THE INDUSTRIAL TRIBUNALS

CASE REF: 2473/12

CLAIMANT: **Noel Stewart**

RESPONDENT: **Department for Employment and Learning**

DECISION

The unanimous decision of the tribunal is that, although the claimant is disabled within the meaning of the Disability Discrimination Act 1995 (as amended), his claims relating to unlawful disability discrimination and age discrimination are dismissed.

Constitution of Tribunal:

Chairman: **Mr S A Crothers**

Members: **Mr J Kinnear**
Mrs T Kelly

Appearances:

The claimant appeared and represented himself.

The respondent was represented by Mr A Sands, Barrister-at-Law, instructed by the Departmental Solicitor's Office.

THE CLAIM

1. The claimant claimed that he was the subject of unlawful discrimination under the provisions of the Disability Discrimination Act 1995 (as amended), ("the DDA"). The claimant also claimed that he was the subject of unlawful discrimination by virtue of Regulation 3 of the Employment Equality (Age) Regulations (Northern Ireland) 2006, ("the Regulations"). The respondent contended that the claimant did not meet the definition of disability under the DDA, and denied his allegations in their entirety.

ISSUES BEFORE THE TRIBUNAL

2. The issues before the tribunal were as follows:-

Preliminary Legal Issue

Is the claimant disabled within the meaning of the DDA?

Other Legal Issues

1) Subject to the preliminary issue, by giving the claimant a written warning for absence did the respondent discriminate against the claimant on the ground of his alleged disability? (direct discrimination).

2) Subject to the preliminary issue, by giving the claimant a written warning for absence did the respondent discriminate against the claimant for a reason related to his alleged disability? (disability related discrimination).

3) Subject to the preliminary issue, did the respondent comply with its statutory duty to make reasonable adjustments for the claimant under the DDA?

4) By giving the claimant a written warning for absence did the respondent discriminate against the claimant on the ground of his age contrary to Regulation 3(1)(a) of the Regulations?

5) By giving the claimant a written warning for absence did the respondent indirectly discriminate against the claimant on the ground of his age contrary to Regulation (3)(1)(b) of the Regulations?

DEFINITION OF DISABILITY

3. The respondent did not dispute that the claimant had an impairment (neuralgia). It was also accepted by the respondent that the impairment had adverse effects and that it was long-term. However, the respondent did not accept that the impairment had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities.

SOURCES OF EVIDENCE

4. The tribunal heard evidence from the claimant and, on behalf of the respondent, from Anne McGarel, Executive Officer 1, Linda Toland, Staff Officer in the respondent's Human Resources Managing Attendance Team; and Geraldine Lavery, Human Resources Business Partner with responsibility for employee relations and the respondent's Equal Opportunities Officer. The tribunal received an agreed bundle of documents (duly supplemented in the course of the hearing), and took into account only the documentation referred to it in the course of the hearing.

FINDINGS OF FACT

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

(i) The claimant commenced employment with the respondent on 26 January 1982 and is currently an Employment Services Advisor in the Larne Jobs and Benefits Office. His date of birth is 22 December 1958. He presented his claim to the tribunal on 6 December 2012 alleging that unlawful discrimination on the grounds of disability and age occurred on 8 November 2012, when he was issued with a written warning, signed by Linda Toland, under the respondent's Inefficiency Sickness Absence Policy ("the Policy"), in the following terms:-

> "On **11 September 2012** you were informed that the Department was considering taking action under the Inefficiency Sickness Absence Policy. You subsequently attended a meeting on **21 September 2012** when you were given the opportunity to respond.
>
> I have given careful consideration to the facts of your case, and to the information provided by you at the meeting and I have decided to issue you with a **written warning**. This warning is effective from the date of this letter and will remain valid for 2 years i.e. to **7 November 2014**.
>
> I would remind you that this warning constitutes the first step in the Inefficiency Sick Absence procedures. Failure to demonstrate an immediate and sustained improvement in your attendance, during the **2 year** warning period, may lead to further Inefficiency action which could ultimately lead to your dismissal.
>
> You have the right to appeal against this decision. If you wish to avail of this please write to Belinda Tunnah, Human Resources, Adelaide House, 39/49 Adelaide St, Belfast setting out the grounds for your appeal within 10 working days of the date of this letter.
>
> The Inefficiency Sickness Absence policy and further information about the Inefficiency Sickness Absence procedures can be obtained from the HRConnect portal. If you do not have access to the portal, you should contact HRConnect (0800 1300 400) who will provide you with a copy.
>
> Welfare Support Service (028 90547427), Equal Opportunities (028) 90257855 and Carecall (0808 800 0002) are also available to you should you wish to avail of any of these services.

If you have any further queries, please contact HRConnect on the number above.

Yours sincerely

Linda Toland
Human Resources"

(ii) The claimant was a straight forward and credible witness before the tribunal, who felt hurt by having received a written warning in the context of having had an absence-free period of 17 months preceding the two episodes giving rise to the warning and having worked without any absence from his return to work on 28 June 2012. It was not disputed by the respondent that the claimant was a very good employee whose service since his return to work had shown no diminution in performance. The tribunal was impressed by the claimant's work ethic and his desire to work if at all possible. The claimant was annoyed that he was being treated as someone who had done something "wrong". However, it was plain to the tribunal, that this was emphatically not the case.

(iii) It was also clear to the tribunal that the respondent found itself under pressure to meet targets as a result of correspondence from the respondent's Permanent Secretary dated 27 July 2012 entitled "Departmental performance" and directed to "all DEL staff". It includes the following:-

"The second target aimed to reduce the days lost per member of staff through sickness to 9.5 days by March 2012. This target was intended to contribute to an NICS wide target of 10.0 days set by the Minister of Finance and Personnel. It was not achieved; the outturn was a disappointing 11.4 days.

I am extremely disappointed by this, not least because this is the third year in succession that the DEL target has not been met and our absence level is now the highest of all the NICS Departments. This is not acceptable.

I believe that we need to move rapidly away from a culture of absence to a culture of attendance wherein we can evidence a strong ethos of commitment to team-working to tackle this issue collectively. … all staff now need to work with Directors, Heads of Branches and Line Managers and make a concerted effort to address the issue of absence management, to substantially improve our performance in this area, and to meet this year's challenge target of 8.9 days.

I have asked to see detailed absence statistics each month by office and over coming months. I shall insist that managers are held to account for consistent poor performance.

We have a sick leave scheme which many other employers regard as generous. It is right that staff who are genuinely ill can have time to recover without the added burden of loss of earnings. We all have a duty to protect the scheme by ensuring it is not abused".

(iv) The claimant was absent from work on two occasions totalling 76 working days in a twelve month period ending on 27 June 2012. The absences were from 2 December 2011 to 13 January 2012 and related to 'heart, cardiac and circulatory problems', and 17 April 2012- 27 June 2012 recorded as relating to "pinched/trapped nerve".

(v) The case summary in the Occupational Health Report dated 18 June 2012 records that:-

"EO2, DEL, has been absent since 17/04/12 due to degenerative disease of his cervical spine. He was complaining of severe pain in his right arm and sensory loss affecting his right hand. His symptoms have improved with treatment and an early return is expected once he has mobilised further with physiotherapy".

The remainder of the Occupational Health Report is relevant to the issues before the tribunal and reads as follows:-

"2. ***ADVICE – STANDARD REFERRAL QUESTIONS***

2.1 Any underlying medical condition affecting this employee's performance or attendance at work.

There is significant evidence of an underlying medical condition which does adversely impact on his performance or attendance.

2.2 Whether the employee is currently fit to carry out the normal duties of their grade.

Mr Stewart is currently unfit to carry out the normal duties of his grade.

2.3 Whether there are any adjustments to the work tasks or environment that would help facilitate rehabilitation or an early return to work and the duration of any adjustments.

Management should contact officer to discuss a return to work on a phased basis the pattern to be agreed between the officer and management.

2.4 Whether a definitive return to work can be given (and if not), an indication of likely timescale for recovery and return to work.

A definitive return to work date cannot be given and the absence is likely to continue for at least another 2-3 weeks.

2.5 Whether the health problem is likely to recur and/or affect future attendance.

Mr Stewart's medical condition is likely to recur in the future and may impact on future attendance.

The Occupational Health Assessment was carried out on 15 June 2012.

(vi) The tribunal also had before it, correspondence from the claimant's GP, Doctor Buckley dated 7 January 2013 confirming that the claimant:

"Has been attending from April 2012 with a neck problem and neuralgia of arm".

The tribunal also had before it the result of an MRI scan in which Dr Ian Rennie, Consultant Radiologist, concludes as follows:-

"There is evidence of degenerative change present in the lower two cervical discs spaces. The changes are perhaps most severe at C7/T1 where there is a broad-based disc osteophyte causing relative narrowing of the spinal canal but no cord signal change or specific nerve root impingement".

The scan was conducted on 10 May 2012. The report under the heading of "INDICATION " refers to "pain down right shoulder and right arm? Cervical disc prolapse".

(vii) A further report to the claimant from Doctor Buckley, dated 14 February 2013, reads as follows:-

"I enclose a copy of your CT scan which revealed osteophytes and evidence of degenerative change.

Osteophytes, commonly referred to as bone spurs or parrot beak, are bony projections that form along joint margins. Osteophytes form because of the increase in a damaged joint's surface area. This is most common from the onset of arthritis. Osteophytes usually limit joint movement and typically cause pain. Osteophytes form naturally on the back of the spine as a person ages and are a sign of degeneration in the spine. In this case the spurs are not the source of back pains, but instead are the common symptom of a deeper problem. However, bone spurs on the spine can impinge on nerves that leave the spine for other parts of the body. This impingement can cause pain in both upper and lower limbs and a numbness or tingling sensations in the hands and feet because the nerves are supplying sensation to their dermatomes.

I note that whilst the pain has improved that you still have residual numbness in your right thumb and index finger.

After this period of time I would consider that this is most likely to be a permanent disability. It is also likely that you will have acute exacerbations of severe pain in the future.

As I have stated above osteophytes are a sign of degenerative change, consistent with ageing. In your case this is irreversible and likely to be slowly progressive as you continue to age.

I note you continue to be prescribed medication for this condition and are under review".

(viii) The claimant described his neuralgia symptoms in his evidence to the tribunal as involving numbness in his right thumb and forefinger, weakness in his right arm and hand, and diminished grip in his right hand. In his cross-examination he also referred to continuous numbness in his right thumb and forefinger and described how different fingers would be affected according to the condition of the discs in his back. The tribunal is satisfied that his capacity to lift and carry and his manual dexterity were affected by his condition. In relation to day-to-day activities, the claimant's loss of sensitivity in his right thumb and forefinger means that he cannot easily distinguish between hot and cold and had sustained minor burns as a result. He is also on medication for the pains in his right hand and right arm which keep the pain spasms under control. The claimant did acknowledge in his evidence that he "more or less" carried out his full range of duties with some or occasional difficulty. He described how on occasions he had to type, and that although he was poor at typing generally, he could not type with his left hand as well as he could have done with his right hand. His job involved interviewing clients and normally he tried to make records. This did not cause a problem for him unless something was particularly urgent. He has recently been supplied with a multifunctional chair which gives support for his arm, together with a new keyboard with softer keys. He described how he still experiences trouble with neuralgia and feels that he is not performing his duties as well as he used to. He also needs to take painkillers on occasions. Apart from his difficulty in lifting items with his right hand, the claimant was also unable to drive for some time after the neuralgia developed. He was able to drive again from July 2012 mainly along quiet country roads, after receiving medical advice that he could do so. The tribunal is satisfied that he was able to work and carry out a full range of duties without support after 28 June 2012, albeit with some difficulty. This is to the claimant's credit.

(ix) There was no medical evidence before the tribunal dealing specifically with the "deduced" effects of the impairment, ie, without the benefit of medication. The tribunal also had to bear in mind, in relation to the definition issue, that if a condition is "recurring" or "long-term", it has to assess what would have been the position as understood by the respondent at the date of the alleged discrimination. Furthermore, as **Harvey on Industrial Relations and Employment Law ("Harvey")** points out in Volume 2 L at paragraph 160.02:-

> "… The simple fact that a claimant can only carry out normal day-to-day activities with difficulty or with pain does not establish that disability is made out. As pointed out in *Condappa v Newham Healthcare Trust* (2001) All E R (D/38/(DEC)), the Act is concerned not with any adverse effect but rather with a substantial adverse effect. Whether or not pain or difficulty is sufficient in any particular case is a matter for the tribunal to decide on the facts before it".

The aspect of a 'progressive condition' is considered further at paragraphs 6 (vii) and 10 ((1)-(3)) below.

(x) The Policy provides as follows:-

"Review Points

4.1 Review points are used to identify the level and pattern of sickness absence that require closer examination. The Review points are 4 occasions or 10 working days in a rolling 12 month period.

4.2 Review points will not apply to probationers, or to those appointed on a fixed-term or temporary basis, where each spell of sickness absence will lead to a review and consideration of inefficiency action.

4.3 Should your level of sickness absence reach a Review point, Departmental HR and/or your line management will assess what action, if any, might be required. In so doing, they will consider a range of factors such as those listed below:

- nature of the illness or injury;
- circumstances falling within relevant legislation, including disability legislation;
- frequency/pattern of absences;
- prior sickness absence record;
- relevant information contained in return to work records; and
- any relevant circumstances highlighted by you or your line management.

This is not an exhaustive list and there may be other factors that will influence whether formal inefficiency action is appropriate".

(xi) In her evidence, Linda Toland acknowledged that she had made an error and that it was unusual for her not to have considered the records of two previous return-to-work interviews under 4.3 above. An additional return-to-work interview form could not be located. However Linda Toland insisted that even if she had had access to these records, it would not have made any difference to her decision, issued on 8 November 2012, to administer a written warning to the claimant under paragraph 5 of the policy.

(xii) The tribunal considered the evidence relating to the meeting held between the claimant and Linda Toland on 21 September 2012. The amended notes record:-

"Linda highlighted that a written warning was the first step in the inefficiency process and further absences (intermittent or long-term) following the issue of a written warning could lead to the next stage, ie, consideration of a final

written warning and further absences after this could ultimately result in dismissal.

She provided a copy of the Inefficiency Sickness Absence Policy and advised that the Department could proceed with further action at any time within the two year period should further absences occur".

(xiii) The tribunal also considered a further document which dealt with the rationale for issuing a written warning to the claimant. It is dated 26 October 2012 and is reproduced below:-

Rationale for *Issue/~~Non Issue~~ of Written Warning
**** delete as appropriate**

Name: Noel Stewart	**Payroll No: 0534914**
Review Point Reached: • 2 occs totalling 76 working days (27 and 49).	
Return to Work Interview: • RTW interview recorded on HRC system for the 49 day absence Apr-June 2012. Held on 2/7/12. • No RTW interview recorded on HRC system for the 27 day absence Dec 2011 – Jan 2012.	
Previous Record and/or Pattern: • 5 year period 11 occs totalling 93 days.	
Long Term Sickness Absences: • 2 Long Term Sick Absences during 5 year period (two absences that caused the review point to be reached): ▪ 02/12/11 – 13/01/12 – 27 days – Heart, Cardiac and Circulatory Problems. ▪ 17/04/12 – 27/06/12 – 49 days – Pinched/Trapped Nerve	
Review Point Reached Previously: • Using current calculation for review points the employee would have reached a review point on both long term absences and 4 other occs due to intermittent absences during 5 year period. In total the review point has now been reached 6 times during the 5 year period ending June 2012.	
Considered Previously for Warning: • No trace of any action considered when review point was reached due to intermittent absences in 2008 and 2009. • WW considered by HR for 1 occ 27 days in 2011/2012 – Outcome – NFA 6/3/12.	
Information Considered: • Background information received from Line Manager 11/09/12. • Information provided by employee at Consideration of Written Warning Meeting (see notes 21/9/12).	

• Welfare Reports 29/5/12 and 8/6/12. • OHS Report 15/06/12.	
DDA: • Unable to determine if DDA would be applicable.	
Conclusion: • Review Point was reached – 2 occs totalling 76 working days. • 5 year period 11 occs totalling 93 days. • 2 long term absences during 5 year period. • Consideration given previously to WW and NFA taken. • Has reached review point 6 times during the 5 year period ending June 2012. • No action was taken on the 4 intermittent occasions. • On balance I feel a warning should issue on this occasion.	
Decision: • Warning to issue.	
Signed: *Linda Toland* **Date: 26/10/12**	**Peer Reviewed by:** **Signed:** *Stephen Brady* **Date: 26/10/12**

(xiv) The respondent could have invoked the Policy in relation to the 27 day absence from 2 December 2011 until 13 January 2012 but did not do so. Furthermore, under the Policy any absence (other than sickness due to pregnancy-related illness during the protected period) for a period longer than ten working days is considered and is relevant to employees whether disabled or not. Notwithstanding the omissions referred to above, the tribunal is satisfied that the respondent was entitled to administer a written warning in the context of paragraphs 4 and 5 of the Policy and in the circumstances presented to it following the letter from the Permanent Secretary already referred to above.

(xv) The claimant appealed the decision to issue a written warning in correspondence of 12 November 2012 and an appeal hearing was held on 7 September 2012 with Belinda Tunnah. In the minutes of the appeal meeting the claimant's hurt and frustration are reflected:-

> "Noel felt as though the genuineness of his absence was being questioned however Belinda assured him, that this was not the case. He said that he was very annoyed when he saw other people taking advantage of the absence policy and "swinging the lead" and he believes that he has being **(sic - been)** unfairly penalised. He stated that he only ever missed work if there was something seriously wrong with him.

Noel stated that during his absence he kept in contact with his management and kept his line manager fully informed, he was very frustrated at not being able to return to work sooner".

The claimant also indicated at that meeting that he wished to initiate a grievance and that if the appeal against the written warning was overturned he would not proceed with a grievance.

(xvi) The claimant's grievance dated 7 December 2012, claiming that the warning constituted both age and disability discrimination, was handed to Belinda Tunnah during the appeal meeting. Geraldine Lavery, Human Resources Business Partner, dealt with the grievance under the Dignity at Work Procedure and suspended Belinda Tunnah's decision regarding the claimant's appeal until the Dignity at Work process was complete. The tribunal carefully considered Geraldine Lavery's evidence together with her detailed correspondence to the claimant dated 6 February 2013 dismissing the grievance and granting him a right of appeal. (The claimant's appeals against the written warning and the subsequent decision arising out of the Dignity at Work process were still outstanding at the date of the tribunal hearing). Geraldine Lavery agreed with Linda Toland's assertion that it was not clear if the claimant's condition amounted to a disability, although in evidence before the tribunal, she did concede that, as far as she was concerned, it was a border line case. Geraldine Lavery offered the claimant a DSE assessment which was to be carried out in his workplace. Such an assessment was subsequently carried out and a reasonable adjustments form completed, resulting in the claimant obtaining a replacement multifunctional chair.

(xvii) Subject to the definition issue, the claimant, in his written submissions to the tribunal, proposed the following by way of reasonable adjustments to the Policy:-

1. Explicit mention of the DDA under the heading of "review points" at paragraph 4.3.

2. Explicit mention of age-related discrimination and other forms in this section.

3. The respondent should seek additional medical and legal advice on potential discrimination cases before issuing warnings.

4. The respondent should review all information available concerning absence to identify long-term conditions in order that reasonable adjustments may be made where appropriate, ie, return to work interviews, medical reports, etc.

5. Powers to issue written warnings should be delegated to line management. The Department of Human Resources should only become involved where disputes arise.

6. Return to work interviews should be conducted as soon as possible after absence ends and the Department of Human Resources should ensure that these are completed.

7. At paragraph 4.9 information from both the General Practitioner and the Occupational Health Service should be sought in these circumstances.

8. At paragraph 4.10 not complied with by (the claimant was unsure as to what the remainder of this point was).

9. Written warnings should be dated from the termination of absences.

10. There should be clear time-limits for procedures to be completed (the claimant submitted that he had returned to work on 28 June 2012 and that the warning had not been given until 8 November 2012, some 7 weeks after the review meeting had been held).

(xviii) In relation to the indirect age discrimination, the claimant did not indicate the age group he considered himself to be part of, and therefore how such a group was disadvantaged by the Policy. Geraldine Lavery referred to statistics prepared by the Northern Ireland Statistics and Research Agency (NISRA), as set out in a document entitled "Sickness Absence in the Northern Ireland Civil Service 2010/2011". This information indicated that an age group into which the claimant fell (45-54), had an average of 10.2 days sickness absence per year. This was less than the average for the 35-44 age group of 10.7. The 55 and over age group had 11.2 days sickness absence per year. Based on this information, and in the absence of any further evidence from the claimant on this aspect of indirect discrimination, the tribunal finds itself in agreement with the respondent's assertion that the rate of absence associated with the claimant's age group was not higher than other age groups and the likelihood of absence in other age groups is comparable and/or higher to that of the claimant's age group. Therefore, it is unlikely that the claimant's age group would receive a higher proportion of warnings under the Policy.

(xix) The claimant relied on the medical evidence to assert that evidence of degenerative change was age related. Geraldine Lavery disputed this definition of degenerative disease in her evidence but Dr Buckley's report of 14 February 2013 does state:-

"Osteophytes are a sign of degenerative change, consistent with ageing. In your case this is irreversible and likely to be slowly progressive as you continue to age".

(xx) Based on the medical evidence, the claimant also asserted that his condition was a progressive condition as defined by the DDA.

(xxi) As a further reflection of his work ethic and his desire to work, the claimant indicated in his written warning appeal meeting with Belinda Tunnah on 7 November 2012 that had he been diagnosed sooner he believed that he could have returned to work about four weeks earlier. However, this was obviously a matter of speculation and depended on a number of factors relating to the manner and efficiency of his medical treatment.

THE LAW

Definition of Disability

6. (1) Section (I) of the DDA provides:-

"*Subject to the provisions of Schedule (1), a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities".*

(i) Paragraph 4(1) of Schedule 1 to the Act provides that an impairment is only to be taken as affecting the ability of the person to carry out normal day-to-day activities if it affects one of certain specified activities, namely:

(a) Mobility;
(b) Manual dexterity;
(c) Physical co-ordination;
(d) Continence;
(e) Ability to lift, carry or otherwise move every day objects;
(f) Speech, hearing or eyesight;
(g) Memory or ability to concentrate, learn or understand;
(h) Perception of the risk of physical danger.

(ii) The burden of proof is on the claimant to prove that, when the alleged action of discrimination took place, he was disabled, in the manner alleged, for the purposes of the DDA. **(Morgan v Staffordshire University (2002) IRLR 190 EAT)**. In **Ross v Precision Industrial Services Limited and DuPont NICA 2005**, Kerr LCJ confirmed the position at paragraph 39 of his judgement as follows:

> "The onus of establishing that he was substantially affected in manual dexterity and lifting ability rested squarely on the appellant".

(iii) The tribunal must make its decision in the light of the medical evidence. **(Hospice of St Mary of Furness v Howard (2007) IRLR 994, EAT)**.

(iv) In **Goodwin v Patent Office (1999) IRLR 4**, the EAT directed tribunals to answer four questions in determining whether an individual is disabled for the purposes of the DDA:-

(a) Does the claimant have an impairment which is mental or physical?

(b) Does the impairment affect the claimant's ability to carry out normal day-to-day activities in one of the respects set out at paragraph 4(1) of Schedule 1 to the DDA and does it have an adverse effect?

(c) Is the adverse effect (upon the claimant's ability) substantial?

(d) Is the adverse effect (upon the claimant's ability) long-term?

The case also stated that a tribunal should adopt a purposive approach towards the construction of the legislation and make explicit reference to any relevant provision of the Guidance or Code which has been taken into

account in arriving at its decision. The Guidance at D21 and D24 together with Appendix B of the Code are relevant in this case in relation to the definition issue.

(v) Evidence of how the claimant carries out normal day-to-day activities while at work in relevant evidence **(Law Hospital NHS Trust v Rushe (2001) IRLR 611)**. What is "normal" is anything "which is not abnormal or unusual" **(EKPE v Metropolitan Police Commissioner (2001) IRLR 605)**.

(vi) A substantial effect is one that is more than "minor" or "trivial". **(Vicary v The British Telecommunications PLC (1999) IRLR 680 EAT**. There is nothing inappropriate as a matter of law in considering an impairment to be more than trivial, and yet still minor rather than substantial **(*Anwar v Tarr Hamlets College* UKEAT/0091/10, (2011) ER (D) 101(Nov)**. Also, in deciding how substantial an adverse effect is, examination should be made of what someone cannot do, rather than what they can do. This position has been reinforced in the recent case of **Aderemi v London and South Eastern Railway Limited UKEAT/0316/12/KN**. Furthermore, if the tribunal is considering the effects of any impairment in the absence of medication, medical evidence as to the deduced effects is necessary and the burden of proof is with the claimant. **(Woodrup v London Borough of Southwark (2003) IRLR 111)**.

(vii) Under the DDA, if a person has a progressive condition and as a result of that condition has an impairment which has (or had) an effect on his ability to carry out normal day-to-day activities but the effect is not (or was not) a substantial adverse effect, the person shall be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in him having such an impairment. The DDA gives specific examples of progressive conditions, namely cancer, multiple sclerosis, muscular dystrophy or HIV. The interpretation of "likely" as set out by the House of Lords in ***SCA Packaging v Boyle* (2009) UKHL 37**, (in that case relating to the question of long-term), is "could well happen".

Disability Discrimination

(2) (a) Article 3A of the DDA provides as follows:-

"Meaning of "discrimination"

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

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

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

(2) For the purposes of this Part, a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable

adjustments imposed on him in relation to the disabled person.

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

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

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

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

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

> "Section 3A identifies three kinds of disability discrimination. First, there is direct discrimination. This is the situation where someone is discriminated against because they are disabled. This particular form of discrimination mirrors that which has long been found in the area of race and sex discrimination. As with other forms of direct discrimination, such discrimination cannot be justified …
>
> Second, there is disability-related discrimination …
>
> Third, there is the failure to make reasonable adjustments form of discrimination in sub-section (2). Here, the employer can be liable for failing to take positive steps to help to overcome the disadvantages resulting from the disability. However, this is once he has a duty to make such adjustments. That duty arises where the employee is placed at a substantial disadvantage when compared with those who are not disabled".

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

(d) The decision in **Malcolm v London Borough of Lewisham (2008) UKHL 43** had the effect of eliminating the concept of disability-related discrimination as a

self-standing ground of discrimination. As Elias LJ stated at paragraph 8 of his judgement in the Court of Appeal decision of **J P Morgan Europe Ltd v Chweidan** "for all practical purposes it adds nothing to the concept of direct discrimination".

(e) The tribunal also took into account relevant sections in the Disability Code of Practice Employment and Occupation ("the Code"), being careful not to use the Code to interpret the legislative provisions. It also considered Harvey on Industrial Relations and Employment Law ("Harvey") at L368.01ff, in so far as relevant.

(6) **Reasonable Adjustments**

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

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

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

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

… 5.24 Whether it is reasonable for an employer to make any particular adjustment will depend on a number of things, such as its costs and effectiveness. However, if an adjustment is one which it is reasonable to make, then the employer must do so. Where a disabled person is placed at a substantial disadvantage by a provision, criterion or practice of the employer, or by a physical feature of the premises it occupies, the employer must consider whether any reasonable adjustments can be made to overcome that disadvantage. There is no onus on the disabled person to suggest what adjustments should be made (although it is good practice for employers to ask) but, where the disabled person does so the employer must consider whether such adjustments would help overcome the disadvantage, and whether they are reasonable."

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

"Reasonable adjustments: supplementary

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

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

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

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

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

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

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

(g) ….

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

(a) making adjustments to premises;

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

(c) transferring him to fill an existing vacancy;

(d) altering his hours of working or training;

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

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

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

(h) acquiring or modifying equipment;

(i) modifying instructions or reference manuals;

(j) modifying procedures for testing or assessment;

(k) ….

(l) providing supervision or other support.

(3) ….

(4) ….

(5) ….

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

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

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

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

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

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

(d) the nature and extent of the substantial disadvantage suffered by the claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the "provision, criterion or practice applied by or on behalf of the employer" and the "physical feature of premises", so it would be necessary to look at the overall picture.

In our opinion, an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process. Unless the employment tribunal has identified the four matters we have set out above, it cannot go on to judge if any proposed adjustment is reasonable. It is

simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage".

BURDEN OF PROOF

7. (i) Section 17A of the DDA and Regulation 42 of the Regulations deal with the burden of proof.

(ii) In **Igen Ltd (formerly Leeds Carers Guidance) and Others v Wong, Chamberlains Solicitors and Another v Emokpae**; and **Brunel University v Webster [2006] IRLR 258**, the Court of Appeal in England and Wales set out guidance on the interpretation of the statutory provisions shifting the burden of proof in cases of sex, race and disability discrimination. This guidance is now set out at Annex to the judgment in the **Igen** case. The guidance is not reproduced but has been taken fully into account. It also applies to cases of discrimination on the ground of age.

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

(iv) The Court of Appeal in **Ladele v London Borough of Islington (2010) IRLR 211 CA**, upheld the following reasoning of the EAT that:

> "Explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the claimant unreasonably. That is a frequent occurrence, quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy Stage 1".

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

> "This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude in the absence of adequate explanation that the respondent has committed an act of discrimination. In Curley v Chief Constable

[2009] NICA 8 Coghlin LJ emphasised the need for a tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination".

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

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

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

"5. Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focussing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: See the observations of Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285

paragraphs 8-12. This is how the tribunal approached the issue of direct discrimination in this case.

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

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

Age Discrimination

Regulation 3 of the Employment Equality (Age) Regulations (Northern Ireland) 2006 ("the Regulations"), provide as follows:-

"**3.** – (1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if -

(a) on the grounds of B's age, A treats B less favourably than he treats or would treat other persons, or

(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but -

(i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and

(ii) which puts B at that disadvantage,

and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.

(2) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

(3) In this regulation –

(a) "age group" means a group of persons defined by reference to age, whether by reference to a particular age or a range of ages; and

(b) the reference in paragraph (1)(a) to B's age, includes B's apparent age."

Burden of Proof Regulations – Indirect Discrimination

8. (i) Indirect discrimination consists of a number of elements, namely:

(a) that the employer applied to the employee a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as the claimant, but

(b) which puts or would put persons of the same age group as the claimant at a particular disadvantage compared with other persons;

(c) which puts the claimant at that disadvantage; and

(d) which he cannot show to be a proportionate means of achieving a legitimate aim.

It is difficult to strictly apply the two stage process as referred to in the guidelines set out in **Igen v Wong**. The tribunal considers it necessary to find that it could conclude that the first, second and third elements referred to above have been satisfied by the claimant and, if so satisfied, to find that the burden of proof has shifted, requiring the respondent to justify the provision, criterion or practice.

(ii) Once the provision, criterion or practice ("PCP") has been established it is necessary for the claimant to show that he is at a particular disadvantage, which equates to the concept of a "detriment". However the claimant has also to show that the PCP disadvantages persons within the same "age group" as himself. Neither the regulations, nor to date the case law, has provided any guidance in relation to this issue of "age group".

In *Discrimination and Employment, Tucker and George, in paragraph H3.011,* suggested that:-

> "The relevant provision, criterion or practice, must be applied to the claimant as well as others who are not of the same "age group". Regulation 3(3)(a) defines "age group" as a group of persons defined by reference to age, whether by reference to a particular age or a range of ages.
>
> However the concept of an "age group" remains something of a nebulous one. It appears that an age group can be either a group of people of a particular age (eg people aged 50), or, a range of ages (eg people aged 18-30). However, on the face of the Age Regulations 2006 it is not clear how precise the reference to age must be. There appears to be no

reason why an age group could not, for example, be a group such as "retired persons". More contentious perhaps might be groups described as "older employees" or "junior staff".

The difficulty with such "loose" definitions is that they present problems in defining accurately limits of any particular age group …".

SUBMISSIONS

9. The tribunal carefully considered the written and oral submissions presented to it on behalf of the respondent and by the claimant. The claimant was given an opportunity of reading out his submissions to the tribunal and supplementing them where necessary. Counsel for the respondent was also provided with an opportunity of addressing the tribunal in relation to the progressive condition argument referred to in the claimant's written submissions. Copies of the submissions are annexed to this decision.

CONCLUSIONS

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

Definition of Disability

(1) The tribunal was satisfied that in light of the fact that the claimant commenced his full range of duties following his return to work on 28 June 2012 with no additional support means that he does not satisfy the limb in the definition of disability relating to "a substantial and long-term adverse effect on his ability to carry out day-to-day activities". However, the claimant also contended that he suffered from a progressive condition. The Guidance on the DDA at paragraphs B16-B18 describes a progressive condition as follows:-

"Progressive conditions

B16. A progressive condition is one which is likely to change and develop over time. **The Act gives** examples of progressive conditions, including cancer, multiple sclerosis, and HIV infection. It should be noted that, following the amendments made by the Disability Discrimination (Northern Ireland) Order 2006 (**see paragraph A10**), persons with cancer, multiple sclerosis or HIV infection are all now deemed to be disabled persons, for the purposes of the Act, from the point at which they have that condition: thus effectively from diagnosis.

B17. Progressive conditions are subject to the special provisions set out in **Sch1, Para 8**. These provisions provide that a person with a progressive condition is to be regarded as having an impairment which has a substantial adverse effect on his or her ability to carry out normal day-to-day activities **before** it does so. A person who has a progressive condition, will be treated as having an impairment which has a **substantial** adverse effect from the moment any impairment

resulting from that condition first has **some** adverse effect on his or her ability to carry out normal day-to-day activities, provided that in the future the adverse effect is **more likely than not** to become substantial. Medical prognosis of the likely impact of the condition will be the normal route to establishing protection under this provision. The effect need not be continuous and need not be substantial. **See also paragraphs C4 to C7 on recurring or fluctuating effects**. The person will still need to show that the impairment meets the requirements of **Sch1, Para 2** (meaning of long-term).

B18. Further examples of progressive conditions to which the special provisions apply include systemic lupus erythematosis (SLE), various types of dementia, rheumatoid arthritis, and motor neurone disease. This list, however, is not exhaustive".

The tribunal also considered **Harvey at L162-162.01** in this regard.

(2) The claimant has to take painkillers to prevent spasms. As stated in the findings of fact at paragraph 5(viii) of this decision, the claimant did acknowledge in his evidence that he "more or less" carried out his full range of duties with some or occasional difficulty. However, he described how on occasions he had to type and that, although he was poor at typing generally, he could not type with his left hand as well as he could have done with his right hand. His job involved interviewing clients and normally he tried to make records. This did not cause a problem for him unless something was particularly urgent. He has recently been supplied with a multifunctional chair which gives support for his arm, together with a new keyboard with softer keys. The claimant still experiences trouble with neuralgia and feels that he is not performing his duties as well as he used to.

(3) The Occupational Health Report, which Geraldine Lavery had access to when she was considering the definition issue combined with the later medical evidence from the General Practitioner dated 7 January 14 and 14 February 2013, and the factual findings referred to above and in the remainder of paragraph 5(viii) satisfy the tribunal that on 8 November 2012 the claimant suffered from a progressive condition which first had some adverse effect on his ability to carry out normal day-to-day activities in April 2012 and that in the future the adverse effect is more likely than not to become substantial.

Direct Disability Discrimination

(4) In order to be successful in a claim for direct disability discrimination, the tribunal must be satisfied that the claimant was treated less favourably on the ground of his disability. The relevant comparator is someone who does not have the particular disability of a disabled person and whose relevant circumstances are the same as, or not materially different, from those of the disabled person. Sometimes it will not be possible to decide whether there is less favourable treatment without deciding "the reason why" **(Shamoon v Chief Constable of the RUC (2003) UKHL 11)**. This is especially the case when hypothetical comparators are being used because in order to ascertain how a hypothetical comparator would have been treated, it is necessary to know what the reason for the treatment of the claimant was. The proper

comparator is a fellow employee who was absent for the same length of time but who was not disabled. However, the Policy applied to all employees whether disabled or non-disabled. The claimant has not therefore proved facts from which the tribunal could conclude in the absence of an adequate explanation that he had been treated less favourably on the ground of disability and therefore the burden of proof does not shift to the respondent to prove on the balance of probabilities that the alleged detriment was not on the prohibited ground of disability.

Disability Related Discrimination

(5) The concept of disability-related discrimination adds nothing to a claim of direct discrimination. This was made clear in the House of Lords decision in **London Borough of Lewisham v Malcolm (2008) UKHL-43** where it was also held that in assessing the comparator for a disability discrimination case, one must take away the disability itself but crucially not the reason or reasons for the treatment in question. Therefore, as in a claim for direct discrimination, there is only unlawful discrimination if a non-disabled person would be treated more favourably in a situation in which the same reason or reasons for the treatment of the claimant apply to that non-disabled person.

Reasonable Adjustments

(6) The case of ***Tarbuck v Sainsbury's Supermarkets Limited*** **(2006) IRLR 664**, EAT, establishes that the duty to consult is not of itself imposed by the duty to make reasonable adjustments. The only question is, objectively, whether or not the employer has complied with his obligations.

(7) Following the principles set out in *Rowan*, it was common case that the provision criterion or practice was the Policy itself. The claimant has not identified his non-disabled comparators. Furthermore, as Langstaff J stated in the case of *Royal Bank of Scotland v Ashton* (2010) UKEAT/0542/09, at paragraph 14:-

> "An Employment Tribunal – in order to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination – must be satisfied that there is provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled".
>
> The claimant has not identified the nature and extent of any substantial disadvantage suffered. The Policy applied to disabled and non-disabled employees and was triggered at the same points for either category. No action was taken against the claimant in respect of the 27 day absence, and the written warning issued on 8 November 2012, was an indicator to the claimant that absence was an issue and a cause for concern.
>
> The Employment Appeal Tribunal in the case of **Project Management Institute v Latif (227) IRLR 579**, (already referred to in terms of the burden of proof), held that there must at least be facts before the tribunal from which, absent any innocent explanation, it could be inferred that a

particular adjustment could have been made, otherwise the respondent would be placed in the impossible position of having to prove the negative proposition that there was no reasonable adjustment that could have been made. The claimant failed to lead evidence or challenge the respondent's witnesses on the vast majority of the list of reasonable adjustments suggested in his written submissions. However, while the tribunal is satisfied that the claimant has proved that a duty to make reasonable adjustments had arisen, he has not proved facts from which it could be reasonably inferred, absent explanation, that the duty has been breached, and, therefore, the burden of proof does not shift to the respondent so as to require it to prove that it complied with the duty. In any event the respondent was entitled to apply the Policy to the claimant in the manner in which it did. The claimant was not placed at a substantial disadvantage by comparison to a fellow employee who was absent for the same length of time but who was not disabled.

Direct Age Discrimination

(8) In relation to the direct age discrimination claim, the tribunal is satisfied that the claimant has not proved facts from which the tribunal could conclude on the absence of inadequate explanation that discrimination has occurred on the ground of age. The tribunal, (as in the direct disability discrimination case) has to determine the reason why the claimant was treated as he was. It is not necessary in every case for a tribunal to go through the two stage procedure. In some cases it may be appropriate for the tribunal to simply focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent explanation, would have been capable of mounting to a prima facia case under stage 1 of the *Igen* test. The tribunal is satisfied that the reason for the alleged treatment was not on the ground of age but due to the operation and application of the Policy following the claimant's absence from work. The Policy applied without discrimination to disabled and non-disabled employees alike.

Indirect Age Discrimination

(9) Again, it was common case that the provision, criterion or practice was the Policy. There was no identification of an age group by the claimant and the findings of fact at paragraph 5(xvii) shows that the available statistical evidence does not favour the claimant's case. On this ground alone, he cannot prove that the Policy put or would put persons of the same age group as himself at a particular disadvantage compared with other persons and which put the claimant at that disadvantage. His claim of indirect age discrimination must also fail.

(10) As reflected in the findings of fact, the tribunal has considerable sympathy with the claimant in the circumstances in which he found himself, but is satisfied that, although he meets the definition of disability for the purposes of the DDA, his claims of unlawful disability and age discrimination must be dismissed.

Chairman:

Date and place of hearing: 3-7 June 2013, Belfast.

Date decision recorded in register and issued to parties:

(1)

CLAIMANTS SUBMISSIONS.

AGE DISCRIMINATION. INEFFICIENCY.

1) THE PROVISIONS OF THE ABSENCE POLICY WERE NOT CORRECTLY APPLIED. THE RESPONDENT'S WITNESS HAS ADMITTED THAT AT LEAST THREE AREAS LISTED UNDER SECTION 4.3 OF THE POLICY WERE NOT EXAMINED. I.E. CIRCUMSTANCES FALLING WITHIN THE RELEVANT LEGISLATION, INCLUDING DISABILITY LEGISLATION, RELEVANT INFORMATION IN RETURN TO WORK RECORDS, PRIOR SICKNESS RECORDS. SHE SAID A WARNING WOULD ISSUE ANYHOW.

2) THE MEDICAL EVIDENCE PROVIDED CONFIRMS THAT I HAVE AN AGE-RELATED DEGENERATIVE CONDITION. IT IS CONSISTENT WITH AGEING AND ITS LIKELY TO BE PROGRESSIVE.

(1)

CEARANS NOTES (2)

DISABILITY DISCRIMINATION.

DDA 1995 STATES:

1. SUBJECT TO THE PROVISIONS OF SCHEDULE 1, A PERSON HAS A DISABILITY FOR THE PURPOSES OF THIS ACT IF HE HAS A PHYSICAL OR MENTAL IMPAIRMENT WHICH HAS A SUBSTANTIAL AND LONG TERM ADVERSE EFFECT ON HIS ABILITY TO CARRY OUT NORMAL DAY TO DAY ACTIVITIES.

SCHEDULE 1 DA 95 2. (1) THE EFFECT OF AN IMPAIRMENT IS A LONG-TERM EFFECT IF (a) IT HAS LASTED FOR 12 MONTHS, THE PERIOD FOR WHICH IT IS ~~CLAIMED TO~~ LASTS IS LIKELY TO BE AT LEAST 12 MONTHS, OR (c) IT IS LIKELY TO LAST FOR THE ~~WHOLE~~ REST OF THE LIFE OF THE PERSON AFFECTED.

THE MEDICAL REPORT FROM DR B CONFIRMS THAT MY DISABILITY WHICH HAS GONE ON SINCE APRIL 2012 IS LIKELY TO BE PERMANENT. TO DATE THIS HAS CONTINUED FOR 14 MONTHS. BOTH THE GMS AND DR. B CONFIRM THAT THE CONDITION WILL BE RECURRING.

3 SUPPLEMENT DDA 1995. 4(1) THIS SCHEDULE OUTLINES THAT AN IMPAIRMENT IS TAKEN TO AFFECT THE ABILITY OF THE PERSON CONCERNED TO CARRY OUT NORMAL DAY TO DAY ACTIVITIES if it affects one of the following:

(a) MOBILITY
(b) MANUAL DEXTERITY
(c) PHYSICAL CO-ORDINATION
(d) CONTINENCE
(e) ABILITY TO LIFT, CARRY OR OTHERWISE MOVE EVERYDAY OBJECTS.
(f) SPEECH HEARING OR EYESIGHT.
(g) MEMORY OR ABILITY TO CONCENTRATE, LEARN OR UNDERSTAND.
(h) PERCEPTION OF THE RISK OF PHYSICAL DANGER.

(2)

PROGRESSIVE CONDITIONS

SCHEDULE 1 DDA 1995. 8(1)

(a) A PERSON HAS A PROGRESSIVE CONDITION

(b) AS A RESULT OF THAT CONDITION, HE HAS AN IMPAIRMENT WHICH HAS, OR HAD, AN EFFECT ON HIS ABILITY TO CARRY OUT NORMAL DAY TO DAY ACTIVITIES, but

(c) THAT EFFECT IS NOT (OR WAS NOT) A SUBSTANTIAL ADVERSE EFFECT.

HE SHALL BE TAKEN TO HAVE AN IMPAIRMENT WHICH HAS SUCH A SUBSTANTIAL ADVERSE EFFECT IF THE CONDITION ~~IF~~ IS LIKELY TO RESULT IN HIS HAVING SUCH AN IMPAIRMENT.

DDA COVERS PEOPLE FROM THE MOMENT THERE IS A NOTICEABLE EFFECT ON NORMAL DAY TO DAY ACTIVITIES, HOWEVER SLIGHT NOT WHEN THERE IS A SUBSTANTIAL EFFECT. CONDITIONS WHERE THE EFFECT CAN SOMETIMES BE LESS THAN SUBSTANTIAL ARE TREATED AS CONTINUING TO HAVE A SUBSTANTIAL ~~EFFECT~~ ADVERSE EFFECT SO LONG AS THE EFFECT IS LIKELY TO RECUR (DRB + ORS)

CITE. SCA PACKAGING LTD V BOYLE 2009. (CLEARING NOTES).

FAILURE TO MAKE A REASONABLE ADJUSTMENT

TOLAND DOES NOT EXPRESSLY ~~SAY~~ STATE THAT SUFF DOES NOT SEEK ME AS FALLING UNDER DDA. THIS SHOULD HAVE BEEN DETERMINED — FEATHERBED DUTY — BEFORE THE WARNING WAS ISSUED, AS IT COULD POTENTIALLY HAVE AN IMPACT ON THE OUTCOME. REASONABLE ADJUSTMENT — EXPLICIT MENTION OF DDA UNDER PARA 6.3 OF THE POLICY.

Proposed

Insufficiency

Reasonable Adjustments to Sickness Absence Policy

1). Explicit mention of the DDA under the heading of 'Review Points'. at Para 4.3.

2) Explicit mention of Age Related Discrimination + other forms in this section.

3) Seek additional ~~additional~~ medical and legal advice in potential discrimination cases before issuing warnings.

4) Review all information available concerning absence to identify long term conditions in order that reasonable adjustments may be made where appropriate. i.e. RTW interviews medical reports etc.

5) Powers of the issuing of written warnings should be delegated to line Management. DHR should only become involved where disputes arise.

6) RTW interviews should be conducted ASAP after absence ends and DHR should ensure that these are completed.

7) 4.9 – Both information from the GP and OHS should be sought in this circumstance.

8) 4.10 not complied with by (Bl[illegible])

9) Warning should be stated for termination of [illegible].

10) CLEAR TIME LIMITS FOR PROCESS TO BE CONSIDERED.

[illegible] JUNE — WARNING NOVEMBER — 7 WEEKS AFTER REVIEW MEETING. –

(4)

Concluding Remarks.

FLAWS IN RATIONALE FOR ISSUE OF WRITTEN WARNING
PROCESS WAS NOT CARRIED OUT IN LINE WITH POLICY.

DDA WAS NOT DETERMINED. GOOD ABSENCE RECORD NOT CONSIDERED. NO CREDIT. ROW I NOT CONSIDERED. MISSING ROW I

What are mitigating? S denied? Before Trib. Evidence.

EVIDENCE OF MANNER APPLICATION OF POLICY IN DRC — PERM SEC'S LETTER — MENTIONED BY MS [illegible] WHEN QUESTIONED ABOUT ABSENCE POLICY IN DRC. TALKS OF CULTURE OF ABSENCE.)

SUGGESTION OF ABUSE — INSULTING AND DEMEANING. DISGRACEFUL

Application of the Policy is flawed in DRC.
Suggestion of abuse.

All AREAS ~~ANYTHING~~ WHICH COULD HAVE POTENTIALLY HAD AN IMPACT ON THE OUTCOME SHOULD HAVE BEEN CONSIDERED BEFORE THE WARNING WAS ISSUED. IT SEEMS THAT THE WARNING WAS ISSUED WITHOUT ALL FACTORS BEING CONSIDERED.

CK DISPROPORTIONATE RESPONSE — DDA SHOULD HAVE BEEN DETERMINED (DISCRIMINATORY ACT) DUE TO THE POTENTIAL IMPACT ON THE OUTCOME. I AM PLACED IN A POSITION WHERE I COULD ULTIMATELY LOSE MY JOB — AND THE POLICY (ISAP) PROCEDURES IN 4.3 NOT CARRIED OUT. DECISION BASED ON INCOMPLETE INFORMATION. 31 YEARS WITHOUT A STAIN. (PRE-DETERMINED OUTCOME) LESSER PENALTY FOR 1st OFFENCE. DISCIPLINARY ACTION — NOTHING WRONG.

Case Ref No 2473/12 II

IN THE INDUSTRIAL TRIBUNAL FOR NORTHERN IRELAND

BETWEEN

NOEL STEWART

Claimant

-and-

THE DEPARTMENT OF EMPLOYMENT AND LEARNING

Respondent

SUMMARY OF RESPONDENT'S SUBMISSIONS

AGE DISCRIMINATION

1. There is no evidence of direct age discrimination **[Reg 3(a) of the Employment Equality (Age) Regulations (Northern Ireland) 2006]**. The Respondent did not treat the Claimant less favourably on the ground of his age. He was given a warning because of his absence, not his age.

2. The Claimant has not made out any claim of indirect age discrimination. **[Reg 3(b)]**. The provision, criterion or practice is the Respondent's Managing Attendance Policy. There is no evidence that this policy places people in the Claimant's age group at a particular disadvantage when compared with other persons in that the Claimant has not demonstrated that people of his age group are more likely to be absent.

3. Even if they were more likely to be absent, the policy would be a proportionate means of achieving a legitmate aim, namely securing the attendance of employees at work.

Harvey

DISABILITY DISCRIMINATION

Definition

4. The Claimant has not satisfied the statutory definition of disability for the following reasons;

   a. It is accepted that the Claimant has an impairment (neuralgia). In his witness statement he describes the symptoms;

      i. Numbness in the right thumb and forefinger

      ii. Weakness in the right arm and hand.

      iii. Diminished grip in the right hand.

   b. The following capacities;

      i. his ability to lift and carry

      ii. his manual dexterity

   c. It is accepted that the impairments have adverse effects and that they are long term. However, the Claimant has not demonstrated that there is a substantial adverse effect on his ability to carry out day to day activities.

   d. The only evidence from the Claimant about day to day activities is as follows;

      i. He has sustained minor burns on his right hand.

      ii. Difficulty lifting items with his right hand.

      iii. He was unable to drive for some months. However, this improved by July 2012. He confirmed that he was able to work and carry out a full range of duties.

   e. There is insufficient evidence of the impairment having a substantial long term effect on his ability to carry out day to day activities.

f. There is no medical evidence as to the "deduced" effects of the impairment (ie without the benefit of medication. See decision of Court of Appeal in **Kapadia v Lambeth London BC** [2000] IRLR699).

Disability Related Discrimination

5. If, which is denied, the Claimant does satisfy the definition there is no evidence that he was subjected disability related discrimination.

6. The correct comparator for a claim of disability related discrimination is a person whose circumstances were the same or not materially different to those of the Claimant but who was not disabled. Following the decision of the House of Lords in **Malcolm v Lewisham LBC [2008] IRLR 700** that comparator is a person who was off work for the same amount of time as the Claimant but who was not disabled. He or she would also have received a written warning. The Claimant was not therefore less favourably treated.

Reasonable Adjustments

7. There is no free standing duty to consult. An employer may have made adjustments for all the wrong reasons but still have satisfied the statutory duty (see decision of the EAT in **Tarbuck v Sainsburys Supermarket [2006] IRLR 664)** .

8. Thus, it does not matter that the Respondent did not conclusively deem the Claimant to have met the statutory definition. In terms of fulfilling the duty, what matters is what it did, not what it may have thought.

9. The test for reasonable adjustments is as follows; These are;

   a. Where a provision, criterion or practice ("PCP")

   b. places the claimant at a substantial disadvantage in comparison with non-disabled comparators

c. the employer must take such steps as are reasonable to prevent the PCP from having that effect.

10. In **Environment Agency v Rowan** the EAT held that the Tribunal in a Reasonable Adjustments case ought to precisely identify the following;

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

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

    c. the nature and extent of the substantial disadvantage suffered by the Claimant.

11. The PCP is the Respondent's sick absence policy.

12. The issue of adjustments in the context of sickness absence was most recently examined by Langstaff J in **Royal Bank of Scotland v Ashton [2010] UKEAT/0542/09.** As in Rowan, the EAT stated that what was required was *"an intense focus on the words of the statute."*

13. At paragraphs 14 and 15 he states;

> *A close focus upon the wording of 3A(2), 4A and 18B shows that an Employment Tribunal – in order to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination – must be satisfied that there is a provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled.*
>
> *The duty, given that disadvantage and the fact that it is substantial are both identified, is to take such steps as are reasonable to prevent the provision, criterion or practice (which will, of course, have been identified for this purpose) having the proscribed effect – that is the effect of creating that disadvantage when compared to those who are not disabled. It is not, therefore, a section which obliges an employer to take reasonable steps to assist a disabled person or to help the disabled person overcome the effects of their disability, except insofar as the terms to which we have referred permit it*

14. There is no evidence that the Claimant was placed at a disadvantage compared to non-disabled people or that, even if he was, it was substantial. (This point is analysed at paragraphs 41-46 of *Ashton.*)

15. The proper comparator is a fellow employee who was absent for the same length of time but who was not disabled. (eg. someone who was off having broken a limb) That person would have been treated in the same way as the claimant. The sick absence policy applies to all employees, disabled and non-disabled. In Ashton Langstaff J says (at paragraph 46);

> *"Mr Morton would argue that the comparison here should have been with persons who were not sick by reason of disability. Those who were sick by reason of disability would necessarily be more likely to subject to the trigger points and more likely, therefore, to be exposed to a disciplinary hearing and more likely, therefore, to be subject to a loss of sick pay in consequence. We have little hesitation in thinking that in particular bearing in mind that any comparison here should be a comparison of those who but for the disability are in like circumstances (see Malcolm) that Mr Linden QC's submission is correct."*

16. It is of note that the period of absence was 76 working days – well in excess of the short term trigger point of 10 working days in 12 months or 20 working days in 12 months for long term sick absence.

17. The claimant has not therefore been placed at a substantial disadvantage by comparison.

18. Whilst the claimant was absent because of his disability, there is no evidence that he was in general more likely to be absent by reason of the disability than other employees. Indeed, since his return to work on 28 June 2012 he has not been absent at all.

Reasonableness of the Adjustment

19. Even if the Claimant was placed at a substantial disadvantage it would not be reasonable to expect the Respondent to simply ignore absence of 71

days, a total almost 4 times greater than the review point. It had already decided to take no further action over the first absence of 27 days.

20. The Respondent was entitled to take into account other factors such as the sustainability of the absence.

21. A written warning is not a disciplinary sanction. It is an indicator to the employee that absence is an issue and a cause for concern. It does not mean that if further absences are taken he or she would be dismissed. It is only one stage in the inefficiency process.

22. An adjustment by way of giving no warning at all would be unreasonable. The Respondent was entitled to warn the Claimant in those circumstances that absence was an issue.

AIDAN SANDS BL

The Bar Library
5 June 2013

FROM THE PERMANENT SECRETARY
Alan Shannon

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From: Alan Shannon

To: All DEL Staff

Date: 27 July 2012

Departmental Performance

As you know each year the Department publishes a business plan setting out in some detail the objectives and targets which the Minister has set us. Our performance against these targets is continuously monitored by each Division, by SMT, by the Departmental Board and by the Minister.

Last year, ending 31 March 2012, we tackled a wide-ranging and challenging programme of work associated with which were 46 key targets. We successfully achieved 37 of these targets with seven likely to be achieved with some delay. Details are available on both the intranet and internet. This is an excellent outcome for the Department, our stakeholders and our clients. So well done, and thank you all for your contributions.

Only two targets were not achieved during the year. The first of these concerned the merger of Stranmillis University College with Queen's University Belfast. Although the work was taken forward there was insufficient political support to enable the target to be achieved before the end of the year.

The second target aimed to reduce the days lost per member of staff through sickness to 9.5 days by March 2012. This target was intended to contribute to an NICS wide target of 10.0 days set by the Minister of Finance and Personnel. It was not achieved; the outturn was a disappointing 11.4 days.