THE EMPLOYMENT TRIBUNALS

Claimant **Mrs G Baglow**

Respondent **Nice Systems Technologies UK Limited**

HELD AT: **London Central**

ON: **1-3 March 2017**

Employment Judge: Mr J Tayler **Members: Ms S Samek**
Mr B Tyson

Appearances

For Claimant: **In Person**
For Respondent: **Mr J Crozier, Counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The Claimant was entitled to take 8 days of additional annual leave pursuant to Regulation 18A of the Working Time Regulations 1989 in the 2015 leave year. The Claimant is awarded the sum of £1,215.36.

2. The determination of the question of whether the amendment to add a claim for the 2016 leave year took effect as if included in the original claim or from the date of the application to amend is stayed pending the decision of the Employment Appeal Tribunal in **Galilee v The Commissioner of Police for the Metropolis** EAT/0207/16/RN.

3. It is declared that the Claimant was subject to discrimination because of something arising in consequence of disability by not being provided with access to the Respondent's intranet prior to 28 July 2016.

4. A recommendation is made that the Respondent should maintain reasonable access for the Claimant to the Respondent's intranet and take reasonable steps to provided her with equivalent information about employee benefits as is provided those at work.

5. The Claimant is awarded injury to feeling in the sum of £1,500 and interest of £71.67.

REASONS

Introduction

1. By a Claim Form submitted to the Employment Tribunal on 12 April 2016 the Claimant brought complaints, principally, that the Respondent had failed to permit the Claimant to take additional annual leave pursuant to regulation 13A of the Working Time Regulations 1998 and alleging that by failing to provide her with access to the company intranet the Respondent had subjected her to disability discrimination.

2. This case raises two issues of some significance:

   2.1 Is an employee who is absent from work on long-term sickness during the entirety of a leave year entitled to take additional leave pursuant to regulation 13A of the Working Time Regulations.

   2.2 To what extent may a respondent be guilty of disability discrimination by failing to keep a disabled employee absent on long-term sickness absence informed about employee benefits.

3. The matter was considered at a Preliminary Hearing for Case Management before Employment Judge Lewzey on 20 June 2016 (p42) where the issues were accepted to be as set out in a list of issues produced by the Respondent (annex A). The Claimant accepted that the list was accurate and that her claim of disability discrimination relates only to not being granted access to the Respondent's intranet and her financial claim was limited to a claim for injury to feelings. Mr Crozier accepted there was an error in the List of Issues in that time runs on a section 13 or 13A WTR claim from the date on which the requested leave would have commenced, rather than the date of denial of the request. We have determined the issues that are necessary to decide the claim.

Evidence

4. The Claimant gave evidence.

5. The Respondents called Leo Ross, Vice President Human Resources, EMEA.

6. The witnesses gave evidence from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.

7. We were provided with an agreed bundle of documents. References to page numbers in this Judgment are to the page number in the agreed bundle of documents.

Findings of fact

8. On 2 January 2001 the Claimant commenced employment with Searchspace Limited, (p45) a company that creates and licenses software. The Claimant was employed as director of strategic marketing. The Claimant was provided with PHI insurance although there was no specific term referring to it in her contract of employment.

9. In early 2003 the Claimant became ill and commenced a period of sickness absence. From April 2003 the Claimant was determined to be unfit to return to work and became entitled to receive PHI benefits. The Claimant remains off work to date. It is not currently anticipated that the Claimant will return to work.

10. In December 2006 Searchspace Limited changes its name to Fortent Limited. On 31 August 2009 Tiltgrange Limited (together with (i) its wholly owned subsidiary Searchspace Group Limited ("SGL"); and (ii) Fortent Limited, a wholly owned subsidiary of SGL) was acquired by Nice CTI Systems UK Limited (now NICE Systems UK Limited) by way of a share purchase. On 7 September 2009 Tiltgrange Limited's name is changed to Fortent Holdings UK Limited; then the Claimant's employer.

11. On 18 November 2012, the Claimant was informed in an email from Mairead Kerr of human resources that she has not been covered under the Respondent's life insurance policy since March 2010 (p74d). The email was written in a very matter-of-fact way which was unfortunate bearing in mind the significance of the issue for the Claimant. The Claimant was extremely upset, particularly because of her ill health and the very significant consequences the loss of life insurance could have for her.

12. Leo Ross, Vice President Human Resources EMEA, was involved in the matter. In his evidence, he accepted that there was good reason for the Claimant to be upset. He stated that he was sure that she had many sleepless nights worrying about it; and that he had some sleepless nights himself. The Respondent arranged for new life insurance to be put in place to cover the Claimant.

13. This issue was the subject of separate Employment Tribunal proceedings that were settled in 2013 ("the first claim").

14. The dispute has had the consequence that the Claimant is extremely anxious about being unaware of employee benefits and has lost trust in the Respondent providing her with such information. On the other hand, we do not consider that the Respondent deliberately withheld information from the Claimant and where there have been delays in providing information we accept that this genuinely has been a mistake rather than a deliberate decision having been taken not to provide the Claimant with the information.

15. On 19 November 2012 the Claimant requested "information of all the current employee benefits (benefits handbook?)" from the Respondent (p74c). On 23 November 2012 the Respondent sent the Claimant a copy of the Fortent UK Employee Handbook; but noted that they generally apply NICE policies.

16. On 14 February 2013 the Claimant wrote to Ms Kerr noting that there was no mention of share options or a share purchase scheme in handbook (p75). She had discovered these schemes by researching financial information linked to the Respondent's NASDAQ listing. The Claimant accepted that share options have been provided on the basis of work performance and that it is therefore extremely unlikely that the benefit would have been available to her. On the other hand, the share purchase scheme was available to all employees. The Claimant was eventually permitted to purchase some shares but had she been aware of the scheme at an earlier stage she might have purchased more. The scheme ceased operation shortly after the Claimant had purchased her shares.

17. On 16 February 2013 Ms Kerr sent an email to the Claimant email stating that "a large part" of the Fortent Handbook was out of date (p76). On 19 February 2013 the Claimant wrote to Ms Kerr stating that she wanted information on all benefits for employees (p79).

18. On 4 March 2013 the Claimant requested "a complete set of staff benefits and procedures and policies – current and complete please". We accept that similar requests were repeated in conversations in April/May 2013.

19. On 24 March 2013 Fortent Limited's name was changed to NICE Systems Technologies UK Limited - which was accepted by the parties to be the correct Respondent to the proceedings.

20. 2 August 2013 the Claimant was sent a summary of employee benefits for the NICE Group companies prepared as part of the COT3 settlement of the first claim. There was no pre-existing document and the summary is not available to the Respondent's other employees (p92).

21. Having seen them referred to on the summary, on 2 August 2013, the Claimant requested Christmas and Birthday vouchers (p94). On 4 February 2013 Mr Ross agreed to provide backdated vouchers as a gesture of goodwill.

22. On 6 February 2013, the Claimant again requested a complete set of employee and company information (p96). On 14 February 2014 Mr Ross sent the Claimant a copy of the November 2013 NICE Group Employee Handbook (p97).

23. The Claimant brought Employment Tribunal proceedings alleging that the Respondent had failed to allow her to take annual leave (the second claim). The matter was heard between 28 to 30 April 2014. On 16 June 2014 a written Judgment was promulgated by Employment Judge Charlton (p98) who dismissed the claim on the basis that the Claimant had not made valid requests for annual leave but in the light of the continuing relationship between the parties gave non-binding guidance:

> 46 "The claim under the Working Time Regulations does not therefore succeed. In coming to this conclusion I am satisfied that there is no conflict with the opportunity principle. Mrs Baglow retains the right to 28 days paid leave whilst she remains in the employment of the Respondent

> and the rights to carry over unused leave on the terms of Schulte and Neidel.
>
> 56…if in any year, Mrs Baglow makes a Regulation 15 request, she will be entitled to 20 days pay at the difference between a normal pay calculation based on £98,000 and the sum received by way of PHI. The difference is a daily rate of £151.92 which gives an annual sum of £3,038.40 (before tax and national insurance deductions). In addition, some accrued pay will be owing in respect of the allowance in respect of the 16 month carry over period. This is in respect of Regulation 13 only. On the above I would not see a Regulation 13A claim as succeeding and I have of course dismissed the contractual claim"

24. On 19, 20 and 21 October 2015 the Claimant made request to take and be paid for 28 days holiday (p116-119).

25. On 26 October 2015 Mr Ross sent an email to the Claimant in which he stated that the Respondent would accept and pay her for the Claimant's requested leave insofar as it related to 20 days of Regulation 13 Working Time Regulations 1998 annual leave as suggested in the nonbinding section of the Judgment of Employment Judge Charlton. The Respondent refused to agree to the Claimant taking and being paid for Regulation 13A leave (p121).

26. On 5 November 2015 the Claimant requested access to what she described as "an employee information portal", being a reference to the employee information pages of the NICE intranet (p125), having seen a link to intranet pages in an email Mr Ross had forwarded to her about private medical cover. Previously, she had not been told that there was an intranet that included details of certain employee benefits. As the Claimant was absent from work Mr Ross had not thought to tell her about it. The intranet had been existence for some years. The Claimant had not been provided with all the information about employee benefits that appeared on the intranet. If the Claimant had been provided with access to the intranet she would have known about the share purchase scheme at an earlier date. She would have known that personal financial advice was available from Tisco. She would have known that there was a e-learning suite available for employees and about the possibility of auto enrolment.

27. On 17 November 2015 Mr Ross began investigating whether it would be possible for the Claimant to have access to those areas of its intranet. He contacted the Respondent's IT team who confirmed it should be possible to issue the Claimant a VPN token (129c).

28. On 2 December 2015 Mr Ross sent an email to the Claimant stating that the Respondent was arranging for her to be given a VPN token giving her access to the "NICE intranet" (p122).

29. There was ongoing correspondence between Mr Ross and the Claimant in December 2015 and January 2016 about the Claimant gaining intranet access (pp 130, 141). On 7 January 2016 Mr Ross suggested that it might be more practical for him to print off the relevant section (p146). The Claimant did not

specifically respond to that suggestion, but stated that she wanted access to the "NICE internal website" (p146).

30. On 10 February 2016 Mr Ross sent an email to the Claimant stating that the Respondent's IT team were struggling to provide relevant access to the intranet (p150b).

31. On 11 February 2016 the Claimant was sent instructions that it was though would give her intranet access (p150a). On 18 February 2016 the Claimant informed the Respondent that she was unable to get the VPN access to work (150d).

32. In March and April 2016, the Respondent continued to investigate how the Claimant could be given limited access to the employee information pages on the intranet (pp151,157, 159).

33. On 27 June 2016 the Respondent's IT team sent Mr Ross details of a further potential technical solution that it was thought could give the Claimant access to the EMEA employee information pages of the Intranet. Mr Ross sent the instructions to Claimant (p165). On 5 July 2016 the Claimant advised the Respondent that she had tried following the instructions but still could not gain access.

34. On 26 July 2016 the Claimant was put in direct contact with a member of the Respondent's IT team, Mr Dorrington, who solved the access issue by granting the Claimant access to the full intranet, save for specific workgroup sections.

35. On 28 July 2016 the Claimant first had access to employee information pages on NICE Group intranet (p167).

36. Having seen reference to it on the intranet on 11 January 2017 the Claimant requested information from the Respondent about her pension auto-enrolment status. This is one of the subjects raised in a further Employment Tribunal claim ("the fourth claim").

37. On 18 October 2016 the Claimant requested Regulation 13A leave (p298). On 4 November 2016 Mr Ross refused the request (p299). On 24 February 2017 Employment Judge Lewzey granted permission to the Claimant to amend her claim to claim a failure to allow this leave pursuant to an application made by the Claimant on 14 February 2017.

Holiday Pay

38. The right to annual leave is provided by Regulation 13 of the Working Time Regulations 1998 ("WTR")

> 13 Entitlement to annual leave
>
> (1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

39. Regulation 13A added an additional 8 days “additional leave”, essentially to take account of Bank Holidays:

> 13A Entitlement to additional annual leave
>
> (1) Subject to regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

40. Regulation 15 WTR provides a mechanism whereby the dates on which annual leave and additional leave are to be taken is fixed; such as by a request from the employee.

41. Regulation 16 WTR provides for the payment that is to be made for periods of leave by application of sections 221 to 224 of the Employment Rights Act 1996.

42. Regulation 30 WTR provides:

> 30 Remedies
>
> (1) A worker may present a complaint to an Employment Tribunal that his employer--
>
> (*a*) has refused to permit him to exercise any right he has under-
>
> (i) regulation …13 or 13A …
>
> (2) Subject to regulations 30A and 30B an Employment Tribunal shall not consider a complaint under this regulation unless it is presented--
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> (a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.
>
> (2A) Where the period within which a complaint must be presented in accordance with paragraph (2) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the period within which the complaint must be presented shall be the extended period rather than the period in paragraph (2).

> (3) Where an Employment Tribunal finds a complaint under paragraph (1)(*a*) well-founded, the tribunal--
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> (a) shall make a declaration to that effect, and
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> (b) may make an award of compensation to be paid by the employer to the worker.
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> (4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to--
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> (*a*) the employer's default in refusing to permit the worker to exercise his right, and
>
> (*b*) any loss sustained by the worker which is attributable to the matters complained of.

43. The question of whether an employee can take annual leave during a period during which she is absent from work due to ill health has been the subject of considerable judicial scrutiny.

44. In **Kigass Aero Components Ltd v Brown** [2002] ICR 697, Lindsay J (President) held that an employee who is on long-term sickness absence remains an employee and need only comply with the notification requirements in Regulation 15 WTR to be entitled to take annual leave, triggering the right to payment even if sick pay has come to an end. He held at paragraph 30:

> "Given our approach to the constructions of the regulations in the light of the argument we received, we see no error of law in the tribunal's decision. The employee had fulfilled the only requirements which he needed to in order to be paid for annual leave taken; he was, as regards the employers, a worker throughout the leave year and had duly given notice under regulation 15 which had not been countermanded under the Regulations. He thus was entitled to leave and took it and thus is to be paid for it. His absence from the workplace and his failure to put in any working time is no bar to his claim."

45. The matter was considered again by the Court of Appeal in **Inland Revenue Comrs v Ainsworth** [2005] ICR 1149 in which Maurice Kay LJ decided that **Kigass** was incorrectly decided. He held that the EAT had erroneously focused too much on the question of whether person absent due to ill health was a worker as opposed to whether it was possible for a person on long-term sickness absence to take "leave". Maurice Kay LJ was persuaded by the argument advanced by the Respondent and stated at paragraph 8:

> "On behalf of the Inland Revenue Mr Underhill makes the following submissions. First, he submits that Kigass was fatally flawed by the emphasis on the definition of "worker" rather than on the undefined concept of "leave". The natural meaning of "leave" connotes a release from what would otherwise be an obligation. This fundamental submission is put as follows in Mr Underhill's skeleton argument:

> "It is contrary to all ordinary usage for a worker who is off work for a year or more as a result of serious illness to say that during some arbitrarily chosen part of that period he is taking 'leave'-leave from what?"

46. Maurice Kay LJ set out the counterargument put forward on behalf of the employees at paragraph 9:

> "Mr Ford attempts to meet these submissions with the following arguments. First, a person who is already on one type of leave, in particular long-term sick leave, may nevertheless have continuing obligations such as to keep his employer informed about his situation, to attend for medical examination and to respond to reasonable requests for information. It is only by designating a period of leave under regulation 15 that a worker can obtain temporary release from such obligations."

47. Maurice Kay LJ preferred the argument of the Respondent, holding at paragraph11

> "Focusing on the language and its context, I have come to the conclusion that the construction contended for by Mr Underhill is the correct one. I say this for the following reasons. I accept that the key word in regulation 13 is "leave". It is, after all, what regulation 13 is about. According it the importance that it therefore has, it seems to me that the rhetorical question posed by Mr Underhill-leave from what?—is instructive and the sensible answer to it is the one which he proposes. The Employment Appeal Tribunal in Kigass was distracted from this analysis by emphasising the definition of "worker" at the expense of concentration on the concept of "leave". I also attach significance to the context and purpose of the 1998 Regulations and Directive93/104 to which they seek to give effect. Article 1 of the Directive makes it clear that its purpose and scope are to prescribe "minimum safety and health standards for the organisation of working time". The Regulations were enacted pursuant to section 2(2) of the European Communities Act 1972. They must be construed in the light of that authority and limitation. For the reasons submitted by Mr Underhill, the construction advanced on behalf of the applicants serves no health and safety purpose. It simply produces a windfall in most cases."

48. **Ainsworth** was appealed to the House of Lords which referred the matter to the CJEU as the right to regulation 13 annual leave derives from art.7(1) of the Working Time Directive 2003/88/EC (the "Directive"); which provides that:

> "Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice."

49. The CJEU held in the case, by then called **Stringer & Ors v Revenue and Customers Commissioners** [2009] ICR 932, that domestic legislation may allow annual leave to be taken during periods of long-term sickness or may prevent leave being taken in such periods provided that the employee is entitled to take the leave at the end of the sickness period. The Court also held that there should be appropriate provision to carry over periods of unused annual leave that have accrued during periods of ill-health.

50. The matter was remitted to the Supreme Court where the parties agreed that the effect of the ruling of the CJEU was that the employees were entitled to take annual leave during their periods of sickness and therefore would be entitled to payment for it. It was also accepted that there was a right to carry over periods of annual leave undertaken due to ill health.

51. Mr Crozier accepted that in circumstances in which **Ainsworth** had been overturned in **Stringer** it was no longer formally binding upon us. Similarly, he contended that **Kiggas** was no longer binding having been expressly disapproved in **Ainsworth**. It was common ground between the parties that there is no binding authority as to how we should interpret the provisions.

52. Mr Crozier accepts that the consequence of the Judgment in **Stringer** is that the Claimant is entitled to Regulation 13 annual leave based on her full rate of pay. That has been paid to her by the Respondent. Mr Crozier contends that the position is different in respect of regulation 13A leave which is governed by purely domestic legislation.

53. Mr Crozier notes that in In **Sood Enterprises v Healy** [2013] ICR1361, EAT *per* Lady Stacy, it was held that the right to carry over annual leave during periods of long-term sickness absence applied only to regulation 13 leave.

54. He also relied on **British Gas Trading Ltd v Lock** [2017] ICR 119, CA (calculation of pay for purposes of Reg.13 WTR) in which Sir Colin Rimer noted at [19]:

> "I add that it is agreed that the Court of Justice's ruling in Lock [namely, calculation of holiday pay should include commission entitlement] applies only to the four weeks of annual leave provided for by regulation 13 of the 1998 Regulations. It does not apply also to the extra 1·6 weeks of annual leave provided for, as a matter of UK domestic law, by regulation 13A (which does not derive from the Directive) [inserted by regulation 2(2) of the Working Time (Amendment) Regulations 2007 (SI 2007/2079)], nor does it apply to any additional contractual leave period."

55. We accept that our interpretation of regulation 13 is to be based on domestic law principles. There is little to guide us. In **Sood** there is reference to the employee being entitled to 28 days leave in the last leave and it was held that an employee is not able to carry over any more than 20 days from a previously year. This suggests that it was accepted there is a right to take the additional regulation 13A leave but not to carry it over.

56. In **The Sash Window Workshop Limited v King** [2015] IRLR 348 SimlerJ (P) noted that no point was taken that a distinction was to be drawn between

entitlement to annual leave under regulation 13 and regulation 13A. Accordingly. The question of whether a distinction should be drawn was not argued.

57. Mr Crozier submitted that in analysing regulation 13 as a matter of domestic law we should take our guidance from **Ainsworth** and conclude that it is not possible for a person to take additional leave pursuant to regulation 13A when the person is already absent from work on long-term sickness absence. This analysis rests on the submission accepted by Maurice Kay LJ that pertinent question is to ask what the person is seeking to take leave from. We consider that that question includes within it an assumed answer to a prior question; namely, what does leave mean in the Working Time Regulations. Does it connotate merely a permission to be absent or something more. We consider that the rhetorical question posed in **Ainsworth** includes within it an assumed definition that leave means no more than a permission to be absent. Accordingly, how can you give permission to be absent to someone who already is absent. We considered that the term leave in the Working Time Regulations means more than that. We note that in Regulation 13 the term is “annual leave” and in regulation 13A “additional leave”. We consider that these terms are more akin to what most people would refer to as “holiday”. One might ask whether a person who is absent on sick long-term sick leave can take a holiday. We consider that leave is time during which the employee is entitled to do precisely what she wants, without being required to inform the employer of where she is or being any under a duty to be available for any purpose. During leave the employee may travel where she wishes and be un-contactable. That element of freedom from control, or potential control, by the employer is an important part of what provides the respite that give the health and safety or welfare benefits of annual or additional leave. That is the purpose of both domestic and European legislation. While some people who are absent through ill health may physically be incapable of taking a holiday, other may well be able to do so.

58. Michael Forde's arguments in Ainsworth that during sickness absence an employee may be required to attend sickness absence reviews etc is not answered in **Ainsworth**. One could also ask the question whether being absent through ill health is the same as being away on holiday: both being forms of leave. We consider they are not the same. While the employer is exercising some control, or has a contractual power to exercise control, during a period of sickness absence we do not consider it can be truly said to be annual or additional leave. We consider that the same analysis should be applied to additional leave as is applied to annual leave as both provisions provide for a period during which an employee can be on leave in the sense of being on holiday. In the circumstances, we consider that the Claimant was entitled to request and be permitted to take annual leave. The necessary consequence under regulation 15 is an entitlement to payment for the annual leave. While Maurice Kay LJ considered that this gave rise to a windfall that is a consequence of the way in which Parliament has chosen to enact the regulations in that they give an automatic right to payment when leave is taken.

59. It is accepted by the Respondent that the 2015 leave claim is within time. However, the Respondent contend that the 2016 leave claim is out of time as it should be treated as only having been submitted on the date of the application to amend. Mr Crozier, properly complying with his duty to inform the tribunal of relevant authorities, told us that **Galilee v The Commissioner of Police for the Metropolis** EAT/0207/16/RN in which the question of whether the reference back principle applies to amendment is to be determined was heard in the EAT in early January 2017. We consider we should stay the determination of the claim for 2016 until judgment is given by the EAT.

Disability Discrimination

60. It is accepted by The Respondent that the Claimant has been a disabled person at all material time.

61. The claim that the Claimant was not given access to the intranet so did not have the same information about employee benefits as other employees is put as a claim of direct discrimination, indirect discrimination, failure to make reasonable adjustments and discrimination because of something arising in consequence of disability.

62. Direct discrimination is defined by Section 13 EQA:

> **13 Direct discrimination**
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> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

63. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there are no material differences between the circumstances in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this meant, in most cases, the Tribunal should consider how the Claimant would have been treated if she had not had the protected characteristic. This is often referred to as relying upon a hypothetical comparator.

64. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516. Statutory provision for the reversal of the burden of proof is now made by Section 136 EQA:

> 136 Burden of proof
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> (1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

65. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. The guidance may be summarised in two stages: (a) the Claimant must prove on the balance of probabilities, facts from which the Tribunal 'could conclude in the absence of an adequate explanation' that the Respondent had discriminated against her. This means that the Claimant must establish a 'prima facie case' of discrimination including less favourable treatment than a comparator of a different race or gender with circumstances materially the same as the Claimant's, and facts from which the Tribunal could infer that this less favourable treatment was on the grounds of race or gender; (b) having done so, the Respondent must prove that the less favourable treatment was in no sense whatever because of disability.

66. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: see Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572 at 576.

67. Pursuant to Section 15 of the Equality Act 2010 ("EqA"):

> 15(1) A person (A) discriminates against a disabled person (B) if—
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> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
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> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

68. The question of what constitutes a legitimate aim is a question of fact for the Tribunal: **Ladele v Islington Borough Council** [2010] ICR 532 at §45.

69. It is often possible to analyse disability discrimination claims under a number of the potential heads of prohibited conduct. It is generally best to find the most apposite For example, in **Griffiths v The Secretary of State for Work and Pensions** [2016] IRLR 216 Lord Justice Elias noted that where it is suggested that an employee should not have been dismissed by reason of ill health, but more time should have been allowed for assessment, this is generally better identified as a claim of discrimination because of something arising in consequence of disability, rather than a claim for reasonable adjustments. We consider the best analysis of the Claimant's claim is as one of discrimination because of something arising in consequence of disability.

70. Discrimination in employment is prohibited by section 39 EQA:

> 39 Employees and applicants
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> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> (d) by subjecting B to any other detriment.

71. In **St Helens BC v Derbyshire** [2007] ICR 841, Lord Neuberger summarised the authorities on the meaning of detriment, at paragraph 67:

> "67 In that connection, Brightman LJ said in *Ministry of Defence v Jeremiah [1980] ICR 13*, 31a that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment". That observation was cited with apparent approval by Lord Hoffmann in *Khan [2001] ICR 1065*, para 53. More recently it has been cited with approval in your Lordships' House in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337*. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment' ". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice."

72. In **Shamoon v Chief Constable of Royal Ulster Constabulary** [2003] ICR 337Lord Hope of Craighead stated, at paragraph 35, that to establish a detriment:

> "it is not necessary to demonstrate some physical or economic consequence"

73. Section 124 EQA makes provision for remedy as follows:

> **124 Remedies: general**
>
> (1) This section applies if an Employment Tribunal finds that there has been a contravention of a provision referred to in section 120(1).
> (2) The tribunal may--
>
> (*a*) make a declaration as to the rights of the complainant and the Respondent in relation to the matters to which the proceedings relate;
> (*b*) order the Respondent to pay compensation to the complainant;
> (*c*) make an appropriate recommendation.
>
> (3) An appropriate recommendation is a recommendation that within a specified period the Respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate

74. In considering an award for injury to feeling we are assisted by consideration of the bands set out in **Vento [No 2]** [2003] IRLR 102 as updated in **Da'Bell v NSPCC** [2010] IRLR 19 and taking account of inflation thereafter.

75. Where an award of compensation is made the Employment Tribunal is required to consider awarding interest pursuant to the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803. The interest is to be calculated as simple interest: regulation 3(1) at the rate fixed, for the time being, by section 17 of the Judgments Act 1838: regulation 3(2), which is currently 8% per anum. For non-pecuniary losses, the award is for the entire period from the act complained of to the date of calculation:

regulation 6(1)). There is a discretion to award interest on some other basis where there is a risk that a serious injustice would be caused if interest were to be awarded on the normal basis: regulation 6(3). Where a tribunal decides not to award interest on something other than the normal basis it should provide its reasons for not doing so.

76. It is accepted by the Respondent that the Claimant is absent from work and that is something that arises in consequence of her disability. Mr Ross accepted that because of the Claimant being absent from work he had given no consideration as to whether she should have access to the company intranet. The consequence of the Claimant not having access to the intranet is that she has not received the same level of information about employee benefits that a person at work would have received. She would have known about the share purchase scheme at an earlier date had she had access to the intranet. She would have known that person personal financial advice was available from Tisco. She would have known that there was a e-learning suite available for employees and about the possibility of auto-enrolment. Auto-enrolment is one of the aspects of the Claimants next claim (claim four). In this claim the Claimant contends only that not knowing about the possibility of auto-enrolment has caused her upset because she has not been in receipt of the same information as her colleagues. She does not make any substantive claim in respect of any benefits she has allegedly lost, that being part of the fourth claim. The share purchase scheme ended in July 2013 and the Claimant does not make any claim in respect of any additional shares she might have purchased.

77. The Respondent contends that the failure to grant her access to the intranet was not because of a conscious decision. The Claimant had never asked for it. When the Claimant did ask for access to the intranet at steps were taken to provide it, although there was very substantial delay in this being done. Mr Ross offered to print off relevant pages from the intranet. The Claimant did not respond to that request. We consider that being excluded from the full information about benefits available to other employees, even in the extreme circumstances of such a long period of absence from work, is something that a reasonable employee could consider disadvantaged them in the workplace. We consider that there was a detriment. The Claimant suffered that detriment because of something arising in consequence of her disability; namely, her absence due to ill health. If she had been at work the information would have been available to her well before Mr Ross offered to print of relevant pages. We do not accept that that denying her such access that was a proportionate means of achieving a legitimate aim. Mr Crozier suggested a legitimate aim of providing alternative access to the same information. We found a little hard to follow. Although the Respondent provided information the Claimant she did not receive all the information that was available on the intranet. When the matter was properly considered by the Respondent they saw no reason why the Claimant could not be given access to the intranet. We do not consider that provision of less information by alternative means was a legitimate aim. We do not consider that the Respondent has established justification for its actions in failing to provide access to the intranet to allow the Claimant to have full information about employee benefits available to employees at work.

78. We declare that the Claimant was subject to discrimination because of something arising in consequence of disability by not being provided with access to the Respondent's intranet prior to 28 July 2016.

79. We consider it is appropriate to recommend that the Respondent should maintain reasonable access for the Claimant to the Respondent's intranet and take reasonable steps to provided her with equivalent information about employee benefits as those at work.

80. Unfortunately, because of the issues that arose in respect of her life insurance, the Claimant has lost a degree of trust in the Respondent. She was upset by the shortfall in information. We accept that the Respondent has not been deliberately excluding the Claimant from information. The Claimant has had access to Mr Ross in a way that only a couple of other very senior employees do. The Respondent has taken steps to try and provide her with information, even if she has not been provided with all that is available to those at work. We consider that must reduce her level of upset. As soon as she raised the question of access to the intranet attempts were made to provide access and Mr Ross offered an alternative of print out the pages, although there was a substantial delay before access to the intranet was provided. We consider that there was only minor injury to the Claimant's feelings. We consider a sum of £1,500 is appropriate compensation.

81. We consider it would be seriously unjust to award interest for the period before the Claimant was aware that she had not been granted access to the internet as she cannot have suffered any injury to feeling until she knew that she had not been granted access. We consider it is just to award interest from 28 July 2016 to 3 March 2017: 218. The interest is 218/365 x 8/100 x £1,500 = £71.67.

Employment Judge Tayler
28 March 2017

Annex A

1. TIME LIMITS – HOLIDAY PAY

1.1 If the Respondent has refused a valid request from the Claimant to take, and be paid for, annual leave to which she says she is entitled under Regulation 13A Working Time Regulations 1998 (**WTR**), on what date did that refusal take place?

1.2 Was the Claimant's claim brought within 3 months of that refusal (taking into account any applicable extension for Acas Early Conciliation)?

1.3 If not, the Claimant's claim is out of time.

1.4 If the Claimant's claim is out of time, was it not reasonably practicable for her to bring the claim in time?

1.5 If it was not reasonably practicable for the Claimant to bring her claim in time, is the Tribunal satisfied that she brought it within a reasonable further period of time?

1.6 If not, her claim should be struck out.

2. TIME LIMITS – UNLAWFUL DEDUCTION FROM WAGES

2.1 When is the alleged deduction from wages the Claimant is relying on alleged to have occurred?

2.2 Was her claim brought within 3 months of such alleged deduction?

2.3 If not, the claim is out of time.

2.4 If the Claimant's claim is out of time, was it not reasonably practicable for her to bring the claim in time?

2.5 If it was not reasonably practicable for the Claimant to bring her claim in time, is the Tribunal satisfied that she brought it within a reasonable further period of time?

2.6 If not, her claim should be struck out.

3. HOLIDAY PAY CLAIM

3.1 Is a worker who is absent from work due to sickness and in receipt of PHI benefits entitled to accrue, take and be paid in respect of annual leave under Regulation 13A WTR 1998?

3.2 In particular, does the European Court of Justice's decision in *Stringer and Others v HM Revenue & Customs* [2009] IRLR 214 (ECJ) apply to annual leave under Regulation 13A WTR or does it just apply to the EU minimum annual leave entitlement incorporated into UK law by Regulation 13 WTR?

3.3 If the Claimant is entitled to accrue annual leave under Regulation 13A WTR, has she given a valid notice to the Respondent to take such leave as require by Regulation 15 WTR? If so, has the Respondent allowed her to take such leave?

3.4 If the Respondent has refused a valid request in respect of annual leave under Regulation 13A WTR, what compensation should the Claimant be entitled to?

4. UNLAWFUL DEDUCTION FROM WAGES RELATING TO HOLIDAY PAY

4.1 If (1) the Claimant is entitled to accrue annual leave under Regulation 13A whilst absent from work due to sickness and (2) she has given a valid notice to take and be paid for such leave and it has been refused by the Respondent, does this amount to a deduction from wages?

4.2 If so, was such deduction unlawful?

4.3 If so, what compensation should the Claimant be entitled to?

5. DIRECT DISABILITY DISCRIMINATION

5.1 In relation to access to the Respondent's company intranet: Has the Claimant been treated less favourably than a non-disabled comparator whose circumstances (including his/her abilities) are not materially different to those of the Claimant?

5.2 Who is the appropriate comparator for the purposes of this claim? The Respondent's position is that this would need to be a hypothetical non-disabled employee who is absent from work with no requirement to perform any work.

5.3 If the Claimant has been treated less favourably than such a comparator, was that treatment because of the Claimant's disability?

6. DISCRIMINATION ARISING FROM DISABILITY

6.1 Does the fact that the Claimant does not have access to the Respondent's company intranet amount to unfavourable treatment of the Claimant?

6.2 If so, does the Claimant not have that access because of something arising in consequence of the Claimant's disability (the Claimant says this is her absence from work)?

6.3 If so, can the Respondent show that its actions in this regard were a proportionate means of achieving a legitimate aim?

7. INDIRECT DISABILITY DISCRIMINATION

7.1 Does the fact that the Claimant does not have access to the Respondent's company intranet amount to a provision, criterion or practice (**PCP**)?

7.2 If so, is that PCP something that is also applied to persons who do not share the Claimant's disability?

7.3 Does the PCP put persons with the Claimant's disability at a particular disadvantage compared to persons who do not share the Claimant's disability?

7.4 If so, is the Claimant put at that disadvantage?

7.5 If so, can the Respondent show the PCP to be a proportionate means of achieving a legitimate aim?

8. REASONABLE ADJUSTMENTS

8.1 Does the fact that the Claimant does not have access to the Respondent's company intranet amount to a PCP?

8.2 If it does amount to a PCP, does it put the Claimant, as a disabled person, at a substantial disadvantage compared to non-disabled persons?

8.3 If so, has the Respondent taken reasonable steps to avoid that disadvantage? In particular, do the Respondent's actions in trying to overcome technical challenges with providing the Claimant with the access she has requested amount to it taking reasonable steps to avoid the disadvantage?

9. DISCRIMINATION CLAIMS GENERALLY

9.1 If the Claimant has been discriminated against, had the Respondent taken reasonable steps to prevent acts of discrimination occurring?

9.2 If the Claimant has been discriminated against, should the Tribunal make a recommendation? If so, what?

9.3 If the Claimant has been discriminated against, is she entitled to any compensation? If so, what?