THE INDUSTRIAL TRIBUNALS

CASE REFS: 751/13
700/14

CLAIMANT: **Patrik Galo**

RESPONDENT: **Bombardier Aerospace**

DECISION

The unanimous decision of the tribunal is:-

1. The claimant's claims of unlawful race discrimination are struck out.

2. The claimant's claims of unlawful disability discrimination (including claims of direct discrimination, disability related discrimination and indirect discrimination) are struck out.

3. The claimant's claims of victimisation on the grounds of having previously brought proceedings against the respondent are struck out.

4. The claimant's claims of harassment on grounds of his disability and nationality are struck out.

5. The claimant's claims of detriment on the basis of having made a public interest disclosure are struck out.

6. The claimant's claim of unfair dismissal is dismissed for the reasons set out at section 4 below.

Constitution of Tribunal:

Employment Judge: **Employment Judge McCaffrey**

Members: **Mrs D Adams**
Mr P McKenna

Appearances:

The claimant appeared in person.

The respondent was represented by Ms Michelle McGinley of the Engineering Employers Federation.

1. INTRODUCTION

1.1 This case involved two claims brought by the claimant, who is Slovakian, against the respondent. It was agreed by the respondent that the claimant had a disability, in that he suffers from Asperger's Syndrome. The claims involving alleged discrimination (including race discrimination, disability discrimination, victimisation, harassment and public interest disclosure detriment) were struck out on 12 November 2014, the third day of the hearing for the reasons set out at paragraphs 3.42 to 3.47 below. The claimant did not attend the hearing on the third day of hearing, but sent a letter and a medical report received after the commencement of the unfair dismissal claim and the decision to strike out his various discrimination claims. This was an application for a postponement of the case. That application was refused, for the reasons set out at paragraphs 3.48-3.52 below.

1.2 The respondent's representative then adduced evidence in relation to the claimant's claim of unfair dismissal in his absence. We indicated at the end of the hearing that we would give a written decision. The hearing ended at approximately 12.30 pm, the panel had a short break and then had a panel discussion ending at approximately 1.45 pm. We decided that the claim of unfair dismissal should be dismissed for the reasons set out at paragraphs 4.27-4.33 below.

1.3 At 2.50 pm that day, the claimant delivered to OIT a further copy of his application for postponement of the matter. This correspondence was therefore handed to the Employment Judge some time later, after the end of the hearing and the end of the panel's deliberations. We deal with this matter at paragraphs 3.50 and following below.

2. FACTUAL BACKGROUND TO THE CLAIMS

2.1 The claimant commenced work for the respondent as a Composite Operator on 29 October 2007. He initiated proceedings before the Industrial Tribunal in 2012 which were subsequently resolved by way of a conciliated settlement in May 2013.

2.2 Prior to that, there were two incidents on 18 March 2013 and 21 March 2013 of alleged aggressive behaviour by the claimant which led to him being suspended with full pay. The respondent proposed to carry out an investigatory meeting in relation to these matters, but this did not immediately proceed because of the claimant objecting to the Trade Union representative who was available to accompany him to the meeting.

2.3 There had already been some disciplinary issues and events which resulted in the claimant lodging a further claim (under case reference number 751/13) ("the first claim") on 12 April 2013 alleging amongst other things discrimination on grounds of

his religious belief, race and disability. The claimant lodged a grievance alleging religion and disability discrimination on the same day.

2.4 There followed a series of letters and meetings where the claimant was asked to specify the alleged discrimination for the purposes of his grievance but he did not respond. On 28 June 2013 the claimant provided the respondent with a letter from Joanne Douglas, Consultant Psychologist, advising that he had been diagnosed with Asperger's Syndrome. This letter was dated 10 April 2013, but not provided to the respondent until the end of June. The respondent sought to deal with the claimant's grievance in advance of dealing with the investigation and possible disciplinary action regarding the incidents on 18 and 21 March 2013. Paul Cunningham, an HR Manager with the respondent and Ryan Logan were appointed to deal with the grievance and the investigation of the March 2013 disciplinary issues. The position was complicated by the fact that after the claimant provided Joanne Douglas' report, the respondent then sought to obtain some further information in relation to his disability and in particular how it should address the grievance and the disciplinary matters in light of the claimant. The respondent instructed Doctor Wendy Losty, Consultant Psychiatrist, to examine the claimant. She saw him on two occasions in August and September 2013. The claimant however refused consent for her to answer questions regarding the management of the internal grievance and disciplinary process. Despite two further requests from the respondent to the claimant to provide his consent, the claimant refused to provide consent for Doctor Losty to answer questions regarding the internal processes, ending with the claimant's letter of 16 October 2013.

2.5 The claimant's grievance was dealt with at the end of November 2013 and the claimant then indicated that he would not be available from 5 December 2013 to 31 December 2013 as he would be out of the country. The respondent required him to attend a grievance outcome meeting on 5 December 2013 when the claimant was told his grievance was not upheld. It was then agreed that the investigation into the disciplinary matter would be dealt with after the Christmas break when the claimant was back in this country. Ultimately an investigation meeting regarding allegations of aggressive and erratic behaviour by the claimant on 18 and 21 March 2013 was held on 21 January 2014. It was agreed that there would be a disciplinary meeting on 23 January 2014. The claimant was accompanied at this meeting as a union representative and he was advised at the end of the meeting, after a period of deliberation that he would be dismissed and given a right to appeal. The claimant lodged a claim alleging (amongst other things) unfair dismissal and detriment due to having made a public interest disclosure on 23 April 2014 ("the second claim").

2.6 One of the individuals dealing with the disciplinary hearing (Mr Cunningham) had an unexpected bereavement due to the death of a close relative on 28 January 2014 followed by a period of leave and a period of working reduced hours. The other disciplinary officer left the respondent company shortly after the disciplinary hearing. There was a delay therefore in the claimant receiving the disciplinary outcome letter which was sent to him on 4 March 2014. His appeal period ran from the date of receiving the letter. The claimant lodged an appeal which was ultimately heard on 19 August 2014. The appeal panel considered letters sent by the claimant to the panel after the hearing, reconvened the appeal hearing on 11 September 2014 and the outcome of the appeal hearing was given to the claimant both orally and in writing on 15 September 2014. His appeal was unsuccessful.

2.7 We deal further below with specific circumstances of the unfair dismissal claim, but considered it useful to set out, albeit briefly, the lengthy factual background to these matters.

3. THE LEGAL PROCEEDINGS

3.1 As stated above, the claimant lodged proceedings before the Industrial Tribunal in 2012 which were resolved after these present proceedings had begun. They do not therefore concern us, except insofar as those proceedings were the basis of the claimant's claim of victimisation.

3.2 The first of the claims involved in this case (case reference 751/13IT) was lodged on 17 April 2013 and alleged discrimination on grounds of disability, race, "victimisation on my statutory rights" and discrimination on grounds of religious belief or political opinion. The claimant referred to various general matters in the course of his form, but he did not specify exactly his racial background or specifically refer to his disability although the form does refer to the respondent having given "an incorrect and misleading account of Aspergers Syndrome prior to assessing the claimant's disability". His allegations were imprecise and did not refer to specific allegations or incidents of discrimination.

3.3 The response in relation to that first claim was lodged on 3 June 2013 and a Case Management Discussion was convened on 25 July 2013. At that Case Management Discussion, legal and factual issues were identified and there was a general order made for discovery of documents, namely that each party should produce to the other copies of all documents which were in the care, custody, control or possession of them and which were relevant to the issues. At that stage no witness statements were ordered as it was considered inappropriate and the hearing was scheduled for 18-22 November 2013.

3.4 A further Case Management Discussion was held on 7 November 2013 at which there was a joint application for a postponement of the case due to outstanding matters regarding the disciplinary process which had not been completed (see below). The case was relisted for hearing from 27-31 January 2014 and the timetable amended accordingly.

3.5 At a further Case Management Discussion on 19 November 2013, the claimant did not attend although the Case Management Discussion had been arranged to deal with matters raised by him. At this stage the respondent conceded that the claimant had a disability under the Disability Discrimination Act 1995 (as amended).

3.6 A further Case Management Discussion was held on 22 January 2014 when the claimant was represented by Mr Neil Gillam of Donnelly and Kinder Solicitors. At that stage Mr Gillam on behalf of the claimant requested a postponement of the case due to the fact that he had recently been instructed and due to the fact that there was a pending disciplinary hearing due to take place at the end of January 2014. The respondent did not either consent or object to that application and the case was removed from the list. A further Case Management Discussion was to be arranged to deal with retimetabling of the case.

3.7 Following his dismissal by the respondent on 23 January 2013 the claimant lodged a further claim alleging unfair dismissal and detriment on the grounds of having made public interest disclosures on 23 April 2014 under case reference number 700/14IT. That claim form included allegations that the claimant's dismissal was discriminatory on grounds of disability, race, victimisation and harassment. The claim form also alleged that the claimant had made public interest disclosures regarding the duration from company policies which compromised product safety, although the precise detail of this was not set out in the form. This claim was consolidated with claim reference 751/13IT by order of the tribunal dated 30 June 2014.

3.8 A Case Management Discussion was held on 30 June 2014 at which the claimant was represented by Mr Gillam and the respondent by Ms McGinley of the Engineering Employers Federation: a copy of the record of proceedings is attached to this decision. At that Case Management Discussion the legal and factual issues in the case were identified and agreed. No orders for discovery or additional information were sought or required. The case was timetabled for hearing and directions were given in relation to the exchange of witness statements and production of a schedule of loss. The claimant was to provide its witness statement by 5.00 pm on 26 August 2014 and the respondent was to provide their witness statements by 7 October 2014. Directions were also given in relation to the preparation of a bundle for the hearing and the case was listed for hearing from 10-14 November 2014. In August 2014, the claimant's solicitors came off record.

3.9 On 9 September 2014 there was a further Case Management Discussion which the claimant failed to attend. The claimant had failed to provide his witness statement by 26 August 2014 as directed by the tribunal but had requested an extension of time. He did not however specify the period of time he required to provide a witness statement. On 8 September 2014 he had sent a letter to the tribunal indicating that he could not attend the Case Management Discussion on 9 September 2014, but he did not ask for any postponement. At that hearing, Employment Judge Crothers issued an unless order, directing that the claimant should provide a witness statement by 23 September 2014 or his claim would be struck out for failure to do so. That witness order was subsequently extended to 30 September 2014 to allow the claimant to provide medical evidence or reasons why he could not provide his witness statement at the specified time.

3.10 The claimant failed to provide his witness statement or any other information as required and a further Case Management Discussion was convened on 16 October 2014. A copy of the record of proceedings of that Case Management Discussion is also attached to this decision. The claimant attended and represented himself. Ms McGinley had made an application for the case to be struck out as the claimant had not provided medical evidence or reasons why he could not provide his witness statement, in spite of the fact that he had been given an extension of time to do so.

3.11 The claimant had produced two medical reports, both from his General Practitioner, one of which indicated he was attending Doctor McHugh at Bradbury Centre. In the light of this Employment Judge Crothers declined to strike out the claim. He stressed however to both parties that it was important that the case should proceed as listed from 10-14 November 2014. He also explained to the claimant, given his desire to furnish a witness statement, that if he did so near the hearing date he

could not expect to receive witness statements from the respondent's witnesses. In the circumstances however and taking into account the claimant's disability and the medical reports, he decided that witness statements should no longer be ordered but that the hearing would go ahead on 10 November 2014.

3.12 In light of the claimant referring to "conditions" which had prevented him from complying with various orders of the tribunal, Employment Judge Crothers also ordered both sides to provide to one another by not later than 23 October 2014 all documentation relevant to any of the issues in the case. He referred the parties to the legal and factual issues set out in the record of proceedings of the Case Management Discussion of 30 June 2014 as guidance for what was relevant.

3.13 Towards the end of that hearing the claimant made an application for a postponement of the substantive case. This was opposed by Ms McGinley, indicating that the respondent would be prejudiced if the case did not proceed in relation to the availability of witnesses and herself as she was due to commence maternity leave in November. The claimant was refused an adjournment of the matter at that time. The record of proceedings notes the possibility of a strike out application at a later stage.

3.14 On 23 October 2014 the claimant sent an email to the Office of the Industrial Tribunals enclosing a letter of 22 October 2014 and setting out a list of items of which he said he required discovery. He had not sent this to the respondent's representative. The correspondence was copied to the respondent's representative and both parties were advised that this matter would be dealt with at the outset of the hearing on 10 November 2014.

3.15 The respondent's representative replied by email dated 30 October 2014 setting out their dissatisfaction at the way that the case was proceeding and the claimant's failure to comply with the tribunal's order that he should provide discovery of any relevant documentation by 23 October 2014. Mr McGinley for the respondent also indicated that the respondent was seeking a strike out of the claimant's claims for failure to comply with the tribunal's orders regarding. Her email to the tribunal was copied to the claimant. The Office of the Tribunals also copied the email to the claimant by post and email, with a request for his comments as soon as possible.

3.16 The claimant wrote again to the Office of the Industrial Tribunals on 29 October 2014 seeking an "appeal" of Employment Judge Crothers' directions at the Case Management Discussion on 16 October 2014. This letter was received on 31 October and had crossed with the respondent's correspondence. He said that he wished to provide a witness statement and indicating he wished to have the matter postponed on medical grounds. Both parties were advised by letter and email from the Office of the Tribunals that all outstanding matters would be dealt with at the outset of the full hearing on 10 November 2014. On that occasion the correspondence was again copied to the respondent's representative who replied by email on 6 November 2014. In that email Ms McGinley set out that she had complied with the order in relation to discovery made by Employment Judge Crothers on 16 October 2014. She stated that she had provided all documentation to the claimant by delivering it to him on Friday 17 October 2014 and indeed had provided all documents which had been previously been provided to this solicitor, for completeness. She clarified to the claimant that she did not intend to include in the bundle for hearing all of the documents provided to him but asked if he wished

for any particular document to be included in the hearing bundle that he should identify them and/or provide her with a copy in advance of the hearing. There was no response from the claimant in relation to this. Ms McGinley also indicated that she had responded to the claimant in relation to his requests for discovery and indeed she had sent an email to the tribunal indicating that in her view some of the documents had already been furnished, and questioning the relevance of others. The claimant had not sought an order for discovery at any time.

3.17 The claimant in his letter of 29 October 2014 had repeated a request for an adjournment of the matter.

3.18 At the direction of the Employment Judge dealing with this matter, a letter was sent (by post and email) to the claimant and to the respondent on 6 November 2014, reminding them that all outstanding matters would be dealt with at the commencement of the hearing on 10 November 2014. They were also reminded that any application for a postponement on medical grounds needed to be accompanied by an up-to-date medical report which specified the nature of the claimant's illness, how it would prevent him from attending the hearing and when he might be expected to be fit to attend the hearing.

3.19 At the commencement of the hearing on 10 November 2014 there were a number of applications made which we deal with in order below. In advance of the hearing it had been indicated that there would be an application for a postponement by the claimant on medical grounds and an application by the respondent for the matter to be struck out. Later that afternoon the claimant raised the issue of an application for further discovery and then subsequently raised the issue that he required the right to lodge a witness statement as a reasonable adjustment. We dealt with these applications as set out below.

A. Application to Adjourn on Medical Grounds

3.20 The claimant made an application to adjourn the case on medical grounds and handed in two medical reports. The first of these was from Doctor Andrew Harper of the University Health Centre at Queen's University and is dated 15 October 2014. In its entirety this reads as follows:-

> "To whom it may concern:
>
> Mr Patrick Galo – 04/03/1974 ...
>
> This patient registered with University Health Centre attended the surgery today and was sent by Doctor Andrew Harper. He is currently undergoing legal proceedings. He has struggled to comply with all of the Court's requests. He tells me this is due to difficulty concentrating and completing tasks. He is under review with Psychiatry for depression and post-traumatic stress related to the legal proceedings. We have not received any letters yet detailing diagnosis. He attends Doctor McHugh at Bradbury Centre who would be able to provide further information.
>
> Yours sincerely"

3.21 The second report was from the Primary Community Mental Health Team. Although the signature line reads "Doctor S McHugh, Consultant Psychiatrist" it was "pp'ed" by Claire Toner. The report reads as follows:-

> "To whom it may concern
>
> Re – Patrick Galo, DOB 04/03/1974 ...
>
> This man was referred to the Primary Mental Health Team and seen at the Bradbury Health and Well-Being Centre on 2/10/2014. He was assessed by myself on (sic) and has subsequently been referred for assessment to the Cognitive Behavioural Therapy Team.
>
> Yours sincerely"

3.22 We pointed out to the claimant that he had been specifically reminded in the tribunal's letter of 6 November 2014 that if he was seeking a postponement on medical grounds, the medical report provided would have to be up-to-date, and would have to provide details of the nature of the illness, how it would impact on his ability to conduct proceedings and give an indication of when the claimant would be able to attend the hearing. In so doing we were conscious of the decision of the Court of Appeal in **Teinaz v Wandsworth London Borough Council [2002] IRLR 721** where Peter Gibson LJ stated:-

> *"A litigant whose presence is needed for the fair trial of the case, but who is unable to be present through no fault of his own would usually have to be granted an adjournment, however inconvenient it may be to the tribunal or Court and to the other parties ... But the tribunal or Court is entitled to be satisfied that the inability of the litigant to be present is genuine and the onus is on the litigant for an adjournment to prove the need for such an adjournment".*

3.23 In **O'Cathail v Transport for London EWCA Civ 21 [2013] IRLR 310** the Court of Appeal confirmed that the approach should be taken was effectively one of fairness. As **Mummery LJ** stated:-

> *"Overall fairness to both parties is the overriding objective. The assessment of fairness must be made the round. It is not necessarily predetermined by the situation of one of the parties, such as the potentially absent claimant who is denied an adjournment".*

3.24 We are also aware of the guidance in relation to adjournments issued in relation to seeking a postponement of a hearing issued by the Presidents of the Employment Tribunals for England and Wales and for Scotland. While this does not apply strictly speaking in Northern Ireland, the principles are extracted from relevant case law which is highly persuasive in this jurisdiction. In relation to a postponement sought for medical grounds, medical certificates and supporting medical evidence should be provided together with an explanation of the nature of the health condition concerned. The medical evidence should include a statement from the medical practitioner that in their opinion the applicant is unfit to attend the hearing, the prognosis of the condition and an indication of when that state of

affairs may cease. (See Harvey on Industrial Relations and Employment Law, Division P1, paragraph 756).

3.25 Ms McGinley pointed to the evidence which had been produced by the claimant and suggested that his medical evidence was not sufficient to justify an adjournment. She noted that Doctor Harper's report had already been before Employment Judge Crothers on 16 October 2014 when he had refused an adjournment of the case. She reminded us that the case had had a lengthy history and that it had already been delayed. She also noted that she had already raised the issue that two of the respondents' witnesses who were essential in the terms of the presentation of that case would be leaving the respondent company at the end of December. She herself was due to go on maternity leave at the end of November and had had carriage of the matter for almost two years. She argued that the respondent would be severely disadvantaged if the case did not proceed. She noted that the claimant had made very serious allegations against a number of the respondents' witnesses accusing them of lying, having been abusive and having been manipulative. She suggested that these individuals as well as the claimant were entitled to have the allegations against them heard and dealt with.

3.26 We considered the matter carefully and came to the conclusion that the claimant had not provided sufficient information to us to ground an application to postpone the matter on medical grounds. We believe that the new report from Doctor McHugh did not add anything to the information before us. There was no information regarding the nature of claimant's condition, how it affected his ability to appear before the tribunal or when he might be fit to attend. We were also aware that at the time of dealing with this application, the claimant was present and was able to put forward arguments on his own behalf. We could not see at that time that he was physically unable to present his case. Accordingly the application for a postponement was refused.

B. Application to Strike Out

3.27 The respondent made an application to strike out the claimant's claims on the basis that he had failed to comply with the tribunal's orders of 16 October 2014 to provide discovery of all documents on which he intended to rely and which were relevant to the proceedings on or before 23 October 2014. Notice of this application had been given to the claimant by the respondent's correspondence of 30 October 2014, copied to the claimant by both respondents representative and the Office of the Tribunals in advance of the hearing. There followed an exchange between the parties in relation to this matter. Ms McGinley alleged that the claimant had failed to address any issues in relation to the unfair dismissal claim. She noted that at no time at the hearing of 16 October 2014 had the claimant indicated that he would have difficulty in complying with the tribunal's order and she also noted that Employment Judge Crothers had specifically recorded that he was content that the claimant had understood his directions and appreciated what it was required.

3.28 Mr Galo said that he was hearing for the first time that there was an allegation of failing to provide information and discovery on behalf of the claimant. When it was pointed to him that Employment Judge Crothers had been satisfied that the claimant understood what was required at the Case Management Discussion in October, the claimant denied this and said that Employment Judge Crothers did

not fully understand what the conditions were affecting the claimant and how it affected him from fully participating in the proceedings. He went on to say that he had no information to disclose in relation to discovery. When he was asked specifically if he had provided any information to the respondent's solicitor in relation to his efforts to find alternative work and receipt of Social Security benefits, he indicated that he had not been aware that he was supposed to do this.

3.29 The claimant also made a number of unsubstantiated allegations against Employment Judge Crothers and Ms McGinley accusing them of manipulation and accusing Ms McGinley of refusing to provide information and discovery.

3.30 The respondent had made its application on the basis of Rule 18(7)(e) and (f) of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 ("The 2005 Rules"). These provisions indicate that a tribunal may make orders striking out a claim or response for non-compliance with an order or practice direction or may strike out a claim where the Chairman or tribunal considers that it is no longer possible to have a fair hearing under Rule 26 in those proceedings.

3.31 Having reflected on this matter, we noted that the claimant had indicated that he had no relevant discovery and that he alleged that he had not specifically been told to disclose to the respondent if he had no discoverable documentation. Ms McGinley said that she had specifically asked this at the Case Management Discussion and we note that she also refers to this in her correspondence. However it was not specifically recorded in the Record of Proceedings of the Case Management Discussion on 16 October 2014. This does not reflect in any way on Ms McGinley or Employment Judge Crothers who provided a comprehensive record of proceedings. However, in the light of that and in light of the fact that we believed that this matter could be dealt with in a more proportionate way, we refused to strike out the claimant's claim at that time. However we indicated we would require the claimant to provide the following information by 9.30 am on Wednesday 12 November 2014:-

(1) Details of all new jobs held by the claimant since the date of his dismissal by the respondent including the start date and earnings received.

(2) Details of all jobs applied for, dates of applications and the nature of the work applied for.

(3) Details of all Social Security benefits received by the claimant from the date of dismissal to the present.

We indicated that if the information was not provided to the respondents by that time the tribunal would then reconsider the matter.

C. Application for Discovery

3.32 The above two applications were dealt with between approximately 12.15 pm and 3.30 pm on the first day of hearing, with a short break for lunch and a break for the tribunal to deliberate on its decision. We gave our ruling and then indicated to the parties that as it was then 3.30 pm in the afternoon we would adjourn the hearing for the day and recommence the following morning. The claimant was made

aware that as he was claiming discrimination on a number of grounds it would be for him to start with his evidence. He indicated that he would not be prepared to go ahead the next day. We repeated to him that we proposed to start the hearing the next morning and he indicated that he could not go ahead because he was seeking discovery of documents. The claimant indicated that the respondent had not provided complete discovery. After some discussion in relation to this matter the claimant was invited to indicate exactly what matters he was seeking discovery of, how they were relevant to the issues before the tribunal and what efforts he had made to seek discovery prior to commencement of the hearing. He was specifically asked when these matters had been raised at the numerous Case Management Discussions in relation to the case. He was unable to point to the records of proceedings at that stage as he did not have them with him. We indicated that we would deal with the matter first thing the following morning, that he would have approximately fifteen minutes to address us on the topic and we would give the respondent a similar amount of time to address us before deciding the matter.

3.33 The following morning the claimant made his application and indicated that he was demanding full discovery as required to allow him to comply with the tribunal's orders. When he was asked what previous requests or applications he had made in relation to discovery of documents, he indicated that he has been applying since July 2013 onwards. When he was asked if he had raised it in a Case Management Discussion, his reply was that he had directed Mr Gillam to request these matters around June and July 2014 but had not had any response. In fact the record of proceedings for the Case Management Discussion in June 2014 (see copy attached) clearly indicates under the heading "Interlocutory matters – No order is sought or required". This indicated to us that no orders for discovery had been sought at that stage and this presumably meant that either Mr Gillam was satisfied with the information already received or was satisfied that he would receive responses from the respondent's Solicitor.

3.34 The claimant then referred to his letter dated 22 October 2014 and he was asked if he had made an application to the tribunal for an order for discovery of the matters set out in that letter. His answer was that he had made an appeal. He was reminded again that he had been told the previous day that he was unable to appeal a direction of the tribunal made at a Case Management Discussion. The claimant went on to say that he required more information to comply with the tribunal's orders. He did not at any time during the course of a twenty-five minute application indicate exactly the matters of which he was seeking discovery, how they were relevant to the issues nor did he confirm when he had made any request to the respondent for these matters prior to his letter of 22 October 2014. In that letter he did not seek a further Case Management Discussion or an order in relation to the matter of discovery.

3.35 Ms McGinley indicated that she had provided full discovery of all relevant matters to the claimant. She indicated that at no stage did Mr Gillam send her a request for discovery to her. She referred to the legal and factual issues which had been settled at the Case Management Discussion in June 2014 and indicated that the claimant's request for documents on 22 October 2014 (which was sent to the tribunal and not to the respondent) did not clarify how those requests were relevant to the legal and factual issues before the tribunal. She noted that

discovery had been provided to Mr Gillam and again to the claimant following the tribunal's order on 16 October 2014.

3.36 We rose to consider the matter of discovery and subsequently gave our ruling to the parties. We refused the application for discovery on the grounds that the claimant had failed to provide any details of the matters of which he required discovery and how they were relevant to the issues before the tribunal. We noted that in June 2014 when the claimant was legally represented, no request for orders for additional information or discovery was made at the Case Management Discussion or indeed subsequently. We also noted that the claimant's request on 22 October 2014 did not show how the matters he had set out in his letter were relevant to the determination of the issues in the case. Accordingly, we refused the application for discovery.

D. Application by the Claimant for Reasonable Adjustments

3.37 During the making of his application for discovery and after we came back to give our ruling, the claimant indicated that he would be unable to start due to his medical conditions. It was made clear to him that that application had been dealt with the previous day. In his application for discovery, he had indicated that as a person with a disability he was seeking a reasonable adjustment. When he was asked what the reasonable adjustment sought was, he indicated that he required a "visual aid". On further questioning it transpired that he wished to submit a witness statement to the tribunal. It was pointed out to him that Employment Judge Crothers had waived the requirement for a witness statement to facilitate him because he (the claimant) had not provided a witness statement at the dates previously ordered and had failed to comply with two extensions of that order. The claimant went on to say that he wanted to provide a witness statement but that he had been prevented from doing so because he didn't have proper discovery in relation to the case. It was pointed out to him that these matters had already been dealt with. When we returned to the room after the application for discovery had been made and gave our ruling, the claimant was clearly very agitated and sat with his head in his hands at various points. We understood that during the break he had gone to speak to the Labour Relations Agency representative and indeed had asked the clerk what would happen if he went home.

3.38 When we came back into the room at approximately 11.15 am, the claimant indicated that the only reason he had come to the tribunal was to prevent "any other irregularities or manipulation by McGinley" and he indicated that under these conditions he believed that there was an unfair and untransparent process.

3.39 He refused however to go ahead with the hearing. He said that he wanted to go ahead with his case but that he was not able to do so on medical grounds. He was reminded that we had already dealt with his application in relation to this the previous day. We indicated to him that we would rise again for a short time but that we were concerned to know from him whether he intended to go ahead with his case or withdraw. We also said that if he was not prepared to give evidence, we would need to consider whether we would go ahead and deal with the matter without the benefit of his evidence.

3.40 We later returned to the tribunal room and indicated that, on reflection, we believed the best course of action would be to adjourn the hearing for the day in

order to allow the claimant the rest of that day and the following day to prepare a witness statement. We would recommence the hearing on Thursday 13 November 2014 at 10.00 am. We indicated that this would have the benefit (in our view) that the claimant could put down on paper his evidence to the tribunal. We were aware that he was agitated and appeared upset and we believe that he would not therefore be at his best if he was asked to continue on that day. If the claimant had time to put his witness statement on paper (and there was already quite a lot of information in both claim forms which would assist him) this would have the advantage that the respondent would then be clear as to the exact evidence being given by the claimant. We could move on Thursday to cross-examination of the claimant on his evidence and the respondents would then be able to call their witnesses, who the claimant would be able to cross-examine. We also indicated to the parties that the panel would if necessary be available to deal with the case on Wednesday and Thursday the following week.

3.41 The claimant indicated that he wanted to warn us that it would be difficult to provide a statement in such a short time and that he had already indicated that he had difficulty in providing a statement. He was reminded that he had been directed to provide a witness statement at the Case Management Discussion in June of 2014. He had not complied with the order in spite of the fact that extensions had been given. He was told that he was being facilitated in being given an extra day and a half to provide it. He was also advised that as he had clear handwriting, we were content to accept a handwritten statement and that if he came to the Office of the Tribunals early, the clerk would arrange for his statement to be photocopied for the panel members and for the respondent in order to assist him. We were satisfied that the claimant understood at all times exactly at what was being requested of him and the directions that were given. We also made it clear that we would start the hearing again at 10.00 am on Thursday 13 November 2014.

E. Application by the Respondent to Strike Out on 13 November 2014

3.42 On the morning of 13 November 2014, the tribunal was ready to start the hearing at 10.00 am. The claimant was not in attendance. There had been no contact from the claimant to the Office of the Tribunals and the respondent's representative indicated that she had heard nothing from the claimant either. The hearing started at approximately 10.15 am in the claimant's absence. Ms McGinley also indicated she had received no information from the claimant in relation to his efforts to find alternative work or receipt of Social Security benefits as directed by the tribunal on Monday 10 November 2014. She also noted that had the claimant produced this information this morning at the hearing, she would not have taken any issue in relation to it. She renewed her application for strike-out of the claimant's claims under Rule 18(7)(e) namely, on grounds of non-compliance with an order or practice direction of the tribunal and that a fair hearing was not possible (Rule 18(7)(f)) for the reasons she had already outlined in her strike out application on 10 November 2014. The orders the claimant had breached were the order to provide discovery of all relevant documents made by Employment Judge Crothers on 16 October 2014 and the subsequent order made by the tribunal on 10 November 2014 for discovery of documents relating to the claimant's efforts to find other work and the social security benefits had had received. Details of that order are set out at paragraph 3.31 above.

3.43 We rose to consider this matter and subsequently ordered that all of the claimant's claims apart from his unfair dismissal claim (namely the claims of discrimination on grounds of race, religious belief or political opinion, all elements of disability discrimination, victimisation, harassment and detriment on ground of having made a public interest disclosure) should be struck out for failure to comply with the Tribunal's orders and also on the grounds of Rule 18(7)(f) namely, that it was not possible for a fair trial to take place. Our reasons for this decision are as follows. This case has been dogged by delays from the outset. Details of the discrimination alleged in the first claim were unclear, and it appeared that the lack of clarity from the claimant in his tribunal proceedings had also led to delay in dealing with similar issues raised by way of an internal grievance. We have set out above at paragraphs 2.1-2.7 and 3.1-3.19 of this decision the lengthy history of the case and its factual background. We are aware of the case law in relation to these issues, in particular the judgments of the Court of Appeal in England and Wales in **O'Cathail v Transport for London [2013] ICR 614** and **Riley v The Crown Prosecution Service [2013] EWCA Civ 951**. We have referred to **O'Cathail** at paragraph 3.23 above. In **Riley**, the claimant had brought claims of unlawful race discrimination against her employers, covering a lengthy period of time. Her tribunal claims were lodged in September 2009 and April 2010, and she had already been off sick for over a year and a half at that point. She was still off sick in May 2011, when the employment tribunal hearing was due to take place. After numerous delays, the tribunal heard medical evidence from two experts, who agreed they were unable to say when Ms Riley would be fit, if ever, to take part in proceedings. The case was struck out, on the basis that if the Employment Judge took account of the claimant's health and the balance of prejudice to either party, a fair trial was not positive.

3.44 In the Court of Appeal, Longmore LJ upheld the decision of the Employment Tribunal. He cited with approval the comments of Peter Gibson LJ in **Andreou v The Lord Chancellor's Department [2002] IRLR 728**, where he said:

> *"The tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to [the claimant] (of course an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights, having regard to the terms of Article 6): they had to include fairness to the respondent. All accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that a complaint such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed".*

3.45 In the present case, the events giving rise to the claim occurred in early 2013. There had been delays in the case coming on for hearing, partly due to the delays in dealing with the disciplinary process and appeal, which in turn gave rise to a further claim being lodged, and the first claim being postponed so that the two claims could be consolidated and heard together. There were then further delays, caused by lack of co-operation by the claimant, which had also hindered the respondent's internal process. The medical evidence produced by the claimant was imprecise as to the exact nature of his illness and the final report indicated he would not be fit to attend this tribunal "for the foreseeable future". Faced with the prospect of a lengthy delay if the case were postponed, we also had to consider

the fairness of any postponement to the respondent. Their representative noted that the claims had been ongoing for almost two years. Two of their essential witnesses, the disciplinary officer and the manager who heard the appeal, were due to leave the company at the end of December 2014 and their future non-availability would seriously hinder the respondent's ability to present its case. The claimant had made serious allegations against a number of the respondent's staff and its legal representative: these individuals were entitled to have these allegations dealt with too. The respondent's legal representative was due to go on maternity leave at the end of November and would not then be available for several months, perhaps longer. As she had had carriage of the matter from the start, both she and the respondent were keen she should be able to deal with it, which is perfectly understandable. If the case were postponed (perhaps indefinitely), the respondent would be severely disadvantaged. These issues led us to the view that the matter should not be postponed any further.

3.46 In our view, this case had been case-managed carefully and thoroughly, and in such a way as to give every allowance possible to the claimant in light of his disability. He refused to co-operate which had meant more hearings, thus increasing the cost for the respondents. Indeed, the hearing listed for 5 days from 10-14 November had been severely disrupted by applications caused by the claimant's failure to co-operate with the tribunal or comply with our directions. If the case continued, costs would continue to increase, with no clear prospect of resolution. We considered that the discrimination claims set out at paragraph 3.43 should be dismissed and that we would proceed to hear the unfair dismissal claim in the claimant's absence. He had attended on the other days of hearing at 10.00 am, but on 13 November he failed to attend and the email requesting a postponement was sent out at 10.57 am, almost an hour after the start time for the hearing. We can only conclude that his non-attendance was deliberate, and the timing of his email scheduled to disrupt any planned hearing.

3.47 This meant that the only claim still outstanding was the claimant's unfair dismissal claim which is dealt with at Section 4 below.

F. Second Application for Postponement

3.48 At approximately 11.15 am on 13 November 2014 during the hearing of evidence on the unfair dismissal claim, the tribunal was made aware that an email from the claimant had been received at 10.57 am that morning in which he made a further application for postponement of the case. We rose to consider that application. The claimant had produced a further medial report from Dr S J W Martin of the University Health Centre at Queens. The body of that report reads:-

> "To whom it may concern
>
> Patrik has given me permission to write this letter.
>
> I believe you are looking at a reasonable timeframe at which Patrik would be deemed medically fit to attend the tribunal.
>
> I see Dr McHugh (Consultant Psychiatrist) and Dr Harper (my GP colleague) have already submitted letters.

Further to their letters Patrik is awaiting referral for a further assessment and treatment and at present (having met with Patrik on several occasions) I do not feel he is medically fit to attend a tribunal for the foreseeable future.

He may need specialist medical assessment organised by the tribunal to ensure he is medically fit to attend.

I hope this is of help but may I suggest that you contact Dr S McHugh who has already submitted a letter to yourselves for further assessment.

Yours sincerely"

3.49 We considered the content of that letter and the claimant's covering note requesting a postponement of the case. We did not consider that this report assisted us any further, particularly since it did not give a timeframe for the claimant to be able to attend the tribunal. In fact, it clarified that the claimant would not be fit "for the foreseeable future". It did not, either, specify exactly the nature of the claimant's medical problems or how they prevented him from attending the tribunal.

3.50 We were also aware of the difficulties raised by the report produced by Dr Martin. For example, it was suggested in that report that the tribunal may wish to carry out an assessment of the claimant before deciding to proceed. We are conscious of the guidance given by Underhill J in **Johnson v Edwardian International Hotels Ltd (UKEAT/0588/07/ZT)** which specifically deals with the power of the tribunal to have a claimant assessed in relation to his mental capacity. That decision makes it clear that there is no such provision in the Industrial Tribunal Rules of Procedure in England and Wales, and equally there is no such provision in the Rules of Procedure applying in Northern Ireland. We cannot therefore see that we would have any power to oblige the claimant to undergo such an assessment.

3.51 Secondly, and perhaps more pertinently for the purposes of these proceedings, the claimant had not produced a medical report which complies with the guidance in the **Teinaz** and the **O'Cathail** decisions set out above, and we could see no basis therefore on which to change our decision in relation to the postponement request. It was therefore refused.

3.52 Following the end of the hearing at 12.30 pm, the tribunal rose to consider their decision in relation to the unfair dismissal case and had a short lunch break. They concluded their deliberations at approximately 1.45 pm, having indicated to the respondent's representative that a written decision would be given to deal with the various points which had been raised over the three days of the hearing.

3.53 At approximately 2.50 pm the same day the claimant called at the Office of the Industrial Tribunals and left a further copy of Dr Martin's medical report, his cover note and a hand written letter set out on A4 paper which covers over four pages. That letter, received after the end of the proceedings, sought an adjournment of the matter and challenged the tribunal's decision not to adjourn the hearing, suggesting that it was "plainly wrong" and that the claimant had been denied a fair hearing under Article 6 of the European Convention of Human Rights. Bearing in mind that the claimant is Slovakian by nationality, it is relevant that this letter (which is in clear, elegant handwriting), uses complex and sophisticated language

in English and sets out again the claimant's grounds for a postponement, including references to Article 6 of the European Convention and legal principles.

3.54 Although this application was received after the end of the proceedings, we have taken it into account for completeness. We have already set out the relevant case law in some detail at paras 3.23 and paras [3.43-3.47] above. In particular, we are conscious of Longmore LJ's comments in **Andreou**, where he noted that the tribunal, in considering whether to refuse an adjournment, had to balance not only the rights of the claimant under Article 6 of the ECHR, but also the rights of the respondent. (See para 3.4 – above). The arguments against postponement on medical grounds have already been set out above, and the claimant's reliance on his Article 6 rights did not persuade us to change our decision. The claimant provided no clear medical evidence as to when he may be fit to pursue his case and for the reasons set out a paragraph 3.44 above, we accept that it would be unjust to the respondent to delay the cases perhaps indefinitely.

4. THE UNFAIR DISMISSAL CLAIM

(a) The Issues and Facts

4.1 The claimant claimed that he had been unfairly dismissed from his employment with the respondent on 23 January 2014 and in particular that the employer had treated him unfairly in light of his disability (Asperger's Syndrome) in that they had not taken this condition into account properly in dealing with the disciplinary procedure. The claimant also alleged that the investigation into the claimant's grievance and the appeal had both taken too long and that there had been unreasonable delay.

4.2 The respondent disputed this, arguing that the claimant had been fairly dismissed for gross misconduct. Specifically the respondent referred to two incidents. The first was on 18 March 2013 when the claimant was being approached by Gary Pritchard and Paul Maguire, to discuss the latter's concern that the claimant had used a heat gun without proper permission. When the claimant saw them approaching, he threw a rubbing stick behind him without looking to see where it fell and walked off, avoiding speaking to Mr Maguire. The second incident related to the claimant's medical appointment with Doctor Bill Jenkinson, the Occupational Health Consultant on 21 March 2013. This was against a background where the respondent had been passed a letter dated 8 March 2013 from Joanne Douglas, Chartered Psychologist, indicating that the claimant's behaviour profile met the diagnostic criteria for Autistic Spectrum Disorder which indicated he had Asperger's Syndrome. When the claimant attended for the medical appointment with Doctor Jenkinson, Doctor Jenkinson reported that the claimant behaved aggressively and verbally abused him, including shouting the word "shit" in Doctor Jenkinson's face. Doctor Jenkinson was unable to obtain the claimant's consent to proceed with the consultation. Immediately after this consultation meeting, Doctor Jenkinson met Paul Maguire who was concerned that Doctor Jenkinson was in a state of shock, and took him to another office where Doctor Jenkinson described his meeting with the claimant. The claimant was suspended on full pay on 21 March 2013 due to behaviour that appeared to be erratic and aggressive. He was advised the matter would be further investigated. The claimant remained suspended on full pay until he was dismissed in January 2014.

4.3 On 11 April 2013 the claimant was invited to an investigation meeting which did not proceed (because his preferred union representative was not available).

4.4 On 17 April 2013 the respondent received a grievance letter from the claimant and as a result of that grievance being raised, the investigation into the disciplinary matters was postponed until the grievance matter had been fully investigated. Details of this are set out above at paragraphs 2.3-2.6.

4.5 There were delays in progressing the investigation and disciplinary process, in part due to the investigation of the grievance and in part due to the fact that the respondent endeavoured on a number of occasions to obtain the claimant's consent to a report from Doctor Wendy Losty. They had sought this information to enable them to make reasonable adjustments to properly consider the claimant's grievances and disciplinary matters, but the claimant repeatedly refused to provide this consent.

4.6 The claimant was invited to a meeting on 5 December 2013 in relation to his grievance. On 28 November 2013 (the same day he was sent the letter regarding the grievance meetings) he contacted Human Resources to say he would not be available from 5-31 December 2013 as he was taking holidays. The claimant was refused leave for 5 December 2013 and invited to attend the grievance meeting. The outcome of the grievance was indicated to the claimant on that date and it was subsequently agreed that the internal process regarding the investigation would be resumed in January 2014 when the claimant was back in the country.

4.7 There were investigation meetings in relation to the outstanding disciplinary matters on 6 and 17 January 2014. The investigation was dealt with by Paul Cunningham and Ryan Logan, another manager, who also interviewed the managers involved in the incident on 18 March 2013, Paul Maguire and Gary Pritchard. Mr Pritchard corroborated Mr Maguire's account of the incident when Mr Maguire had approached the claimant to speak about using a heat gun without authorisation. They both said that the claimant then threw a rubbing stick which he had been using over his shoulder, then threw his gauntlets into the bin and walked off. They were concerned that the claimant's action in throwing the rubbing stick behind him without looking to see where it was going could potentially have caused injury to someone else. They were also concerned at his demeanour and erratic behaviour. It was clarified for us that a rubbing stick is an item approximately eight inches long and two inches wide which is made of nylon plastic and therefore is quite a heavy object for its size.

4.8 Mr Cunningham and Mr Logan also considered Doctor Jenkinson's statement which had been made shortly after the events of 21 March 2013 and also interviewed him on 22 January 2014.

4.9 At the investigation meeting on 21 January 2014 the claimant was present along with his union representative Dougie Jamison and a second union representative Kieran Ellis who was there to take notes. The investigatory panel had been provided with notes in relation to dealing with Asperger's Syndrome which had been provided by the claimant. As stated above, they did not have the benefit of a report from Doctor Losty.

4.10 On the basis of the interviews which were carried out it was decided that it was appropriate to proceed to a disciplinary hearing and indeed it had been agreed at the investigation meeting on 21 January that the disciplinary meeting would proceed on 23 January.

4.11 The claimant was provided with full details of the allegations against him. He was advised that if either of the allegations was found to be substantiated he may be dismissed summarily on grounds of gross misconduct. He was provided with a copy of the respondent's disciplinary procedure.

4.12 The claimant was also provided with copies of the handwritten and typed investigation notes from his own meetings, notes from Doctor Jenkinson's examination with the claimant and notes from Mr Cunningham's meeting with Doctor Jenkinson on 22 January. The claimant had been previously provided with a copy of Doctor Jenkinson's memo of 21 March in relation to the meeting and interview notes of the investigation meetings with Gary Pritchard, Joanne Millar and Paul Maguire.

4.13 The claimant was advised of his right to be accompanied at the meeting and advised that the panel would have the notes on Asperger's Syndrome from Disability Action. They also offered the claimant the opportunity to be accompanied by a person from the Orchardville Society (which he had previously approached for assistance) if he wished.

4.14 The disciplinary meeting took place on 23 January 2014. The claimant was given the full opportunity to put his case.

4.15 At the previous investigation meeting the claimant had given a totally different account of events on both 18 and 21 March 2013. He made allegations about Doctor Jenkinson's behaviour towards him on 21 March and when it was put to him that he had acted aggressively towards Doctor Jenkinson, he denied this completely. Mr Cunningham noted in his evidence to the tribunal that the claimant appeared to have no perception at all of how his conduct might be seen by someone else.

4.16 The claimant was advised at the end of the meeting on 23 January 2014 that he was being dismissed and that he would have a period of five working days to lodge an appeal. That meeting began at 10.15 am and continued until 10.40 am. There was then a break and the claimant was told the outcome at 12.10 pm.

4.17 Unfortunately a few days later Mr Cunningham's mother died unexpectedly. He was off work for a period of time and was then working on a part-time basis for some time. Mr Logan the other person dealing with the disciplinary matter left the Company on 31 January 2014 and so was unable to deal with matter. As a result, the formal dismissal letter was not sent to the claimant promptly.

4.18 Mr Cunningham wrote to the claimant with the formal outcome of the disciplinary hearing on 4 March 2014. In that letter he apologised for the delay. He confirmed the finding of gross misconduct against the claimant and advised the claimant that he had the right to appeal the decision in writing within five working days of receipt of the letter.

4.19 The claimant wrote seeking an appeal on 6 March 2014. That letter was addressed to the Vice-President and General Manager of Bombardier. Mr Cunningham wrote to the claimant on 25 March 2014confirming that his appeal had been received and enclosing a typed version of the notes from the investigation and disciplinary hearing. On 2 June 2014 Bronwen Brewer, Human Resource Business Partner in Engineering and Finance, wrote to the claimant to indicate that she had been appointed as the HR representative on the appeal investigatory panel and that she would contact him again shortly. Also appointed on the appeal panel was Mr Ken Teague who was notified about this matter in June 2014 when he was working in Montreal at a customer site. He confirmed in his evidence to the tribunal that he was to be on the appeals panel along with Stephen Scott, Production Manager and Bronwen Brewer. It was explained that Mr Teague was due to be on holiday from 11-25 July 2014 and another member of the panel was due to be on holiday later in July, so the appeal was arranged for Tuesday 12 August. At the meeting on 12 August the claimant attended but did not have a union representative with him. He apparently had omitted to contact his union representative and the meeting was therefore reconvened for 19 August when the claimant attended with his union representative, George Burns. There were three grounds for appeal. The first was that the claimant alleged "slanderous behaviour" by Rory Galway, the Equal Opportunities Manager at the respondent company and by Michelle McGinley, the respondent's legal representative. Secondly, the claimant was unhappy about the time taken for the disciplinary and appeal process to be completed and thirdly, the claimant refuted the information given by Doctor Jenkinson in relation to the events leading to his dismissal. The claimant was then advised that the panel wished to meet with some of the other individuals involved, namely Paul Cunningham, Doctor Jenkinson, Paul Maguire and Rory Galway. The claimant subsequently wrote two lengthy letters to the appeal panel which they took into account in reaching their conclusion. The appeal panel sent a lengthy and detailed letter to the claimant on 15 September 2014 setting out the outcome of their appeal.

4.20 The appeal was turned down. The claimant had alleged that Doctor Jenkinson had lied in his description of events on 21 March 2013 and had alleged that Rory Galway and Michelle McGinley had engaged in "slanderous and inappropriate conduct in an attempt to influence third parties". The claimant had apparently made allegations that Mr Galway and Ms McGinley had engaged in inappropriate conduct as regard to Wendy Losty, the Orchardville Society and the Industrial Tribunal. The appeal panel dealt with these allegations and found that there was no evidence of any inappropriate or slanderous behaviour.

4.21 The claimant claimed that the disciplinary and appeal process were abusive to him and that he had not had an opportunity to defend himself which the appeal panel refuted.

4.22 Concerns were raised in relation to the length of time the process took. The appeal panel noted that there was a sufficient rationale to explain the reasons the time took to conclude the investigation and disciplinary processes. These included the claimant's grievance procedure and the fact that the respondent had been seeking medical information regarding the claimant's condition. They acknowledged that the time between the claimant's dismissal hearing on 23 January 2014 and the dismissal outcome letter was long but was due to exceptional circumstances applying to the disciplinary panel. In relation to the

claimant's allegation of Doctor Jenkinson's statement of events was "falsified", the panel did not find any evidence to support this allegation.

4.23 Mr Teague also confirmed that before sending the outcome letter for the appeal, the panel had had a number of meetings with the personnel involved, namely Doctor Jenkinson, Sam Dobson, Paul Cunningham and Paul Maguire and the panel had also met with Rory Galway, the Equal Opportunities Manager. The panel was satisfied that there were grounds to dismiss the claimant on the basis of his aggressive behaviour towards Doctor Jenkinson and the throwing of the rubbing stick.

(b) The Relevant Law on Unfair Dismissal

4.24 The relevant law in relation to unfair dismissal is to be found at Article 130 of the Employment Rights (Northern Ireland) Order 1996 and reads as follows:-

> "Article 130 (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -
>
> (a) the reason (or if more than one, the principal reason) for the dismissal; and
>
> (b) that it is either a reason following within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this paragraph if it -
>
> (a) relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employers to do;
>
> (b) relates to the conduct of the employee;
>
> (c) that the employee was redundant; or
>
> (d) is that the employee could not continue to work in a position in which he held without contravention (either on his part or that of his employer) of a duty or restriction imposed by or under a statutory provision…"

In this case, the respondent conceded that the employee had been dismissed and it is therefore for the employer to show that the reason for the dismissal was a fair one, i.e. that it related to the conduct of the employee. It is then for the tribunal to consider whether the employer acted reasonably in treating the conduct alleged as sufficient reason for dismissal.

4.25 The relevant case law was summarised in the judgment of the Northern Ireland Court of Appeal in **Dobbin v Citybus Ltd [2008] NICA 42** and quoted with approval by the same Court in **Rogan v South Eastern Health and Social Care Trust [2009] NICA 47**. They were referred to established case law in the cases of **British Home Stores v Burchell [1980] ICR 303** and **Iceland Frozen Foods Ltd v Jones [1983] ICR** which was further refined in the judgments of Lord Justice Mummery in **Foley v Post Office** and **HSBC Bank Plc (formerly Midland Bank Plc) v Madden [2000] ICR 1283**. The guidance set out in **Iceland Frozen Foods** is as follows:-

> "(1) The starting point should always be the words of [Article 130] themselves;
>
> (2) In applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;
>
> (3) In judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
>
> (4) In many, though not all, cases there is a band of reasonable responses to the employees' conduct within which one employer might reasonably take one view, another quite reasonably take another;
>
> (5) The function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair."

4.26 In **British Home Stores v Burchell** the position was summarised by Mr Justice Arnold as follows:-

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly that the employer had in his mind reasonable grounds on which to sustain that belief. And thirdly, we think, that the employer at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the

> circumstances of the case. … It is not relevant, as we think that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now more normally in the criminal context, or, to use the more old fashioned term, such as to put the matter "beyond reasonable doubt". The test, and the test all the way through, is reasonableness; and certainly, as seems to us, a conclusion on the balance of probabilities will in any surmisable circumstances be a reasonable conclusion."

(c) **Reasons and Decision**

4.27 We have considered the claim form lodged on the claimant's behalf and the issues of fact and law which were agreed at the Case Management Discussion in June 2014. We have also considered the evidence given by Paul Cunningham and Ken Teague and the documents produced by the respondent's witnesses and which were opened to us in the course of the hearing.

4.28 We are satisfied having considered this matter that the respondent acted within the band of reasonable responses in dismissing the claimant. We note when the incidents occurred, the claimant was suspended on full pay. He then raised a grievance a short time afterwards and that grievance was investigated fully before the disciplinary process was commenced. We also note that because the claimant had raised an issue in relation to his disability, the respondent took some time to investigate this matter, to try and learn more about the claimant's medical condition and how they should then approach the grievance and the disciplinary issues in light of it. The claimant unfortunately did not co-operate with the respondent in this regard. The respondent tried on a number of occasions to obtain the claimant's consent to getting a more detailed report from Doctor Losty which may have assisted both the respondent and the claimant. However the claimant refused his consent and so the respondent had to proceed without the benefit of that information. However the respondent ensured that the claimant had the facility of an extra union representative as note taker at the disciplinary hearings and was offered the opportunity to be accompanied by someone from the Orchardville Society if he wished. The respondent also took the step of providing the investigatory, disciplinary and appeals panels with information regarding Asperger's Syndrome before the various hearings took place.

4.29 We are satisfied that the respondent took all reasonable steps it could to facilitate the claimant in relation to making a reasonable adjustment to allow for his disability, particularly in light of the fact that they did not have detailed and specific medical advice in relation to the claimant's condition, due to his lack of co-operation.

4.30 We also note that the respondent did not rush the procedure, in that the claimant was accommodated with postponements where the trade union representative of his choice was not available. While we appreciate it may have been more

satisfactory from everyone's point of view to have had these matters addressed sooner, we are satisfied that there were good reasons for the delay in the investigation and disciplinary procedure actually taking place, including at least two occasions when the claimant was out of the country on holiday.

4.31 The only real delay which appears to be have been the respondent's responsibility occurred after the disciplinary meeting itself on 23 January 2014, with the issue of the dismissal outcome letter on 4 March (see paragraph 4.17 above). This delay was due to exceptional circumstances in that, sadly, Mr Cunningham had suffered a bereavement and Mr Logan (the other member of the disciplinary panel) left the Company and so was unable to send the letter in his place. While this was most unfortunate, it was understandable in the circumstances. The claimant was not prejudiced by the delay in that his appeal period ran from the date of receipt of the outcome letter and so in our view the delay did not taint the procedure so as to render it unfair.

4.32 There also appears to have been a delay in relation to the appeal being convened. Part of the reason for this was due to the fact that the claimant had written a number of letters and there appears to have been a holdup in the matter then being assigned to the correct person. This took until June, and at that stage one of the panel was abroad for work reasons, and the appeal then had to be arranged around holiday commitments and the respondent company's shutdown in July. We are satisfied however that the appeal was conducted in an appropriate fashion in that the claimant was given the opportunity to come to not one but two meetings and to make his case fully. We are also satisfied that the appeal panel carried out a thorough appeal, re-interviewing a number of witnesses and even taking into account letters which the claimant sent in after the actual appeal hearing had been completed.

4.33 We are therefore satisfied that in accordance with the principles in **British Home Stores v Burchell** and approved by the Northern Ireland Court of Appeal in **Rogan v Belfast Health and Social Care Trust**, that the respondent had carried out as much investigation as was reasonable in the circumstances and had established that there was a reasonable belief that the claimant had carried out the two acts of aggressive and erratic behaviour complained of on 18 and 21 March 2013. We accept that the employer had reasonable grounds on which to sustain that belief. In this case it is fair to say that not only was the investigation and disciplinary procedure reasonable, it took into account the claimant's particular disability and endeavoured to accommodate that disability in every way possible. This was not a rushed or one-sided procedure. The claimant was given every opportunity to be represented. He was in fact given additional representation and offered the facility of being accompanied by someone from the Orchardville Society as well as his Trade Union representatives. We do not believe that there has been anything unreasonable in the way that the respondent has dealt with this matter. Accordingly we find that the decision to dismiss the claimant fell within the band of reasonable responses and the claimant's claim of unfair dismissal is dismissed.

Employment Judge:

Date and place of hearing: 10, 11 and13 November 2014, Belfast.

Date decision recorded in register and issued to parties:

THE INDUSTRIAL TRIBUNALS
CASE MANAGEMENT DISCUSSION

CASE REF: 751/13
700/14

CLAIMANT: **Patrik Galo**

RESPONDENT: **Bombardier Aerospace**

DATE OF HEARING: **16 October 2014**

REPRESENTATIVES OF PARTIES:

CLAIMANT BY: **The claimant appeared and represented himself.**

RESPONDENT BY: **The respondent was represented by Ms M McGinley, EEF Northern Ireland.**

Record of Proceedings

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1. This case was timetabled for hearing at a Case Management Discussion on 30 June 2014. A further Case Management Discussion was held on 9 September 2014 which included an Unless Order to be complied with by 23 September 2014. The Case Management Discussion was convened to consider the extended Unless Order together with recent relevant correspondence, and to establish the best way ahead. Ms McGinley considered that the case should be struck out as the claimant had not furnished the requisite medical evidence or reasons, and time had been extended under the Unless Order until 30 September 2014 to enable him to do so. The claimant did furnish correspondence to the tribunal on 10 September 2014 and again on 10 October 2014 and provided a medical report from Doctor Harper dated 15 October 2014 on the morning of the Case Management Discussion. The medical report reads as follows:

> "This patient registered with University Health Centre attended the surgery today and was seen by Dr Andrew Harper. He is currently undergoing legal pr[o]ceedings. He has struggled to comply ... with all of the court's requests. He tells me this is due to difficulty concentrating and completing tasks. He is under review with psychiatry for depression and post traumatic stress related to the legal proceedings. We have not received any letters yet detailing the diagnosis. He attends Dr McHugh at Bradbury Centre who would be able to provide further information".

The claimant had previously furnished a report from the University Health Centre, signed by Dr Fiona Deering, dated 19 September 2014, which states:-

> "To whom it may concern

I have reviewed Patrick [Patrik] today and in my opinion he is medically unfit to attend the court hearing next week. I would be grateful if this could kindly be deferred".

2. In the overall circumstances as presented to me I was not prepared, on balance, to strike out the claimant's claim. The further medical report by Dr Harper reinforced my decision in this regard. The claimant sought to explain the difficulties he had in complying with the tribunal's order to furnish a witness statement and could not provide a firm date for doing so. I explained and stressed to both sides that it was in everyones interests that the case should proceed as listed from 10-14 November 2014. I also explained to the claimant, given his desire to furnish a witness statement, that should he do so near the hearing date, he could not expect to receive witness statements from the respondent's witnesses. I was satisfied, in these circumstances, and taking into account the claimant's disability and medical reports, that witness statements should no longer be ordered and that the hearing should proceed at **10.00 am on 10 November 2014.**

3. The claimant referred repeatedly to "conditions" which prevented him from complying with the previous tribunal orders for the provision of a witness statement and a schedule of loss. These "conditions", also related to what the claimant regarded as outstanding discovery. In order to address this issue I ordered both sides to provide to one another **by not later than 23 October 2014** all documentation relevant to any of the issues in the case. These issues are clearly set out in the Case Management Discussion record of proceedings dated 30 June 2014 when the claimant was represented to Mr Gillam, Solicitor of Donnelly and Kinder Solicitors. The claimant also alleged that he had been subjected to an abusive process of investigation and appeal following his suspension. The appeal process was however finalised in August 2014.

4. The claimant made an application for a postponement of the substantive case towards the end of the Case Management Discussion. Ms McGinley opposed any such postponement and indicated that the respondent would be prejudiced in various ways by a postponement in regard to the availability of witnesses and herself, (as she is about to commence maternity leave). I explained to the claimant that a postponement would almost certainly mean that his case would not be relisted before the New Year, and stressed again, in accordance with the tribunal's overriding objective, that it was in the interests of all concerned that the case should proceed. I explained to the claimant that not to order him to provide a witness statement would alleviate any pressure upon him in this particular regard.

5. In relation to the schedule of loss, some information has already been provided to the respondent's Solicitor. The claimant maintained that he required details of overtime payments, extra hours, and training times pertaining to his comparators. Ms McGinley stated that the claimant had not identified any comparators. I explained to the claimant that it would be necessary for him to do so in relevant claims or to rely on a hypothetical comparator. His response was that he was relying on some 400 co-workers as comparators. I explained to the claimant that this was not acceptable and that he would have to be specific and try to understand what the term "less favourable" treatment meant in relation to relevant discrimination claims. Ms McGinley submitted that should such details be furnished late in the day, her client would be placed at a disadvantage. In these circumstances, I explained to both sides that the tribunal hearing the case would presumably afford some time to the respondent to address any issues raised late in the day by the claimant.

6. I am satisfied that the claimant understood the issues discussed and also understood any directions given by the tribunal.

7. I further explained to the claimant that should he apply for a postponement of the case based on new medical evidence, any such opinion would be expected to inform the tribunal as to when the claimant would be in a position to conduct his case in the tribunal.

8. In relation to the schedule of loss, apart from the injury to feelings aspect relating to discrimination claims, I explained to the claimant that he would have to be in position to prove his loss and read out the relevant paragraph from the record of proceedings dated 1 July 2014 in this regard.

9. Ms McGinley suggested that it seemed that the tribunal was being controlled by the claimant. I immediately rejected this suggestion as I was simply trying to manage a difficult and complex set of circumstances in accordance with the tribunal's overriding objective, and in the best way possible, having regard to the positions of both sides.

10. Ms McGinley referred to a possible costs application. She is to set out the basis for any such application in correspondence to the claimant. There is also the possibility of a strike-out application at some later stage and/or a further application for an Unless Order by the respondent, depending on how the matter proceeds.

Employment Judge: 

Date: 17th **October 2014**

Notice

1. **If any party fails and/or is unable to comply with any of the above Orders, any application arising out of such failure or inability to comply must be made promptly to the tribunal and in accordance with the Industrial Tribunals Rules of Procedure 2005.**

2. **Failure to comply with any of these Orders may result in a Costs Order or a Preparation Time Order or a Wasted Costs Order or an Order that the whole or part of the claim, or as the case may be, the response may be struck out and, where appropriate, the respondent may be debarred from responding to the claim altogether.**

3. Under Article 9(4) of the Industrial Tribunals (Northern Ireland) Order 1996, any person who, without reasonable excuse, fails to comply with a requirement to grant discovery and inspection of documents under Rule 10(2)(d) of the Industrial Tribunals Rules of Procedure 2005 shall be liable on summary conviction to a fine not exceeding Level 3 on the standard scale - £1,000 at 3 September 2007, but subject to alteration from time to time.

4. A party may apply to the tribunal to vary or revoke any of the above Orders in accordance with the Industrial Tribunals Rules of Procedure 2005.

Parties and their representatives should note that if any matters arise which require a further direction or order by the tribunal, they should **immediately** notify the Office of the Tribunals of that matter and attend **at 10.00 am on the first day of hearing** so that such matters can be resolved.

Employment Judge: 

Date: 17th **July 2014**

Notice

1. **If any party fails and/or is unable to comply with any of the above Orders, any application arising out of such failure or inability to comply must be made promptly to the tribunal and in accordance with the Industrial Tribunals Rules of Procedure 2005.**

2. **Failure to comply with any of these Orders may result in a Costs Order or a Preparation Time Order or a Wasted Costs Order or an Order that the whole or part of the claim, or as the case may be, the response may be struck out and, where appropriate, the respondent may be debarred from responding to the claim altogether.**

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THE INDUSTRIAL TRIBUNALS
CASE MANAGEMENT DISCUSSION

CASE REFS: 751/13
700/14

CLAIMANT: **Patrik Galo**

RESPONDENT: **Bombardier Aerospace**

DATE OF HEARING: **30 June 2014**

REPRESENTATIVES OF PARTIES:

CLAIMANT BY: **Mr N Gillam, Solicitor of Donnelly and Kinder Solicitors.**

RESPONDENT BY: **Ms M McGinley, EEF Northern Ireland.**

Record of Proceedings

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1. The purpose of the Case Management Discussion was to:-

   (1) identify the precise issues which the tribunal has to consider;

   (2) consider the use of witness statements and their exchange; and

   (3) agree dates for a hearing.

A **Issues**

The precise legal and main factual issues in the case have been identified as follows:-

Legal

(i) Was the Claimant discriminated against on the grounds of his race as compared to a hypothetical comparator and contrary to Article 6 of the Race Relations (NI) Order 1997?

(ii) Was the Claimant subject to harassment on the grounds of his race contrary to Article 4A of the Race Relations (NI) Order 1997?

(iii) Was the Claimant discriminated against on the grounds of his disability contrary to Article 4 of the DDA 1995?

(iv) Was the Claimant discriminated against for a reason related to his disability contrary to 3A of the DDA 1995?

(v) Did the Respondent fail to afford the Claimant reasonable adjustments pursuant to Article 4A of the DDA 1995>

(vi) Was the Claimant harassed on the grounds of his disability contrary to Article 3B of the DDA 1995?

(vii) Was the Claimant victimised for having lodged previous proceedings in 2011 and 2012 contrary to the DDA 1995 and Race Relations Order (NI) 1997?

Unfair Dismissal

(viii) Was the Claimant's dismissal unfair contrary to Article 126 of the Employment Rights (NI) Order 1996?

(ix) Was the Claimant's dismissal discriminatory contrary to the DDA 1995 or RRO 1997?

Protected disclosure

(x) Did the Claimant make a protected disclosure as alleged in the ET1 and if so did he thereafter suffer a detriment and/or dismissal contrary to Article 5 and Article 8 of the Public Interest Disclosure NI Regulations 1998?

Reasonable steps defence

(xi) Did the Respondent take all reasonable steps to prevent the employees from doing the alleged discriminatory acts or from doing anything of that description.

(xii) The claimant's contentions in, relates to the discrimination claims are hypothetical. It relates to the unfair dismissal claims the comparators will be identified by not later than 31 July 2014.

Factual Issues

1. Was the Claimant isolated and excluded from the Respondent's HR Development process of overtime, shift patterns, training, upskilling and job rotation on a fair and equal basis by his manager Paul Maguire?

2. Was there a failure to respond to the Claimant's work related questions in a fair and dignified way by Sam Dobson?

3. Was the Claimant's suspension justified and in line with the policy and practice of the Respondent?

4. Were the allegations brought against the Claimant by Sam Dobson and Paul Maguire justified?

5. Was the Claimant aggressive in the meeting with Dr Jenkinson in March 2013?

6. What consideration was given to the Claimant's disability at the investigatory stage?

7. Was the selection of Dr Jenkinson appropriate in the circumstances?

8. Why did the investigation into the Claimant's conduct take as long as it did?

9. Did the incident with the rubbing stick constitute gross misconduct?

10. What consideration was given to the Claimant's disability at the disciplinary stage?

11. Was the Respondent's decision to dismiss consistent with other incidences of aggressive behaviour in the workplace?

12. Why was the Claimant dismissed?

13. What part, if any did the Claimant's race, disability, protected act or alleged protected disclosure have in respect of the decision to dismiss?

14. Has the Claimant's appeal been delayed?

B **Interlocutory Matters**

No orders sought or required.

C **Preliminary Issues**

Not applicable.

D **Orders**

In accordance with Rule 10(1) of the Industrial Tribunals Rules of Procedure 2005, I make the following orders, by consent:-

1. **Witness Statements**

(a) The claimant and any witness he wishes to call must provide a witness statement to the respondent's representative **by 5.00 pm on 26 August 2014**.

(b) The respondent and any witness it wishes to call must provide a witness statement to the claimant's representative **by 7 October 2014**.

(c) **A witness statement must be a complete statement of the evidence relating to the issues, in respect of both liability and remedy, in the case, that the witness wishes to give to the tribunal. A witness will not be permitted to add to his statement without the consent of the tribunal. Consent will only be given where there is good reason for doing so.**

Witness statements should commence with an introductory paragraph which identifies the witness and explains the relevance of the witness to the claim, eg claimant, line manager, member of interview panel, etc.

The statement should then use the factual issues agreed [or identified] at Paragraph A above and set out the witnesses' evidence [if any] in relation to each factual issue chronologically. The witness statement should finish with a short summary paragraph.

Witness statements may not exceed 5,000 words unless otherwise directed by the tribunal.

(d) Witness statementswill not be read aloud to the tribunal, subject to the discretion of the tribunal hearing the case.

(e) Witness statements will be read by the tribunal prior to the commencement of the hearing.

(f) Witness statements must be signed and dated.

2. **Schedule of Loss**

The claimant must provide to the respondent/respondent's representative a schedule of all financial loss claimed by the claimant, setting out in particular the nature and amount of any such loss claimed and how that sum is made up, **by 5.00 pm on 15 August 2014**.

3. **Bundles**

An agreed bundle of all relevant documents along with three copies of a separate folder containing the witness statements, must be lodged in the Office of the Tribunals **by 27 October 2014**. Any documents referred to in the witness statements must be identified by page number in the bundle. Three further sets of the bundle and of the witness statement folder must be brought to the Office of the Tribunals not later than **9.30 am** on the first day of the hearing:-

(a) the bundle must contain only those documents which are necessary for the tribunal to hear and determine the claim. The bundle is not meant to contain all documentation which has been disclosed between the parties, documents should appear only once in the bundle;

(b) the bundle must contain a detailed index and each page in the bundle must be clearly and consecutively numbered;

(c) each document must appear in chronological sequence;

(d) the bundle may not, without the consent of the tribunal, contain more than 200 pages.

4. Date of Hearing

The hearing will be from **10-14 November 2014**.

The tribunal will read the witness statements between 10.00 am and 2.00 pm *on the first day of hearing* and the substantive hearing will commence **immediately** thereafter. Parties and witnesses must be in attendance at that point.