermine my position, remove my responsibilities, and have me report on a daily basis, which I was never required to do before. I have also had to endure implicit criticism in the Appraisal process which has resulted in my having been set unrealistic, immeasurable and unattainable targets, which bode badly for the future. My role has been diminished and I have been told to keep distance from staff and I believe this is to isolate me. This diminishment of my role is ongoing.

The document confirms that these changes are not “innocent” nor arising from the way the Practice wishes to manage its staff has evolved but because the Partners “do not trust” me. To read that you wanted to take away and have taken away the financial element of my job because you “do not trust” me is insulting and hurtful. I have been devastated by this. I am a professional person and for upwards of ten years I have worked without any issue. I feel your treatment of me is appalling and completely unwarranted. I note this conduct by you has only occurred since my Cancer. It has been the most difficult two years of my life as I have battled to get well and return to the job I have loved. It has been physically and emotionally gruelling and now to discover that the illness and process has fundamentally altered the basis of trust and confidence which have never before been questioned in ten years, has been personally and professionally devastating. I feel the rug has been pulled from underneath my feet.

I believe that I have been subject to an unlawful ongoing course of discriminatory conduct and harassment which is rendered unlawful under the provisions of the Disability Discrimination Act 1995 (as amended) by reason of the altered reporting provisions, appraisal provisions, the reduced responsibilities and the undermining of my job/role which are ongoing.

The purpose of this grievance is to seek an apology for the appalling discriminatory conduct on the part of the Practice towards me, to seek your proposals for how a working relationship can be restored in an environment of distrust towards me and a determination to dispense with my services by one means or another and seek your proposals for the hurt, distress and injury to feelings which this situation has caused me.

As you will be aware I am currently unfit to work as a result of this situation and the effect it is having on my health. I would be unable to face the prospect of meeting the Partners in a Grievance Meeting as

this would be too stressful for me in my current state. Accordingly, I would be grateful if by way of reasonable adjustment, you could deal with my grievance in writing. I am happy to deal with any further query you may seek in writing.

Yours sincerely

Gael Mejury"

(xiii) The tribunal accepts that the claimant, as a result of her discovery on 19 January 2012, was left shocked and humiliated and lost trust and confidence in her employer. The surgery had sought to convince the panel that since the time at which advice was sought and obtained from Peninsula on 19 August 2011, matters had moved on and that the surgery wanted the claimant to remain as Practice Manager. The tribunal was not convinced by this evidence, particularly in light of its previous finding regarding the consistency, plausibility, and credibility of the evidence of Dr Sharkey and Dr Mason in relation to the advice sought and obtained from Peninsula on 19 August 2011. It is also significant that there was no evidence placed before the tribunal of anything having been addressed with Emma Spies arising out of the advice note.

(xiv) The surgery dealt with the claimant's grievance "in house". The tribunal considers this to have been inappropriate. The surgery was, in effect, investigating itself as the grievance was made against all the partners. The tribunal, in addition to being furnished with a copy of the claimant's job description and her amended contract of employment, also had copy extracts from the reviewed and updated staff Handbook placed before it. These included a section on the grievance procedure. Having considered the procedure, (which was presumably the same on 23 January 2012), the tribunal is surprised that the surgery did not consider its provisions more carefully before addressing the claimant's grievance. There was no evidence of the partners having taken advice or having considered the appointment of a suitable person from outside the surgery to deal with the grievance.

(xv) The tribunal considered the response to the grievance dated 7 February 2012 signed by Dr Karen Clarke which includes the following paragraphs:-

"You will be aware that, prior to your illness, we had discussed taking on employment law advisors and proceeded to engage Peninsula Business Services. We discussed your case with them and followed, often softening, their advice in dealing with your sickness leave and return. We have also sought advice on other employee matters. You accessed the records pertaining to these discussions when opening a file labelled with your name. We are sorry if the contents of this file have caused you distress, as it was never our intention that you would view the advice and for that we sincerely apologise.

There have been performance issues which preceded your illness. These were dealt with informally and a formative and supportive approach was felt to be most beneficial. You were dealt with in a manner mindful of your circumstances with the intention of ensuring a successful return to work within a supportive framework with greater partner engagement, as you had previously suggested. Matters were discussed with you at each juncture to ensure your understanding and agreement and only enacted with your approval. We have throughout been mindful of your health situation and engaged the Occupational Health Service and Peninsula in order to ensure that everything that could be done would be done to ensure your successful long term return to the practice.

The reason we favour a formative rather than disciplinary approach to dealing with performance issues is to encourage long term successful working relations, with good team cohesion and long term commitment. We remain committed to this approach and would be keen that this matter might be resolved with mutual agreement and continue with the long term development of the practice with you as our practice manager. As practice manager you are a valued and trusted member of the team and we are very keen to see you return to work as soon as possible. The landscape of primary care changes frequently and requires adaptability. We remain keen to develop a strong, cohesive and functional team with which to deliver the best care to our patients.

As a proposal to restore a much valued working relationship we would like to engage an external mediator. If you are willing to engage in mediation I would be grateful if you could advise that this is an option which you would be willing to consider.

Yours sincerely

Karen Clarke"

The letter did not advise the claimant that she had a right of appeal.

(xvi) The tribunal is satisfied that the apology referred to in the response to the grievance is not an apology for the contents of the advice file and that the reference to the claimant being "a valued and trusted member of the team" and that "we are very keen to see you return to work as soon as possible", is not only contrary to the advice file but is more a reflection on the constraints placed upon the surgery by the advice given by Peninsula. Furthermore a full apology to include the contents of the advice file which had so upset the claimant, would have been a convincing way of demonstrating the genuineness of the sentiments expressed in the penultimate paragraph of the correspondence of 7 February 2012.

(xvii) The tribunal carefully considered the sequence of correspondence between the claimant and the surgery subsequent to 7 February 2012 in which the claimant requests a thorough investigation of her complaint and questions

the purpose of a further meeting with the surgery in the absence of such an investigation. The surgery confirmed in correspondence to the claimant dated 6 March 2012 that it had decided to treat her correspondence of 15 February 2012 as an appeal against the grievance outcome. The claimant subsequently discovered that Anne O'Callaghan, who was designated to hear the appeal was head of Graphite HRM Ltd, which was acquired by Peninsula, and is part of the Peninsula Business Services Group. Furthermore, two of the directors of Graphite HRM Ltd are directors of Peninsula UK. In her correspondence of 5 April 2012 the claimant made it clear that she did not intend to engage with Miss O'Callaghan in the appeal process. The tribunal accepts however, that the surgery did not appear to appreciate the association between Miss O'Callaghan and Peninsula until this was pointed out by the claimant.

(xviii) On 27 April 2012 the surgery offered the claimant one of three alternative professionals to hear the appeal. In correspondence of 2 May 2012 the claimant expressed her disappointment in the way the surgery had dealt with her complaint to date and asserted that the surgery had not taken any action which would facilitate her return to work and had exacerbated the situation. The claimant further pointed out that her pay for April 2012 has been withheld by the surgery, that they have not provided any reason for this, and that the requisite form for appealing the withholding of statutory sick pay had also not been provided. The claimant had claimed unlawful victimisation arising out of these circumstances which was withdrawn at the end of the hearing from before the tribunal. The tribunal is satisfied, however, that there was a clerical error by the surgery in not forwarding her pay for April. The surgery expressed a keenness to resolve the claimant's grievance by requesting an indication from her as to how she wished the surgery to progress the matter by Friday, 18 May 2012.

(xix) In further correspondence of 14 May 2012, the claimant states that she has lost all confidence in the handling of her grievance by Carryduff Surgery and continues:-

> "It is my view, given the manner in which the grievance has been handled to date, that the ability of an Independent Investigator (not drawn from Peninsula or Carryduff Surgery), would be compromised from the outset, and that at this appeal stage is merely "window dressing". I will wish to be provided with an outcome in any event … To date you have not apologised for the disgraceful treatment meted out to me (merely proffering an apology for my having accessed the records unintentionally), nor have you provided any meaningful suggestions to address the outstanding issues in a way which would allow me to return to work with dignity and in a suitable environment. I trust this will suffice as an indication of how my grievance should be resolved and how you can progress matters. These are matters which lie within your control, not mine. At the outset you had suggested mediation. I have recently indicated my willingness to engage in a conciliation process through the Labour Relations Agency, which I had hoped would provide some opportunity for us to move forward.

> I would not be able to engage in any mediation with Carryduff Surgery until my grievance is properly addressed, I receive a full and unconditional apology for the treatment I have received and measures are introduced to protect my dignity at work and protect me from unlawful discrimination in the future. I note that despite the LRA conciliator contacting your representative, she has received no indication that Carryduff Surgery are willing to engage in conciliation …
>
> I note that you have invited me to an informal meeting on 21 May 2012 at 12.30 pm at the surgery, or an alternative venue, to discuss my absence. I note with dismay that you appear to be progressing on a capability procedure, notwithstanding the fact that you are fully aware of the cause of my absence from work, and that you have taken no meaningful steps towards addressing my grievance (and indeed have exacerbated my distress and hurt in the response to date). I do not believe that an "informal meeting" would serve any useful purpose as you know why I am off work and you know that the provision of such a redress as is required to facilitate my return is a matter which lies within your control. My current absence was not caused by my cancer, but by the treatment I have received since my return. It is a matter of disappointment to me that to date the surgery has refused to engage with the issues and provide resolution to my Grievance in a fair and appropriate manner.
>
> I hope this response is helpful to you as you consider how this matter can be progressed in a manner which will facilitate my return to a job which I have carried out for in excess of 10 years in which (prior to my return from cancer treatment) was without issue and a source of pleasure and fulfilment for me."

(xx) It is clear that, in or about this time, the claimant was contemplating applying for alternative jobs. The tribunal was shown a job application dated 16 May 2012 for a Practice Manager's post with Dr Gilmore and Partners, General Practitioners, based at Bangor Health Centre. The claimant, whose initial evidence in this regard was somewhat vague, attended an interview on 13 June 2012 and on that date also contacted Dr Johnny Browne, a former partner in the surgery, to provide a reference. Dr Browne was contacted by the prospective employer for a reference on 21 June following which the claimant was contacted to attend a second interview on 27 June 2012. She described this interview as a "cards on table interview". Terms and conditions were discussed and the claimant stated what she required as there was a considerable disparity between the salary being offered for the new post and what she was earning in the surgery. She did not have a letter of offer from Gilmore and Partners at this stage. She was told that she was the highest scoring candidate at the first interview and that her references were excellent. Gilmore and Partners were concerned that they could not meet the claimant's expectations regarding pay. They also wanted her to work five days per week, instead of her preference for four days per week, owing to family commitments involving her children.

(xxi) The tribunal considered further correspondence of 7 June 2012 from the surgery assuring the claimant that the Independent Investigation would be fully impartial and that the individual nominated would have absolutely no affiliation to either the surgery or Peninsula. The surgery also confirmed that they had already engaged an independent consultant to hear the appeal and that the consultant should be in a position to provide the claimant with an outcome "within the coming weeks". This correspondence was signed by Dr Karen Clarke for and on behalf of the partners.

(xxii) Further correspondence ensued from Dr Mason, dated 15 June 2012, confirming that the practice had located the claimant's pay slip for May 2012. In correspondence to the surgery, dated 28 June 2012, the claimant refers to her letter of 15 February 2012 and expresses her disappointment that over four months later she has yet to receive an outcome to the appeal process. She further complains about the protraction of the grievance procedure and that the surgery's failure to provide redress was causing her hardship. She requests the appeal outcome as a matter of urgency "as the ongoing delay and lack of any steps on your part to resolve my grievance is causing me financial hardship, anxiety and distress". She is then advised by the surgery, in correspondence of 2 July 2012 (which did not arrive with the claimant until 5 July 2012), that the outcome of her appeal would be provided at the latest by week commencing 9 July 2012. Meantime, in the absence of receiving this correspondence, the claimant forwarded her resignation letter which was received by the surgery on 9 July 2012. Dr Sharkey's further correspondence of 9 July 2012 ends by stating:-

> "Not only do we wish for you to reconsider your resignation but we would like (to) engage in mediation with the Labour Relations Agency with a view to resolving any outstanding issues and assisting your return to work. Again I would ask that if you wish to engage in mediation that you contact me within the next seven days."

The claimant explained that she was quite concerned about resigning from her job in the surgery which had provided security for her. However, she felt that she had no choice as she was under so much stress. Around the period of 12/13 July Gilmore and Partners reverted to her as a result of which she agreed to accept the job as Practice Manager at less pay, at a greater distance from her home than the surgery, and with less agreeable hours. She commenced employment with Gilmore and Partners on 6 August 2012.

(xxiii) At the date of her resignation, the claimant had presented three claims to the tribunal, Case Ref: 272/12 on 2 February 2012, Case Ref: 762/12 on 27 April 2012, and 01262/12 on 4 July 2012. Her final claim, Case Ref: 1549/12 was presented on 12 August 2012.

THE LAW

5. (1) Article 3A of the Act provides as follows:-

"Meaning of "discrimination"

3A.—(1) For the purposes of this Part, a person discriminates against a disabled person if —

(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and

(b) he cannot show that the treatment in question is justified.

(2) For the purposes of this Part, a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person.

(3) Treatment is justified for the purposes of sub-section (1)(b) if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.

(4) But treatment of a disabled person cannot be justified under sub-section (3) if it amounts to direct discrimination falling within sub-section (5).

(5) A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having a particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.

(6) If, in a case falling within sub-section (1), a person is under a duty to make reasonable adjustment in relation to a disabled person but fails to comply with that duty, his treatment of that person cannot be justified under sub-section (3) unless it would have been justified even if he had complied with that duty.

Meaning of "harassment"

3B.—(1) For the purposes of this Part, a person subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has a purpose or effect of —

(a) Violating the disabled person's dignity, or

(b) Creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

(2) Conduct shall be regarded as having the effect referred to in paragraph (a) or (b) of sub-section (1) only if, having regard to all the circumstances, including in particular the perception of the disabled person, it should reasonably be considered as having that effect".

(2) The tribunal found the summary on disability discrimination given by Lord Justice Hooper in the case of **O'Hanlon v Commissioners for HM Revenue and Customs [2007] EWCA Civ 283 [2007] IRLR 404**, to be of assistance. In paragraphs 20-22 of his judgment he states as follows:-

> "Section 3A identifies three kinds of disability discrimination. First, there is direct discrimination. This is the situation where someone is discriminated against because they are disabled. This particular form of discrimination mirrors that which has long been found in the area of race and sex discrimination. As with other forms of direct discrimination, such discrimination cannot be justified …
>
> Second, there is disability-related discrimination …
>
> Third, there is the failure to make reasonable adjustments form of discrimination in sub-section (2). Here, the employer can be liable for failing to take positive steps to help to overcome the disadvantages resulting from the disability. However, this is once he has a duty to make such adjustments. That duty arises where the employee is placed at a substantial disadvantage when compared with those who are not disabled".

Disability-related discrimination is not alleged in this case.

(3) In the case of **Tarbuck v Sainsburys Supermarkets Ltd [2006] IRLR 664, EAT**, it was held that while it will always be good practice for the employer to consult, and it will potentially jeopardise the employer's legal position if it does not do so, there is no separate and distinct duty on an employer to consult with a disabled worker. The only question is, objectively, whether or not the employer has complied with his obligations to make reasonable adjustments.

(4) The Tribunal also took into account relevant sections in the Disability Code of Practice Employment and Occupation ("the Code"), being careful not to use the Code to interpret the legislative provisions. It also considered Harvey on Industrial Relations and Employment Law ("Harvey") at L368.01ff, in so far as relevant.

(5) **<u>Reasonable Adjustments</u>**

(i) The Tribunal considered carefully the provisions of Sections 4A and 18B of the Act. Paragraph 5.3 of the Code states:-

> "The duty to make reasonable adjustments arises where a provision, criterion or practice applied by or on behalf of the employer, or any physical feature of premises occupied by the employer, places a disabled person at a substantial disadvantage compared with people

who are not disabled. An employer has to take such steps as it is reasonable for it to have to take in all the circumstances to prevent that disadvantage – in other words the employer has to make a "reasonable adjustment". Where the duty arises, an employer cannot justify a failure to make a reasonable adjustment ……

…5.4 It does not matter if a disabled person cannot point to an actual non disabled person compared with whom s/he is at a substantial disadvantage. The fact that a non disabled person, or even another disabled person, would not be substantially disadvantaged by the provision, criterion or practice or by the physical feature in question is irrelevant. The duty is owed specifically to the individual disabled person.

…. 5.11 The Act states that only substantial disadvantages give rise to the duty. Substantial disadvantages are those of which are not minor or trivial. Whether or not such a disadvantage exists in a particular case is a question of fact.

… 5.24 Whether it is reasonable for an employer to make any particular adjustment will depend on a number of things, such as its costs and effectiveness. However, if an adjustment is one which it is reasonable to make, then the employer must do so. Where a disabled person is placed at a substantial disadvantage by a provision, criterion or practice of the employer, or by a physical feature of the premises it occupies, the employer must consider whether any reasonable adjustments can be made to overcome that disadvantage. There is no onus on the disabled person to suggest what adjustments should be made (although it is good practice for employers to ask) but, where the disabled person does so the employer must consider whether such adjustments would help overcome the disadvantage, and whether they are reasonable."

(ii) The tribunal also considered the types of adjustments which an employer might have to make and the factors which may have a bearing on whether it would be reasonable for an employer to make a particular adjustment. These are set out in Section 18B of the Act as follows; (in so far as may be material and relevant)

"Reasonable adjustments: supplementary

18B.—(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to -

(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

(b) the extent to which it is practicable for him to take the step;

(c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;

(d) the extent of his financial and other resources;

(e) the availability to him of financial or other assistance with respect to taking the step;

(f) the nature of his activities and the size of his undertaking;

(g) ….

(2) The following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments –

(a) making adjustments to premises;

(b) allocating some of the disabled person's duties to another person;

(c) transferring him to fill an existing vacancy;

(d) altering his hours of working or training;

(e) assigning him to a different place of work or training;

(f) allowing him to be absent during working or training hours for rehabilitation, assessment or treatment;

(g) giving, or arranging for, training or mentoring (whether for the disabled person or any other person);

(h) acquiring or modifying equipment;

(i) modifying instructions or reference manuals;

(j) modifying procedures for testing or assessment;

(k) ….

(l) providing supervision or other support.

(3) ….

(4) ….

(5) ….

(6) A provision of this Part imposing a duty to make reasonable adjustments applies only for the purpose of determining whether a person has discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such."

(iii) The tribunal also considered the guidance given to Tribunals in the Employment Appeal Tribunal case of **Environment Agency v Rowan (2008) IRLR 20** where Judge Serota states at paragraph 27 of his judgment:-

> "In our opinion an employment tribunal considering a claim that his employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:-
>
> (a) the provision, criterion or practice applied by or on behalf of an employer or
>
> (b) the physical feature of premises occupied by the employer, or
>
> (c) the identity of non-disabled comparators (where appropriate) and
>
> (d) the nature and extent of the substantial disadvantage suffered by the claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the "provision, criterion or practice applied by or on behalf of the employer" and the "physical feature of premises", so it would be necessary to look at the overall picture.
>
> In our opinion, an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process. Unless the employment tribunal has identified the four matters we have set out above, it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage".

The tribunal also had regard to the Code at Section 8.15 relating to managing disability or ill health and retention of disabled employees. Paragraph 8.16 states, inter alia:-

> "If there are no reasonable adjustments which would enable the disabled employee to continue in his or her present job, the employer must consider whether there are suitable alternative positions to which she could be redeployed".

(6)(i) The tribunal also considered section 42(2) of the Act which states:-

"It is unlawful for an employer to discriminate against the disabled person — …

(d) By dismissing him or subjecting him to any other detriment".

(ii) In this case, the claimant was alleging that he had been constructively dismissed in accordance with Article 127(1)(c) of the Employment Rights (Northern Ireland) Order 1996 ("the Order") which states as follows:-

"127. – (1) for the purposes of this Part an employee is dismissed by his employer if … - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

(iii) Harvey on Industrial Relations and Employment Law ("Harvey") states at Division D1 at 403 as follows:-

"In order for the employee to be able to claim constructive dismissal, four conditions must be met:

(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.

(2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.

(3) He must leave in response to the breach and not for some other, unconnected reason.

(4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract".

(iv) The tribunal considered, insofar as relevant, the remainder of the section dealing with constructive dismissal in Harvey. Harvey continues:-

"(b) **The duty of co-operation**

[461] More recently the EAT has specifically followed the *Post Office* case on this point (*Woods v WM Car Services (Peterborough) Ltd* 1981] IRLR 347, [1981] ICR 666). The Tribunal emphasised the significance of this duty for employers not to conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust. As it pointed out, it enables an employee who is 'squeezed out' of the company by the wholly unreasonable conduct of the employer to leave and

claim that he has been dismissed even though he cannot point to any specific major breach of contract by the employer.

[462] This duty not to undermine the trust and confidence in the employment relationship can be subsumed under a wider contractual duty which is imposed on the employer, to co-operate with the employee."

(v) A term can be implied in a contract of employment if it is an inherent legal duty central to the relationship between employer and employee, such as a duty not to undermine trust and confidence. Once a tribunal has established that a relevant contractual term exists and that a breach has occurred, it must then consider whether the breach is fundamental. Where an employer breaches the implied term of trust and confidence, the breach is inevitably fundamental **(Morrow v Safeway Stores plc 2002 IRLR 9, EAT)**. A key factor to be taken into account in assessing whether the breach is fundamental is the effect that the breach has on the employee concerned.

BURDEN OF PROOF

6. (i) In **Igen Ltd (formerly Leeds Carers Guidance) and Others v Wong, Chamberlains Solicitors and Another v Emokpae**; and **Brunel University v Webster [2006] IRLR 258**, the Court of Appeal in England and Wales set out guidance on the interpretation of the statutory provisions shifting the burden of proof in cases of sex, race and disability discrimination. This guidance is now set out at Annex to the judgment in the **Igen** case. The guidance is not reproduced but has been taken fully into account.

(ii) The tribunal also considered the following authorities, **McDonagh and Others v Hamilton Thom Trading As The Royal Hotel, Dungannon [2007] NICA, Madarassy v Nomur International Plc [2007] IRLR 246 ("Madarassy"), Laing v Manchester City Council [2006] IRLR 748** and **Mohmed v West Coast trains Ltd [2006] UK EAT 0682053008**. It is clear from these authorities that in deciding whether a claimant has proved facts from which the tribunal could conclude in the absence of an adequate explanation that discrimination had occurred, the tribunal must consider evidence adduced by both the claimant and the respondent, putting to the one side the employer's explanation for the treatment. As Lord Justice Mummery stated in **Madarassy** at paragraphs 56 and 57:-

> "The Court in *Igen v Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that on the balance of probabilities the respondent had committed an unlawful act of discrimination.
>
> "Could conclude" in s.63A(2) must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support

of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage ., the Tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complaint were of like with like as required by s5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment."

(iii) The tribunal received valuable assistance from Mr Justice Elias' judgement in the case of ***London Borough of Islington v Ladele & Liberty (EAT) [2009] IRLR 154,*** at paragraphs 40 and 41. These paragraphs as set out in full to give the full context of this part of his judgment.

> "Whilst the basic principles are not difficult to state, there has been extensive case law seeking to assist tribunals in determining whether direct discrimination has occurred. The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:
>
> (1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport* [1999] *IRLR* 572, 575 – 'this is the crucial question'. He also observed that in most cases this will call for some consideration of the mental processes (conscious or sub-conscious) of the alleged discriminator.
>
> (2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p.576) as explained by Peter Gibson LJ in *Igen v Wong* [2005] IRLR 258, paragraph 37.
>
> (3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the

exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:-

> 'Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer.'

If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the tribunal *must* find that there is discrimination. (The English law in existence prior to the Burden of Proof Directive reflected these principles save that it laid down that where the prima facie case of discrimination was established it was open to a tribunal to infer that there was discrimination if the employer did not provide a satisfactory non-discriminatory explanation, whereas the Directive requires that such an inference *must* be made in those circumstances: see the judgment of Neill LJ in the Court of Appeal in *King v The Great Britain-China Centre* [1991] IRLR 513.)

(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson pointed out in *Zafar v Glasgow City Council* [1997] IRLR 229:-

> 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'

Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in *Bahl v Law Society* [2004] IRLR 799, paragraphs 100,

101 and if the employer fails to provide a non-discrimination explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself – or at least not simply from that fact – but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC* [2007] IRLR 259 paragraphs 28-39. The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in *Anya v University of Oxford* [2001] IRLR 377 esp paragraph 10.

(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan* [2008] IRLR 243, a case of direct race discrimination by the Labour Party. Lord Hoffmann summarised the position as follows (paragraphs 36-37):-

> ’36. The discrimination … is defined … as treating someone on racial grounds “less favourably than he treats or would treat other persons”. The meaning of these apparently simple words was considered by the House in *Shamoon v Chief Constable of the Royal Ulster*

Constabulary [2003] IRLR 285. Nothing has been said in this appeal to cast any doubt upon the principles there stated by the House, but the case produced five lengthy speeches and it may be useful to summarise:-

(1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the "statutory comparator") actual or hypothetical, who is not of the same sex or racial group, as the case may be.

(2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant …

(3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated: see Lord Scott of Foscote in *Shamoon* at paragraph 109 and Lord Rodger of Earlsferry at paragraph 143. This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the "evidential comparator") to those of the complainant and all the other evidence in the case.

37. It is probably uncommon to find a real person who qualifies … as a statutory comparator. Lord Rodger's example at paragraph 139 of *Shamoon* of the two employees with similar disciplinary records who are found drinking together in working time has a factual simplicity which may be rare in ordinary life. At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are "materially different" is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical

person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator.'

The logic of Lord Hoffmann's analysis is that if the tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then again it is unnecessary to determine what are the characteristics of the statutory comparator. This chimes with Lord Nicholls' observations in ***Shamoon*** to the effect that the question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:-

> 'employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was' (paragraph 10).
>
> This approach is also consistent with the proposition in point (5) above. The construction of the statutory comparator has to be identified at the first stage of the *Igen* principles. But it may not be necessary to engage with the first stage at all".

(iv) The tribunal also received considerable assistance from the judgment of Lord Justice Girvan in the Northern Ireland Court of Appeal decision in ***Stephen William Nelson v Newry and Mourne District Council [2009] NICA 24***. Referring to the ***Madarassy*** decision (supra) he states at paragraph 24 of his judgment:-

> "This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude in the absence of adequate explanation that the respondent has committed an act of discrimination. In Curley v Chief Constable [2009] NICA 8 Coghlin LJ emphasised the need for a tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination".
>
> Again, at paragraph 28 he states in the context of the facts of that particular case, as follows:-
>
> > "The question in the present case however is not one to be determined by reference to the principles of Wednesbury unreasonabless but by reference to the question of whether one could properly infer that the Council was motivated by a

sexually discriminatory intention. Even if an employer could rationally reach the decision which it did in this case, it would nevertheless be liable for unlawful sex discrimination if it was truly motivated by a discriminatory intention. However, having regard to the Council's margin of appreciation of the circumstances the fact that the decision-making could not be found to be irrational or perverse must be very relevant in deciding whether there was evidence from which it could properly be inferred that the decision making in this instance was motivated by an improper sexually discriminatory intent. The differences between the cases of Mr Nelson and Ms O'Donnell were such that the employer Council could rationally and sensibly have concluded that they were not in a comparable position demanding equality of disciplinary measures. That is a strong factor tending to point away from a sexually discriminatory intent. Once one recognises that there were sufficient differences between the two cases that could sensibly lead to a difference of treatment it is not possible to conclude in the absence of other evidence pointing to gender based decision-making that an inference or presumption of sexual discrimination should be drawn because of the disparate treatment of Ms O'Donnell and Mr Nelson".

(v) In the case of **J P Morgan Europe Ltd v Chweidan [2011] EWCA Civ 648**, Lord Justice Elias states as follows:-

"5. Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focussing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: See the observations of Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 paragraphs 8-12. This is how the tribunal approached the issue of direct discrimination in this case.

6. In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie, if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the

sense of being a non-discriminatory reason: See Peter Gibson LJ in *Igen v Wong* [2005] IRLR 258, paragraph 37".

(vi) Regarding the duty to make reasonable adjustments the Tribunal considered the case of **Latif v Project Management Institute [2007] IRLR 579**. In that case the EAT held that a claimant must prove both that the duty has arisen, and that there are facts from which it could reasonably be inferred, absent explanation, that it has been breached before the burden will shift and require the respondent to prove it complied with the duty. There is no requirement for claimants to suggest any specific reasonable adjustments at the time of the alleged failure to comply with the duty. It is permissible (subject to the tribunal exercising appropriate control to avoid injustice) for claimants to propose reasonable adjustments on which they wished to rely at any time up to and including the tribunal hearing itself.

(vii) Section 57 of the DDA states, inter alia, as follows:-

(1) A person who knowingly aids another person to do an act made unlawful by this Act is to be treated for the purposes of this Act as himself doing the same kind of unlawful act…

(viii) "Aids" is a familiar word in everyday use bearing no technical or special meaning in this context. (**Anyanwu v South Bank Students' Union (2001) IRLR 305HL**). In the case of **Bird v Sylvester (2008) IRLR 232 CA**, **('Bird')** the Court of Appeal held that the execution by a Solicitor of a client's instructions is not something that was properly to be treated as aiding an unlawful act, even if the instructions involved some decision by the principal that might offend the statutory discrimination provisions. Furthermore, it held that a Solicitor's role as an adviser cannot render him an aider, and therefore it was very difficult to see how a Solicitor who confines himself to giving objective legal advice in good faith as to the proper protection of his client's interests, and acts strictly upon his client's instructions, could be at risk of an adverse finding.

(ix) In relation to harassment the necessary elements are threefold:-

(1) Did the respondent engage in unwanted conduct?

(2) Did the conduct in question either:-

(a) have the purpose; or

(b) the effect of either:-

(i) violating the claimant's dignity; or

(ii) creating an adverse environment for her – the proscribed consequences?

(3) Was the conduct on a prohibited ground?

There is a substantial overlap between the questions that arise in relation to each element. Whether conduct was "unwanted" will overlap with whether it creates an adverse environment for the claimant. Many or most acts that are found to create an adverse environment for an employee will also violate her dignity (**Richmond Pharmacology Ltd v Dhaliwal (2009) IRLR 336 EAT**).

SUBMISSIONS

7. The tribunal carefully considered the written submissions submitted by the parties representatives, which are annexed to this decision, the last of which is dated 4 January 2013. It also carefully considered the oral submissions made previously on 6 December 2012.

CONCLUSIONS

8. The tribunal, having carefully considered the evidence together with the submissions and apply the principles of law to the findings of fact, concludes as follows:-

(1) The tribunal is satisfied that the claimant was required to do some degree of manual handling and has proved facts from which in the absence of an adequate explanation the tribunal could conclude that a duty to make reasonable adjustments has arisen. She has proved that the duty has been breached and therefore the burden shifts to the surgery to prove that it complied with the duty. On the facts as found, it plainly did not.

(2) (i) In relation to the claim of direct disability discrimination, only, the tribunal is satisfied that the claimant has proved facts from which the tribunal could conclude in the absence of an adequate explanation that the claimant had been treated less favourably on the ground of disability. The burden therefore shifts to the surgery which can only discharge the burden by proving on the balance of probabilities that the detriment was not on the prohibited ground of disability.

(ii) The tribunal carefully considered the surgery's explanation for the treatment of the claimant. The tribunal is satisfied, having weighed its findings of fact and the credibility issues attaching to the evidence of Dr Sharkey and Dr Mason, in the context of its other findings of fact, that the surgery has not provided an adequate non-discriminatory explanation for the less favourable treatment of the claimant. As reflected in the findings of fact, and in the claimant's grievance letter referred at paragraph 4(xii) above, following the claimant's return to work on 4 October 2012, the surgery was seeking to further its declared intentions as referred to in the advice file note of 19 August 2012. Following the claimant's discovery of the advice file on 19 January 2012 and her consequent sickness absence due to stress, during which time she compiled and presented a detailed grievance letter dated 23 January 2012, the surgery did not react appropriately by failing to adopt an objective approach towards investigating the grievance. The partners in the surgery were, in effect, investigating themselves. There was no evidence before the tribunal that they took further advice or considered the possibility of appointing a suitable outside person to deal

with the grievance. Moreover, they did not advise the claimant of her right to appeal the grievance outcome. The situation was, in effect further compounded at the appeal stage by the proposed involvement of Miss O'Callaghan, although the surgery did not appear to appreciate her close connection with Peninsula until alerted by the claimant. Furthermore, in the period prior to the claimant's resignation, the surgery was aware of two claims having already been presented to the tribunal, and, in light of this should have shown more awareness of the need to expedite the claimant's appeal.

In light of the foregoing, an inference of unlawful discrimination must be drawn. Disability was a significant reason, in the sense of being more than trivial, for the treatment of the claimant.

(iii) As indicated in paragraph 2(i) above, the tribunal is not satisfied that the claimant has proved facts from which the tribunal could conclude in the absence of an adequate explanation that the claimant had been harassed in accordance with the definition in the Act. Furthermore, the fact that she accessed a confidential advice file on 19 January 2012 and was shocked and felt humiliated as a result, does not, in the tribunal's view, amount to unwanted conduct, as the surgery was providing instructions for advice purposes which they were perfectly entitled to do, and did not envisage the claimant having access to such documentation.

(3) The tribunal, by analogy with the Bird case referred to above, is satisfied that Peninsula, in its capacity as advisers to the surgery, did not knowingly aid the surgery in committing any unlawful act contrary to Section 57 of the Act.

(4) The tribunal is satisfied that the surgery through its partners conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between the surgery and the claimant which was sufficiently important to justify her resigning. The tribunal is also satisfied that the main reason for her resignation was the breach of the implied term of trust and confidence, arising from her discovery of the advice file note on 19 January 2012, that she left in response to that breach and the manner in which the surgery subsequently dealt with her grievance and the appeal, and did not delay too long in terminating her contract in response to the breach. She was also entitled, in the circumstances, to look around for another job.

Remedy

9. (1) The parties' representatives furnished further written submissions in relation to remedy which are attached to this decision. The issue to be determined by the tribunal relates to the claim for injury to feelings from 4 October 2011 until 4 July 2012, when the claimant resigned.

(2) The guidelines for awarding compensation for injury to feelings is set out by the Court of Appeal in the case of **Chief Constable of West Yorkshire Police v Vento (No 2) [2003] IRLR 102 CA**, as updated by the Employment Appeal Tribunal decision in **Da'bell v NSPCC (2010) IRLR 19 EAT**. The

bottom band is increased from £5,000 to £6,000; the top of the middle band is increased from £15,000 to £18,000; and the top of the higher band is increased from £25,000-£30,000. The tribunal did not have the benefit of any medical evidence in this case relating to the claim for injury to feelings.

(3) The tribunal is satisfied that there is some force in the claimant's contention that there should be an uplift in the award for failure to comply with the Labour Relations Agency Code of Practice and Grievance Procedures by virtue of Article 90AA and Schedule 4A to the Industrial Relations (Northern Ireland) Order 1992, in respect of the surgery's failure to notify the claimant of her right to appeal the grievance outcome and in respect of the delay in expediting her appeal. The tribunal assesses the uplift to be 10% in both the discrimination and constructive dismissal awards.

(4) Under Regulation 3(1) of the Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996 No 581, a tribunal may include simple interest on an award made and shall consider whether to do so without the need for any application by the parties. Any interest awarded under the discrimination legislation for injury to feelings is from the date on which the discrimination began, in this case on 4 October 2011. In relation to other sums of damages, interest shall be awarded from the mid-point between the date on which the discrimination began and the day of calculation.

(5) The tribunal is satisfied, in light of its finding pertaining to Peninsula, that there should not be an apportionment between the surgery and Peninsula.

(6) The tribunal considers it appropriate to add simple interest at the rate of 8% per annum on the compensatory award from 4 October 2011 until the day of calculation. The tribunal does not consider it appropriate, on the facts as found, to award the claimant a further amount by way of special loss, as this arose from the breach of the implied term of trust and confidence stemming from 19 January 2012, and not from unlawful discrimination. Regulation 5 of the above Regulations provides as follows:-

> "(1) ... 'midpoint date' means the date half-way through the period mentioned in paragraph (2) or, where the number of days in that period is even, the first day of the second half of that period.
>
> (2) The period referred to in paragraph (1) is the period beginning on the date of the contravention or, as the case may be, of the act of discrimination to which the award in question relates and ending on the day of calculation (both dates inclusive)."

(3) The tribunal awards the claimant the following:

BASIC AWARD for unfair dismissal

Length of service at EDT 04/07/12:	10 years 7 months (01/12/01 to 04/07/12)
Age of effective date of termination	48 years old (DOB 03/06/64)
Relevant multipliers:	1.5 x 7 years (for age > 41 years)
	1 x 3 years (for age 22 > 41 years)
Normal week's pay at EDT (gross): (£2,000.00 per month x 12/52) =	£500.00 (subject to statutory max £430)

Basic award: (7 years x 1.5 x £430.00 = £4,515.00 +
3 years x 1 x £430.00 = £1,290.00) **£5,805.00**

COMPENSATORY AWARD for unfair dismissal

A. Loss of statutory employment rights **£500.00**

B. Immediate loss of earnings to date of tribunal

Loss from EDT 04/07/12 to start of new job 05/08/12

- Average weekly earnings prior to EDT 04/07/12 (full net wage):
  (£1,587.26 per month x 12/52) = £366.29
- Relevant period 04/07/12 to 05/08/12: 4 weeks
- Average weekly earnings during relevant period: £81.60 (SSP)
- Weekly loss for relevant period: £366.29 - £81.60 = £284.69
- Total loss for relevant period: £284.69 x 4 weeks = £1,138.76

Loss from start of new job 05/08/12 to date of tribunal 03/12/12

- Average weekly earnings prior to EDT 04/07/12 (full net wage): £366.29

1. ● Relevant period 05/08/12 to 03/12/12: 17 weeks
   ● Average weekly earnings during relevant period:
   (£1,336.02 per month x 12/52) = £308.31
   ● Weekly loss for relevant period: £366.29 - £308.31 = £57.98
   ● Total loss for relevant period: £57.98 x 17 weeks = £985.66

Total immediate loss of earnings: £1,138.76 + £985.66 **£2,124.42**

C. Future loss of earnings

Eg. 52 weeks' loss from date of tribunal 03/12/12

- Loss of earnings for relevant period: £57.98 x 52 weeks = **£3,014.96**

D. Increased mileage costs

New job started 05/08/12 entails an extra 24 miles each day for 4 days per week; and an extra 46 miles for 1 day per week.

- Standard mileage and fuel rate for up to 10,000 miles, Per 2012 HMRC guidance (www.hmrc.gov.uk/rates/travel.htm): £0.40 per mile

- Weekly increased mileage cost: (24 miles x 4 days £0.40 = £38.40) + (46 miles x 1 day x £0.40 = £18.40) = £56.80

Total immediate increased mileage costs: £56.80 x 17 weeks = **£965.60**

Total estimated future increased mileage costs: £56.80 x 52 weeks = **£2,953.60**

TOTAL LOSS – UNFAIR DISMISSAL:

Basic award (£5,805.00)
+ Compensatory award (£500.00 + £2,124.42 + £3,014.96 + £965.60 + £2,953.60 = £9,558.58) = **£15,363.58**

Add uplift of 10% £1,536.36

Total **£16,899.94**

2. **DISABILITY DISCRIMINATION**

A. Injury to feelings

- Middle band *Vento* [2002] EWCA Civ 1871, As updated by *Da'Bell v NSPCC* [2010] IRLR 19 = £7,500.00

Uplift of 10% on £7,500 = £750.00

Award of injury to feelings = £8,250.00

Add interest of 8% per annum

From 4/10/11 to date of calculation (12 March 2013) = £948.44
(524 days x 1.81)

Total award for injury to feelings to include interest = **£9,198.44**

TOTAL AWARD for constructive dismissal and disability discrimination (£16,899.94 + £9,198.40) = £26,098.34

10. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (NI) 1990.

Chairman:

Date and place of hearing: 3-6 December 2012, Belfast.

Date decision recorded in register and issued to parties:

Case Refs: 271/12, 767/12, 1262/12 & 1549/12

IN THE INDUSTRIAL TRIBUNAL

Between:

GAEL MEJURY

(Claimant)

-and-

DR K CLARKE & OTHERS t/a CARRYDUFF SURGERY

(1st Named Respondent)

-and-

PENINSULA BUSINESS SERVICES LIMITED

(2nd Named Respondent)

RELEVANT POINTS OF LAW TO ACCOMPANY SUBMISSIONS ON BEHALF OF THE CLAIMANT

Constructive unfair dismissal

1. An employee faced with a fundamental breach of contract by her employer, or a series of acts cumulatively amounting to a fundamental breach, can elect to treat her employment as terminated, and pursue an action for unfair dismissal *(Art 127(1)(c) Employment Rights (Northern Ireland) Order 1996;Harvey Div DI/3, paras 401-600; Lewis v Motorworld Garages Ltd [1985] IRLR 465)*
2. A breach of the implied duty of trust and confidence arises where the employer has "...without reasonable and proper cause, conduct[ed] itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee..." *(Malik and another v Bank of Credit and Commerce International [1997] IRLR 462)* This is a question of fact in each case. It can include, for example, acts or omissions which also amount to disability discrimination *(Nottinghamshire County Council v Meikle [2004] IRLR 703)*; a failure to afford a reasonable opportunity to achieve redress of a grievance, and/or the presence of actual or apparent bias within a grievance appeal *(Watson v University of Strathclyde [2011] IRLR 458)*
3. The *employer* cannot 'cure' a fundamental breach by purporting to make amends *(Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445)* However, the *employee* may give the employer a chance to remedy the breach, and will not lose her right to claim constructive dismissal if she delays resigning pending the employer's response *(Harvey Div DI/3, para 523.01)*
4. The employee may leave partly in response to a fundamental breach and partly in the anticipation of starting a new job. It is not necessary that the breach is the sole prompt for resignation provided that it is the effective cause *(Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493)*, or that the employee resigned in response to it at least in part *(Nottinghamshire County Council v Meikle [2004] IRLR 703)*

Disability discrimination

5. Pursuant to the reverse burden of proof in s17A(1C) of the Disability Discrimination Act 1995 (DDA) "... [w]here...the complainant proves facts from which the tribunal could, apart from this subsection, conclude in the absence of an adequate explanation that the respondent has acted in a way which is unlawful...the tribunal shall uphold the complaint unless the respondent proves that he did not so act..."

6. For the burden of proof to shift, it must be that a reasonable tribunal could properly conclude from all the evidence before it that, minus a convincing explanation, discrimination has occurred. The tribunal should take heed of the "whole relevant factual matrix" including evidence adduced by the claimant and the respondent. If the burden passes to the respondent, it must prove that its treatment of the claimant was "in no sense whatever" discriminatory *(Nelson v Newry & Mourne District Council [2009] IRLR 548, 552-553)*

7. Unreasonable treatment *per se* is not enough to shift the burden, yet "...in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation...and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn...the inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it..." *(London Borough of Islington v Ladele and Liberty [2009] IRLR 154, 160)*

8. Per s4(2) DDA, it is unlawful "...for an employer to discriminate against a disabled person whom he employs...(d) by dismissing him, or subjecting him to any other detriment..."; and per s4(3) it is unlawful "...for an employer...to subject to harassment...(a) a disabled person whom he employs..."

9. 'Detriment' exists if "...by reason of the act or acts complained of a reasonable worker would or might take the view that he had...been disadvantaged in the circumstances in which he thereafter had to work..." *(Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285,291,301)

10. Under s3A(5) DDA "...[a] person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability..." In establishing direct discrimination, it may often be better to concentrate on the overriding 'reason why' the respondent treated the claimant in the way it did; rather than to focus on how to construct a hypothetical comparator *(Shamoon op cit; Aylott v Stockton on Tees Borough Council [2010] IRLR 994, 999, 1000)* For disability to constitute the 'reason why', there must be a causative link between it and the claimant's treatment. It suffices if disability had a "significant influence" *(Nagarajan v London Regional Transport [1999] IRLR 572, 576, 579, 580)*

11. Under s3B DDA "(1)...a person subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of...(a) violating the disabled person's dignity, or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him....(2) Conduct shall be regarded as having the effect referred to...only if, having regard to all the circumstances, including in particular the perception of the disabled person, it should reasonably be considered as having that effect..." The 'reason why' principles apply similarly to harassment, the test being "...whether as a matter of logic or commonsense the disability was causative of the [conduct]..." *(Garrett v Lidl Ltd [2009] UKEAT, para 32)*

12. Under s4A(1) DDA, where "...(a) a provision, criterion or practice applied by or on behalf of an employer...places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice...having that effect...." In this context "substantial" means "not minor or trivial" *(ECNI Disability Code of Practice 2005, para 5.11)* One example of a possible adjustment cited in s18B(2) DDA is "...(g) giving, or arranging for, training or mentoring..."

13. Per s57(1) DDA "...[a] person who knowingly aids another person to do an [unlawful act] is to be treated...as himself doing the same kind of unlawful act..." Whether aiding has occurred is a question of fact in each case. "Aid" is accorded its everyday meaning i.e. to help or assist, and the help need not be substantial, so long as it is not so insignificant as to be negligible *(Anyanwu v South Bank Students' Union [2001] IRLR 305, 306; Harvey Div L/3/D, paras 513-520)*

14. The tribunal may draw an inference from the failure of a relevant witness to appear *(Taylor v Crawfordsburn Inn Limited (2012) NIIT 496/12)*

Case Nos 271/12
767/12
1262/12
1549/12

IN THE INDUSTRIAL TRIBUNALS
AT BELFAST

BETWEEN:

MRS G MEJURY Claimant

and

DR K CLARKE & OTHERS t/a CARRYDUFF SURGERY First Respondent

PENINSULA BUSNINESS SERVICES LIMITED Second Respondent

SUBMISSIONS - RESPONDENTS

The legal issues were identified at a Case Management Discussion held on 10 September 2012 as follows:

1. **Discrimination**

   a) Whether the Claimant was directly discriminated against in respect of the matters listed at 1 – 20 below on the grounds of her disability, contrary to the Disability Discrimination Act 1995 as amended?

b) (i) Whether the Claimant was discriminated against in respect of the matters listed 1-20 below for a reason related to her disability, contrary to the Disability Discrimination Act 1995, as amended?

(ii) If so, was the discrimination justified?

c) Whether the Claimant was in respect of the matters listed 1-20 below subjected to harassment, contrary to the Disability Discrimination Act 1995, as amended, in that for a reason which relates to the Claimant's disability, the Respondents engaged in unwanted conduct which had the purpose or effect of –

(a) violating the Claimant's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

d) Whether the Claimant has been victimized contrary to the Disability Discrimination Act 1995 as amended?

e) Whether the First Respondent was under a duty to make reasonable adjustments for the Claimant; and if so, whether it failed to comply with that duty?

f) Whether the Second Respondent has knowingly aided the First Respondent in committing any unlawful act contrary to section 57 of the Disability Discrimination Act 1995?

1. Dismissal

Was the Claimant constructively unfairly dismissed by the First Respondent? Was this dismissal also an act of discrimination contrary to the Disability Discrimination Act 1995, as amended?

2. Adjustment of Award

If the Tribunal finds that the First Respondent did not comply with the Code of Practice on Disciplinary and Grievance Procedures, is it just and equitable to increase any award made to the claimant pursuant to Article 90AA of the Industrial Relations (Northern Ireland) Order 1992?

Issues of Fact (agreed at Case Management Discussion dated 24 April 2012)

1. Did the First Respondent hold an attendance meeting which was hostile for the Claimant on the 5 April 2011?

2. Did the First Respondent on the advice of the Second Respondent unnecessarily refer the Claimant for an Occupational Health Referral on or about 15th September 2011 after the Claimant had submitted a return to work note?

3. Was the correspondence issued in respect of the referral intimidating or offensive and did this amount to harassment?

4. Did the wording of the referral as prepared by the Second Respondent and issued by the First Respondent violate the Claimant's dignity and was it humiliating?

5. Did the First Respondent correspond with the Second Respondent in a way which was a violation of the Claimant's dignity and was it humiliating?

6. Did the First and Second Respondents conspire to replace the Claimant with a 'candidate' and prevent her return to work?

7. Did the First Respondent with the knowledge and/or upon the advice of the Second Respondent prevent the Claimant from returning to a full range of duties contrary to the advice of the Occupational Health Physician?

8. Did the First Respondent with the knowledge of and/or upon the advice of the Second Respondent diminish the Claimant's role and subject her to a "more managed role" which required daily reporting to Dr Clarke upon her return to work?

9. Did the First Respondent with the knowledge of and/or upon the advice of the Second Respondent try to isolate the Claimant?

10. Did the First Respondent with the knowledge of and/or upon the advice of the Second Respondent set unattainable targets for the Claimant?

11. Did the First Respondent with the knowledge of and/or upon the advice of the Second Respondent allocate a portion of the Claimant's duties to another person?

12. Did the First Respondent with the knowledge of and/or upon the advice of the Second Respondent try to maintain upon the Claimant's return to work that she had been guilty of an issue of misconduct at some unspecified time before her sickness absence without affording her an investigation, right to reply or representation?

13. Did the First Respondent with the knowledge of and/or upon the advice of the Second Respondent or vice versa allow the Claimant access to material which was insulting and degrading?

Further factual matters arising out of the Second, Third and Fourth Complaints

14. Did the First Respondent adequately and properly investigate the Claimant's grievance? Did the Respondent's management of the Claimant's grievance have the purpose or effect of violating the Claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her? Did the First Respondent act upon the advice of the Second Respondent in the conduct of the Grievance or in settling the content of the response to it?

15. Did the First Respondent acting on the Second Respondent's advice, handle the arrangements for the Appeal in an appropriate and timely manner and further did the First Respondent comply with the Statutory Code of Practice on Disciplinary and Grievance Procedures in the arrangements made to deal with the Claimant's grievance, in responding to it and in dealing with the Appeal against the first stage decision? Further, did the First

Respondent, in consultation with the Second Respondent, discriminate against the Claimant in attempting to pass off a person who was connected with the Second Respondent as an 'Independent Consultant' for the purposes of hearing the Grievance Appeal?

16. Should the First Respondent have paid the Claimant's salary in full during the protracted period taken to deal with her grievance? Was the Claimant reduced to Statutory Sick Pay during the protracted Grievance Appeal with the knowledge of and/or on the advice of the Second Respondent?

17. Did the First Respondent withhold the Claimant's Statutory Sick Pay for the month ending April 2012? Was the reason for this a 'clerical error'? How many staff were affected by this clerical error? What was the reason for the delay in providing the claimant with her payslip in May 2012?

18. Did the First Respondent fail to deal expeditiously and effectively with the claimant's grievance and appeal? Was the impugned and protracted Grievance and Appeal procedure conducted with the knowledge of and/or in accordance with advice provided by the Second Respondent?

19. Did the conduct of the First Respondent whether viewed cumulatively as a single failing, or as a series of discrete failings (in the management of the Claimant's sickness absence in the management of her return to work, in their treatment of the Claimant after her return to work, in the conduct of her grievance and appeal and in failing to introduce appropriate measures which were binding on the Partners) consist of a fundamental failure or series of failures to make reasonable adjustments in the circumstances for her disability? Did this conduct also amount to direct discrimination on the grounds of the Claimant's disability, and/or discrimination for reason related to her disability, and/or harassment and/or victimisation?

20. Did the conduct of the First Respondent whether view cumulatively as single failing or as a series of discrete failings amount to a fundamental breach of contract which entitled the Claimant to resign?

Facts

21. The meeting held on 5 April 2011 was not hostile. The note of the meeting at page **82** records that the claimant attended with Alex, her partner. The purpose of the meeting was clearly set out in the letter dated 24 March 2011 **[81]**. The claimant was invited to attend a meeting at the surgery and furthermore was given the opportunity of suggesting an alternative location. The claimant was provided with landline, mobile and personal email address of Dr Sharkey in the letter of invitation.

22. The claimant had been absent due to a serious illness for over a year. It is completely reasonable for the respondent to engage the services of an Occupational Health Specialist to assess the claimant's condition with regards to her employment duties and to consider and suggest a return to work programme.

23. The correspondence **[83]** cannot be considered to be offensive, and cannot be considered to be harassment. The letter refers to telephone contact. The letter simply states the purpose of the Occupational Health Assessment. The claimant had failed to respond to previous correspondence. The respondent had made telephone contact with the claimant with regards to the Assessment. The claimant was informed of her rights. It is a requirement on the respondent to seek the claimant's consent.

24. The wording of the referral is standard wording. In order to effect a safe return to work it was essential for the respondent to discover the answers to the question as set out in the referral letter. **[87 – 88]**

25. The correspondence between the first and second respondents is not a violation of the claimant's dignity. It was not degrading or humiliating.

26. There is no evidence to support the allegation that there was a conspiracy between the first and second respondents to replace the claimant with a candidate. The correspondence is dated 19 August 2011. The respondent required temporary cover whilst the claimant had been absent. Mrs Neill had provided that cover but had resigned to take up a permanent position. Miss Emma Spies, the Office Manager, had acted as Practice Manager but was about to go on maternity leave. The claimant attended a back to work interview on 30 September 2011 and returned to work on 4 October 2011.

27. The claimant returned to work on 4 October 2011. The back to work notes **[98 – 99]** are an accurate account of what was discussed at the meeting. The claimant was consulted and agreed to the on-going financial assistance as provided by Mrs Neill. It is recorded that the claimant was entirely happy with the arrangement.

28. The claimant was not subjected to more 'managed role'. The claimant had previously requested more contact with the doctors. The claimant was not required to report to Dr Sharkey. The issue was discussed and agreed by the claimant at her back to work meeting held on 30 September 2011 and confirmed at her appraisal meeting held on 29 November 2011.

29. The claimant was not isolated nor was there any attempt to impose isolation on the claimant. The claimant was advised to "keep a professional distance from the staff". **100** The claimant's duties included the management of around 25 members of staff at the surgery. Keeping a professional distance is a reasonable instruction. The claimant's view is correctly recorded in the final paragraph of the appraisal notes. The claimant typed the notes without any input from any partner. The claimant typed and signed her agreement. The claimant comments that the appraisal was productive and motivational. The claimant expresses her gratitude to Dr Sharkey for his support. **100**

30. No unattainable targets were set for the claimant. The claimant was responsible to type the conclusion of the appraisal. No date was set for a review. No targets were set rather guidance and advice.

31. The claimant had agreed to the assistance as provided by Mrs Neill. It is clear from the evidence that the claimant was gradually taking over the financial duties, the claimant's record of the appraisal meeting at point 2, records that "I need to be proactive on financial issues". **100**

32. The first respondent raised their concerns with the claimant on her past conduct at the back to work interview and at the appraisal. However, no disciplinary procedure was instigated. Following the appraisal no conduct/performance issue is raised by the first respondent.

33. The claimant accessed the advice material on 19 January 2012. The claimant knew that she ought not read the advice notes of which she was the subject. The claimant printed off the notes. The claimant printed off screen shots. The claimant knew that she ought not to have sight of the notes which explains her letter to the tribunal in September 2012 seeking discovery of the advice notes. It was only by chance that it was discovered that the claimant already had the notes in her possession. The comments in the advice notes were never acted on. The advice from the second respondent was followed.

34. The claimant chose not to engage in the grievance process. The claimant makes it clear in her grievance letter of 23 January 2012 that she will not attend a meeting. **106** The first respondent provide the claimant with a full response to her complaints by letter dated 7 February 2012 including an apology. **108 – 110** The claimant chose not to engage in any of the process that followed. By letter dated 8 March 2012 the claimant complains that she had not been invited to a meeting but could not explain why she had made that complaint. The clear evidence is that the claimant was repeatedly asked to attend meetings. It was even suggested to the claimant that meetings could be held away from the surgery.

35. The claimant acted in breach of the code of practice. It was the claimant that failed to engage in the process. The respondents sought to comply with each of the suggestions as made by the claimant including the appointment of an independent consultant which was changed at the claimant's request.

36. The claimant was not entitled to her salary during her sickness absence commencing on 19 January 2012. The claimant was invited to attend a meeting to be held on 21 May 2012 by letter dated 11 May 2012 but chose to not to ignore that invitation. **123**

37. The claimant's salary for the month of April 2012 was withheld by clerical error. As soon as the error was discovered Dr Mason arranged for the attendance of Mrs Neill to correct the situation.

38. The delays in the grievance procedure were caused primarily by the claimant. The claimant was clear that she would not attend any meeting to discuss her complaints. The claimant chose not to attend an informal meeting to discuss her absence. The claimant demanded that the process be held by an outside party. When the respondent sought to arrange an outside party the claimant still chose not to engage in the process.

39. The first respondents did not fail to made reasonable adjustments in the circumstances. The advice of the Occupational Health Specialist was followed. There was no heavy manual handling duties for the claimant to fulfil. The claimant's consent was sought and gained for the attendance of Mrs Neill.

40. There is no breach of contract entitling the claimant to resign. The claimant resigned because she had successfully applied for an alternative role of Practice Manager at the surgery of Dr Gilmore. The claimant's evidence on her search for an alternative role is incredible. The claimant asserted that her job search had only begun after her resignation letter of 4 July 2012. The claimant asserted that she had attended interviews at least two employment agencies following her resignation. This cannot be correct as the new employer sought a reference on 13 June 2012. A reference is only sought towards the very

end of the appointment process and most likely is only sought when an offer of appointment is made subject to references. The timing of the claimant's resignation coincides with the offer of the new role. The claimant has not resigned as the result of a breach of contract but rather because of the job offer. If there was no job offer there would be no resignation.

41. Capstaff v ITNET [1998] Appeal No. EAT/1121/96 – authorities considered at page six of the Judgment and conclusion at page seven. The claimant's evidence with regards to her job search before/after her resignation.

Tom Grady
Employment Law Chambers
On behalf of the First and Second Respondents

Case Nos 271/12
767/12
1262/12
1549/12

IN THE INDUSTRIAL TRIBUNALS
AT BELFAST

BETWEEN:

MRS G MEJURY Claimant

and

DR K CLARKE & OTHERS t/a CARRYDUFF SURGERY First Respondent

PENINSULA BUSNINESS SERVICES LIMITED Second Respondent

CHRONOLOGY

1 December 2001 Claimant commences employment.

20 November 2009 Allegations by Jude Pollock. **[80B – 80F]**

December 2009 Claimant informs of diagnosis of cancer.

March 2010 Claimant commences sickness absence.

5 April 2011 Meeting held by Dr Mason, Dr Sharkey, Dr Murray and claimant. **[82]**

23 June 2011 Claimant's receives second letter re: access to medical records request. **[83]**

28 June 2011 Claimant signs Access to Medical Reports. **[84]**

9 August 2011 Claimant informs practice that her GP says she is fit to return to work and expects to return on 14 September 2011.

12 August 2011 First appointment at Occupational Health, claimant does not attend. **[93]**

19 August 2011 First respondent seeks advice re: claimant's return to work. **[197]**

15 September 2011 Claimant attends Occupational Health Assessment. **[96 - 97]**

16 September 2011 Occupational Health Report Produced. **[96 - 97]**

30 September 2011 Claimant attends back to work interview held by Dr Sharkey, Dr Mason & Dr Murray **[98 - 99]**

4 October 2011 Claimant returns to work

29 November 2011 Claimant appraisal held by Dr Sharkey **[100; 101]**

19 January 2012 Claimant accesses advice files **[209 - 224]**

20 January 2012 Claimant off sick with stress until her resignation on 4 July 2012.

23 January 2012 Claimant grievance letter **[102 – 106]**

7 February 2012 Respondents findings on grievance **[108 – 110]**

15 February 2012 Claimant's letter of appeal against grievance outcome. **[111 - 114]**

6 March 2012 Letter from respondent inviting claimant to meeting to be held on 13 March 2012. **[115 - 116]**

8 March 2012 Claimant's reply to the above. **[117]**

30 March 2012 Claimant invited to attend re-arrange grievance appeal hearing to be held on 12 April 2012. **[118 - 119]**

5 April 2012 Claimant's objection to Ms O'Callaghan. **[120]**

27 April 2012 Claimant offered to choose one of three consultants. **[121]**

2 May 2012 Claimant's reply to the above and complaint re: SSP payment. **[122]**

11 May 2012 Claimant invited to meeting to be held on 21 May 2012 to discuss absence. **[123 - 124]**

14 May 2012 Claimant's reply to above. **[125]**

28 June 2012 Claimant's letter requesting appeal outcome. **[130]**

2 July 2012 Dr Mason's response to above. **[131]**

4 July 2012 Letter of resignation. **[132]**

9 July 2012 Grievance Appeal Outcome. **[134 - 158]**

Tom Grady
Employment Law Chambers
On behalf of the respondents

Case Refs: 271/12 767/12 1262/12 & 1549/12

IN THE INDUSTRIAL TRIBUNAL

Between:

GAEL MEJURY (Claimant)

-and-

CARRYDUFF SURGERY (1st Named Respondent)

-and-

PENINSULA BUSINESS SERVICES (2nd Named Respondent)

SCHEDULE OF LOSS

as revised 3rd December 2012

1) UNFAIR CONSTRUCTIVE DISMISSAL

BASIC AWARD for unfair dismissal

Length of service at EDT 04/07/12:	10 years 7 months (01/12/01 to 04/07/12)
Age at EDT:	48 years old (DOB 03/06/64)
Relevant multipliers:	1.5 x 7 years (for age >41 years)
	1 x 3 years (for age 22>41 years)
Normal week's pay at EDT (gross): (£2,000.00 per month x 12 / 52)=	£500.00 (subject to statutory max £430)
Basic award: (7 years x 1.5 x £430.00=£4,515.00 +	
3 years x 1 x £430.00=£1,290.00)	**£5,805.00**

COMPENSATORY AWARD for unfair dismissal

A. Loss of statutory employment rights **£500.00**

B. Immediate loss of earnings to date of tribunal

Loss from EDT 04/07/12 to start of new job 05/08/12

• Average weekly earnings prior to EDT 04/07/12 (full net wage): (£1,587.26 per month x 12 / 52)=	£366.29
• Relevant period 04/07/12 to 05/08/12:	4 weeks
• Average weekly earnings during relevant period:	£81.60 (SSP)
• Weekly loss for relevant period: £366.29-£81.60=	£284.69
• Total loss for relevant period: £284.69 x 4 weeks=	£1,138.76

Loss from start of new job 05/08/12 to date of tribunal 03/12/12

• Average weekly earnings prior to EDT 04/07/12 (full net wage):	£366.29

- Relevant period 05/08/12 to 03/12/12: 17 weeks
- Average weekly earnings during relevant period: (£1,336.02 per month x 12 / 52)= £308.31
- Weekly loss for relevant period: £366.29-£308.31= £57.98
- Total loss for relevant period: £57.98 x 17 weeks= £985.66

Total immediate loss of earnings: £1,138.76 + £985.66 **£2,124.42**

C. Future loss of earnings (as assessed by tribunal)

E.g. 52 weeks' loss from date of tribunal 03/12/12

- Loss of earnings for relevant period: £57.98 x 52 weeks= **£3,014.96**

D. Increased mileage costs

New job started 05/08/12 entails an extra 24 miles each day for 4 days per week; and an extra 46 miles for 1 day per week.

- Standard mileage and fuel rate for up to 10,000 miles, per 2012 HMRC guidance (www.hmrc.gov.uk/rates/travel.htm): £0.40 per mile
- Weekly increased mileage cost: (24 miles x 4 days x £0.40=£38.40) + (46 miles x 1 day x £0.40=£18.40)= £56.80

Total immediate increased mileage costs: £56.80 x 17 weeks= **£965.60**

Total estimated future increased mileage costs: £56.80 x 52 weeks= **£2,953.60**

TOTAL LOSS – UNFAIR DISMISSAL:

Basic award (£5,805.00)
+ Compensatory award (£500.00+£2,124.42+£3,014.96+£965.60+ £2,953.60=£9,558.58)= **£15,363.58**

2) DISABILITY DISCRIMINATION

A. Injury to feelings (as assessed by tribunal)

- Middle/Higher band *Vento* [2002] EWCA Civ 1871, as updated by *Da'Bell v NSPCC* [2010] IRLR 19 = **£18,000.00**

B. Financial loss

Loss from start of contractual sick pay at half wage rate 05/03/12 to start of SSP 02/04/12

- Average weekly earnings (full net wage): £366.29
- Relevant period 05/03/12 to 02/04/12: 4 weeks
- Average weekly earnings during relevant period: £183.14 (half wage rate)
- Weekly loss for relevant period: £366.29-£183.14= £183.15
- Total loss for relevant period: £183.15 x 4 weeks= £732.60

Loss from start of SSP 02/04/12 to EDT 04/07/12

- Relevant period 02/04/12 to EDT 04/07/12 13 weeks
- Average weekly earnings during relevant period: £81.60 (SSP)
- Weekly loss for relevant period: £366.29-£81.60= £284.69

- Total loss for relevant period: £284.69 x 13 weeks= £3,700.97

Immediate loss of earnings from EDT 04/07/12 to date of tribunal 03/12/12,
Future loss of earnings from date of tribunal 03/12/12, and
Increased Mileage costs.

- As per unfair dismissal compensatory award, above*:
  £2,124.42+£3,014.96+£965.60+£2,953.60= £9,058.58 *(subject to rule against double-recovery)

Total financial loss: £732.60+£3,700.97+£9,058.58= **£13,492.15**

TOTAL LOSS – DISABLITY DISCRIMINATION:

Injury to feelings (£18,000.00) + Financial loss (£13,492.15)= **£31,492.15**

***Plus* interest at 8% per annum**
(per (Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases Regulations (Northern Ireland) 1996)

***Plus* uplift to award of up to 50%**
(for failure to comply with LRA Code of Practice on Grievance Procedures, per Art 90AA & Sched 4A Industrial Relations (Northern Ireland) Order 1992)

Brady, James

From: Donna Wilson [Donna@mcgradylegal.com]
Sent: 14 December 2012 10:33
To: James.Brady@delni.gov.uk
Subject: Employment Matter : Gael Mejury

Dear Sir

Re: Our Client – Gael Mejury
Case Reference - 271/12, 767/12, 1262/12, 1549/12

We refer to previous correspondence.

In relation to the various queries raised by the Chairman we would reply as follows:-

1. Regarding the schedule of loss and the period relevant to discrimination, as referred to in oral submissions the claimant's case is that there was an ongoing discriminatory state of affairs *(per Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96)*. This existed from the time of the claimant's first 'informal' meeting on or around 5/4/11 addressing a return to work, up until and including her constructive dismissal on 4/7/12. Hence it is submitted that the whole of said period is relevant to the discrimination claims and any award for injury to feelings and financial loss. And insofar as the constructive dismissal was discriminatory, it is suggested that an award for immediate and future loss arising from the dismissal is appropriate. *This is reflected in section 2) A) "Injury to Feelings" & 2) B) "Financial Loss" in the claimant's schedule of loss.*

   For loss arising from the dismissal it will be noted in the schedule that section 2) B) "Financial Loss" cites exactly the same period for immediate and future loss as does the unfair dismissal compensatory award set out in section 1) B), i.e. from the EDT 4/7/12 to the tribunal hearing 3/12/12, and 1 year thereafter. The only difference is that there is no claim for £500 loss of statutory rights, as it is unclear whether this is a valid type of loss within a discrimination claim as opposed to one of unfair dismissal.

   The reason why section 2) B) "Financial Loss" also claims for an earlier period, *viz* from the start of half-rate contractual sick pay on 5/3/12 to the EDT 4/7/12, is that this is arguably recoverable under the discrimination claim; whereas it would not be so in an unfair dismissal claim, as it precedes the date of dismissal. The claimant's case is that the discriminatory state of affairs began on or around 5/4/11; that her sick leave for stress which commenced on 20/1/12 was caused by the discriminatory treatment; that she dropped from full-rate to half-rate sick pay on 5/3/12; then to SSP rate on 2/4/12 until the termination of employment on 4/7/12. *If* the tribunal were to accept the claimant's case here, it would be open to compensate her for the loss of her full wage *minus* half-rate sick pay received *minus* SSP received, being a loss resulting directly from the ongoing discrimination.

2. As to the four questions on compensation/contingencies:

   (a) The award would be (i) basic and compensatory award (constructive dismissal), plus (ii) injury to feelings and period on reduced sick pay (discrimination) Per the schedule this would amount to: (i) £5,805.00 + £9,558.58 = £15,363.58, plus (ii) £18,000 + £732.60 + £3,700.97 = £22,433.57. In addition there would be interest at 8% per annum in respect of (ii)

   (b) The award would be for injury to feelings plus financial loss as depicted in section 2 of the schedule of loss, i.e. £18,000.00 + £13,492.15 = £31,492.15. In addition there would be interest at 8% per annum.

(c) There should be no double-recovery as between the awards for discrimination, discriminatory dismissal and constructive dismissal. And per *Harvey Div E/6/C, para 869 "...[t]ribunals faced with an unfair dismissal that is also an act of unlawful discrimination should award compensation for loss on the principles applying to discrimination cases...ignoring the upper limits fixed for a compensatory award: D'Souza v London Borough of Lambeth [1997] IRLR 677..."* Thus it is suggested that the award would be (i) basic award and loss of statutory rights (constructive dismissal), plus (ii) injury to feelings and financial loss (discrimination/discriminatory dismissal) Per the schedule this would amount to (i) £5,805.00 + £500.00 = £6,305.00, plus (ii) £18,000.00 + £13,492.15 = £31,492.15. In addition there would be interest at 8% per annum in respect of (ii)

(d) The only bases upon which the uplift is now pursued are that:

- as put to and accepted by the respondent's witnesses, they failed to notify the claimant of her right of appeal when delivering their grievance decision on 7/2/12;
- as maintained in the claimant's evidence and put to the respondent's witnesses, there was an attempt to introduce a Ms O'Callaghan to hear the claimant's appeal, and Ms O'Callaghan was ostensibly not independent, as she worked for a company related to Peninsula Business Services;
- as maintained in the claimant's evidence and put to the respondent's witnesses, there was a delay in the furnishing of her grievance appeal outcome, which she received on 9/7/12 five days after her resignation.

It is submitted that these represent breaches of the LRA Code of Practice on Disciplinary and Grievance Procedures, in particular para 82 "[t]he employee should be informed that they can appeal..."; para 85 "...[t]he appeal should be dealt with impartially..."; and para 87 "[t]he outcome of the appeal should be communicated to the employee in writing without unreasonable delay..."

Both constructive unfair dismissal and disability discrimination are subject to the grievance provisions. Art 90AA(2) of the Industrial Relations (Northern Ireland) Order 1992 states "*...[i]f...it appears to the tribunal that...(a) the claim to which the proceedings relate concerns a matter...(i) to which a relevant Code of Practice applies, and...(ii) to which a statutory dispute resolution procedure does not apply... (b) the employer has failed to comply with that Code in relation to that matter, and...(c) that failure was unreasonable...the tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 50%...*"

The matters complained of by the claimant in her grievance pertained *both* to the claims of disability discrimination *and* to the ultimate claim of constructive dismissal. Thus an uplift should apply to awards under any of the claimant's heads of claim, i.e. it should apply to any of the above mentioned 'contingencies'

The amount of any uplift is within the tribunal's discretion having regard to the gravity of the breaches *(see Harvey Div AII/7/C, paras 366, 366.01)*. In the circumstances, 20% is proposed as a just and equitable uplift.

3. On the final query, i.e. whether the claim of harassment is against both respondents as appears in the issues:

NO, it is against the First Respondent only. Legal issue 1) c) should read "Whether...the *First Respondent* engaged in unwanted conduct..."

The sole claim against the Second Respondent should be that of aiding the First Respondent, per Legal issue 1) f).

We have forwarded a copy of this reply to Tom Brady for his consideration.

Should you require any further information please do not hesitate to contact us.

Yours faithfully

McGrady Scullion

Case Nos 271/12
767/12
1262/12
1549/12

IN THE INDUSTRIAL TRIBUNALS
AT BELFAST

BETWEEN:

MRS G MEJURY **Claimant**

and

DR K CLARKE & OTHERS t/a CARRYDUFF SURGERY **First Respondent**

PENINSULA BUSNINESS SERVICES LIMITED **Second Respondent**

SUBMISSIONS - RESPONDENTS

Further to the email from the Industrial Tribunal dated 7 December 2012, we make the following submissions.

Case Law Referred to:

Ministry of Defence v. Cannock [1994] ICR 918 EAT

Issue

a) the tribunal awards an amount for unlawful discrimination and constructive dismissal but not for discriminatory dismissal;

Submission

In situation (a) The Industrial Tribunal is entitled to make an award for injury to feelings and for unfair dismissal.

It is further submitted that on the evidence before the Tribunal, the claimant did not establish a causal link between any losses arising from her absence between 5 April 2011 and her return to work on 4 October 2011. The Industrial Tribunal is respectfully reminded that the claimant had not provided the respondent with any written correspondence from her medical advisors as to her fitness to return to work. There was no direct contact between the claimant's medical advisors and the respondent. The only written confirmation as to the claimant's fitness to return to work was provided in the Occupational Health Report. **[bundle ref: 96 - 97].**

It is submitted that the claimant failed to establish a causal link between her absence commencing on 20 January 2012 and 4 July 2012, the effective date of termination.

In other words, the correct approach is, so far as is possible, to put the claimant into the position that she would have been in had the act of discrimination not occurred. (Ministry of Defence- v. Cannock [1994] ICR 918 EAT). Accordingly, in the absence of establishing a causal link between the sickness absence and the alleged discriminatory conduct, the claimant would only be entitled to an award for injury to feelings and not entitled to the loss of wages as claimed in the schedule of loss.

Similarly, the compensatory award for constructive unfair dismissal can be calculated only by reference to the period after the effective date of termination. The claimant commenced new employment on 6 August 2012. The difference between the salary as enjoyed from the new employment, commencing on 6 August 2012 and the salary as paid by the first respondent is a weekly loss of £57.98 plus additional travel expenses.

Issue

b) the tribunal makes an award for unlawful discrimination and discriminatory dismissal, but not for stand alone constructive dismissal.

Submission

It is submitted that the award can be for injury to feelings only and not for the difference between sick pay and the wages because as above, it is not sufficient for liability to be established but causation must also be established by the claimant. The applicable test is whether the losses occurred "but for" the wrongful act.

Issue

c) the tribunal makes an award for unlawful discrimination, discriminatory dismissal, and constructive dismissal.

Submission

It is submitted that the calculation for unlawful discrimination is in made in accordance with the submissions made on point 'b' above.

With respect to the award for unfair dismissal, the claimant would be entitled to loss of earnings with the addition of the basic award and an award for loss of statutory rights. In the absence of causation there can be no compensatory award for the period between the EDT, 4 July 2012 to 6 August 2012. The compensatory award would be calculated by the difference between the wages as paid by the first respondent and the wages as paid by Gilmore & Partners, the new employer, a weekly difference of £57.98 plus additional travel expenses.

Issue

d) the reps did not address the tribunal, and the tribunal heard no evidence, regarding the alleged breach of the statutory procedures and the uplift sought by the claimant,

Submission

The claimant raised her grievance by letter dated 23 January 2012. **[bundle ref: 102 - 106]** The grievance letter concluding paragraph contains the following:

> "Accordingly I would be grateful if by way of reasonable adjustment, you could deal with my grievance in writing". **[bundle ref: 106]**

It is submitted that the relevant grievance procedure is the modified grievance procedure, a two step process that requires the employee to submit a written grievance and requires the employer to supply a written response.

The First Respondent provided their response by letter dated 7 February 2012. **[bundle ref: 108 - 110]**

In the alternative, it is submitted that the respondent's obligations to comply with the requirements as provided by the statutory procedures cease upon the claimant's failure to attend a grievance hearing or a grievance appeal hearing.

Tom Grady
Employment Law Chambers
On behalf of the First and Second Respondents

Case Nos 271/12
767/12
1262/12
1549/12

IN THE INDUSTRIAL TRIBUNALS
AT BELFAST

BETWEEN:

MRS G MEJURY **Claimant**

and

DR K CLARKE & OTHERS t/a CARRYDUFF SURGERY **First Respondent**

PENINSULA BUSNINESS SERVICES LIMITED **Second Respondent**

ADDITIONAL SUBMISSIONS - RESPONDENTS

Further to the email sent by the Employment Tribunals dated 31 December 2012 at 14:38 we make the following submissions.

Case law referred to:

Stockton on Tees Borough Council v. Aylott [2011] ICR 1279

Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11.

Chief Constable of West Yorkshire v. Vento [2001] IRLR 124

Laing v. Manchester City Council [2006] ICR 1519

London Borough of Lewisham v. Malcolm [2008] IRLR 700

1. It was contended on behalf of the claimant that the appropriate comparator is a hypothetical comparator.

2. In dealing with a hypothetical comparator in cases of direct discrimination on the grounds of disability it is not correct for the constructed comparator to be a clone of the complainant as this approach would run together the two relevant questions, namely, whether the complainant was less favourably treated and whether they less favourably treated on the grounds of disability. It is submitted that the correct approach is found in *Stockton on Tees Borough Council v. Aylott [2011] ICR 1279*, where the Court of Appeal followed the decision of the House of Lords in *Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*. The correct approach is to start by identifying the reason for the treatment that the employee complains of. If the answer to that question is the protected characteristic, in this case disability, it is then likely that a finding of unfavourable treatment will follow. The *Shamoon* approach is to begin the journey at was previously thought as the destination. Mummery LJ in *Stockton* makes it clear that this approach may well negate the need to identify a comparator at all. Where a comparator is identified the Tribunal should determine which circumstances are relevant by reasoning backwards from the reason for the treatment accorded to the complainant. As Mummery LJ puts it in *Stockton*:

   "The relevant circumstances and attributes of an appropriate comparator should reflect the circumstances and attributes relevant to the reason for the action or decision which is complained of."

3. Once the circumstances and attributes of the hypothetical comparator have been identified it is the Tribunal is then required to perform the comparison.

4. In *Chief Constable of West Yorkshire v. Vento [2001] IRLR 124*, the Employment Appeal Tribunal suggests that in circumstances where there is little direct evidence the Tribunal can look to see how unidentical but not wholly dissimilar cases had been dealt with. Thus,

someone whose circumstances differ sufficiently from those of the claimant to make them an inappropriate comparator may nevertheless have relevance in the context of the consideration of how a hypothetical comparator would have been treated. [*Para 4.18 Disability Code of Practice*]

5. The Tribunal is respectfully reminded that the claimant did not adduce any evidence that suggests a general discriminatory attitude at Carryduff Surgery. It was accepted by the claimant and the respondent's evidence on this point was unchallenged that the general atmosphere at the surgery was informal. Evidence normally relevant to the question of whether less favourable treatment was on a prohibited ground may be used to assist in establishing whether or not the complainant would have been less favourably treated. This approach as set out in *Shamoon* was concerned prior to the enactment of the reversal of the burden of proof provisions. As the burden only shifts once a prima facie case of discrimination has been made out, an exploration of the employer's reasons for actions might be perceived to be jumping the gun but in *Laing v. Manchester City Council [2006] ICR 1519* the Employment Appeal Tribunal stressed the suitability of the *Shamoon* guidance when dealing with cases of hypothetical comparators.

6. The approach to be taken with respect to comparators in cases of disability related discrimination is found in the non-employment House of Lords case of *London Borough of Lewisham v. Malcolm [2008] IRLR 700*. The case involved the eviction of a tenant, (Mr Malcolm), as he had sub-let his council property. Mr Malcolm contended that his actions were due to the fact that he had not taken his medication for his mental illness and that the eviction proceedings were related to his disability. The House of Lords held that the appropriate comparator was a person without a mental health condition who had sublet his council flat. Such a comparator would have been treated in the same way that Mr Malcolm had been treated and that there was therefore no unlawful discrimination.

7. Accordingly, it follows that the appropriate comparator is an employee who has not suffered from cancer but who has been absent for a protracted period on the grounds of sickness. The respondents can only be found to be liable for disability-related discrimination only if it is found that the comparator would not have been the subject of an Occupational Health Assessment and would not have received the correspondence that related to the Occupational Health Assessment.

Conclusions

8. The respondents rely upon the submissions presented to the Tribunal on 6 December 2012 as to the determinations of fact that we have invited the Tribunal to find. In particular, we remind the Tribunal that it was accepted by the claimant that there has been no other employee absent from Carryduff Surgery for a protracted period of illness.

9. It is submitted that the appropriate comparator for direct disability discrimination is a person whom without the disability in question but whose relevant circumstances are the same. The comparator must have the same relevant abilities of the claimant. [*Para 4.18 of the Disability Code of Practice*]

10. It is submitted that the appropriate comparator is an employee for disability-related discrimination is a person to whom the disability-related reason does not apply. The key point being that the disability-related reason for the less favourable treatment must not apply to the comparator. Therefore, the comparator is a person that has been absent for a protracted period on the grounds of sickness but who does not suffer from the same disability as the claimant. [*Para 4.30 of the Disability Code of Practice*]

11. Accordingly, we invite the Tribunal to conclude that:

    a) the claimant was not directly discriminated against in respect of the matters set complained of on the grounds of her disability.

b) the claimant was not discriminated against in respect of the matters complained of for a reason related to her disability.

12. In the alternative, it is submitted that the discrimination was justified.

Tom Grady
Employment Law Chambers

On behalf of the First and Second Respondents

Quinn, Andrew

From: Donna Wilson [Donna@mcgradylegal.com]
Sent: 04 January 2013 09:31
To: Andrew.Quinn@delni.gov.uk
Subject: Employment Matter : Gael Mejury -v- Carryduff Surgery & Others
Attachments: Blank Bkgrd.gif

Dear Sir

Re: Our Client – Gael Mejury
Case Reference - 271/12, 767/12, 1262/12, 1549/12

Further to your previous emails and telephone conversations with this office we would advise that we have now spoken with our Counsel, Mr Neil Richards BL who has been out of the jurisdiction and would state that insofar as it is still required:-

1. It is confirmed that Mrs Mejury withdrew her claim of *disability-related* discrimination. Thus the case of *Malcolm* and the issue of justification are not relevant.

2. The written bullet points accompanying original submissions on behalf of Mrs Mejury (at para 7) quoted *London Borough of Islington v Ladele and Liberty [2009] IRLR 154* in connection with the reverse burden of proof. As to the comparator for ***direct discrimination***, the tribunal is directed to the following passages from the same judgment:

> *"The concept of direct discrimination is fundamentally a simple one. A claimant suffers some form of detriment...and the reason for that detrimental treatment is the prohibited ground...Accordingly, although the Directive and the Regulations both identify the need for a tribunal to determine how a comparator was or would have been treated,* ***that conclusion is necessarily encompassed in the finding that the claimant suffered the detriment on the prohibited ground. So a finding of discrimination can be made without the tribunal needing specifically to identify the precise characteristics of the comparator at all...*** *" [pp158-159, para 32, emphasis added]*
>
> *"...in practice a tribunal is unlikely to be able to identify the...comparator without first answering the question why the claimant was treated as he or she was..." [p159, para 35]*
>
> *"...[t]he determination of the comparator depends upon the reason for the difference in treatment. This point is more elegantly made by Lord Nicholls in Shamoon...In short,* ***the use of comparators may be of evidential value in determining the reason why the claimant was treated as he or she was. Frequently, however, they cast no useful light on that question at all...*** *" [p159, paras 37 & 38, emphasis added]*
>
> *"...in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation...and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn...the inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it..." [p160, para 40, as cited in original bullet points]*

3. The original bullet points (at para 10) also touched upon *Shamoon v Chief Constable of the RUC [2003] IRLR 285* and *Aylott v Stockton on Tees BC [2010] IRLR 994* as regards the comparison

and 'reason why' exercise for direct discrimination. The tribunal is further referred to the following extracts from *Aylott*:

> *"...there is no obligation on the ET to construct a hypothetical comparator in every case..." [p999, para 37]*
>
> *"...**the two-stage analysis which has been followed...in direct discrimination cases can cause unnecessary difficulty and confusion in practice.** As Lord Nicholls explained in [Shamoon]...the question of less favourable treatment than an appropriate comparator and the question whether that treatment was on the relevant prohibited ground may be so intertwined that one cannot be resolved without at the same time deciding the other. There is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others?..." [p1000, para 41, emphasis added]*
>
> *"...the real question is not so much about the hypothetical comparator, as whether the ET's finding on the ground of dismissal was supported by evidence..." [p1000, para 42]*
>
> *"...it is good practice to cross check by constructing a hypothetical comparator. **But there are dangers in attaching too much importance to the construct and to less favourable treatment as a separate issue, if the tribunal is satisfied by all the evidence that the treatment...was on a prohibited ground...**" [p1000, para 43, emphasis added]*

4. See also *Harvey* Div L/A/2 , para 260 (commenting upon *Shamoon*):

> *"...[t]he upshot is two-fold. First, it will not be a ground of appeal that a tribunal has determined the presence of direct discrimination without having gone through a sequential process of first identifying whether there was less favourable treatment and then considering the reason for it....Second, it points the way towards the correct approach in cases where it is difficult to apply a two-stage test, which is for a tribunal...to look at all the circumstances of the case to decide why the claimant was treated as she was...In so doing, a tribunal must take into account all potentially non-discriminatory factors which might explain the conduct of the alleged discriminator, as well as those which are indicative of discrimination..."*

5. It is accepted that the proposition at para 4 of the respondents' recent submissions on comparators is correct – *viz* that the tribunal may consider broader *evidential* comparisons where it is not possible to construct a statutory comparator.

6. **Pursuant to the above, in relation to direct discrimination the tribunal is invited to focus on the 'reason why' Mrs Mejury was treated as she was; as opposed to dwelling unnecessarily on the precise characteristics of a hypothetical comparator.** There is evidence from which the tribunal could reasonably infer that Mrs Mejury's disability may have been the 'reason why'. If so, it follows that a hypothetical comparator without Mrs Mejury's disability may not have been treated in the same way. The burden shifts to the respondents to provide a wholly non-discriminatory explanation. It is submitted that the respondents have failed to do that.

7. **In particular, the tribunal is reminded that Mrs Mejury's complaint of less favourable treatment subsequent to her diagnosis and absence with cancer was *not* confined to her OHW referal.** It encompassed *inter alia* the imposition of closer daily scrutiny or a 'more managed role' by Dr Sharkey; the permanent retention of most of her financial duties by the purported stand-in Heather Neill, long after the initial phased return period indicated both by OHW and in return to work meetings; and the first respondent's apparent intention to resurrect performance issues that supposedly pre-dated Mrs Mejury's absence but had never been raised with her previously.

8. The respondents rightly state that no other employee had been absent due to illness for a protracted

period. All that does, though, is to limit the scope for making solid evidential comparisons. In line with oral submissions it is suggested: (a) that in determining the 'reason why', the tribunal may make an evidential comparison of sorts between Mrs Mejury's *own* treatment by the first respondent before and after her diagnosis and absence with cancer. There was a marked change in said treatment; and that change is not explained adequately by the mere fact of her absence. Plus, (b) Mrs Mejury's treatment should be viewed in light of the evidence about advice sought from Peninsula Business Services and discovered by Mrs Mejury on 19th January 2012. As put to the first respondent's witnesses, this evidence showed clearly that they desired to get rid of Mrs Mejury. Yet the replies of Dr Sharkey and Dr Mason on cross-examination were highly unsatisfactory and indeed contradictory as to what the partners had discussed, and what they intended, *vis-a-vis* Mrs Mejury's role prior to obtaining advice. This is relevant to the last quote from *Ladele* relayed above at para 2. The first respondent treated Mrs Mejury unreasonably after she became disabled, especially in respect of the matters highlighted above at para 7. There is evidence that the first respondent wanted to dispense with her services. Its two witnesses gave a vague and inconsistent account surrounding the latter. In the circumstances, it is suggested that these points suffice to discharge stage one of the burden of proof; and equally they mean that at stage two the respondents have not provided a full, non-discriminatory explanation for their conduct. **Therefore a finding of direct discrimination is appropriate.**

9. Moreover, even if the tribunal *were* to construct a hypothetical comparator for the "cross check" mooted in *Aylott*, it is submitted that the conclusion would be identical. If the hypothetical comparator were an employee of Mrs Mejury's status who had been on long term absence for a reason other than cancer, there is no evidence to suggest that they too would have been placed in a 'more managed role'; or would have had some of their duties assigned permanently to another individual; or would have been faced with alleged historical performance issues.

10. Two final brief points might be made relating to comparators. Firstly, for the sake of completeness it should be noted that a comparator is not required for Mrs Mejury's ***harassment*** claim; rather the tribunal must look at the nature of the impugned conduct and the 'reason why' (see original bullet points, para 11 and *Harvey Div L/3/C, para 426*) Secondly, regarding the ***reasonable adjustments*** claim, the comparison is wider. As stated in *Smith v Churchills Stairlifts plc [2006] IRLR 41* "*...the proper comparator is readily identified by reference to the disadvantage caused by the relevant [PCP]...*" Per the original written bullet points on behalf of Mrs Mejury (at para 12), as supplemented by oral submissions, there is evidence from which the tribunal could reasonably infer that Mrs Mejury may have been placed at a more than minor or trivial disadvantage by the requirement to perform some degree of manual tasks; that the OHW recommendation to avoid heavy manual handling and to update manual handling training may have alleviated said disadvantage; and that the respondent failed to make a reasonable adjustment by implementing said recommendation. In this context, the comparators would simply be hypothetical non-disabled employees who were required to perform the same tasks and who were not thereby placed at a disadvantage.

Yours faithfully
McGrady Scullion

07/01/2013