THE INDUSTRIAL TRIBUNALS

CASE REF: 1470/16

CLAIMANT: **Muire Sweeney Ahern**

RESPONDENT: **Western Health and Social Care Trust**

DECISION

The unanimous decision of the tribunal is that the claimant's claims of unlawful discrimination by way of victimisation on the ground of her sex is dismissed as set out in paragraph 11 of this decision.

Constitution of Tribunal:

Employment Judge: **Employment Judge Crothers**

Members: **Mr J Barbour**
Mrs G Ferguson

Appearances:

The claimant was represented by Mr D Ahern.

The respondent was represented by Ms S Bradley, Barrister-at-Law instructed by Directorate of Legal Services.

BACKGROUND

1. (i) This case was the subject of a Case Management Discussion on 30 September 2016, the record of which contains the following paragraphs:-

> "I explained to the claimant's representative that the tribunal is a statutory tribunal with a very narrow focus. It does not have power to direct the reinstatement of the claimant as sought by the claimant. I

also stated that the tribunal has no power to direct that "*the dental therapist position in Enniskillen [be] retained for at least three days per week and (the claimant) be facilitated in moving position in the same manner other staff have been*.

I stressed that as a statutory tribunal with a narrow focus, I did not have power to undertake a public enquiry into dental therapist provision in Enniskillen".

(ii) The case was then timetabled for hearing at a Case Management Discussion held on 8 December 2016, for 25, 26 and 27 April 2017. The hearing was scheduled to commence at 12 noon on 25 April 2017. The record of proceedings of the Case Management Discussion under the heading of "Timetable" contains the following:

> "The parties should liaise and try to agree a timetable to ensure that the cross-examination of witnesses and closing submissions are completed within the allocated time. If the parties are unable to do so the Employment Judge will set the timetable with the parties at the outset of the Hearing".

(iii) It transpired, after the cross-examination of the claimant on the afternoon of 25 April 2017 and on the morning of 26 April 2017, that it was unlikely that the case would finish within the allocated time as the respondent had three witnesses to call. The claimant's husband, as her representative, was afforded considerable flexibility and time in accordance with the tribunal's overriding objective to complete his cross-examination of the respondent's main witness, Dr Grainne Quinn (Dr Quinn). Her evidence began at 13.57 pm on 26 April 2017, when she adopted her witness statement as evidence. The tribunal then afforded the claimant's representative until 3.28 pm on 27 April 2017 to complete his extensive cross-examination of this witness. The claimant's representative acknowledged that the tribunal should ignore the statement at paragraph 34 of the claimant's final written submissions that:-

> "The claimant also outlined other unfair treatment in her witness statement, which due to time constraints it was not possible to put to Dr Quinn in cross-examination".

Mr Ahern was in fact afforded the opportunity of making an application to recall Dr Quinn but he declined to do so. His further oral submissions on 2 June 2017 relating to the claimant struggling with the legal aspects of the claim and to the fact that she did not have a legal representative prefaced a submission that on two occasions the claimant's representative sought to intervene on her behalf but was prevented from doing so. Again the tribunal carefully explored this matter and was satisfied that there was no real substance in what was being suggested. Both parties had had very considerable time to properly prepare their respective sides of the case.

(iv) The tribunal is therefore entirely satisfied that the case was conducted throughout in accordance with its overriding objective. It transpired that two further days had to be set aside to complete the hearing, on 31 May 2017

and 2 June 2017 respectively.

THE CLAIM

2. (1) The claimant claimed that she had been victimised contrary to the Sex Discrimination (Northern Ireland) Order 1976, as amended ("the 1976 Order"). She relied upon an alleged protected act arising out of a grievance in 2012. The claimant's allegations of victimisation mainly concerned the reorganisation of dental therapist provision in Enniskillen pursuant to retirement of the dental therapist in September 2015. She alleged that the various acts complained of were motivated at least in part by the grievance. The respondent denied the claimant's allegations in their entirety.

THE ISSUES

3. The following factual and legal issues were agreed by the parties at the outset of the hearing as follows:-

Factual Issues

(1) What was the reason for the consultation paper issued on 16 December 2015?

(2) Whether the Claimant had been denied the opportunity of a transfer to a post more desirable to her as a result of the decision to reduce the dental therapist post in the South West Acute Hospital, Enniskillen from 5 days per week to 1 day.

(3) Is the person who expressed an interest in Voluntarily Early Retirement (VER) in 2012 an appropriate comparator for the act of victimisation?

Legal Issues

(1) Was the Claimant subjected to victimisation in the decision to re-configure the Dental Therapist post in Enniskillen, by the Respondent on the ground of her sex as a result of having lodged a grievance in 2012?

(2) If so, what is the appropriate remedy?

SOURCES OF EVIDENCE

4. The tribunal heard evidence from the claimant, and on the respondent's behalf from Dr Quinn, Clinical Director of Community Dentistry, Pamela Crozier, Assistant Director of Human Resources, and Catherine McDaid, Assistant Director of Women and Children's Health Care from July 2007 until March 2016. The tribunal received a bundle of documentation together with other documents in the course of the hearing.

5. (i) At the outset of the hearing the tribunal referred the parties to the judgement of Girvan LJ in the Northern Ireland Court of Appeal decision of **Jill Simpson v Castlereagh Borough Council** (Ref: GIR9206, delivered 25/03/14) **("Simpson")**. In the section of the judgement headed "conclusions" Girvan

LJ states as follows:-

> "[14] As the agreed terms of the remittal of the Tribunal show a Tribunal determining the question of victimisation must address the issues, firstly, whether the claimant suffered a detriment and, secondly, whether she was subjected to less favourable treatment as compared to an actual or hypothetical comparator by reason of the fact that she had done a protected act.
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> [15] The appellant has not sought to pursue an argument that she was discriminated against on the grounds of disability and the case thus turns on whether she was victimised on the grounds of having brought a sex discrimination claim or grievance. ... The case turned on whether the doing of the protected acts was the cause of the alleged victimisation.
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> [16] The Tribunal concluded that the relevant comparator would be a person who lodged a grievance and had not carried out a protected act. The respondent did not challenge that decision. It was satisfied that the appellant suffered less favourable treatment than such a hypothetical comparator would have received.
>
> ...
>
> [18] A person discriminates against the person alleged to have been victimised if he treats the person less favourably "by reason that the person victimised" has (inter alia) done anything under or by reference to the 1976 Order or the Equal Pay Act. "By reason that" simply means "because (see Neuberger in **Derbyshire v St Helen's Metropolitan Borough Council [2007] ICR 841** at 865 paragraph 76). As Mr Potter pointed out in argument, in determining whether an act is done because the party victimised did one or some of the things set out in Article 6(1)(a)-(d) the test to be applied may be expressed in somewhat different ways though it should lead to the same answer. The Tribunal can ask the question "why did the respondent act as it did?" See, for example **Nagarajan v LRT [1999] IRLR 57** at paragraphs [13] and [18]. In **Derbyshire** Lord Neuberger put the matter thus:
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> > "The words 'by reason that' require one to consider why the employer has done the particular act ... and to that extent one must assess the alleged act of victimisation from the employer's point of view. However, in considering whether the act has caused a detriment, one must view the issue from the point of view of the alleged victim".
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> Alternatively the Tribunal may pose the question "Would the respondent have acted as it did but for the fact that the victimised party did what he or she did acting under Article 6(1)(a)-(d)". (See for example Lady Hale in **R v Governing Body of JFS [2010] IRLR 136** paragraph [58] and Lord Clarke (ibid.) at paragraphs [131]-[134]).

Alternatively, it may pose the question, as Lord Mance did in **JFS**, whether the impugned act was inherently discriminatory".

(ii) The claimant had crystallised the general nature of her victimisation claim at paragraph 7.4 of her claim form as follows:-

> "I am making a claim on the grounds of victimisation when the Western Health and Social Care Trust decided to reduce a Dental Therapist post in Enniskillen from five days per week to one day per week. I was informed of this decision by letter dated 11th March 2016, received on April 4th 2016. I am currently a dental therapist working for the Trust in Omagh and had hoped to be able to fill this position and had made this known to management. I believe the decision to downgrade this post is an unfair denial of opportunity to me and the result of a grievance I took in 2012 of sexual discrimination while on maternity leave".

(iii) It was common case that the claimant's claim had been presented to the tribunal on 5 June 2016 and that the claimant was relying on events prior to that date.

FINDINGS OF FACT

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

(i) The claimant was employed by the respondent as a Dental Therapist MTO 3 Band 6 working in Community Dental Services and based at Omagh. She worked 22.5 hours per week. She was employed in this capacity at all times material to her case before the tribunal.

(ii) Whilst on maternity leave, the claimant submitted an SC1 application form to her manager, Dr Quinn, Clinical Director for Dentistry, in March 2012 for approval to attend the British Association of Dental Therapists' annual conference. The claimant was refused funding for "financial reasons/on maternity leave". Two of her colleagues did receive funding to attend. Upon returning to work in September 2012, the claimant, having expressed concerns to Dr Quinn that she had been discriminated against because she was on maternity leave, sent a grievance by way of email to Kate McDaid, Assistant Director, on 19 September 2012. The respondent agreed that this constituted a protected act for the purposes of the claimant's victimisation claim.

(iii) Dr Quinn wrote to the claimant on 3 October 2012 in the following terms:-

> "3/10/12
>
> Dear Muire
>
> Re: British Association of Dental Therapists Annual Conference

I refer to your request to attend the above Annual Conference which was not approved by the Trust, and to the subsequent e-mails and discussions we have had concerning this matter.

I can confirm that Kate McDaid, Assistant Director and myself have had the opportunity to consider the circumstances in which this request was not supported.

On 16/2/12 discussions took place between Kate McDaid and myself concerning identifying funding for Dental Therapy staff training and CPD. There is no identified funding source for Dental Nurses and Dental Therapists training and CPD. It was agreed at that time that a maximum of 2 members of staff would be supported by the Trust to attend the British Association of Dental Therapist Conference this year. However whilst Kate McDaid and I reached this decision, I fully accept these arrangements were not communicated to staff.

I acknowledge that the refusal to support your SC1 application has led to your dissatisfaction, and you were unaware of the Trust position with regard to this matter. In addition I recognise that you could not have provided me with your request to attend the Conference prior to the commencement of your Maternity Leave, since details relating to the Conference were not available at that time.

Accordingly I can confirm that, given these circumstances I have reconsidered the matter and can confirm the Trust will reimburse you the expenditure of the conference fee and give you the time in lieu, the same as was granted to the other staff members. I trust this brings the matter to a satisfactory close.

Yours sincerely

Grainne Quinn
Clinical Director CDS"

(iv) The claimant's subsequent email to Kate McDaid dated 10 October 2012 highlights her feelings and attitude at that stage:-

"Dear Ms McDaid

I received a reply to my complaint regarding SC1 refusal from Dr Quinn yesterday, having been advised by her earlier that it was on its way. I gather from the letter that I should not be expecting any further response from you to my correspondence.

I just wanted to let you know that I accept that this should lead to the matter coming to an end as it brings some fairness to the situation. However I think that I should make you aware that I am somewhat disappointed with the response for the following reasons:

1. The series of explanations for the refusal, including in the recent letter, are bizarre.

2. I was clearly discriminated against, the solution reverses this, but there has been no acknowledgement of this or any apology for the whole episode from the person(s) responsible.

Thank you for your assistance in providing an equitable solution in this matter.

Regards

Muire"

(v) The tribunal carefully considered the evidence relating to relevant events and correspondence from 10 October 2012 until the date of presentation of the claimant's claim to the tribunal on 5 June 2016. The tribunal is satisfied that the claimant relied on events and correspondence subsequent to the grievance outcome as background material only until the act of victimisation relied on emerged following the retirement, in September 2015, of a Dental Therapist based in Enniskillen. This retirement was communicated to staff by Dr Quinn as Clinical Director on 2 September 2015. The claimant was clearly annoyed by the fact that Dr Quinn had not directly approached her regarding this post. The claimant's email to Dr Quinn (copied to Kate McDaid), dated 8 September 2015 indicates her strength of feeling regarding the matter:-

"Dear Grainne,

I am disappointed that following my email of 22nd June this year you did not feel the need to contact me on this matter prior to or since the staff meeting on Wednesday last where you announced the retirement of the current post-holder in Enniskillen. As a victim in the past of harassment and discrimination while on maternity leave and bearing in mind the defamatory nature of your failed consultation paper on abolishing a dental therapist post I had hoped that you might have treated me with more courtesy on this occasion.

My reply to the consultation document extensively outlined the benefits to the Trust and the cost effectiveness involved in having a dental therapist with their many skills holding posts. This is done through the flexibility we provide with our extensive skill mix. It think this has been proven in Enniskillen where you have utilised my services paid on a Band 6 and a dental nurse, giving oral health education and occasionally applying varnish, being paid on a Band 5 since the previous post-holder took ill. I think you would find it difficult to disagree with me when I say the cost to the Trust has actually been significantly less to employ me than the dental nurse even though I am carrying out more highly skilled work a lot of the time. I am a mother of four young children who has shown exemplary commitment to the Trust throughout my eleven years employment, only missing one days work despite my childcare and huge travel commitments. I wish to

reiterate my previous desires from the email of 22nd June and would appreciate if you could keep me informed of your plans for the post. Regards, Muire".

(vi) The reference by the claimant to an email of 22 June 2015 is significant. In that email to Dr Quinn she refers to a conversation with her the previous week and states that she is contacting her regarding her future location and hours of work within the Trust. She goes on to state:-

> "...As you know I requested a transfer of my position from Omagh to Enniskillen in the event of a post becoming available. Subsequently I was advised that the transfer policy within the Trust was suspended and this appears to be still the case.
>
> Having spent more than ten years commuting the greater than 100 mile round trip from home to Omagh, I am very keen in the event of the dental therapist post becoming vacant in Enniskillen, that I could change my position to it. I would also like to be considered for an increase in my current weekly hours if these became available.
>
> I am aware that at present this post is not available but wish to express my desire for future change and hope that it be given due consideration.
>
> Regards
>
> Muire"

(vii) The claimant's email of 8 September 2015, which had been copied to Kate McDaid, led to Dr Quinn emailing the Assistant Director of Human Resources, Pamela Crozier, on 11 September 2015 explaining her reaction to the claimant's email as follows:-

> "Dear Pamela
>
> Please see below the email from Muire Sweeney. I feel the tone of this email is very disrespectful and I totally refute the suggestion that she was harassed while on maternity leave. I also disagree with the way she describes the consultation which took place with regard to reduction of the dental therapist posts within the trust. As you know this was carried out according to trust procedures. Despite this I had to endure a FOI request from her regarding the procedure which I had no problem with complying with as I had carried it out as per trust procedures. However this demonstrates that she is constantly trying to undermine all of my management decisions with regard to the management of DCPS within the trust. I had spoke to Muire about the post in June. I then spoke to the Omagh team 2 weeks ago when Aideen announced her retirement and I advised all staff that a review of the post was being undertaken to determine what the service required and that all staff would be informed of this when the decision was made.

By copying Kate McDaid in her e-mails I feel she is trying to undermine my position as head of service and at this stage feel harassed by this member of staff because of the nature of her e-mails and previous actions. I already know that she will challenge any decision we make with regard to this post and feel she is trying to put undue pressure on me with regard to it.

I would be grateful for advice on taking this matter further. I am not sure if it is your department or if I should be contacting employee relations.

Regards

Grainne"

(viii) The tribunal is satisfied that it was the decision taken by the respondent to reduce a dental therapist post in Enniskillen from five days per week to one day per week and the following events which precipitated the claim to the tribunal. The claimant alleged that the decision to reduce the dental therapist post to one day per week was taken for the purposes of denying her the opportunity to transfer her base to Enniskillen and that this was done due to her previous grievance lodged in 2012.

(ix) The tribunal reminds itself of the approach set out by Kerr LCJ in **McNally v Limavady Borough Council [2005] NICA46**, where, in order to establish victimisation, the person must have protected status (which is conceded in this case). The person must have been treated less favourably than other persons in the same circumstances and the less favourable treatment must have occurred because the victimised person had brought proceedings against those who were guilty of victimisation. In her case before the tribunal, the claimant relied on a comparator being a dental therapist who had expressed an interest in VER in 2012. The tribunal is satisfied however, that this individual is not an appropriate comparator as there is no similarity in the material circumstances involving the therapist who expressed a desire in VER and the material circumstances being relied on by the claimant. The VER exercise is not at all comparable to the consultation process to reconfigure a post in Enniskillen pursuant to the retirement of a current post holder. The tribunal is further satisfied that the closest actual comparator is the Band 5 Oral Health Co-Ordinator who also hoped to gain an extra day in the reconfiguration but was also disappointed. However, unlike the claimant, this individual had not done a protected act. Furthermore it is difficult to envisage how the claimant can sustain an argument that she was subjected to less favourable treatment as compared to a hypothetical comparator by reason of the fact she had done a protected act, or that, apart from the foregoing, there was a causative link between the alleged treatment and the protected act.

(x) The claimant referred to a miscellany of individuals who had allegedly victimised her. However, there is no satisfactory evidence that any of these individuals, except for Dr Quinn and Kate McDaid, knew of her 2012 allegations and the protected act during the Enniskillen consultation process.

(xi) The tribunal can understand the claimant's disappointment in not being transferred from Omagh to Enniskillen, as requested in her email to Dr Quinn dated 22 June 2015. The consultation document had proposed that the funding of the vacant Dental Therapist Band 6 post would be reconfigured to provide clinical output in Enniskillen using a Dental Therapist (Band 6), one day per week and a Dental Hygienist (Band 5) two days per week. Clearly there were financial pressures operative in the background to this proposal. However, the monies released by the change were designed to ease service pressures by increasing the working hours of staff as well as the amount of clinical capacity available, from two to three days per week. The claimant's post in Omagh was not affected by the reconfiguration of the Dental Therapist position in the South West Acute Hospital in Enniskillen. Although not within the time framework of the case to the tribunal, the claimant has since gained an extra day working in Enniskillen in the absence of a Dental Therapist. Furthermore the tribunal is satisfied that the Dental Therapist post in Enniskillen was not abolished nor was it downgraded. Rather, the reconfiguration of the vacant post was designed to fulfil service needs. Although the claimant may have grounds for criticising the respondent in certain respects, any such criticism cannot, in itself, amount to victimisation under the 1976 Order.

(xii) There was considerable focus during the hearing on the relationship between Dr Quinn and the claimant. Correspondence dated 23 December 2015 from the claimant to Mary McKenna, Head of Acute and Community Paediatrics, includes the following and again highlights the nature of some of the issues between the two individuals:-

> "I stated that Dr Quinn was dishonest with regard to the issue of discrimination in 2012 and that I had provided clear written evidence of this. This was inappropriate of me and I wish to withdraw this comment and apologise for it. It was made out of frustration that despite the fact that I have taken a grievance on this matter and there has now also been an informal investigation into it, no effort has been made to explain why Dr Quinn gave a number of reasons for refusing funding that do not correlate with the explanation given following my grievance. The written evidence I referred to relates to this. While standing by my strongly held opinions that I was discriminated against and that the grievance was not dealt with appropriately it was a mistake on my part to mention clear written evidence of dishonesty".

(xiii) The tribunal was directed to the consultation documentation and correspondence surrounding it and to the claimant's detailed response to Dr Quinn dated 12 January 2016, when she again makes her position clear regarding a transfer to Enniskillen:-

> "I believe that the Trust has social responsibilities and in this proposal my personal circumstances and the environmental effects of any decision should have been taken into account. There is no evidence that this is the case. If I was to be denied a position in SWAH I would be driving an unnecessary 7,000 miles per year for possibly the rest of

my career. A more sustainable alternative for the future would be to allow me move my three days per week as a Dental Therapist to SWAH and if there is an absolute need to downgrade a dental therapist post this could be done on the same basis as proposed in Omagh instead, where it would deliver the exact same cost savings and services without the same personal and social consequences.

For the reasons outlined I believe that the proposal is not the best option and is unfair and request that whoever makes a decision on this matter will take an objective and unbiased look at all the factors involved.

In summary I believe that this proposal should be modified to have a dental therapist in SWAH 3 days per week without a hygienist post for the following reasons:

- It will result in a better service for clients and will prove to be more satisfactory for staff of the dental department and other health and social care workers.

- This will be in line with optimal dental services as planned for by the leaders of public service dentistry in the UK.

- This change can be very comfortably provided for within existing funding and still leave savings that can be used elsewhere.

- If the modest extra cost involved in modifying this proposal is not available it could be recouped in full by making changes to the Dental Therapist post in Omagh without the huge social costs, although I would regard this as a hugely retrograde step in any centre, as outlined thoroughly already".

Dr Quinn replied to the claimant on 11 March 2016 addressing various points in the claimant's correspondence and reiterating the Trust's position:-

"I feel the changes proposed in the Consultation will help to deliver a high quality service to our clients in the South West Acute Hospital. Following consideration of all responses received it remains my intention to proceed to implement the proposed changes as per the Consultation document. I plan to offer the additional hours available to existing staff in the first instance. Normal recruitment process will take place as appropriate thereafter to meet any shortfall. I will be contact with staff in the near future to take this matter forward".

(xiii) The tribunal is satisfied that the Trust had an objective basis for the reconfiguration of the vacant post in Enniskillen pursuant to the retirement of a Dental Therapist in September 2015.

THE LAW

7. (1) The 1976 Order provides as follows:-

Discrimination by way of victimisation

6.—(1) A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Order if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has—

(a) brought proceedings against the discriminator or any other person under this Order or the Equal Pay Act or Article 62 to 65 of the Pensions (Northern Ireland) Order 1995, or

(b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Order or the Equal Pay Act or Article 62 to 65 of the Pensions (Northern Ireland) Order 1995, or

(c) otherwise done anything under or by reference to this Order or the Equal Pay Act or Article 62 to 65 of the Pensions (Northern Ireland) Order 1995 in relation to the discriminator or any other person, or

(d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Order or give rise to a claim under the Equal Pay Act or under Article 62 to 65 of the Pensions (Northern Ireland) Order 1995,

or by reason that the discriminator knows the person victimised intends to do any of those things, or suspects the person victimised has done, or intends to do, any of them.

(2) Paragraph (1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.

(2) Article 8 of the 1976 Order provides:

Applicants and employees

8 .—(1) It is unlawful for a person, in relation to employment by him at an establishment in Northern Ireland, to discriminate against a woman—

(a) in the arrangements he makes for the purpose of determining who should be offered that employment, or

(b) in the terms on which he offers her that employment, or

(c) by refusing or deliberately omitting to offer her that employment.

(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland, to discriminate against her—

(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or

(b) by dismissing her, or subjecting her to any other detriment.

(3) The tribunal has already referred to the Northern Ireland Court of Appeal in **Simpson**.

(4) In the earlier Northern Ireland Court of Appeal case of **John Joseph Rice v Yvonne McEvoy** (reference GIR8161, delivered 16/5/11), Girvan LJ sets out the relevant legal principles in victimisation cases as follows:-

"[22] In order to establish that discrimination by way of victimisation has occurred –

(a) circumstances relevant for the purposes of the provisions of the Order must apply;

(b) the alleged discriminator must have treated the person allegedly victimised less favourably than in those circumstances he treats or would treat other persons in similar circumstances ("the less favourable treatment issue"); and

(c) he must have done so by reason of the fact that the person victimised has done one of the protected acts ("the reason why issue").

[23] For a complainant to have suffered comparable discrimination he or she must have been detrimentally affected by the way the employer has afforded her access to some benefit, facility, service or opportunity or subjected him or her to some other detriment.

[24] In the absence of a true comparator it is necessary to approach the question of comparative treatment hypothetically.

[25] The primary object of the victimisation provisions is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so.

[26] In determining whether the alleged victim has been less favourably treated than others the comparison is a simple comparison between the treatment afforded to the complainant who has done the protected act and the treatment that had or would have been afforded to other employees who had not done so.

[27] As Lord Nicholls points out in **Shamoon v Chief Constable of the RUC [2002] NI 174** tribunals usually proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which a claimant must cross before the tribunal is called on to decide why the claimant was afforded the treatment of which she or he complains.

[28] However, while in many cases it is convenient and helpful to adopt the two stage approach to the less favourable treatment issue and the reason why issue there is essentially one single question: did the claimant on the prescribed ground receive less favourable treatment than others. Sometimes the less favourable treatment issue cannot be resolved without at the same time deciding the reason why issue the two issues are intertwined (Lord Nicholls in Shamoon at paragraph [8]).

[29] There can be cases where the position held by the complainant was the only one of its kind and was incapable of being compared with that held at the relevant time by anyone else in the employer's organisation. The words "or would treat" in Article 6 of the Order permit the question whether there was discrimination against a woman on the ground of her sex to be approached as a hypothesis. It would defeat the purpose of the Order if this question could not be addressed simply because the complainant was unable to point to anyone else who was in fact in the same position as she was (per Lord Hope in Shamoon at paragraph 52).

[30] The victim who complains of discrimination must satisfy the fact finding tribunal that, on the balance of probabilities, he has suffered discrimination falling within the statutory definition. This may be done by placing before the tribunal evidential material how he or she would have been treated if she had not been a member of the protected class. Actual comparators may constitute such evidential material but they are only a tool which may or may not justify an inference of discrimination. The usefulness of the tool will depend on the extent of the circumstances relating to the victim. The more significant the differences the less cogent will be the case for drawing inferences. The fact that a particular chosen comparator cannot because of material differences qualify as the statutory comparator by no means disqualifies him from an evidential role. It may, in conjunction with other material, justify a tribunal drawing an inference (per Lord Scott in **Shamoon** at paragraph [109]).

[31] In the absence of comparators of sufficient evidential value some other material must be identified that is capable of supporting the requisite inferences of discrimination. Unconvincing denials of a discriminatory intent given by the alleged discriminator coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision might in some cases suffice (per Lord Scott in **Shamoon** at [116]).

[32] In deciding the issue whether the claimant has been treated less favourably by the alleged discriminator the conduct of the hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. Circumstances may be relevant even if no reasonable employer would have attached any weight to them in considering how to treat the employer (per Lord Browne-Wilkinson in **Glasgow City Council v Zafar [1998] 2 All ER 953 at 956** and per Lord Rodger in **Shamoon** at paragraph [132]).

[33] In determining the reason why issue it is necessary for the tribunal to consider the employer's mental processes, conscious and unconscious. If on such consideration it appears that the protected act had a significant influence on the outcome victimisation is established (see Lord Nicholls in **Nagarajan v London Regional Transport[1999] IRLR 572 at 575, 576**). The question is why did the alleged discriminator act as he did? What consciously or unconsciously was his reason? Unlike causation this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact (per Lord Nicholls in **Chief Constable of West Yorkshire v Khan [2001] IRLR 830** at paragraph 29).

[34] The reverse burden of proof provisions in Article 63A apply to claims of victimisation under Article 6 because they are claims of discrimination **(Pothecary Witham Weld v Bullimore [2010] IRLR 572)**.

[35] In a case where a claimant has raised a prima facie case for the purposes of Article 63A it must in principle be enough to say with such reasons as may be appropriate "we are not persuaded that his explanation was right" rather than "we reject his explanation." It is preferable for a tribunal to make positive findings one way or the other (see **Pothecary Witham Weld v Bullimore**.)

BURDEN OF PROOF

8. Article 63 of the 1976 Order provides as follows:-

63A.–(1) This Article applies to any complaint presented under Article 63 to an industrial tribunal.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent–

(a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part III, or

(b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination or harassment] against the complainant, or

(c) has contravened Article 40 or 41 in relation to an act which is unlawful by virtue of Part III].

the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.]

9. (i) In ***Igen Ltd (formerly Leeds Carers Guidance) and Others v Wong***, ***Chamberlains Solicitors and Another v Emokpae***; and ***Brunel University v Webster [2006] IRLR 258***, the Court of Appeal in England and Wales set out guidance on the interpretation of the statutory provisions shifting the burden of proof in cases of sex, race and disability discrimination. The reversal of the burden of proof provisions apply in cases of victimisation under the 1976 Order (**Pothecary Witham Weld v Bullimore [2010] IRLR 572**).

(ii) The Tribunal also considered the following authorities, **McDonagh and Others v Hamilton Thom Trading As The Royal Hotel, Dungannon [2007] NICA, Madarassy v Nomura 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 complainant were of like

with like as required by s.5(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 and Liberty (EAT) [2009] IRLR 154,*** at paragraphs 40 and 41. These paragraphs are set out in full to give the full context of this part of his judgement.

> "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-discriminatory 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".

SUBMISSIONS

10. The tribunal carefully considered helpful written submissions presented to it on behalf of both parties together with further brief oral submissions on 2 June 2016. The written submissions are appended to this decision.

CONCLUSIONS

11. 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) As pointed out in the Northern Ireland Court of Appeal case of **Rice (Supra)**, in order to establish that discrimination by way of victimisation has occurred –

(a) circumstances relevant for the purposes of the provisions of the Order must apply;

(b) the alleged discriminator must have treated the person allegedly victimised less favourably than in those circumstances he treats or would treat other persons in similar circumstances ("the less favourable treatment issue"); and

(c) he must have done so by reason of the fact that the person victimised has done one of the protected acts ("the reason why issue"). Furthermore, in order to have suffered comparable discrimination the claimant must prove that she has been detrimentally affected by the way the respondent has subjected her to some detriment. In the absence of a true comparator it is necessary to approach the question of comparative treatment hypothetically.

(2) In determining whether the claimant has been less favourably treated than others, the comparison is a simple comparison between the treatment afforded to her, as having done a protected act, and the treatment that had or would have been afforded to other employees who had not done so. As pointed out at paragraph [28] in **Rice** there is essentially one single question:-

> "Did the claimant on the prescribed ground receive less favourable treatment than others? Sometimes the less favourable treatment issue cannot be resolved without at the same time deciding the reason why issue the two issues are intertwined (Lord Nicholls in **Shamoon v The Chief Constable of the RUC [2002] NI 174, at paragraph 8**)".

(3) In order to rely on a hypothetical comparator, the claimant must place before the tribunal evidential material of how she would have been treated if she had not been a member of the protected class.

(4) As recorded in its findings of fact, the tribunal is not satisfied that the claimant has established a true comparator. A Dental Therapist who expressed an interest in VER in 2012 is not an appropriate comparator in respect of whom the claimant has been treated less favourably than the respondent has treated or would treat other persons in similar circumstances. Furthermore, the tribunal is satisfied that the comparator relied on is not appropriate as a hypothetical comparator by way of evidential material as to how the claimant would have been treated if she had not been a member of the protected class. Moreover, the tribunal is satisfied that none of the events pursuant to the outcome of the 2012 grievance, and culminating in the consultation process in 2015/16, establish a causative link between the protected act and the case being made by the claimant that the reconfiguration of a Dental Therapist in Enniskillen was an unfair denial of an opportunity which should have been afforded to her to transfer to Enniskillen as requested by her on several occasions preceding the consultation process. The consultation process was occasioned by the retirement of a permanent member of staff as a result of which, for objective reasons, the respondent reconfigured the post as described in the consultation documentation, and subsequent correspondence.

(5) There is therefore no satisfactory evidence before the tribunal that another

employee who had not done the protected act would have been afforded a transfer from a substantive post in Omagh to Enniskillen as requested by the claimant. The tribunal is further satisfied that the claimant has not proved detrimental treatment.

(6) The tribunal is therefore also satisfied that the claimant has not proved facts from which the tribunal could conclude, in the absence of an adequate explanation, that unlawful discrimation by way of victimisation had occurred on the ground of her sex as a result of having her lodged a grievance in 2012.

(7) The tribunal must therefore dismiss the claimant's claim in its entirety.

Employment Judge:

Date and place of hearing: 25-27 April, 31 May and 2 June 2017, Belfast.

Date decision recorded in register and issued to parties:

Muire Sweeney Ahern and Western Health and Social Care Trust

Case Ref No. 1470/16 IT

Written Submission On Behalf Of The Claimant

Work History

1. Since commencing work with the Trust it is evident that the claimant is a hard worker (P88, top) and Dr Quinn has stated that the dentists in Enniskillen have spoken highly of her work (P113). Her attendance is excellent having only one sick day since 2004. Dr Quinn confirmed at the start of her cross-examination that she is not aware that there was ever a complaint against the claimant from any client or staff member in the Trust and that she has never spoken to her about anything she felt was inappropriate. The respondent has stated in the ET3 that 'all the relevant decisions and actions taken by the Respondent have been based on objective reasons entirely unrelated to the claimant'. Dr Quinn in cross-examination stated that she fully agrees with this, however this statement is not accepted by the claimant.

Grievance of Discrimination September 2012

2. The manner in which the grievance of discrimination in 2012 was handled was very poor. Mrs McDaid gave evidence that the Trust policy for dealing with informal grievances was not followed as 'that is not the way we do business'. The fact that an open and frank discussion of the grievance did not take place meant that matters that lead to the issue arising were not cleared up. Examples of these are:

   (i) The claimant believed that she was discriminated against, the letter from Dr Quinn did not address whether this was accepted or not. When the claimant subsequently contacted Mrs McDaid (P46) there is no doubt that she still believed that she had been discriminated against. Mrs McDaid did not address this even though she believes that the claimant was definitely not discriminated against.

   (ii) When lodging the grievance (P44) the claimant clearly took issue with the fact that she had been told that she was refused as the days were regarded as KIT days, this was not clarified by Dr Quinn's letter (P45).

   (iii) Ms Crozier said during cross-examination that she didn't think that Mrs McDaid, when seeking advice on how to deal with the matter, told her that the claimant had taken a

grievance. It is difficult to believe that appropriate advice could have been given by Ms Crozier under the circumstances and that the issue could have been dealt with adequately.

(iv) No apology was made to the claimant; Dr Quinn and Mrs McDaid agreed that she should have received one.

The information given by the respondent's witnesses in their statements is that the grievance of discrimination was dealt with appropriately and to everybody's satisfaction, the evidence shows that this was definitely not the case. There is a strong possibility that had the grievance been handled in accordance with the Trust policy future problems including this claim of victimisation could have been avoided.

3. This is illustrated by the fact that Dr Quinn stated during cross-examination that she was unsure whether she was aware that the claimant had taken a grievance to Ms McDaid when she, Dr Quinn, wrote a letter to the claimant to try and resolve the grievance. She could also not remember when she became aware it was a grievance. One would expect that Dr Quinn should know if she was aware in September 2012 that a grievance of discrimination was raised and if she did not know then that she would remember when she found out. When writing her witness statement Dr Quinn doesn't acknowledge the grievance took place, it is not mentioned in paragraphs 5, 6 or 7, which deal with the issue, or anywhere else. Neither does she mention that it was only resolved after the claimant approached her line manager Mrs McDaid. In addressing an important issue this seems very strange. In paragraph 42 of her witness statement Dr Quinn states that she put the matter of the complaint behind her, this despite the fact she doesn't know when she became aware a grievance was taken. If she does not know when she became aware of the grievance it is difficult to understand how she would know when and whether she had put the matter behind her. This statement in paragraph 42 is also undermined by the fact that the two statements immediately preceding it are untrue i.e. that she was never accused of unfair treatment by any other member of staff (P192) and that when she received the complaint of discrimination she accepted the initial decision was wrong and acted to address it (P133).

Unfair treatment of the Claimant

4. The Claimant has given evidence that as well as being very unfair to dental therapists as a group, the VER process commenced in 2013 was particularly unfair to her. Despite it being stated as an option in the VER consultation paper (P177), witnesses for the respondent have said that compulsory redundancy was not a possibility. Even if this is correct, redeployment

was certainly an option as reflected in the email from Ms Crozier to Dr Quinn on 18 January 2013 (P49). Ms Crozier acknowledged that at the outset of the consultation redeployment was an option, though at a later unspecified date Dr Quinn had made clear that she would not look at redeployment. The claimant has stated in her witness statement that she did not see redeployment as being an option for her (Para 9).

5. The only interpretation of the email sent by Dr Quinn to Ms Crozier at the outset of the VER consultation on 16 January 2013 (P48) that we can make is that it reveals hopes of getting even with the claimant, following her grievance of discrimination. This email was sent just over three months following the grievance. It's obvious that the evidence given in Dr Quinn's witness statement (Para 16) and cross-examination about the meaning of 'the problems start' and the double exclamation mark at the end of this sentence could not be correct. If the proposal was dropped it would of course be disappointing for Dr Quinn. However, there was no explanation for what would *start* at this point. It is not accepted that the double exclamation mark is a sign of concern. Given that Dr Quinn has not satisfactorily explained it, the double exclamation mark can only mean excitement, excitement that one of the four dental therapists could be forced to redeploy against their wishes. In order for her to mention it, it is also clear that she believes there is a clear possibility that no therapist will take the voluntary option. The claimant has explained in her witness statement why she believed that she was the most likely candidate to be selected in this event (Para 9), the respondent has not disputed this.

6. The evidence shows that the claimant made a strong response to the consultation paper and sought a correction and apology (P178-184). One of the other dental therapists made an equally strong if not stronger response and also sought a correction or apology (P190-192). Dr Quinn in her witness statement (Para 20) and cross-examination says that she said sorry to this therapist, although under cross-examination she stated that this wasn't an apology. Instead of acting similarly with the claimant she discussed the issue with Assistant Director Mrs McDaid and together they decided that the claimant should receive no apology (P312). Neither Dr Quinn nor Mrs McDaid could explain why the claimant was named in these minutes and her colleague was not. This is part of a pattern of treatment towards the claimant.

7. When the VER proposal was dropped in March 2014 Ms Crozier contacted two of the three dental therapists she had met to advise them of this (Para 13). She says she did not contact the claimant as she had not expressed an interest in VER. However the evidence given in the ET3 (P29) states that at this stage only one of the other therapists wished to avail of VER. This shows that the claimant was treated differently to the therapist who had withdrawn her interest.

Process leading to the 2015 Consultation Paper

8. At the outset of the process to replace the dental therapist post in Enniskillen Dr Quinn mentioned the retirement of the previous post-holder at a staff meeting in Omagh on 2nd September 2015 at which the claimant was present. Dr Quinn agreed in cross-examination that the account of her comments in the minutes of the meeting (P166), her witness statement (Para 31) and the claimants witness statement (Para 19) were consistent and accurate. She also agreed that her account of this in the email to Ms Crozier on 11th September 2015 (P64) is not consistent with these. Her description to Ms Crozier of what she said is likely to be what she felt she should have said, but did not. Instead she had decided to start this process with as much secrecy as possible in a bid to prevent the claimant having any influence on the process as she felt this would be a threat to her getting what she wanted from it.

9. This email from Dr Quinn (P64) also shows some other things. One is that she already knows on 11th September 2015 that the changes she will make to the post will prevent the claimant getting the transfer she wants – 'I already know that she will challenge any decision we make with regard to this post.....' The claimant realised from her conversation with Dr Quinn 6 days later that there was little chance she would get the transfer, this is reflected in her witness statement (Para 23) and in her reaction in this conversation as mentioned in Dr Quinn's notes (P168).

10. Also in Dr Quinn's email she says she is feeling harassed due to the claimant's 'emails and previous actions'. In paragraph 34 of her witness statement Dr Quinn explains that this was caused by the claimant's reference to being the 'victim of harassment and discrimination while on maternity leave in 2012' along with referring to 'the defamatory nature of your failed consultation paper on abolishing a dental therapist post'. These are the contents of that one email that have angered her (P64-65). Despite the claimant saying in her witness

statement (Para 22) that if harassing emails had been sent prior to that there should be a clear record of theses available, this was not reflected in Dr Quinn's witness statement or the bundle of evidence.

11. The only two emails Dr Quinn identified in cross-examination are one the claimant sent on 22nd August 2012 (P41) which is clearly not harassing and the email already referred to, sent by the claimant on 8th September 2015(P64/65). On re-examination Dr Quinn was directed by counsel to read sections of an email and attachment from the claimant on 7th February 2013 (P178-184), which Dr Quinn had *invited* in response to the VER consultation paper. It should be repeated at this stage that a colleague had sent a similar response to Dr Quinn, who subsequently said sorry to that colleague. It is difficult to see how Dr Quinn could regard the claimant's email and attachment as harassing when she was willing to tell her colleague she was sorry for the 'upset' caused. The fact the claimant's three emails were spread over more than three years also undermines the assertion of harassment. All Dr Quinn's explanations on this relate purely to emails and their contents and not the 'previous actions'.

12. At the end of paragraph 34 of her witness statement Dr Quinn tries to explain the 'previous actions'. She refers again to part of the contents of the email of 8th September 2015. The 'previous actions' mentioned by Dr Quinn in the email to Ms Crozier (P 64) are clearly in addition to the emails. She has not taken the opportunities at any stage to properly explain what the 'previous actions' she mentions refer to, even though the claimant has said in her witness statement that the only previous action she took was her complaint and grievance of discrimination and that this was the basis of her claim of victimisation (Para 22). Given the importance the claimant attached to this in her witness statement and the opportunities the respondent and its witnesses have had to refute this, it is reasonable to conclude that Dr Quinn's failure to state what the 'previous actions' are means that it must refer to the grievance of discrimination in 2012.

13. This email shows that Dr Quinn was personally fraught by the claimant in September 2015. The only conclusion that can be reached is that this upset has been caused substantively by the claimant's previous grievance of discrimination as Dr Quinn has been unable to either demonstrate harassment from emails or show any other previous actions. This grievance was

at the forefront of her mind in September 2015 when she took the decision on the dental therapist post in Enniskillen.

14. Following this Dr Quinn spoke to Ms Clifford in Employee Relations. Ms Clifford's notes (P 169) mention an 'issue on maternity leave' which Dr Quinn acknowledged is the grievance of discrimination. This is immediately followed by 'feel wants to put marker down'. Dr Quinn stated in cross-examination that this is not what she said but was unable to say exactly what she did say that would have prompted Ms Clifford to write this down. Dr Quinn's memory of events at this time is not clear. During her cross-examination she initially stated that she contacted Employee Relations before Ms Crozier. As the evidence was produced she gradually changed her stance on this and eventually agreed that it was Ms Crozier she contacted first followed by Ms Clifford.

15. It is not credible to believe that Ms Clifford would have noted at the time 'feel wants to put marker down' if these were not words Dr Quinn had used and as stated Dr Quinn's memory is not clear. There is no reason why these notes should not be regarded as an accurate record and they show that Dr Quinn wished to take action against the claimant, in order to try to stop her from challenging the decision she knew she was going to take about the post in Enniskillen. The action Dr Quinn wanted to take was unjustifiable based on the evidence of the emails. Like the email to Ms Crozier on 11th September 2015 these notes show that the previous grievance of discrimination was to the forefront of her mind in September 2015 and was influencing her actions.

16. Dr Quinn in cross-examination said that on 2nd September 2015 she asked the dentists in Enniskillen to get back to her with what they wanted to happen with the dental therapist post. She stated that she gave them no guidance regarding this and that there was no discussion on the matter and this is why there was no notes taken. An email from a Senior Dental Officer to Dr Quinn on 4th September 2015 (P62-63) shows that there was discussion on 2nd September; the contents of this email were not disputed by Dr Quinn when this was pointed out to her under cross-examination. Dr Quinn went on to acknowledge that the only options discussed in the emails at this time were whether to have a dental hygienist one day/dental therapist two days or dental hygienist two days/dental therapist one day and that from 10 September there was no disagreement with the final configuration chosen, although there were requests to review the service needs from a wider perspective that were not followed

up on. It is clear that Dr Quinn gave the dentists a very narrow range of options to choose from but has not been forthcoming on this in her evidence. However, she did admit that there was no discussion on the benefits to patients of having a dental therapist three days a week as an alternative to the above two options.

17. It is evident in this process that when Dr Quinn sought advice from the dentists she used that which suited her in formulating the proposal she wanted, and ignored that which could have lead to an alternative proposal that the claimant would be happy with. One example of this is the email mentioned in the last paragraph from a Senior Dental Officer on 4th September 2015 (P62-63) when she suggested that 'If both hygienist and therapist worked in Omagh and Fermanagh we could cover a lot of options'. Dr Quinn admitted in cross-examination that this suggestion received no follow-up. The decision of the Senior Dental Management Meeting of 2nd October 2015 (P171) is similar to this suggestion and is the clearest example of how Dr Quinn failed to take account of the dentist's opinions when it did not suit her. A decision was made to review the service needs of the dental therapist posts in the whole southern sector (including Omagh) rather than just Enniskillen alone. Dr Quinn admitted in cross-examination that she did not review service needs in accordance with this decision but instead produced activity figures, which were not requested by the senior dentists. The respondent states in the ET3 (P32) that these figures produced in November 2015 were the rationale for the reconfiguration of the post in Enniskillen; however the evidence shows that the decision about the post was taken prior to this. Another example of Dr Quinn not taking on board what her Senior Dental colleagues told her was with regard to the incorrect working pattern of the previous dental therapist in Enniskillen, as outlined in the consultation paper (P206). Despite receiving emails from two different Senior Dentists(P90(para3), P92) and an Associate Specialist (P96) that there was a problem with this in draft versions, Dr Quinn admitted that she did not try to correct it.

18. It is evident that Dr Quinn did not allow the dentists to make the decision as she claimed in cross-examination. Instead she used them as cover for the decision that she was determined to make, one that would not allow the claimant a transfer. This is demonstrated in the fact that out of the three dentists who Dr Quinn says in her witness statement (Para 32) were best placed to offer a view, only one responded in favour of the proposal that Dr Quinn drew up in her consultation paper, according to Dr Quinn's own analysis of the responses. This dentist was the only staff member in the southern sector who responded in favour. It is clear

that when the other two dentists read the consultation paper as a whole and reflected on it they realised that this proposal was one that they could not endorse (P230, 244). It is significant that, given the fact that Dr Quinn says the dentists have had such a major input into this decision, the respondent has not called any of them as witnesses to verify this and to confirm that this proposal is sound.

19. Evidence has been presented which shows that Dr Quinn attended Omagh Health Centre during the consultation period on a day the claimant did not work there and made a statement to her colleagues about the claimant's post being 'safe' that she was not prepared to repeat to the claimant by email (P100-102). Dr Quinn denied under cross-examination that this statement was made in an attempt to influence the responses of staff from Omagh to the consultation. This is not accepted by the claimant.

Reasons for the Consultation Paper Issued on 16th December 2015

20. Dr Quinn has put forward a number of factors in the consultation paper and her witness statement that have motivated the changes in the dental therapist post in Enniskillen. She has stated that the most important factor in any decision like this that she makes is what is best for patients. However, she admitted in cross-examination that in all the discussions with the dentists prior to the consultation paper and in the consultation paper itself there was no mention or discussion on how different options could benefit patients and there was no discussion on whether there would be benefits to patients in having a dental therapist three days a week rather than dividing the role between a dental therapist and hygienist. She stated that there was no disadvantage to patients in having a dental therapist three days per week but that she herself did not see any benefit to it. However, there are clear arguments in the responses to the consultation showing that many others would disagree with her opinion of there being no benefit (P210-214, P236, P239-241, P247-248) so it should surely have merited at least some discussion. The three day per week dental therapist option was that suggested by the claimant, it is highly significant that the benefits to patients of this option were not even looked at or discussed.

21. The next reason given by Dr Quinn is that the proposal was done for efficiencies and to ensure the best use of Trust resources. On three occasions in the consultation paper and accompanying email to staff Dr Quinn indicates there will be cost savings because of the

proposal (P 99, 207). However the evidence shows and Dr Quinn admitted that there were no costings done (P263b) and she later told the claimant the proposal was cost neutral (P216). She stated under cross-examination that she still doesn't know if the changes will be cost saving or cost neutral. With no costings done for the actual proposal stated in the consultation paper and all the contradictions on costings it is not credible that the proposal could have been motivated by efficiencies.

22. This is added to by the fact that Dr Quinn admitted that oral health work was and still is provided by a less qualified Band 5 Oral Health Co-ordinator travelling from Omagh and this is at a significantly higher cost than a Band 5 Dental Hygienist based in Enniskillen carrying out the work. Under the proposal as outlined in the consultation paper there was to be no change in this, however Dr Quinn after the consultation said that the work of the travelling Oral Health Co-ordinator would be scaled back when the claimant had drawn attention to this in her response (P209, final paragraph). If Dr Quinn was so motivated by efficiencies when drawing up this proposal her priority should have been to address this issue, this wasn't the case.

23. One of the other benefits of the proposal given was an increase in clinical time from two days per week to three (p207, final para). Dr Quinn agreed that the information she was given when drawing up the consultation showed that the previous dental therapist worked more than two clinical days per week but she was unable to put a more precise figure on this. Although the consultation paper gives the clear impression there will be three clinical days, Dr Quinn stated later that the work of the Oral Health Co-ordinator in Enniskillen would be scaled back(P216, third paragraph), with the incoming hygienist carrying out this oral health work, meaning there will be less than three clinical days. This means the claim of an increase in clinical time from two to three days per week under this proposal is not genuine and is not a motivating factor and again gives misleading information to readers of and respondents to the consultation paper.

24. The consultation paper outlines an 'innovative approach to working' where the therapist and hygienist concentrate on clinical work and the oral health work is provided by oral health co-ordinators and dental nurses (P206, 2nd para). It states that the 'interim change has brought the southern sector into line with the existing practices in the northern sector'.

However as mentioned previously, subsequent to the consultation paper and in her cross-examination Dr Quinn stated that the work of the Oral Health Co-ordinator in Enniskillen is to be scaled back and carried out by the incoming dental hygienist. This means that the innovative approach to working that is being used as a motivating factor for this change in the consultation paper is not genuine. This is emphasised in the response letter (P216) when Dr Quinn states that this change to the interim measures will be 'in line with current practice of similar staff in the Northern Sector'.

25. Similarly the consultation paper states that patients in the outlying clinics will also benefit from increased capacity (P207, final para). A Senior Dental Officer, in Enniskillen, in an email on 10th September 2015 to Dr Quinn with regard to this change states 'as we look to centralise our clinics' and says that he doesn't think the hygienist or therapist is 'needed out there' when mentioning'the likes of Bellek etc'(P62). Dr Quinn admitted that management at the time were looking to centralise clinics and are still doing this. She stated however that the clinics in Fermanagh are not part of this. However the contents of this email, from a senior dentist in Fermanagh, in relation to the Fermanagh clinics specifically, clearly contradict this and shows that benefiting patients in outlying clinics could not be a motivating factor behind this proposal.

26. The reasons given by the respondent for the proposal in the consultation paper do not stand up to any analysis of the solid evidence available. The evidence shows that the reason this proposal was put forward is that Dr Quinn would not countenance a proposal such as a three day dental therapist post in Enniskillen or a shared therapist post between Omagh and Enniskillen that would leave the path open for the claimant to transfer to Enniskillen (Para 16-18 above). She was motivated in this approach by personal reasons that stemmed from the grievance of discrimination in 2012. The evidence for this is outlined in paragraphs 33 & 34 below.

Opportunity to Transfer to a Post in Enniskillen

27. The claimant was given information about an informal transfer process available in the Trust by her Union and she discussed this with Dr Quinn in June 2015. Ms Crozier describes this process in paragraph 19 of her witness statement and this description is broadly in line with that described to the claimant by her union. It is clear from this description and Ms Crozier confirmed that had the dental therapist post in Enniskillen been retained for three days per week she could see no reason why the claimant would not be able to transfer there.

28. No reasons have been given by the respondent as to why this transfer would not have been able to proceed under these circumstances. The claimant is aware from discussions with colleagues in different departments that transfers under this process are widespread and ongoing throughout the Trust. The respondent did not provide any information on the number of transfers taking place, despite it being requested under the Notice of Additional Information, on the grounds that it was not relevant (P37(a) 5-6). They also did not provide any reasons why informal transfer requests would be turned down, where suitable posts were available, or on the number turned down, again because it was not relevant to the claim. The claimant was asked under cross-examination if she had presented evidence that these transfers were taking place. However, given that the respondent has not provided the information requested and deemed it irrelevant, coupled with Ms Crozier's evidence, this is clearly unnecessary.

An Appropriate Comparator

29. During Dr Quinn's time as Clinical Director of the Dental Department there have been two consultations regarding changes in posts and these have both involved dental therapist posts. In the first one commenced in 2013 'Ms Quinn would not have considered availing of VER if the member of staff had not expressed an interest due to the fact that the post would be abolished as a result of this process' (P28). Quite clearly service needs were not prioritised but Dr Quinn, under cross-examination said she deemed this acceptable if there was a 'positive outcome' for a member of staff. It is very clear that priority was given to the personal benefit of the staff member involved. This staff member is the comparator mentioned in the legal and factual issues and she should be appropriate as she is of the same post as the claimant, these have been the only consultations regarding posts in the department and both therapists had made Dr Quinn aware of personal circumstances relevant to the consultations beforehand.

30. At the outset of the second process Dr Quinn was aware that the claimant was hoping to get a transfer in her post to Enniskillen and the evidence shows that if the post was retained for three days per week or more this could be possible. In the second consultation Dr Quinn was very clear under cross-examination that she did not take any account of personal circumstances of the claimant when considering the future of this post and writing the consultation paper. Without taking anything further into consideration this alone shows that

the claimant has been treated less favourably than her colleague. However, as outlined in this submission, Dr Quinn's actions went further than this, from the outset of the process it is clear that she sought and succeeded in achieving an outcome from this process that would ensure that the claimant would not get the outcome she so keenly desired, a transfer to the dental therapist post in Enniskillen.

31. Dr Quinn stated and Ms Crozier later agreed that service needs were the only criteria that could be taken into consideration in the second consultation even though they both said that it was appropriate to set these aside for the first. This approach is unjustifiable. Furthermore, even when the claimant suggested an alternative approach to the proposal in response to the consultation paper with an identical cost and effect on service (P214 (last para), 215) Dr Quinn stated she could not consider this as it related to the personal circumstances of the claimant. This is also unjustifiable and constitutes clearly unfavourable treatment, especially when one considers the value she placed on a 'positive outcome' for a staff member in relation to the first consultation.

32. During cross-examination of the claimant an alternative comparator was suggested, an Oral Health Co-ordinator. She is not an appropriate comparator for the following reasons:
    (i) The respondent has provided no evidence to show how she is a relevant comparator except for Dr Quinn's brief reference in paragraph 55 of her witness statement when she says that this staff member hoped for extra hours when the post was rationalised.
    (ii) In the consultation document there is no reference to what the hours of the Oral Health Co-ordinator were prior to the proposal, whether these will change under the proposal and if they are to change whether there will be an increase or decrease. This was confirmed by Dr Quinn under cross-examination. This contrasts with the very clear information that the Dental Therapist post was previously a full-time post and is to be reduced to a one day per week post.
    (iii) Dr Quinn also confirmed under cross-examination that although this staff member had an opportunity to respond to the consultation she did not use that opportunity. If she had any concerns that the proposal made was in any way unfair or unjustified she could have used that opportunity but she did not. This contrasts with the actions of the claimant who put in a comprehensive response outlining why she felt the proposal was unwise, unfair and unjustified and made a suggestion for a fairer alternative at no extra cost to the Trust (P209-215).

Whether the Claimant Was Subjected to Victimisation

33. The evidence demonstrates that the benefits stated for this proposal in the consultation document and elsewhere are not genuine and are not the motivating factors behind it (Paragraphs 20-26 above). The failure of the respondent and Dr Quinn to provide reasons that would justifiably motivate the change proposed, and which was subsequently ratified by the Senior Management meeting leads to the conclusion that this proposal was motivated by Dr Quinn's personal desire not to see the claimant get a transfer, which she knew she wanted so much. This is also shown in the way Dr Quinn approached the process and dealt with the views of her dentist colleagues in formulating the proposal (Paragraphs 8, 9, 16-19 above). The approach taken to balancing the service needs with the personal circumstances of staff shows unfavourable treatment towards the claimant when compared to the 2012 consultation and the comparator mentioned in the factual issues (Paragraph 29-31 above).

34. The communications between Dr Quinn, Ms Crozier and Ms Clifford in September 2015 (Paragraphs 8-15 above) show Dr Quinn's underlying personal issues with the claimant and that these were strongly related to her grievance of discrimination in 2012. The evidence also shows a pattern of unfair treatment towards the claimant that commenced shortly after she took that grievance (Paragraphs 4-7 above). The claimant also outlined other unfair treatment in her witness statement, which due to time constraints it was not possible to put to Dr Quinn in cross-examination. There is no doubt that the grievance of discrimination was not handled in accordance with the Trust policy (Paragraphs 2&3 above), it is likely that if it was, later problems relating to the grievance could have been avoided.

35. While commuting long distances to work the claimant hoped to be treated fairly when an opportunity arose to try and secure a transfer to Enniskillen. She has suffered detriment in the decision to reduce the dental therapist post as this removed the strong possibility of a transfer. She has outlined this detriment in her witness statement when she says she has not been able to reduce her expense and time spent travelling, something she had been hoping for since she commenced work for the Trust in Omagh in 2004. She hoped that when an opportunity arose she would be treated fairly but the solid evidence provided shows that she has been unfairly denied this opportunity and this happened because she took the grievance of discrimination in 2012.

An Appropriate Remedy

36. The claimant has sought compensation in the event of her claim being successful. She provided a schedule of financial loss with her witness statement along with detail of injury to feeling (Para 33-35).

Other Legal Issues

37. During cross-examination of the claimant she was presented with questions about the response from her representative to the Notice for Additional Information and number 2 in particular (Pages37(b): 3,6 &7). With regard to part (a) it is clear that the claimant did not know how the decision at the Senior Management Meeting was reached and did not point the finger at anybody except to name those who were present and to say Dr Quinn presented the proposal. This is in accordance with the evidence that was available at the time (P176). This claim of victimisation is against the Western Health and Social Care Trust and this decision was taken by those present on behalf of the Trust.

38. Mrs McDaid, who was present at the meeting, later confirmed under cross-examination that following a brief presentation by Dr Quinn the proposal was accepted without any other discussion. She stated that those present had no knowledge of dental matters and accepted the proposal without question and she also agreed that this was just a rubber stamping exercise. This confirms that the reason the decision was reached at the meeting is the same reason that caused Dr Quinn to bring the proposal to the meeting, even if those present were unaware of it. The evidence presented to the tribunal regarding this claim of victimisation shows that the process from September 2015 culminating with the decision at this meeting was lead and controlled by Dr Quinn at all stages with HR providing advice on the process to be followed and the wording of documents. This was also confirmed in the cross-examination of Ms Crozier.

39. In answering part (b) it is clear that this has been replied to in the widest possible sense of the word 'involved' i.e. anybody who had any connection with the process that lead to the decision. This is in the context of a Notice for Additional Information where in the interests of transparency all possible relevant information has been provided. The reply clearly states that those mentioned were involved in the *consultation process*, again with the widest sense

of the word 'involved' beyond doubt. The respondent's representative was advised to seek information from the respondent if further detail was required on how each member of staff was involved with the process. No interpretation of the information provided could conclude that it suggested that all those referred to in (b) were complicit in this act of victimisation.

40. The case of Jill Simpson and Castlereagh Borough Council, Ref GIR9206, which was mentioned at the hearing, partly involved a claim of victimisation based on the respondent's failure to deal appropriately with a grievance lodged by the claimant. In that case it was deemed that an appropriate comparator would be a staff member who had lodged a grievance but who previously had not taken a grievance of sexual discrimination. In this case of Ms Sweeney Ahern the claim made is not that the respondent has treated the claimant unfavourably in its handling of a grievance. Therefore an appropriate comparator should be a fellow staff member who has not previously taken a grievance of sexual discrimination.

CASE REF NO: 1470/16 IT

INDUSTRIAL TRIBUNALS (CONSTITUTION AND RULES OF PROCEDURE) (REGULATIONS) (NORTHERN IRELAND) ORDER 2005

BETWEEN:

MUIRE SWEENEY AHERN

Claimant

and

WESTERN HEALTH AND SOCIAL CARE TRUST

Respondent

Submissions on behalf of the Respondent

PLEADINGS

1. The Claimant has identified the "*sole protected act relied upon to support this claim of discrimination is a grievance of discrimination whilst on maternity leave that the Claimant communicated to Ms Kate McDaid, Assistant Director on 19 September 2012.*"- Para 1 of the Reply to the Notice for Additional Information dated 23.01.2107 (page 37(b)(6).

   It is agreed that the Claimant performed a protected act on 19 September 2012.

2. In Para 2(a) of the Reply to the Notice for Additional Information dated 23.01.2107 (page 37(b)(6) The Claimant identifies the act of victimisation as;

   "*The sole alleged act of victimisation made in this claim was the decision taken by the Western Health and Social Care Trust to reduce a Dental Therapist post in Enniskillen from five days per week to one day per week. While the Claimant would agree that some reduction in the number of days can be justified she believes that the decision to reduce to just one day per week was taken for the purposes of denying her the opportunity to transfer her*

base to Enniskillen and that this was due to her previous grievance of discrimination"

During cross examination the Claimant explicitly confirmed that there were no acts of discrimination between 2012 and the commencement of the 2015 Enniskillen consultation process.

3. In the Respondent's Notice for Additional Information (page 37(b)(3) dated 22 December 2016 at Para 2(b) the Claimant was requested to provide the identity of the individual(s) involved in each and every act of alleged victimisation. She responded at page 37(b)(7);

   2(b) *..." In addition to those named above* the decision was reached following a consultation process involving a large number of Trust staff in addition to those named above including;*

- *Dental departmental Staff, some of whom were given input to the Consultation document, all of whom were circulated the document and some of whom gave responses to it.*
- *Various Staff in the Human Resources Department who were involved in the different stages of the process*
- *Trade union Officials*

   *Those named are set out at Para 2(a) being Mrs Quinn, Kieran Downey, Mrs Kate McDaid, MS Karen O'Brien., Mrs Ann McDuff, Ms Deirdre Mahon, Mr Tom Cassidy, Mrs Margaret Taggart, Mrs Anne Donaghey and Ms Elaine Forrest. All members of the SMT of the Women's and Children's Directorate who ratified the proposal (minute 10.02.16 page 176)

4. In cross examination the Claimant was asked if she had any evidence that any of the foregoing (save Dr Quinn and Mrs McDaid) knew of her 2012 allegation of discrimination and she confirmed that she had no such evidence. She was then asked if she was saying that those persons who had no knowledge of her allegation in 2012 had supported the proposal to reconfigure the Enniskillen post in 2015 in order to victimise her for bringing of a complaint of which they were unaware – she conceded that the dental staff who responded to the initial review and the persons identified at Para 2(b) could not have victimised her for that purpose. She also explicitly stated during cross examination that she never said that the Trade Union (who did not oppose the reconfiguration) victimised her, notwithstanding her pleaded case.

5. **The relevant statutory provisions**

Articles 6 and 8 of the Sex Discrimination NI Order 1976 Order provides as follows:

> "6(1) A person ('the discriminator') discriminates against another person ('the person victimised') in any circumstances relevant for the purposes of any provision

of this Order if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has –

(a) brought proceedings against the discriminator or any other person under this order or the Equal Pay Act or Article 62-65 of the Pensions (Northern Ireland) Order 1995, or

(b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Order or the Equal Pay Act or Article 62-65 of the Pensions (Northern Ireland) Order 1995, or

(c) otherwise done anything under or by reference to this Order or the Equal Pay Act or Article 62-65 of the Pensions (Northern Ireland) Order 1995 in relation to the discriminator or any other person, or

(d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Order or give rise to a claim under the Equal Pay Act or under Article 62-65 of the Pensions (Northern Ireland) Order 1995,

or by reason that the discriminator knows the person victimised intends to do any of those things or suspects the person victimised has done, or intends to do any of them.

(2) Paragraph (1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith."

5. Article 8 provides:

"8(1) It is unlawful for a person in relation to employment by him at an establishment in Northern Ireland, to discriminate against a woman –

(a) in the arrangements he makes for the purpose of determining who should be offered that employment, or

(b) in the terms in which he offers her that employment, or

(c) by refusing or deliberately omitting to offer her that employment.

(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland to discriminate against her –

(a) in the way he affords her access to opportunities for promotion, transfer or training or to any other benefits, facilities or services or by refusing or deliberately omitting to afford her access to them, or

(b) by dismissing her or subjecting her to any other detriment."

6. CASE LAW

The approach to be taken in cases in order to determine whether victimisation has taken place was set out in the case of **McNally v Limavady Borough Council [2005] NICA 46** by Kerr LCJ. Notwithstanding that it is a Fair Employment case the definition of victimisation and the principles are the same. The person who alleges they have been victimised is required to show that they have done the protected act, they must have been treated less favourably, and the treatment must have occurred because the person has done the protected act.

[13] *The legal test for victimisation in article 3(4) of the Order contains three conjunctive conditions. Firstly, the person alleged to have been victimised must have protected status. Secondly, that person must have been treated less favourably than other persons in the same circumstances and, finally, the less favourable treatment must have occurred because the victimised person had brought proceedings against those who were guilty of the victimisation or any other proceedings under the Order.*

7. In a more recent consideration of victimisation by the NICA **in McCann v Extern Association Limited [2014] NICA 65 at Para 15** Harvey on Industrial Relations and Employment Law was quoted with approval by Horner J where

he set out the factors for consideration by a Tribunal in determining whether an act of victimisation had occurred;

[15] As Harvey said at paragraph [468] in respect of the test for victimisation:

"Analysing the elements of any potential victimisation claim requires somewhat different considerations as compared to the other discrimination legislation.

...
A claim of victimisation requires consideration of:-

The protected act being relied upon

The correct comparator

Less favourable treatment

The reason for the treatment

Any defence.

Burden of proof."

8. The Court of Appeal gave further guidance in ***Simpson (Jill) v Castlereagh Borough Council*** **[2014] NICA**

Para 14 " ..... *A Tribunal determining victimisation must address the issues, firstly, whether the claimant suffered a detriment and, secondly, whether she was subjected to less favourable treatment as compared to an actual or hypothetical comparator by reason of the fact that she had done a protected act.*

.....
Para 18 ..... Derbyshire v St Helen's Metropolitan BC 2007 ICR 841 Lord Neuberger
The words by reason that" require one to consider why the employer has done the particular act..... and to that extent one must assess the alleged act of victimisation from the employer's point of view.....
Alternatively the Tribunal may pose the question "Would the employer have acted as it did but for the fact that the victimised party did what she did acting under Art.6(1)(a)-(d)"..... Alternatively, it may pose the question whether the impugned act was inherently discriminatory.

The Claimant must prove a causative link between the treatment and the protected act.

9. In **NI Fire and Rescue Service v McNally [2012] NICA 59 Higgins LJ** reading the judgement of the Court **at Para 30**

"The court must look at why the employer has taken the particular act from his standpoint and whether the act has caused detriment from the point of view of the alleged victim. What is clear is that an unjustified sense of grievance by the employee at the act of the employer cannot amount to a detriment. However, if it is the victim's opinion that the treatment was to his detriment and that was a reasonable opinion to hold, then that ought to suffice to prove detriment. But it would require positive evidence and findings to that effect. Mental distress and worry induced by honest and reasonable conduct of an employer in the course of his defence of a claim on its own cannot amount to detriment. There would have to be something more, at the very least the distress would have to be objectively reasonable."

10. **Burden of Proof in a Victimisation claim**;

Art 63(A) SDO

Burden of proof: industrial tribunals

63A.—(1) This Article applies to any complaint presented under Article 63 to an industrial tribunal.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent—

(a)has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part III, or

(b)is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination or harassment] against the complainant, or

(c)has contravened Article 40 or 41 in relation to an act which is unlawful by virtue of Part III,]

the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.]

Rice v McEvoy [2011] NICA 9

Para34 The reverse burden of proof provisions in Article 63A apply to claims of victimisation under Article 6 because they are claims of discrimination **Pothecary Witham Weld v Bullimore [2010] IRLR 572.** The EAT holds that the 'reverse' burden of proof provided for by S.63A of the Sex Discrimination Act 1975 applies to victimisation claims under that Act.

McCann v EXTERN 97/11 FET NIIT

65. It is for the Tribunal to determine the reason why the claimant was treated as he was and whether the protected characteristic was an effective cause of the treatment. This means a cause which was not insignificant. In essence we must decide whether the perceived trade union activities comprised the context of any adverse treatment or whether the perception that the claimant was involved in them was an effective cause of such treatment and the treatment was thus discriminatory.

*66. ..... **it is for the claimant to prove facts from which we could infer that a discriminatory reason was an effective cause.***

11. APPLICATION OF THE LAW TO THE FACTS

Applying the law as interpreted in the foregoing cases the onus is on the Claimant to prove on the balance of probabilities the three conjunctive factors;

(i) Firstly, the person alleged to have been victimised must have protected status. It is agreed that the Claimant performed a protected act in September 2012.

(ii) Secondly, that person must have been treated less favourably than other persons in the same circumstances. It must first be shown that there is a difference in treatment between that meted out to the complainant and that which a comparator had or would have received. The second aspect is that the difference in treatment must result in a less favourable outcome or a disadvantage to the complainant, commonly referred to as a detriment (**McNally Para 14**). To establish less favourable treatment the Claimant has to identify a comparator. The Claimant's choice of comparator, being the therapist who expressed an interest in VER in 2013 is not an appropriate comparator as there is no similarity between the material circumstances of one with the other. This was not a comparable exercise to the 2015 consultation to reconfigure a post on the retirement of the post-holder. The closest actual comparator is the Band 5 Oral Health Co-ordinator who also hoped to gain an extra day in the reconfiguration but was also disappointed. The oral health co-ordinator had not done a protected act.

(iii) Dr Quinn's evidence was that the Claimant was not disadvantaged by the 2015 consultation process and outcome but rather than suffering disadvantage the Claimant who retained her substantive post and hours was actually advantaged in gaining an extra day per week. The Claimant cannot have suffered a " detriment" as defined by Lord Hope in **Shamoon v Chief Constable of the RUC** [2003] UKHL 11;

34. The statutory cause of action which the appellant has invoked in this case is discrimination in the field of employment. So the first requirement,

if the disadvantage is to qualify as a "detriment" within the meaning of article 8(2)(b), is that it has arisen in that field. The various acts and omissions mentioned in article 8(2)(a) are all of that character and so are the words "by dismissing her" in section 8(2)(b). The word "detriment" draws this limitation on its broad and ordinary meaning from its context and from the other words with which it is associated. Res noscitur a sociis. As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522G, the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

35. But once this requirement is satisfied, the only other limitation that can be read into the word is that indicated by Lord Brightman. As he put it in Ministry of Defence v Jeremiah [1980] QB 87, 104B, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment":

12. Thirdly, the less favourable treatment must have occurred because the victimised person had brought proceedings against those who were guilty of the victimisation or any other proceedings under the Order. While it is submitted that there was no less favourable treatment and therefore no requirement to proceed to consider the third factor, should the Tribunal disagree, the following reasons offered by the Respondent for the protected act and the detriment **not** being linked are compelling;

i. The detrimental treatment complained about commenced before the protected act (an upsetting phone call on 22 August 2012 (page 41) one month before the first allegation of discrimination on 19.0912). ;

ii the Claimant identified those who had victimised her (Replies page 37(b)(7); -

a) Dental departmental Staff
b) Various Staff in the Human Resources Department who were involved in the different stages of the process
c) Trade union Officials
d) Those named are set out at Para 2(a) being Mrs Quinn, Kieran Downey
e) All members of the SMT of the Womens and Childrens Directorate who ratified the proposal (minute 10.02.16 page 176)

iii All those consultees who agreed with the proposals in the 2015 process did so for the non-discriminatory reasons set out in each of their responses none of which were related to the 2012 complaint. See pages 218 Joe McGarry SDO, pg 220 Helen McCollum, pg 222 Jude Anderson, pg 224,Alison Quinn, pg 228 Marion Deeney pg 66 Inta Straume, Pg 90 Marie Ferguson. The Claimant

conceded in cross examination that there was no evidence that any of these members of the dental team had knowledge of her 2012 complaint and when specifically asked whether it was her case that 6 dental team members supported the proposal to victimise her she replied " no".

iv Notwithstanding the identification of the Trade Union Officials in the list of identified discriminators the Claimant resiled from this during cross examination saying that she never said the Trade Union victimised her.

v. With regard to victimisation by the members of the SMT who ratified the proposal (page 76, 10.02.16). The Claimant's conceded in cross examination that only Dr Quinn and Ms McDaid (possibly Mr Downey – although she had no evidence of that) knew of the 2012 complaint. Dr.Quinn's evidence was that the 2012 complaint was confidential between her, Mrs McDaid and the Claimant. The Claimant agreed during cross examination that all those additional seven named SMT persons who were unaware of the complaint could not have been victimising her in approving the proposal.

vi There was a significant time lapse between the protected act and the alleged detrimental act, with no sustainable evidence in the interim of any lingering animosity or hostility. The protected act was in September 2012 and the evidence from the Claimant was that she was happy with the resolution and " was happy to receive equal treatment" ..... e-mail 10.10.12 page 46 " *I was clearly discriminated against, the solution reverses this.....Thank you for your assistance in providing an equitable solution in this matter*". Despite what appears to be a resolution and moving on the Claimant now unreasonably attempts to interpret subsequent scenarios, namely the 2013 VER consultation, the cessation of voluntary transfer arrangements, and the removal of additional hours in such a way as to support her claim of continuing animosity. She did however concede in cross examination that, notwithstanding that much Tribunal time was accorded to dealing with these issues, no discriminatory acts had occurred between September 2012 and the start of the 2015 consultation process (three years later).

vii Dr Quinn repeatedly made the case that in conducting the review she was not looking at the aspirations of individual staff members but her focus was firmly on the review of the post to ensure that patient's needs were best met within the available budget. The Claimant has adduced no evidence that Dr Quinn was motivated by any ulterior motive.

viii The evidence (particularly the written evidence contained in e-mail communications and written submissions from the Claimant in the consultation process in 2013 and 2015) are couched in confrontational and vitriolic terms and the language used belies an unwarranted and unjustified sense of grievance. See examples e-mail 22.08.12 page 41, e-mail 8.09.2015 page 64, e-mail 11.10.15 " *As a victim of harassment in the past and discrimination while*

on maternity leave and bearing in mind the defamatory nature of your failed consultation paper....." @page 80 (accusation of *untrue and defamatory remarks*), e-mail 22.12.15 @page 108 " *clear evidence of Dr Quinn's dishonesty*"

Examples of how misconceived the Claimant is in her interpretation are to be found in;

a) Para 9 of her witness statement where she places emphasis on the use of a double exclamation mark in the e-mail (page 48) from Dr Quinn to Ms Crozier re VER and
b) the suggestion put to Ms Crozier during cross examination that the reference to the Claimant by Mary McKenna (Head of Acute Paediatrics) in her e-mail of 10.12.15 " I am speaking to ***this individual*** tomorrow....." evidences hostility.
c) The expectation that she should receive an apology (page 183) that the Trust had undertaken a VER consultation in 2013 involving some 12,000 staff (evidence of Pamela Crozier)

vii. The Claimant has harboured an unjustified sense of grievance since 2012 and although she has every opportunity to bring victimisation proceedings at any stage between 2012 and 2015 she chose not to do so. Rather than doing so she has now banded together the allegations which underpin this claim but rather than each lending support to the other they only serve to highlight the unreasonable conduct of the Claimant in bringing and continuing with a wholly unmeritorious claim.

13. REMEDY

Notwithstanding that the Respondent contends that the claim is wholly unmeritorious it is noted that the Claimant in her IT1 Para 6.11 sought by way of remedy that the dental therapist post in Enniskillen be retained for 3 days per week and she would be facilitated in moving position. She did not seek compensation.

14. At CMD on 30.09.16 the Vice President (Para 3-5) made very clear that the tribunal had no power to direct that the post be retained for three days per week and that she be facilitated as sought. In her Reply to the Request for Additional Information 23.01.2017 Para 14 she now claims compensation for injury to feelings and for travel expenses by reason that she has to travel an extra 7,000 miles per year. The Claimant did accept during cross examination that she always had those travel expenses in her substantive post which had not altered and that those expenses were by reason of her choice of residence for which the Respondent cannot have any liability. It is further

submitted that any stress suffered arises solely from the Claimant's misguided expectations of her entitlements and notwithstanding the advice and guidance to her by the VP some nine months ago she has persisted in continuing this litigation. "*Mental distress and worry induced by honest and reasonable conduct of an employer in the course of his defence of a claim on its own cannot amount to detriment*" " **McNally Para 30 above**.

Suzanne Bradley BL

1.06.2017

AUTHORITIES FOR THE RESPONDENT

1. Articles 6, 8 and 63A of the Sex Discrimination NI Order 1976
2. McCann (Thomas) v Extern Organisation Ltd [2014] NICA 65.
3. Rice v McEvoy [2011] NICA 9 [2012] NIJB 80.
4. Simpson (Jill) v Castlereagh Borough Council [2014] NICA
5. McNally v Limavady BC [2005] NICA 46
6. Shamoon v Chief Constable of the RUC [2003] UKHL 11
7. NI Fire and Rescue Service v McNally [2012] NICA 59