THE INDUSTRIAL TRIBUNALS

CASE REF: 94/14

CLAIMANT: **Neal Blaney**

RESPONDENT: **Coleraine Borough Council**

DECISION

The unanimous decision of the tribunal is that the claimant's claims of unfair dismissal and his further claims under the Disability Discrimination Act 1995, as amended, are dismissed.

Constitution of Tribunal:

Employment Judge: **Employment Judge Crothers**

Members: **Mr J Smyth**
Ms E McFarline

Appearances:

The claimant appeared in person and represented himself.

The respondent was represented by Mr T Warnock, Barrister-at-Law, instructed by Worthingtons Solicitors.

The Claim

1. The claimant made a number of claims alleging unlawful discrimination under the Disability Discrimination Act (as amended), ("the Act"). He also claimed unfair dismissal and that his dismissal was discriminatory. The respondent denied all of his claims.

Issues before the Tribunal

2. The issues before the tribunal, as agreed at a Case Management Discussion held on 25 March 2014, were as follows:-

   (1) Was the claimant unfairly dismissed contrary to Articles 126 and 130 of the Employment Rights (NI) Order 1996 as amended ("the 1996 Order")?

(2) Did the respondent's decision to dismiss the claimant on the ground of his ill-health/capacity, discriminate against him on the ground of his disability contrary to Section 4(2)(d) of the Act?

(3) Did the respondent act reasonably in treating the claimant's ill-health/ capability as a sufficient ground for dismissal?

(4) Did the respondent discriminate against the claimant on the ground of his disability by failing to make reasonable adjustments to facilitate his return to work, contrary to Section 6 of the Act?

(5) Was the claimant treated less favourably on the ground of his disability contrary to Section 4 of the Act?

Sources of Evidence

3. The tribunal heard evidence from the claimant. On the respondent's behalf, the tribunal heard evidence from Aidan Mullan, the respondent's Head of Operations from 1 August 2012, Roger Wilson, Town Clerk and Chief Executive of the respondent from October 2008 to March 2014, Kieran Doherty, Town Clerk and Chief Executive of the respondent, and previously Corporate Director of Environmental Services from 1 April 2011, Lucille McElholm, Human Resources Partner, Sharon McQuillan, Pay Roll Pensions Manager, and Dr David Hamilton, Occupational Health Physician. The tribunal was also presented with an agreed bundle of documentation. The tribunal was also assisted by an agreed chronology, forwarded by the Respondent's solicitor on 5 September 2014, a copy of which is appended to this decision.

Findings of Fact

4. The tribunal, having carefully considered the evidence before it in relation to the above issues, made the following findings of fact on the balance of probabilities:-

(i) The claimant was employed by the respondent as a Building Control Officer from 16 August 1999 until the effective date of termination of his employment on 1 October 2013. The claimant was absent from work effectively from 1 May 2012. An appointment was arranged with Dr Hamilton of Occupational Health on 16 May 2012 in accordance with the respondent's absence management policy. In his report of 16 May 2012 Dr Hamilton records that:-

> "Neal is currently exhibiting symptoms and signs of an acute mental health illness. He has a previous history of a similar episode a few years ago and I remember meeting him at that time when he was on long term sick leave".

(ii) Dr Hamilton also recorded that:-

> "Neal has limited insight into his current illness" and that he was unfit for work.

(iii) The claimant was deemed by the respondent to be disabled in accordance with the definition in the Act, from 16 May 2012, until the termination of his employment. The time line however does not finish until his appeal against dismissal was dismissed by the respondent on 26 November 2013.

(iv) The tribunal considered the evidence before it in relation to subsequent appointments between the claimant and Dr Hamilton on 13 June 2012, 11 July 2012, 8 August 2012, 5 September 2012, 3 October 2012, 31 October 2012 and 28 November 2012, during which time the claimant remained unfit for work and was being encouraged by Dr Hamilton to engage the services of a private psychiatrist. The claimant eventually agreed with Dr Hamilton to make such an appointment and, by the time of the next review with Dr Hamilton on 23 January 2013, the claimant had attended the private psychiatrist and was awaiting a report. He agreed at that stage to allow Dr Hamilton to see the report when available. However at a further review on 13 February 2013 the claimant refused to disclose the report to Dr Hamilton stating that it was his private property. He also refused permission for Dr Hamilton to contact his GP, but made it clear that he intended to return to work the following week owing to financial concerns. At this stage the claimant was also exhibiting signs of paranoia. In his report to Anne Lennon, the Human Resources Manager, dated 13 February 2013, Dr Hamilton records:-

> "I am very concerned about Neal's fitness for work. He is exhibiting symptoms consistent with a mental health disorder and he has a lack of insight into the fact that he is unwell. Today Neal was irritable and exhibited a lot of paranoia concerns about work, eg. that people had been talking about him in a negative manner and that colleagues and work had access to his email account. I do not believe that Neal is currently fit to be at work, and that if he did return it could both worsen his medical condition and pose a risk to the council, given the nature of Neal's job involving contact with the public"

(v) A further review with Dr Hamilton on 27 February 2013, during which the claimant expressed his keenness to return to work, was followed by another review on 13 March 2013. In his report, dated 13 March 2013 Dr Hamilton states:-

> "Despite his health problems, I think Neal could potentially consider returning to work provided he can do so on a very restricted basis and is able to phase-in, starting by working half-time hours. His duty should also be restricted so that he does not encounter any potential stressful situations as far as possible, and in doing so then he should be office based initially and not carrying out his full range of duties".

(vi) In his evidence before the tribunal Dr Hamilton was clearly of the view that the claimant would be unable to interact with the public and other professionals in a logical manner given the nature of his condition and his disorganised thought process. He was also concerned about the importance of the decisions he had to make in terms of impact upon the public health and safety. Dr Hamilton clearly had concerns about the claimant not taking prescribed medication and being reluctant to engage with mental health services. It was also his opinion before the tribunal that, had the claimant taken the prescribed medication, he could have returned to his substantive post.

(vii) In advance of receiving Dr Hamilton's report, Lucille McElholm, the respondent's Human Resources Business Partner, met with the claimant

during which he discussed when he could return to work and raised issues regarding other colleagues. Lucille McElholm stated to the claimant that once she had further information regarding how a return to work could be facilitated, she would ring him and arrange a further meeting. The claimant agreed to this. On receipt of Dr Hamilton's report of 13 March 2013, Lucille McElholm discussed its contents with Anne Lennon, the HR Manager. They agreed that Dr Hamilton needed to provide further advice regarding the adjustments required to the claimant's role to ensure that he did not encounter stressful situations.

(viii) The main elements of the claimant's role involved assessing applications, inspecting work on site, property certificates, postal numbering, and dangerous structure inspections.

(ix) The claimant appeared for work on 22 April 2013 without any liaison with Lucille McElholm or his line manager, David Robinson. However David Robinson and Anne Lennon met with him and explained that he could not return to work until there was agreement with regard to how the respondent could accommodate the restrictions outlined by Dr Hamilton in his report of 13 March 2013. Dr Hamilton had specifically stated in that report that the restrictions he outlined were on the basis that such adjustments could be facilitated.

(x) The claimant attended for another review with Dr Hamilton on 24 April 2013. His report of that date contains the following:-

> "If he returns, because of the length of time he has been on sick leave and also due to the nature of his illness, his work will need to be monitored to ensure accuracy. Again, because of the nature of his illness, he should not perform his full range of duties, particularly those pertaining to public and professional contact. It is not clear when, or if indeed at all, these restrictions can be removed. I am aware that this will cause extra work pressures for his manager and colleagues, due to his reduced work output and the need for monitoring, but hopefully this can be facilitated as means of a reasonable adjustment under the terms of the DDA".

(xi) The tribunal is satisfied that the respondent engaged in a full consultation process with the claimant and, in terms of the restrictions recommended by Dr Hamilton, that the persons best equipped to make an assessment were David Robinson, Principal Building Control Officer, and Jackie Barr, Head of Service, in conjunction with Lucille McElholm as the Human Resources Business Partner.

(xii) The claimant was clearly concerned that his contract of employment might be terminated. After his appointment with Dr Hamilton on 24 April 2013, he had met with Lucille McElholm and outlined that he had been off for nearly 12 months and was worried that his contract would be terminated after one year. Lucille McElholm confirmed to him this was not the case. She explained that his sick pay would be exhausted after that period of time. He requested that he should be paid for annual leave as he had no income. Lucille McElholm stated that she would seek approval for this request from David Robinson and contact the claimant in due course. Mr Robinson was not available as he was on leave. However, a meeting was arranged for 30

April 2013 with David Robinson, Lucille McElholm and the claimant to discuss the contents of Dr Hamilton's report. This meeting was moved to 2 May 2013.

(xiii) The tribunal was referred to notes of the meeting held between the claimant, David Robinson, and Lucille McElholm on 2 May 2013. They record, inter alia:-

> "Neal [Neal's] role was discussed in detail, the plan checking the assessment that Building regulations side of things. Regarding the regulations Neal would have to communicate with architects and agents to do this and to decide what needs "tweaked" and also Neal would deal with the final plans and the agent and the applicant.
>
> On site he would have to see the foundations and the subfloors, the roof structure, the drainage, the inspections when he would be out and about and to give advice to people.
>
> The certification side of things [,] the construction certificate, structure wise, industrial engineers certificate/calculating thermals (SAP calculations at design and onsite stage), get all checks done, the buildings and the paperwork needs to be correct at the design and completion stage, collation of information in line with regulations. Neal would have looked through new legislative requirements and exemptions – add building project."

Other aspects of his job were discussed including licensing for entertainment, post and numbering/street naming, and dangerous buildings.

The notes conclude by stating:-

"It was outlined that following this meeting that Jackie Barr (HoS) & David would meet to discuss if the reasonable adjustments requested by Dr Hamilton could apply to Neal's job. It was outlined that Jackie was off for the rest of this week and that David was off next week so the soonest that Jackie and David would get to meet would be the week of 13 May 2013. It was explained to Neal that as soon as this meeting was held and a decision was made that Lucille would contact him and arrange a follow-up meeting to discuss the outcomes. Neal agreed to this."

Earlier in the meeting the claimant has stated that he was fit for work and could do whatever the respondent asked him to do. He stated that he had never had any issues with applicants or engineers and had no problem with anyone in work.

(xiv) The managers further discussed adjustments under the Act and suitable alternative employment for the claimant on about 14 and 15 May 2013.

(xv) An email from David Robinson to Lucille McElholm and copied to Jackie Barr, dated 15 May 2013, encapsulates the managers' assessment of the situation at that point in time. The tribunal considers it important to set out that correspondence as follows:-

"Following on from the meeting which we had with Neal on 2nd May to discuss Dr Hamilton's report which was dated 24th April.

I was not able to meet up with Jackie Barr until Monday 13th May to discuss Dr Hamilton's report due to Leave commitments.

The work of a Building Control officer is of a specialist nature and require a large degree of interaction with both the public and other professionals both outside and within the office environment.

Dr Hamilton has stated **"If he returns, because of the length of time he has been on sick leave and due to the nature of his illness, his work will need to be monitored to ensure accuracy".**

Dr Hamilton also states that **"because of the nature of his illness, he should not perform his full range of duties, particularly those pertaining to public and professional contact".**

The main functions of a Building Control officers are as follows

1. Assess applications submitted for compliance with Building Regulations
2. Inspection of work on site to ensure compliance with Building Regulations
3. Carry out property certificate replies
4. Issue postal number/street naming
5. Carry out Dangerous structure inspections and prepare report for issue of notice.

Points 1 & 2 would cover the core functions of the post and require a high level of communication and interaction with both public and professionals.

Points 2[3] & 3[4] to a lesser degree would not require this interaction. But the quantity of work involved with these duties would not contribute to a significant work load.

Point 5 would again have interaction with others but does not constitute a significant work load within the office.

Having discussed the above with Jackie Barr we cannot see how Neal can return to his current role as a Building Control officer, taking into account the recommendations as set out in Dr Hamilton's report. There is a substantial amount of functions which are core to the job which Dr Hamilton has stated that Neal should be restricted from doing.

Having both discussed the report in detail we have concluded that there is not any other role within the Environmental Services section which Neal could be reallocated to.

Please contact me if you wish to discuss.

Regards

David Robinson"

(xvi) Lucille McElholm then wrote to the claimant on 11 June 2013 as follows:-

"Dear Neal

RE: LONG TERM ABSENCE
CONSIDERATION OF TERMINATION OF CONTRACT

I write to advise you that a meeting has been set up with Mrs Jackie Barr, Head of Service and myself under the Sickness Absence Policy (page 15, section 10.19). Please attend this meeting on Tuesday 2 July 2013 at 2.00 pm in the HR Interview Room, Cloonavin.

The purpose of this meeting is to discuss your level of absence and your continued employment with the Council, where consideration will be given to the termination of your contract. At this meeting all material evidence relevant to your case will be considered and you will be given the opportunity to present relevant facts in support of your case, this will include:

- Ascertaining the length and nature of the illness
- Considering occupational health opinions
- Discussing reasonable adjustments and/or different work arrangements
- Discussing alternative employment/if ill health is applicable

As laid down in the policy you have the right to be accompanied by a work colleague or trade union representative. Sharon McQuillan (TU Representative) will be in attendance at this meeting.

I hope this above date and time is convenient for you, however if you have any queries in relation to this please do not hesitate to contact me on 0 28 70347123.

Yours sincerely

Lucille McElholm
Human Resources Officer"

(xvii) The claimant did not attend the meeting arranged for 2 July 2013. It was then moved to 4 July 2013 and was attended by Aidan Mullan, the respondent's Head of Operations, together with Lucille McElholm, Sharon McQuillan of NIPSA, and the claimant.

(xviii) During the meeting held on 4 July 2013, 15 Occupational Health Reports forwarded by Dr Hamilton were discussed. It is recorded in the minutes of the meeting that ill-health retirement was discussed with Dr Hamilton and the claimant on 15 May 2013. It is also recorded in the minutes that "Neal stated that Dr Hamilton thought this would not be successful". The tribunal has no reason to question the accuracy of the minutes which record the following:-

"Redeployment was discussed. It was explained to Neal that there were a number of positions available within Council at present as potential suitable alternative employment options, namely LGV Driver, Semi Skilled Operative, Vehicle Maintenance Fitter, and Business Support Assistant. These were discussed in light of the current restrictions that Dr Hamilton has put in place until Neal avails of treatment. Neal stated that the conditions that Dr Hamilton is putting on his own job and also because of the restrictions placed that none of these jobs are options as they all involve dealing with the public.

Aidan stated that the fact that Neal has not given Dr Hamilton consent to contact his GP nor given him access to his psychiatrist report does not help the situation as Dr Hamilton cannot move forward or assist with treatment. Aidan asked if Neal was going to give this permission. This was discussed between Neal and Sharon and Neal stated that he would think about this. Aidan stated that the permission form would be sent out to Neal by Dr Hamilton and that he needed to sign this and get it back within 7 days.

It was explained that Aidan would compile a report based on all this information and forward this to Kieran Doherty for his decision regarding Neal's continued employment. A copy would be sent to Neal also.

Meeting ended".

(xix) The tribunal was also referred to a very detailed report entitled "REPORT RECOMMENDING TERMINATION DUE TO LONG-TERM ABSENCE" prepared by Aidan Mullan after the meeting held on 4 July 2013. It contains a general chronology from 2003 up to 1 May 2012 and reflects the claimant's view relating to Dr Hamilton's report of 16 May 2012 "which scared me and which was a complete change to the previous meeting". A detailed chronology follows the entire process involving the claimant up to and including the meeting of 4 July 2013. It is also apparent from the report that, following the meeting on 4 July 2013, the claimant had not given consent to Dr Hamilton to contact his GP and specialist consultants and had not completed the consent form for access to his medical records.

(xx) Correspondence dated 9 August 2013 was sent to the claimant by Anne Lennon, Human Resources Manager, inviting the claimant to a meeting with Mr Doherty on Thursday 22 August 2013 "to discuss your level of absence so that consideration can be given regarding your continued employment with [the] council." The letter continues:-

> "I can advise you that whilst Mr Doherty will listen to any further views you may have the outcome may result in the termination of your contract of employment.
>
> You may, if you wish, be accompanied at this meeting by an employee/ trade union representative.
>
> Enclosed is a copy of Council's Sickness Absence Policy that will explain the process at this stage under 10.20, page 15".

(xxi) The meeting was ultimately held on 17 September 2013 involving Kieran Doherty, Alan Law of NIPSA, Sharon McQuillan of NIPSA, Anne Lennon,

Lucille McElholm, and the claimant. The contents of the report prepared by Aidan Mullan were discussed and a termination letter, dated 1 October 2013 ensued. The tribunal considers it essential to set out this correspondence as follows:-

"Dear Neal

RE: HEARING DECISION – CONSIDERATION OF TERMINATION OF CONTRACT DUE TO LONG TERM SICKNESS

Thank you for attending the Absence Hearing held on 17 September 1013 (2013) in accordance with the Council's Absence Procedure (page 18, section 10.12) to discuss your continued employment with the Council; as you have been off work on sick leave since 01 May 2012 with Stress.

At the hearing we had a lengthy discussion on the details of your sickness absence and the report from Mr Aidan Mullan (Head of Service) recommending termination of your contract of employment. You were able to put forward your own case and views regarding the report. I now write to confirm the outcome of the hearing:

- Following consideration of Mr Aidan Mullan's report and your own views by way of mitigation a decision has been made that your contract will be terminated and you are dismissed from Council's service on the grounds of capability. The reason for this decision is because you are unable to return to work in the near future and therefore Council is unable to sustain your level of sickness absence. This termination will take place with immediate effective.

You will have 17 days annual leave outstanding at your final date of employment which equates to £1,976.42 prior to any deductions. As per the Council's Sickness Absence policy you are also entitled to one week's paid notice for each year of continuous employment subject to an overall maximum of twelve weeks, therefore you will also be entitled to 12 weeks full pay. This will total £6,975.72 and combined with the above amount equates to £8,952.14 prior to deductions. As you have been paid £2,525,92 (prior to deductions) the remaining amount to be paid is £6,426.22 (prior to deductions) which will be paid in your final salary on 31 October 2013.

You have the right to appeal within 7 working days of receipt of this letter to the Head of Central Services against this decision. If you wish to exercise this right you should write to: Mr David Jackson, Head of Central Services, Cloonavin, 66 Portstewart Road, Coleraine, Co Londonderry, BT52 1EY. Please give full details under which the appeal is being brought.

Yours Sincerely

Mr Kieran Doherty
Corporate Director of Environmental Services"

(xxii) The claimant appealed the termination of his employment on 7 October 2013 in the following terms:-

"FAO Mr David Jackson

RE; RIGHT TO APPEAL DECISION MADE ON MEETING OF 17TH SEPTEMBER 2013 TO TERMINATE CONTRACT OF EMPLOYMENT DUE TO ILL HEALTH

I would like to appeal the decision received by letter of 5th October 2013 to terminate my contract of employment with Coleraine Borough Council due to ***stress related illness*** triggered by stress in the work place, a decision which has been made by Mr Kieran Doherty **based only on Dr Hamilton employer's doctor report(s).** Last Dr Hamilton report received dated 12th June 2013, approximately 4 months ago.

Despite provision of;

- Fit note from my GP
- Independent medical report stating fit to return to work since February 2013
- In the absence of provision of any contact number for Dr Hamilton, I forwarded contact details to Dr D Hamilton of consultant doctor, to allow Dr Hamilton to explain why he or my employer is preventing my return to work, and to explain what further reports in addition to the above would he normally require, if the above is not satisfactory to an employer.

I would like to appeal the above, following consultant doctor's professional medical and legal advice. And will take further legal guidance.

I have requested advice from NIPSA, and advised trade union representative to notify you I whish [wish] to appeal decision.

I do not have access to council absence procedure (page 18 section 10.12) referred to in termination of contract letter, please forward copy of document, for reference with regard the above.

Yours sincerely

Neal Blaney"

(xxiii) The tribunal was also referred to the Social Security Agency assessment of the claimant for employment and support allowance which is dated 25 February 2013, which refers to the claimant's view that, at that stage, his return to work was being blocked by Occupational Health and he was not being told why. It also records, that at that stage, he was not taking any medication. He was assessed by Social Security Agency as being capable of work and was refused employment and support allowance.

(xxiv) At the meeting held on 17 September 2013 the claimant referred to the above ESA assessment. Kieran Doherty was also aware that the claimant had attended a private psychiatrist but had not forwarded a copy of his

medical opinion. Kieran Doherty requested him to forward a copy of this report to enable him to make an informed decision. The claimant was reluctant to forward a copy of the report as he claimed it contained third party information and he did not want it shown to his employer. The claimant claimed that this consultant psychiatrist, Dr Anderson, had no issue with his return to work and that Dr Hamilton could speak to him about the adjustments outlined in the Occupational Health Reports. The claimant mentioned that Dr Anderson could not supply him with a report without speaking first with Dr Hamilton. In this respect the claimant stated that he had emailed Dr Hamilton with Dr Anderson's details on 16 September 2013.

(xxv) The tribunal is satisfied that Kieran Doherty carefully considered the adjustments recommended by Dr Hamilton to the claimant's substantive post and David Robinson's email of 15 to Lucille McElholm in respect of same. He also considered alternative options elsewhere within the Council as referred to previously and concluded that he had no other option other than to terminate the claimant's contract of employment on the ground of his capability. Kieran Doherty did wait until the end of September before finalising his decision to terminate the claimant's employment owing to the claimant's reference to Dr Anderson and his report. It is evident to the tribunal that during this period Dr Hamilton made exhaustive efforts to contact Dr Anderson, but without success.

(xxvi) Dr Anderson eventually wrote to Kieran Doherty on 12 November 2013 (received 18 November 2013) stating that:-

> [he] "can see no reason why Mr Blaney should not be able to attempt to return to his original employment if necessary on a phased basis. He himself is keen to do so and does not report any current problems with work colleagues. He is aware as you will be, all reasonable efforts should be made to accommodate him back at work and that he should not be discriminated against on the basis of his mental health difficulties as concerned (contained) in the Disability Discrimination Act. If he is ultimately unable to perform his work because of his mental health problems I would have thought that consideration should be given to ill-health retirement".

(xxvii) The tribunal was shown Dr Hamilton's hand written notes of a conversation he held with Dr Anderson on 20 November 2013. It was clear to the tribunal that Dr Anderson was not aware of the full extent of the claimant's job and especially his contact with members of the public and professionals and the seriousness of any errors being made in terms of building safety. He was also not aware of the claimant's paranoia about work colleagues and access to emails etc. He agreed with Dr Hamilton that the claimant was still not fit for the building control job. Dr Hamilton then emailed Anne Lennon of Human Resources as follows:-

"Anne

Following my last email, I would like to update you further.

I have spoken to Dr Anderson and he confirmed that he was not fully aware of the nature of Neal's job and could understand why Neal was deemed unfit for work in the full role as a Building Control Officer. He was also unaware of

the attempts made to try to allow Neal to return to work in a restricted role and to redeploy him.

Dr Anderson also confirmed that Neal's mental health problems were ongoing.

With regard to Dr Grant's letter, the reference to the ATOS assessment for ESA (employment support allowance) relates to their "all work test", which means that the individual is assessed for fitness for "any" employment. Neal is fit for some types of work, and that is why we looked at redeployment options for him.

I hope this helps to clarify things further.

Regards

David"

(xxviii) The claimant's GP, Dr Grant, also wrote to the Council on 12 November 2013 referring to the claimant having been assessed by ATOS as fit for work. He recommended that the claimant should be able to return to work if he wishes. However Dr Hamilton, in his evidence, made clear that the ATOS assessment did not take into consideration the claimant's mental health status and expressed the view that there were lots of problems with the ATOS test.

(xxix) The claimant's appeal hearing took place on 20 November 2013 before Roger Wilson, the respondent's Town Clerk and Chief Executive from October 2008 to March 2014. It was clear to the tribunal that Mr Wilson had considerable sympathy for the claimant who stated at the appeal hearing that he was not requesting any adjustments from Dr Hamilton. The tribunal was referred to the minutes of the appeal hearing and, by Roger Wilson, in his witness statement, to Dr Anderson's correspondence to the respondent of 12 November 2013 which Roger Wilson discussed with Dr Hamilton following the appeal hearing. Roger Wilson became aware of Dr Hamilton having contacted Dr Anderson and of the email previously referred to dated 22 November 2013 stating that Dr Anderson was not fully aware of the claimant's job and could understand why he was deemed unfit for work. Dr Hamilton had also referred to Dr Grant's correspondence of 12 November 2013. The reason for the claimant's unsuccessful appeal is summarised in the outcome letter from Roger Wilson dated 26 November 2013 which reads as follows:-

"Dear Neal

<u>Appeal Hearing – 20 November, 2013</u>

I refer to the above appeal hearing that was held following the decision of Mr Doherty on 1 October, 2013 to terminate your employment on the grounds of capability.

The appeal was held in accordance with Council's Absence procedure at 10.21 of the policy. You were entitled to be accompanied at the appeal but chose to proceed unaccompanied.

At the appeal hearing you were given an opportunity to outline the reasons for appealing Mr Doherty's decision. Prior to the hearing I was presented with a copy of a letter from Dr Anderson, Consultant Psychiatrist and at the hearing you presented me with copy correspondence from your GP.

I would advise that following the appeal hearing, I met with Dr Hamilton, Council's Occupational Health Physician to discuss his reports and also to seek his comments with regard to the correspondence referred to above. I can confirm that Dr Hamilton has now spoken with Dr Anderson and as a consequence his advice to Council has not changed.

Following consideration of the facts of this case and in particular the recent information presented I have reached my decision. Furthermore I am satisfied that Council has adhered to the relevant policies and procedures regarding this matter and as such I have decided to uphold the decision taken by Mr Doherty.

I am conscious that this decision will come as a disappointment to you, however, taking into account medical information and advice and considering operational requirements (including possible, suitable alternative employment). I believe this decision is in both your interests and that of the organisation.

I would like to thank you for your time spent working at Coleraine Borough Council and hope that in due course you are able to find employment in the future and that your health will improve.

Yours sincerely

Town Clerk and Chief Executive"

(xxx) The tribunal is satisfied that in its decision to dismiss the claimant, the respondent had established the true medical position (which had remained unchanged since Dr Hamilton's last review on 12 June 2013) and that, in the overall circumstances, it was reasonable for the respondent not to wait beyond the end of September before terminating the claimant's employment on 1 October 2013. In any event, in the process of the claimant's appeal, the medical position, as established by Dr Hamilton, was essentially confirmed by Dr Anderson pursuant to his conversation with Dr Hamilton. Moreover, the respondent had engaged the claimant in full and lengthy consultation and had seriously addressed the issues of adjustments under the Act and suitable alternative employment in the context of incapability before terminating the claimant's employment.

(xxxi) In the context of his disability discrimination claim, the claimant sought to rely on various comparators. One comparator, Sam McMullan, also a Building Control officer, and not deemed disabled under the Act, was off work for a period of time in 2012 after losing his licence which was an essential part of

his job. He died in the summer of 2013. By that time he had obtained a driving licence and was engaged in an informal counselling process which was still ongoing at the time of his death. Adjustments had been made upon his return to work in terms of someone else driving him to and from inspections.

(xxxii) Paul McGurgan, another comparator relied on by the claimant, was a Litter Warden Enforcement Officer who had type 2 diabetes and was deemed disabled under the Act. He was off work for a period of time in 2011-12 and adjustments were made in terms of providing him with shoes to avoid the possibility of foot ulcers. He had been off work not owing to his disability but due to stress following allegations made by him against another member of staff which led to an investigation. He had returned to work afterwards and no adjustments were made after his return.

(xxxiii) Donald Kenny, was named as another comparator. He is still working for the respondent as a Building Control officer. He is not deemed disabled under the Act and no adjustments have been made in relation to him apart from an alteration in the reporting structure following a personality clash between himself and another member of staff. He had apparently been off work for a period of time due to stress in 2006-2007.

(xxxiv) The claimant consistently claimed that he had not been given proper advice regarding ill health retirement and sought to compare himself with Johnny Vance, Claire Miller and Collette Ward, all of whom had received ill-health retirement. However, as distinct from the claimant, they had taken the initiative and made the relevant application and been successful. In the claimant's case, Dr Hamilton had indicated that he was unlikely to be successful in any such application and the claimant was aware of this. In her evidence to the tribunal, Sharon McQuillan made it clear that the claimant had spoken to her on several occasions about ill-health retirement and that he was aware of the need to take the initiative in any such direction in accordance with paragraphs 10.15-10.17 of the Sickness Absence Policy, a copy of which he possessed at least during the process leading to the termination of his employment and throughout the appeal stage. The tribunal is satisfied that the claimant was aware of the fact that the procedure was voluntary and is further satisfied that he had discussed the matter with the respondent's payroll pensions manager, Sharon McQuillan and Alan Law of NIPSA. During the consultation process, the claimant was anxious to return to work and in the course of the appeal hearing on 20 November 2013 stated that he was not looking for any adjustments in order to return to work. He had not therefore taken the initiative towards making any application for ill-health retirement.

(xxxv) The tribunal is satisfied that the dismissal and appeal processes were procedurally and substantively fair and that the claimant was allowed ample opportunity to articulate his case.

The Law

5. (1) In relation to unfair dismissal the tribunal is satisfied that the position is adequately set out in paragraphs 3-25 of the respondent's submissions annexed to this decision.

(2) Article 3A of the Act states as follows:-

"Meaning of "discrimination"

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

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

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

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

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

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

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

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

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

> "Section 3A identifies three kinds of disability discrimination. First, there is direct discrimination. This is the situation where someone is discriminated against because they are disabled. This particular form of discrimination mirrors that which has long been found in the area of race and sex discrimination. As with other forms of direct discrimination, such discrimination cannot be justified …
>
> Second, there is disability-related discrimination …
>
> Third, there is the failure to make reasonable adjustments form of discrimination in sub-section (2). Here, the employer can be liable for failing to take positive steps to help to overcome the disadvantages

resulting from the disability. However, this is once he has a duty to make such adjustments. That duty arises where the employee is placed at a substantial disadvantage when compared with those who are not disabled".

Disability-related discrimination is not alleged in this case.

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

(5) The tribunal also took into account relevant sections in the Disability Code of Practice Employment and Occupation ("the Code"), being careful not to use the Code to interpret the legislative provisions. It also considered Harvey on Industrial Relations and Employment Law ("Harvey") at L 384ff in so far as relevant.

(6) **Reasonable Adjustments**

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

"The duty to make reasonable adjustments arises where a provision, criterion or practice applied by or on behalf of the employer, or any physical feature of premises occupied by the employer, places a disabled person at a substantial disadvantage compared with people who are not disabled. An employer has to take such steps as it is reasonable for it to have to take in all the circumstances to prevent that disadvantage – in other words the employer has to make a "reasonable adjustment". Where the duty arises, an employer cannot justify a failure to make a reasonable adjustment……

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

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

… 5.24 Whether it is reasonable for an employer to make any particular adjustment will depend on a number of things, such as its costs and effectiveness. However, if an adjustment is one which it is reasonable to make, then the employer must do so. Where a disabled person is placed at a substantial disadvantage by a provision, criterion

or practice of the employer, or by a physical feature of the premises it occupies, the employer must consider whether any reasonable adjustments can be made to overcome that disadvantage. There is no onus on the disabled person to suggest what adjustments should be made (although it is good practice for employers to ask) but, where the disabled person does so the employer must consider whether such adjustments would help overcome the disadvantage, and whether they are reasonable."

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

"Reasonable adjustments: supplementary

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

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

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

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

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

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

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

(g) ….

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

(a) making adjustments to premises;

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

(c) transferring him to fill an existing vacancy;

(d) altering his hours of working or training;

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

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

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

(h) acquiring or modifying equipment;

(i) modifying instructions or reference manuals;

(j) modifying procedures for testing or assessment;

(k) ….

(l) providing supervision or other support.

(3) ….

(4) ….

(5) ….

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

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

"In our opinion an employment tribunal considering a claim that his employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:-

(a) the provision, criterion or practice applied by or on behalf of an employer or

(b) the physical feature of premises occupied by the employer, or

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the "provision, criterion or practice applied by or on behalf of the employer" and the

"physical feature of premises", so it would be necessary to look at the overall picture.

In our opinion, an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process. Unless the employment tribunal has identified the four matters we have set out above, it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage".

(iv) The Court of Appeal in the case of **Newham Sixth Form College v Sanders (2014) EWCA Civ 734**, confirmed the decision in **Rowan** and in the later case of **ABS v Ashton (2011) ICR 632, EAT** (where the important rider was added that the test remains an objective one, not dependent on the employers thought processes). In his judgement Lord Justice Laws stated in paragraph 14 of his judgement as follows:-

"In my judgement these three aspects of the case – nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments – necessarily run together. An employer cannot, as it seems to me, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important since an adjustment which is either excessive or inadequate will not be reasonable."

(v) The tribunal also had regard to the Code at Section 8.15 relating to managing disability or ill health and retention of disabled employees.

Paragraph 8.16 states, inter alia:-

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

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

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

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

(ii) In this case, the claimant was also alleging that he had been unfairly dismissed by the respondent under Articles 126-130 of the 1996 Order.

Burden of Proof

6. (i) Section 17A of the Act deals with the burden of proof.

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

> "The Court in *Igen v Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that on the balance of probabilities the respondent had committed an unlawful act of discrimination.
>
> "Could conclude" in s.63A(2) must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage ., the Tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complaint were of like with like as required by s5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment."

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

> "Whilst the basic principles are not difficult to state, there has been extensive case law seeking to assist tribunals in determining whether direct discrimination has occurred. The following propositions with

respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:

(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport* [1999] *IRLR* 572, 575 – 'this is the crucial question'. He also observed that in most cases this will call for some consideration of the mental processes (conscious or sub-conscious) of the alleged discriminator.

(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p.576) as explained by Peter Gibson LJ in *Igen v Wong* [2005] IRLR 258, paragraph 37.

(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:-

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

If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the tribunal *must* find that there is discrimination. (The English law in existence prior to the Burden of Proof Directive reflected these principles save that it laid down that where the prima facie case of discrimination was established it was open to a tribunal to infer that there was discrimination if the employer did not provide a

satisfactory non-discriminatory explanation, whereas the Directive requires that such an inference *must* be made in those circumstances: see the judgment of Neill LJ in the Court of Appeal in *King v The Great Britain-China Centre* [1991] IRLR 513.)

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

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

Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in *Bahl v Law Society* [2004] IRLR 799, paragraphs 100, 101 and if the employer fails to provide a non-discrimination explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself – or at least not simply from that fact – but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

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

employer has provided a convincing non-discriminatory explanation for the less favourable treatment.

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

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

> '36. The discrimination … is defined … as treating someone on racial grounds "less favourably than he treats or would treat other persons". The meaning of these apparently simple words was considered by the House in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285. Nothing has been said in this appeal to cast any doubt upon the principles there stated by the House, but the case produced five lengthy speeches and it may be useful to summarise:-
>
> (1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the "statutory comparator") actual or hypothetical, who is not of the same sex or racial group, as the case may be.
>
> (2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant …
>
> (3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated: see Lord Scott of Foscote in *Shamoon* at paragraph 109 and

Lord Rodger of Earlsferry at paragraph 143. This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the "evidential comparator") to those of the complainant and all the other evidence in the case.

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

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

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

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

> "This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude in the absence of adequate explanation that the respondent has committed an act of discrimination. In Curley v Chief Constable [2009] NICA 8 Coghlin LJ emphasised the need for a tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination".

Again, at paragraph 28 he states in the context of the facts of that particular case, as follows:-

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

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

> "5. Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would

have been treated less favourably than that comparator. The tribunal can short circuit that step by focussing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: See the observations of Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 paragraphs 8-12. This is how the tribunal approached the issue of direct discrimination in this case.

6. In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie, if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason: See Peter Gibson LJ in *Igen v Wong* [2005] IRLR 258, paragraph 37".

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

Submissions

7. The tribunal carefully considered the written submissions submitted by both parties. The respondent's submissions are annexed to this decision. For reasons explained at the hearing, the claimant's written submissions are not annexed. However, these submissions together with the further brief oral submissions from the claimant and from the respondent's counsel were carefully considered by the tribunal.

Conclusions

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

(1) The tribunal is satisfied that the claimant has proved that a duty to make reasonable adjustments had arisen. However the tribunal is not satisfied that the claimant has proved facts from which it could reasonably be inferred, absent explanation, that the duty has been breached, and, therefore, the burden of proof does not shift to the respondent so as to require it to prove that it complied with the duty. Furthermore, in terms of the comparators, only Paul McGurgan was assessed as being covered by the Act. Adjustments

were made to provide him with special shoes to avoid foot ulcers. A comparator must be in the same or not materially different circumstances to the claimant in order to be a valid comparator. The tribunal is satisfied that Paul McGurgan is not therefore a valid comparator.

(2) In relation to the claim of direct disability discrimination, the tribunal is not satisfied that the claimant has proved facts from which the tribunal could conclude in the absence of an adequate explanation that the claimant had been treated less favourably on the ground of disability, and therefore the burden does not shift to the respondent to prove on the balance of probabilities that the alleged detriment was not on the prohibited ground of disability. It is clear to the tribunal, that the comparators relied on by the claimant are not in the same or not materially different circumstances to the claimant and are therefore not valid comparators. This extends to the comparators relied on in the context of the claimant's ill health retirement, referred to in paragraph 4 (xxxiv) of the findings of fact. The tribunal is also satisfied that the reason for the claimant's treatment was because of his absence and incapability to do his job, and not on the ground of his disability.

(3) Paragraph 8.16 of the Code states:-

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

In this case the claimant was also relying on the provisions of Articles 126 of the 1996 Order (his right not to be unfairly dismissed), 127, (circumstances in which an employee is dismissed) and 130, (fairness), to establish unfair dismissal. "Capability", in Article 130(3), "in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality". The tribunal is satisfied that the reason for the claimant's dismissal related to his capability for performing work of the kind which he was employed by the employer to do and that the dismissal was fair in all the circumstances of the case, as further set out in paragraph 4 (xxx) of the findings of fact.

(4) The tribunal has considerable sympathy for the claimant in his personal circumstances. Nevertheless, it finds itself unable to uphold his claims and, accordingly all claims are dismissed.

Employment Judge:

Date and place of hearing: 1, 2, 3, 4 September 2014, Belfast.

Date decision recorded in register and issued to parties:

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS

BETWEEN

11th July 2012 – Review with Dr Hamilton. Mr Blaney remains unfit for work.

8th August 2012 – Review with Dr Hamilton . Mr Blaney remains unfit for work.

5th September 2012 – Review with Dr Hamilton. Mr Blaney remains unfit for work.

3rd October 2012 – Review with Dr Hamilton. Mr Blaney remains unfit for work.

31st October 2012 – Review with Dr Hamilton. Mr Blaney remains unfit for work.

28th November 2012 – Review with Dr Hamilton. Mr Blaney remains unfit for work.

9th January 2013 – Review with Dr Hamilton. With the agreement of Mr Blaney, Dr Hamilton made an appointment with a private psychiatrist.

1st May 2012
to stress. Mr E

23rd January 2013 – Review with Dr Hamilton. Mr Blaney had attended the private psychiatrist the previous week, and is awaiting the report. Dr Hamilton made clear that Mr Blaney's Line Manager should not contact him.

16th May 201
suffering from
work and havi
covered by DD

13th February 2013 – Review with Dr Hamilton. Mr Blaney would not disclose the private psychiatric report to Dr Hamilton, stating that it was his private property and he would not be supplying a copy. Dr Hamilton recorded that Mr Blaney refused to allow Dr Hamilton permission to contact his GP. Mr Blaney also expressed that he intended to return to work the following week. Dr Hamilton records that Mr Blaney remains unfit for work.

13th June 201
Mr Blaney rem
GP and other h

27th February 2013 – Review with Dr Hamilton. Mr Blaney expressed that he wished to return to work and agreed to meet Dr Hamilton and HR representatives at their next meeting to discuss the possibility.

13th March 2013 – Review with Dr Hamilton. Dr Hamilton stated that he believed Mr Blaney could potentially consider returning to work on a very restricted basis. He would have to phase in, initially on half-time hours. His duties would also have to be restricted so that he would not encounter any potential stressful situations, through being office-based initially and not carrying out his full range of duties. This was provided the adjustments could be facilitated.

13th March 2013 – Meeting with Lucille McElholm and Mr Blaney.

22nd April 2013 – Mr Blaney attended work.

22nd April 2013 – Meeting with David Robinson, Anne Lennon and Mr Blaney. It was explained to Mr Blaney that he could not return to work until any reasonable adjustments had been considered and agreed.

24th April 2013 – Review with Dr Hamilton. Dr Hamilton's report stated that due to the length of absence Mr Blaney's work will need to be monitored to ensure accuracy. Dr Hamilton's report stated that Mr Blaney should not perform his full range of duties should he return to work, particularly public and professional contact. Dr Hamilton's report stated that it is not clear when, if at all, the restrictions would be able to be removed. There is a conflict of evidence between the parties as to what was discussed at this meeting.

2nd May 2013 – Meeting with David Robinson, Lucille McElholm and Mr Blaney. This meeting involved a detailed assessment of potential adjustments that could be made to facilitate a return to work by Mr Blaney. Mr Blaney made clear his dissatisfaction with Dr Hamilton.

14th May 2013 – Meeting with Mr Robinson, Ms Barr and Ms McElholm. This meeting considered reasonable adjustments, with no tasks within Building Control Officer or other jobs available that would meeting the required reasonable adjustments.

15th May 2013 – Email correspondence between David Robinson and Lucille McElholm regarding reasonable adjustments.

15th May 2013 – Review with Dr Hamilton. Dr Hamilton stated that it had been difficult to accommodate the adjustments as there was no suitable work available for Mr Blaney. Dr Hamilton encouraged Mr Blaney to engage with Mental Health Services as his condition is amenable to treatment, making it clear that his condition would be likely to improve to a level where less restrictions would be necessary. Dr Hamilton stated in his report that ill health retirement was discussed and stated that it was unlikely to be successful given that Mr Blaney's condition has a potential to improve. However Mr Blaney disputes this.

11th June 2013 – Lucille McElholm wrote to Mr Blaney to invite him to a meeting on 2nd July 2013 regarding potential termination in line with the Sickness Absence Policy.

12th June 2013 – Review with Dr Hamilton.

4th July 2013 – Meeting with Aidan Mullan, Lucille McElholm, Mr Blaney and Sharon McQuillan. This meeting was rescheduled from 2nd July 2013. The contents of Dr Hamilton's reports were discussed. Ill health retirement was discussed. Redeployment was discussed, with the potential suitable alternative employment options being presented to Mr Blaney. Mr Blaney stated that he would think about giving permission for Dr Hamilton to have access to psychiatric reports and to contact his GP. Consent not provided.

6th August 2013 – Report prepared by Aidan Mullan to Kieran Doherty recommending termination due to long-term absence.

17th September 2013 – Meeting with Mr Blaney, Alan Law, Sharon McQuillan, Kieran Doherty, Anne Lennon and Lucille McElholm. This was the Dismissal Hearing in which the contents of the report prepared by Aidan Mullan were

discussed. Mr Blaney indicated that he had seen Dr Anderson and had given his contact details to OH.

1st October 2013 – Kieran Doherty wrote to Mr Blaney to inform him of his role and attempts made by Council to return in restricted role and or to redeploy. Dr Anderson confirms that mental health problems were ongoing. Dr Hamilton comments on the "all work" ATOS test.

26th November 2013 – Roger Wilson wrote to Mr Blaney to inform him that his appeal had been unsuccessful.

CASE REF: 94/14

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS

AND THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN:

NEAL BLANEY

CLAIMANT

AND

COLERAINE BOROUGH COUNCIL

RESPONDENT

RESPONDENT'S SUBMISSIONS

SOLICITORS FOR THE RESPONDENT: WORTHINGTONS SOLICITORS

COUNSEL FOR THE RESPONDENT: TIMOTHY M.V. WARNOCK

Introduction

1. The Claimant claims unfair dismissal, direct disability discrimination and failure to make reasonable adjustments. The Respondent denies the Claimant's claims in their entirety and says that the claims are not well founded and ought to be dismissed.

2. The Tribunal is asked, on the balance of probabilities, to accept the Respondent's evidence as is set out in the Respondent's witness statements and as has been given in evidence before the Tribunal during the hearing of the case. Where there is a conflict of evidence between the parties, the Tribunal is asked to prefer the evidence of the Respondent.

Relevant Legal Background

Unfair Dismissal

3. Article 130 of the Employment Rights (Northern Ireland) Order 1996 provides as follows:-

> *(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 falling 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.*

4. The reason will fall within paragraph (2) if it relates to the capability or qualifications of the employee for performing work of a kind he is employed to do.

5. Article 130 provides that the determination of the question whether the dismissal is fair or unfair having regard to the reason shown by the employer:

> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

6. As the Tribunal in *McPhee v George H Wright Ltd [1975] IRLR 132* commented:

> *"'Cases where an employee is dismissed because of absence, where that absence is unquestionably due to medical reasons, are always difficult. At the same time a firm, cannot wait indefinitely for an employee to return when his work has to be done, and there is a need for a replacement".*

7. In terms of ill health capability dismissal, Mr. Justice Phillips, in the EAT decision in *Spencer v Paragon Wallpapers Ltd [1976] IRLR 373, [1977] ICR 301,* emphasised that a Tribunal ought not place themselves in the shoes of an employer but should instead assess the relevant factors and ask whether the employer acted reasonably in treating capability as a reason to dismiss.

8. When explaining how a Tribunal ought to deal with an ill health capability dismissal Justice Phillips asserted at paragraph 13 of his judgment in *Spencer* that:

> *"In the first instance, the decision how to act in circumstances such as the present is that of the management. Secondly, it is the function of the Industrial Tribunal to determine whether the management has satisfied them that in the circumstances (having regard to equity and the substantial merits of the case) they acted reasonably in treating it as a sufficient reason for dismissing the employee. It is not the function of the Industrial Tribunal to take the management's decision for it, but only to decide whether the decision taken by the management passes that test".*

9. The factors in Spencer included the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do and the circumstances of the case.

10. Justice Phillips went on the explain at paragraph 14 of his judgment that:

> *"Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?".*

11. In Spencer, Mr. Spencer had been absent for two months and was likely to be absent for a further four to six weeks. The Respondent dismissed and the EAT upheld the Tribunal's decision that the dismissal was fair taking into account the circumstances of the case.

There are however no fixed time periods and the question is always one of reasonableness.

12. It is of course necessary for an employer to consult with the employee in question before moving to dismiss. It was asserted by Mr. Justice Phillips at paragraph 18 of the subsequent EAT case of *East Lindsey District Council v Daubney [1977] IRLR 181, [1977] ICR 566* that:

> *"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done".*

13. Interestingly, the EAT found that the Industrial Tribunal had, required "overmuch of the District Council" in saying that they should have demanded a detailed medical report and should have questioned the doctor concerned about it. Mr. Justice Phillips went on the make the point at paragraph 17 of the judgment that:

> *"It is not the function of employers, any more than it is of Industrial Tribunals, to turn themselves into some sort of medical Appeal Tribunal to review the opinions and advice received from their medical advisers…".*

14. Rather the employer should ensure it has an adequate amount of information available from its medical expert before making a decision and Mr. Justice Phillips asserted that it was important that when seeking advice employers should do so "in terms suitably adjusted to the circumstances".

15. Whether or not medical opinion is required is a fact sensitive issue however the issue is somewhat moot in this case as opinion was obtained from Dr. Hamilton as to the Claimant's fitness to work.

16. As Mr. Justice Popplewell asserted in *Ford Motor Co Ltd v Nawaz [1987] IRLR 163, [1987] ICR 434, EAT*) at paragraph 10 of the decision of the EAT:

> "*It is trite law that cases of dismissal due to inability to work, whether due to incapacity or misconduct, are matters which management are entitled to take on the say so of their medical advisers. Management do not have to put themselves into the position of deciding, if there are conflicting medical reports, which ones they are going to prefer because management is not in the position of having the necessary expertise to weigh up the respective merits of medical argument. That does not, however, wholly absolve management from carrying out, through their medical agent, the proper investigation which is required in any case of dismissal*".

17. Mr. Justice Popplewell expanded upon this and confirmed at paragraph 11 of the EAT decision that an employer does not have to prove that an employee is not actually fit for work, rather:

> "*..they can proceed on the basis that they had reasonable grounds for so believing but it necessarily involves proper investigation and proper investigation by the proper person*".

18. It had already been established at the time of the decision *in Ford Motor Co Ltd* that even if an employer is faced with conflicting medical advice he will not necessarily be acting unfairly if he accepts the report which is less favourable to the employee and dismisses him, see *Singh-Deu v Chloride Metals [1976] IRLR 56* and *Jeffries v BP Tanker Co Ltd [1974] IRLR 260*. The question is always one of reasonableness and in particular whether the employer acted unreasonably on the evidence before it.

19. If after a reasonable period of time the position in terms of recovering health is still uncertain, that will properly weigh heavily with an employer, see *Luckings v May and Baker Ltd [1974] IRLR 151*.

20. In terms of ill health retirement, as Mr. Justice Langstaff pointed out in the EAT case of *Matinpour v Rotherham MBC UKEAT/0573/12 (19 April 2013, unreported)* at paragraph 34 of the decision:

"...in general, ill-health retirement is not a decision for an employer; it is one for the trustees of any pension scheme which is applicable. The process is costly and expensive to the scheme. Applications are therefore admitted cautiously, with considerable effort being made to ensure that they meet the applicable criteria, whatever they may be".

21. In *Matinpour*, the EAT held at paragraph 35 of its decision that it was plain that unless the circumstances are such that an employer should think that an employee is or may reasonably be suitable for ill-health retirement, it had no duty to delay dismissal to allow for an application for ill health retirement to be made.

22. Interestingly, in *Matinpour*, the Claimant had argued that his dismissal was unfair because no consideration was given to ill health retirement. However, the Claimant had in fact argued throughout the dismissal process that he was fit to return to work and had submitted evidence from his doctor suggesting he was fit to return to work. In the circumstances, the EAT upheld the Tribunal's decision that there was no need to consider ill health retirement as there was no evidence to suggest that the Claimant was a suitable candidate for ill health retirement given that there was no evidence to suggest permanent incapacity.

23. In any event, the Respondent's case in the instant case is that ill health retirement was in fact considered and communications were made with the Claimant in this regard. He was aware of the possibility of making an application and chose not to do so.

24. In terms of looking at alternative employment, there is no duty to create a new role, despite how long serving the employee is, see *Merseyside and North Wales Electricity Board v Taylor [1975] IRLR 60, [1975] ICR 185* and *Taylorplan Catering (Scotland) Ltd v McInally [1980] IRLR 53.*

25. Further, as Slynn J said in *Garricks (Caterers) Ltd v Nolan [1980] IRLR 259*

"Clearly employers cannot be expected to go to unreasonable lengths in seeking to accommodate someone who is not able to carry out his job to the full extent. What is reasonable is very largely a question of fact and degree for the industrial tribunal".

Disability Discrimination Act 1995

26. Direct disability discrimination is governed by section 3A(5) of the Disability Discrimination 1995 Act.

27. According to the 1995 Act, a person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as or not materially different from, those of the disabled person.

28. Pursuant to section 3A(2) of the 1995 Act, a person discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person.

29. Section 4A(1) makes it clear that where a "provision, criterion or practice" applied by an employer places the disabled person at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as are reasonable, in all the circumstances of the case, to prevent the provision, criterion or practice having that effect.

30. Section 18B(1) of the 1995 Act sets out matters to consider when considering the reasonableness of adjustments and also provides examples of reasonable adjustments.

Direct Disability Discrimination

31. In order to be successful in a claim for direct disability discrimination the Tribunal must be satisfied that the Claimant was less favourably treated on the grounds of his disability. This is the fundamental nature of a direct disability discrimination claim.

32. In *Glasgow City Council v Zafar* [1998] IRLR 36, [1998] ICR 120 at 123, Lord Browne-Wilkinson asserted that the analysis in discrimination cases:

> *"...requires an answer to be given to a single question (viz has the complainant been treated less favourably than others on [the ground of that protected characteristic]?) ... it is convenient for the purposes of analysis to split that question into two parts—(a)*

less favourable treatment; and (b) [on grounds of that protected characteristic]."

33. Where discrimination is alleged to be direct disability discrimination then the relevant comparator is someone who does not have the particular disability of the disabled person, whose relevant circumstances are the same as, or not materially different from, those of the disabled person, *High Quality Lifestyles Ltd v Watts* [2006] IRLR 850.

34. In Stockton on *Tees Borough Council v Aylott* [2010] EWCA Civ 910, [2010] IRLR 994, CA, Mummary LJ however clarified that there is not an obligation to construct a hypothetical comparator in every case and the failure to do so does not necessarily lead to an error of law in the Tribunal's findings.

35. *As Lord Nicholls put it in Nagarajan v London Regional Transport [1999] IRLR 572, 575* the reason why question *"is the crucial question"*.

Duty to Make Reasonable Adjustments

36. The duty to make reasonable adjustments is found within section 4A of the 1995 Act. The duty applies where the disabled person is placed at a substantial disadvantage, compared to persons who are not disabled, by a 'provision, criterion or practice applied by or on behalf of an employer' (s 4A(1)(a)) or by 'any physical feature of premises occupied by the employer' (s 4A(1)(b)). The s 4A duty arises only when the 'disabled person concerned' is placed at a substantial disadvantage.

37. In *Environment Agency v Rowan* [2008] IRLR 20, [2008] ICR 218, the EAT restated guidance on how an employment tribunal should act when considering a claim for failure to make reasonable adjustments. The Tribunal should identify

(a) the provision, criterion or practice applied by or on behalf of an employer, or;
(b) the physical feature of premises occupied by the employer;
(c) the identity of non-disabled comparators (where appropriate); and
(d) the nature and extent of the substantial disadvantage suffered by the claimant.

38. In terms of the need to consult, in the case of *Tarbuck v Sainsbury Supermarkets Ltd* [2006] IRLR 664, the EAT made it clear that the duty to consult is not of itself imposed by the duty to make reasonable adjustments. Elias J held at para 71 that:

> *'[t]he only question is, objectively, whether the employer has complied with his obligations or not',*

39. In term of comparators the Court of Appeal, in *Smith v Churchills Stairlifts plc* [2005] EWCA Civ 1220, [2006] IRLR 41, [2006] ICR 524 made it clear that there would be a limited comparison group in light of *Archibald v Fife Council* [2004] UKHL 32, [2004] IRLR 651, [2004] ICR 954. The proper comparator can be identified only by reference to the disadvantage caused by the arrangements that are questioned.

40. The EAT in *Project Management Institute v Latif* [2007] IRLR 579 in terms of the burden of proof, asserted that there must at least be before the tribunal facts from which, absent any innocent explanation, it could be inferred that a particular adjustment could have been made. Otherwise, the Respondent would be placed in the "impossible position" of having to prove the negative proposition that there was no reasonable adjustment that could have been made.

41. Further in *Newcastle City Council v Spires* [2011] All ER (D) 60 (May) the EAT emphasised the importance of Tribunals confining themselves to findings about proposed adjustments which are identified as being in issue in the case before them.

42. The question as to whether an adjustment is reasonable is a matter of fact for the Tribunal and the test is an objective one, see *Smith v Churchills Stairlifts plc [2005] EWCA 1220, [2006] IRLR 41.* The Tribunal ought to take into account not only the perspective of the Claimant but also the operational perspective from the point of view of the employer, see *Lincolnshire Police v Weaver [2008] All ER (D) 291 (Mar).*

43. In *Igen v Wong* [2005] IRLR 258 (CA) considered the 2 stage test in discrimination cases flowing from the burden of proof regulations. The first stage requires the Claimant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that the Respondents have committed, or are to be treated as having committed, the relevant unlawful act or acts of discrimination against the complainant. The answer to this question will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The second stage requires the Respondents to prove that it did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld. If there is detriment the reason or reasons for the detriment must be non-discriminatory.

44. The Northern Ireland Court of Appeal in *McDonagh & Others v Samuel John Hamilton Thom t/a The Royal Hotel Dungannon* [2007] NICA 3 stated that when considering claims of discrimination, tribunals ought to have regard to the Annex to the decision of the English Court of Appeal in Igen v Wong.

45. The Northern Ireland Court of Appeal re-visited the issue in the case of *Nelson v Newry & Mourne District* Council [2009] NICA -3 April 2009. The court considered the post Igen case law and in particular the case of *Madarassy v Nomura International PLC [2007] IRLR* 247. The Court of Appeal asserted that *Madarassy:*

> *"provided further clarification of the Tribunal's task in deciding whether the tribunal could properly conclude from the evidence that in the absence of an adequate explanation that the respondent had committed unlawful discrimination. While the Court of Appeal stated that it was simply applying the Igen approach, the Madarassy decision is in fact an important gloss on Igen. The court stated:-*
>
> > *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient matter from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination; 'could conclude' in Section 63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it".*

46. The Court of Appeal went on to hold that:

> *[T]he decision makes clear that the words 'could conclude' is not be read as equivalent to 'might possibly conclude'. The facts must lead to an inference of discrimination. This approach bears out the wording of the Directive which refers to facts from which discrimination can be 'presumed'.*

47. *The Court of Appeal also considered the case of Curley v Chief Constable of the Police Service of Northern Ireland* [2009] NICA 8, in which Coghlin LJ emphasised the need for a tribunal to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The Court asserted that:

> *"the need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination".*

48. Whilst in direct discrimination cases, courts have often asked firstly whether there was less favourable treatment and secondly to ask whether it was on the grounds of a prohibited reason, it was however pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] UKHL 11, [2003] IRLR 285 at paras 7–12, that sometimes it will not be possible to decide whether there is less favourable treatment without deciding 'the reason why'.

49. This is particularly so when a hypothetical comparator is being used because in order to ascertain how a hypothetical comparator would have been treated one needs to know what the reason for the treatment of the Claimant was. If the complainant was treated in the manner they were because of the characteristic in question then it is likely that a hypothetical comparator without that characteristic would have been treated differently.

50. In the English Court of Appeal case of *Ladele v London Borough of Islington [2009] EWCA Civ 1357 (the Christian Registrar's case)* it was asserted that:

> *"[An].....error of law in the ET's approach, which applies to virtually every allegation of direct discrimination, was identified by the EAT, and was expressed by Elias J in paragraph 59 in these terms: "Even if ... there is sufficient evidence from which*

an inference of discrimination could be made, [the allegation] requires consideration of the explanation given by the employer for the less favourable treatment", as, if the ET had been "satisfied that the reason is non-discriminatory (even if in other respects the conduct is unreasonable) then no discrimination has occurred."

51. The Court of Appeal in *Ladele* upheld the following reasoning of the EAT that:

> *"The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one."*

52. It is therefore clear that even if the Respondent have in any way acted unreasonably (which is denied) this is not sufficient to justify making the finding of discrimination.

Factual Submissions

Summary of Respondent's Case on the Facts

53. The Claimant was fairly dismissed by the Respondent after a fair and proper capability procedure was followed by the Respondent. The Respondent appropriately obtained medical opinion from Dr Hamilton as an independent occupational health expert; the Respondent engaged in appropriate consultation with the Claimant and thereafter the Respondent allowed the Claimant the opportunity to put his case at consultation stage, at investigation stage, at the dismissal hearing and at the appeal hearing.

54. Taking into account the circumstances of the case, the decision to dismiss was reasonable in the circumstances. The Claimant was not fit to return to his post as building control officer, reasonable adjustments could not be implemented to allow such a return and the only posts available within the Council at the time were not suitable alternative employment for the Claimant given his condition and the restrictions recommended by Dr. Hamilton.

55. The option to apply for ill heath retirement was explained to the Claimant and the Claimant did not take up the option to make an application. In any event, it appears that an ill health retirement application would not have been successful in the circumstances.

56. In short, after consideration of all material circumstances the only appropriate option open to the Council was dismissal on the grounds of capability in the context of the 17 month absence from May 2012 to October 2013.

The Relevant Timeline

57. The relevant timeline in this case starts in May 2012 when the Claimant commenced the period of long term sickness absence that ultimately led to his dismissal on the grounds of capability. The timeline finishes upon the dismissal of the Claimant's appeal against his dismissal on 26th November 2013.

58. It is clear that the Claimant was suffering from an acute mental illness with associated paranoia and anxiety. At May 2012, the Claimant was classed as being likely to be covered by the Disability Discrimination Act 1995 by Dr. Hamilton. The Claimant remained classed as disabled throughout his ensuing absence and the consultation and capability process.

59. The Claimant was seen by Dr. Hamilton on a regular basis from May 2012 onwards (at least on a monthly basis) and the Claimant remained off work due to his condition until his dismissal.

60. It was in February 2013 that the Claimant expressed his preference to return to work as soon as possible, as noted in Dr. Hamilton's report of 27/02/13.

61. It is clear that Dr. Hamilton remained of the opinion that the Claimant remained unwell however he did advise that a return to work may be possible subject to adjustments being put in place by the Respondent.

Suggested Adjustments and Suitable Alternative Employment

62. In order to facilitate a return to work, it was clear, *inter alia*, that the Claimant had to be placed in a supervised role with avoidance of stressful situations as far as possible. Further the Respondent had to ensure that the Claimant avoided contact with the public and or professionals. Dr Hamilton explained in his evidence that it was his view that the Claimant would be unable to interact with the public and or professionals in a logic manner given the nature of his condition and his disorganised thought process.

63. Dr Hamilton further expressed concern in relation to the Claimant carrying out the fundamental duties of a building control officer given the importance of the decisions to be made in terms of impact upon public health and safety.

64. The situation was apparently compounded by the Claimant not taking medication at the time and his reluctance to engage with mental health services.

65. The employer therefore had to assess the mooted return to work in the capacity of a building control officer in the context of the aforementioned circumstances, which related to the Claimant's capability to perform the required duties given his mental health difficulties.

66. The Respondent properly engaged in a consultation process with the Claimant to decide whether the restrictions recommended by Dr Hamilton could be accommodated by the Building Control Department and to look at the suitability of the available alternative employment. The persons best placed to make that assessment were David Jackson (Principal Building Control Officer) and Jackie Barr (Head of Service) in conjunction with Lucille McElholm (HR Business Manager).

67. A meeting took place on 2nd May 2013 between the Claimant, Lucille McElholm and David Robinson at which the proposed restrictions/ adjustments were discussed in detail with the Claimant. It is noteworthy that the Claimant himself agreed that there was a significant element of public/professional contact involved with his role, see the last paragraph at page 188. Further the case made by the Claimant seemed to be that he did not need adjustments and he was fit to return, see the last paragraph of page 189.

68. Adjustments and suitable alternative employment were discussed between the managers on or about the 14th and 15th May 2013, prior to the meeting Mr. Mullan had with the Claimant on the 4th July 2013. The outcome of the relevant discussions are as embodied in the email form Mr. Jackson as found at page 196 of the bundle and dated 15th May.

69. In essence, it is the Respondent's case that the role of a building control officer inherently involves frequent interaction with the public and professionals. Mr. Jackson in particular sets out the core functions of the role in his email of 15th May and it is clear that the majority of the work of a Building Control Officer involved interaction with the public and or professionals. That element of the role which did not involve such interaction was not sufficient to make up a role for the Claimant and no adjustments would have altered this position.

70. In reality, due to the inherent nature of the role and the importance of the function performed, it was simply not feasible for the Claimant to return to his role.

71. Further the alternative roles were not suitable for the Claimant, again due to the need for contact with the public and or professionals. This was the view of David Robinson, Dr. Hamilton, Kieran Doherty and Roger Wilson. It therefore was the case that there were in effect, sadly, no roles available for the Claimant.

72. The Claimant's managers were best placed to decide upon these issues and it is not the function of the Tribunal to reassess the situation by placing themselves in the shoes of the employer. It is submitted that the Respondent at all times acted reasonably and there is no evidence to suggest that the Respondent did not properly apply its mind to the questions. To the contrary, it is submitted that the evidence demonstrates proper consideration of the relevant issues and indeed indicated that the Respondent had sympathy for the Claimant and tried its best to accommodate the Claimant.

73. The Claimant attended at the meeting with Mr. Mullan on 4th July 2013, and the relevant history and OH reports were discussed with the Claimant. The Claimant accepted that the alternative employment options were not suitable options given the restrictions recommended by Dr. Hamilton, see the third paragraph from the bottom of page 224.

74. The Claimant also indicated at this meeting that that he would consider allowing Dr. Hamilton to contact his G.P. and or Psychiatrist however ultimately the consent was not forthcoming. The Respondent therefore had to act on the evidence as was before it at the relevant time.

75. Mr. Mullan subsequently prepared a very detailed report, which was forwarded to Mr. Kieran Doherty prior to the dismissal hearing of 17th September 2014.

Dismissal and Appeal Process

76. It is submitted that the dismissal and appeal process were procedurally and substantively fair. Both Kieran Doherty and Roger Wilson afforded the Claimant fair hearings and allowed the Claimant to fully make his case.

Dismissal

77. At the time of the dismissal, which was effected by letter dated 1st October 2012, the medical position had been established that the Claimant was continuing to suffer from an acute mental illness and it had further been established that the necessary restrictions could not be put in place so as to allow a return to the role of building control officer.

78. Equally, due to the restrictions, the alternative available roles were also not viable options for the Claimant. This was explicitly confirmed by Dr. Hamilton in his email of 21st August 2013 at page 259. This had also been the view of line management.

79. The Claimant had confirmed at his meeting with Mr. Mullan on 4th July 2013 that ill health retirement had been discussed with Dr Hamilton who had indicated that ill health retirement would be unlikely to be successful. See page 224 of the bundle. Mr. Mullan was of the view that the Claimant was not interested in ill health retirement. Indeed the Clamant consistently made the case that he was in fact fit to return to work.

80. Further we know that Ms. McQuillan had spoken with the Claimant on several occasions in relation to ill health retirement from July 2013 right through until the appeal. The process was explained to him and Ms. McQuillan indicated that she was happy to assist. In the event, the Claimant chose not to pursue this until after his dismissal. That was his choice.

81. It is also noteworthy that the Claimant had the absence policy in his possession throughout the dismissal and appeal process and was clearly aware of his ability to make an ill health retirement application. It seems however that the Claimant was fixated upon returning to his role and his case was effectively that Dr. Hamilton had got it wrong. In any event, despite the awareness of the possibility of making an application the Claimant chose not to do so.

82. At the dismissal hearing, the Claimant asked that Dr. Anderson be contacted by Dr. Hamilton. Whilst there is no obligation on an employer to chase up an employee's medical adviser to get details, Dr. Hamilton in fact attempted to contact Dr. Anderson on several occasions without success. He left voicemails for Dr. Anderson and left a contact number. See the email from Dr. Hamilton at page 279.

83. In the event Mr. Doherty waited nearly two weeks after the meeting of 17th September before making the decision to dismiss. It is submitted this is reasonable.

84. As Mr. Doherty indicated in his evidence, he had no option but to dismiss given the circumstances of the case. Sadly adjustments were not feasible and the alternative employment was not suitable.

85. In respect of ill health retirement, the Claimant had been advised of his options and chose not to make an application. That was a matter for him.

Appeal

86. The Claimant of course appealed the decision to Mr. Wilson, then Chief Executive of the Council. Again it is submitted that a fair and proper appeal was allowed and that the decision to dismiss the appeal was reasonable in the circumstances.

87. The change of circumstances at appeal stage was the provision of a report from Dr. Anderson and a letter from the Claimant's GP referring to the ATOS "all work" test for ESA.

88. Although it is noteworthy that an employer can prefer the opinion from its occupational health advisor in the event of conflict of medical opinion, if reasonable in the circumstances, in this case Mr. Wilson ensured that Dr. Hamilton in fact considered the evidence presented by the Claimant. Dr. Hamilton sent an email with his views on the matter as is found at page 284 of the bundle of documents. Dr. Hamilton expanded upon his views in oral evidence before the Tribunal and outlined his concerns with the "all work" test and the report of Dr. Anderson.

89. Further than that, Dr. Hamilton contacted Dr. Anderson to discuss his report. The outcome of that conversation is found in the email from Dr. Hamilton as found at page 292 of the bundle.

90. It appears the Dr. Anderson was not fully aware of the Claimant's role and was not aware of the efforts that the Council had gone to in trying to accommodate the Claimant. Dr. Anderson in fact changed his position and understood why the Claimant could not return to his role.

91. Indeed, Dr. Anderson confirmed that the Claimant was still suffering poor mental health and was unsure as to whether he was taking medication to control his condition. As Dr. Hamilton commented in his evidence, this gave him an updated position in relation to the Claimant's medical condition. Dr. Hamilton therefore reasonably stood over his considered opinion. Ultimately, it was this informed medical

opinion view which properly weighed heavily in Mr. Wilson's mind when coming to his conclusion in relation to the appeal.

92. It is submitted, that just like Mr. Doherty, Mr. Wilson had no option but to dismiss the appeal. The proper processes had been followed and a return to work was not possible. The Claimant had been advised of the right to apply for ill health retirement and had not availed of that opportunity. Mr. Wilson gave evidence of his great sympathy for the Claimant but he had no option but to dismiss. The Claimant had been absent for work for 17 months and there was no way that the Council could feasibly accommodate a return to work for the Claimant in the circumstances of the case.

Disability Discrimination?

93. It is submitted that on the facts there is no evidence upon which the Tribunal could safely draw an inference of unlawful discrimination. Even if there were, which is denied, it is clear that the reason why the Claimant was treated as he was treated was because of his absence and incapability to do his job, not because of his disability.

94. There is no claim for disability related discrimination and in any event after the decision of the House of Lords in *London Borough of Lewisham v Malcolm* [2008] UKHL 43, [2008] IRLR 700 the concept of disability related discrimination in fact adds nothing to that of direct discrimination.

95. Equally, there is no evidence of failure to make reasonable adjustments. The Respondent properly applied its mind to the recommendations made by Dr. Hamilton and properly looked at suitable alternative employment. In addition the comparators named in this case are not proper comparators.

96. In reality, the restrictions recommended by Dr. Hamilton meant that, sadly, in the circumstances the Claimant could not return to his role and that the available positions within the Council were not suitable.

Comparators

97. It is trite law that a comparator must be in the same or not materially different circumstances of the Claimant in order to be a valid comparator. Quite simply none of the comparators named are appropriate comparators.

98. In terms of the reasonable adjustment comparators, only Paul McGurgan was assessed as being covered by the DDA 1995. Adjustments were made to provide him with special shoes to prevent

foot ulcers. The circumstances are wildly different and no comparison can be made.

99. The Ill Health Retirement comparators are again not appropriate comparators as they are individuals who applied voluntarily of their own volition whilst still in employment and were assessed as suitable by the Northern Ireland Local Government Superannuation Scheme Committee. The Claimant was aware of his right to apply but failed to do. That was and is a matter for him. There is no appropriate comparison to be made.

Conclusion

100. For the reasons advanced herein and for the reasons to be offered, the Respondent submits that the Claimant's claims ought to be dismissed in their entirety.

Timothy M.V. Warnock
Bar Library

3rd September 2014