THE INDUSTRIAL TRIBUNALS

CASE REF: 1268/13

CLAIMANT: **Anthony McErlean**

RESPONDENT: **Northern Health & Social Care Trust**

DECISION

The unanimous decision of the tribunal is that the claimant was unfairly dismissed by the respondent; that the claimant was disabled for the purposes of the Disability Discrimination Act 1995 and that the respondent failed in its duty to put in place reasonable adjustments.

The tribunal orders the reinstatement of the claimant on the terms set out in this decision and orders that the respondent should pay the claimant £12,000.00 as injury to feelings compensation.

Constitution of Tribunal:

Vice President: **Mr N Kelly**

Members: **Mr P Killen**
Mr A White

Appearances:

The claimant was represented by Mr G Grainger, Barrister-at-Law, instructed by Worthingtons, Solicitors.

The respondent was represented by Ms S Bradley, Barrister-at-Law, instructed by Chief Legal Adviser of the Regional Business Services Organisation.

Background

1. The claimant had been a community mental health nurse employed by the respondent providing services in the community, including services delivered in patients' homes, to those suffering from mental ill-health.

2. The claimant was detained in a PSNI Station on 14 April 2012 following a complaint from his wife that he had assaulted her and had threatened her with a legally held

firearm. The claimant's wife did not make a formal written complaint and did not make a formal written statement. The claimant was released without charge after a brief period. There was no prosecution.

3. The incident was investigated by the respondent. Following disciplinary proceedings, which were upheld on appeal, the claimant was dismissed summarily for misconduct on 16 April 2013.

4. The claimant lodged a claim of unfair dismissal on 3 July 2013. At that stage he was not legally represented.

5. At a Case Management Discussion on 21 August 2013, the claimant sought to amend that claim to include an additional claim of disability discrimination contrary to the Disability Discrimination Act 1995. He alleged that he had been, at all relevant times, disabled for the purposes of that Act. He alleged that he had had a depressive illness and had suffered a psychotic episode at the time of the incident in April 2012. At that stage, and indeed up to the submissions hearing on 2 June 2014, the respondent argued that this had not been the case. The claimant further alleged that the respondent had failed to make reasonable adjustments in relation to that disability as required by the 1995 Act. The claim was subsequently amended, by consent, to include a claim that the respondent had failed to make reasonable adjustments contrary to the 1995 Act. Disability was not accepted by the respondent and it argued, in any event, that it had not been in breach of any statutory duty.

6. The issues for determination were identified at a further Case Management Discussion on 24 October 2013. Basically, they were:-

> *"(i) Was the claimant disabled for the purposes of the 1995 Act during all or any of the relevant times?*
>
> *(ii) Did the respondent fail to make reasonable adjustments as required by the 1995 Act?*
>
> *(iii) Was the claimant unfairly dismissed for the purposes of the Employment Rights (Northern Ireland) Order 1996?*
>
> *(iv) If appropriate, what was the remedy to be afforded to the claimant?"*

7. In his claim form, the claimant sought an Order for Re-engagement, ie that he should be re-employed and receive compensation. It was however made plain by the claimant, in his additional oral evidence-in-chief, given at the start of the hearing, that he was seeking a return to his old job; ie a reinstatement order. The respondent was offered the chance to call additional evidence in this respect at the submissions hearing on 2 June 2014 or, if it wished on 6 June 2014 when the panel would be available. The respondent did not avail of this opportunity.

8. The respondent ultimately conceded unfair dismissal but argued that the claimant should not be reinstated or re-engaged; it continued to defend the disability discrimination claim.

Relevant law

Unfair dismissal

9. Tribunals must approach with particular care any claim that includes not just a claim of unfair dismissal but, in addition a claim of unlawful discrimination. Further problems can occur where there may be an issue of contributory conduct.

In ***London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220*** the Court of Appeal stated at Paragraph 46:-

> *"Mr Marsh spoke of his experience that employment tribunals often structure their reasons by setting out all their findings of fact in one place and then drawing on the findings at the later stage of applying the law to the relevant facts. It is not the function of appeal courts to tell trial tribunals and courts how to write their judgments. As a general rule, however, it might be better practice in an unfair dismissal case for an employment tribunal to keep its findings on that particular issue separate from its findings of disputed facts that are only relevant to other issues, such as contributory fault, constructive dismissal and increasingly, discrimination and victimisation claims. Of course some facts would be relevant to more than one issue, but the legal elements of the different issues, the role of the employment tribunal and the relevant facts are not necessarily all the same. Separate and sequential findings of fact on discrete issues may help to avoid errors of law, such as substitution, even if it may lead to some duplication."*

The difficulty is of course lessened when unfair dismissal is conceded but it is important that the tribunal approaches the separate complaints of unfair dismissal and unlawful discrimination carefully.

10. The proper approach for an industrial tribunal to take when considering the fairness of a misconduct dismissal is well settled and was recently considered by the Court of Appeal in ***Rogan v South Eastern Health & Social Care Trust [2009] NICA 47***.

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

> *"130*
>
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or if more than one, the principal reason) for the dismissal and*
>
> *(b) that is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) a reason falls within this paragraph if it –*

(b) relates to the conduct of the employee,

(4) where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case."

12. The Court of Appeal in ***Rogan*** approved the earlier decision of Court in ***Dobbin v Citybus Ltd [2008] NICA 42*** where the Court held:-

*"(49) The correct approach to [equivalent GB legislation] was settled in two principal cases – **British Home Stores v Burchell [1980] ICR 303** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17** and explained and refined, principally in the judgements of Mummery LJ, in two further cases **Foley v Post Office** and **HSBC Bank Plc (formerly Midland Bank) –v- Madden reported at [2000] ICR 1283** (two appeals heard together) and **J Sainsbury v Hitt [2003] ICR111**.*

*(50) In **Iceland Frozen Foods**, Browne-Wilkinson J offered the following guidance:-*

"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by [equivalent GB legislation] is as follows:-

(1) the starting point should always be the words of [equivalent GB legislation] themselves;

(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) *in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another;*

(5) *the function of an industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair."*

(51) *To that may be added the remarks of Arnold J in* ***British Home Stores*** *where in the context of a misconduct case he stated:-*

> *"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, it must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now said more normally in a criminal context, or, to use the more old fashioned term such as to put the matter beyond reasonable doubt. The test, and the test all the way through is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."*

13. In *Harvey on Industrial Relations and Employment Law (Division 1 – 195)* it provides that:-

> *"In a suitable case, the employer may rely upon breakdown in trust and confidence as the substantial reason justifying the dismissal."*

Reasonable adjustments duty

14. Section 4A of the Act provides:-

> *"(1) Where –*
>
> *(a) any provision, criterion or practice applied by or on behalf of an employer …*
>
> *places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.*

15. Section 17A(1) of the Act provides that where a claimant proves facts from which the tribunal could, apart from that sub-section, conclude in the absence of an adequate explanation that the respondent has acted in a way which is unlawful under this Part, the tribunal shall uphold the complaint unless the respondent proves that he did not so act. The EAT in ***Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664*** suggested that in a reasonable adjustments case, the burden of proof will shift to the respondent employer if an adjustment could reasonably have been made and it would then be up to the employer to show why it had not been made.

16. The Employment Appeal Tribunal in the case of ***Project Management Institute v Latif [2007] IRLR 579***, when dealing with a reasonable adjustment case concluded that:-

> *"The paragraph in the DRC's Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably have been inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing substantial disadvantage envisages the duty but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. That is not to say that in every case the claimant would have to provide the detailed adjustment that would need to be made before the burden would shift. It would, however, be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could be reasonably be achieved or not."*

17. The Code of Practice issued by the Equality Commission provides at Paragraph 5.8 that the duty to make reasonable adjustment applies to contractual arrangements

and working conditions. Paragraph 5.11 states that substantial disadvantages are those which are not minor or trivial.

Burden of proof

18. The statutory changes, introduced to give effect to EC Council Directive 97/80 and Council Directive 2000/78/AC, were analysed by the GB Court of Appeal in the case of ***Igen v Wong [2005] EWCA 142*** and guidance for tribunals was set out in a series of 13 numbered paragraphs in that decision. The Northern Ireland Court of Appeal in ***McDonagh and Others v Royal Hotel [2007] NICA 3***, confirmed that that guidance can be applied to all forms of discrimination and stated:-

> *"For the purposes of the present case the first question that the judge should have articulated was, 'have the plaintiffs proved on the balance of probabilities, facts from which I could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against them?'"*

Those guidelines were revisited and affirmed by the I Court of Appeal in the case of ***Madarassy v Nomura International Plc [2007] EWCA CIB 33*** on 26 January 2007. At Paragraph 12 in that decision, the court stated:-

> *"I do not underestimate the significance of the burden of proof in discrimination cases. There is probably no other area of civil law in which the burden of proof plays a larger part than in discrimination cases. Arguments on the burden of proof surface in almost every case. The factual content of the cases does not simply involve testing the credibility of witnesses and contested issues of fact. Most cases turn on the accumulation of multiple findings of primary fact, on which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts. It is vital that, as far as possible, the law on the burden of proof applied by the fact-finding bodies is clear and certain. The guidance in **Igen v Wong** meets these criteria. It does not need to be amended to make it work better."*

The court went on to say at Paragraph 54 that:-

> *"I am unable to agree with Mr Allen's contention that the burden of proof shifts to Nomura simply on Ms Madarassy establishing the facts of the difference in status and the difference in the treatment of her."*

At Paragraph 56, the court continued:-

> *"The court in **Igen v Wong** expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which the tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

At Paragraph 57, the court continued:-

> *"'Could conclude' in Section 63a(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the claimant in support of the allegation of sex discrimination such as evidence of the difference of status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint."*

Was the claimant disabled at the relevant times?

19. It is clear that the question of whether or not the claimant was disabled for the purposes of the 1995 Act has to be determined by reference to the dates of the alleged acts of discrimination – ***Cruickshank v VAW Motorcast Ltd [2002] IRLR 24***. Section 1(1) of the 1995 Act 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 day-to-day activities."*

The relevant day-to-day activities are identified in the Schedule. The relevant one for the purposes of the present case is:-

> *"Memory or ability to learn, concentrate or to understand and the perception of the risk of physical danger."*

Definition of disability

20. A person has a disability for the purposes of the 1995 Act if he has a physical or mental impairment which has a substantial (more than trivial) and long-term adverse effect on normal day-to-day activities. Those activities are defined. The relevant ones appear to be:-

> *"(i) memory or ability to concentrate, learn or understand;*
>
> *(ii) perception of the risk of physical danger."*

21. Under Schedule 1 to the 1995 Act, an impairment is regarded as long-term if it has lasted for 12 months or is likely to last for 12 months. If the substantial adverse effect has ceased but is likely to recur, ie if it '*could well happen*', that is also taken into account [***SCA Packaging v Boyle [2009] UKHL 37***].

Where an impairment would have a substantial adverse effect but for '*measures*' taken to treat it, it shall be treated as having that effect.

22. The *Disability Code of Practice* is something which the tribunal is obliged to consider. It was issued in 2005 and updates were added in April 2013.

Appendix B deals with the definition of disability. Applying the updates, it states *at Page 228*:-

"The term 'mental impairment' is intended to cover a wide range of impairments relating to mental functioning, including what is often known as learning disabilities."

The previous requirement that a mental illness '*must be a clinically well-recognised illness*' has been deleted. That deletion follows the deletion of Paragraph 1(1) of Schedule 1 to the 1995 Act by Article 18 of the Disability Discrimination (Northern Ireland) Order 2006.

It is therefore no longer the position that a mental impairment is restricted to those cases where there is a clinically well-recognised illness.

23. In ***Morgan v Staffordshire University [2002] IRLR 190***, the EAT gave guidance on the definition of '*disability*' for the purposes of the Act, where an employee was claiming a mental impairment. This decision clearly preceded the 2006 amendments to the Act, which removed the requirement for a clinically well-recognised illness. Much of what the EAT said, in reference to the then statutory position, and to World Health Organisation classifications, can be disregarded. However, the EAT stated:-

"Advisers to parties claiming mental impairment must bear in mind the onus on a claimant under the DDA is on him to prove that impairment on the conventional balance of probabilities."

24. In ***Walker v Sita Information Network Computing [EAT/0099/12]*** the tribunal had held that a claimant had not been '*disabled*' because no specified mental or physical cause could be identified for any impairment. The EAT overturned this decision and stated:-

"He [the Employment Judge] should have had regard to the effects of the impairments, not their cause (though the absence of an obvious cause might have evidential significance in an appropriate case if the genuineness of the symptoms was put in issue); should have considered the guidance in the Code; and wrongly relied on authority which dated from the time when a recognised mental illness had to be shown before a mental impairment could be regarded as a disability, which has not been the case since 2005 [2006 in Northern Ireland]."

25. In ***J v DLA Piper UK LLP [2010] IRLR 936***, the EAT overturned a tribunal decision that an employee had not suffered from a relevant mental impairment amounting to a disability. The tribunal had referred to the ***Morgan*** (above) and had relied on the proposition that '*vague references to stress, anxiety or depression are unlikely to be sufficient*'.

The head note states:-

"(1) There were sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions. In many or most such cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If it finds that it has been, it will in many

or most cases follow as a matter of commonsense inference that the claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues.

However, it does not follow that the impairment issue can simply be ignored. The distinction between impairment and effect is built into the structure of the DDA. Both the EAT and the Court of Appeal have repeatedly enjoined on tribunals the importance of following a systematic analysis based closely on the statutory words, and when this injunction is not followed the result is all too often confusion and error.

Accordingly, the correct approach is as follows:-

(i) It remains good practice for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it).

(ii) However, in reaching those conclusions, the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where they may be a dispute about the existence of an impairment it will make sense to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.

(iii) Those observations do not conflict with the terms of the guidance and existing case law. In particular, ***Rippon College*** and ***McNicol*** *have not been undermined by the repeal of Paragraph 1(1) of Schedule 1 to the DDA, and they remain authoritative save insofar as they specifically refer to the repealed provisions.*

(2) The distinction between the mental illness known as 'clinical depression' and depression as a reaction to adverse circumstances is routinely made by clinicians and should in principle be recognised for the purposes of the DDA. It may be a difficult distinction to apply in a particular case, and the difficulty can be exacerbated by the looseness with which some medical professionals, and mostly people, use such terms as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'.

Those difficulties would not often cause a real problem in the context of a claim under the DDA. If a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was suffering

'clinical depression' rather than simply a reaction to adverse circumstances. It is a commonsense observation that such reactions are not normally long-lived.

The distinction does not involve the restoration of the requirement previously imposed by Paragraph 1(1) of Schedule 1 that the claimant prove that he or she is suffering from a 'clinically well-recognised illness'. The impact of the repeal of Paragraph 1(1) is in a case where it is evident from a claimant's symptoms that he or she is suffering from a mental impairment of some kind but where the nature of the impairment is hard to identify or classify.

In that regard, the EAT's decision in ***Morgan*** *was concerned with the law prior to the repeal of Paragraph 1(1) of Schedule 1, and much of the discussion in it is concerned with how the existence of a clinically well-recognised illness can be established. It cannot be relied on as a guide to the law as it stands after the repeal of Paragraph 1(1). The observation of the EAT in that case that 'loose terms' such as 'anxiety', 'stress' or 'depression' would not suffice should be understood in its context; as directed at the need to prove a clinically well-recognised illness. However, a similar, though more general, point is valid in the context of the DDA in its current form. Both laymen and some health professionals too often use loosely such terms, and in considering both the adverse effect issue and the impairment issue tribunals may have to look behind labels.*

On the question of recurrence, it cannot be assumed that depression is likely to recur and is therefore long-term. That can be illustrated with two extreme examples. Firstly, there is the case of a woman who suffers a depressive illness in her early 20s, for over a year, which has a serious impact on her ability to carry out normal day-to-day activities, and then recovers and remains symptom-free for 30 years, at which point she suffers a second depressive illness. Statistically, the fact of the earlier illness means that she is more likely than a person without such a history to suffer a further episode of depression, but that does not mean that she can be said during the intervening 30 years to be suffering from a mental impairment. Rather, the model is of someone who has suffered two distinct illnesses or impairments. Secondly, there is the example of a woman who over a five-year period suffers several short episodes of depression which have a substantial adverse impact on her ability to carry out normal day-to-day activities but who between those episodes if symptom-free and does not require treatment. In such a case, it may be appropriate, though the question would require medical evidence, to regard her as suffering from a mental impairment throughout the period in question even between the episodes; the model would be not of a number of discrete illnesses but of a single condition producing recurrent symptomatic episodes.

In the former case, the issue of whether the second illness amounted to a disability would fall to be answered simply by reference to the degree and duration of the adverse effects of that illness. But in the

latter, the woman could, if the medical evidence supported the diagnosis of a condition producing recurrent symptomatic episodes, properly claim to be disabled through the period; even if each individual episode were too short for its adverse effects to be regarded as 'long-term'. She should invoke Paragraph 2(2) of Schedule 1 (provided that she could show that the effects were 'likely' to recur).

In the present case, the facts established beyond question that between mid-2005 and mid-2006 the claimant suffered a mental impairment and that for part of that period at least that impairment substantially adversely affected her ability to carry out normal day-to-day activities. There was nothing to suggest that it was not a true 'clinical' depression, as opposed to simply a reaction to adverse circumstances. The tribunal's finding to the contrary was perverse. That had an impact on its finding that the claimant did not have an impairment in June 2008. If it had accepted that during the earlier period she had suffered a disabling condition, it might have been slower to accept that she was by mid-2008 no longer suffering from that conditions. It was not bound to have reached a different conclusion, but it could not be said with confidence that its error about the earlier period did not affect its thinking as regards the position in June 2008."`

26. That onus of proof which is placed on the claimant is particularly important where the claimant seeks to rely on a presumed adverse effect which would take effect if medical measures were not in operation. In ***Kapadia v London Borough of Lambeth [2000] IRLR 699***, it was stated that:-

> *"It was not enough for a claimant to maintain that he or she would be badly affected if treatment were to stop – proof, preferably of an expert medical nature, is necessary."*

Procedure at hearing

27. The matter was first heard from 28 April 2014 to 2 May 2014. As indicated above, the matter had previously been case-managed. Directions had been given for the exchange of witness statements between the parties. The parties had been advised that witness statements were to comprise a complete statement of the evidence that each witness intended to give in respect of both liability and remedy. The intention was that each witness would be sworn or affirmed, would adopt their exchanged witness statement as their evidence-in-chief and would then move immediately into cross-examination and re-examination. In the event, the claimant had not covered reinstatement and remedy in his witness statement and, with the consent of the respondent, he was allowed to introduce additional oral evidence-in-chief to supplement his exchanged witness statement before moving to cross-examination and re-examination.

28. The tribunal heard evidence from the claimant and, on his behalf, from Professor Ciaran Mulholland and from the claimant's wife, Mrs Julie McErlean. On behalf of the respondent, the tribunal heard evidence from Mr Brian McCosh, Mr Trevor Fleming and Mrs Elizabeth Graham. The evidence of Dr Mangan was

accepted and his statement was entered into evidence without the need for cross-examination or re-examination.

29. Following the conclusion of evidence on 2 May 2014, the matter was adjourned until 2 June 2014 at which point submissions were to be made on behalf of both parties. The lengthy delay in concluding the proceedings was in the hope that the parties would find an alternative method of determining of these matters and to allow both parties to consider the responses of witnesses during cross-examination.

    During this period, the respondent conceded in correspondence that the claimant had been unfairly dismissed. The respondent however continued to dispute the claim of disability discrimination and to argue that re-employment was not a practicable remedy.

30. At the submissions hearing on 2 June 2014, the respondent confirmed, in open tribunal, that it had conceded that the claimant had been unfairly dismissed. Both parties handed in written submissions [which are attached hereto]. They were supplemented by oral submissions. After the submissions, the panel met in the afternoon of 2 June 2014 to discuss those submissions and the evidence. It met again on 6 June 2014 to continue that discussion and to reach this decision. It was stressed by the tribunal on 2 June 2014 that it was prepared to hear further evidence from the respondent in relation to remedy either on that day or on 6 June 2014 when the panel would be available. No further evidence was put forward. No application was made for a postponement to allow such evidence to be put forward on an alternative date.

Findings of fact

31. On 10 April 2012, the claimant and his wife were involved in what is commonly described as a domestic incident. He accused her of having an affair and an argument ensued in which he assaulted her. The claimant had a legally held shotgun at that stage. There is a dispute about whether or not the claimant threatened his wife with the legally held shotgun in the course of this domestic incident. On the balance of probabilities, the tribunal concludes that he did so in the course of a psychotic episode.

32. The claimant went to work the next day (Wednesday 11 April 2012). On his return home the domestic incident resumed and the claimant's wife left the marital home for the next few days. On Friday 13 April 2012 the claimant drove to Omagh in what appears to have been an erratic manner. He was eventually stopped by the police between Derry and Coleraine and he agreed to present himself subsequently to Antrim PSNI Station. When he appeared at Antrim PSNI Station he was detained in the Custody Suite and the PSNI put to him allegations of assault and threats to kill which came from a verbal (telephone call) report from the claimant's wife. The tribunal accepts that Mrs McErlean was, at that stage, primarily concerned with securing help for her husband.

33. The police custody records indicate that the claimant's state of mental health was a source of some concern to the PSNI officers who were responsible for his detention in Antrim PSNI Station. He was asked by them whether he had any concerns in relation to his mental health. He stated that he was not sure whether he had mental health problems. A Forensic Medical Officer was called to assess whether

he was fit to be detained further and/or fit to be interviewed. It is clear from the custody records that the Forensic Medical Officer was asked to ensure that the claimant was not left alone at any stage.

34. The Forensic Medical Officer referred this matter to the Crisis Intervention Team operated by the Trust. That team was a specialist team designed to deal with such incidents and with mental health crises generally.

35. At this point the tribunal should turn its attention to a particular page of the custody record (*marked Page 2 in the bundle*) which contained details of the circumstances of arrest. The content of that page, which was supplied by the claimant through his trade union representative to the respondent during the internal disciplinary proceedings, had clearly been altered to remove some of the detailed allegations relating to the alleged assault and to the alleged use of a shotgun to threaten the claimant's wife. The altered version still referred to the alleged threat to kill with a shotgun and to the arrest for assault occasioning actual bodily harm, possession of a firearm in suspicious circumstances and threats to kill. The fuller version of the page was presented to the tribunal by the claimant's representative who had located it in their documents. It is absolutely clear from the fuller version of this page, that the page presented in the course of the disciplinary process had been altered. The only persons who could have altered this document were the claimant or the claimant's trade union representative from the Royal College of Nurses ('RCN'). The tribunal concludes that it is highly improbable that the RCN representative would have altered the document or would have knowingly passed on an altered document. The tribunal therefore concludes that it is much more likely than not that the claimant and the claimant alone was responsible for the alteration of this document.

36. That said, it is difficult to see what rational advantage the claimant sought to gain by altering this document. The salient details remained and the altered document did not present the claimant in a particularly better light than the unaltered document. When this issue was raised by the tribunal in the submissions hearing on 2 June 2014, counsel for the respondent argued that the version disclosed by the claimant in the course of the disciplinary proceedings was notably more favourable to the claimant in that it left out the detail of the assault and in that it left it unclear as to whether the firearm had actually been brandished by the claimant or whether its use had simply been threatened. That submission ignored the fact that the paperwork completed by the crisis intervention team had been available to the respondent. It appears at *Page 16* of the bundle. On that page, the report of the team describes the alleged incident in clear terms as the '*Presenting Problem*' It also made plain that the alleged assault included actual use of the firearm. It stated '*then put the gun away*'. It was also clear that the details of the incident, as there recorded, had been put to the claimant for comment. The tribunal also has to remember that the difference between the documents was not an issue considered by the respondent at the time of the dismissal and therefore the relevance of this had to be considered carefully in relation to the claim of unfair dismissal (since conceded). The tribunal must also remember that an individual facing the loss of his job and the loss of his career might, for whatever reason, lie about something or might, as in this case, alter a document. While this may well have an effect on how the tribunal views the credibility of the claimant, it does not automatically mean that everything else that the claimant says must be untrue. Finally, there is an argument about the claimant's mental health in this case which must also be considered in this context.

The claimant clearly produced the full document to his legal representatives who then, properly, produced it to the tribunal. The claimant appeared to be genuinely puzzled at the difference between the two documents. In any event, the tribunal concludes that the respondent had not been materially misled, and could not have been materially misled, by the altered document.

37. The crisis team summoned by the FMO in this case consisted of two experienced mental health nurses, ie Mrs McIlwee and Mrs McIlvenna. They interviewed the claimant in Antrim PSNI Station, commencing at 3.15 am. Mrs McIlvenna completed a detailed proforma document setting out various matters, including the details of the allegation (which again makes the tribunal wonder what rational benefit could have been anticipated from the limited alteration of one page of the custody record), the claimant's behaviour, the claimant's medical state and history, the claimant's personal history, a detailed record of his mood, sleep patterns, etc and the team's assessment of his mental health.

38. In that particular document the team noted the claimant's erratic behaviour before being arrested. The document included the alleged assault on his wife, the claimant's belief that his wife had been having an affair, the claimant's driving at 100 mph and over kerbs, pavements, etc. It noted the ingestion of up to 12 tins of Red Bull and the ingestion of a considerable quantity of alcohol. They noted the marital difficulties existing at that time and noted difficulties in relation to access to children.

39. Again in the same document the team recorded that the claimant had felt stressed but that no significant clinical or depressive features had been noted or had been overt. They noted that the claimant had had sleep difficulties and felt exhausted. The report noted that he had '*declined all proposed offers of support and services*'. There was '*no diagnosis of mental illness*' and '*no current symptoms of mental illness*'. He was discharged by mutual consent from the police station.

40. Mrs Christine Bateson, the Crisis Response Manager with overall responsibility for the team, arranged for the claimant to be referred to the respondent's Occupational Health Department for examination. The claimant was told to stay off work. A review of the claimant's work files showed a deterioration in record-keeping over the previous six months by the claimant in the course of his work as a community mental health nurse.

41. Mr Trevor Fleming, the Head of Mental Health, Acute and Hospital Services, referred the claimant's case on 18 May 2012 to the Nurses & Midwifery Council for temporary suspension. He stated that the Trust was concerned for public protection issues. Mr Fleming stated in cross-examination that he was concerned that the claimant might work in England. It appears to have been generally known at this time that the claimant was going to England for a few days for a football match. The decision to refer the claimant in these circumstances for a temporary suspension appears to have been premature when there had been no realistic prospect of him seeking or obtaining alternative nursing employment.

42. On 23 May 2012, the claimant declined to attend a pre-arranged meeting on that day because of his mental health. He stated that there had been a discussion with

his GP following an Occupational Health examination. On that day, he was placed on suspension pending a disciplinary investigation.

43. A report from Dr McGread in the respondent's Occupational Health Department (*Page 49 of the bundle*) stated:-

> *"He is attending a consultant colleague for an emotional health problem and I believe he requires medication also. In the meantime however there is an improvement in his condition. Equally, I believe he has had an emotional health problem for some time prior to this. It also appears the cause is multi-factorial based on the information I have available, for example he described the pressures relating to preparing for a professional development course and the frustrations therein, his views about work experience and training in his community mental health team that is as opposed to his previous experience in the forensic mental health team but we will review these again when he attends in the future."*

Dr McGread determined that he was unfit for work at that stage but that with '*further time, treatment and adhering to a structured plan through the day he will continue to improve*'.

Dr McGread stated that he was hoping for a return to work in approximately six weeks.

44. An investigation report issued from Mr Brian McCosh dated 5 December 2012. It recounted the background to the case and the details of the incident on the night of 13/14 April 2012. It noted that the initial assessment by the team did not indicate any significant mental illness and that the claimant had told the team that there was nothing wrong with him at that point. It noted that following the incident the claimant had been contacted by Dr Lynch a Consultant Psychiatrist and that Dr Lynch himself had been contacted by Professor Mulholland, another Consultant Psychiatrist who had expressed the view that the claimant was a risk to himself and was psychotic. It noted also that one of his work colleagues, Mrs Hazel Devine, had expressed concern after the alleged incident about the claimant's mental health. The investigation report went onto deal with the issues of domestic violence and the standard of conduct expected by the NMC Code. It concluded by stating that the claimant '*has stated that he now realises he was mentally unwell for some time leading up to the alleged domestic incident and in the interim period has been receiving psychiatric help which entailed appropriate medication for his condition at that time*'.

45. The medical report attached various appendices. One such was a record of the interview held between Mr McCosh and Mrs McIlvenna who was largely responsible for the report of the crisis team. Mrs McIlvenna had confirmed that the outcome of the team's assessment was that the claimant had been '*extremely stressed and both mentally and physically exhausted. There was no indication of any psychotic or significant mental illness either observed or reported*'.

46. Another appendix to the investigation report was the record of the interview between Mr McCosh and Mrs Bateson. Mrs Bateson was responsible for the crisis intervention team. Mrs Bateson stated:-

"A full psychological assessment had been carried out by Audrey McIlvenna. Audrey reported this to me as Mr McErlean was a staff member. This was reported to me due to the reason and the nature of the referral. Mr McErlean had refused a medical assessment as was advised by the team, nor would he take any advice in relation to his resuming for duty on the following Monday.

I reviewed the assessment with the member of staff. Nothing in the assessment would have warranted an assessment under the Mental Health Order or any other action. He refused any ongoing assessment or medical assessment and was therefore discharged.

I was contacted by Dr Lynch on 17th of April 2012. He had been contacted by Professor Mulholland. Professor Mulholland has expressed concerns about Mr McErlean's mental health, believing he was a risk to himself and also that he was psychotic. He had informed Dr Lynch of his view that Mr McErlean's concerns about his wife were delusional.

Following a lengthy conversation in Willow House, Mr McErlean did not display any behaviours that warranted immediate action. He agreed to consider the appointment with the doctor and contact me following his trip to Manchester. He never contacted me again."

47. Another appendix included the interview record between Mr McCosh and Mrs Hazel Devine. Mrs Devine stated:-

"There was confusion regarding Mr McErlean's activities on 16th of April and I was unsure if his intentions were to go back to work on that day or report in sick and when Suzanne Meenagh (team leader) enquired she was told that. Concerns were raised as to Mr McErlean's mental state and I felt he was possibly psychotic/paranoid. It was also felt at that time that there was more to the domestic incident than what Mr McErlean had stated.

I don't know Mr McErlean that well, but was concerned regarding Mr McErlean's mental state the week starting 16th of April 2012. I, along with Joanne Carley spoke to Mrs Meenagh on 20th of April regarding this as we viewed him being thought-disordered and paranoid.

There had been no previous concerns regarding Mr McErlean's well-being during the previous six months, and there was no concern regarding difficulties at home until I received a text from Mr McErlean on 11th of April asking me to ring him. Because this was out of character for him I was very concerned and phoned him, when he proceeded to tell me his version of a domestic incident. It was later that I realised that the incident was a much more serious matter and I more [sic] was concerned regarding Mr McErlean's mental state so reported to the team leader Mrs Meenagh. At this stage I had no further role."

48. Another appendix to the investigation report was the interview record between Mr McCosh and the claimant. Mr McCosh stated:-

"Mr McErlean agreed that there was no suggestion that he would put his vulnerable adult patients at risk. He stated that his behaviour at the time was not normal due to stress.

Mr McErlean replied that the stress built up over months but he didn't feel that Occupational Health was necessary. The stress had been increasing since last August. The number of referrals, contact with GPs and cover had increased due to sick leave. There had been a slow build up over a period of months and could have lead to the alleged critical incident and having had a severe mental health upset, but was now aware of the relapse indicators."

49. Another appendix to the investigation report contained the Occupational Health reports. One report of 24 April 2012 from a Dr O'Connor stated:-

"Mr McErlean is under the care of his GP. He has also been seen by a specialist mental health service.

It is clear that Mr McErlean was under extreme stress at the start of the week. However he is now well settled and is clear in his thoughts. I believe Mr McErlean is now suffering from a degree of exhaustion and I have suggested that he obtains a sick line for two weeks in order to address this. Following this period he should be able to return to normal duties.

Mr McErlean does not appear to have a disability as defined by current legislation (DDA)."

50. The next Occupational Health report was dated 22 May 2012. In that Dr McGread stated:-

"He denies any previous history of mental ill-health and I also note he has recently been assessed by a number of psychiatric colleagues.

***Intervention** : To date he has been provided with mild tranquillisers on a temporary basis only. However I believe he should consider contacting Carecall and it is also vital he continues on a regular vigorous exercise programme presuming he is physically capable of such.*

***Prognosis and fitness for work** : On the basis of his ongoing level of anxiety and associated symptoms he is unfit for work."*

51. The next Occupational Health report is dated 12 June 2012. In that Dr McGread stated:-

"I have reviewed Mr McErlean's medical and related history in some detail. He is attending a consultant colleague for an emotional health problem and I believe he requires medication also. In the meantime however there is improvement in his condition. Equally so he has had an emotional health problem for some time prior to this.

He is unfit for work at this stage. I believe with further time, treatment and adhering to a structured plan through the day he will continue to improve."

52. The next Occupational Health report was dated 28 August 2012. In that Dr McGread stated:-

> *"I met with this man today and note that his medical condition is progressing satisfactorily. He continues to attend for appropriate treatment and hopefully will be discharged for specialist follow-up in the near future.*
>
> *On return to work which I believe could happen at any stage following his meeting with management I would advise commencing on half his normal hours for two weeks before increasing to three quarters of those for a further two weeks and full-time thereafter."*

53. The final Occupational Health report contained in the investigation report was dated 9 October 2012. In that, from Dr McGread, he states:-

> *"From a medical point of view I believe Mr McErlean is entirely fit to commence work at any stage and return to appropriate duties. There are no restrictions on medical grounds to his hours or duties."*

54. The disciplinary hearing was on 16 April 2013. It was conducted by Mr Trevor McIlroy and Mr Trevor Fleming. The claimant attended and was represented by an RCN representative. Management called three witnesses, ie Mrs McIlvenna, Mrs Bateson and Mrs Devine.

55. Mrs McIlvenna gave evidence in relation to her report compiled in relation to 14 April 2012. In particular, she stated that the claimant had explained that he had removed the gun from the gun cabinet as he wanted to frighten his wife. She stated that he had revealed that he had no intention of harming her but merely wanted to frighten her. That was described by Mrs McIlvenna as a conversation which took place when they '*first talked*'. That does seem to conflict with the report compiled by her later which states:-

> *"Tony adamantly denies threatening to shoot his wife Julie or pointing the gun at her. Denies any threats to shoot friend BT."*

56. Mrs McIlvenna stated that:-

> *"During the timeframe in question, both she and her colleague agreed that he was not suffering from a mental health condition and this was also Dr Kapur's (FMO) conclusion. However, Mrs McIlvenna had offered the follow-up assessment with a consultant in order to get a full clinical insight into any potential condition."*

57. Mrs Bateson stated that:-

> *"Given the significant allegations concerning Mr McErlean's behaviour, Dr Kapur had asked for a mental state assessment. The assessment indicated no overt signs of mental health illness. Mr McErlean did participate in the assessment but Mrs McIlvenna felt a full medical assessment would have given a fuller picture."*

58. Mrs Bateson under questioning from the trade union representative stated that [*Page 148 of the bundle*]:-

> "*Dr Kapur wanted an assessment and there was nothing overt showing in this. However, it can be a fluctuating picture and Mr McErlean was very tired during the initial assessment. This potential for a changing picture is the reason why she wanted Mr McErlean to engage with the service and have a full medical assessment. The assessment at the PSNI station was a snapshot of three hours and would not provide a holistic assessment."*

The trade union representative asked Mrs Bateson if she recognised that it was not always possible to capture somebody's mental state. Mrs Bateson replied that:-

> *"This is why Mr McErlean was offered a further medical assessment to ensure a complete picture over a longer timeframe."*

59. Mrs Devine was asked by the trade union representative what the claimant's behaviour had been like when he visited the office immediately following the domestic incident on 16 April 2012. She stated that:-

> *"He displayed pressure of speech, flight of ideas, talking louder than usual, had a lack of insight, was argumentative and he reported not sleeping."*

Following questioning from Mr McIlroy, Mrs Devine stated:-

> *"She had worked in mental health for 25 years, knew Mr McErlean well and he was not acting like the person she knew. The information he described was not real and skewed."*
> *[Page 153 of the bundle]*

60. The claimant had called Professor Mulholland as a witness. Professor Mulholland was and is a Consultant Psychiatrist employed by the respondent. Professor Mulholland's evidence was that while he was not the claimant's treating psychiatrist he knew the claimant and had engaged in conversations with him in order to allay concerns about his mental health. He stated that in retrospect he would have concluded that the claimant had been unwell for a period of time. He stated that in his opinion the claimant would have had the ability to mask his mental illness. He stated that the claimant had been very paranoid, defensive and not forthcoming with information and that he had felt there was a plot against him. He stated that the claimant had deliberately clammed up and had barely spoken to the intervention team and that he could understand why the team had not picked up on any mental concerns.

61. Following the disciplinary hearing, the two person panel met [*Pages 168 – 169 of the bundle*] to determine outcome of the disciplinary charges. They stated:-

> *"The panel is not convinced about the severity of his mental health problems at the time of the domestic incident nor does it believe the stress he was under in carrying out his job was significantly different than any other nurse on the team.*

We gave great weight to the evidence of Mrs McIlvenna, a very experienced community psychiatric nurse who was the first mental health practitioner to see him after the incident and who after carrying out a prolonged mental health assessment found no evidence of mental health issues but rather that he was suffering from stress and poor sleep patterns.

The panel found that either Mr McErlean, at the time of the domestic incident and for a number of days afterwards was not suffering from significant mental health problems or that if he was, as a mental health practitioner he deliberately and wilfully withheld information. Either way, we find his actions amount to gross misconduct and that his mental health state, while under some degree of uncertainty, cannot mitigate against his gross misconduct actions.

We therefore conclude that the allegations are proven and that the mitigation of his mental health problems, if they existed at all the time of the domestic incident, were wilfully hidden by him in breach of the NMC Code of Conduct. It therefore follows as allegations of gross misconduct are proven and are of an extremely serious nature and in order to protect the Trust's clients, Mr McErlean should be dismissed."

62. The respondent informed the claimant of the result in a letter dated 16 April 2013 [*Pages 170 – 171 of the bundle*]. The letter referred to two disciplinary charges, ie:-

"(1) You were subject to a police investigation in respect of an incident of domestic violence which included

- *assault causing actual bodily harm;*
- *threats to kill; and*
- *possessing a firearm in suspicious circumstances.*

(2) You have breached the NMC Code of Conduct:

- *as a professional you must be professionally accountable for your actions and omissions in your practice and must always be able to justify your decisions;*
- *you must always act lawfully whether those laws relate to your professional practice or personal life;*
- *you must inform someone in authority if you experience problems that prevent you from working within this Code or other nationally agreed standards; and*
- *you must uphold the reputation of your profession at all time."*

The letter stated:-

"It is therefore the decision of the disciplinary authority that your actions as noted in the allegations are totally unacceptable and constitute gross misconduct and that you be dismissed from your post as a community mental health nurse Band 6 with effect from 16th of April 2013."

63. The first charge is peculiarly worded, in that it simply requires that the claimant was subject to a police investigation as described. It does not appear from the wording of that charge that a finding of guilt in respect of all or any of the sub-headings was necessary. In any event, it does not appear from the letter that there were any actual findings in relation to assault, threats to kill or possession of a firearm.

64. The claimant lodged an appeal by letter dated 25 April 2013. The appeal was on the basis that the charges were not proven, the decision fell outside the band of reasonable responses; an alternative disciplinary sanction had not been considered; the claimant's previous record had not been considered; the dismissal was unfair as a result of the claimant suffering from an acute mental health illness; the dismissal was unfair because it was in relation to conduct which was unrelated to work and posed no threat to patients or colleagues; that the procedure was unfair as a result of bias on the part of Mr Fleming who had previously sought the claimant's suspension from practice and, finally, that the Trust had failed to apply its own disciplinary policy uniformly.

65. The tribunal was referred to a report dated 25 May 2012 from Dr Kinch who was a locum consultant psychiatrist and who had assessed the claimant on 21 May 2012. It described the domestic incident, the detention of the claimant and information received from Professor Mulholland. It stated [*Page 183 of the bundle*] that Professor Mulholland had stated that the claimant had been clearly delusional, that he had believed he had been followed by the police and two gangs of criminals and that he had approached a stranger and a lady in her car that he believed to be his wife's. Professor Mulholland had indicated that the claimant had admitted to him that he felt people had been interfering with his mobile phone, computer account, his wife's face book account and that he had accused several different men of having an affair with his wife. Professor Mulholland had indicated to Dr Kinch that he felt that the diagnosis was of a bipolar illness and that the claimant had had a similar incident 10 years previously.

66. Dr Kinch at this early stage stated:-

"This is a difficult case to formulate or to give a diagnosis; there still needs to be a corroborative history from his wife and other members of the multi-disciplinary team he worked with in Whiteabbey.

In view of the current non-molestation order his wife has taken out on him, I do not feel it is appropriate at this moment in time to talk to his wife. I concur with Professor Mulholland's belief that he may have a bipolar disorder; but an alternative formula is that there is evidence to suggest a prolonged depressive reaction which then resulted in persecutory beliefs that his wife had had an affair and with the list of symptoms that Professor Mulholland provided me with, that he has suffered a brief psychotic episode which is now resolving secondary to sleep deprivation and Red Bull ingestion."

67. A note was provided [*Page 193 of the bundle*] from the claimant's brother to the appeal hearing which stated that the claimant had been behaving irrationally since 11 April 2012 until the incident.

68. Professor Mulholland provided a full and detailed witness statement to the appeal panel and also attended the appeal panel. His statement [*Pages 196 – 199 of the bundle*] states that his opinion was that the claimant had a psychotic episode in April 2012 in which he lost contact with reality. He stated that the claimant had not realised at that point that he was ill. He could not have exercised sound judgment or have made rational decisions. He stated that although he did not carry out a formal assessment of the claimant and was not his treating physician, he did carry out a thorough assessment. He had met the claimant on four separate occasions to assist him as a friend and colleague. He had spent approximately six hours with him and had also spoken to him on the phone on several occasions. He had spoken to his wife on the phone on three separate occasions. He believed that the claimant had been mentally ill. He stated that his opinion was '*based on much careful consideration and I stand over it in its entirety*'. He stated that Mrs McIlvenna and Mrs Bateson had made a wrong judgment and had reached the wrong conclusions. He stated in summary that it did not appear to him that his view had been taken into account at the disciplinary hearing. He stated that the claimant had not deliberately withheld information. The situation was '*that he was ill, he lacked insight into his condition and consequently he did not co-operate*' [with the intervention team].

69. A further very detailed medical report from Dr Kinch [*Pages 200 – 206 of the bundle*] was submitted for the purposes of the appeal. Dr Kinch referred to the history of the domestic incident and to the information provided by Professor Mulholland and to his diagnosis. Dr Kinch had diagnosed the claimant with a depressive disorder and described the medication that he had prescribed. He stated [*206*]:-

> *"Mr McErlean remains a patient of mine; I would like to conclude that there was definite evidence of delusional beliefs expressed by Mr McErlean post the incident with his wife to both his brother and to Professor Mulholland prior to myself taking him on as a patient. Although he did not appear psychotic to the home treatment team, this could have been as a consequence of Mr McErlean's forensic training and of him being guarded in a psychiatric sense. I also note that in the notes Mr McErlean provided me with that it is acknowledged that there was workplace stress in the Whiteabbey team and that post-incident both Hazel Devine and Joanne Carey were concerned with Mr McErlean's mental state. I sincerely hope that the information I have provided will help you in Mr McErlean's appeal; please note it is my job as a psychiatrist to explain rather than to judge. However I am surprised that my clinical opinion of this case was not asked for before the disciplinary panel made their decision."*

Therefore it appears that Dr Kinch's opinion was not sought and was not considered by the disciplinary panel. That is surprising.

70. The appeal was to be a complete re-hearing of the disciplinary charges. It was not meant to be simply a review or a double-check on the first stage. That was confirmed by Mr McIlroy in an e-mail to the claimant on 29 May 2013 [*209*]. It was

also confirmed in evidence by Mrs Graham who heard the appeal. The evidence given at the original disciplinary hearing would be re-considered at the appeal and witnesses could be available for further questioning. Mrs Graham stated in evidence that they did not consider the disciplinary panel's rationale and that they were uncontaminated and untrammelled by the previous decision-making process. Mrs Graham emphasised that point. She insisted that she was had not been tainted or influenced by the previous process. On cross-examination however she accepted that she had read the previous panel's discussion notes. She appeared surprised to remember that she had done so. Mrs Graham remembered having the investigation report. She was quite clear that she did not have the notes of the rationale for the disciplinary hearing. She repeated that answer three times. When referred to the notes of the appeal hearing, it recorded that she and the other panel member had read the relevant documents [*168 and 169*] before the claimant and his representative entered the room.

71. It therefore seems unlikely that this appeal hearing was, as suggested by Mrs Graham, completely untainted and untrammelled by the reasoning of the disciplinary panel. Mrs Graham did not know why she had read the reasoning of the disciplinary panel.

Furthermore, there seems to be a remarkable degree of similarity between the rationale of the disciplinary panel [*168 – 169*] and the rationale of the appeal panel [*220 – 221*].

In the former, the disciplinary panel states:-

> *"The panel is not convinced about the severity of his mental health problems at the time of the domestic incident ... ."*

In the latter, the appeal panel states:-

> *"The panel was not convinced about the severity of his mental health at the time of the incident."*

In the former:-

> *"We gave great weight to the evidence of Mrs McIlvenna ... ."*

In the latter:-

> *"The panel gave great weight to this assessment."*

In the former:-

> *"That his mental state, while under some degree of uncertainty cannot mitigate against his gross misconduct actions."*

In the latter:-

> *"While his mental health is under some degree of uncertainty the panel cannot mitigate against his gross misconduct actions."*

In the former:-

> *"It therefore follows if allegation of gross misconduct are proven and are of an extremely serious nature and in order to protect the Trust's clients, Mr McErlean should be dismissed."*

In the latter:-

> *"It therefore follows that allegations of gross misconduct are proven and of an extremely serious nature. In order to protect the clients the decision of the disciplinary panel should be upheld."*

It is clear to the tribunal that the appeal process was far from 'independent' and far from being a '*complete re-hearing*'. The appeal panel read and regurgitated the reasoning of the disciplinary panel.

72. Mrs Graham accepted she had read the custody record and the report of the intervention team, including remarks in relation to his wife's concern about a nervous breakdown and his abnormal behaviour. She acknowledged that this demonstrated that there had been grave concerns about his condition until there had been a professional assessment. She had reports from Dr Kinch and Professor Mulholland. Those reports from Dr Kinch referred to a prolonged depressive reaction leading to a psychotic episode. Professor Mulholland felt he had been clearly delusional and believed he had a bipolar disorder. Dr Kinch felt that the reason he may not have appeared psychotic to the intervention team was his forensic training.

73. Professor Mulholland wrote out a detailed written statement for the appeal hearing and gave oral evidence. He remained firmly of the view that the claimant had been psychotic throughout the incident. He referred to delusional beliefs and stated that the claimant had lacked insight : the claimant had not realised he had been ill when he had been assessed by the intervention team. He stated that he had completed a thorough medical assessment. He disagreed with the assessment of Mrs McIlvenna, the intervention team nurse. [*198*] [*199*]

Professor Mulholland was the most senior clinician to have examined the claimant, even though he had not formally been the treating physician.

74. Mrs Graham accepted that Mrs McIlvenna had not completed the process with the report of the intervention team; and that she had wanted to have a further medical assessment. While the report of the intervention team was written by Mrs McIlvenna, it represented the view of two experienced nurses, reached after an interview of some hours.

75. Mrs Hazel Devine, another psychiatric nurse and a colleague of the claimant, gave evidence to the appeal. She felt that the claimant had possibly been psychotic and paranoid. She later considered his thoughts disordered and paranoid. When cross-examined before this tribunal on this evidence, Mrs Graham, who had conducted the appeal, stated:-

> *"I do believe that following that event, yes, Mr McErlean was mentally ill."*

When asked to clarify whether she had thought that the claimant had been mentally ill when she determined the internal appeal (rather than at some point during the industrial tribunal hearing), she stated:-

> *"The evidence suggested he was mentally ill.*
>
> *At the time of the appeal, I believed Mr McErlean was mentally ill."*

76. The answers given by Mrs Graham to cross-examination on this point before the tribunal were vague in the extreme. It was impossible to be certain whether her answers in this respect were referring to her feelings in the course of the industrial tribunal or to her feelings during the appeal hearing and indeed whether or not she was referring to the claimant's mental health at the time of the incident, which was the subject of the disciplinary charges, or to his mental health at the time of the internal appeal hearing. Clarification was sought on several occasions from Mrs Graham by the claimant's representative and indeed by the Vice President. She was asked to clarify her thoughts and to explain them in relation to the claimant's mental state during the incident as determined by her at the time of the internal appeal hearing. She said she was sure that the claimant had '*been mentally ill*'. When asked again to clarify whether that referred to the claimant's mental health at the time of the incident, her answer was again vague. She referred to the report of the intervention team and to the custody record in the police station which said:-

> *"No mental illness."*

She was asked again to clarify her evidence. She was again vague and referred to the intervention team report. She was asked yet again by the Vice President to clarify what her opinion had been of the claimant's mental health at the time of the internal appeal in relation to the original incident. She said:-

> *"I agreed with the conclusion that he was demonstrating a form of mental illness – be that around his erratic behaviour and his transient psychotic episode."*

77. Mrs Graham then confirmed that she did accept that the claimant had been undergoing a psychotic episode at the time of the incident for which he faced disciplinary charges, as concluded by Dr Kinch and Professor Mulholland.

78. Mrs Graham was asked if she had considered the requirements of the Disability Discrimination Act 1995. She stated:-

> *"It did cross my mind – I focused my mind on the assessment through the Occupational Health Department."*

Mrs Graham was asked whether, given her view that the claimant had been mentally unwell at the time of the incident, she had considered that she should have investigated the claimant's position under the 1995 Act. She stated:-

> *"I did not follow through on that."*

79. The decision of the appeal panel was formally issued the next day, ie on 19 June 2013. The note taker had actually phoned the trade union representative at 4.40 pm on 18 June 2013 to confirm that the appeal had been dismissed. Mrs Graham confirmed, in cross-examination, that the decision to dismiss the appeal had been made on 18 June 2013.

80. The appeal panel's note of the presenting officer's evidence and submissions were recorded and described as facts. Conversely, the trade union submissions, on behalf of the claimant, were referred to as '*claims*' or '*opinion*'. Mrs Graham stated that the use of these terms had not been intentional.

However, it does seem to this tribunal that the appeal panel did not place any weight on any evidence other than the original report of the intervention team and that it did not seriously consider the claimant's case.

81. Mrs Graham confirmed in cross-examination that the appeal panel had not considered that there had been any mitigating factors in this case. The appeal panel felt that there had been a risk to patients. She was asked in cross-examination where the evidence for such a conclusion existed. She referred simply to the type of patients that the claimant dealt with in the course of his occupation. She was twice asked again to point to the evidence substantiating a specific risk to patients. She stated:-

"No – there was no evidence presented."

Mrs Graham stated that:-

"Due to domestic incident, the claimant would have posed a risk to patients."

She was asked again for any specific medical or other evidence to support that conclusion. She replied:-

"I don't know."

82. The Occupational Health reports and Professor Mulholland's report had both been prepared on the basis that the claimant could return to work and that his return to work was anticipated. There was no mention of any risk to patients. It could be expected that the Occupational Health Department, at least, would have focused on this issue and that if any real risk existed, either to patients or to colleagues, it would have been dealt with in some detail in their reports.

83. The appeal panel convened again after 19 June 2013 to provide '*a rationale for our decision*'. A document was prepared as a result of that follow-up meeting [*214*]. There were various drafts of that document. The follow-up meeting occurred on 26 June 2013, ie one week after the appeal panel and after the decision had been given. Mrs Graham stated that the delay had been caused by intervening annual leave which had to be taken by Mrs Burgess.

84. Mrs Graham agreed that the intervention team report had been a snapshot of events and that it did not present a full medical assessment. She accepted that she had recorded that Mrs Bateson had been '*influenced*' by Professor Mulholland. That seems to have been an unusual and pejorative choice of words.

85. When asked why she had placed so much weight on the original report of the intervention team over and above other medical evidence, Mrs Graham said it had been because of its contemporaneous nature, the lack of a professional relationship and the fact that the two nurses had been able to challenge each other. No evidence has been presented to this tribunal that the two nurses did in fact challenge each other at any point. It appears to be the case that the report was written and complied by Mrs McIlvenna without any particular challenge or intervention or indeed any obvious contribution from the other nurse, Mrs McIlwee.

86. In cross-examination, Mr Fleming had stated that if the claimant had been mentally ill at the time of the incident, in April 2012, the matter would have proceeded internally as a capability issue rather than as a misconduct issue through the disciplinary process. When this was put to Mrs Graham in her cross-examination, she stated that she would, in those circumstances, have dealt with the incident in April 2012 as '*capability*'.

87. When it was put to Mrs Graham in cross-examination that she had already accepted that the claimant had been mentally ill at the time of the incident, she stated :-

> *"At the time of the appeal panel, he was mentally ill."*

That again raised the issue which had already been gone over at some length with Mrs Graham and where clarification had apparently been given by Mrs Graham.

88. Mrs Graham confirmed again in cross-examination that the internal appeal panel had concluded that the claimant had suffered a transient psychotic episode at the time of the incident. When then asked if she was happy or unhappy that this matter had been dealt with as an issue of misconduct through the disciplinary process, she answered:-

> *"I can't answer that."*

89. The handwritten notes and draft [*215*] of the follow-up meeting on 26 June 2013 refer to a risk to the claimant's wife. That part was removed from a later draft [*211*].

90. It was entirely unclear where this reference to a risk to the claimant's wife originated. Mrs Graham accepted in cross-examination that no evidence had been produced to support this proposition. It seems unlikely that it had been produced by the note taker rather than by the appeal panel.

91. Mrs Graham also accepted that there had been no evidence of a risk to the claimant's fellow workers or indeed to patients. It was pointed out to her that the evidence before the appeal panel and indeed before the tribunal indicated the opposite. The evidence from the Occupational Health Department and from Professor Mulholland actually supported a return to work and raised no issue in relation to the safety of fellow workers or of patients. Mrs Graham stated that this concern about a risk to fellow workers or to patients would have come from her and from Mrs Burgess considering the claimant and his work environment. It seems odd that Mrs Graham and Mrs Burgess interjected this personal opinion when it was a matter on which the Occupational Health Department should have been focusing

and where particular evidence should have been required. It also seems odd that the appeal panel were comfortable in ignoring the clear evidence of the Occupational Health Department and of Professor Mulholland.

92. When it was suggested, in cross-examination, that this decision had been '*an irrational decision*', Mrs Graham stated that this '*was a discussion which she had had at the time'*. When the question was posed again, she said that it had been '*irrational*' at the time based on the medical evidence available.

93. At that point, the tribunal rose to allow the parties 15 minutes to consider their positions. At that point, the respondent had still been arguing resolutely that there had been a fair dismissal.

The hearing resumed after the 15 minute break without any resolution being apparent. The tribunal decided to conclude the evidence. At that point Mrs Graham was almost finished and she was the last witness.

94. At the conclusion of the evidence the matter was re-listed for submissions on **2 June 2014**.

Decision

Disability

95. The first issue to be determined is the time or times at which it is relevant for the tribunal to determine whether the claimant had been disabled for the purposes of the 1995 Act. That has to be determined by reference to the discriminatory act or acts complained of by the claimant – ***Cruickshank*** (above). The claimant's case is that the respondent failed to put reasonable adjustments in place, as required by the 1995 Act, when it pursued its concerns about the claimant as a misconduct issue through the disciplinary process rather than as a medical capability issue through a different process and also when it ultimately dismissed the claimant for misconduct.

The relevant timeframe therefore includes the investigation process which commenced shortly after the relevant incident in April 2012, the disciplinary hearing on 16 April 2013, the dismissal on the same date, and the appeal hearing on 18 June 2013 with the decision given orally that day to the trade union representative.

96. The respondent sought to argue that it was significant that the claimant had not raised the 1995 Act during the investigation, disciplinary or appeal processes and that he had not raised the Act in his claim form as a separate head of claim when originally lodged and that he had not done so until the claim form had been amended much later.

The respondent, for its part, does not appear to have given much consideration to the 1995 Act, in its deliberations on this matter. There is a brief reference in one Occupational Health report on 20 April 2012 (right at the start of the relevant period) which recorded:-

"Mr McErlean does not appear to have a disability as defined by current legislation."

It was accepted by both parties that the question of disability is a legal question, firstly, to be considered by the parties; and, secondly, to be determined by this tribunal. It is not simply a medical issue which is to be authoratively pronounced upon by a medical adviser. Furthermore, the snapshot given by the Occupational Health doctor on 20 April 2012 was less than definite and related to one particular report and to one particular point in time. The issue does not appear to have been re-visited or to have been reviewed by the Occupational Health Department at any subsequent point. Furthermore, the issue of the 1995 Act and the potential need for reasonable adjustments does not appear to have been considered by Mr McCosh at the investigation stage. It also does not appear to have been considered by either Mr Fleming or Mrs Graham at the disciplinary or appeal stages.

That in itself is surprising given that the respondent is a large public health authority with a specialism in mental health and with its own personnel department.

In any event, the 1995 Act does not require that it should be specifically raised or specifically relied upon by either party at any stage. The statutory test for disability exists independently of any contemporary reliance upon it or of any contemporary consideration of it. Having regard to the onus placed on the claimant to provide evidence at this tribunal, the statutory test for disability has to be weighed against the normal balance of probabilities test.

The tribunal therefore does not place any particular significance on the failure by both parties to pay much or any attention to this Act until a relatively late stage in these proceedings.

97. The respondent accepted at the submissions hearing on 2 June 2014 that the claimant had suffered a psychotic episode on or about 13 April 2012 and that he had been mentally ill at that time. That was after a disciplinary and appeal process and indeed after a contested tribunal hearing in which the respondent had stuck resolutely to its guns and had maintained that the claimant had not been mentally ill in April 2012 and that there had been no evidence of a psychotic episode. That had been despite substantial medical evidence to the contrary which had been set aside and where the evidence of two nurses, described as a 'snapshot' and subject to further medical assessment, had been preferred.

98. In any event, the respondent continued to dispute that the claimant satisfied the statutory definition of disability, necessarily at the relevant times indicated above. A large part, perhaps a significant part, of the respondent's argument was that the claimant, again necessarily at the relevant times, had not satisfied the requirement that the substantial effect was long-term as defined by the Act. The respondent also argued that it had not had actual or constructive notice of any disability.

99. The tribunal is faced with a wealth of medical and non-medical evidence. With the exception of that one brief reference in the first Occupational Health report on 20 April 2012, none of this evidence directed itself specifically to the statutory test for disability.

100. To simplify matters, the tribunal will look at the time of the appeal hearing on 18 June 2013. The claimant argues that he had been disabled for the purposes of the 1995 Act at that time and that the respondent should have stopped the disciplinary proceedings, should have revoked the dismissal and then should have pursued the matter as an issue of medical capability rather than as an issue of misconduct.

101. There clearly had been a psychotic episode on or about 13 April 2012. That much has been conceded by the respondent despite its earlier and resolute reliance on the original view expressed by the crisis intervention team.

102. The issue to be determined is not what medical evidence was before the respondent when the appeal against dismissal was rejected. The unfair dismissal claim has, albeit belatedly, been conceded by the respondent. The issue is whether, on the evidence before this tribunal, the claimant was disabled at the time of the appeal hearing; and if so, whether a reasonable adjustment should have been made as indicated above.

103. There are reports from the Occupational Health Department dated 20 April 2012, 22 May 2012, 12 June 2012, 19 July 2012, 28 August 2012 and 9 October 2012. Apart from the very first, these reports do not address the statutory test for disability or the 1995 Act in general. The first three reports conclude that he had been at that point unfit for work and they refer to '*stress*' and '*anxiety*' and to an '*emotional health problem for some time prior to this*'. The remainder note that his medical condition was progressing and that he was '*entirely fit to commence work at any stage and return to appropriate duties*'.

104. The report of the crisis intervention team was to the effect that there was, at the time of their interventions, and in their opinion, no evidence of psychosis or mental ill-health. That report has been acknowledged by Mrs McIlveen as a snapshot in time and subject to further assessment.

105. Professor Mulholland expressed his view to the disciplinary hearing, appeal hearing and indeed this tribunal. He stated that the claimant had been unwell in April 2012 and shortly thereafter. He described the claimant as very paranoid and defensive. In Professor Mulholland's statement to the appeal panel he stated that the claimant had suffered from a psychotic episode in April 2012 and that he had developed this condition beforehand. In his medical opinion, the claimant had been seriously mentally ill at that time. Professor Mulholland disagreed with the views of the crisis intervention team. He also postulated a diagnosis of bipolar illness.

106. Dr Kinch in his report of 25 May 2012, again shortly after the incident, stated that it was a difficult case to diagnose and that there needed to be a corroborative history from the claimant's wife and work colleagues. He concurred with Professor Mulholland, at that stage, that the claimant might have had a bipolar disorder or alternatively a prolonged depressive reaction which then resulted in persecutory beliefs. He stated that the issue was at that point resolving and that the claimant did not require medication.

107. Dr Kinch completed a further report one year later on 9 May 2013. He referred to a history of events taken from the claimant's wife. He stated that this '*supported a diagnosis of an acute and transient psychosis following a prolonged depressive*

reaction'. The claimant had resumed taking medication on 13 June 2012 shortly after his earlier report with a '*mild depressive disorder*'. On further review on 23 July 2012, Dr Kinch felt that the clinical depression was in remission but nevertheless asked the claimant to continue with his medication for a further period. On 2 March 2013 the claimant stopped taking his antidepressant medication but then had to re-start on 28 March 2013.

108 There is no specific finding by any medical party on when a '*prolonged depressive reaction*' began before the incident on April 2012. Equally, there is no specific finding as to when the condition concluded, if indeed it did so. However, Dr Kinch refers to the claimant's wife noting that the claimant had not been himself for one year before the incident in April 2012 and that he had not been sleeping properly for some eight months earlier. The claimant told Dr Kinch of workplace stress over an unspecified period. The claimant's wife in her later statement to the appeal referred to increased stress from Autumn 2012 and to a particular change in behaviour in January 2012.

109. The tribunal's task is made more difficult by the failure of both the claimant and respondent to address the issue of Disability Discrimination Act 1995 properly at the time at the investigation, the disciplinary process and the appeal process. The contemporary medical reports therefore do not address the statutory test and do not focus on the issues raised by the Act, particularly the '*long-term*' requirement.

110. In this type of situation, where no one has addressed the issues properly at the time, there is a large element of diagnosis by hindsight and where the medical reports do not even focus on the issue, the tribunal is left with seeking to interpret those reports as best it possibly can, bearing in mind the onus of proof rests on the claimant.

111. In ***McNicol v Balfour Beatty Rent Maintenance Limited 2002 IRLR 711***, which was cited with approval in the ***SCA Packaging*** case (see later). The EAT stated that the term '*impairment*' should bear its ordinary and natural meaning. The Court of Appeal in ***SCA Packaging*** stated at Paragraph 7 that:-

> *"The essential question in each case is whether, on a sensible interpretation of the relevant evidence (including the expert medical evidence and the reasonable inferences which can be made from all the evidence), the claimant can fairly be described as having a physical or mental impairment. Such a decision should be made without substituting for the statutory language a different word or form of words in an attempt to describe or define the concept of impairment."*

In ***DLA Piper*** (above) the EAT stressed that the tribunal should reach conclusions separately on the impairment and on the substantial adverse impact issues; although the latter issue might on occasion answer the first.

The EAT stressed that if the claimant had suffered a substantial adverse impact for 12 months or more it would be likely to conclude that he had been suffering from clinical depression rather than a simple reaction to difficult circumstances. While it is important not to fall into the trap of reviving the former requirement that there should be a clinically well-recognised illness, the tribunal has to be prepared to look behind labels to determine the impairment question.

112. It seems clear that there was a substantial adverse impact in April 2012, ie the time of the psychotic episode. It seems equally clear from the reports to hand that this substantial impact had existed for some time beforehand and that it existed for some time after April 2012. It also seems clear that medication was being taken by the claimant for some time thereafter and had to be re-started after a brief interlude on 28 March 2013. It is reasonable to conclude that his condition would have been worse without the medication; otherwise there would have been no point in prescribing it for a lengthy period. The tribunal has to look at all the evidence and has to deduce what the adverse impact would have been without medication and treatment. It notes, in particular, that medication had to be re-started in June 2012 and March 2013.

113. The tribunal therefore concludes that the claimant had suffered from a substantial adverse reaction for at least one year starting at some time some months before April 2012 and continuing on at least until the end of March 2013.

114. The tribunal concludes that for a significant part of this period the claimant was taking medication and that therefore, on the basis of the medical report from Dr Kinch, concludes that if medication had not been taken by the claimant throughout this latter part of the period, he would have suffered a substantial impact on day-to-day activities as defined by the Act. This substantial impact would have been on the ability to concentrate and to understand and indeed on the perception of danger. It would have been in place for some time before the psychotic episode, through the psychotic episode and subject to the intervention of medical measures would have continued at least until the end of March 2013.

115. It seems clear that the claimant was suffering from a mental impairment during this period. This case would have been a good deal simpler if there had been a contemporaneous medical opinion, covering all of the period, and considering all the evidence, which had been directed to this point. There is clearly some doubt as to the exact nature of the mental impairment. Professor Mulholland suggested a bipolar disorder; Dr Kinch a prolonged depressive reaction. However, the tribunal does not have to decide one way or the other, since the 2006 amendments, as noted in ***DLA Piper*** (above):-

> "*The impact of the repeal of Paragraph (1)(i) is in a case where it is evident from a claimant's symptoms that he or she is suffering from a mental impairment of some kind but where the nature of the impairment is hard to identify or classify."*

Whether or not this impairment was a bipolar disorder, or a prolonged depressive reaction, it was clearly not a simple reaction to adverse circumstances which might fall outside the proper meaning of '*mental impairment*'. The tribunal therefore is satisfied that the claimant suffered from a mental impairment throughout the relevant period.

116. The respondent cannot realistically argue that it did not have actual or constructive notice of the claimant's liability. The fact that the claimant did not specifically refer to the 1995 Act until later in the proceedings is not conclusive. Obligations under the Act exist whether they are specifically asserted or not. The medical reports were all readily available to the respondent including, crucially, the detailed reports

of two of their own consultant psychiatrists. Whether the 1995 Act was specifically raised or not, the respondent had full notice of the claimant's medical condition. The equivocal and time specific opinion of one Occupational Health doctor on 20 April 2012 does not assist the respondent's argument. It should have pursued the matter and should have kept it under review.

117. The tribunal therefore concludes that the claimant was throughout this period disabled for the purposes of the Act. It is not the case, on the balance of probabilities, that any mental impairment was simply a short-lived reaction to adverse circumstances. It appears to have been a real mental impairment satisfying the statutory definition of disability.

118. The tribunal also concludes that a reasonable employer would not have pursued a disabled person through the misconduct procedure for an action which was taken in the context of his disability. A reasonable employer would necessarily have dealt with this matter as an issue of medical capability. That would have been a proper and necessary adjustment, apart from being common sense. As the EAT stated in ***Tarbuck*** (above) the burden of proof shifts to the employer if the adjustment could reasonably have been made. The burden of proof has shifted in the present case and the respondent has presented no reason why it, given its specialism in mental health, and given the evidence before it, did not pursue this matter through the culpability procedure. The burden of proof has not been discharged by the respondent. Given the clear opinions of the Occupational Health reports that there had been no contra-indications to the claimant's returning to work, any such progress through a capability procedure would not have resulted in the claimant's dismissal or in his medical retirement.

119. Compensation for financial loss in respect of this unlawful discrimination is not appropriate at this stage, given that the tribunal is separately issuing a reinstatement order. However if that order is not complied with by the respondent, compensation for financial loss will have to be reviewed by the tribunal.

120. The three bands for injury to feelings compensation set out originally in ***Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102*** have been updated in ***Da'Bell v NSPCC [2010] IRLR 19*** and are:-

(1)	*Lower band*	-	*Up to £6,000.00*
(2)	*Middle band*	-	*£6,000.00 to £18,000.00*
(3)	*Higher band*	-	*£18,000.00 to £30,000.00*

Since inflation has been relatively low since 2010, the tribunal determines that those bands remain applicable.

121. An injury to feelings award is compensatory and not punitive. Where the discriminatory act involves the loss of employment, the nature of that employment can be taken into account. In ***Orlando v Didcot Power Station Sports and Social Club [1996] IRLR 262***, the EAT stated:-

"A person who unlawfully loses an evening job may be expected to be less hurt and humiliated by the discriminatory treatment than a person who loses their entire professional career."

In ***Voith Turbo Ltd v Stowe [2005] IRLR 228***, the EAT held that a dismissal on racial grounds was a very serious incident and that it could not be described as '*one-off*' or '*isolated*'. An award in the middle range was appropriate.

122. While the actions of the respondent in this instance were misguided rather than malicious, the tribunal is satisfied, on the evidence, that the respondent failed to deal properly with the claimant's impairment leading to the loss of a professional career, which had been enjoyed by the claimant. This caused significant injury to the claimant's feelings. An award at the middle point of the middle range appears appropriate. It was not what can properly be described as a one-off incident which could be within the lower band. It lasted over a lengthy period and involved the loss of a professional career. It is therefore a serious case but one which does not fall within the highest band which is reserved for the most serious cases.

123. The tribunal therefore awards £12,000.00 in relation to injury to feelings. The tribunal will next turn to a reinstatement order which will be imposed for the reasons to be stated shortly in relation to the conceded issue of unfair dismissal. If the reinstatement order is not complied with by the respondent, the issue of compensation for disability discrimination will have to be reviewed accordingly at any subsequent hearing to determine monetary compensation.

124. The tribunal has already determined that the claimant was disabled for the purposes of the 1995 Act without having to have regard to Paragraph 2(4) of Schedule 1. However, for completeness sake, the tribunal should address the arguments on this matter. In relation to this point, the respondent sought to argue that the claimant's mental impairment was not a recurring condition for the purposes of the 1995 Act.

125. That is an issue which has been addressed by the Northern Ireland Court of Appeal in ***SCA Packaging Limited v Boyle [2009] IRLR 54***. In that decision the court set out the four questions, discussed in ***Goodwin v Pattons Office [1999] IRLR 4*****,** which have to be addressed by a tribunal in determining whether an employee was disabled for the purposes of the Act, ie:-

(i) whether the claimant had an impairment which is either mental or physical;

(ii) whether the impairment effected the claimant's ability to carry out normal day-to-day activities and whether it had an adverse effect;

(iii) whether that adverse effect was substantial; and

(iv) whether the adverse effect was long term.

The court in that decision was primarily concerned with the fourth question, ie whether the adverse effect was long term. It was also concerned with the impact of medical treatment. It referred in that regard to two parts of the Act, ie to Paragraphs 2 and 6 of Schedule 1.

126. In ***SCA Packaging***, *Paragraph 13*, the Court of Appeal stated:-

> *"For the purposes of Paragraph 2(2) [of Schedule 1 to the Act] an impairment which ceases to have a substantial effect on a person's ability to carry out normal activities falls to be treated as continuing to have a substantial adverse effect, even if does not currently do so, if that substantial adverse effect is 'likely' to recur. This presupposes that an impairment continues to subsist although it does not currently have a substantial effect."*

The Court of Appeal stated in Paragraph 20:-

> *"The tribunal in reaching its conclusion that on a balance of probabilities the condition of vocal nodules was at the relevant time likely to occur did not define what it meant by the word 'likely' or what test of likelihood it was applying. Applying the 'could well happen' threshold, the tribunal's conclusion was one it could legitimately make on the medical evidence adduced."*

127. The Court also stated in the judgment that:-

> *"The tribunal made a number of findings in relation to the condition of the claimant's voice, including that she had a propensity to develop vocal nodules; that the following of the management regime mitigated the risk of misuse and abuse of her voice which would lead to the creation of vocal nodules; that the management regime which she followed constituted a great curtailment of her day-to-day activities; that she had to avoid environments which aggravated her voice and had to take positive steps to lubricate her vocal chords; and that the requirements of the necessary regime went far beyond reasonable and mitigating steps envisaged by the guidance. Having regard to these findings the logical conclusion to draw was that the complainant did in fact have an existing impairment at the relevant time and that but for the following of the management regime that impairment was likely (in the sense discussed) to give rise to a substantial adverse long term effect on her ability to carry out reasonable day-to-day activities."*

128. The evidence indicates that recurrence was a possibility; it may well happen if care were not taken in the management and supervision of the claimant's mental health.

129. This is an instance where the respondent seeks to have it both ways. The respondent argues, firstly, that any mental impairment is not a long-term condition for the purposes of the Act; the respondent simultaneously argues that the mental impairment is likely to recur and therefore a reinstatement or re-engagement order is not practicable. In support of that latter point, the respondent states at Paragraph 10(b)(iii) of their written submission that:-

> *"Dr Kinch's opinion was that the claimant had developed a psychotic disorder associated with acute stress upon a background of chronic work-related stress. The possibility of a future episode is high (Page 157) Professor Mulholland. The claimant is vulnerable to developing a relapse of his condition at times of severe stress (Dr Mangan Page 45 witness statement*

bundle). It is not practical to place him back in a working environment whereby he may be vulnerable to a recurrence of his condition.

If the respondent accepts that there was a mental impairment and if it then accepts that there was there is a strong likelihood of recurrence without particular supervision and measures, then it is difficult for them to argue that the mental impairment does not satisfy the long-term requirement.

130. In any event, if the tribunal had to consider *Paragraph 2(2)* of Schedule 1 it would have determined that, absence any medication, medical supervision or medical support, recurrence '*could well happen*' and that, if a 12 month time period had not already been established, a further indefinite period of a substantial adverse effect could have been relied upon.

Unfair dismissal - Remedy

131. The respondent, after contesting the matter, conceded that the claimant had been unfairly dismissed shortly before the submissions hearing on 2 June 2014. The respondent accepted that the claimant had suffered from a psychotic episode in April 2012 and that further investigation would have been appropriate in that regard. The respondent also relied on the concessions which had been made by Mr Fleming and Mrs Graham in the course of their evidence.

132. The statutory provisions make it plain that where the tribunal finds that an employee has been unfairly dismissed, an order for reinstatement or re-engagement is the primary remedy. It is to be considered first. In Article 146 of the 1996 Order it is stated:-

> *"(2) The tribunal shall –*
>
> > *(a) explain to the complainant what orders may be made under Article 147 and in what circumstances they may be made, and*
> >
> > *(b) ask him whether he wishes the tribunal to make such an order.*
>
> *(3) If the complainant expresses such a wish the tribunal may make an order under Article 147.*
>
> *(4) If no order is made under Article 147, the tribunal may make an award of compensation for unfair dismissal ... ."*

133. In this case the claimant in his claim form had requested an order for re-engagement. However that position was clarified in the additional oral evidence-in-chief given by the claimant in which he stated that he wanted to return to the same job, ie to seek an order for reinstatement. The respondent was offered the opportunity in the course of the submissions hearing on 2 June 2014 to call further evidence in this respect in case they had in any way been misled or caught by surprise. It was also offered the opportunity that it could, if it wished, call further evidence on this point on 6 June 2014 when the panel would be in the building in any event for a panel meeting. It was also offered the same opportunity to call

further evidence in relation to the suitability of an order of re-engagement. The respondent did not call any further evidence.

134. Under Article 147, the tribunal should decide whether to make an order for reinstatement or an order for re-engagement. Under Article 148, it is plain that an order for reinstatement is an order to reinstate the claimant in the same post from which he had been unfairly dismissed and to treat him in all respects as if he had not been dismissed. Any such order should specify any amount payable as a result to the claimant in terms of, for example, arrears of pay, and any rights and privileges, including seniority etc, which should be restored to the claimant. It should also specify the date by which the order should be complied with.

135. Under Article 149, an order for re-engagement is an order to re-engage the claimant in comparable employment to that from which he had been unfairly dismissed. Again any such order must specify certain matters including in this regard the identity of the employer, the nature of the employment, the remuneration, any amount payable and the date by which the order should be complied with.

136. Article 150 of the 1996 Order provides:-

> *"(1) In exercising its discretion under Article 147, the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account –*
>
> > *(a) whether the complainant wishes to be reinstated,*
> >
> > *(b) whether it is practicable for the employer to comply with an order for reinstatement, and*
> >
> > *(c) whether the claimant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.*
>
> *(2) If the tribunal decides not to make an order for reinstatement, it shall then consider whether to make an order for re-engagement and, if so, on what terms.*
>
> *(3) In so doing, the tribunal shall take into account –*
>
> > *(a) any wish expressed by the complainant as to the nature of the order to be made,*
> >
> > *(b) whether it is practicable for the employer (of his successor or an associated employer) to comply with an order for re-engagement, and*
> >
> > *(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.*
>
> *(4) Except in a case where the tribunal takes into account contributory fault under Paragraph (3)(c) it shall, if it orders re-engagement, do so*

in terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.

(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of Paragraph (1)(b) or (3)(b) whether it is practicable to comply with an order for reinstatement or re-engagement.

(6) Paragraph (5) does not apply where the employer shows –

(a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or

(b) that –

(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and

(ii) when the employee engaged the replacement it was not longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement."

137. It is clear that the tribunal must, first, ascertain the wishes of the claimant. The wishes of the claimant, expressed directly by the claimant in terms of his oral evidence and expressed on his behalf by Mr Grainger, were perfectly clear. He wishes to be reinstated in the job from which he had been unfairly dismissed. Under Article 50, the tribunal must first then consider such an order for reinstatement. It must then consider the matters set out in Article 150(1)(b) and (c).

138. Given the concession of the respondent that the claimant had been suffering from a psychotic episode at the time of the incident in April 2012 and since it is that incident which led to his dismissal, it cannot reasonably be argued by the respondent that there is anything substantive for the tribunal to consider in terms of Article 150(1)(c). While the respondent's counsel did seek to argue that, should compensation become payable, there had been an element of contributory conduct, she was unable to point to any culpable behaviour on the part of the claimant which led to his dismissal. The argument in relation to the custody record shown *at Pages 2* or *2A in the bundle* was a matter which was not known to the respondent at the time of the dismissal. It cannot therefore be said to have contributed to the dismissal even if a significant degree of culpability were to be attached to the claimant in that regard.

139. Therefore the primary issue for the tribunal to consider in terms of its first issue, ie whether or not to make an order for reinstatement as requested is that set out in Article 150(1)(b), ie whether it is practicable for the employer to comply with an order for reinstatement.

The EAT stated in ***Arriva London Ltd v Eleftheriou [UKEAT/0272/12*]** that:-

> *"The statute is prescriptive as to the order in which a tribunal is obliged to consider remedy. It must consider reinstatement before it considers compensation.*
>
> *As to reinstatement it has a wide discretion. It follows that unless it can be said that the tribunal failed to take into account any matter which it should have done or took into account matters which it should not have done or reached a conclusion which was wholly unreasonable, effectively perverse, an exercise of its discretion must stand."*

140. It is clear the practicability of reinstatement has to be considered at the time of the submissions hearing, ie at the end of the tribunal process and not at any earlier point in time. In the case of ***Rembiszewski v Atkins Ltd [UKEAT/0402/11]*** the EAT determined at Paragraph 49(3) that:-

> *"Whether an order for re-employment is to be made is to be judged as at the date that any such re-employment would take effect. In practice that is likely to be on the date on which the Employment Tribunal has received all the material on this issue put before them by the parties."*

It cannot be the case that a reinstatement order is to be considered impracticable simply because of a degree of bad-feeling between the parties. It is a condition precedent to any type of re-employment order that there will have been an unfair dismissal and it is almost inevitable that both parties will have taken entrenched positions in a prolonged dispute. If that were sufficient to rule out a re-employment order, the legislation would not have provided for such an order.

141. In the case of ***Arriva London Ltd v Eleftheriou***, the EAT was considering a case where reinstatement had been ordered, but where the money payable between the date of dismissal and the date of reinstatement had been reduced by 60%. The parties agreed and indeed the EAT agreed, that the tribunal had no jurisdiction to reduce the amounts to be paid to the complainant on an order for reinstatement. In that case the Employment Appeal Tribunal had imposed a ***Polkey*** reduction. The EAT held that ***Polkey*** related to compensation not to the statutorily prior enquiry into whether reinstatement should be ordered and therefore not into any orders for payment linked to that order for reinstatement.

142. In ***Oasis Community Learning v Wolff [UKEAT/0364/12]***, the Employment Appeal Tribunal considered a decision of an Employment Tribunal that a teacher who worked for an institution turning round failing schools, had been unfairly dismissed and should be re-engaged. The respondent appealed on the basis that allegations of misconduct made by the claimant against the respondent institution and against members of the respondent's Human Resources Department meant that it was not practicable for him to be re-engaged even at a different school and a different part of the country. The EAT dismissed the appeal and held that the tribunal had been entitled to make a re-engagement order.

143. The EAT recited the relevant statutory procedures. It then stated that:-

"The effect of those provisions is that in a case where an unfairly dismissed employee wishes to be reinstated or re-engaged the tribunal must first consider whether to make such an order and should only make a compensatory award when it has made a positive decision again reinstatement or re-engagement. It is sometimes said that this reflects the intention of Parliament that reinstatement or re-engagement, rather than pecuniary compensation, should be the primary remedy for unfair dismissal or that there is a presumption in their favour. That is in one sense true, but it is necessary nevertheless to appreciate the form in which that intention, or presumption, is enacted. It consists simply in providing that those remedies be considered first : on such consideration, the tribunal's discretion is a general one, albeit that Section 116 prescribes certain specific factors to which it has to have regard. It is of course that orders for reinstatement are re-engagement are made in only a very small proportion of successful unfair dismissal cases (although the figures do not exist to ascertain to what extent that is because they are not sought rather than because they have been refused)."

144. The arguments in the ***Oasis*** case centred on the effect that the allegations made by the teacher in relation to the respondent company and in relation to individual members of the HR Department, would have adversely impacted on the practicability of continued employment and also on whether that would be affected by employment continuing by way of a re-engagement order at a different school. The EAT referred to the case of ***Nothman v London Borough of Barnet [1980] IRLR 65*** which raised a similar point in relation to a teacher who sought reinstatement to his earlier job at the same school. The ***Oasis*** case therefore has no direct analogy to the present matter except that it emphasises that provided the tribunal direct its attention to the proper matters listed or set out in the statute and provided it exercises its discretion properly, a reinstatement or re-engagement order is properly made.

145. In ***Central and North West London NHS Foundation Trust v Abimbola [UKEAT/0542/08]*** the Employment Appeal Tribunal considered an order for reinstatement made by an Employment Tribunal in respect of a psychiatric nurse. The Employment Appeal Tribunal determined that the Employment Tribunal had failed to take into account relevant factors in the exercise of their discretion and set aside the Employment Tribunal's order for reinstatement.

The obvious analogy to the present matter is that both cases concern the employment of psychiatric nurses in an area of employment which contains a potential for injury to patients and indeed for injury to fellow employees. In the ***Abimbola*** case, the psychiatric nurse had been dismissed following an incident in which he and nursing colleagues attempted to restrain a patient. Security men from a private company did not intervene. The security men alleged that the claimant had placed the patient in a headlock. The claimant and his colleagues alleged that he had not. The Employment Tribunal determined that he had been unfairly dismissed. The Employment Tribunal had determined that the evidence had not been sufficient to support a reasonable belief in the alleged misconduct. The Employment Tribunal ordered the reinstatement of the claimant by the respondent as a Band 5 psychiatric nurse in a female ward in Hillington Hospital effective on 8 September 2008 and it further directed that he would be paid arrears of salary

and pension rights less £900.00 pay earned by the claimant in the interval by working at a carwash. It ordered an interim payment of £2,000.00.

146. The Employment Appeal Tribunal in ***Abimbola*** stated:-

> *"14 Although orders for reinstatement or re-engagement are the primary remedy for unfair dismissal, we believe that historically only about 3% of successful unfair dismissal claims result in an order for re-employment in one or other of these forms. By Section 114(1) of the Employment Rights Act 1996, an order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed. That is precisely the effect of the Employment Tribunal's order in this case. Re-engagement, with which we were not concerned, requires the employer to re-employ the claimant on comparable, but different terms from those he enjoyed prior to dismissal.*
>
> *15 Employment Tribunals have a wide discretion in determining whether or not to order reinstatement. It is essentially a question of fact for them. However they must take into account three factors under Section 116(1) ERA; (a) whether the complainant wishes to be reinstated (b) whether it is practicable for the employer to comply with an order for reinstatement and (c) where the complainant caused or contributed to his dismissal whether it would be just to order his reinstatement.*
>
> *16 In the present case the claimant asked for reinstatement; he was found not to have contributed to his dismissal, therefore the sole mandatory issue before the Employment Tribunal was whether it was practicable for the respondent to comply with an order for reinstatement.*
>
> *17 As the Court of Appeal made clear in **Port of London Authority v Payne [1994] IRLR 9**, the scheme of the legislation involves a two-stage approach. At Stage One (the first remedy hearing) the Employment Tribunal must make some determination as to the practicability of reinstatement (Ber Neill LJ, Paragraph 46). However such a determination is provisional at that stage. If the employer fails to comply with an order for reinstatement, at a second stage remedy hearing, in addition to making an ordinary compensatory and basic award for unfair dismissal, the Employment Tribunal shall also make an additional award of between 26 and 52 weeks pay unless the employer proves on the second stage that reinstatement is in fact impracticable. At that stage the Employment Tribunal will make a final determination of the practicability question. (ERA Section 117(3)).*"

147. In the same case the EAT stated:-

> *"20 What does practicability mean in this context? Practicable means more than possible. For example, in **Coleman v Magnet Joinery Ltd [1975] ICR 46**, where re-engagement of the unfairly dismissed employees, although possible, would have led to industrial strife, the*

Court of Appeal held that re-engagement was not practicable. Further, loss of a necessary mutual trust and confidence between employer and employee may render re-employment impracticable. ***ILEA v Gravett*** *is a relevant example."*

148. The EAT quoted from the ***Gravett*** decision as follows:-

> *"21 The tribunal ordered a re-engagement and are criticised by the appellant employer for what they submit is a wholly perverse decision upon all the facts of this case. It is a possible view of that decision, but we do not seek nor do we need to go that far. An essential finding in the present case was that the authority had a genuine belief in the guilt of the applicant. It is said with accuracy that this is the largest education authority in the country and that it has a vast area to cover and a vast variety of posts into the applicant can be fitted. It is, however, a common factor in any of those posts that the applicant would have the care and handling of young children of both sexes. Bearing in mind the duty of care imposed on the authority and the very real risks should they depart from the highest standard of care, we take the view that this tribunal failed adequately to give weight to those factors in the balancing exercise carried out in order to reach their decision on re-engagement."*

149. In linking the ***Gravett*** case to the ***Abimbola*** case the EAT stated:-

> *"Pausing there, we accept Mr Morton's submission that the duty on the respondent in the present case for the care of vulnerable patients is not dissimilar from the duty on the educational authority in the* ***Gravett*** *case."*

The ***Gravett*** case was one determined on its own particular facts. It involved a swimming instructor employed by a local authority who had been accused of indecent exposure and indecent assault on a 13 year old girl at the leisure centre at which he had been employed. It also, as the extract indicates, involved a situation where there had been a clear belief on behalf of the employing authority as to the guilt of the individual concerned in relation to the alleged offence. In the present case, there is an acceptance on the part of the respondent that the claimant had suffered a psychotic episode in April 2012 and that he had therefore, throughout this incident, lost contact with reality. There cannot in those circumstances be any real allegation on the part of the respondent that it believed or had reasonable grounds to believe in any culpability or in any misconduct on the part of the claimant in the present case. Furthermore, the facts of the ***Gravett*** case are such that they cannot reasonably be compared to the facts of the present case where there was a clear mental impairment which led to the incident which then led to the disciplinary charges. It is nevertheless obvious that a tribunal when exercising its discretion in relation to an order for reinstatement, must consider, as part of its consideration of practicability, the nature of the employment concerned and in this case, the nature of the mental impairment in reaching a decision as to that practicability, or otherwise.

150. The ***Abimbola*** case was also decided on its own particular facts and it seems clear that the basis on which the EAT set aside the order for re-engagement was one which does not apply in the present case. In the ***Abimbola*** case, the EAT referred

to various factors put forward on behalf of the employing authority. In the first place it was alleged that the claimant had actually given dishonest evidence in relation to his loss of earnings at the remedy hearing. That does not apply in the present case. The closest analogous situation relates to the custody record shown *at Pages 2 and 2A in the Bundle*. The claimant appeared genuinely surprised and puzzled at the alteration. The alteration in the custody record did not significantly detract from the substance of the alleged offences, particularly when read together with the contemporaneous record of the crisis intervention team. Furthermore, it has to be remembered that the fuller version of the custody record was in fact produced to this tribunal via the claimant from his own records. If there had been a conscious and rational attempt by the claimant to mislead anyone, that piece of paper would surely have vanished before it reached his legal advisers.

151. Going back to the ***Abimbola*** case, the second factor put forward on behalf of the employing authority was that there had been a final warning in relation to assault already given to the employee. That is clearly not analogous to anything in the present case. The claimant had no previous disciplinary record.

The third issue put forward on behalf of the employing authority in the ***Abimbola*** case was that there had been three unproven complaints of sexual misconduct against the claimant in that case. Again there is no analogy to the present case.

The final point relied on by the employing authority and endorsed by the EAT was that the respondent had genuinely believed that the claimant had been guilty of the headlock assault. In that matter there was a clear issue of culpability which had been genuinely determined and genuinely believed by the employing authority. In the present case the employing authority has already conceded that there had been a mental impairment in April 2012 which cannot be regarded, leaving aside for the moment the argument on disability, as in any way insignificant, which led to the incident in respect of which no criminal charges emerged. There is therefore no analogy to the present case.

152. What this tribunal takes from the ***Abimbola*** case is that it is important that the tribunal looks at the specific factors set out in statute which it must consider and that it must also properly exercise its discretion in relation to an order for reinstatement generally and with specific regard to the nature of the employment proposed and with specific regard to the nature of the mental impairment.

153. The Occupational Health reports contained at *Pages 92 to 97 of the bundle* on spanning the period from 20 April 2012 up to 9 October 2012, ie the period immediately following the incident in April 2012, do not put forward the proposition that continued employment in the claimant's existing post is contra-indicated on medical grounds or is in any sense impracticable.

The first such report on 20 April 2012 suggests a sick line for two weeks. It states:-

"Following this period he should be able to return to his normal duties".

The second report on 22 May 2012 indicated that he continued to be unfit for work. It stated:-

"Equally so I thoroughly encouraged him to formulate an appropriate plan to deal with those issues. If he does this his sense of anxiety will improve and he will undoubtedly be back to work sooner rather than later."

The third such report on 12 June 2012 stated:-

"I will review him in approximately four weeks from now but hope we are looking at a return to work in approximately six weeks as not least I believe prolonged absence from work is unlikely to be medically helpful in this case."

The next report of 28 August 2012 states:-

"I also believe he could return to work either to a substantive post or to any other job as deemed appropriate to his skills and experience."

The final such report states:-

"From a medical point of view, I believe Mr McErlean is entirely fit to commence work at any stage and return to appropriate duties. There are no restrictions on medical grounds to his hours or duties."

154. The tribunal must give appropriate weight to the conclusions of the Occupational Health Department which had been employed by the Northern Health & Social Care Trust to determine precisely the employee's suitability for continued employment. The Occupational Health doctors employed by the Trust, who were aware of the claimant's occupation as a community mental health nurse (which is endorsed on each such report) and who examined the claimant in precisely that context, did not say that there are on medical grounds any indication of unsuitability for continued employment. That is strong evidence which must be taken into account by the tribunal.

155. The respondent has not sought to introduce a further medical report from the Occupational Health Department seeking to resile from their previous and repeated opinions. It also must be remembered that at the present time, some two years have passed with no further incidents put forward in evidence.

156. The opinion of the appropriate professional body, ie the Nursing & Midwifery Council is also a matter to which the tribunal should properly have regard in the exercise of its general discretion as to practicability. The Nursing & Midwifery Council, to which the matter had been referred by the respondent Trust determined on 19 March 2014 at *Pages 290 to 292 of the bundle* that:-

"The panel noted that this is the first consideration of this case by the Investigating Committee in respect of determining if there is a case for Mr McErlean to answer on the facts and if there is a real prospect of a finding of current impairment of fitness to practice.

The panel was mindful that its role is to consider the matter in accordance with the test in Article 26(2)(3)(I) of the Nursing & Midwifery Order 2001, that is whether in its opinion there is a case to answer. The panel considered this question in relation both to the facts alleged and in relation to the allegation of impairment of fitness to practice. In considering this question, the panel

had regard to NMC's 'Guidance to investigating committees panels on deciding whether there is a case to answer' or to advise that the panel is required to decide whether it is satisfied that there is a real prospect that the ultimate decision making committee could find that Mr McErlean's fitness to practice to be impaired.

The panel considered whether there was a case for Mr McErlean to answer on the facts. The panel considered the allegations in this matter and noted that the victim in the incident chose not to press charges and the police did not proceed with any criminal prosecution against Mr McErlean. The panel also noted that there was no evidence of any patient harm in relation to concerns with Mr McErlean's record-keeping.

With regard to Mr McErlean's record-keeping the panel noted that there was insufficient evidence to support these concerns and noted evidence that Mr McErlean's high workload may have led to these errors being made. The panel also noted submissions made by the NMC in its Report to the Investigating Committee that Mr McErlean's actions may have been attributable to his health at that time. The panel had sight of a letter from Mr McErlean's GP dated 22 October 2013 which states that there are no fitness to practice concerns with Mr McErlean and noted that they have recently confirmed this.

After reviewing all the evidence before it, the panel concluded that there was insufficient evidence to establish a case to answer on those facts. The panel was therefore satisfied that no further action should be taken in this matter."

157. It is therefore clear that the NMC, which has a statutory role in this area, concluded that on a basis of GP's evidence, and on the basis of the submissions made to the Investigating Committee by the NMC, that there were concerns about his mental health at the time of the incident and that there was insufficient evidence to support any fitness to practice concerns. That finding appears to the tribunal to be absolutely crucial to the proper consideration of practicability. How could this tribunal properly override the conclusion of the NMC and conclude that because of some perceived risk, it was impracticable to allow the claimant to resume employment as a community mental health nurse?

158. When putting forward its submission in relation to the practicability of a re-employment order, the respondent sought to rely firstly on a submission made by the claimant's trade union representative at his internal appeal hearing. This is essentially a medical issue to be determined on actual evidence put forward at various stages in the internal processes and before the industrial tribunal. It is not a matter which can properly be addressed by cherry picking parts of a submission made on the claimant's behalf by a trade union representative in which that trade union representative sought, for whatever reason, to draw an analogy with patients suffering from schizophrenia complicated by alcohol and illicit drug misuse. Submissions made by trade union representatives and indeed on occasion by professional lawyers, can sometimes be rather expansive and cannot be regarded as evidential in nature. The tribunal therefore does not glean any assistance from these excerpts from a trade union representative's submission in determining whether to exercise its discretion in this matter.

159. Next, the respondent sought to rely on the fact that the claimant had been involved in an incident of domestic violence. Again it has to be emphasised that the respondent has already accepted that the claimant was mentally impaired at the time of the incident. It however sought to rely on the Trust's domestic violence policy.

It was obvious from the evidence and indeed from the observations of the tribunal of Mr McErlean and his wife during the course of this hearing that they have reconciled. It was also obvious that they have had a child since the incident in April 2012, and that they are now living together as man and wife. While the respondent Trust's concern on behalf of the claimant's wife is in a way touching (albeit not a concern shared by Mrs McErlean) it is, in essence, patronising, intrusive and entirely inappropriate. It is not for the Trust to interpose itself into a marital relationship and to seek to exercise some sort of role in that relationship as a result of something which occurred as a result of a mental impairment.

160. In relation to the practicability of re-employment the Trust then seeks to rely on Dr Kinch's opinion that the claimant had developed a psychotic disorder associated with acute stress against a background of chronic work-related stress. That ignores the fact that the chronic work-related stress related to a pattern of alleged overwork. Unless the respondent is putting forward the proposition that it intends to impose excessive workloads in the future, the relevance of this matter is limited. The Trust also relies on the indication from Professor Mulholland that the possibility of a future episode is high. That, again with respect to the respondent, is a matter on which the evidence has been cherry picked by the respondent. The excerpt to which they refers appears on *Page 157 of the bundle* in which the cross-examination of Professor Mulholland is recorded by the disciplinary panel. The full excerpt reads:-

> *"Mr McIlroy asked, in Professor Mulholland's experience, can the proper treatment and care ensure his mental health is not compromised or is it an ongoing problem. Professor Mullholland replied, in general, the person if treated is 100% well. The possibility of a future episode is high and the person needs medication and to engage with services. However, between episodes, the person is able to function."*

The first and obvious point to make is that Professor Mulholland's remarks, as recorded by Mr McIlroy, are related to the general situation and not to the claimant in particular. That point was not made plain in the respondent's submissions. Secondly, the respondent does not rely on the whole of Professor Mulholland's reported remarks where he made it plain that the person <u>if treated</u> is 100% well. It also does not refer to the emphasis that Professor Mulholland places on the person needing medication and engagement with services. It does not refer to his clear statement that between episodes the person is able to function. It is not the situation, as suggested by the respondent, that Professor Mulholland warned against the re-employment of the claimant; quite the contrary. Professor Mulholland took the trouble to attend the disciplinary hearing, to provide a full witness statement for the appeal hearing and to attend the appeal hearing. He did the same at this tribunal hearing. He would not have done so if he had felt that the claimant was not fit for re-employment. He was quite clear that he believed the respondent's rationale for its decision was fundamentally flawed.

161. The respondent then relies on Dr Mangan's statement in which Dr Mangan indicated that the claimant was vulnerable to developing a relapse of his condition at times of severe stress. Again this is a situation in which the medical evidence has been cherry picked by the respondent. Dr Mangan does not advise against the re-employment of the claimant. In fact he states quite clearly that:-

> *"In my opinion, if Mr McErlean returned to working as a psychiatric nurse, he should engage fully with Occupational Health services and be reviewed by a consultant psychiatrist. Mr McErlean is vulnerable to developing a relapse of his condition at times of severe stress."*

162. It is important that the appropriate part of the medical evidence is quoted in full. It is not the case that Dr Mangan simply highlighted a particular risk which existed no matter what was done. Dr Mangan highlighted a particular risk which depended firstly on there being times of severe stress and secondly that has to be read together with his advice that on return to work the claimant should engage fully with Occupational Health services and should be reviewed by a consultant psychiatrist. The respondent has not indicated that it plans to overwork the claimant, to overload the claimant, or to inflict severe stress upon him. Furthermore it is not argued on behalf of the respondent that it is beyond their ability, given their particular resources, to provide ongoing engagement with Occupational Health services or to provide an ongoing review by a consultant psychiatrist in their employ, ie by Professor Mulholland, Dr Kinch, etc.

163. The tribunal clearly must have regard to the nature of the claimant's work as a community mental health nurse. It has had particular and anxious regard to the vulnerable nature of the patients tended by the claimant and indeed by his colleagues. However it cannot seriously be argued on behalf of the respondent that vast tracts of employment in the health sector or in the education sector are to be closed to anyone with any history of mental ill-health simply on the premise that they, could at times of severe stress, be vulnerable to further periods of mental ill-health, which could in reality strike anyone in those particular circumstances. If that were to be the position, much of the effect of the Disability Discrimination Act would be rendered nugatory. The respondent Trust is a large employer with an elaborate management structure and significant medical resources and with significant occupational health resources. It cannot be beyond the wit of the respondent to put in place a specific plan for the management of the claimant in his existing post to ensure that he is not subjected to periods of severe stress, and that he has ongoing access to the Occupational Health Department and to ongoing access to a consultant psychiatrist. There is nothing in any of this which suggests to this tribunal that an Order for reinstatement is not practicable in the circumstances of this case.

164. The tribunal therefore orders reinstatement of the claimant in his existing role as a community psychiatric nurse on 14 July 2014. The tribunal also directs that the respondent should pay to the claimant all salary, allowances and pensions contributions and any financial benefits whatsoever payable to the claimant in the interval following his dismissal up to 14 July 2014 subject only to the ordinary deductions in respect of income tax, national insurance, etc. The seniority of the claimant and any consequent pay progression should be restored. The claimant's reckonable service for pension purposes shall be restored as if he had never been dismissed.

The Order shall be complied with **by 14 July 2014**.

165. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Vice President:

Date and place of hearing: **28 April 2014 – 2 May 2014; and 2 June 2014, Belfast**

Date decision recorded in register and issued to parties:

Anthony McErlean v Northern Health and Social Care Trust

Case Ref. No: 1268/13 IT

Written Representations on behalf of the Claimant

The tribunal heard evidence over a number of days and it is not proposed to rehearse that evidence in this submission. The tribunal is asked to consider the evidence given and the documentation which was referred to during the course of the hearing. The Claimant contends that he was unfairly dismissed, which is now conceded, and that he was a disabled person within the meaning of the Disability Discrimination Act 1995 and that the Respondent discriminated against him by failing to comply with its duty to make reasonable adjustments.

Reinstatement

In this case the Claimant seeks reinstatement to his post. It is submitted that there is no sound reason why this should not be so. The matters for which he was disciplined and dismissed arose as a result of a psychotic episode and there is absolutely no evidence that he is unable to perform his duties or that he poses any risk to work colleagues or patients of the Trust. Indeed the evidence is to the contrary. By letter dated 22 October 2013 the Claimant's General Practitioner stated that he deemed the Claimant fit for work and fit to practise as a registered nurse. The NMC in its determination concluded that the facts as alleged were insufficient for a case to answer that the Claimant's fitness to practise was impaired. The Respondent's own Occupational Health Service deemed the Claimant fit to return to work. The clear import from Dr Mangan's report is that the Claimant could return to work.

Where a finding of unfair dismissal has been made by a tribunal, or as in this case where unfair dismissal is now conceded, the tribunal may make an order for reinstatement or re-engagement or an order for compensation. (Article 147 of the Employment Rights (Northern Ireland) Order 1996)

An order for reinstatement is defined as "an order that the employer shall treat the complainant in all respects as if he had not been dismissed" (Article 148 of the Employment Rights (Northern Ireland) Order 1996). In exercising its discretion under Article 147 the tribunal should first consider reinstatement and shall take into account:

(a) whether or not the complainant wishes to be reinstated;

(b) whether or not it is practicable for the employer to comply with an order for reinstatement; and

(c) in cases of contributory conduct, whether or not it would be just and equitable to order reinstatement.

The tribunal will consider, for example, the effect that an order for reinstatement would have on a respondent's business. It will not make such an order where it would lead to a redundancy situation or over-manning or industrial unrest (*Port of London Authority v Payne and others [1994] IRLR 9 CA*). In *King v Royal Bank of Canada Europe Ltd [2012] IRLR 280 EAT*, the EAT stated that in the context of the importance that the claimant had attached to re-employment, "the tribunal's failure to deal with this issue [was] a striking omission". The EAT also held that the tribunal wrongly restricted its consideration of alternative employment to the time of the claimant's dismissal; it failed to deal with the issue at the hearing, "which would be the relevant time for considering the question of re-engagement".

If a reinstatement order is made the complainant will be entitled to the arrears of pay and benefits that he or she would have received but for the dismissal, together with any rights and privileges, including seniority and pension rights. He or she must be restored to his or her original job and receive back pay and benefits from the date of dismissal.

If a tribunal decides not to order reinstatement it must go on to consider re-engagement, which is defined as "an order that the complainant be engaged by the employer or by a successor of the employer or by an associated employer in employment comparable to that from which he was dismissed or other suitable employment" (Article 149 of the Employment Rights Order). In deciding whether or not to re-engage the tribunal will take into consideration the same factors as for reinstatement above.

The tribunal must specify the terms on which re-engagement will take place and in particular specify:

(a) the identity of the employer;

(b) the nature of the employment;

(c) the remuneration for the employment;

(d) benefits payable and arrears of pay;

(e) any rights and privileges including seniority and pension rights to be restored; and
(f) the date by which the order must be complied with.

For the purposes of deciding whether or not it is practicable to make an order for reinstatement/re-engagement the tribunal should not take account of the fact that the employer has engaged a replacement unless the employer can show either that it was not practicable for it to arrange for the dismissed employee's work to be done without engaging a replacement or that it engaged the replacement after a lapse of a reasonable period of time without having heard from the employee that he or she wished to be reinstated or re-engaged (Article 150(5) of the ERO).

In *Rembiszewski v Atkins Ltd EAT/0402/11*, the EAT stated that whether or not an order for reinstatement or re-engagement should be made, should be judged as of the date that the reinstatement or re-engagement would take effect. The tribunal should not take into account whether or not an order for reinstatement or re-engagement would result in the employee receiving a "windfall" from the way in which the amount payable on

reinstatement/re-engagement is calculated - the key question is whether or not it is practicable for the employer to comply with the order (*Home Office v Khan and another EAT/0257/07*, in which the employer argued that a failure to mitigate loss by seeking other employment should have been taken into account in deciding if an order for re-engagement should be made).

In calculating the amount of arrears of pay and benefits payable the tribunal will take into account, so as to reduce an employer's liability, wages paid in lieu of notice, ex gratia payments paid by the employer or remuneration paid in respect of employment with another employer.

It should be remembered that at this stage the tribunal is only required to "take into account" the issue of practicability and therefore the tribunal's assessment is provisional as the issue will be considered again at the enforcement stage. It is not uncommon for tribunals to make an order to test whether or not the employer's claims of impracticability are justified: *Timex Corporation Ltd v Thomson [1981] IRLR 522* and *Freemans plc v Flynn [1984] IRLR 486.*

If an employer refuses to reinstate or re-engage the tribunal will award additional compensation over and above the basic compensatory awards unless the employer can satisfy the tribunal that it was not practicable to comply with the order. In these circumstances the complainant will be entitled to an "additional award" of between 26 and 52 weeks' pay in addition to the basic and compensatory awards. In *Awotona v South Tyneside Healthcare NHS Trust [2005] All ER (D) 221 (Feb) CA*, the Court of Appeal held that a tribunal is entitled to reassess any award made to the claimant at the original hearing, in respect of losses from the date of dismissal to the date of re-engagement or reinstatement, if the employer subsequently fails to re-engage or reinstate the employee.

It is, accordingly, submitted that having regard to the relevant legal principles and the facts of this case the claimant should be reinstated to his post.

Compensation:

In the event that there is no order for re-employment of the Claimant the tribunal is required to assess compensation which must consist of a basic award and a compensatory award.

The Claimant refers to the schedule of loss provided subject to the issue of pension loss which has been "parked" given the actuarial calculations which may be required, pending consideration of the issue of re-instatement and re-engagement.

The amount of compensation is such amount as a tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. The tribunal may also award a nominal figure in respect of the loss of statutory rights and a figure for injury to feelings where liability for unlawful disability discrimination is established.

Contributory Conduct

Where a claimant is considered to have caused or contributed to his or her own dismissal the tribunal may reduce both the compensatory and basic award by such proportion as it considers just and equitable. In the present case, and given the circumstances of the conduct in respect of which the Claimant was disciplined and subsequently dismissed and his mental state at the material time it is submitted that it would not be appropriate to reduce any award made to the Claimant by reason of contributory conduct.

A reduction for contributory fault should only take place if the claimant has acted in a culpable or blameworthy manner. It must have those characteristics. (*Nelson v BBC (No. 2) [1979] IRLR 346,351*) In *Nelson* the Court of Appeal said that three factors must be satisfied:

(a) the relevant action must be culpable or blameworthy;

(b) it must have actually caused or contributed to the dismissal;

(c) it must be just and equitable to reduce the award by the proportion specified.

Brandon LJ held that it could never be just and equitable to reduce a successful complainant's compensation unless the conduct was culpable or blameworthy. Deductions under this heading can only be made in respect of actions by the employee that took place prior to the dismissal and of which the employer had knowledge when the decision to dismiss was taken. The employee's conduct must be shown to have actually caused or contributed to the employer's decision to dismiss.

The distinction between findings relating to fairness and contributory conduct were emphasised in *Iggesund Converters Ltd v Lewis [1984] ICR 544, EAT.* This point was made again by the Court of Appeal in *London Ambulance Service NHS Trust v Small [2009] IRLR 563, CA.* The contributory fault issue was one for the tribunal to make on the evidence it heard. Accordingly, an assessment of the issue of contributory fault requires the tribunal to consider the claimant's conduct and to arrive at a subjective determination on the evidence as to whether or not there had been some blameworthy conduct on the part of the claimant and whether this had contributed to the dismissal.

The question of whether the conduct in question amounts to blameworthy conduct is largely a question of fact for the tribunal. However, tribunals are reluctant to find blameworthy conduct where, for example, an employee is dismissed for capability-related reasons and in *Kraft Foods Ltd v Fox [1977] IRLR 43,* the EAT drew a distinction between actions over which an employee has control and those outside his control. The EAT has also recognised that there may also be cases where the degree of blameworthiness is so small that it may not be appropriate to make a reduction at all. (*Lindsay v General Contracting Ltd (t/a Pik a Pak Home Electrical) EAT 1096/00 and 1126/00*)

The fact that an employee's conduct or capability is explicable by a mental illness or condition is unlikely, without more, to constitute the basis for a finding of contributory conduct. A person's mental health is not generally to be regarded as culpable or blameworthy conduct over which the person has any control. Given the nature of this case, and the circumstances in which the matters giving rise to the disciplinary charges took place

it is submitted that these took place in circumstances where the mental health and reasoning of the claimant was compromised and these were, accordingly, not matters in the control of the claimant in the normal meaning of that concept.

Mitigation:

Generally, an employee is under a duty to mitigate his or her loss. The employee must make attempts to seek alternative employment and be realistic in his or her job expectations. If the employee has not made reasonable efforts to find other work, compensation may be reduced to reflect the tribunal's view of what would have happened if he or she had done so. The burden of proving a failure to mitigate is on the employer: *Fyfe v Scientific Furnishing Ltd [1989] IRLR 331.*

The question as to whether the claimant has taken reasonable steps to mitigate the loss is essentially one of fact for the tribunal. Whether an individual; has done enough to fulfil the duty to mitigate depends on the circumstances of each case and is to be judged subjectively: *Johnson v Hobart Manufacturing Co. Ltd EAT 210/89.* Much will depend on the state of the labour market and the personal characteristics of the employee. As the NIRC said in *AG Bracey v Iles [1973] IRLR 210* "it may not be reasonable to take the first job that comes along. It may be much more reasonable, in the interests of the employee and the employer who has to pay compensation, that he should wait a little time..." In particular, a professional employee with particular skills does not necessarily have to lower his or her expectations immediately as regards the type of work he or she is prepared to apply for in seeking new employment: *Orthet Ltd v Vince-Cain [2005] ICR 374, EAT.* Indeed, the very fact of the claimant's dismissal, which is now conceded to have been unfair, could in itself have militated against the claimant readily finding and securing new and different employment.

This is a case in which the Claimant was a nurse by profession. He has always made clear his wish to return to that profession. His wife is also a nurse. He had to await the findings of the NMC. It would have been neither prudent nor appropriate to seek work in that capacity while that decision was outstanding. Indeed there is some merit in the Claimant's suggestion, given that Northern Ireland is a relatively small place with a limited number of health trusts, that he also required a decision from a tribunal relating to his dismissal before returning to work as a nurse. From the outset reinstatement has been the Claimant's preferred option.

There are also limits on the power to make just and equitable reductions and the Courts have enjoined tribunals not to leap to the conclusion that it is invariably just and equitable to reduce a compensation award in light of misconduct and to the consideration of overall fairness in such situations which the Court of Appeal in *Panama v London Borough of Hackney [2003] IRLR 278, CA* described as being "paramount".

Disability Discrimination:

The Disability Discrimination Act 1995 introduced measures to prevent discrimination against disabled people. The Disability Code of Practice – Employment and Occupation provides practical guidance on how to prevent discrimination against disabled people in employment. It describes the duties of employers in this regard. The Code does not impose legal obligations, nor is it an authoritative statement of the law. However, the Code can be used in evidence in legal proceedings under the Act and courts and tribunals must take into account any part of the Code that appears to them relevant to any question arising in those proceedings.

In addition to the obligations imposed on employers by the Disability Discrimination Act 1995, as amended, designated public authorities, including government departments, are required by section 75 of the Northern Ireland Act 1998 when carrying out their functions to have due regard to the need to promote equality of opportunity, inter alia, between persons with a disability and persons without.

To come within the definition of disability the burden of proof is on an employee to show that he or she meets the four requirements contained in Section1 of the Disability Discrimination Act 1995:

(a) Does the claimant have an impairment that is either 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 in Schedule1?

(c) Is the adverse effect substantial, rather than minor or trivial?

(d) Is the adverse effect long term?

Although tribunals address the above parts separately, in *Cunningham v Ballylaw Foods Ltd 31 January 2007 NICA* the Court of Appeal in Northern Ireland said that the questions of substantial adverse effect and long-term adverse effect overlap and, ultimately, the tribunal must take a view, on the evidence, as to whether or not the overall statutory definition is satisfied.

The definition of disability in s.1 of the Disability Discrimination Act 1995 is supplemented by schs.1 and 2 to the Act, a code of practice (Disability Discrimination Act 1995 code of practice: employment and occupation) and the guidance on matters to be taken into account in determining questions relating to the definition of disability. Section 3(3) of the Disability Discrimination Act 1995 provides that tribunals must take account of any matter in the guidance relevant to the issue to be determined.

The claimant's disability is assessed at the time of the alleged discriminatory act, (in this case the investigatory and disciplinary process (including the appeal) which led to his dismissal. In *Richmond Adult Community College v McDougall [2008] IRLR 22 CA*, the Court of Appeal held that the likelihood of recurrence of a disability must be assessed at the date of the act of discrimination. It is, accordingly, advisable for an employer to investigate whether or not an employee is disabled as, if it could reasonably have known that the employee was disabled, it will have a duty to make reasonable adjustments.

The terms "physical impairment" and "mental impairment" are not defined or explained in the Disability Discrimination Act 1995 but the requirement that they have a substantial

effect on ability to carry out day-to-day activities is seen as ensuring that minor impairments that do not amount to what are normally regarded as disabilities will not be covered by the Act.

In *Walker v Sita Information Networking Computing Ltd EAT/0097/12*, the EAT (overturning the employment tribunal decision on this point) held that an employee who suffered from a wide range of health conditions and symptoms described as "functional overlay accentuated by obesity" without any identifiable physical or mental "cause" was disabled. The tribunal had erred in considering it necessary to establish a physical or mental "cause" of the impairment. The absence of an apparent cause for the employee's impairment was significant only as an evidential issue in that: "Where an individual presents as if disabled, but there is no recognised cause of that disability, it is open to a tribunal to conclude that he does not genuinely suffer from it." However, in the present case it is submitted that there was ample evidence before the employer that the employee's impairments were genuine.

"Mental impairment" covers a wide range of impairments relating to mental functioning, including learning disabilities and mental illness. A claimant need establish only that he or she has a mental impairment. Following the decision in *Millar v Inland Revenue Commissioners [2006] IRLR 112 CS* it is not necessary to show the cause of that impairment.

Even if there is a mental or physical impairment, it will be regarded as a disability in terms of the Disability Discrimination Act 1995 only if it has a substantial adverse impact upon the employee's day-to-day activities. This is assessed on an individual basis so that what for one employee would amount to a disability may not be assessed as a disability for another employee. The focus should be on the disabling effects in the individual case not just the disorder itself.

A person is a "disabled person" only if the impairment has an adverse effect upon his or her "normal day-to-day activities". The Act specifies that in order to satisfy this element of the definition it must affect:

- mobility; or
- manual dexterity; or
- physical coordination; or
- continence; or
- ability to lift, carry or otherwise move everyday objects; or
- speech, hearing or eyesight; or
- memory or ability to concentrate, learn or understand; or
- perception of the risk of physical danger.

A tribunal can consider the claimant's ability to perform day-to-day tasks at work, although not all working activities - for example lifting heavy weights - amount to day-to-day activities: *Cruickshank v VAW Motorcast Ltd [2002] IRLR 24 EAT.*

The effect on the ability to carry out normal day-to-day activities must be both "substantial" and "long term".

What is substantial is a question of fact and evidence for the tribunal to determine. In *Vicary v British Telecommunications plc [1999] IRLR 680 EAT*, the EAT allowed the employee's appeal where the employment tribunal had simply followed the opinion of the medical expert as to whether or not the impairment would have a substantial effect on normal day-to-day activities. It is a matter for the employment tribunal to address not the doctor.

The guidance states that a "substantial" effect is one that is more than "minor" or "trivial".

The focus required by the Act is on the things that the claimant cannot do or can do only with difficulty, rather than on the things that the person can do: *Goodwin v The Patent Office [1999] IRLR 4 EAT.*

The guidance provides that consideration should be given to the time taken to carry out the activity and the way in which the activity is carried out, and a comparison made with how the activity might be expected to be carried out "if the person did not have the impairment". An impairment may not have a substantially adverse effect on one activity as set out "but its effects on more than one activity, taken together" could result in a substantial adverse effect on the person's ability to carry out normal day-to-day activities.

There are express provisions in relation to what is meant by "long term". Generally, "long term" means has lasted or is likely to last for at least 12 months or for the rest of the life of the person affected.

The guidance provides that: "In assessing the likelihood of an effect lasting for 12 months, account should be taken of the total period for which the effect exists. This includes any time before the point at which the alleged incident of discriminatory behaviour which is being considered ... occurred."

The effect may be judged as long term even if the symptoms are not continuous, provided that they are likely to recur. In assessing the likelihood of a recurrence of a condition, the Court of Appeal in *Richmond Adult Community College v McDougall [2008] IRLR 227 CA* held that a tribunal should take into account only those events up to the alleged discrimination.

In *Patel v Oldham Metropolitan Borough Council and another [2010] IRLR 280 EAT*, the EAT held that "the duration of the effects of an impairment which is likely to develop or which has developed from a different impairment" may be aggregated with the duration of the adverse effects of the original impairment to assess whether or not the effect of the original impairment is likely to last or has lasted for at least 12 months. The EAT allowed the employee's appeal and remitted the case to the tribunal to determine this issue on the facts.

It is important to note that when assessing the substantial effect of an impairment to determine whether or not it is a disability the effect of any medical treatment that the employee is receiving should be disregarded. The tribunal is invited to consider the fact that the claimant had been prescribed medication for his condition.

The Disability Discrimination Act 1995 provides that an impairment that would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal

day-to-day activities "but for the fact that measures are being taken to treat or correct it" is to be treated as having that effect. "Measures" are defined as including medical treatment or the use of prosthesis or other aids. The Employment Appeal Tribunal has used the term "deduced effects" for such cases.

In *Kapadia v London Borough of Lambeth [2000] IRLR 14 EAT*, the claimant suffered from depression for which he had attended counselling sessions. It was found that the counselling sessions amounted to medical treatment and that there was evidence that without such sessions Mr Kapadia would have had a mental breakdown and required psychiatric treatment, including in-patient treatment. Taking into account the deduced effects, the impairment had a substantial adverse effect.

In *Poulton v Walton [1998] ET/1805515/97*, it was found that the term medical treatment could also apply to a special diet that the claimant was following to avoid the effects of diabetes. The Disability Discrimination Act 1995 code of practice: employment and occupation refers to someone with an impairment receiving "medical or other treatment" which alleviates or removes the effect.

It is submitted that when one examines the medical evidence available, including the evidence of Dr Mangan, professor Mulholland, Dr Kinch and the occupational health doctors that there is clear evidence of a disability, namely a mental impairment, being a psychotic episode in April 2012 following a prolonged depressive reaction (Dr Kinch) and followed by a prolonged depressive reaction (Dr Mangan) when the Claimant was diagnosed as suffering from clinical depression and prescribed anti-depressant medical and he attended a counsellor. There are sufficient references to memory and concentration etc and to the duration of this impairment and its substantial effects on the Claimant to bring the impairment experienced by the Claimant within the definition contained in the DDA.

Reasonable Adjustments:

The duty to make reasonable adjustments is the unique feature of the Disability Discrimination Act 1995. A failure to comply with the duty amounts to discrimination under s.3A(2), which states that an employer "also" discriminates against a disabled person if it fails to comply with the duty to make reasonable adjustments: the duty to make reasonable adjustments.

Where (a) a provision, criterion or practice applied by or on behalf of an employer, or (b) any physical feature of premises occupied by the employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect (section 4A(1) Disability Discrimination Act 1995 (as amended) ("the DDA").

In the present case it is the Claimant's contention that his employer had applied a PCP in relation to him which was that he should be subjected to the disciplinary process and dismissed. He contends that he was at the material times a disabled person. He contends that the employer knew or from the circumstances could reasonably have been expected to have known that he was a disabled person. He contends that the symptoms of his disability

prevented him from controlling his actions which were out of character for him. To disregard these matters was to place the Claimant at a substantial disadvantage in comparison with persons charged with such disciplinary offences who were not disabled. To continue to process the Claimant through the investigation, disciplinary hearing and appeal hearing without taking account of these matters, to deal with this matter as a misconduct issue and to disregard the mental health considerations in respect of the disciplinary charges was leading inexorably towards a dismissal, therefore, there was a duty to make reasonable adjustments to disapply the disciplinary process, and, in any event, to decide upon a disposal which did not amount to dismissal from his employment. It was conceded during the hearing by the Respondent's witnesses that this matter may have taken a different course had the issue of capability rather than misconduct have been considered. There would have been no cost to the Respondent and it would have been effective in that the Claimant would have been enabled to return to his employment.

The duty arises under s.4A(1) where a provision, criterion or practice applied by or on behalf of an employer, or any physical feature of premises occupied by the employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled. In such a case it is the duty of the employer to take such steps as are reasonable, in all the circumstances, in order to prevent the provision, criterion or practice, or feature having that effect. If the duty has been breached the employer cannot rely on a justification defence.

The Act states that only substantial disadvantages give rise to the duty. Substantial disadvantages are those which are not minor or trivial. What matters is not that a provision, criterion or practice or a physical feature is capable of causing a substantial disadvantage to the disabled person in question but that it actually has this effect on him or her, or (where applicable) that it would have this effect if the disabled person was doing the job at the time.

Whether it is reasonable for an employer to make any particular adjustment will depend on a number of factors, such as cost 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.

The applicability of the duty to make reasonable adjustments is limited by the knowledge of the employer. An employer may have a defence to a disability discrimination claim if it shows that it did not know and could not be reasonably expected to know that an individual has a disability and is likely to be placed at a substantial disadvantage by one of the employer's practices or a physical feature of its premises ("the "ignorance defence").

Early case law under the DDA suggested that an employer was unlikely to be expected to make enquiries to ascertain whether an employee had a disability. Employment tribunals, however, began to show an increasing willingness to fix an employer with knowledge of an employee's disability. Where an individual's behaviour is problematic there is a strong argument that it should be investigated and consideration given as to whether or not there is an issue re disability. It is submitted that this was such a case. The behaviour of the Claimant taken together with the ample medical evidence available to the employer was

sufficient to raise an issue that should have been considered given (a) the professional expertise in the area of mental health on the part of the Respondent's officers involved in this process and (b) the resources, including an occupational health department, available to the Respondent. Indeed, when pressed at least some of the Respondent's witnesses appeared to concede that the Claimant may have been disabled during the process which led to his dismissal.

Two EAT decisions concern the proper interpretation of section 4A(3) of the Disability Discrimination Act 1995 and the "lack of knowledge" exemption from the duty to make reasonable adjustments: *Eastern and Coastal Kent PCT v Grey [2009] IRLR 429* and *DWP v Alam (EAT 9th November 2009).*

The definition of disabled for the purposes of the DDA can encompass various physical and mental *conditions* (which may or may not have a substantial and long-term effect on normal day-to-day activities amounting to a qualifying *impairment*), for example: asthma, ME, diabetes, personality disorders, depression and dyslexia. Even an assiduous and sensitive employer - in the absence of an express complaint - may miss signs that would notify them of a substantial disadvantage affecting an employee. The duty to make reasonable adjustments is operative when the employer possesses constructive as well as actual knowledge of a disability and may mean that an employer is held liable for a failure to make reasonable adjustments notwithstanding the fact that it does not know that the employee or applicant is disabled or, if it does so know, of the effects of an employee's disability. If it is shown that they could reasonably have found out those facts, they may be guilty of this form of discrimination. This is balanced by the fact that an employer's reasonable lack of knowledge of the disability and its likely effect prevents the duty being engaged.

The DDA encapsulates this in section 4A(3), *"Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know... (b) in any case, that that person has a disability and is likely to be affected in the way mentioned in subsection (1)"* (section 4A (3) DDA).

First, this defence combines testing objective actual or constructive knowledge (the fact of the disability) with subjective knowledge (the likelihood that a disabled person would be placed at a substantial disadvantage as a result of a particular provision, criterion or practice ("PCP")). Secondly, it is a particularly fact sensitive defence. What an employer can reasonably be expected to know about the fact of a person's disability, and due to that disability the effect of a practice applied by the employer, will always depend on the specific circumstances. This may pose difficult questions in circumstances where conditions such as depression or dyslexia might only manifest themselves in headaches, difficulty concentrating, or other potentially concealed forms although perhaps less so with a manifest physical impairment.

The Disability Discrimination Act 1995 code of practice: employment and occupation states that employers must do all that they can reasonably be expected to do to find out whether or not an employee has a disability and is likely to be placed at a substantial disadvantage.

The decision in the case of *Eastern and Coastal Kent PCT* appeared to make it very difficult for an employer to rely on the section 4A(3) DDA defence. In that case the claimant, a job applicant with dyslexia, was successful at tribunal in establishing that the prospective

employer had failed during her interview to make reasonable adjustments in relation to her disability. The employer knew of the applicant's disability but argued it could not reasonably have been expected to know she was likely to be at a disadvantage in comparison with a non-disabled person.

On appeal from the tribunal's decision that the employer was in breach of the duty to make reasonable adjustments, the EAT construed the provisions in section 4A(3) DDA 1995 and determined a cumulative rather than alternative test for the application of the exemption from the duty. That is to say, the employer would only be exempt if each of the following four matters were satisfied. That the employer:

i. did not know that the disabled person had a disability;

ii. did not know that the disabled person was likely to be at a substantial disadvantage compared with persons who are not disabled;

iii. could not reasonably be expected to know that the disabled person had a disability; and

iv. could not reasonably be expected to know that the disabled person was likely to be placed at a substantial disadvantage in comparison with persons who are not disabled.

The EAT's view of the correct interpretation of section 4A (3) was as follows, "*It is necessary to stress that these are cumulative and not alternative requirements and that is because of the use of the word 'and' in two significant places in subsection (3),* [set out above]. *The first use of the word 'and' is between the words; 'the employer does not know' and the words 'could not reasonably be expected to know'. The second is between the words 'the person has a disability' and 'is likely to be affected in the way...' If the draftsman of this provision had intended the requirements to be alternative rather than cumulative, surely he or she would have used the word 'or' rather than the word 'and'. Indeed, what is clear is that the section cannot be construed so that 'and' means 'or'.*"

This results in the exemption from the duty being unavailable to an employer who was aware of the disability but reasonably unaware of the disadvantageous effect of a PCP on that applicant or employee. This interpretation would be truly onerous for any employer, as simple knowledge of an employee's disability would prevent the application of the section 4A(3) DDA defence.

A peculiarity of the judgment in *Eastern and Coastal Kent* was that the EAT remitted the case back to the tribunal to determine whether or not the statutory provision, as so interpreted, had been satisfied by the employer. This was inconsistent with the logic of the interpretation of s 4A(3) DDA that had been central to the EAT's judgment. It had been accepted that the employer did in fact know that the applicant was disabled and therefore it had not met the cumulative requirements of the section. On the EAT's reasoning the exemption from making reasonable adjustments plainly could not apply. This was a feature of the EAT's judgment noted and commented on in the intervening period between the two

cases by, at least, the editors of *Harvey*, and which was to influence the EAT's further decision in *DWP v Alam*.

The claimant in *DWP v Alam* had symptoms of depression including loss of concentration, losing his temper and severe headaches. It was conceded that in relation to the symptoms constituting a loss of concentration he was disabled for the purposes of the DDA. The claimant left work early without permission and as a result was given a twelve month written warning. In summary, the tribunal concluded: that the employer had applied a PCP in relation to the claimant, which was that he should obtain permission before leaving the workplace or he would receive a disciplinary sanction; that the symptoms of his disability prevented the claimant from controlling his actions and feelings sufficiently to ask permission to leave; that he was thus much more likely to receive a disciplinary sanction thereby, and therefore the duty to make reasonable adjustments operated in this claimant's case to not apply a disciplinary sanction.

Ultimately, the EAT judged that the tribunal had erred in finding that a PCP had been correctly identified but the EAT also scrutinised whether the provisions of section 4A(3) and 4A(3)(b) DDA applied so as to show that the employer was not under a duty to make any reasonable adjustments *per se.*

In *DWP v Alam*, the EAT was not prepared to accept *Eastern and Coastal Kent* as authority for the proposition that an employer cannot benefit from the provisions of section 4A(3) DDA unless it qualified in a cumulative manner in respect of each feature of that section. It was identified as material to this decision that the EAT's remission of the issue back to the tribunal was inconsistent with that very proposition and (despite the express explanation in the judgment of *Eastern and Coastal Kent* - quoted above), this gave "*the impression that matters were not in fact regarded by the Employment Appeal Tribunal as being that an employer could only qualify for the benefit of section 4A(3)(b) if all four of the questions posed were answered in the affirmative*" (*DWP v Alam*, paragraph 15).

The EAT once again interpreted the relevant section as follows:

"... it seems to us clear, as a matter of statutory interpretation and giving the language of those provisions their ordinary meaning, that to ascertain whether the exemption from the obligation to make reasonable adjustments provided for by section 4A(3) and 4A(3)(b) applies, two questions arise. They are: 1. Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A (1)? If the answer to that question is: "no" then there is a second question, namely, 2. Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)?

If the answer to that second question is: "no", then the section does not impose any duty to make reasonable adjustments. Thus, the employer will qualify for the exemption from any duty to make reasonable adjustments if both those questions are answered in the negative. That interpretation takes proper account not only of the use, twice, of the word "and" but also of the comma after "know" in the second line of section 4A (3)" (paragraphs 17 - 18).

Elizabeth Graham accepted in evidence that at the time of the appeal hearing the Claimant was mentally ill. She also accepted that she agreed with the conclusion that at the time of the incident the Claimant was demonstrating a form of mental illness.

In *Fareham College Corporation v Walters [2009] IRLR 991 EAT*, the EAT considered the requirement, as restated in *Rowan* (*Environment Agency v Rowan [2008] IRLR 20 EAT*), for tribunals considering reasonable adjustment claims to consider "the identity of the non-disabled comparators (where appropriate)". In *Fareham College Corporation*, the EAT stated that the use of the words "where appropriate" by the EAT in *Rowan* recognised that it may not always be necessary to identify the non-disabled comparators.

The employer is obliged to "take such steps as it is reasonable, in all the .criterion or practice, or feature" having the effect of placing the disabled person at a substantial disadvantage. Section 18B(2) of the Disability Discrimination Act 1995 sets out examples of the kinds of steps that an employer may have to take in relation to a disabled worker although this is not an exhaustive list.

The non-exhaustive nature of the list was emphasised in *Jelic v Chief Constable of South Yorkshire Police EAT/0491/09.* In Romec Ltd v Rudham EAT/0069/07, the EAT said that, in determining whether or not an employer has complied with the duty to make reasonable adjustments the critical question is whether or not there is a real prospect that the adjustment would have removed the disadvantage suffered by the employee. It is only where the making of a specific adjustment would be likely to lead to the disabled employee's disadvantage being removed that such an adjustment will be reasonable. The tribunal should then go on to consider if the adjustment was a reasonable one to make. This approach was adopted in *Salford NHS Primary Care Trust v Smith EAT/0507/10*, in which the EAT confirmed that reasonable adjustments are "primarily concerned with enabling the disabled person to remain in or return to work with the employer" with the result that a proposed adjustment that does not have the effect of preventing the provision, criterion or practice from placing the employee at the substantial disadvantage will not be a reasonable adjustment. However, in *Leeds Teaching Hospital NHS Trust v Foster EAT/0552/10*, the EAT held that: "there was no need for the tribunal to go as far as to find that there would have been a good or real prospect of Mr Foster being redeployed if he had been on the redeployment register between January and June 2008. It would have been sufficient for the tribunal to find that there would have been just a prospect of that." The EAT went on to say that this was not inconsistent with *Romec Ltd v Rudham EAT/0069/07* because in that case the EAT "was saying that if there was a real prospect of an adjustment removing the disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one, but [it] was not saying that a prospect less than a real prospect would not be sufficient to make the adjustment a reasonable one". In this case the Respondent's witnesses concede that this case could have been disposed of in a different way.

In *EA Gibson Shipbrokers Ltd v Staples EAT/0263/07*, the EAT held that the employment tribunal was entitled to form the opinion that the suggested adjustments, taken cumulatively, might have prevented the claimant's dismissal. It was not required to examine whether or not each individual adjustment might have had that effect before hearing submissions from the employer on the issues of likely effectiveness, proportionality and cost.

The House of Lords in *Archibald v Fife Council [2004] IRLR 651 HL* held that the duty to make reasonable adjustments could require an employer to treat a disabled person more favourably than others in some circumstances. The duty could require an employer to transfer an employee who was no longer able to do her original job because of disability to

another position for which she was qualified, without competitive interview, even if the post was at a higher grade, if this was reasonable in the circumstances. The House of Lords remitted the case to the employment tribunal to decide whether or not it would have been a reasonable adjustment for the council to set aside its policy that people seeking employment at a higher grade had to undertake competitive interviews, in order to place an employee who, due to disability, was no longer able to do her job as a road sweeper, in a sedentary post, where there was a vacancy that she was qualified to fill. The employee was at a substantial disadvantage compared to non-disabled people.

The fact that an employee or his or her advisers cannot, or do not, suggest a reasonable adjustment does not mean that the employer has discharged its duty. The duty to make adjustments is upon the employer: *Cosgrove v Caesar & Howie [2001] IRLR 653 EAT.* The Disability Discrimination Act 1995 code of practice: employment and occupation says that there is no onus on the disabled person to suggest what adjustments should be made (although it is good practice for the employer to ask). However, where the disabled person does so, the employer must consider whether or not such adjustments would help overcome the disadvantage, and whether or not they are reasonable.

In *Project Management Institute v Latif [2007] IRLR 579 EAT* the EAT, following *Cosgrove*, noted that a depressed employee is not in the best position to make suggestions about reasonable adjustments.

In *Hinsley v Chief Constable of West Mercia Constabulary EAT/0200/10*, the EAT upheld a claim for post-employment discrimination in the form of a failure to make reasonable adjustments. The EAT overturned the employment tribunal decision that the employer was not in breach of its duty to make reasonable adjustments when it failed to reinstate Ms Hinsley as a probationary police constable after she sought to retract her resignation.

The EAT in *HM Prison Service v Beart EAT/650/01* said that a particular step does not have to prevent the effect in question to be a reasonable adjustment. There are many steps described in the Disability Discrimination Act 1995 that could not be guaranteed to work in the sense of totally removing the disadvantage to the disabled employee but this of itself was no reason to absolve an employer from the duty to take a particular step; nor was it enough, without more, to lead to the conclusion that the step was not a reasonable one. In that case, the EAT upheld the tribunal decision that the Prison Service had failed to make a reasonable adjustment by not following its medical adviser's recommendation to relocate a depressed employee to a different workplace. The fact that the duty to relocate arose during disciplinary proceedings did not justify the failure.

The correct comparator in a reasonable adjustment case was held by the Court of Appeal, in the case of *Smith v Churchill's Stairlifts PLC [2006] IRLR 41* to be readily identified by reference to the particular disadvantage caused by the relevant arrangements, and the comparison is not made with the entire non-disabled population. Thus, the comparison is to be made between 'the disabled person concerned' and persons who are not disabled. This case also made clear the test of reasonableness (for the purposes of the duty to make reasonable adjustments) is objective and not subjective.

The EAT decision in the case of *Project Management Institute v Latif* (see above) considered for the first time how the burden of proof provisions should be applied for the purposes of a

claim for failure to make reasonable adjustments. It held the claimant must establish that the duty has arisen, and that there are facts from which it could be reasonably inferred, in the absence of an explanation, that it has been breached. Accordingly, the Claimant must show the existence of a PCP and that it places him at a substantial disadvantage in comparison with those who are not disabled. In the circumstances of that case, the tribunal concluded, applying the burden of proof provisions, the claimant had shown, in the absence of an explanation, that the Respondent was under a duty to make a reasonable adjustment and that it had failed in its duty to do so.

Conclusion:

It is, accordingly submitted that having regard to the evidence (and belated concessions) in this case that the Claimant was unfairly dismissed from his position, that he was subjected to unlawful discrimination having regard to the provisions of the Disability Discrimination Act 1995 by a failure to comply with its duty to make reasonable adjustments in the circumstances and that the Claimant should be reinstated to his post together with the arrears of pay and benefits that he or she would have received but for the dismissal, together with any rights and privileges, including seniority and pension rights.

G. Grainger
02 June 2014

IN THE INDUSTRIAL TRIBUNAL IN NORTHERN IRELAND

BETWEEN

ANTHONY MC ERLEAN

CLAIMANT

--AND—

NORTHERN HEALTH AND SOCIAL CARE TRUST

RESPONDENT

CASE REF NO 1268/13 IT

SUBMISSION ON BEHALF OF THE RESPONDENT

1. The Claimant, Anthony McErlean, dob 6.10.68, lodged a claim in the Industrial Tribunal on 3 July 2013 (pgs 1-11) claiming unfair dismissal. By way of remedy he sought re-engagement (to be placed in another job by the Respondent) and compensation (para 6.11 IT1). He did not seek re-instatement into his post of Community Mental Health Nurse (Band 6). The Claimant was permitted to amend his claim to add a claim of disability discrimination (21.08.13). The particulars of that claim are at pages 16-17 of the Tribunal bundle. The Respondent resisted both elements of the claim which proceeded to full hearing on 28 April 2014 – 2 May 2014.

2. The Tribunal heard evidence from the Claimant, his wife Julie McErlean and Prof Mulholland, Consultant Psychiatrist. The Trust witnesses were;
   - Brian McCosh _ Presenting Officer (Internal disciplinary investigation)
   - Trevor Fleming – member of the Disciplinary panel
   - Elizabeth Graham – member of the Appeal panel

3. During the course of the Respondent's evidence concessions were made by the Respondent's witnesses in response to questions asked in cross examination by counsel for the Claimant and the Vice President which undermined the Respondent's defence that the dismissal was neither substantively nor procedurally unfair.

4. UNFAIR DISMISSAL CLAIM

On conclusion of the evidence the Respondent having evaluated the evidence notified the Claimant's representatives and OITFET that it conceded that the Claimant was unfairly dismissed but that the claim of disability discrimination is resisted. In addition the Respondent requests the Tribunal to determine the issue of remedy.

1

. **DISABILITY DISCRIMINATION CLAIM**

The IT1was lodged on 3 July 2013. The Claimant was permitted to amend his claim to add a claim of disability discrimination (21.08.13).

. The Respondent contends that the Claimant does not satisfy the definition of a disabled person as set out in S1 of the Disability Discrimination Act 1995 at the relevant dates.

The relevant time to consider whether a person was disabled is the date of the alleged discrimination; see ***McDougall v Richmond Adult Community College [2008] IRLR 227, [2008] ICR 431.*** **(Harvey on Industrial Relations and Employment Law > Division L Equal Opportunities > 2. Protected Characteristics > C. Disability > (1) Meaning > (a) Overview).**

The relevant date/s are 16 April 2013 (disciplinary decision to dismiss) and 18 June 2013 (Appeal panel decision).

Rimer LJ Gallop v Newport City Council 2103 EWCA 1583.

In paras 4 -5 Rimer LJ sets out the relevant statutory provisions of the DDA.
to include;
4A. Employers: duty to make adjustments
(3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know –
(b) in any case, that that person has a disability and is likely to be affected in the way mentioned in subsection (1).'

*6 **As I have said, it is agreed that the employer must know of the employee's disability before he can be answerable for alleged disability discrimination.** As regards direct discrimination under section 3A(5), that is because the alleged discrimination must be 'on the ground' of the employee's disability; and as regards the failure to make reasonable adjustments, the knowledge requirement is prescribed by section 4A(3). The critical question is as to the nature of the required knowledge.*
.....

*36. I come to the central question, namely whether the ET misdirected itself in law in arriving at its conclusion that Newport had neither actual nor constructive knowledge of Mr Gallop's disability. **As to that, Ms Monaghan and Ms Grennan were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's***

disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; *and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2). I agree with counsel that this is the correct legal position.*

7. It is submitted that the Respondent did not have actual or constructive knowledge of the alleged disability:

a) The Claimant did not make a case that he was disabled during the investigation or to either the disciplinary panel or the appeal panel.

b) At CRHTT assessment the Claimant declared that he was not mentally ill (page 28) and there was no evidence of significant clinical depressive, psychotic or FTD features observed or reported.(Pg 28)

c) The OH report from the head of OH, Kevin O'Connor, of 20 April 2012, advises "*Mr McErlean does not appear to have a disability as defined by current legislation.*"

d) Prof Mulholland had not noticed anything prior to 20 April but that he was convinced in retrospect that he was "very unwell", His evidence only relates to the period of the assault incident and not the alleged time of discrimination. He did not form or provide any opinion on disability.

e) Dr Kinch at review on 28 May 2012 could not diagnose the Claimant with clinical depression as he only had symptoms for 1 ½ weeks (pg 300). It was Dr Kinch's opinion that he had developed an acute transient psychotic disorder which occurred secondary to sleep deprivation and then Red Bull ingestion and was associated with acute stress upon a background of chronic work related stress (pg 204 of report 9.05.13) He was diagnosed with a mild depressive disorder and prescribed an anti-depressant. By 23 July 2012 (6/7 weeks) his clinical depression was in remission and he continued on the anti depressant for 5 months. By 24 September 2012 he was well and by 7 Nov 2012 was well but continued to be stressed. Dr Kinch's diagnosis at the review on 2 March 2013 (pg 313) was that there were no biological signs of depression. A decision was made to stop his anti-depressant medication on 2 March 2013 but it was prescribed again following increased anxiety on 28 March 2013. On 15 May 2013 his opinion was that the Claimant was stressed rather than clinically depressed (pg 316).

f) There was no evidence that the psychotic episode or clinical depressive condition was long term. At the time of the disciplinary hearing (16 April 2013) and the appeal hearing (on 18 June 2013) there was no evidence of a long term mental impairment.

g) Neither consultant psychiatrist suggested that he had a disability so as to satisfy the DDA.

h) No evidence was presented to either panel that at the time of the hearings the Claimant's condition affected his ability to carry out normal day-to-day activities.

i) The Claimant first raised a claim of disability discrimination on 28 August 2013. In his reply to the request for additional information regarding his claim for disability he details effects on his daily activities between April 2012 to August 2012 and mentions relapse between July 2013 and October 2013(page 48/ 49). He makes no case that he suffered from any effects at the time of the disciplinary or appeal hearings.

8. Reasonable Adjustments

- The Respondent is not under a duty to make reasonable adjustments where it was unaware of the Claimant's alleged disability. If, however, the Tribunal should find that the Claimant was disabled at the time of the alleged discriminatory act(s) and the Respondent ought to have been aware of his disability, it is nevertheless contended that it was not a reasonable adjustment to permit him to continue working in his post as a Community Mental Health Nurse in circumstances where he had by his own admission been involved in an incident of domestic violence against his wife, a Trust employee, contrary to the Trust's policy.

- If the Claimant is vulnerable to any recurrence of a depressive condition at times of severe stress (Dr Mangan) or that the possibility of a future episode is high (Dr Kinch pg157) it is not reasonable to place him in a work scenario where there is a possibility of him being subjected to work related stress which may precipitate a recurrence of his condition.

- It is contended that it was not a reasonable adjustment to permit the Claimant to continue working in his job wherein he would be unsupervised and working with patients as described by Ms Knape at page 236 "*high risks with complex needs and they required comprehensive input.*"

9. REMEDY

Re-Engagement

The Claimant has requested re-engagement and has not requested re-instatement into his job as a Community Mental Health nurse (para 6.11 page 6).

Art 150 Employment Rights (NI) Order 1996

(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing the tribunal shall take into account—

(a) any wish expressed by the complainant as to the nature of the order to be made,

(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

(4) Except in a case where the tribunal takes into account contributory fault under paragraph (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.

Harvey on Industrial Relations and Employment Law > Division DI Unfair Dismissal > 18. Reinstatement and Re-engagement > C. When will Reinstatement or Re-Engagement be Ordered?

(1) Introduction

[2378]

A tribunal has a wide discretion in deciding whether either order is appropriate. However three factors are expressly provided for in the legislation, namely, in the case of reinstatement, whether the employee wishes that order (as opposed to an order of re-engagement) to be made, and **where the proposed order is of re-engagement, the employee's wishes as to the nature of that order; whether it is practicable for the employer** (or, in the case of re-engagement, when relevant an associated employer or successor) to comply with the order; **and whether the employee has caused or contributed to his own dismissal.** In practice, these are the elements on which the tribunal is likely to concentrate. They will be considered in turn.

.....

(3) The practicability of complying with the order > (a) The approach to practicability

[2393.01]

The Tribunal must consider the question of practicability as at the date when reinstatement or re-engagement would take effect (which in most cases will mean judging the position as at the date of the hearing) and not limit its consideration to the time of the dismissal. *.....*

(4) Contributory action by the employee

5

[2400]

If the employee has caused or contributed to his dismissal, this factor must be taken into account by the tribunal when considering reinstatement or re-engagement. Obviously it is going to be only in the most exceptional of circumstances that a tribunal will order reinstatement of an employee who has contributed to the dismissal in a blameworthy sense, for why should he then be treated as though he had never been dismissed? But in these circumstances an order for re-engagement may sometimes be appropriate, with the tribunal reflecting the employee's fault in the terms on which re-engagement is ordered.

[2401]–[2409]

In Boots Co plc v Lees-Collier *[1986] IRLR 485,* [1986] ICR 728, *the EAT held that where a tribunal has found that the employee did not contribute to his dismissal so as to justify any reduction in his compensation, it could not properly conclude that he had so contributed when considering whether the remedies of reinstatement or re-engagement should be granted, ie the test of contributory fault was the same in both contexts.*

10. Following the principles;

a) **Employees wishes** - the Claimant sought re-engagement not re-instatement

b) **Practicability of re-engagement**

The practicability of re-engagement must be considered against the background where the Respondent is the provider of mental health services to clients as described by the Claimant's TU representative at the appeal hearing as

"clients diagnosed with a severe and enduring mental health illness, such as schizophrenia, which would often be complicated by alcohol and illicit drug misuse. The clients he cared for would have often been deemed high risks with comprehensive needs and they requires comprehensive input"

The Trust's duty of care to its mental health clients is self evident and it is essential that any employee of the Trust delivering those services must have the full trust and confidence of the Trust.

Factors which militate against the practicability of re-engagement are:

(i) It was suggested that the Claimant could return to work in a supervised setting – this is not practicable when the Claimant performs his duties within a community setting seeing patients in their home environment. He works largely autonomously and without supervision.

(ii) It is contended that the Claimant was involved in an incident of domestic violence (page 145 Claimant's account of the incident to Audrey McIlvenna) (even if it is not accepted by him that the incident involved a gun he physically assaulted his wife (pg 205 Wife's account to Dr Kinch & admission to Dr Kinch pg 303 Dr Kinch 21.05.12). While the Claimant's wife, in evidence before the Tribunal (and for the first time) retracted her account to the PSNI of threat with a firearm she did not retract the evidence regarding the assault. She had applied for and was granted a non-molestation order on behalf the herself and the children of the family on 16 April 2012. A copy of the order has been discovered after the close of the evidence and is appended hereto. The claimant's conduct contravenes the Trust's Domestic Violence Policy.

The only other post into which he could be placed was within the hospital setting where his wife (victim of the domestic violence incident) works. The Trust have a duty of care to the Claimant's wife as an employee under the policy and having knowledge of the Claimant's admitted assault could be held liable should any future incident occur.

iii) Dr Kinch's opinion was that the Claimant had developed the psychotic disorder associated with *" acute stress upon a background of chronic work related stress"* .The possibility of a future episode is high (pg 157) Prof Mulholland. The Claimant is vulnerable to developing a relapse of his condition at times of severe stress (Dr Mangan 2.12.12 pg 45 witness statement bundle). It is not practicable to place him back in a working environment whereby he may be vulnerable to a recurrence of his condition.

c) Contributory conduct

Against the foregoing background, it is submitted that the Claimant's relationship with his employer should be considered when deciding on the practicability of re-engagement

Factors which must be considered in reaching that determination are;

(i) The Claimant was not forthcoming nor candid with the CRHTT when they were assessing him (pg 204 admission to Dr Kinch/ pg 159 Ms Knape *" why he reached the decision not to be open")* He was evasive / misleading in the evidence he put before the CRHT team who were his workplace colleagues (*" he would be in contact with these people in a professional capacity" page 159*). This must undermine the trust and confidence his employer can repose in him particularly in a scenario where he is working with vulnerable patients. – see remarks of **Girvan LJ in Rogan v SHE&SCT 2009 NICA 47;**

[4] In Harvey on Industrial Relations and Employment Law at paragraph 1466 it is suggested that in exceptional cases where there is a need for an employee to have complete and unimpeachable integrity any real doubt about his reliability will justify dismissal. In the case of a nurse in charge of vulnerable adults it could be argued that where there is any real doubt about the nurse's dismissal on the grounds of misconduct the dismissal may be justified. In this case the employer acting through the disciplinary panel concluded that the case had been made out on a balance of probabilities. Applying that test was one favourable to the employee.

(ii) The fact that the Claimant was prepared to use his professional knowledge of mental health symptoms to mislead in order to achieve his desired outcome is of concern. His inconsistency in claiming *"lack of insight"* (page 4 IT1) does not sit comfortably with his decision " *not to be open*" and " *he knew certain things could be said and the person doing the assessment would look out for certain things" (page 159).*

(iii) In addition to the foregoing the Tribunal when considering trust and confidence should also have regard to the credibility of the Claimant arising from the unexplained discovery of an edited/ redacted version of the custody record (page 2 & 2A of the bundle to the investigation / disciplinary panels) . The document at page 2 was discovered during the disciplinary process and it was long after the dismissal and a few weeks prior to the commencement of the hearing that the version at 2A was disclosed. The version at page 2 removed all the detail of the assault. This calls into question the Claimant's honesty and reliability in his relationship with his employer who was seeking to investigate the incident of 10 April 2012 and the Claimant's conduct.

It is submitted that the Respondent's trust and confidence in the Claimant is damaged to the extent that re-engagement is not practicable as it is unlikely that an order for re-engagement is likely to be effective.

11. Financial loss

The Claimant was unfit for work between 29 August 2013 and 28 April 2014 as is evidenced by his receipt of ESA during that period.

In addition he was the primary carer for his parents from October 2013 to April 2014.

It is submitted that he cannot sustain a claim for loss of earnings during the period 29 August 2103 to 28 April 2014 when he was unfit or otherwise engaged.

The Claimant has not provided any evidence that at any stage after notification of the dismissal on 18 June 2013 he made any attempts to seek alternative employment.

12. Injury to Feelings

The Respondent contends that the Claimant has not satisfied the definition that he was at the time of the alleged discriminatory act (the date of dismissal) a disabled person and that his claim for disability discrimination must fail. He is therefore not entitled to compensation for injury to feelings.

13. Costs

It is submitted that it would be unreasonable to award costs against the Respondent under Reg 40(3) of The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005

40. (3) The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived.

As recognised by the VP at the conclusion of the hearing, this was a complex case involving both disability discrimination, unfair dismissal, issues of re-engagement and remedy. On the Respondent's evidence as contained in the witnesses statements of the witnesses there were sustainable grounds for resisting the claim of unfair dismissal and it would be wholly unreasonable to contend that the Respondent's case did not have a reasonable prospect of success. While the Respondent has conceded, in light of the evidence during cross examination (in particular the evidence of Mrs Graham on Friday 1 May), that the Claimant was unfairly dismissed it maintains that its resisting and conducting the proceedings cannot be categorised as unreasonable or misconceived. It was only at this stage that it was appropriate to make such concession.

The Respondent continues to resist the claim of disability discrimination. Further the Respondent does not accept that re-engagement is an appropriate, practicable remedy. The Tribunal would have been required to hear evidence in respect of those issues which would have largely included all the evidence heard over the 5 day hearing.

Suzanne Bradley BL
02.06.14

IN THE INDUSTRIAL TRIBUNAL IN NORTHERN IRELAND

ETWEEN

ANTHONY MC ERLEAN

CLAIMANT

-AND—

NORTHERN HEALTH AND SOCIAL CARE TRUST

RESPONDENT

CASE REF NO 1268/13 IT

AUTHORITIES FOR RESPONDENT

1. Art 150 Employment Rights (NI) Order 1996
2. Reg 40(3) of The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005
3. McDougall v Richmond Adult Community College [2008] IRLR 227, [2008] ICR 431
4. Gallop v Newport City Council 2103 EWCA 1583.
5. Rogan v SHE&SCT 2009 NICA 47;
6. Harvey on Industrial Relations and Employment Law > Division DI Unfair Dismissal > 18. Reinstatement and Re-engagement > C. When will Reinstatement or Re-Engagement be Ordered?

10

FAMILY HOMES AND DOMESTIC VIOLENCE (NORTHERN IRELAND) ORDER 1998 ARTICLE 23

NON-MOLESTATION ORDER (EX-PARTE)

Petty Sessions District ofAntrim

JULIE MCERLEAN
96 The Meadow
Antrim
BT41 1EZ
Applicant

County Court Division of Antrim

ANTHONY MCERLEAN
25 Ajax Court
Antrim
Respondent

By the Court of Summary Jurisdiction sitting at Antrim Magistrates Court on 16 April 2012.
Upon the hearing of an application for an Order under Article 23 of the above mentioned Order.
It is ordered that Leave shall be granted to bring application ex-parte.

IT IS ORDERED that:

The respondent ANTHONY MCERLEAN is forbidden to use or threaten violence against the applicant Julie McErlean , and must not instruct, encourage or in any way suggest that any other person should do so.

The respondent ANTHONY MCERLEAN is forbidden to intimidate, harass or pester the applicant Julie McErlean, and must not instruct, encourage or in any way suggest that any other person should do so.

The respondent ANTHONY MCERLEAN is forbidden to use or threaten violence against the relevant children Antaine McErlean dob 30.06.04, Ségdae McErlean dob 13.10.05 and Mánus McErlean dob 05.01.07 and must not instruct, encourage or in any way suggest that any other person should do so, **AND**

The respondent ANTHONY MCERLEAN is forbidden to intimidate, harass or pester the relevant

children Antaine McErlean dob 30.06.04, Segdae McErlean dob 13.10.05 and Mánus McErlean dob 05.01.07 and must not instruct, encourage or in any way suggest that any other person should do so.

In accordance with Article 20(6) of the said order the respondent ANTHONY MCERLEAN shall be prohibited from entering within 500 yards of 96 The Meadow, Antrim, BT41 1EZ.

This order shall take effect forthwith and shall remain in force until 18 June 2012.

The Respondent shall be given an opportunity to make any representation to the Court with regard to the making of this order at Antrim Domestic Proceedings Court, The Courthouse, 30 Castle Way, Antrim on 21 May 2012 at 10.00.

ORDERED by

DEPUTY DISTRICT JUDGE (MAGISTRATES' COURTS) BROWNE

on Monday the 16th day of April 2012

NOTICE: This Order gives you instructions, which you must follow. You should read it all carefully. If you do not understand anything in this Order you should go to a Solicitor, or an Advice Centre or Citizen's Advice Bureau. You have a right to ask the Court to change or cancel the Order, but you must obey it unless the Court does change or cancel it.

You must obey the instructions contained in this Order. If you do not, you may be guilty of an offence, and you may be sent to prison and/or fined.

FVM23XF