Legal Island 2017

Constructive Dismissal/Court of Appeal

Lindsay Knox v Henderson Retail Ltd
Case Ref: WEI10237
Decision Issued: 10 March 2017
Judge: Morgan LCJ, Weatherup LJ and Weir LJ

The Claimant was employed as a Manager in Henderson's Abbey Hill store from 23 July 2007 until her resignation on 1 April 2015. Her letter of resignation stated:

"*Dear Ann* (Ann McKillop, Human Resources Manager)

I am writing to inform you that I am resigning from the Henderson Group as Store Manager with immediate effect. Please accept this as my formal letter of resignation, and termination of our contract.

I feel that I am left with no choice but to resign in light of the fact that after having followed your grievance procedure you refused to provide me with a safe working environment contrary to the terms of my contract by attempting to have me work in the same environment as the person whose actions I believe caused me ill health.

I raised health and safety issues to you once I had reported a theft from your store stating clearly I felt unable to work in the store with the alleged thief still delivering to the store and you failed to protect my health and safety.

As a result your manager sought to place me under further pressure thus exacerbating my health to the point where I felt too ill to work.

I fully engaged in your grievance procedure offering you every opportunity to comply with your duty of care to me. However you chose to dismiss any concerns I raised and failed to discuss any solution to the situation I suggested, such as a move to another store. In this process you only sought to force me to engage in mediation with the person I informed you had abused me and I felt unable to meet, speak to and in no circumstances work with again. In doing so I feel you have failed in your duty of care to me, your actions amount to a breach of contract and a breach of trust. I feel that you are therefore an unsafe company for me to work in.

My health has suffered as a result of your fundamental breach of our contract and a breach of trust and I have suffered significant financial loss.

I would be grateful if you could acknowledge this letter at the earliest available opportunity.

I would appreciate very much if you could also forward to me any outstanding pay or holiday pay owed to me.

I look forward to hearing from you.

Regards"

On 2 and 23 August 2014 the Claimant had detected a Delivery Driver for a bread company (Brennan's Bread) had stolen stock from the store that she worked in.

The Claimant had challenged the delivery driver and had recovered the stolen property. She had reported the theft to Ian Mullin (Area Manager) on 23 August 2014 but on 25 August 2014 had not received any reply from him and she therefore informed David Hamilton (Fresh Food Manager) of the theft. In her grievance letter she stated that she was astounded that the same Delivery Driver, Peter, was still delivering to the store and she rang Ian Mullin and asked why he was allowed in the store.

The Claimant was advised by Ian Mullin that the Driver would not be delivering to the store on 30 August 2014 or 1 September 2014 and in the meantime they would be working out what was going to happen. The Claimant went on annual leave from 1 September 2014 until 7 September 2014. On her return from annual leave the Delivery Driver from Brennan's was still delivering to the store.

In the Claimant's grievance she stated:

"*I felt sick at the fact that a person I had caught and had to deal with personally for stealing from the store was still delivering to Abbeyhill on the 10th of September when I informed Ian Mullin of my feelings. Ian Mullin suggested that I swap shifts to avoid Peter. The reality there was no other staff available that could take on the responsibility required to supervise Peter. However my issue is, why am I asked to change my shift and the impact that has on my family life to facilitate a person who I have detected stealing from Henderson's to continue in his routine without hindrance?*

Everything Ian Mullin suggested would leave Henderson's at risk of losing stock from the same thief. To my knowledge the situation is still unchanged. I remind you that on previous stock takes we have had £1300 loss in the first quarter of this year and this was reduced to £400 down on the third quarter as a result of checks being put in place. The CCTV evidence shows approximately £6 of stock being stolen by the delivery driver Peter".

It was the Claimant's case that following the incidents on 2 and 23 August 2014, the attitude of Ian Mullin changed towards her and manifested itself in the form of extreme pressure, excessive hours, unrealistic tasks and a lack of staff to support her. She also alleged that her experience of Ian Mullin was that he was unreasonable and disrespectful to his subordinates. Her case was that on 13 December 2014, Ian Mullin also asked the Claimant if she wanted to be in the Abbey Hill store. She felt that Ian Mullin was manufacturing a situation to have her moved from the store. She felt threatened and explained to Ian Mullin, that due to her family circumstances, she would not be making such a request. Essentially her allegation was that at this stage Ian Mullin was pressing her to transfer to another store because of poor stock sales and results. He then asked her for a letter requesting a move on 15 September 2014. Her case was that the store in question had been transformed from being a non-profitable store to a profitable one and that she had worked hard to achieve this. The Claimant felt under extreme pressure and stress as a result of these events following the alleged theft. She was unable to sleep, and felt depressed and sick at the thought of going into work. She arranged an appointment with her doctor for 16 September 2014.

In the Claimant's grievance, she summarised her grievance as:

"*1* (Ian Mullin) *has placed the concerns of a person who has been detected stealing Henderson's property above that of me, a member of staff, in suggesting I change shifts to avoid contact with the thief and in doing so was prepared to place Henderson's at risk of further losses.*

2 *He has created an atmosphere and dynamic that asserts an undue pressure on me to request a move from the Abbeyhill store.*

3 *That he has attempted to discredit me and may have committed a fraudulent act in his attempts.*

4 *That he has failed in his duty of care to Alison Patterson and myself in demanding I work unreasonable and unlawful hours.*

5 *He has failed to support me in my role as is his duty, ignoring request for additional staff.*"

The Claimant's initial grievance was not upheld and she appealed this on 6 February 2015.

In the outcome of the grievance process, she was given the opportunity to attend at the Labour Relations Agency to have "*an open discussion with Ian Mullin to allow you to raise your concerns with him directly. This could be facilitated through mediation and a neutral mediator could be used from within the company. Alternatively we can offer you to move to stage three of the company grievance procedure which would involve referring the matter to the Labour Relations Agency. This option exists as a contingency for when open communication between an employee and management fails to identify and remove problems*".

The Claimant had been on sick leave from September.

The Claimant resigned on 1 April 2015 after having sent a letter requesting something more be done. Ian Mullin's office was to be permanently moved to the store she was managing. The Claimant stated that if she agreed to return to work at the same store she would have contact with Ian Mullin and therefore the company would not be providing her with a safe place to work and she believed this was the last straw. As the employer has failed to provide a safe working environment by still requiring her to work in the same environment as the person whose actions caused her ill health, the Claimant's resignation states that during the grievance process, the company dismissed her concerns and sought to force her to engage in mediation with the person in respect of whom she raised a grievance. She felt the company had failed in its duty of care to her, that its actions amounted to breach of contract and her health had suffered as a result.

An Occupational Health Report dated 2 October 2014 stated that the Claimant loved her work and attributed her absence from work to "*not being able to take any more*" from her Line Manager. Reference was made to the resulting impact on her health, including headaches, nausea, becoming very tearful, lying awake at night worrying about going to work and having to speak to her Line Manager on the phone or in the store. The report concluded that the Claimant was unlikely to be fit to meet with management prior to her review appointment with Occupational Health in four weeks but it was recommended that management should meet and attempt to resolve the issues the Respondent perceives led to her absence.

An Occupational Health Report dated 30 October 2014 contained the recommendation that management should arrange to meet with the Claimant at the earliest opportunity in an attempt to have the issues addressed to all parties' satisfaction.

The Report dated 27 November 2014 referred to an improvement in the Claimant's mood since an increase in her medication. The report writer opined that she should be fit to attempt a phased return to work but, to enable a sustained return and to prevent any further

deterioration in her health or a protracted absence, it would be necessary for management to address the issues the Claimant perceived had led to her absence. Rather than recommending a routine review, the report writer advised she would be happy to see the Claimant again if she or management felt that was appropriate.

The Tribunal held that an important consideration in the investigation of the alleged facts was that if the company moved the Delivery Driver they removed the brand. The Tribunal concluded that the company "*clearly did not want to go more deeply into the issue of the alleged thefts*" and the investigator "*choose not to view the CCTV footage and to take the claimant's claims more seriously in relation to the alleged thefts*".

The Claimant's grievance was not upheld by letter dated 8 December 2014, however by an e-mail dated 28 December 2014 the Claimant stated she wished to escalate her grievance as she was not satisfied that a thorough and impartial investigation had been conducted. This stage two was a review of the stage one process – under the procedures it was not a re-hearing of her original grievance but an opportunity for the Claimant to present any new evidence to support the claims as per her escalated grievance.

The outcome meeting of the stage two took place on 2 February 2015.

Part of the outcome in the stage two stated that in relation to the bread company's Delivery Driver:

"*The investigation found that the Brennan's delivery driver had made an error in relation to credits. A full investigation was carried out by David Hamilton and Colin Todd (Brennan's) David and Colin made the decision that no action would be taken that the driver would continue to deliver to SPAR Abbeyhill. This decision was not taken by your Area Manager, Ian Mullin. It was documented during the investigatory interviews that you had told David Hamilton that you did not want the driver dismissed and that you were happy with the outcome. You will appreciate that when conversations take place on a one to one basis, it makes it difficult to substantiate any allegations made*".

The stage two outcome letter concluded by setting out the options available to the Claimant, being an open discussion with Ian Mullin facilitated through mediation or alternatively moving to stage three of the grievance procedure which involved referred the matter to the Labour Relations Agency where such option was referred to as "*a contingency for when open communication between an employee and management fails to identify and remove problems*".

The Tribunal decided that the investigation did not adequately accommodate the Claimant's concerns either in relation to the alleged thefts and the Delivery Driver or in relation to Ian Mullin. The Tribunal found that the investigation was neither adequate, thorough enough, nor properly handled in that the Claimant's claims were not taken sufficiently seriously. It found that the concerns in respect of the company's business concerning retention of the particular bread brand and the Delivery Driver concerned had been placed above the interest of the Claimant. In the Tribunal's view, it was significant that the alleged thefts formed the fountainhead from which the subsequent streams of difficulties arose leading, ultimately to the Claimant's resignation. The Tribunal stated that it had no reason to question the credibility of the Claimant's claims involving Ian Mullin. The Tribunal pointed to the Occupational Health reports as highlighting the significant problems between Ian Mullin and the Claimant.

In an e-mail dated 18 February 2015 sent to a senior member of the company by the Claimant, she stated she was contemplating resignation as she could not see a future for herself in the company business. She stated that she felt her concerns were not being adequately addressed and that the mediation process was entirely unsatisfactory and that it did not deal adequately with the ongoing problem of Ian Mullin. The Claimant also made reference to the considerable financial difficulty that she found herself in and that she had a deterioration in her health and this was having an impact on her and her family.

A meeting was held on 31 March 2015, however the Claimant found out the next day that Ian Mullin, with whom she found it impossible to work was being provided with an office to be situated within the store that she managed. Her case to the Tribunal that this was essentially "the last straw" and on that day she wrote tendering her resignation and explaining what she was doing "*in light of the fact that after having followed your grievance procedure you refused to provide me with a safe working environment contrary to the terms of my contract by attempting to have me work in the same environment as the person whose actions I believe caused me ill health*".

The Tribunal's findings were that:

"*… the Respondent breached the implied term of trust and confidence and the wider contractual duty to co-operate with the claimant. The claimant resigned in response to that breach. The Tribunal has already made factual findings in relation to the investigation as being neither adequate, thorough enough, or properly handled, particularly in its assessment of the claimant's genuinely held belief regarding the alleged thefts and the attitude of M displayed towards her subsequently. The Tribunal was satisfied that the claimant was a credible witness who was well motivated in her employment with the respondent. It is also clear to the Tribunal that from in or about 18 February 2015 the claimant was contemplating possible resignation due to the foregoing factors. This is reflected in her correspondence to [the senior member of the company] dated 18 February 2015. The Tribunal is further satisfied that the breach was fundamental and therefore sufficiently important to justify her resignation, or, alternatively the failure in the mediation process was the last in a series of incidents flowing from the alleged thefts (and compounded by the nature of the investigation), ultimately justifying the claimant leaving the respondent's employment. The occupational health reports also substantiate the claimant's claims as to the impact of the ongoing events upon her health. These reports also stress the need for the respondent to make attempts to resolve the issues. The Tribunal's finding is that the mediation process could have gone further to minimise any contact between M and the claimant and to safeguard the claimant's interests and her health in continued employment with the respondent. The Tribunal does not consider contributory conduct to be a factor in this case*".

The employer appealed to the Court of Appeal on three grounds:

1. The decision was perverse.

2. There were material findings of fact either unsupported by or contrary to the evidence.

3. There was ex facie an error of law, a misapplication of law or misdirection of law in relation to the application of the law of constructive dismissal and the law in relation to the drawing of adverse inferences.

A major plank in Mr Warnock's submissions (Counsel for the company) in support of these grounds derived from what he contended ought to have been the implications for the Tribunal's conduct of the hearing of the terms of a Case Management Discussion held on 19

February 2016 in which the Employment Judge made orders by consent. This was the list of legal and factual issues that were agreed at Case Management Discussion. At the Court of Appeal, the company's Counsel argued that the main legal and factual issues constrained the ability of the Tribunal to step outside those agreed issues so that it ought not to have conducted what he described as its own investigation of the Claimant's grievance, a course which he characterised as an error of law or perverse.

He submitted that the fact that the Tribunal had drawn an adverse inference from the fact that Ian Mullin had not given evidence was to be similarly characterised as an error of law or perversity.

There was no evidence to support the Tribunal's conclusion that the company did not conduct an adequate investigation into the Claimant's grievance.

There was no evidence to support the conclusion that the failure of the mediation process was the last in the series of incidents justifying the Claimant's resignation.

That the decision was perverse in the sense that no reasonable Tribunal properly directing itself could have concluded that the Claimant was constructively dismissed.

That the Tribunal had failed to give proper reasons for its decision.

The Court of Appeal stated that the adequacy of the grievance process necessarily involved in examination of the alleged matters giving rise to the grievance. Otherwise the Tribunal would be deprived of the context required to enable it to assess the sufficiency of the grievance process including its conduct and outcome. This Court does not accept that the list of main factual issues narrowly confined the Tribunal to a consideration of those and nothing more. In the Parekh v The London Borough of Brent [2012] EWCA Civ 1630 it describes the list of issues as useful case management tool and further said this:

" *… As the employment Tribunal that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determined the case in accordance with the law and the evidence…*"

The Court of Appeal accordingly concluded that the Tribunal was entitled and indeed obliged to consider the factual antecedents of the grievance process. The Tribunal cannot be criticised for then proceeding to decide the case on such evidence as the two parties had chosen to place before it.

The Tribunal did not agree that there was no evidence to support the Tribunal's conclusion that the company did not conduct an adequate investigation. The Court of Appeal referred to the evidence established to the satisfaction of the Tribunal the company was more interested in maintaining its trade connection with the bread company than in properly investigating the Claimant's allegations of theft and the subsequent victimisation by Ian Mullin that were there was no independent evidence of the context of exchanges between the Claimant and others the investigation simply rejected the Claimant's allegations without attempting to discern where the truth lay, paid no or insufficient attention to the reports from Occupational Health about the effects upon the Claimant's health and the need for action to be taken to resolve matters and made no effort to devise a method of minimising ongoing contact between the Claimant and Ian Mullin so as to safeguard the Claimant's interest and her health and continuing the company's employment.

In the Court of Appeal's view there was ample evidence upon which the Tribunal could be satisfied that the Respondent breached the implied term of trust and confidence and its wider contractual duty to co-operate with the Claimant and that the Claimant resigned in response to that breach.

The Court of Appeal dismissed the employer's appeal. The matter was re-heard and we are awaiting the decision.

Unfair Dismissal/Court of Appeal

Caroline Connolly v Western Health & Social Care Trust
Case Ref: 1258/13
Hearing: 13-15 September 2016
Decision Issued: 13 December 2016
Judge: Judge Bell

The Claimant had admitted to having removed the Respondent's Ventolin inhaler from ward stock for her own use. The Respondent's genuine reason for the Claimant's dismissal related to her conduct.

The Respondent in view of the procedural deficiencies in the disciplinary procedure did not seek to rely upon the disciplinary proceedings to establish fairness of the dismissal but contended that the appeal process cured these.

The relevant point in time for our consideration is on conclusion of the appeal decision. It is the Tribunal's role to apply the objective standards of the hypothetical reasonable employer to all aspects of the question whether the Claimant was fairly and reasonably dismissed.

The Claimant admitted that she removed a Ventolin inhaler from ward stock for personal use and it was accepted in submissions on behalf of the Claimant that the Respondent had reasonable grounds to believe that the Claimant took and used the Respondent's inhaler without authorisation and that she did not immediately alert anyone in her line management. The Tribunal rejected the Claimant's argument that as a further element of misconduct for which the Claimant was dismissed the appeal panel had perversely found as proven that the "*claimant intended to replace the inhaler with one of her own prescription thereby concealing her use of the inhaler*", in effect adding an additional charge of "*attempting to conceal*" the use of the Respondent's inhaler, which was not put to the Claimant, contrary to evidence and stated findings, not properly investigated and adversely affected the panel's assessment of the Claimant's integrity and ability to have trust and confidence in her. It was submitted the decision to dismiss on this point was procedurally and substantively unfair. Mrs Young's evidence was that in response to the Claimant's comment that she had borrowed the inhaler and description of how she would replace it, Mrs Young considered "*the possibility, that if the truth had not become apparent, that the claimant intended to conceal her actions by replacing the hospital inhaler from one of her own prescription*". Mrs Young got the impression that the Claimant had described a "*covert substitution*" and in response she specifically queried with the Claimant what she meant by "*borrowed*". Mrs Young found it "*shocking*" that a qualified Nurse would think it alright to replace medication and considered an intention to conceal was a possible explanation for the delay in reporting the matter. The Tribunal found that the panel's point of concern however in this regard and which aggravated the seriousness of the admitted matters was not attempting or intending to "*conceal*" the use of the Respondent's inhaler but the Claimant's belief that it would be alright to replace the

inhaler with one of her own in light of her clearly stated intention and to do so, with no appreciation of pharmacy supply chain, governance and safety issues which Mrs Young found "*shocking*". Mrs Young investigated this concern further by asking the Claimant about whether she would consider replacing antibiotics and then about labels and barcodes on medication products, to which the Claimant replied that she was not thinking about that at the time, she just thought she could replace the inhaler. The Tribunal found that it was the intention to replace and foremost the belief it was alright to do so which detrimentally affected the panel's assessment of the Claimant and particularly so the apparent continuing belief at the appeal stage, still with no appreciation of pharmacy supply chain, governance and safety issues, which did not reassure the appeal panel that matters had been genuinely reflected upon by the Claimant as asserted by her representative and that they could have confidence in the Claimant's judgement.

The major thrust of the Claimant's case was the procedural difficulties and the question being whether these deficiencies were considered and resolved by the appeal panel or whether they persisted.

Agreed procedural difficulties were as follows:

The investigation carried out by Mr Jackson had focused on the other workplace conflicts and failed to investigate the inhaler incident so as to establish a definitive timeline of events, whether there was one or two different inhalers being referred to and what became of the Respondent's inhaler after the Claimant had used it.

The Tribunal stated that a reasonable investigation is important as a procedural safeguard in particular to enable the employer to discover relevant facts upon which to decide whether an offence has been committed, to provide the employee with an opportunity to respond to allegations and raise substantive defences and opportunity to put forward factors in mitigation of the conduct. However, where an employee admits the misconduct, generally there will be little purpose in carrying on any investigation and the employer will be acting reasonably in believing that the misconduct has been committed. It is not reasonable though for an employer to simply ignore matters which they ought to reasonably have known, which would have shown that the reason was insufficient. The Tribunal noted the confusion at the earlier stage of the disciplinary hearing as to whether the Claimant had used the Respondent's inhaler on more than one occasion; whether she used it on 4 or 7 October and what had become of the inhaler after it was used. At the appeal hearing the Tribunal were satisfied that the panel were clear that the charge against the claimant for their consideration was "*removal*" as clearly pointed out by Mrs Young during the appeal hearing when Ms Gault took issue with Mr Jackson's suggestion that the Claimant had "*stolen*" the inhaler and the Tribunal were satisfied that no suggestion of theft was entertained by the panel and find that none of the confusion that existed at the disciplinary hearing as to what the Claimant was charged with persisted at the appeal hearing. The Tribunal considered that given the admission of the charge and acceptance of the Claimant's account as to the time line and her use of the inhaler that the confusion which existed at the disciplinary hearing did not persist at the appeal hearing and consider that the investigation of the respondent into these matters was reasonable.

Prior to commencing the disciplinary hearing the same panel members on the same day also dealt with a formal grievance lodged by the Claimant in relation to the workplace conflicts.

Mrs Young declined the request to chair the Claimant's Stage 2 Grievance because she did not wish to put herself in a position where evidence could be confused or an impression of unfairness be given and that she did not know what the Claimant's grievance was about.

The Tribunal were satisfied that the appeal panel had no dealings with formal grievance matters raised by the Claimant but dealt only with the Claimant's appeal hearing so this procedural deficiency did not persist at the appeal hearing.

The papers placed before the disciplinary panel contained the full investigation of the workplace conflicts which did not directly concern the specific disciplinary charge levelled against the Claimant and were potentially prejudicial against her.

The appeal panel formed its own view of the Claimant from Mrs Young's questioning of her at the appeal hearing. Mrs Young's evidence that potentially prejudicial content relating to workplace conflict involving the Claimant in the statements of Sister Palmer and Sister McGarrigle, which should not have been put before the appeal panel, was not read by Mrs Young and did not form part of the deliberations of the appeal panel; that similar content referred to at the start of the redacted investigatory notes and in the subsequently produced un-redacted version was not presented by Mr Jackson during the appeal hearing to the appeal panel and did not form part of the deliberations of the panel. The appeal panel was in any event made aware from the case presented on behalf of the Claimant that personal relationships were not as harmonious as should be expected, that the asthmatic attack was considered by the Claimant as most likely triggered following an inappropriate altercation with a colleague and that the Claimant accepted that she needed to improve her relationships and vice versa in the Acute Medical Unit, and was keen to minimize any aggravation which could trigger an asthmatic attack. Matters of workplace conflict were, as put by Mr Ferrity, an "*open secret*" and the Tribunal did not consider on balance that the procedural error of their inclusion in the appeal papers in this case caused sub conscious bias of the panel against the Claimant.

Whilst the Claimant was formally charged with having "*removed*" an inhaler which might be considered to fall under the Respondent's disciplinary procedure as "*misuse of Trust property*", in the course of the disciplinary hearing reference was made by the panel to the Claimant's actions having constituted "*theft*" which was a graver allegation and one with which the Claimant had not been formally charged.

The Tribunal found that the appeal panel were clear that the charge against the Claimant for their consideration was "*removal*" as clearly pointed out by Mrs Young during the appeal hearing when Ms Gault took issue with Mr Jackson's suggestion that the Claimant had "*stolen*" the inhaler and are satisfied that no suggestion of theft was entertained by the panel. The charge considered and upon which the appeal panel based their decision was "*removal*" of the inhaler and not one of "*theft*".

Whilst there was no medical evidence in respect of the Claimant's condition at the time and albeit that Ms Keenan the chairperson of the disciplinary panel was a trained and experienced nurse, the panel conducted a "*clinical assessment*" of the Claimant's medical condition at the relevant time.

The appeal panel accepted that the Claimant had asthma and that it was her reason for taking the Respondent's inhaler. Whilst the appeal panel had some doubt over the plausibility of the Claimant's account that her asthma attack was so severe that it warranted taking an inhaler from ward stock but then failed to mention it or seek some level of medical assistance, the appeal panel in its rehearing did not endeavour to conduct a clinical assessment of the Claimant's medical condition at the relevant time.

It could have been made clearer by the Respondent to the Claimant that the alleged conduct could amount to gross misconduct.

The respondent's disciplinary rules clearly include in its list of example offences of gross misconduct issues of probity and misuse or unauthorised use of property, including the unauthorised use or removal of trust property. The Claimant was aware that the removal and use of prescription medicine for personal use was not allowed and it was accepted at the appeal hearing that her actions were in breach of trust policy. Given the outcome of the disciplinary hearing having been dismissal, that by the stage of the appeal hearing the Claimant was fully aware of the seriousness of the charge against her, that the alleged conduct could amount to gross misconduct and the possible outcome be dismissal.

Agreed matters in dispute were as follows:

1. The investigation, disciplinary and appeal processes between them failed to investigate and establish if there was a culture of staff using Trust drugs for personal use.

   This point was not advanced at the appeal hearing save for the Claimant's comment that Sister McGarrigle had offered her Linctus from ward stock. Mrs Young established that Linctus differed from Ventolin in that was not a prescribed drug and consider that it was a reasonable distinction for a reasonable employer to have drawn.

2. The appeal panel failed to act fairly by not recalling Sister Palmer and Sister McGarrigle after it was indicated that they could leave and were no longer required.

   The Claimant was in receipt of the statements of Sister Palmer and Sister McGarrigle prior to the appeal hearing and on notice of what their evidence would be. Full opportunity to challenge the evidence of Sister Palmer and Sister McGarrigle was given at the appeal hearing, both after their evidence and panel questions and confirmation was sought by Mrs Young that there were no further matters to be put before the witnesses were allowed to leave. The panel concluded that it would serve little useful purpose to recall Sister Palmer to respond to the Claimant's later suggestion that Sister Palmer would have seen her using her own inhaler before and on the morning of 9 October but not questioned her about it and she had volunteered the information to Sister Palmer. No request was made to recall Sister McGarrigle to respond to the suggestion that the Claimant reported all ailments to her and by implication may not have had a cold that week. In the circumstances, given the admission of the relevant charge, the appeal panel's decision to proceed without recalling either witness was within the band of reasonable responses of a reasonable employer.

3. The disciplinary and appeal panels did not take account of the Claimant's points in mitigation.

   The panel accepted that the Claimant suffered from asthma and that this was her reason for taking the inhaler in the absence of having her own to hand. Mrs Young approached the rehearing of the charge against the Claimant with an open mind and accept that she considered it part of the purpose of the hearing to consider whether the charge fell into "misconduct" or "*gross misconduct*". Mrs Young was of the view that a final written warning would be an appropriate sanction. It was however the Claimant's performance on questioning that led the panel to consider the Claimant's evidence as "*worrying and inconsistent*", in particular the Claimant changing her answer as to whether she told anyone at the time she had had an asthma attack. Mrs Gault in her presentation had confirmed that the Claimant was "*mindful of her*

responsibilities and accountability for her own actions in light of her misconduct", had undertaken "*a root and branch review of her professional responsibilities as a registered nurse and as an employee*", "*reflected on her actions, attitude and behaviour relating to the inappropriate removal of the Ventolin inhaler..*", considered her judgement fatally flawed, deeply regretted her actions and would tender in good faith a genuine and remorseful apology and seek to demonstrate that she now had sufficient insight and had learnt from the incident. The Claimant's remarks thereafter that no-one was harmed and the inhaler taken was not a controlled drug gave the panel the impression that the Claimant had a continuing belief contrary to the reassurances given that the unauthorised removal of drugs could be justified and to appear to miss the point that it was the unauthorised removal of a prescription drug from a locked drugs cabinet in breach of trust which was of concern to them and they sought reassurance going into the future that she and her judgement could be trusted. The panel took into account the Claimant's points in mitigation but find as a fact that it was the Claimant's approach to the charge and attitude displayed at hearing which led the panel to conclude that the substantial reassurances in the pre-prepared statements presented were not supported, to question whether the points put forward in mitigation were correct and to doubt the claimant's integrity and credibility going "*into the future*".

4. The panels failed to adequately deal with the "*removal*" of the inhaler in the context of the charge as formulated.

   No suggestion or charge of theft was made at the appeal hearing. It was admitted by the Claimant that the inhaler was taken from stock and used for personal use. The appeal panel accepted the Claimant's account that the inhaler was used only once. The Tribunal accepted the Respondent's contention that whatever then subsequently happened to the inhaler thereafter, whether it was left on a table or removed, the upshot of the admitted actions was that it could not be re-used and the employer was effectively permanently deprived of the inhaler. In these circumstances for the appeal panel not to seek to investigate further or make findings relating to the "*removal*" was not outside a band of reasonable responses and their consideration of the "*removal*" of the inhaler in the context of the charge as formulated at the appeal stage was reasonable.

5. The Assistant Director of HR, who sat on the appeal panel, may have been influenced by the report of the disciplinary panel in regards to both the disciplinary hearing and the grievance hearing.

   The Tribunal found Mrs Young a credible witness and consider that she approached the appeal with an open mind and was not affected by extraneous matters.

6. The appeal panel created an unfair pressurised environment due to time constraints.

   At the outset of the appeal Mrs Young indicated that it would reconvene if the hearing was not finished and that this point was not pursued at the appeal hearing. The Tribunal did not consider that the appeal panel created an unfair pressurised environment due to time constraints.

7. The hearings were unfair because the Claimant did not have certain witness statements.

8. The Claimant was not afforded the opportunity to access some pre-prepared documents prior to entering the appeal hearing which allegedly contained the wrong framing of the charge.

   This point was not pursued at the appeal hearing or before this tribunal.

9. The appeal panel saw all the un-redacted material produced to the appeal panel.

   As set out above, the un-redacted material was not read, nor taken into consideration in the appeal panel's deliberations. Workplace conflict involving the Claimant was an "*open secret*" and was referred to by the Claimant in the appeal hearing. The un-redacted material did not result in sub conscious bias against the Claimant.

10. The panel failed in its inquisitorial role to find facts around Sister Palmer's comments at the disciplinary hearing as to why she thought that the Claimant did not appreciate the seriousness of the issue.

    Mrs Young was credible in her evidence and she solely from her own direct questioning of the Claimant at the appeal hearing formed her own view that the Claimant did not appreciate the seriousness of the issue. The appeal panel did not rely upon the comments of Sister Palmer in forming their opinion.

The Claimant's representative contended that the acts admitted by the Claimant, of taking and using the inhaler without authorisation and not immediately alerting anyone in her line management, could not reasonably be considered to be acts of gross misconduct and reasonable in all of the circumstances to dismiss the claimant. He argued that following the Sandwell & West Birmingham Hospitals NHS Trust v Mrs A Westwood [2009] UKEAT/0032/09/LA case, the bare charge of removal of the inhaler for personal use is not a charge reasonably capable of amounting to gross misconduct given the Respondent's acceptance that it was not an act of theft, was not an act of dishonesty and it did not without significant aggravating factors alone serve to repudiate the contract and that for a first offence to be considered gross misconduct sufficiently serious for dismissal it should be exceptionally serious, the Claimant's representative submitted the admitted charge was not exceptional in that way. It was contended that Mrs Young did not appear to attach any weight to factors such as the importance of establishing a time line and if the inhaler was used more than once, but relied only on the bare fact admitted and did not undertake any analysis which would help characterise the nature and gravity of the offence between being misconduct or gross misconduct.

Mindful of the Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 principle and the severity of the consequences for the Claimant's career in nursing in Northern Ireland we note that the principle relates to the thoroughness of the investigation and is most applicable in disputed cases where principle findings of fact need to be the result of investigations most thorough. The Tribunal accepted the Respondent's submissions that this case involved an admission of guilt and that although misconduct can take many forms there is no hierarchy in the range test. Whilst the Respondent did not have an express medicines use policy the Tribunal noted the Claimant's evidence that she knew not to take medication without authorisation and accept as per Harvey on Industrial Relations and Employment Law that "*certain acts of misconduct are so well known that there is hardly any need for them to be spelt out*". The Tribunal found in light of the conflicting accounts before the appeal panel with no evidence to provide corroboration one way or the other the panel accepted the Claimant's

account as to the time line and number of uses of the inhaler, which was the most favourable approach to her.

The Tribunal stated:

"*We find that the matter of concern to the appeal panel was the Claimant's failure to make the report for a significant period of time, rather than the undetermined matter of whether it was made unprompted. We accept that the Respondent considered the Claimant's taking of a prescription drug from under lock and key for her own use as aggravated by her failure to report the matter until two days later, compounded by her contemplating replacing it with one of her own and in particular her ongoing failure to see that that there was much wrong with this, together with concern over the Claimant's integrity and credibility arising from her inconsistency in her evidence on challenge before them. We note that the Claimant was aware that the removal of medication without authorisation for personal use was wrong, that she admitted the charge put and acknowledged before the appeal panel that her actions were wrong and in breach of the Respondent's procedures and that at the appeal hearing the Claimant sought the next least severe sanction to dismissal, of a final written warning*".

"*We consider that at the end of the appeal stage when the decision to dismiss was made, the appeal panel held a genuine belief in misconduct by the Claimant based upon reasonable grounds, following a reasonable investigation, being that the Claimant took and used the Respondent's inhaler without authorisation and that she did not immediately alert anyone in her line management*".

"*Whilst it is not for the Tribunal to substitute its opinion for that of the employer, following the Westwood case, as a mixed question of fact and law in these circumstances we do not consider unreasonable the Respondent's analysis of the nature and gravity of the offence, or a conclusion that the conduct in question was a wilful contradiction of the fundamental implied term of trust and confidence and capable of amounting to gross misconduct sufficient to repudiate the contract of employment. We consider that the respondent considered a lesser sanction of a final written warning and took account of the Claimant's points in mitigation*".

"*We are satisfied in the above circumstances that the respondent genuinely believed that the Claimant was guilty of the misconduct alleged, had reasonable grounds upon which to sustain such a belief in the Claimant's guilt following a reasonable investigation and notwithstanding the deficiencies at the earlier stage of the procedure, that the appeal process was conducted in an adequately thorough and open minded way, such that overall the procedures adopted and penalty imposed, whilst at the extreme end, fell within a band of reasonable responses for a reasonable employer in all the circumstances of the case*".

Court of Appeal
Decision Issued: 17 October 2017
Judge: Gillen LJ, Deeny LJ and Sir Reginald Weir

The Judgment by Lord Justice Deeny stated that:

"*I was troubled by a number of aspects of the Tribunal's decision. I will address some of those while bearing in mind that the ultimate decision for this court is whether the decision of the Tribunal was wrong in law or the conclusions on the facts were "plainly wrong" … or with "no or no sufficient evidence to found them*".

The Court went on to state:

"*The decision is whether or not a reasonable employer in the circumstances could dismiss bearing in mind "equity and the substantial merits of the case". I do not see how one can properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct. How does one test the reasonableness or otherwise of the employer's decision to dismiss without comparing that decision with the alternative decisions?*

"*Counsel for the respondent then accepted by the time of the second Tribunal that the Trust could not stand over the Disciplinary Panel and the investigation but did argue that the Appeal Panel remedied any defects. The second Tribunal, whose decision is before us, accepted his submissions. Considering how they dealt with these matters and bearing in mind the written and oral submissions of Mr O'Brien I would not agree about the correctness of their conclusion in that regard.*

However, it is not necessary for me to go into this in every detail for it seems to be indisputable that the appeal process was fatally flawed in three particular and important respects.

There had apparently been exchanges of complaints by and against Nurse Connolly. It was accepted by the time of this Tribunal that there were unredacted and irrelevant matters in the papers before the Appeal Panel arising from those exchanges which were prejudicial to Nurse Connolly. Mrs Shirley Young, one of the two members of the Panel gave evidence at the Industrial Tribunal.

The Tribunal found at paragraph 90 that this inclusion of prejudicial material did not matter.

> *"As set out above, we accept that unredacted material was not read, nor taken into consideration in the Appeal Panel's deliberations. Workplace conflict involving the claimant was an open secret and was referred to by the claimant in the appeal hearing. We do not consider that the unredacted material produced resulted in subconscious bias against the claimant."*

However, this conclusion is based on having heard from one of the members of the Panel, Mrs Shirley Young, only. The Tribunal was entitled to find her a credible witness but even if they accepted her assurance she apparently gave no assurance about the thinking of the other member of the Panel. I say nothing adverse about the other member of the Panel. But given that the Panel had been given unredacted prejudicial material she should have been there also before the Tribunal so that the Tribunal could assess whether she had been coloured consciously or unconsciously by unfair and prejudicial material. This did not happen.

The judgment of the Tribunal does not even say that Mrs Young gave hearsay evidence assuring them that the other member of the Panel had not read or was not influenced by the material. It seems to me this was indeed a conclusion with no sufficient evidence to support it. It also undermines a somewhat frail claim that the appeal process had remedied earlier defects.

It is clear in the appeal process that Mrs Young had drawn the conclusion that Nurse Connolly was going to replace the inhaler she had used without telling anyone and that that would be a serious matter involving the chain of supply, something she was interested in. But as counsel pointed out, taking us to the exchanges, there is no evidence that that is what

Nurse Connolly intended to do. There is no finding of fact to that effect. It should not therefore have been taken into account against her.

For my part I think it valuable to go further than those matters. I acknowledge, as Gillen LJ reminds us, that this appellant has now been before two of the employer's panels and two Industrial Tribunals and failed to find favour with any of them. It may be that her previous employment as a soldier, and, indeed, the qualities necessary to become an Irish boxing champion, have not made her an ideal supplicant before panels and tribunals. But the determination, in accordance with equity and the substantial merits of the case as to whether her summary dismissal was one within the band available to a reasonable employer, must be decided on the facts and not on the subjective impression she engendered in those before whom she appeared.

The facts as found are that she took five puffs of this inhaler when undergoing an asthmatic attack without permission. The Tribunal accepted the Appeal Panel's view that this was aggravated by her failure to report the matter until two days later.

It appears to me that, even taking into account the delay, for which an explanation was given which was not rejected as a finding of fact, that could not constitute "deliberate and wilful conduct" justifying summary dismissal. Her Terms of Employment do not seem to have expressly prohibited such a use. The Code of Conduct is ambiguous at best on the topic. If she had asked the Ward Sister for permission before she used the inhaler and the Sister had refused her permission and she had nevertheless gone ahead and used it one might have had the sort of act of disobedience contemplated by the Court of Appeal in Laws v London Chronicle Ltd [1959] 2 All ER 285, op cit. That would have been a deliberate flouting of essential contractual conditions i.e. following the instructions of her clinical superiors. But that is not what happened here. Furthermore, I agree with the statements in Harvey on Industrial Relations and Employment Laws [1550]-[1566] that dismissals for a single first offence must require the offence to be particularly serious. Given the whole list of matters which the employer included under the heading of Gross Misconduct it is impossible, in my view, to regard the nurse's actions as "particularly serious".

The Tribunal cannot have been mindful of the statement of Edmund Davies LJ, as he then was, in Wilson v Racher [1974] ICR 428, CA at page 432, citing Harmon LJ in Pepper v Webb [1969] 1 WLR 514 at 517:

> *"Now what will justify an instant dismissal? — something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract."*

For this court to approbate the Tribunal's decision upholding as within a reasonable range of responses the summary dismissal of an employee from her chosen profession on these facts without any prior warning as a "repudiation of the fundamental terms of the contract" would be to turn language on its head. Employment law is a particular branch of the law of contract. With statutory interventions it has, of course, developed a character of its own. But any dismissed employee opting to go into a court of law and claim damages for breach of contract at common law against an employer who had summarily dismissed them for using a Ventolin inhaler while suffering from an asthmatic attack and delaying two days in reporting that, particularly when it was their "first offence", could be tolerably confident of success before a judge, in my view.

It seems to me therefore that this is one of those cases where the conclusion reached by the Tribunal was "plainly wrong" (Mihail v Lloyds Banking Group [2014] NICA 24) and one that no reasonable Tribunal ought to have arrived at".

The Court of Appeal quashed the findings of the Tribunal and substituted a finding of unfair dismissal and remitted the matter to a fresh Tribunal to determine the remedy and costs are to be borne by the employer, Western Health & Social Care Trust.

Unfair Dismissal

Eamonn McGrath v Southern Health & Social Care Trust
Case Ref: 583/16
Hearing: 17 & 18 May and 15 June 2017
Decision Issued: 8 September 2017
Judge: Judge Leonard

The Claimant was employed on 3 June 1991 as a Senior Support Worker in the Trust and had a clear disciplinary record prior to the events in June 2015 when the Claimant was detected as being under the influence of alcohol at work. The Claimant made a full concession and admission in respect of this matter at the time. He was thereafter subjected to a disciplinary process under the Respondent's disciplinary procedure.

The Claimant was placed on precautionary suspension by letter dated 18 June 2015 which stated:

"*That on 17 June 2015, whilst at work you appeared to be under the influence of alcohol*".

In the Claimant's statement as part of the investigation process, the Claimant amongst other matters alluded to specific circumstances surrounding the incident which had occurred on 17 June 2015. He alluded to the fact that his mother in law, regrettably, was terminally ill and to his wife also being ill.

The Claimant was referred by the employer to a Senior Occupational Health Consultant, Dr Alan Black on 30 June 2015. Dr Black sent a report dated 7 July 2015 to the Claimant's Line Manager recorded that the Claimant had consented to participation in the Respondent's Alcohol Monitoring Programme and that the Claimant had had his first blood test checked on the date upon which he had been seen by Dr Black. The third paragraph of the report dated 7 July 2015 read as follows:

"*I will continue to monitor Mr McGrath by reviewing him again in four weeks' time when the test will be completed. Meanwhile, I would advise that he remains fit for work on the basis that he has reported remaining abstemious since 18 June. I have advised Mr McGrath that I will remove him from the alcohol monitoring programme should he fail to attend any of his appointments without giving a reasonable explanation*".

A review appointment was arranged for Thursday 30 July 2015 at 2pm.

An investigation report was compiled dated August 2015, it ran to 11 pages and an allegation was expressed as "*That on 17 June 2015, Eamonn McGrath was at work under the influence of alcohol*". The Claimant was provided with a copy of the investigation report. In the conclusions of the investigation report they requested that a disciplinary panel consider an

allegation against the Claimant which in their view amounted to gross misconduct in line with the Respondent's disciplinary policies.

By letter dated 24 August 2015 the Claimant was invited to attend a disciplinary hearing on 1 September 2015, with the disciplinary panel members identified. The disciplinary hearing had been originally scheduled to take place on 1 September 2015, however due to the unavailability of the Claimant's representative, Mr Smyth of NIPSA, the hearing was then arranged for Monday 7 September 2015. The Claimant requested that he might be excused from attendance due to the fact of his mother-in-law being very unwell. It was arranged that the Claimant would be represented by Mr Smyth at the hearing and that the Claimant would not attend personally.

The Claimant's evidence was that on the date of the disciplinary hearing and after the hearing had concluded, he had received a telephone call from Mr Smyth who confirmed to the Claimant that he would be returned to a role in Supported Living so that he would no longer be a lone worker. He also confirmed that he was to be downgraded from Band 5 to Band 3 for a period of one year and that a formal warning would be issued by the Respondent to the Claimant and would remain on the Claimant's personnel file for a period of two years. The Claimant indicated to the Tribunal in evidence that at the time he had felt disappointed with the downgrading however he was relieved that the matter was finally over and he could continue working with the Respondent.

The disciplinary panel issued a letter on 9 September 2015 which was probably received by the Claimant a couple of days later. Included in the outcome was the following statement:

"*The panel also agreed that you should be downgraded to a band 3 for a period of one year to relieve you of the higher level of responsibilities of a band 5, this to be reviewed following a period of one year following assurance that your issues of alcohol dependency have satisfactorily been addressed. In addition you are required to take part in the alcohol programme and attend all Occupational Health appointments so as your commitment can be monitored … It is important you understand that any further breaches of discipline may result in more serious disciplinary action being taken against you. Given this disciplinary sanction on file, it is likely any further breach would result in your dismissal*".

The Claimant was afforded the right of appeal but he chose not to appeal.

The Claimant was scheduled to have an appointment with Occupational Health on 9 September 2015. On 8 September 2015 he initially contacted Occupational Health directly with a view to seeking postponement of the following day's appointment, but the Claimant was informed that he could not make a postponement request directly to Occupational Health and the Claimant was then referred to his Line Manager in that regard. The Claimant then contacted his Line Manager, Ms Murchan, requesting a postponement of the following day's appointment. The Claimant's reason for this request, indicated to Ms Murchan, was that the Claimant's mother-in-law's health had deteriorated significantly. He indicated that his mother-in-law was terminally ill and was residing with the Claimant and his spouse. Ms Murchan's evidence to a second disciplinary hearing recounts that she was aware that the Claimant was to attend an appointment at Occupational Health but she was not aware that the Claimant was participating in an alcohol monitoring programme. The statement confirms that the Claimant had contacted her on 8 September 2015 to say that his mother-in-law was terminally ill and had said "*we are sitting with her*" and that Ms Murchan had assumed that death was imminent and the Claimant had stated that he would not be able to leave his wife at such a critical time.

The Claimant was advised by Ms Murchan that his request could indeed be accommodated in the light of the particular circumstances which the Claimant had described. As he had been informed (at least at that point in time) that he was not required to attend the appointment with Occupational Health for the following day, the Claimant felt free to take an alcoholic drink and he proceeded to consume some alcohol with his brother-in-law. The Claimant's perception in so doing, as he explained to the Tribunal, was that he was not required to abstain completely from alcohol; indeed he had consumed alcohol upon such occasions as attended a barbeque and also whilst on vacation a short time before this. From the Claimant's perspective, he felt that he had properly and fully engaged, in a voluntary capacity, with the Respondent's Alcohol Monitoring Programme; he felt that he had made good progress as far as any previous assessment on the part of Dr Black was concerned.

On the morning of the following day, 9 September, the Claimant received a telephone call from his NIPSA representative, Mr Smyth. Mr Smyth was insistent that the Claimant indeed had to attend the Occupational Health appointment arranged for that day or as Mr Smyth stated to the Claimant, it was possible that the Claimant might be dismissed from employment. The Claimant then received a second telephone call, this time from Ms Murchan. Ms Murchan apologised for what she had previously stated to the Claimant and indicated that she was now being advised that the Claimant had to attend the appointment with Occupational Health in order to have his bloods taken. Upon the position being made fully clear to him by Ms Murchan, the Claimant duly complied with the request to attend the appointment on 9 September. Whilst his appointment for that day with Dr Black had been assigned to another person, nonetheless he did have his bloods taken. The Claimant thereafter attended a further appointment with Dr Black on 23 September. After this latter appointment, Dr Black dispatched a report dated 29 September 2015 to Mrs Welch. It stated:

"*Mr McGrath was reviewed again by myself today at the Occupational Health Department. As you know Mr McGrath is attending the department as part of the Alcohol Monitoring Programme. I have discussed with Mr McGrath the results of his most recent blood test and have stressed to him my concerns regarding his health and alcohol intake. I understand from Mr McGrath that he avoids drinking during the day before working and also avoids drinking at work. I have also not received any reports from yourselves suggesting that there have been any further problems at work. This being the case, I would view Mr McGrath as still being fit to work and nonetheless have substantial concerns which I have shared today with Mr McGrath about his ongoing drinking and have once again stressed the importance of avoiding alcoholic drink altogether. Bloods were checked again today and he will be reviewed again in four weeks*".

A review appointment was then arranged with Occupational Health on 29 October 2015. Dr Black indicated that he had discussed with the Claimant the Claimant's previous blood test results and Dr Black was pleased to note a modest improvement. The Claimant himself had reported a reduction in his alcohol intake and (as far as Dr Black was concerned) this would seem to be supported by the blood tests. Dr Black observed that he had once again discussed with the Claimant the concern that the Claimant was drinking at all. Nonetheless the Claimant was confirmed as remaining fit for work and a further appointment with Occupational Health was arranged for 26 November 2015.

The Claimant received a letter dated 14 October 2015 entitled "*Investigation under the Trust's disciplinary procedures*". The issue of concern was expressed as:

"*That you attempted to avoid an appointment with Occupational Health on 9 September 2015, as part of the Trust's Alcohol Monitoring Programme which you previously committed to participating in, and in doing so you have called in to question your honesty and integrity*".

The Claimant provided a statement to the disciplinary investigation. The Claimant recounted in his statement that he had gone on holidays with his family on 18 August, returning on 26 August. He indicated that he would have consumed alcohol every day whilst on holiday, maybe two or three pints in the afternoon and then half a bottle of wine at night over dinner. He indicated he felt this was not a serious consumption and that he had informed Dr Black about this. He also indicated in his statement that he would have had an occasional social drink before going on holiday, for example if he was attending a barbeque he would have had a few beers. He also indicated that when asked why he had cancelled his Occupational Health appointment for 9 September that on 7 September his mother-in-law's doctor had conducted a visit, as the lady's health had deteriorated significantly whilst the Claimant had been away on holiday. The Claimant indicated that his mother-in-law "*had only been given days*" when she was discharged from hospital on 2 September. When the doctor had visited her again on 7 September there had been no significant change but she had appeared to deteriorate the following day, that being 8 September. The Claimant had had further dealings that day with medical personnel and then he had telephoned Ms Murchan at approximately 2.40pm on 8 September to see if it would be possible to postpone the appointment. It was in this context that Ms Murchan, as the Line Manager, initially had agreed to the Claimant not attending the following day's appointment. The Claimant stated that he had disclosed the full extent of his alcohol consumption. He also stated that he did have a few beers on 8 September.

Ms Murchan, in her statement prepared for this disciplinary hearing confirmed that the Claimant had contacted her on 8 September to state that his mother-in-law was terminally ill and that the Claimant had said "*we are sitting with her*". Ms Murchan later that day, 8 September, was contacted by Mrs Johnston who indicated that the Claimant's appointment should not have been rescheduled as he was required to attend as part of the programme. Ms Murchan then contacted Occupational Health again but was informed that the appointment had been given away. She then spoke with Head of Occupational Health and it was agreed that the Claimant could attend at Occupational Health the following day as arranged and that his bloods would be taken but that he would not be seen by a doctor.

The disciplinary hearing in relation to this took place on 19 November 2015. The disciplinary hearing was convened to deal with the following specific allegations:

"*Allegation 1: that you failed to demonstrate commitment to addressing your alcohol dependency, despite previous assurances to do so.*

Allegation 2: that you attempted to mispresent the true level of your alcohol consumption to your employer as part of the Trust's Alcohol Monitoring Programme, and in doing so have called in to question your honesty and integrity".

The Claimant indicated to the Tribunal in his evidence that he was surprised that the matter was proceeding to a disciplinary hearing. The Tribunal stated:

"*Regrettably, on account of what appears to be a settled policy on the part of the respondent (which policy it must be said the tribunal finds to be somewhat unfortunate) no written minutes were taken of the disciplinary hearing, nor was any other detailed recording made. The explanation afforded on behalf of the respondent was that this was normal practice; the view was taken by the respondent that anything of significance arising at any disciplinary hearing would have been effectively encapsulated within the outcome letter*".

The evidence available to the Tribunal was that at the hearing, Mr Brownlee of NIPSA, and the Claimant stated that the Claimant was fully committed to the Alcohol Monitoring Programme and indeed the Claimant had attended all appointments and that Dr Black had felt that the Claimant was indeed making good progress. The Claimant's case, specifically was that at no stage had he been advised, or indeed required, to abstain from alcohol entirely. He had never been asked to enter into any formal contract with the Respondent regarding the Alcohol Monitoring Programme. It had never been fully explained to him what was expected of him, save that he should try and address his levels of drinking and that he should attend Occupational Health appointments. The course of the disciplinary hearing, Mr Brownlee expressly voiced concerns regarding the composition of the disciplinary panel, given as Mr Brownlee observed that it was composed of the same two persons who had dealt with the first disciplinary hearing matter on 7 September 2015. Notwithstanding these concerns being voiced by the NIPSA representative the disciplinary hearing proceed with the panel, as constituted, in respect of these specified disciplinary charges.

The Claimant was dismissed with effect by letter dated 7 December 2015 with 12 weeks' pay in lieu of notice plus outstanding payment for annual leave. The Claimant's evidence at the Tribunal was that he was shocked that after 24 years with an impeccable disciplinary record up to 2015, when due to circumstances in his private life, he began drinking more. He felt the disciplinary panel had failed to take into account all of the relevant facts and that the panel had failed to take into account any mitigating factors. He was of the view that the disciplinary panel had entirely failed to consider any alternatives to dismissal and that the decision was quite unfair.

In relation to the allegation that the Claimant had "*failed to demonstrate commitment to addressing your alcohol dependency, despite previous assurances to do so*", the decision of the panel was that this was upheld for the following reasons:

- That at the previous disciplinary hearing assurances had been given by his NIPSA representative, Mr Smyth, that the Claimant had come to see that he was increasingly dependent on alcohol.

- That the Claimant had asked for a postponement of an appointment scheduled for 9 September.

- That at the Occupational Health meeting held on 30 June the Claimant had reported that he had been abstemious since 18 June – at that time Dr Black had been pleased with his progress.

- That after the appointment of 9 September the letter records that Dr Black had stated that he had substantial concerns which he shared with the Claimant about his ongoing drinking and that once again Dr Black had again stressed the importance of avoiding alcohol altogether.

In the outcome letter the panel recorded its disappointment that the Claimant had started drinking again including confirmation that the Claimant had been drinking whilst on holiday and referenced assurances given by Mr Smyth, the NIPSA representative, to the disciplinary panel in September on behalf of the Claimant that he was committed to the programme and abstemious from drinking but he had in fact started drinking again and was continuing to drink. The panel had concerns that the Claimant had been drinking on 8 September and it was regarded as being remarkable that the Claimant had drunk on this day following his request and approval to postpone the Occupational Health appointment scheduled for 9 September.

The panel expressed the view that the Claimant's actions did not constitute adherence to and commitment to the Alcohol Monitoring Programme.

The Claimant had abstained in October, but there was no commitment that this would continue and the fact that the Claimant was clearly not in control of his drinking.

The panel indicated that it noted that the Claimant now felt that he did not have an alcohol dependency and expressed disappointment by what appeared to be reduced insight into the Claimant's condition and this insight had formed part of the reason why the Claimant had been given a final written warning and had not been dismissed at the hearing in September.

In relation to the second allegation that the Claimant "*attempted to misrepresent the true level of your alcohol consumption to your employer as part of the Trust's Alcohol Monitoring Programme, and in doing so have called in to question your honesty and integrity*", the panel were of the view that the Claimant did try and avoid his monitoring assessment on 9 September and that he had felt free to drink on 8 September because he thought he was able to cancel the appointment. The panel were of the view that an attempt to avoid the Occupational Health appointment brought into question the Claimant's honesty with his employer and the panel expressed itself to be deeply concerned with the lack of honesty and true commitment to the programme and equally the Claimant's lack of acceptance that he had a problem with alcohol.

The letter stated the Claimant's role was one which required that the Claimant support vulnerable people and that the Respondent must have confidence in the Claimant's ability to fully carry out the duties of the post and the panel did not have confidence that this was the case as the Claimant already had a live final warning on file in relation to being under the influence of alcohol whilst on duty, the risk posed by the Claimant's actions to tenants and colleagues and the concerns as to the Claimant's honesty and integrity and the Claimant's return to a pattern of drinking and the underlying impact of this on the Respondent's ability to have faith and trust in him was no longer sustainable. The Claimant had the right to appeal the decision.

- The grounds of appeal were that the same people should not have sat on the second disciplinary panel that had sat on the first disciplinary panel.

- There was a request to remove certain documents from the bundle for the appeal panel not pertaining to the case. The appeal related to the fact that medical evidence confirmed that he was medically fit to work.

- That he was performing adequately at work.

- That there was reasonable excuse to postpone 9 September appointment with Occupational Health.

- That the Claimant made every possible effort to demonstrate his commitment to addressing his dependency on alcohol.

- That nowhere in the documentation was there an expectation that the Claimant would totally abstain from alcohol.

- That the Claimant had been open and honest with his employer.

The appeal panel dismissed his appeal. The appeal panel was very clear that the two current allegations had to be viewed in the context of the fact that the Claimant previously received a final written warning for being under the influence of alcohol at work on 17 June 2015.

The outcome of the disciplinary was given to the Claimant on 7 September verbally by his union representative, Mr Smyth and in writing in or around 9 September. The appeal panel was concerned that there was a postponement of an appointment the day after when the disciplinary panel had issued the Claimant with a final warning on the basis of his commitment to addressing his alcohol dependency and that Dr Black had made a clear statement in his report of 30 June that the Respondent would remove him from the Alcohol Monitoring Programme should he fail to attend any of his appointments without reasonable explanation. The appeal panel stated that it did not accept that the Claimant could have been in any doubt about the fact that he was absolutely required to attend Occupational Health appointments and had considered whether or not the reason indicated for the postponement was reasonable. Whilst there was no dispute that the Claimant's mother-in-law was terminally ill at the time and the Claimant was supporting his wife through this, the evidence and fact surrounding the Claimant's attempt to postpone this appointment did lead the appeal panel to decide that it was reasonable to conclude that the Claimant was deliberately trying to avoid his monitoring assessment.

The Claimant's mother-in-law had eventually passed away on 22 January 2016 yet the Claimant had clearly led Ms Murchan to believe that the death of the Claimant's mother-in-law was imminent when the Claimant had contacted Ms Murchan on 8 September. The panel said it was reasonable to conclude that the Claimant's efforts to cancel the Occupational Health appointment the day after the disciplinary hearing was an attempt to misrepresent the Claimant's true level of alcohol consumption. In summary the appeal panel expressed itself to be deeply concerned at the Claimant's overall lack of honesty and true commitment to the Alcohol Monitoring Programmed and concluded stated that the fundamental relationship of trust and confidence in the Claimant which was at the heart of the employment contract, had broken down.

One issue that arose was what precisely Mr Smyth had conveyed to the first disciplinary panel. The fact that there was an absence of notes has led the Tribunal to some difficulty with this and the Tribunal stated that there was no evidence to confirm whether or not Mr Smyth had stated that the Claimant had been entirely abstinent from alcohol since the events or whether Mr Smyth had stated that the Claimant had been abstemious meaning that the Claimant had reduced his alcohol consumption but he was not entirely abstinent. Therefore the Tribunal concluded that given the Claimant's candour with Dr Black that he did take alcohol the Tribunal thought it would have been illogical to have adopted one approach of concealment at the disciplinary hearing and then a totally different one to Occupational Health.

The Tribunal had concerns given that Ms Murchan, his Line Manager, had received copies of the reports of 7 July and 3 August which referred to his attendance at the Alcohol Monitoring Programme. The Tribunal stated that it found it difficult to comprehend how Ms Murchan could have been unaware of the relevant circumstances surrounding the Claimant's attendance at these appointments and his participation in the programme at the time when the Claimant endeavoured to cancel the 9 September appointment. The Tribunal stated that "*… having very evidently accepted as entirely genuine the circumstances surrounding the serious, indeed terminal, illness of the claimant's mother-in-law and his familial responsibilities, Ms Murchan agreed to the claimant's non-attendance at the following day's appointment, in the light of her evidence awareness of the claimant's participation in the*

programme. The claimant was correspondingly quite entitled to accept this express confirmation at face value of there being no requirement to attend, as his came from his line manager. He was at home. He was not required to attend work the following day. He was in the company of his brother-in-law and they were attending an extremely sick relative. The claimant had no comprehension at this specific time that he would indeed be obliged to attend the appointment the following day and that the direction from this line manager would subsequently be changed".

The disciplinary hearing in respect of the first charge had proceed on the previous day, 7 September. The Claimant's representative, Mr Smyth, had telephoned him to advise of the outcome providing certain basic details. There is no evidence whatsoever to support the proposition that Mr Smyth advised the Claimant that one of the conditions attaching to the disciplinary outcome was that the Claimant was required, as a matter of compulsion, to attend the blood alcohol monitoring programme. Accordingly on 8 September at the time he took the decision to consume alcohol at home, the Claimant was upon the available evidence, entirely ignorant of that compulsory condition imposed by the disciplinary panel. Indeed the Respondent chose to inform him, formally of that outcome and of this specific mandatory condition, by letter dated 9 September dispatched very probably on that date but which did not reach the Claimant until either 10 or 11 September. Accordingly leaving aside the wisdom of doing to and concentrating only upon any work direction there was no reason why the Claimant ought not to have consumed alcohol on 8 September and he did so. When the Claimant was then contacted by telephone on the following day by Ms Murchan, to countermand her original approval and to insist that the Claimant attend the appointment arranged for 9 September, the Claimant was placed in the position of having to attend. Indeed he did so, as instructed notwithstanding his domestic situation concerning his mother-in-law's terminal illness.

The Tribunal stated:

"*All of this course of events, in terms of investigation, appears to have been approached by the respondent with a lack of precise and clear vision. Missing from all of this appears to be an endeavour to conduct a true, proper and thorough analysis of all relevant facts. Examining the investigation carried out which led to these specific disciplinary charges being formulated and then levelled against the claimant (in the second process), the tribunal notes not only the expressly-stated provision of the respondent's Disciplinary Policy … but specifically the requirement that such an investigation must be conducted in accordance with the objective standard represented by the "band of reasonable responses" test*".

"*Is an inescapable fact that this is a case of a long-serving employee, having had some 24 years' of service, who stood to lose a career and who held an otherwise unblemished disciplinary record, save for the disciplinary matter which had already been determined a very short time before. The claimant faced accusations which have, at this tribunal and rather belatedly, been categorised as ones of "probity" … These were, in effect, allegations of dishonest levelled against the employee. In such circumstances, the general approach of the authorities suggest that a higher standard of investigation would be required than might be appropriate in a case with much less far-reaching consequences than the dismissal of an employee in the claimant's circumstances*".

In the case of Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457, it is emphasised that the nature and extent of the investigation must be appropriate to the seriousness of the allegation and any far reaching consequences of the potential outcome. This is precisely the situation which applied in this case. An appropriately comprehensive investigation would normally be required when honesty or integrity of the employee is in issue

and when a long standing career or profession could be brought to an end by dismissal. It is of course not for the Tribunal to decide what investigations would have been appropriate in light of the evidence heard at hearing, but rather the Tribunal is tasked with enquiring if any investigation fell within the band of reasonable responses of a reasonable employer.

In terms of procedural fairness the Tribunal notes that the Respondent is a large Trust. It has, it must be presumed significant resources in terms of personnel. The Tribunal received no proper or credible explanation from the Respondent as to why, given the significant administrative resources available, the arrangements were made in the manner applied by the Respondent. There appears to have been no proper through given by the Respondent to having the second process subject to engagement by persons who were entirely unconnected to the first process, any such persons who could bring a fresh scrutiny to matters, uninfluenced by what had gone before. Indeed the Tribunal notes that this issue was expressly drawn to the Respondent's attention by the Claimant's representative in the disciplinary process. The panel dealing with the second disciplinary hearing however shoe to disregard or dismissed the submissions advanced concerning the significant risk of procedural unfairness. The Tribunal specifically held that the second disciplinary hearing was in breach of Labour Relations Agency's Code of Practice, at paragraph 63:

"*When drawing up and **applying procedures employers should always bear in mind the requirements of natural justice**. This means that, where possible, **employees should be given the opportunity of a meeting with someone who has not been previously involved in the process**. They should be informed of the allegations against them, together with the supporting evidence, in advance of the meeting. Employees should be given the opportunity to challenge the allegations before decisions are reached and should be provided with a right of appeal*".

The Tribunal went on to state that:

"*The content of the appeal outcome letter, taken together with other factors emerging from the entire process, indicates to the tribunal a clear inconsistency of approach and, it must be said, a degree of confused and confusing thinking on the part of the appeal panel, echoing that which is evidence from the preceding stage of the disciplinary process. The outcome letter concludes by stating that the appeal panel was satisfied that it was reasonable to conclude that the claimant's efforts to cancel the Occupational Health appointment on 8 September was an attempt to misrepresent the claimant's true level of alcohol consumption. There is a reference made to deep concern at the claimant's "overall lack of honesty" and "true commitment" to the Alcohol Monitoring Programme. The outcome letter then indicates that the second allegation was found to be substantiated. The letter ends with a reference to the issue of trust and confidence*".

The Tribunal stated that "*Some aspects of the appeal process considerably troubled the tribunal … the presentation of the case to the appeal panel was conducted by the same two persons who had done so in respect of the first disciplinary hearing and the second disciplinary hearing*".

The Tribunal noted that "*… the respondent for the purposes of the appeal made no real endeavour to conduct a fresh investigation. The tribunal regards it as having been of considerable importance that a proper investigation was conducted, within the band of reasonable responses of a reasonable employer, when one disciplinary process the outcome of which is a finding against the employee and the imposition of a disciplinary sanction just short of dismissal, is then followed almost immediately, as it was in this case, by a second disciplinary process which, in itself, fundamentally relies upon information gathered in of the*

first process. Then, if there is to be an appeal by way of a complete rehearing, it is difficult to accept that such a complete rehearing will not be adversely affected by the failure to conduct a full and a fresh investigation into all of the relevant circumstances, such as was the failure in this case. This issue was indeed expressly raised by Mr Brownlee and the panel could have been in no doubt about the issue".

The Tribunal stated "*There were certain fundamental issues left entirely unexplored. This causes the tribunal to form the view that the investigation was not reasonable in all of the circumstances. For example, certain fundamental issues as to what precisely Dr Black intended to say in respect of the issue of total abstinence, as opposed to reduction in alcohol consumption, on the claimant's part and the seeking of clarification from Dr Black or the, it must be said illogical but unquestioned, assumption that the claimant had been without any doubt informed of the entirety of the outcome of the first disciplinary process, when the respondent's letter informing the claimant of the outcome had not even been dispatched by the 8 September, exemplifies both a lack of fair and proper investigation and also a lack of proper, robust and comprehensive enquiry on the part of the hearing panel and indeed the subsequent appeal panel. The point here, of course, to which the respective panels seem to have been blind, is that the claimant's attendance at the Alcohol Monitoring Programme was entirely voluntary on his part. The respondent had at no time ever issued the claimant with a clear work direction that he had to refrain absolutely from alcohol consumption. The situation indeed remained so up to the pint when such attendance at these alcohol monitoring appointment was then expressly designated as being a mandatory work direction; that was on foot of the determination of the disciplinary panel as an outcome of the hearing on 7 September*".

However the Claimant was not in attendance at this hearing. There is no evidence that Mr Smyth expressly mentioned that specific mandatory requirement to the Claimant after the outcome was known in the telephone conversation of that day. The written outcome confirmation was then encompassed in the letter dispatched on 9 September, which letter the Claimant inevitably did not receive until at least the following day, 10 September, or possibly 11 September. Upon receipt, he would have then seen the mandatory stipulation. Notwithstanding all of this, the disciplinary hearing and the subsequent appeal hearing proceeded with the panel, in each case, assuming without question the Claimant's full awareness of compulsion, when none such had ever been effectively communicated to the Claimant at the point when he was alleged to have been engaged in dishonestly attempting to evade the monitoring appointment arranged for 9 September. The respective panels entirely disregarded that the Claimant's attendance had been voluntary, on foot of an inadequate investigation and a defective presentation of the case, with disciplinary charges which did not readily follow from anything contained in the Respondent's Disciplinary Procedure and from any definition of gross misconduct in the Respondent's categorisation therein.

Regrettably, this confused thinking in the framing of the disciplinary charges, which Mr Brownlee endeavoured to bring to the appeal panel's attention, was entirely dismissed. The appeal panel did not properly and conscientiously address its mind to the issue raised. Furthermore, in both the disciplinary hearing and subsequent appeal, the investigation had not encompassed any proper enquiry into the case that had actually been made by Mr Smyth to the first disciplinary panel and indeed the fundamental issue of whether or not the Claimant had intended to give and had given, via Mr Smyth, an entirely unqualified undertaking and assurance that he would fully abstain from alcohol. The somewhat surprising absence of a proper record or minutes taken of the first disciplinary hearing, serves to compound the difficulty. In general terms, it is evident to the Tribunal that the appeal panel did not conscientiously seek to assess all of the relevant evidence. This was, in such a serious

matter as the dismissal of a long-serving employee with an otherwise untarnished record (save for one very recent matter) required to be conducted as much to find factors which might go to the mitigation of the Claimant's position as much as to find factors supporting his culpability which might have properly supported a decision to dismiss. In that latter regard the case of A v B [2003] IRLR 405 is relevant and the passage from Elias J is as cited above. There is nowhere mentioned, in any of this, the Claimant's following of the Alcohol Monitoring Programme and indeed his attendance at every appointment. There is no reference made to the Claimant's full and complete candour, this indeed being the very antithesis of an approach which might have been in any manner dishonest. The appeal panel disregarded the evidence that Ms Murchan, who prior to being informed that the Claimant's attendance at the 9 September appointment was indeed compulsory, appeared fully to accept the veracity of the Claimant's reason for wishing not to attend; indeed Ms Murchan seems to have regarded that reason as being entirely credible. Notwithstanding all of this, the appeal panel committed itself in the outcome letter to even going so far as to insinuate that the delay between these events of 8 and 9 September 2015 and the ultimate death of the Claimant's mother-in-law some time later, in some way was suggestive of dishonesty on the Claimant's part. The fact of the Claimant, in all of the circumstances, having been nothing other than fully candid, open about his alcohol consumption and entirely honest, both with Dr Black and also with the Respondent's investigation, was entirely disregarded. To find dishonesty (or perhaps lack of probity, to adopt the definition advanced at the Tribunal hearing) which has been the finding of the (second) disciplinary panel, with the appeal panel fully supporting that conclusion, is indeed a perverse conclusion.

In regard to the issue of mitigation, there is no evidence apparent from the outcome letter to the (second) disciplinary hearing and also the appeal hearing that the respective panels gave any, or any proper, consideration to the matter of mitigation or to the possibility of considering action short of dismissal. The Tribunal notes that Paragraph 3 (g) of the Respondent's Disciplinary Procedure, provides (with the Tribunal's emphasis), "*In deciding upon appropriate disciplinary action, consideration shall be given to the nature of the offence,* ***any mitigating circumstances and previous good conduct****"*. Indeed this is echoed at Paragraph 6.4, "*Before deciding on the appropriate disciplinary action, the Disciplinary Panel* ***should consider any mitigating circumstances put forward at the hearing and take account of the employee's record***". Dismissal for gross misconduct is not an inevitable sanction. Paragraph 6.5 (c) provides, "*Dismissal will apply in situations where previous warnings issued have not produced the required improvement in standards or in some cases of Gross Misconduct*". The procedure envisages dismissal being applicable where a previous warning has failed to produce the required improvement or in some, but expressly not all, cases of gross misconduct. In this case the "previous warning" had not even been fully and effectively communicated in writing to the Claimant at the point where he was again facing a disciplinary process.

There was insufficient evidence and information upon which both the disciplinary panel and the subsequent appeal panel could reasonably have formed a concluded a belief in the culpability of the Claimant in respect of the two disciplinary charges, as specifically framed. For these reasons, this case epitomises not just an unfair process, firstly in terms of the extent and quality of the disciplinary investigation, secondly in regard to the fair and proper conduct of the (second) disciplinary hearing and, thirdly, the subsequent appeal, but the case also epitomises an element of confused and not entirely logical thinking, with an evident lack of clarity on the part of the Respondent's personnel who were involved in the investigation and presentation of the disciplinary allegations and the adjudication and then the subsequent appeal. This is so in regard to the specific identification of the charges of gross misconduct sought to be levelled against the Claimant (where indeed the Respondent's representative, rather belatedly, at the Tribunal hearing endeavoured to assist the Respondent by

identification of the word "*probity*" in the Respondent's Disciplinary Code) and by the shifting of focus towards a broader "*trust and confidence*" issue, that appears to have arisen out of the process.

The Tribunal held "*The entire process, in the tribunal's view and for the foregoing reasons, does not fall within the band of reasonable responses of a reasonable employer. As this is the conclusion, the tribunal's unanimous finding is that the claimant was unfairly dismissed by the respondent*".

Victimisation

Shane Hynds v South Eastern Regional College & Mr Tim McAlister
Case Ref: 1607/16
Hearing: 25-27 April 2017
Decision Issued: 10 July 2017
Judge: Judge Leonard

The Claimant was employed from 13 October 2006 with the College as a full-time Lecturer in the School of Construction and Engineering. This case arose out of a complaint by a Mr James Nyamutenha who was a full-time Lecturer and these complaints were against a Mr Tim McAlister who was the Claimant's direct line manager and Assistant (or Deputy) Head of the School of Construction and Engineering. This complaint was investigated by Ms Jacqueline Gamble and is hereinafter referred to as "the Gamble Investigation". This investigation related to a total of 14 allegations. The outcome was that four of these allegations were upheld against Mr McAlister. Namely the treatment of Mr Nyamutenha at meetings, the alteration of a spreadsheet to make Mr Nyamutenha appear to have made a mistake, alleged interference with an investigation and undermining Mr Nyamutenha feeling undermined and being accused of plagiarism.

The report expressly made a comment that the incidents were not related to Mr Nyamutenha's race despite this being a ground of complaint from Mr Nyamutenha. The outcome of that was that Mr McAlister was subject to a disciplinary procedure in respect of those allegations that were substantiated and in relation to this Mr McAlister sought advice and assistance from his representative body, UCU, and met with their legal advisors and the Tribunal specifically stated that "*From the evidence it is clear that Mr McAlister met with the Solicitor to obtain legal advice concerning the building of his defence in respect of the pending disciplinary proceedings. The tribunal received very little evidence or information regarding a claim for race discrimination apparently pursued by Mr Nyamutenha to an Industrial Tribunal*".

The evidence that Mr McAlister gave to the Tribunal was that he was advised by his legal advisor to ascertain if certain individuals within South Eastern Regional College would be willing to provide statements or in any other way to assist in the construction of his defence to the disciplinary process. In these discussions, Mr McAlister queried with the solicitor whether approaching individuals might render him vulnerable to accusations that he was interfering with witnesses. Mr McAlister was advised both by the solicitor and also by his UCU rep that that would not be so when the Gamble Investigation was closed. The solicitor explained to Mr McAlister that he had an absolute right to defend his position and as it was apparently put he had "*legal authority*" to do so. Mr McAlister had received the Gamble report (substantially redacted) in November 2015.

The allegation of victimisation arose from actions taken by Mr McAlister in April 2016. On 5 April 2016, the Claimant received a skype communicator message from Mr McAlister asking which class he would be teaching the following day. Mr McAlister stated that he needed to have a chat with the Claimant and that he would come down to the Downpatrick campus the following day. When the Claimant asked Mr McAlister what the chat was to be about, Mr McAlister replied that he would explain the following day. As a result of this communication, the Claimant apparently felt anxious. He was concerned that the meeting might be related to the e-mail that he had received from Ms Victoria Boyce on 30 March 2016 (on 30 March 2016 he had received an e-mail from Ms Boyce, Senior HR Business in SERC seeking his consent for the release of a full copy of the notes of his interview with Ms Gamble to the individuals against whom the allegations had been made. Such confirmation was requested. The Claimant declined to provide his consent.)

Accordingly on the afternoon of 5 April 2016, the Claimant met with Ms Maureen McKay of SERC's HR Department. He expressed his concern that Mr McAlister had arranged a meeting for 6 April 2016 and declined to explain the purpose. The main discussion between the two concerned guidance sought by the Claimant from Ms McKay as to whether or not he was required to attend.

Ms McKay advised the Claimant that in the event that the meeting was about the Gamble report, the Claimant did not have to participate and that Mr McAlister could prepare his defence from the report but that there was no obligation for the Claimant to answer questions. Ms McKay also advised the Claimant in the course of a telephone call made at 5pm that day that Mr McAlister had not been issued with the notes of the meetings of the Gamble Investigation.

At the commencement of the morning of 6 April 2016, the Claimant was engaged in teaching a class in the Downpatrick campus when he was approached by Mr McAlister who requested a meeting with him in a room known as the "Enterprise Suite" scheduled for 10am that morning. The Claimant did not query with Mr McAlister the purpose of that meeting at the time. The Claimant attended the meeting as requested. He arrived at the Enterprise Suite which was a relatively small room. When the Claimant entered the room, Mr McAlister was located behind a table or desk and Mr Paul Henry (Deputy Head of School) was positioned to one side. There was considerable evidence given to the Tribunal regarding the layout of the room, the positioning of the parties relative one to the other and of any words spoken. It was advised to the Claimant that Mr Henry's presence at the meeting was as a note taker and possibly as a witness. However the Claimant argued that at the hearing he had been told that Mr Henry was there to support Mr McAlister.

The meeting was very brief (a matter of a very few minutes only). The best assessment of all the evidence led the Tribunal to the conclusion that the Claimant did approach the meeting with a degree of anxiety. The content of what was said during the course of the meeting by Mr McAlister to the Claimant was in dispute. When the Claimant noted that the anticipated meeting with Mr McAlister was also in the presence of another Deputy Head of School, Mr Henry, he appears to have felt anxious. He observed that Mr McAlister had a document in his hand, highlighted in green which at the Tribunal was clarified was a portion of the Gamble report.

The Claimant's version of what was stated at the meeting was that Mr McAlister commenced by telling him that he wanted clarification on points within the document which he was holding in case HR misinterpreted what the Claimant had said. The Claimant's evidence was that he did not know exactly what documents Mr McAlister was holding and that he was worried that Mr McAlister might have got a copy of the notes from his interview with Ms Gamble. His

evidence was that towards the outset he indicated to Mr McAlister that he found the situation to be stressful. His evidence was that Mr McAlister replied by asking how he felt and that he had had 15 months of this and had been in front of a Board of Governors and that he, Mr McAlister could lose his job.

Mr McAlister's evidence was that he introduced Mr Henry to the Claimant and this was confirmed as accurate to the Tribunal and Mr Henry. Mr McAlister denied that he was aware that the Claimant's mood was becoming more anxious as the meeting progressed but he indicated that he said to the Claimant that this had been a very highly pressurised situation for all and that he in no way wished to add to that and if the Claimant did not feel he wanted to answer or clarify, Mr McAlister was happy to leave it there. Mr McAlister denied that he had asked the Claimant "*how do you think I feel*" and denied that he had said "*I have had 15 months of this*".

The Claimant left the meeting of his volition after some brief discussions. He was then approached by Mr McAlister approximately 45 minutes after the meeting had concluded and when the Claimant was in the motor vehicle workshop. Mr McAlister stated to the Claimant that he was sorry for what had happened upstairs. He then proceeded to ask the Claimant about student numbers for next year in his Level 3 class and about a recent inspection. Mr McAlister's evidence to the Tribunal that this was nothing other than a genuine desire on his part of apologise to the Claimant for any embarrassment or difficulty arising on account of the earlier meeting and to discuss normal College business with the Claimant in terms of student numbers and the allocation of resources.

The Claimant soon afterwards raised concerns about what had occurred with the Deputy Head of HR via telephone and by e-mail. The next day she reverted to the Claimant confirming that she had addressed the matter directly with Mr McAlister and she had sent an e-mail to him stating that it had been brought to her attention that Mr McAlister had been meeting with staff in respect of preparing a defence for his pending disciplinary. Whilst the College certainly did not wish to prevent or impede Mr McAlister from preparing a defence to allegations, any such meetings should be stopped with immediate effect and Ms Carson suggested that in collating his defence, Mr McAlister should first ask staff by e-mail if they were prepared to meet or provide a statement in his defence and provide a clear explanation of the request. Mr McAlister's explanation in an e-mail reply to Ms Carson on that date was the Claimant had asked what the meeting was to be about the previous day and that Mr McAlister had said he would explain to the Claimant when he saw him and this was done to try and avoid any further conversations regarding breach of confidentiality. Mr McAlister assured HR that he would conduct any future conversations in the manner that she had recommended.

Mr McAlister was suspended from work by letter dated 13 April 2016 due to an investigation into his conduct regarding the Claimant. The Claimant went on sick leave diagnosed with work related stress on 12 April 2016 which he stated to be as a result of the events surrounding 6 April 2016 meeting. The Claimant returned to work on 11 October 2016 but then went back again on sick leave on 18 November 2016. He remained absent from work at the date of the Tribunal hearing in April 2017.

An independent investigatory officer, Mr Gary Lyons, was appointed to investigate the Claimant's grievance. The outcome of Mr Lyons' report that Mr McAlister's action did not constitute bullying and/or harassment in relation to the course of the meeting and indeed evidence was given by Mr Henry to Mr Lyons that Mr McAlister had been very professional and that the Claimant had been treated in exactly the same way as Mr McClure and that the Claimant had he wished to leave the meeting had been allowed to do so and that there was

no evidence that the meeting was conducted in an oppressive of threatening manner and that Mr McAlister had a right in law to prepare a defence.

The Claimant brought a case to the Industrial Tribunal on the grounds that he had been victimised under the Race Relations Order 1997 in that he had been subjected to less favourable treatment and detrimental treatment by Mr McAlister in the course of his employment and asserted that the reason he was subjected to detrimental treatment was that he had done a protected act, namely given evidence in an internal investigation in relation to a race relations complaint.
The Tribunal did not uphold his complaint.

Religious Discrimination

Colin Robert Houston v Swissport GB Ltd & Colin Morrow
Case Ref: 93/16FET & 2247/16
Hearing: 26 to 28 June 2017
Decision Issued: 24 July 2017
Judge: Mr N Kelly (Vice-President)

The Claimant was employed as a Ramp Agent by Swissport GB Ltd which is the baggage handling and cargo handling services at various airports including Belfast International. The Second Named Respondent, Mr Colin Morrow as the Ramp Manager.

The Claimant is a Christian pastor and does not approve of same sex relationships or same sex marriages. He is heterosexual. The Claimant alleges in the course of his employment he had been subject to various acts of unlawful harassment and discrimination e.g. that a rainbow coloured bumper sticker stating "*I am so gay, I can't even drive straight*" had been affixed to his car. The Claimant had been on a part-time and a temporary contract and had commenced employment on 16 November 2015 which was terminated on 25 September 2016.

The Claimant alleges that this termination had been an act of unlawful discrimination and an act of unlawful victimisation because he had complained of unlawful harassment. He alleges that the complaints of unlawful discrimination/harassment were not taken seriously and they were not properly investigated and he maintains that he was discriminated against by the Respondents on the basis of his religious belief, his political opinion and his sexual orientation.

The Claimant was represented by the Equality Commission in his Tribunal case.

It is clear from the Tribunal decision that the Claimant was not accepted as a credible witness:

"*He gave evidence on his own behalf without calling a single supporting witness. He seemed to be of the view that if he said something that automatically made it the truth and that it was incomprehensible that anything he said might be challenged. For example, "he knew for a fact" that Mr Morrow, the second-named respondent, and others in the management structure of the first-named respondent had always known of his religious beliefs and his political opinions. Even though he accepted that he had never discussed such matters with the second-named respondent or with any other manager, he "knew for a fact" that they had known of his beliefs and opinions. He had reached this unshakable conclusion because he believed that they would have overheard conversations which might have taken place*

between other employees concerning the claimant. This, at best, was an assumption on the part of the claimant. He assumed that there had been discussions of his religious and political views and that the second-named respondent and other managers would have overheard those discussions. The second-named respondent, in particular, "knew everything that went on in the airport". This had no evidential basis. However the claimant did not appear to be able to understand the difference between an unsupported assumption and hard evidence".

The Tribunal found that the Respondents' witnesses impressed them. They presented a coherent picture of a temporary employee who had been creating a succession of problems at work because of his aggression towards colleagues and supervisors and because of his attitude to his duties. His contract had not been renewed when it fell due, in the normal course of events, for the consideration of renewal. Particularly after an incident concerning Mr Lynn.

The Claimant had commenced a temporary contract which stated that the contract had been extended until 25 September 2016 and will be reviewed again at that date. Mr Morrow, the Manager, stated that the letter of 23 May 2016 had been issued as part of a normal consideration of contracts approaching termination date. The Claimant stated that he had not received the letter and it had been falsified and presented under oath. The Tribunal held that "*He refused to contemplate the possibility that such a routine letter had in fact issued and that he had either ignored it or had misunderstood it, or had forgotten about it*". The Tribunal stated "*Its importance to this case is that the claimant's reaction to it shows his capacity to make extravagant and serious allegations, where he believes they advance his case, without any apparent concern as to their implications*".

The Claimant believes that he is well known and that he has a significant public profile as a Christian pastor with particular interest in relation to same sex marriages and abortion. He referred to various newspapers articles and photographs and also to his decision to stand as a candidate for North Belfast in the local government elections in 20147 for the Ulster Unionist Party. None of the Tribunal had ever heard of the Claimant before this hearing commenced. Many of the newspaper articles and photographs which the Claimant produced into evidence related to periods either before or after the relevant period in the present case. In many he was unidentified and simply part of a group photograph. His unsuccessful participation in a local government election for a specific part of North Belfast has been over one year before he commenced employment with the First Named Respondent. The Second Named Respondent and witnesses for the First Named Respondent had never lived in North Belfast and had known nothing of the Claimant's candidacy. The Claimant had been known to some of his colleagues at least, as "*Pastor*" and had the word *"Pastor*" included on his airside driving licence for the purposes of his employment. The Tribunal accepted that some of his colleagues would have known of his position as a Pastor and therefore that they would have known or could have guessed his views in relation to same sex relationships or same sex marriage. However the Tribunal was clear that the Claimant is not as well-known as he believes he is and he has simply assumed, without any particularly evidence, that his religious beliefs, political beliefs and indeed his sexuality were known to specific individuals, including to the Second Named Respondent. There is no evidence that any of these matters had been known to the Second Named Respondent before some point in August 2016 when the Claimant first complained of graffiti in the toilets. The Second Named Respondent was not aware and the Tribunal held that he had no knowledge of the Claimant's religious beliefs, political opinions or sexual orientation before he raised them in August 2016.

There was an incident in June 2016 were the Claimant attempted to remove a steering pin from a vehicle before the tow bar had been disconnected from the aircraft and an altercation

took place between him and a Mr Doherty and they were both issued with a caution in relation to their conduct. The Tribunal concluded that the Claimant had responded to Mr Doherty with a degree of aggression and indeed to Mr Bushe with the same attitude. This was an attitude the Tribunal observed in the course of the hearing. The Claimant responded to many lines of questioning with a combative attitude and a degree of sarcasm.

There was a further complaint of aggression with a Mr Rankin in that the Claimant had been asked to perform a function in relation to a cargo plane and he became aggressive and had refused to undertake the task.

A further incident occurred on 24 July 2016 where he was requested to go to training but refused. The Claimant had said that he had been there for a year and that the Respondents had not bothered training him before now and that "*didn't care*". The Claimant complained about the standards of health and safety and threatened to report the First Named Respondent to the Health & Safety Executive. He complained about a lack of water in the bay and the standard of the equipment. He stated that that the equipment was rubbish and it was broken but refused to report it as he stated it was not his job.

A further incident occurred on 25 July 2016. On this occasion he was aggressive about a music channel and physically pulled a member of staff out of the way and pushed another member of staff. The Claimant alleged on 10 August 2016 he had visited the staff toilets in Aldergrove and there had been graffiti on the wall which was sickening and offensive to him as a Christian. The Tribunal held that there was no evidence that he had been targeted or that it had been uniquely offensive to a Claimant that was Christian or to someone with a particular political view or to a heterosexual. The graffiti had been obviously offensive but it had been offensive, in the view of the Tribunal to any normal person whether Christian, atheist, agnostic, Jewish or Muslim. It was equally offensive to any such person irrespective of their views on same sex relationships or same sex marriages or indeed their views on any other matter.

The Tribunal stated that is seemed odd that the Claimant had chosen to elevate this unpleasant practice of toilet graffiti to a practice uniquely and particularly directed at his Christian beliefs. He had not been named in any of the graffiti. None of it had been directed at his political belief or his political opinion and in contrast the Second Named Respondent had actually been named in the graffiti. The First Named Respondent did not own or did not operate and had not been responsible for the toilets.

A further allegation in relation to the fact that his signing in sheet had a number of crosses on it, however there was no evidence to substantiate this allegation and the Tribunal was unable to state that the photographs showed three crosses on it whatsoever as the photograph was badly smudged and unclear.

A further incident allegedly occurred on 20 August 2016 at which he stated there was a bumper sticker on his car. There was no evidence the Tribunal could properly infer that a bumper sticker had been placed on the Claimant's car at Aldergrove or that it had been placed on his car by an employee of the First Named Respondent.

On 15 September 2016, a Team Leader, Mr Lynn, who was openly gay told the Second Named Respondent that the Claimant had told him that there was "*a cure for gayness*" and the Tribunal concluded on the evidence that this event took place.

On 23 September 2016, the Claimant was notified that his contract of employment was not being extended. On or about the same date another employee was summarily notified.

The Second Named Respondent stated that he had taken into account the conduct of the Claimant in relation to the incidents set out above where his conduct had been queried. The contract of the other employee had not been renewed because of concerns about attendance.

On 26 September 2016, the Claimant raised a complaint alleging unlawful discrimination. He was invited to a meeting but did not attend as he stated "*it would be inappropriate for me to meet with you at this time because it is in the hands of the Equality Commission*". He was again invited but there was no response.

It was the Tribunal's finding that if the Claimant had not been dismissed he would not have raised a grievance. The Tribunal had no hesitation in stating:

"*There is insufficient credible evidence before the Tribunal in relation to the alleged acts of harassment or discrimination which, whether viewed singly or cumulatively, could provide a basis for a reasonable inference to be drawn. The claimant's allegations of harassment fail at the first step*".

The Tribunal went on to state:

"*The respondents can be criticised, in that the claimant was not given a full opportunity to respond to complaints which had been made against him, eg the complaints by Mr McKee and Mr Lynn. In any of these incidents, particularly the complaint of Mr Lynn, concerns by the complainants about pursuing the matter formally or pursuing the matter further, should have been disregarded by the respondents and a formal disciplinary investigation should have been put in place. The matters raised were that serious, particularly in relation to the complaint of Mr Lynn.*

The respondents can also be criticised for failing to make it plain in its termination letter that the real reason for the non-renewal of his contract had been his conduct. The first-named respondent had clearly been hoping to avoid unpleasantness and simply to rely on a standard non-renewal of a contract. They took the easy way out.

That said, none of these criticisms can amount to a prima facie case of discrimination. Given the catalogue of complaints against the claimant in a relatively short period of time and, in particular, given the substance of the complaint of Mr Lynn, the temptation to simply not renew the claimant's contract of employment must have been overwhelming.

While it would have been better, and not necessarily for the claimant, to have had a full disciplinary investigation into all the allegations and, in particular, into the complaint by Mr Lynn, the first-named respondent was not obliged to take this course. The claimant had been a temporary fixed term employee whose contract was due to expire shortly by effluxion of time alone. The first-named respondent was not obliged to renew that contract of employment or to extend it for a further period. The claimant had less than 52 weeks' continuous service and the first-named respondent was not obliged to use the statutory three-step dismissal procedure. The claimant did not have any right to claim unfair dismissal simpliciter.

The Tribunal unanimously concludes that there is no prima facie case that the claimant had been dismissed for a discriminatory reason. The decision not to extend or renew the claimant's contract of employment was a decision that any reasonable employer would have taken in these circumstances. The complaint of Mr Lynn in particular and indeed the

complaints of several other employees raised a serious risk for the first-named respondent should the claimant's employment had continued. If the claimant had made another remark similar to that which Mr Lynn had alleged had been made to him, the first-named respondent would have been in significant difficulty. The fact that Mr Lynn had not wished the matter to go any further would not have assisted the employer much in such circumstances. The reality is that in such circumstances an employer had two choices. Firstly, he could have overridden Mr Lynn's wishes and gone straight to a full disciplinary investigation. Secondly, he could have taken the easy way out and simply not have renewed the claimant's contract of employment. He took the second option for obvious reasons. That much is clear from the minute of 16 September 2016 from the second-named respondent to HR:

> *"Please see attached minutes of meeting with Kurtis Lynn. Colin Huston has made comments about Kurtis's sexuality. He does not want to go official but is uneasy in his presence. Can you please enter this in his file and I think looking through his records, it would be best if we ended Mr Huston's contract of employment at the next opportunity."*

That is the reality of life for short-term employees. Until you have established 52 weeks' continuous service, your service can be terminated with little ceremony, particularly if your conduct has caused difficulty or if it has the potential to cause difficulty. That is the way the law is designed and that is the way it which it operates in practice.

Furthermore, there is no evidence that the claimant's complaints of harassment had been regarded by the first or second-named respondents as anything other than closed, and satisfactorily closed, once the memorandum had been issued and once it had been signed by the claimant without dispute. The claimant was not pursuing the matter any further. He had raised nothing else for a full month. There is no reason whatsoever why the first or second-named respondents would have seen any advantage or benefit in terminating the claimant's employment at that point, other than as a reaction to the claimant's conduct and, in particular, a reaction to his conduct in relation to Mr Lynn.

Even if the claimant had established a prima facie case of unlawful harassment in relation to the alleged incidents before his dismissal, the Tribunal would have determined that the first-named respondent had established the statutory employer's defence.

That test requires that the employer should have taken all reasonably practicable steps to avoid the harassment occurring the first place.

It does not require an unreasonable or artificial standard from employers. It does not require employers to provide courses in employment law to a university standard to its staff. A short video which makes it plain to employers that harassment is unacceptable will often be sufficient if coupled with a clear practice of dealing with harassment.

It is not a legal requirement that copies of a detailed policy should be distributed in written form and that they should be signed for by employees. Online training is now the norm. It is routine in the private and public sector. The possibility that someone else may complete an online course is real; so is the possibility that an attendee at an old-fashioned or traditional course might "zone out"; so is the possibility that an employee may not read a written document".

Costs

Andrew Bell v Primark Stores Ltd
Case Ref: 76/15FET & 2517/15
Hearing: 17-19 October 2016
Decision Issued: 7 April 2017
Judge: Judge Drennan

The Claimant in this case brought a number of claims on the grounds of unfair dismissal, sex discrimination, religious discrimination, disability discrimination and failure to make reasonable adjustments against the employer.

The Claimant had been absent from work for a period in excess of three years. He had stated that his mental health condition had been triggered by an assault at work.

The assault allegedly took place on 5 September 2011. Medical reports stated that the Claimant would not return to work if he was in the same building as the alleged aggressor. The Occupational Health stated:

- "*Mr Bell has been absent from work in excess of three years, as he is suffering from an adjustment disorder that has arisen following an allegation that he made against a colleague who he claims physically assaulted him.*

- *Mr Bell's mental health will not improve until he feels vindicated.*

- *My understanding from the GP is that Mr Bell will not return to work in the same building as his alleged aggressor.*

- *If a reasonable and mutually agreeable solution cannot be reached regarding this point, you may need to make a definitive decision*".

There was a County Court Judgment were a County Court Judge made an award of £2,512 in relation to the incident on 5 September 2011 and made up of an award of £1,000 for general damages (i.e. pain and suffering) and £1,512 special damages (i.e. loss of earnings). The Judge was satisfied that "*… there was an incident on 5 September 2011 and that you had suffered a prolonged adjustment disorder as a result. She found the adjustment disorder was caused both by the incident and by the way in which the employer dealt with it. The Judge found that you were not entitled to any damages for loss beyond the initial adjustments to the incident*".

The Tribunal found "*Having observed the claimant closely throughout his evidence, the Tribunal had little doubt that the claimant, for the purposes of these proceedings, was prepared to exaggerate his symptoms and the extent of same. It noted, in particular, the claimant accepted, in evidence, if JS had been removed from working at the Belfast premises of the respondents, Bank Buildings, that he could have returned to work, <u>without</u> any other adjustment or change and indeed would have been immediately fit to do so*".

The Claimant had raised a grievance about the incident in the workplace however had been absent from work and therefore had not attended grievance meetings despite the employer writing a number of letters to him setting out the options available to him, namely if he wished to "*continue with these formal proceedings, I would ask you to contract me directly on … to arrange a grievance hearing … at a mutually agreeable venue … if I do not hear from you by 7 March 2014 then I shall assume that you do not wish to continue with the grievance*

process until such time that you return to work. I can confirm that until such time that you contact me I shall not make any further contact with you in regard to your grievance". He was given the option of arranging the grievance whilst he was off sick, conducting the grievance by postal correspondence or alternative methods and delaying the grievance until his return to the workplace. The Claimant failed to engage in any of this correspondence with the employer.

On 8 September 2014 the Store Manager wrote to the Claimant having been asked to carry out a capability meeting under the Respondents' Sickness and Absence Policy:

"*Capability Meeting*

At our meeting we discussed the background of your case, our current circumstances and your wishes for the future. I have summarised the points we discussed and your responses to me below:

- *at present you continue to suffer from stress, depression and diabetes;*
- *you find it difficult to leave home unless it is for an event that has been pre-planned;*
- *you are currently on medication to relieve the symptoms of your illness and have been so for the last 3 years;*
- *you have been attending weekly support sessions with an organisation called 'Aware Mental Health' which you have found to be beneficial;*
- *you are now willing to consent to a MOHS customised medical;*
- *you are keen to return to work in Primark Bank Buildings;*
- *you wish to return under your existing contract of 37.5 hours per week;*
- *you would like to be allocated the first lunch break daily and work on the Menswear Department;*
- *I asked you to advise me of any adjustments that we could make to support you in a successful return to work programme;*
- *you declined any adjustments and you stated you wished to return to Primark, Bank Buildings under your existing terms and conditions;*
- *your only request for a successful return to work was the reassurance of a 'safe environment';*
- *part of your requirement for a 'safe environment' will consist of no verbal or non-verbal communication between yourself and JS (Stockroom Supervisor);*
- *you confirmed that there are no other adjustments or support mechanisms required to assist you at work.*
- *you discuss your intention to return to work with your GP;*

- *if your GP agrees that you are ready to return to work, it would be helpful for them to provide us with their recommendations on any adjustments that they believe may support your return;*

- *you would return to your role as Retail Assistant at Primark Bank Buildings on your existing contract (37.5 hours per week);*

- *if you do find an immediate return to working full hours too much ... happy to discuss a phased return or a temporary amendment to working hours with you;*

- *you would attend an induction to help to welcome you back to the store ...*

- *you will be allocated the first lunch break each day;*

- *GH (Assistant Manager) and BMcM (Senior Department Manager) will be a point of daily contact if you feel the need to talk to someone about issues in the store;*

- *you will have weekly reviews with RA to discuss how your return to work is going and review any additional requirements or adjustments that may be necessary;*

- *we agree a 'buddy' who you feel comfortable to accompany you on required visits to the stockroom;*

- *you can use the 5th floor men's toilets rather then the 4th floor toilets, if preferred;*

- *EMcC will meet with JS and advise him not to have any contact with you;*

- *If there are concerns regarding your health in future, you will agree to a referral to Primark's Occupational Health provider for assessment*".

The Claimant failed to return to work despite reminder letters and phone calls. Therefore in April 2015 a further capability review was undertaken and the Claimant was invited to a further meeting he did not attend. This was rescheduled a number of times. By letter dated 23 July 2015 the Claimant was written to stating at the outset of his letter that he had been continuously absent from work since 17 October 2011 and the decision was taken to terminate his employment due to lack of capability to fulfil his job as a result of continuing ill health. The Claimant appealed this decision by letter dated 3 August. However, his appeal was unsuccessful and he issued Tribunal proceedings for unfair dismissal, sex discrimination, religious discrimination, disability discrimination and failure to make reasonable adjustments. None of this complaints were upheld by the Tribunal.

The Tribunal decided that the Claimant was not disabled as per the Disability Discrimination Act. The Tribunal stated the following:

"*Taking into account the Tribunal's conclusions that there was exaggeration of his day-to-day symptoms but also that, if the issue of JS was resolved on his terms to his satisfaction, he could return to work without any adjustment or change, the Tribunal, not without some hesitation, came to the conclusion that, although he had mental impairment, there was little or no evidence of adverse effect over and above his unwillingness to return to work unless and until JS was removed from the Belfast store. Therefore … the Tribunal came to the conclusion that he did not satisfy the definition of disabled person in relation to the necessary effect on his normal day-to-day activities*".

Accordingly all claims under disability discrimination were not upheld however the Tribunal stated that it:

"*has no doubt that, at all times, the respondents sought to make reasonable adjustments to the claimant; but, no matter what was suggested, the claimant was not prepared to agree to or properly consider and/or engage with anything suggested by the respondents*".

The suggested adjustment of the transfer of JS was not, in the judgment of the Tribunal, a relevant provision, criterion or practice under the 1995 Act, even taking into account the liberal interpretation to be given to the term (see Carreras v United First Partners Research [2016] UKEAT/0266/15/RN). Further, even if it was a PCP, the Tribunal was not satisfied it gave rise to the necessary substantial disadvantage, when the relevant comparative exercise was carried out in relation to any non-disabled comparator, for which there was no evidence. Even if the Tribunal is wrong, as seen in Project Management Institute v Latif [2007] IRLR 579, even if a PCP was established together with the necessary substantial disadvantage, this does not cause the burden of proof to change to the Respondents. A breach of the duty still requires to be established. The Tribunal is not satisfied this has been established and, again, subject to the foregoing, this claim must fail. Even if, as stated previously, the decision by the first Respondent, arising out of the incident in 2011 to give JS a final warning and to keep him in work at the Belfast store was a relevant PCP, this was not a matter to be re-opened by this Tribunal in these proceedings. In any event, it was, by the time of the dismissal in July 2015, some four years later and the Tribunal accepts that to require JS to move so many years later, during a period when the Claimant had remained off sick, would not have been a reasonable adjustment in the circumstances. Significantly and crucially, in the view of the Tribunal, the Claimant, after initially showing interest to return to work in his meeting in October 2014 with Ms Byers, subsequently refused to respond and/or engage with, the 12 options suggested by Ms Byers following her meeting in October 2014. In the Tribunal's view, a more reasonable and comprehensive set of proposals could not have been made by the Respondents. It also is not without significance the Claimant refused, unreasonably in the circumstances, to even consider transfer to another store, a further option suggested, such as Lisburn, which was in fact closer to his home and had good transport links from his home. Indeed, it must also be noted that at no time did the Claimant, in his evidence, address the comparator issue, relevant to his claim under the 1995 Act.

Given the Claimant's absolute refusal to compromise in any way in the face of these suggested measures, or even to try them out for a trial period, the Tribunal was not satisfied it could conclude, on the evidence, there was any such failure of the first Respondent to comply with its duty to make reasonable adjustments under the 1995 Act.

Similarly, in relation to his claim for direct disability discrimination, again the Tribunal did not, on the facts as found by the Tribunal, come to the conclusion, that on the grounds of his disability the Claimant had shown that he had been treated less favourably than the first Respondent would treat a person, not having the particular disability, whose circumstances, including his abilities were the same or not materially different from those of the disabled person. In the judgment of the Tribunal, the Claimant's dismissal, in the circumstances, was not on the grounds of the Claimant's disability. Having refused to accept the previous managerial decision of the Respondents in relation to the said penalty imposed on JS and the continued employment of JS at the Belfast store, he had remained off work ever since, despite detailed and reasonable adjustments and measures to resolve this impasse, which the Claimant refused to engage with or even try. As a consequence, the first Respondent had no alternative but to consider dismissal on the grounds of the Claimant's incapacity to do the work he was employed to do. The Tribunal has no doubt that the first Respondent would

have taken the same decision with either an actual comparator or indeed a hypothetical comparator, neither of which issue the Claimant addressed. No employer could continue to employ an employee, in the Tribunal's judgment, in such circumstances. Again, the Tribunal could not conclude the Claimant had been directly discriminated against, pursuant to the 1995 Act.

Therefore, even if the Claimant was a disabled person, the Claimant's claims of direct disability discrimination and/or failure to comply with the duty to make reasonable adjustments, would have had to be dismissed.

There was no doubt, in the Tribunal's judgment, that the reason for the Claimant's dismissal by the first Respondent related to the Claimant's capability to perform his work, which he had been employed to do; and which he had ceased to do for almost four years. This is a potentially fair reason for dismissing the Claimant, pursuant to Article 130(2) of the 1996 Order. In considering whether the decision was fair, the Tribunal has carefully considered, in some detail, the steps taken by the Respondents, as set out in the said correspondence, before the first Respondent concluded the Claimant's employment required to be terminated. Indeed, the Tribunal, as seen in the correspondence which it has set out in extenso, for the reasons set out above, in previous paragraphs of this decision, noted the extreme patience of the respondents throughout the process; even though it is clear the Claimant, at all times, was playing for time and had no real intention, whatever the Respondents did, to seriously engage with the process itself or indeed the detailed measures which had been proposed by Ms Byers to allow him to return to work. He put up obstacles as to dates of discussion/meeting, methods of communication, none of which the Tribunal considers were genuine; but yet, to its credit, the respondents, in particular, Mr McCloskey and Mr Wallace, gave the Claimant every opportunity to respond in a meaningful way. The Respondents obtained all relevant medical evidence, before taking its decision both from Dr McCallan but also from Dr Rehman. As Dr McCallan accepted in evidence, and had been confirmed by Dr Rehman, the only solution, as far as the Claimant was concerned, was the removal of JS from the Belfast store; and, if that was not to be given as an option, he was not prepared to return to work. The Tribunal is satisfied Mr Wallace, as part of the process for termination, took every issue into account before deciding the Claimant's employment had to be terminated, as set out in his detailed letter to the Claimant. The Tribunal has no doubt that the Claimant's late e-mail to Mr Campbell was deliberate and a further stalling exercise on his part, given the history of such similar steps with Mr Wallace. His failure to engage on the phone with Mr Campbell was typical of his continuing desire not to co-operate with the process. Given his written submission to Mr Wallace, his grounds for appeal, the Tribunal was not satisfied, a face-to-face meeting between Mr Campbell and the Claimant would have added to Mr Campbell's knowledge of the Claimant's position and, in particular, would have changed the decision he ultimately took. Mr Campbell, like Mr Wallace before, was not altering the previous managerial decisions in relation to JS and given that this was the only solution acceptable to the Claimant, nothing further, in the Tribunal's view, would have been gained by such a face-to-face meeting between the Claimant and Mr Campbell. Further, it is clear from his decision, on appeal, in his detailed letter to the Claimant, that Mr Campbell considered all relevant issues. Indeed, the Claimant did not suggest in evidence, some new matter, which had not been raised previously by him and which he would have wished to raise with Mr Campbell at the appeal. Even if the Tribunal had considered it was necessary for Mr Campbell to have had a meeting with the claimant, taking into account the matters referred to above, and, in particular, the whole process, which resulted in the dismissal, the Tribunal is satisfied the overall process was fair, despite the absence of a meeting with Mr Campbell (see Taylor v OCS Group Ltd [2006] EWCA Civ 702).

However much care Mr Wallace and/or Mr Campbell took, in determining the issues in this matter, it was not of any use since the Claimant would not return to work, unless his conditions in relation to JS were met by the first Respondent. JS had been the subject of a managerial decision some four years previously, which was within the remit of management but which the Claimant objected to and continued to object to and would not accept. It was his decision not to do so, despite the many, varied and reasonable measures suggested by the Respondents to overcome any obstacle put forward by the Claimant. As seen in Spencer v Paragon Wallpapers Ltd [1976] IRLR 373 and East Lindsey District Council v Daubney [1977] IRLR 181, after all relevant consultation has taken place, there has to be a limit to how long an employer is required to continue to employ an employee when, in this case some nearly four years, he is unable and unwilling to return to work. In the circumstances, the Tribunal is satisfied the first Respondent done everything possible to avoid termination of the Claimant's employment; but with the Claimant's refusal to engage in any meaningful and proper way, the Tribunal is satisfied the decision to dismiss the Claimant at the end of this nearly four year period of absence on sick leave, came within the bounds of reasonable responses. The Claimant, in the circumstances, could not expect the first Respondent to wait any longer for the Claimant to return to work. The Claimant was therefore not unfairly dismissed by the first Respondent.

Decision on Costs
Hearing: 28 July 2017
Decision Issued: 29 August 2017
Judge: Judge Drennan

An application for costs was made by the Respondent in this case. By letter dated 27 April 2017 the representatives for the Respondents made an application for costs. The application was on the grounds that the Claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably or the bringing or conducting of the proceedings by the Claimant has been misconceived as evidenced in the decision.

The basis of the decision was that the Respondent had sent a costs warning letter dated 26 April 2016. The costs warning letter was headed "*without prejudice save as to costs*" and stated:

"*… the purpose of this letter is to:*

(1) invite you to withdraw your claims before the Industrial Tribunal and Fair Employment Tribunal within seven days of the date of this letter and before any further legal fees are incurred in this matter by either party; and

(2) to put you on notice that should you not do so, and your claim is subsequently unsuccessful at the Industrial Tribunals and Fair Employment Tribunal, we will be advising our client to make an application for an Order that you pay the legal fees our client incurs in defending this claim.

At the Case Management Discussion on 24 March 2015, you confirmed that you were only seeking remedies in respect of your dismissal on 23 July 2015. The subject-matter of these claims was set out in a previous Case Management Discussion on 20 January 2015. For clarification the causes of action you have confirmed you are continuing with in respect of your dismissal on 23 July 2015 are; unfair dismissal, direct sex discrimination, direct religious belief discrimination, direct disability/disability-related discrimination and failure to make reasonable adjustments under the Disability Discrimination Act 1995. Upon consideration of the claims and the basis provided by you for bringing these claims, we are writing to you

because we consider they do not have any reasonable prospect of success. Our reasons for so finding are:

- *the first-named respondent (Primark) is confident that it will be able to establish that your dismissal was fair. You were dismissed on grounds of capability, a potentially fair reason for dismissal, following an absence for some 45 months. The respondent took the decision to dismiss you following a thorough process under its Capability Procedures, including analysis of Occupational Health recommendations. We suggest that a reasonable employer faced with a long-term employee absence such as yours, and having exhausted all reasonable means of facilitating a return to work, would have dismissed you in the circumstances.*

- *You have offered no evidence in support of your claim that your dismissal on 23 July 2015 amounted to direct sex discrimination. In order to successfully establish such a claim, you will be required to demonstrate by way of a comparator that an employee of a different gender whose circumstances are materially the same as yours, would not have been dismissed. In other words, that Primark would not have dismissed a female employee who was on long-term sick leave, having considered the same means of facilitating a return to work and relying on the same Occupational Health recommendations. We suggest that this claim is completely unfounded and without merit.*

- *You have offered no evidence in support of your claim that your dismissal on 23 July 2015 amounted to direct religious belief discrimination. In order to successfully establish a claim of direct religious belief discrimination, you will be required to demonstrate by way of a comparator that an employee of a different religious background whose circumstances were materially the same as yours, would not have been dismissed. In other words, that Primark would not have dismissed an employee of a different religious belief who was on long-term sick leave, having considered the same means of facilitating a return to work and relying on the same Occupational Health recommendations. We suggest that this claim is completely unfounded and without merit.*

- *You have offered no evidence in support of your claim that your dismissal on 23 July 2015 amounted to disability discrimination. In order to successfully establish a claim of disability discrimination, you will be required to demonstrate by way of a comparator, that a non-disabled employee, or an employee with a different disability, whose circumstances are materially the same as yours, would not have been dismissed. In other words, that Primark would not have dismissed a non-disabled employee, or an employee with a different disability, who was on long-term sick leave, having considered the same means of facilitating a return to work and relying on the same Occupational Health recommendations. We suggest that this claim is completely unfounded and without merit.*

- *You also allege that your dismissal amounted to disability discrimination in that Primark failed to make the relevant reasonable adjustment in order to facilitate your return to work. You confirmed at the Case Management Discussion on 20 January 2016, as recorded in Paragraph 12 of the Record of Proceedings, that the reasonable adjustment would have consisted of transferring another employee, JS, to a location other than the Bank Building store. We suggest that, on objective assessment, such an adjustment was neither reasonable nor practicable. Furthermore, and perhaps more importantly, we do not believe that the duty to make reasonable adjustments arose in these circumstances insofar as the central issue in respect of your absence*

was that you did not wish to work with another employee (JS) again. We suggest that the duty to make reasonable adjustments under the Disability Discrimination Act 1995 cannot arise where the subject-matter that is alleging causing an employee to suffer a substantial disadvantage is the continued employment or present of another employee in the same store.

We therefore consider that your claim does not have a reasonable prospect of success.

An industrial tribunal has the power to make an award of costs against the party who has acted vexatiously, abusively, disruptively or otherwise unreasonably in breaking or conducting proceedings, or where the bringing or conducting of proceedings has been misconceived. Bringing or pursuing a claim which does not have reasonable prospect of success can be misconceived and result in an award of costs against the unsuccessful party.

We therefore invite you to withdraw your claim forthwith before any further legal fees are incurred. Should you not do so and the claim is unsuccessful at the Industrial Tribunal and Fair Employment Tribunal will be advising our client to make an application for costs.

You will note that this letter is marked "without prejudice save as to costs". In sending this letter we reserve our clients' position to draw this correspondence to the attention of the Industrial Tribunals and Fair Employment Tribunal in the event that this case proceed to the hearing.

We anticipate that this case will be listed for a three day hearing. Please accept this letter a formal notification that in the above circumstances, we have instructions to produce this letter in support of an application for a Costs Order against your client in respect of legal fees incurred by our client in preparation of this case. We anticipate that our client's legal costs will be in the region of £15,000 plus VAT.

We strongly advise that you take legal advice in relation to the contents of this letter and its possible implications for you. If you cannot afford to pay for legal advice, we suggest that you contact your trade union, a local Citizens Advice Bureau or Law Centre who may be able to provide you with legal advice without making any charge. The Labour Relations Agency will also be able to assist you with any queries you may have regarding the contents of this letter …".

At a Case Management Discussion on 25 May 2016, the Respondents' representative made an application for a Pre-Hearing Review pursuant to the Rules of Procedure, to determine whether the Claimant should be ordered to pay a deposit in relation to the Claimant's claims or any of them. This application was refused by the Employment Judge. The Judge refused the application but stated that although it was refused gave leave for the Respondents' representative to renew the application following any additional witness statements provided by the Claimant. By further letter dated 2 September 2016, the Respondents' representatives wrote to the Tribunal, which was copied to the Claimant, renewing the application of the Respondents for a Deposit Order.

The terms of this letter were also strongly relied on by the Respondents' representative in his submissions to the Tribunal. This request was again refused on the basis that the said substantive hearing was listed to commence on 17 October 2016 and the Case Management Discussion was heard on 4 October 2016. The Tribunal was satisfied that the Claimant, despite the refusal to grant the application, was fully aware of the evidential difficulties facing him as they had been raised at the previous Case Management Discussion.

The Claimant did not attend the costs hearing.

The application for costs was done pursuant to Rule 36(1)(a) of the Rules of Procedure with a said cap of £10,000. The Tribunal noted that the party seeking assessment of costs by way of detailed assessment in the County Court, in accordance with such scales prescribed by the County Court Rules in the proceedings is of limited assistance, if any, to many parties despite the provision of Rule 36(3), that such an order following assessment may exceed £10,000. This is because none of the relevant County Court scales will allow for an order of costs in excess of the cap of £10,000 provided for in Rule 36 of the Rules of Procedure. In these proceedings the amount of costs claimed by the Respondent in the schedule of costs was £18,584 (excluding VAT) together with a note of Counsel's fees in the sum of £3,800 (exclusive of VAT). The Tribunal was satisfied that the costs in the schedule amounting to a total of £22,384, were reasonable and appropriate in the circumstances and properly reflected the work carried out by the Respondents' representative and Counsel in connection with these proceedings.

It was accepted by the employer, that if the Tribunal makes any order for costs against the Claimant the amount of any such order in the circumstances cannot exceed £10,000. The Tribunal stated that

"*… it is necessary to note that, increasingly, Tribunals are faced with application for Orders for Costs in excess of £10,000; but parties are unable to recover same because of the said cap and the absence of any relevant scale in the County Court which would allow for a detailed assessment of costs in excess of £10,000. In the Tribunal's judgement, this is an issue which should be urgently addressed by the relevant rule-making authorities, so that, in an appropriate case, a party can make an application for costs in excess of £10,000 and the Tribunal can, in such circumstances, make such an order for assessment if it is appropriate to do so. In previous decisions of this Tribunal, this lacuna in the Rules of Procedure has been referred to; but unfortunately, no further action has been taken by the relevant legislative authorities. Given the size of applications for costs, in this Tribunal, frequently exceeds £10,000, this is a matter which requires to be considered to by the said legislative authorities and, if appropriate, by an amendment to the Rules of Procedure*".

The Tribunal went on to consider the two stage test that must be established when making an application for costs:

1. That the relevant part has satisfied the costs, for example otherwise unreasonable conduct or bringing or conducting the proceedings has been misconceived.

2. To exercise its discretion to make an Order for Costs.

The Tribunal proceeded to provide a comprehensive synopsis of the law on costs both in employment law and in Northern Ireland as in the situation of personal litigants.

The Tribunal stated that:

"*In view of the Tribunal's findings, in particular, that the Claimant produced no evidence to support a claim of sex discrimination on the grounds of sex and/or religious belief, the Tribunal had no doubt that such claims were misconceived (i.e. had no reasonable prospect of success) and that at all material times the claimant was aware of this. In relation to his claim of disability discrimination and unfair dismissal, the Tribunal was satisfied the claimant acted unreasonably in pursuing the said claims where he exaggerated his medical symptoms and the extent of same and accepted, in evidence, he could have returned to work, without*

any other adjustment or change and would be immediately fit to do so if JS was removed from working at Bank Buildings, which he knew was not relevant to the subject-matter of these proceedings; and at no time was he prepared to return to work, which he was fit to do, regardless of what was suggested by the respondents unless his conditions about JS were met.

Indeed, given the Tribunal's said conclusions, and, in particular, the claimant's repeated attempts to link these proceedings with what had taken place some years before in relation to JS, which was not the subject-matter of these proceedings, the Tribunal concluded, in the circumstances, the claimant's pursuit of these claims was vexatious. His previous proceedings, which were related to the JS issue, had been dismissed; which clearly the claimant found difficult, if not impossible, to accept.

Although the Tribunal was satisfied that the circumstances set out in Rule 35 of the Rules of Procedure had been established, the Tribunal had then to consider, in the exercise of its discretion, whether an Order for Costs should be made. The Tribunal had no hesitation in concluding that such an Order should be made, given the costs warning letter and the applications for a Deposit Order, which although unsuccessful, clearly constituted in themselves a warning of the weakness of the claimant's claims. Despite the warnings he proceeded to pursue all his claims at the Tribunal. The Tribunal found of some significance and relevance in determining the application for an Order for Costs that much of what was set out in the said warning letter and application was reflected in the Tribunal's decision.

The Tribunal decided that, before making any Order for Costs, it should consider the claimant's ability to pay any such Order. This was made more difficult for the Tribunal due to his non-attendance at the costs hearing. In this context, it also noted that, although the total figure claimed by the respondents for costs, namely £22,384 was reasonable and appropriate in the circumstances; but, for the reasons set out previously, the maximum amount for any Order for Costs was limited to £10,000.

The claimant, on the basis of the evidence before it, is the owner of a house, albeit with a mortgage, which has some arrears. However, this property has a value, in which the claimant has an equity, which may be realisable in the future. On his evidence, the claimant accepted, but for the JS issue, he could return to work. It is not known if he has done so; but clearly, in light of the foregoing, future employment for the claimant remains a realistic possibility. Taking all these matters into account, the Tribunal concluded an Order for Costs should be made against the claimant but limited, in the circumstances, to £7,500 as a contribution towards the respondents' costs in these proceedings".

<u>Disability Discrimination/Victimisation /Damages</u>

Marie-Claire McLaughlin v Charles Hurst Ltd – Decision on Remedy
Case Ref: 83/15
Hearing: 13 March 2017
Decision Issued: 10 July 2017
Judge: Judge D Buchanan

The Claimant in this case was employed as a Customer Service Adviser. The Claimant worked at the Respondent's premises since July 2012 at Boucher Road. She had previously worked in Portadown and Lisburn.

The Claimant unfortunately suffered with a history of depression and was disabled under the Disability Discrimination Act.

The early part of her move to Belfast was characterised by absences and lateness. In the period 29 November 2013 to 24 February 2014 she had been absent on 45% of working days and had been late on 25% of the days in which she had worked.

On 9 January 2014 she was invited to a performance review meeting with Andrew Gilmore which took place on 10 January 2014 and the matters discussed included her timekeeping and absences, along with areas in which Andrew Gilmore said he wanted to see a sustained and immediate improvement, such as the quality of customer data and meeting targets.

The Tribunal stated that there was no doubt as her Manager, Andrew Gilmore was frustrated with the Claimant's frequent absences from work and the consequent pressure that those absences were having on the business and other members of staff.

The Claimant felt she was being pressurised to come to work and that the Respondent was looking for ways to end her employment or as she put it was "*trying to performance manager her out of the job*".

On 13 January 2014 a letter was sent from the Claimant's GP practice to the Respondent. It stated that the Claimant had been attending regularly with anxiety and depression from September 2013. It described her condition as moderate to severe. It stated that her treatment had involved several different antidepressants, but that it was proving hard to find one that worked well for her without side effects.

In February 2014 she was referred to Occupation Health Consultants and a report was received on 14 March 2014; at that date the Claimant had been off work on sick leave for three weeks. This report confirmed her clinical depression diagnosed in 2011 and her condition had worsened in 2013 and treatment with antidepressants had been difficult. It stated she was not fit for work and referred to the onus on an employer to ensure that stresses in the workplace did not affect an employee's health. He expressed the opinion that she would not be fit to go back to work for one or two months.

In March 2014 the Claimant asked the employer how she could apply for reduced hours in light of Dr Morrin's Occupational Health report which although had not stated that reduced hours would assist the Claimant claimed that this had been said to her at the Occupational Health appointment. On 20 March 2014 she sent a flexible working application form to the employer which was requesting three or four days a week, no loss of pay and continued benefit of a company car. In her flexible working application the Claimant made specific reference to her disability and the severe impact it was having on her and her colleagues. She tailored the form as best she could to disability. Prior to submitting the application she met with Rosemary Chapman and Andrew Gilmore to review the Occupational Health report on 24 March 2014 and it was confirmed the Claimant's conditions was characterised by mood swings, panic attacks and that her medication was not helping.

In May 2014 the Claimant was on sick leave and she met with Andrew Gilmore and Rosemary Chapman to discuss her application for flexible working. In the course of that meeting she reiterated that Occupational Health had recommended a reduction in her hours and that her GP had also advised that this would help. The Tribunal stated that "*the whole focus of the discussion, from its outset, was what the impact of her request for reduced hours would be on the business. Indeed, this was one of the very first questions Mr Gilmore asked her at the meeting. There was no focus on her disability or the concept of reasonable*

adjustments, which is hardly surprising when Mr Gilmore accepted that he had received no training on the Disability Discrimination Act and that he was not aware of the concept of reasonable adjustments".

The Claimant agreed at this meeting that the company should have more time to consider her proposals which was a reduction in her current weekly working hours of 47.8 hours with some emphasis on her part on having Fridays off. They met on 4 June 2014 and the company offered her a job-share with another Service Adviser at Boucher Road working 25.5 hours per week on average. It wanted her to trial this arrangement before it would agree to a permanent alteration to her working pattern. She was given time to consider this and in the interim she was offered a Receptionist post at the Kia Garage, working 16 hours per week. Both these options involved working less hours than the Claimant wished and in neither would she have access to a company car, although in relation to the job-share at Boucher Road she would have the use of a company car for a three month period until she could make alternative arrangements for transport and she rejected the offers.

On 12 June 2014 a letter was received by the employer from the Claimant's GP which referred to the Disability Discrimination Act and the duty of an employer to make reasonable adjustments and suggested that the Claimant be offered a long phased return to work as part of her rehabilitation process and the hours suggested by the doctor for a phased return were accepted.

On 14 August 2014 Mr Gilmore wrote to the Claimant. In that letter he again made no reference to her condition, the Disability Discrimination Act or the concept of reasonable adjustments. He stated:

"*Having therefore considered your original request [for reduced hours], we are unable to accommodate your request to work three days a week on a permanent basis due to our inability to organise your work among existing staff and our concerns about the detrimental effect on quality and performance. As you know these concerns have been apparent during your current phased return to work after a period of sickness absence, with customers complaining about the standard of service we as a team are providing. While the company is able to accommodate your reduced hours on a short-term basis during your phased return, we do not consider that this is sustainable on a long term basis for the reasons given above*".

The whole tenor of this letter emphasises the company's business needs (which is of course a highly relevant consideration for it), but it does this to the exclusion of the Claimant's health and wellbeing.

More generally, it is clear from the Respondent company's internal e-mails that the Claimant's ongoing and frequent absences were a matter of concern and frustration. Mr Gilmore had certainly become frustrated with her - perhaps understandably - because he felt that he had devoted a lot of time and effort to trying to accommodate her, and to no avail. This feeling was not confined to him. This lack of sympathy led the Claimant to believe that the Respondent company's managers, in particular Mr Gilmore, wanted rid of her. The Tribunal had no doubt the Manager would not have been unhappy to see her go, but against that the long running nature of this saga belies any claim that there was an attempt to force her out.

In September 2014 the Claimant was off again for another two weeks and the Claimant was sent to Occupational Health on 24 October 2014. In the period from October to November 2014 there was no progress in relation to the Claimant's application for reduced hours.

Things took a turn for the worse as far as the Claimant was concerned. On 5 November 2014 she went home early, with her Manager's consent. She had had a bad day at work, characterised by tearfulness, low mood and anxiety.

On the same day it came to Andrew Gilmore's notice that another member of staff wanted to apply for a job in another business. Her stated reason for this was that she could no longer work with the Claimant. Ryan Andrews told him he found the Claimant difficult to manage, and that managing her was taking up a lot of his time, to the exclusion of other work. He, and other members of staff, found her unapproachable and confrontational, and there were concerns about her behaviour towards customers. At a so-called "wrap-up" meeting on that day (these meetings appear to have been held on a frequent, if not daily basis) at which Andrew Gilmore was present, her colleagues in the team opened up about the pressure the Claimant's absences put them under, and complained about her attitude to them and customers.

That evening he also received an e-mail from another Service Sdviser, Sean McCormick, who made similar allegations against the Claimant.

The following day Andrew Gilmore and Ryan Andrews met with the Claimant. As stated above, she had gone home early the previous day and had been told she did not have to come in until 10am. In the meantime, Andrew Gilmore had taken advice and he suspended the Claimant, effective from that date. In a letter handed to her on the same date, she was told that the suspension would be until further notice, "*pending an investigation with a number of issues arising in the workplace*".

It was stressed that the suspension did not constitute a disciplinary sanction, and did not imply that she was guilty of any misconduct.

The suspension came out of the blue as far as the Claimant was concerned. She was not given any substantial reason for her suspension. Although distressed by what had happened, she phoned Rosemary Chapman on the way home, but that conversation did not take the matter any further, as Rosemary Chapman could not, or would not, tell her anything.

On 12 November 2014, the Claimant sent a letter, which a solicitor had drafted for her, asking for the reason for her suspension. She was eventually told - on 14 November 2014 - that there were complaints from colleagues and customers though not who had complained or the nature of the complaints. As far as the Tribunal could see, there were no notes made about complaints from other staff members, and there is no evidence of written complaints by customers. Notwithstanding this, it was clear to the Tribunal that management did have legitimate concerns and that there were matters which needed to be investigated.

A meeting was held on 8 December 2014 at which a Mr McCartney put to the Claimant allegations from her colleagues that she was confrontational and that people did not know how she would react, that she was unapproachable and sharp and snappy with customers. She denied she was confrontational and she said she was clinically depressed and mentally ill and had been referred for psychiatric health.

Prior to the meeting no one had advised those conducting the meeting that the Claimant was disabled nor had the Disability Discrimination Act been mentioned nor had the concept of reasonable adjustments been raised to these individuals namely Mr Jeff McCartney, the company's Dealer Principal.

Subsequent to the meeting on 8 December 2014 the Claimant e-mailed the company alleging that her suspension had been an act of discrimination and pointing out that the company was fully aware that she suffered from clinical depression and of the impact that it had on her health. The company e-mailed her back stating that suspension had not been disciplinary but rather because legitimate concerns had been raised which the company had to look into. It acknowledged that she had raised issues which required investigation. It stated that it was clear there were relationship difficulties between her and her work colleagues and that she had indicated the meeting with Mr McCartney that these might be the result of a medical condition she had.

The Claimant was again referred to Occupational Health in England and they provided a written report dated 29 December 2014 and the Tribunal stated that this report was of some significance as far as the employer was concerned and should have been acted upon.

On 19 January 2015 the Claimant was asked to attend a meeting to review the Occupational Health report. This was scheduled for 23 January 2015, however the Claimant submitted a letter from her GP stating that she was suffering from severe anxiety and depression and that she was not fit to attend any work related meetings. When submitting the GP notes she also asked if there was an option of transferring to another department. This was responded to by the employer which informed the Claimant transfer options would be discussed when they had the opportunity of reviewing the Occupational Health reports with and also informed the Claimant that in the interim and in accordance with company practice in relation to employees who were suspended and also ill she would be placed on SSP.

On 11 February 2015 the Claimant lodged a second grievance alleging that being placed on SSP was a further act of discrimination and victimisation. A meeting was eventually held on 19 February 2015 to review the Occupational Health reports. By this stage it was clear the Claimant was looking for a reduction of working hours to 40 hours per week and that she did not wish to return to the Renault garage. She was told that the company would look into these options pending the outcome of the investigation.

On 24 February 2015 the Claimant again met with Jeff McCartney and Rosemary Chapman. She was accompanied by her partner, Ian Redpath. The purpose of the meeting was to go through the outcome of Mr McCartney's investigation following her suspension.

Mr McCartney started by stating the obvious, namely that there had been a breakdown in relations between the Claimant and her colleagues at Boucher Road, to such an extent that they clearly could not work together. He very reasonably did not apportion blame for this unhappy state of affairs. He wanted to resolve the matter to everyone's satisfaction. The Claimant was told that she would return to work at Toyota, Boucher Road, on a phased basis building up to a five day week. She would therefore be going back to full hours, not reduced hours. Mr McCartney told her that she could make a further application for reduced hours to her Manager when she started work. He said the company did not normally allow another application within a twelve month period but would allow her to do so. Clearly Mr McCartney was talking here about a flexible working application (Article 112(F)(4) of the Employment Rights (Northern Ireland) Order 1996 provides that an employee may not make a further application to his employer for flexible working within 12 months of the date on which any previous application was made).

The Claimant, in response, emphasised that she was not looking for flexible working. She wanted reasonable adjustments on the ground of disability and pointed out that Occupational Health reports had advised the company to reduce her hours. However, Mr McCartney told

her that the alternative job was there for her on a "*like for like basis*" and that "*if she wasn't prepared to accept it we couldn't go on like this indefinitely*".

On 27 February 2015 the Claimant was told that her suspension had been lifted. Although told on that date, it appears it had been lifted on 19 February 2015, as her normal salary was to be paid from that latter date. Her period of suspension had been a protracted one, though clearly the fact that the Claimant had been unable to attend meetings because of illness contributed to that situation. There is no evidence that her suspension was kept under review.

On 6 March 2015, Mr McCartney wrote to the Claimant, setting out formally the outcome of his investigation. It did not add anything to what he had told her at the meeting of 24 February 2015. In the meantime, the Claimant had accepted a transfer as a Sales Adviser to Toyota, Boucher Road, which had been offered and she started there on 9 March 2014. Mr McCartney again told the Claimant that any request for reduced hours in her new post would be a matter for consideration by her new Manager, Mr Richard Hillis of Toyota Aftersales.

On 23 April 2015, Disability Awareness training was held at the company's premises on the Boucher Road. It dealt with stress, anxiety and depression and the purpose of the training was to raise the awareness of employees with these issues, and to familiarise them with issues which might arise when working with someone who suffered from these conditions.

The training was conducted by Norma Bolton of Disability Action. The Claimant, who was present, with a selected group of colleagues, explained to them how depression affected her, and what could be done to help.

Over lunchtime Richard Hillis, who was at another meeting in a nearby building was called out of it and told that Norma Bolton wished to speak to him. Ms Bolton told Mr Hillis that in the course of the disability awareness meeting, it emerged that the Claimant had been experiencing severe panic attacks. In the course of these she suffered from numbness in her legs and arms along with hyperventilation. During a more severe attack she could be left in a state of semi-paralysis with no feeling in her arms. The Claimant had not suffered any such attacks at work, but had recently suffered two at home. The Claimant, who was present, told Richard Hillis that these attacks could come on without warning.

Norma Bolton told Richard Hillis that an action plan/risk assessment would be needed in case the Claimant experienced such an attack at work. Specifically, there was a risk of her falling off her current chair (which had no arms, and therefore a suitable replacement would be required) a 'Medevac' chair would be needed should the Claimant become immobile; during any attack the Claimant might be unable to self-medicate, so one of her colleagues should be able to access her medicine and assist her in taking it (as had happened at home with her partner).
Later that afternoon, the Claimant was asked to go to the boardroom to meet Richard Hillis and Rosemary Chapman. The Claimant was told that the company car was being taken off her and that she was being removed from the company's vehicle insurance with immediate effect. The reason advanced for this course of action was the information about the Claimant's panic attacks of which the company had just become aware. They had had no knowledge of these symptoms before the disability awareness meeting conduct by Norma Bolton.

Clearly the removal of her car had a serious impact on the Claimant. It formed part of her work benefits. She used it to travel to work in Belfast from her home near Newcastle, dropping the children off at nursery on the way.

As far as she was concerned, in the light of all that had gone before, she saw this as another act of discrimination and victimisation; and on 28 April she lodged a further grievance in relation to the removal of her company car and the insurance cover, and an alleged continuing failure to make reasonable adjustments.

The removal of the Claimant's car and insurance cover led to a chain of communications between the Respondent company and her, letters and e-mails from the Respondent company to its Head Office, and in turn to their insurance brokers and the insurance company, Allianz. Reports were also sought from the Claimant's general practitioner and there was a further reference to Dr Brennan, the Occupational Health consultant with Maitland Medical. The Claimant at the Respondent company's request telephoned the Driver and Vehicle Agency in Coleraine. She did this on two occasions, in the presence of company managers. She was asked to do it on the second occasion because the respondents felt that she had not made complete disclosure to DVA.

The medical evidence provided by the Claimant from her GP was favourable to her - it stated she was fit to drive - and Dr Brennan the Occupational Health Consultant was also favourable, emphasising that the risk was comparatively small and warning against overreacting. However, her own medical witness, Dr McGarry, did accept in cross-examination that if someone's condition was such that she could potentially need a 'Medevac' chair, this could raise concerns about her driving.

During this time the Claimant was effectively barred from using a company vehicle. No restriction was placed upon her driving by DVA. Indeed, during this period she was able to hire a car to get to work. The hire company was happy to insure her as she retained a full driving licence and there was a letter from her GP stating that she was fit to drive.

On 12 May 2015 when DVA, having been fully apprised of the situation, issued a letter which did not place any restrictions on her driving, the insurer (Allianz) confirmed that she was insured to drive under the company's group policy, and the Claimant was informed that she could have her company car back.

We have stated, at Paragraph 17(vi) above, the impact which removal of her car had on the Claimant. She said:

"*I felt the company were putting barriers up, making it difficult for me to do my job in the hope that I would leave the company*".

She also felt that in their dealings with her over this issue, they kept moving the goalposts in terms of what they required of her and wanted her to do to satisfy them she should be allowed to drive. She complained that at the end of the day, it had taken one e-mail to sort it all out.

While the Claimant's attitude is understandable in the light of everything that had gone before, contrary to what she complained, it had clearly taken more than one e-mail to resolve the matter. We have referred above to the extensive communications among the various parties who had an interest in, or who were involved in, this matter.

As far as the company is concerned, what had emerged from the meeting with Disability Action on 24 April 2015 about the Claimant's panic attacks, and the potential for resulting paralysis was extremely concerning. It just could not be ignored, and something had to be done to address the problem which had arisen.

The initial measures taken by the employer were reasonable - contacting the insurers to inform them of the position, and not permitting the Claimant to drive pending advice and guidance from them. It is clear from these documents that it was the company's insurers which was effectively calling the shots here once they were made aware of the Claimant's health issue.

Aside from this, in the industrial experience of one of the panel members who has knowledge of dealing with insurance for vehicle fleets, a failure by the insured to notify and involve the insurer in a matter such as this could lead to a failure to indemnify in the event of a road traffic accident.

In the interim - on 28 April 2014 - the Claimant had raised a further grievance alleging ongoing discrimination and victimisation arising out of the continuing failure to reduce her hours and the decision of 24 April 2014 to withdraw her company car.

This was acknowledged by the company on 30 April 2014. She was told that a meeting would be arranged to discuss that grievance, and that she could be accompanied by Norma Bolton, of Disability Action. She was also told that the company continued to consider her request for a reduction in working hours and that it was hoped to find a reasonable adjustment that suited both her and the business. The reasons for the removal of her car were also reiterated to her.

Around this time there were other communications between the Claimant and the company. Medical and Occupational Health reports were exchanged, and in relation to her request for reduced hours, her GP provided a letter dated 28 April 2014 saying that she suffered from anxiety and depression, that a 50 hour working week would be detrimental to her health, and that the Claimant had informed her GP that a 40 hour week would be more suitable for her to work at present.

More significantly, from the point of view of the Claimant, she received a letter dated 28 April 2014 from Jeff McCartney, Dealer Principal, who had carried out the investigation into her suspension, in relation to being placed on SSP. He stated that, having reviewed the matter, he would be making arrangements for her to receive a payment representing her loss of earning during the period she had been placed on SSP, and any sales bonuses she would likely have received had she been at work. Such a payment was made into her account.

On 12 May 2014 - the same day as the driving issue was resolved - the Claimant was offered a four day/forty hour week, together with a company car (notwithstanding that she was not working a full week).

This new working pattern, which the Claimant accepted, was to take effect from 25 May 2014. The company had provided an additional Service Adviser who would work two days a week, though only one day was required.

The end result here was that the Claimant got what she wanted, some 14 months after it had been requested. As against that her previous request to change her working hours had been considered by the company, and alternative arrangements had been offered which she had declined - on at least one of those occasions after a long period on her part.

The cost of the new arrangement was to be met by the company.

When the Claimant moved to Toyota Boucher Road, she complained that Andrew Gilmore started holding meetings and conducting interviews there. Her evidence was that these would normally have been held at Head Office, a separate building where there was more space. She said that Andrew Gilmore's motive in doing this was to put pressure on her and unnerve her as a result of taking a Tribunal claim. In effect, it was an act of harassment.

The Tribunal were satisfied from the evidence of the Respondents that there were no hard and fast rules as to where meetings and interviews were held, and in any event, find it difficult to understand how such meetings put the Claimant under the pressure she alleged.

The Claimant was, in the Tribunal's view, a challenging person to manage. The Respondents, however, had the duty to deal with the state of affairs which had arisen, in accordance with the legislation covering disability at work. In this task they started off at a disadvantage for, as indicated, the knowledge of senior managers of the provisions of the Disability Discrimination Act 1995 at times verged on the non-existent. Mrs Chapman, who was the HR Adviser gave very little relevant professional advice in relation to the legislation and its practical applications. Her main role was that of a note taker at the various meetings which took place.

The timeframe for dealing with the request for reduced hours - 14 months - was long drawn out. This was not all the fault of the Respondents - and, it has to be said the fact that the Respondents took so long is again not consistent with the Claimant's allegation that they wanted rid of her.

Her request for reduced hours was not considered in an appropriate manner. It was consistently dealt with as an application for flexible working, with an emphasis on the needs of the business. There was little or no focus on the needs of the Claimant. There was also a disproportionate emphasis on job-sharing, with pressure to accept that arrangement as the only alternative to full-time work.

Had the employer focused correctly on the concept of reasonable adjustments under the Disability Discrimination Act 1995 and taken a proactive approach to the matter, all members of the Tribunal satisfied that the Claimant would have had the benefit of the reduced hours she sought at an earlier stage. The Respondent failed in its duty to make a reasonable adjustment and that those adjustments should have been in place by January 2015.

As far as the Claimant's suspension from work is concerned, a majority of the Tribunal found that this did not constitute discrimination or victimisation. It was, from the Claimant's point of view, more than coincidental, if not suspicious, that her suspension came shortly after an Occupational Health report which had been favourable to her. However, this ignores the fact that there were other factors present. There were ongoing issues with the Claimant's lateness, attendance, and her relations with colleagues and her alleged attitude to customers. The majority would concede that the suspension was not handled well - there was a lack of any basic investigation, or of any consideration whether something as drastic as suspension was appropriate in the circumstances. Some of the comments being made about the Claimant could have been little more than tittle-tattle or gossip. However, the majority of the Tribunal found that this is indicative of bad practice within the company. While suspension was arguably inappropriate and became unnecessarily protracted, they are satisfied that a non-disabled person would have been treated in the same way in these circumstances.

A minority would find the Claimant was victimised. In his view, the company knew of her mental health issues. It was causing them difficulty. They wanted rid of her and jumped on the complaints in their efforts to do so.

Again, in relation to the Claimant being placed on statutory sick pay, a majority are satisfied that this was not an act of discrimination. It was done in purported compliance with company policy and there was no evidence before us from which we can infer that a non-disabled person would have been treated differently in the same or similar circumstances. Had the Claimant not been suspended, but ill, she would only have received SSP. That is not to say that the majority consider that the matter was handled well, or that it had been clearly thought out.

When the company ultimately paid the shortfall in the Claimant's wages following Mr McCartney's investigation, it did so by way of a concession, and not to acknowledge that it had been in the wrong.

The dissenting member of the Tribunal considered that the placing of the Claimant on SSP was a vindictive act by management, which discriminated against her on the ground of her disability.

There was a decision on remedy issued in March 2017 and the Claimant was awarded £11,500 together with interest of £340.28 in respect of injury to feelings and psychiatric injury sustained by her as a result of the Respondent's breach of duty to make reasonable adjustments.

The Tribunal held that the Respondents did not discriminate against the Claimant on the grounds of her disability or victimise her in respect of her suspension from work placing her on statutory sick pay or removing her company car. The Tribunal unanimously decided that the Respondents did not harass the Claimant by holding meetings in the premises where she worked. The Tribunal also unanimously decided the Respondents did not discriminate against, victimise or harass the Claimant in any other respect. The decision in relation to disability discrimination related solely to the failure to make reasonable adjustments. The failure to make reasonable adjustments related to the failure to deal with the request for reduced hours which was long drawn out – over 14 months.

The Tribunal stated:

"*There is no doubt that the treatment which the claimant received affected her mental health and well-being. The medical evidence shows clearly that she suffered from depression and stress-related illness and that in its extent it was moderate to severe*".

The Tribunal stated that:
"*In dealing with remedy, we therefore keep in mind from the outset that the claimant succeeded only in her reasonable adjustments claim, and that the period of our focus is from January 2015, when we considered the reasonable adjustments should have been in place, until mid-May 2015 when they were put in place. This should not be taken, however, as in any way minimising the seriousness and effect of the breach which we have found to be proved. In this respect we respectfully differ from Mr Bloch in his contention that the claimant had failed on the serious aspects of her case*".

The Tribunal stated that when adjustments were put in place the Claimant found it much easier to cope with her employment. She had little or no absences from work and she found it much easier to get the job done.

The Tribunal also took into consideration other factors affecting the Claimant's mental health namely:

- She had a previous history of mental health going back to 2011/2012.
- The Claimant succeeded before the Tribunal only on her reasonable adjustments claim. However, her mental state was also conditioned by her perception (which the Tribunal did not doubt was genuine) about the validity of her other claims on which she did not succeed. These claims encompassed alleged direct discrimination, victimisation and harassment and related to matters including her suspension from work and its serious financial consequence, and the removal of her company car and the inevitable inconvenience for someone who was travelling daily from Dundrum, Newcastle, to Belfast. These were matters which would clearly have caused her great distress.
- At a consultation on 15 June 2015 with Dr Philip McGarry FRC Psych, he expressed the opinion that "*she did not appear currently severely depressed*", but he qualified this by stating that "*she [was] on a significant dose of antidepressants*". By this time, however, her difficulties had on the face of it been resolved, so logically some improvement in her mental state was to be expected.

The Tribunal was satisfied that the treatment that she received at work inevitably compounded and exacerbated to a serious degree any pre-existing condition and was a major cause of her mental health issues at the relevant time.

The employer's Managers' failure to grasp the reality of the situation which confronted them and the limited extent of their knowledge of the provisions of the Disability Discrimination Act 1995 and the concept of reasonable adjustments, it is significant that when the Claimant met with Jeff McCartney and Rosemary Chapman to discuss the outcome of the former's investigation into the Claimant's suspension, the discussion centred on a phased return to Toyota Boucher Road, building up to full-time work. Any discussion of variation of hours focussed on flexible working, as opposed to reasonable adjustments under the 1995 Act (*Paragraph 13* of liability decision). In March/April 2015, the focus was still very much on the needs of the business, and on 23 April 2015 the Claimant was offered a job-sharing role (*Paragraph 16* of liability decision).

The Respondent company did not act promptly in putting the reasonable adjustment in place. The length of time involved was a period of four and a half months. The adjustment required was reasonably straightforward and should not have taken that amount of time bearing in mind the size of the Respondent company. In dealing with this matter there was a failure in the Respondent company's HR function, and, in effect, it dropped the ball, so to speak.

The Tribunal was satisfied that this case fell into the middle band of Vento and awarded a single amount to encompass both injury to feelings and psychiatric injury.

End