THE INDUSTRIAL TRIBUNALS

CASE REF: 108/20

CLAIMANT: **Michelle Byrne**

RESPONDENT: **Aware Defeat Depression Limited**

JUDGMENT

The unanimous judgment of the tribunal is that:

(i) The claimant was constructively and unfairly dismissed contrary to the Employment Rights (Northern Ireland) Order 1996.

(ii) The respondent had unlawfully discriminated against the claimant by failing to put in place a reasonable adjustment in respect of the claimant contrary to Section 3A(2) of the Disability Discrimination Act 1995.

(iii) The respondent had unlawfully discriminated against the claimant on the ground of her disability by treating her less favourably than it treated or would have treated others, contrary to Section 3A(5) of the Disability Discrimination Act 1995.

(iv) The respondent had unlawfully discriminated against the claimant for a reason which relates to a person's disability, by treating her less favourably that it treated or would have treated others, without objective justification, contrary to Section 3A(1) of the Disability Discrimination Act 1995.

(v) The claimant is awarded a basic award of £2,420.30 with £500.00 for loss of statutory rights and no compensatory award for loss of earnings in respect of constructive unfair dismissal. The claimant is also awarded £7,000.00 for injury to feelings in respect of the unlawful discrimination.

(vi) The total amount of compensation awarded to the claimant is £9,920.30.

CONSTITUTION OF TRIBUNAL

Vice President: **Mr N Kelly**

Members: **Mr E Grant**
Mr T Wells

APPEARANCES:

The claimant was represented by Mr M Potter, Barrister-at-Law, instructed by Thompsons Solicitors.

The respondent was represented by Mr M Mason of Mark Mason Law.

SUMMARY

1. The claimant was employed from March 2013 to 15 November 2019 by the respondent as a Communications Officer.

2. The respondent is a charity providing services in relation to mental health.

3. The claimant was diagnosed with ulcerative colitis (UC) on 15 October 2017. The respondent accepts that at all relevant times thereafter, she had been disabled for the purposes of the Disability Discrimination Act 1995 (the 1995 Act).

4. The claimant sought a variation of her working pattern. That was granted on a temporary basis only. It was subsequently renewed on a temporary basis. The claimant worked, under this temporary variation, for four days each week with one of those four days working at home.

5. The respondent informed the claimant on 3 October 2019 that it viewed her role as Communications Officer as a full-time role which required five day working based in the office. The claimant was invited at the same time to apply for a variation of the full-time office based contractual requirement under an internal flexible working policy.

6. The claimant resigned from her employment on 16 October 2019 with effect from 15 November 2019.

7. The claimant alleged:

   (i) That she had been constructively and unfairly dismissed contrary to the Employment Rights (Northern Ireland) Order 1996 (the 1996 Order).

   (ii) That the respondent had failed to put in place a reasonable adjustment in relation to her working hours and working pattern as required by the 1995 Act.

   (iii) That the respondent had unlawfully discriminated against her contrary to the 1995 Act by treating her less favourably on the ground of her disability, or for disability related reasons, than it treated, or would have treated, other employees.

PROCEDURE

8. The claim had been case managed and detailed directions had been given in relation to the interlocutory procedure and the witness statement procedure.

9. The listing of the full hearing had unfortunately been delayed by the Covid-19 pandemic. The full hearing took place over three days from 26 July 2021 to 28 July 2021.

10. The claimant gave evidence on her own behalf and called no other witnesses. Ms Karen Collins, the CEO and Ms Patricia McDaid, the Head of Corporate Services, gave evidence on behalf of the respondent.

11. With the exception of Ms Collins, each witness swore or affirmed, adopted their witness statement as their entire evidence in chief, and moved immediately into cross-examination and brief re-examination. Ms Collins gave brief oral evidence in chief, in addition to her statement, to deal with one point which had been raised by the claimant in cross-examination, before commencing her own cross-examination.

12. The evidence was heard by the tribunal over the first two days of the hearing. Detailed oral submissions were heard on the third day. The tribunal met thereafter to reach its decision. This document is that decision.

RELEVANT LAW

13. **Constructive Unfair Dismissal**

14. In ***London Borough of Waltham Forest v Omilaju [2005] IRLR 35***, the Court of Appeal (GB) set out the basic propositions of law relating to constructive dismissal. It stated that they were:-

> *"1. The test for constructive dismissal is whether the employers' actions or conduct amounted to a repudiatory breach of the contract of employment:* ***Western Excavating (ECC) Ltd v Sharp [1998] IRLR 27****.*
>
> *2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: see, for example,* ***Malik v Bank of Credit and Commerce International SA [1997] IRLR 462****,* ***464 (Lord Nicholls) and 468 (Lord Steyn).*** *I shall refer to this as 'the implied term of trust and confidence'.*
>
> *3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract; see, for example, per Browne-Wilkinson J in* ***Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347****;* ***350.*** *The very essence of the breach of the implied term is that it is 'calculated or likely to destroy or seriously damage the relationship'.*
>
> *4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in* ***Malik*** *at p464, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".*
>
> *5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para 480 in Harvey on Industrial Relations and Employment Law –*
>
> *'Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving*

in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify him taking that action, but when viewed against the background of such incidents, it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship'."

15. The Court also stated:-

> *"Although the final straw may be relatively insignificant, it must not be utterly trivial. The principle that the law is not concerned with very small things (more elegantly expressed in the maxim "de minimis non curat lex") is of general application."*

16. The Court went on to state:-

> *"The question specifically raised by this appeal is: What is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? When Glidewell LJ stated that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in Woods at page 351 where Browne-Wilkinson J referred to the employer who, stopping short of an actual breach of contract, squeezes out an employee by making the employee's life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant."*

17. The Court went on to state:-

> *"Moreover an entirely innocuous act on the part of an employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective … ."*

18. In ***Brown v Merchant Ferries Ltd*** ***[1998]*** ***IRLR 682***, the Northern Ireland Court of Appeal said that although the correct approach in constructive dismissal cases was to ask whether the employer had been in breach of contract and not to ask whether the employer had simply acted unreasonably; if the employer's conduct is seriously unreasonable, that may provide sufficient evidence that there has been a breach of contract.

19. Apart from establishing a repudiatory breach of contract, the claimant must have left his employment because of that breach of contract and he must not have delayed too long in resigning.

20. In ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833,*** the Court of Appeal (GB) held that in a normal case where an employee claims to have constructively dismissed, it is sufficient for a tribunal to ask itself the following questions:-

> *"(i) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered his resignation?*
>
> *(ii) Has he or she affirmed the contract since that act?*
>
> *(iii) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(iv) If not, was it nevertheless part of a course of conduct comprising several acts or omissions which viewed culmatively amounted to a repudiatory breach of confidence (if it was, there is no need for any separate consideration of a possible previous affirmation).*
>
> *(v) Did the employee resign in response (or partly in response) to that breach?"*

21. In ***United First Partners Research v Carreras [2018] EWCA Civ 323,*** the Court of Appeal (GB) stated:-

> *"It was also common ground before us that where an employee has mixed reasons for resigning, his resignation will constitute a constructive dismissal provided that the repudiatory breach relied on, was at least a substantial part of those reasons: there is a good deal of authority to that effect -"*

<u>Unfair dismissal</u>

22. To ground a successful claim, a constructive dismissal must, of course, also be unfair.

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."

23. **Flexible Working**

Article 112F of the Employment Rights (NI) Order 1996 provides:

"(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if:-

(a) the change relates to:-

(i) the hours he is required to work;

(ii) the times when he is required to work;

(iii) where, as between his home and a place of business of his employer, he is required to work.

(2) an application under this Article must:-

(a) state that it is such an application;

(b) specify the change applied for and the date on which it is proposed the change should become effective; and

(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with.

24. Article 112G of the Employment Rights (NI) Order 1996 provides:-

"(1) An employer to whom an application under Article 112F is made:-

(a) shall deal with the application in accordance with regulations made by the Department, and

(b) shall only refuse the application because he considers that one or more of the following grounds applies:-

(i) the burden of additional costs,

(ii) detrimental effect on ability to meet customer demand,

(iii) inability to re-organise work among existing staff,

(iv) inability to recruit additional staff,

(v) detrimental impact on quality,

(vi) detrimental impact on performance,

(vii) insufficiency of work during the periods the employee proposes to work,

(viii) planned structural changes, and

(ix) such other grounds as the Department may specify by regulations.

(2) Regulations under paragraph (l)(a) shall include :-

(a) provision for the holding of a meeting between the employer and the employee to discuss an application under Article 112F within twenty-eight days after the date the application is made;

(b) provision for the giving by the employer to the employee of notice of his decision on the application within fourteen days after the date of the meeting under sub-paragraph (a);

(c) provision for notice under sub-paragraph (b) of a decision to refuse the application to state the grounds for the decision;

(d) provision for the employee to have a right, if he is dissatisfied with the employer's decision, to appeal against it within fourteen days after the date on which notice under sub-paragraph (b) is given;

(e) provision about the procedure for exercising the right of appeal under sub-paragraph (d), including provision requiring the employee to set out the grounds of appeal;

(f) provision for notice under sub-paragraph (b) to include such information as the regulations may specify relating to the right of appeal under sub-paragraph (d);

(g) provision for the holding, within fourteen days after the date on which notice of appeal is given by the employee, of a meeting between the employer and the employee to discuss the appeal;

(h) provision for the employer to give the employee notice of his decision on any appeal within fourteen days after the date of the meeting under sub-paragraph (g);

(i) provision for notice under sub-paragraph (h) of a decision to dismiss an appeal to state the grounds for the decision;

(j) provision for a statement under sub-paragraph (c) or (i) to contain a sufficient explanation of the grounds for the decision;

(k) provision for the employee to have a right to be accompanied at meetings under sub-paragraph (a) or (g) by a person of such description as the regulations may specify;

(l) provision for postponement in relation to any meeting under sub-paragraph (a) or (g) which a companion under sub-paragraph (k) is not available to attend;

(m) provision in relation to companions under sub-paragraph (k) corresponding to Article 12(6) and (7) of the Employment Relations (Northern Ireland) Order 1999 (NI 9) (right to paid time off to act as companion, etc.);

(n) provision, in relation to the rights under sub-paragraphs (k) and (l), for the application (with or without modification) of Articles 13 to 15 of the Employment Relations (Northern Ireland) Order 1999 (provisions ancillary to right to be accompanied under Article 12 of that Order).

(3) Regulations under paragraph (1)(a) may include:-

(a) provision for any requirement of the regulations not to apply where an application is disposed of by agreement or withdrawn;

(b) provision for extension of a time limit where the employer and employee agree, or in such other circumstances as the regulations may specify;

(c) provision for applications to be treated as withdrawn in specified circumstances.

25. The Flexible Working Regulations (Northern Ireland) 2015 provide

"*2.— (1) These Regulations apply to a flexible working application made on or after 5th April 2015.*

(2) *The Flexible Working (Eligibility, Complaints and Remedies) Regulations (Northern Ireland) 2003(3) are revoked but continue to apply to a flexible working application made before 5th April 2015.*

Entitlement to make an application

3. *An employee who has been continuously employed(4) for a period of at least 26 weeks is entitled to make a flexible working application.*

Form of application

4. *A flexible working application must:-*

(a) *be in writing;*

(b) *state whether the employee has previously made any such application to the employer and, if so, when; and*

(c) *be dated.*

Date when application is taken as made

5.— (1) *A flexible working application is taken as made on the day it is received.*

Breaches of the Procedure Regulations by the employer entitling an employee to make a complaint to an industrial tribunal

6. *The breaches of the Procedure Regulations which entitle an employee to make a complaint to an industrial tribunal under Article 112H of the 1996 Order, notwithstanding the fact that his application has not been disposed of by agreement or withdrawn, are:-*

(a) *failure to hold a meeting in accordance with regulation 3(1) or 8(1);*

(b) *failure to notify a decision in accordance with regulation 4 or 9.*

Compensation

7. *For the purposes of Article 112I of the 1996 Order (remedies) the maximum amount of compensation is 8 weeks' pay of the employee who presented the complaint under Article 112H of the 1996 Order (complaints to industrial tribunals).*

Disability Discrimination

Meaning of Discrimination

26. Section 3A of the 1995 Act provides:

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

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

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

(2) For the purposes of this Part, a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person.

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

(4) Treatment of a disabled person cannot be justified under subsection (3) if it amounts to direct discrimination falling within subsection (5).

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

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

Reasonable adjustments duty

27. 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.

(2) In sub-section (1), "the disabled person concerned means:-

(a) in the case of a provision criterion or practice for determining to when employment should be offered; any disabled person who is an applicant for that employment.

(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.

(a) In any case, that that person has a disability and is likely to be affected in the way mentioned in sub-section (1).

Shifting Burden of Proof

28. The proper approach for a Tribunal to take when assessing whether discrimination has occurred and in applying the provisions relating to the shifting of the burden of proof in relation to discrimination has been discussed several times in case law. The Court of Appeal re-visited the issue in the case of ***Nelson v Newry & Mourne District Council [2009] NICA -3 April 2009***. The court held:-

*"22 This provision and its English analogue have been considered in a number of authorities. The difficulties which Tribunals appear to continue to have with applying the provision in individual cases indicates that the guidance provided by the authorities is not as clear as it might have been. The Court of Appeal in **Igen v Wong [2005] 3 ALL ER 812** considered the equivalent English provision and pointed to the need for a Tribunal to go through a two-stage decision-making process. The first stage requires the complainant to prove facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. Once the Tribunal has so concluded, the respondent has to prove that he did not commit the unlawful act of discrimination. In an annex to its judgment, the Court of Appeal modified the guidance in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 333**. It stated that in considering what inferences and conclusions can be drawn from the primary facts the Tribunal must assume that there is no adequate explanation for those facts. Where the claimant proves facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex then the burden of proof moves to the respondent. To discharge that onus, the respondent must prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of sex. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal would normally expect cogent evidence to be adduced to discharge the burden of proof. In **McDonagh v Royal Hotel Dungannon [2007] NICA 3** the Court of Appeal in Northern Ireland commended adherence to the **Igen** guidance.*

*23 In the post-**Igen** decision in **Madarassy v Nomura International PLC [2007] IRLR 247** the Court of Appeal provided further clarification of the Tribunal's task in deciding whether the Tribunal could properly conclude from the evidence that in the absence of an adequate*

*explanation that the respondent had committed unlawful discrimination. While the Court of Appeal stated that it was simply applying the **Igen** approach, the **Madarassy** decision is in fact an important gloss on **Igen**. The court stated:-*

> *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient matter from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination; '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 allegations of sex discrimination, such as evidence of a difference in status, difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage, the Tribunal needs to consider all the evidence relevant to the discrimination complaint such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the complainant were of like with like as required by Section 5(3) and available evidence of all the reasons for the differential treatment.'*

That decision makes clear that the words 'could conclude' is not be read as equivalent to 'might possibly conclude'. The facts must lead to an inference of discrimination. This approach bears out the wording of the Directive which refers to facts from which discrimination can be 'presumed'.

24 *This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. In **Curley v Chief Constable of the Police Service of Northern Ireland [2009] NICA 8**, Coghlin LJ emphasised the need for a Tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the Tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The Tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination."*

29. In ***S Deman v Commission for Equality and Human Rights & Others [2010] EWCA Civ 1279***, the Court of Appeal considered the shifting burden of proof in a discrimination case. It referred to ***Madarassy*** and the statement in that decision that a difference in status and a difference in treatment 'without more' was not sufficient to shift the burden of proof. At Paragraph 19, Lord Justice Sedley stated:-

> *"(19) We agree with both counsel that the 'more' which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."*

30. In ***Laing v Manchester City Council [2006] IRLR 748***, the EAT stated at Paragraphs 71 - 76:-

> *"(71) There still seems to be much confusion created by the decision in **Igen v Wong**. What must be borne in mind by a Tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the Tribunal on the balance of probabilities that certain treatment had been by reason of race.*
>
> *...*
>
> *(73) No doubt in most cases it would be sensible for a Tribunal to formally analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in **Network Road Infrastructure v Griffiths-Henry**, it may be legitimate to infer he may have been discriminated against on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single answer and Tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.*
>
> *...*
>
> *(75) The focus of the Tribunal's analysis must at all times be the question whether they can properly and fairly infer race discrimination. If they are satisfied that the reason given by an employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is an end of the matter. It is not improper for a Tribunal to say, in effect, 'there is a real question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he believed or he did and it has nothing to do with race'.*

*(76) Whilst, as we have emphasised, it will usually be desirable for a Tribunal to go through the two stages suggested in **Igen**, it is not necessarily an error of law to fail to do so. There is no purpose in compelling Tribunals in every case to go through each stage."*

31. In ***Frank McCorry and Others v Maria McKeith [2016] NICA 47,*** the Court of Appeal stated:

"The Shifting Burden of Proof.

[35] While Ms McKeith did not advance a claim for disability related discrimination in relation to the period before the dismissal decision, her background treatment in the preceding months did inform the approach of the Tribunal in relation to the dismissal decision. The background included the requirement that Ms McKeith remain absent from work for periods to look after her disabled daughter. Had it arisen for decision, the Tribunal would have concluded that the previous treatment of Ms McKeith amounted to disability related discrimination (paragraph 132).

[36] On taking into account that background and the evidence in relation to the dismissal of Ms McKeith, the Tribunal stated that "the shifting burden of proof is going to be crucial" (paragraph 136).

[37] The Burden of Proof Directive (EEC) 97/80 was extended to the United Kingdom in 1998 and Article 4(1) provided –

> *"Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them have established, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."*

[38] Section 17A(1B) of the 1995 Act provides –

> *`Where, on the hearing of a complaint under sub-section (1), the complainant proves facts from which the Tribunal could, apart from this sub-section, conclude in the absence of 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.'"*

[39] The approach to the shifting burden of proof was considered by the Court of Appeal in England and Wales in Wong v Igen Ltd (2005) EWCA Civ 142. It was stated that the statutory amendments required a two-stage process. The first stage required the complainant to prove facts from which the Tribunal could, apart from the section,

conclude, in the absence of an adequate explanation, that the employer had committed, or was to be treated as having committed, the unlawful act of discrimination against the employee. The second stage, which only came into effect on proof of those facts, required the employer to prove that he did not commit or was not to be treated as having committed the unlawful act, if the complaint is not to be upheld.

[40] The issue was revisited by the Court of Appeal in England and Wales In Madarassy v Nomura International plc [2007] EWCA Civ 33 which set out the position as follows (italics added) –

> *"56. The Court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent `could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal `could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *57. `Could conclude' [in the Act] must mean that `a reasonable Tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the Tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the complaint to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by [the Act]; and available evidence of the reasons for the differential treatment.*
>
> *58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the Tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the*

treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."

[41] The Tribunal was satisfied that Ms McKeith had established a prima facie case that she had been directly discriminated against because she had been the primary carer of her disabled daughter (paragraph 147). The Tribunal then found that the Ardoyne Association had not put forward any convincing or coherent explanation for its decision to make Ms McKeith redundant (paragraph 148). It was accepted on the hearing of the appeal that, if this was a case where the burden of proof shifted to the employer, there had not been a sufficient explanation. Accordingly, the challenge was concerned with whether the evidence before the Tribunal was such that a prima facie case of associative direct discrimination had been made out.

[42] In this regard the Tribunal set out a number of facts which concerned Ms McKeith having been sent home on previous occasions because of her disabled daughter, Ms Burns' belief that she should be at home with her disabled daughter, the reluctant piecemeal and incomplete nature of discovery, the other two persons who were made redundant at the same time were first re-engaged as volunteers and then rehired, the evasive and unconvincing evidence of the Manager and the non-compliance with statutory dismissal procedures. The Tribunal stated ". If this is not a case where the burden of proof should shift, no such case exists" (paragraph 147).

[43] We are satisfied that, as outlined by the Tribunal, there was such evidence of a difference in status, a difference in treatment and a reason for differential treatment that, in the absence of an adequate explanation, a Tribunal could conclude that the employer committed an unlawful act of associative disability discrimination. The burden on the Ardoyne Association was not discharged. It followed that the Tribunal would find disability discrimination.

[44] We are not satisfied on any of the appellant's grounds of appeal. The appeal is dismissed."

32. 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.

33. 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."

34. The Code of Practice issued by the Equality Commission provides at Paragraph 5.8 that the duty to make reasonable adjustments applies to contractual arrangements and working conditions. Paragraph 5.11 states that substantial disadvantages are those which are not minor or trivial.

RELEVANT FACTS

35. The claimant was employed as a Communications Officer in March 2013.

36. Her post was full-time (five days per week) and office based.

37. From 2015, she had been line managed by the Director of Fundraising and Communications. That Director subsequently resigned while the claimant had been absent from work on maternity leave and sick leave in 2017 and 2018.

38. The claimant's maternity leave in 2017/2018 had been extended by a period of sick leave, following a diagnosis of UC on 15 October 2017. The claimant returned to work in August 2018.

39. UC is a chronic and debilitating condition which, in the claimant's case, required regular hospital appointments and prescribed medication. The condition can be exacerbated by stress.

40. The claimant had been seriously unwell during her period of maternity/sick leave in 2017/18. The respondent cannot have been unaware of that fact and cannot have been unaware about how serious the claimant's medical condition had been.

41. The claimant met with Ms Patricia McDaid, the Head of Corporate Services, on 2 August 2018 in the Dunsilly Hotel Antrim. The purpose of that meeting had been specifically to discuss the claimant's return to work after her extensive period of maternity leave and sick leave.

42. At that meeting, the claimant asked for a variation of her existing working pattern. That existing working pattern had been for five days per week, based in the office. The purpose of that variation was to enable the claimant to manage her condition and specifically to manage stress. That variation was apparently granted by Ms McDaid in the course of that meeting. However the basis on which that variation had been granted and the terms of that variation are in dispute.

43. The claimant left that meeting with the impression that the variation had been granted by the respondent on a permanent basis. However no minutes were kept of this meeting. There had apparently been no note-taker. No written confirmation of the variation had been issued immediately after the meeting by the respondent.

No such confirmation was issued by the respondent until significantly later and only when the claimant had sought that confirmation.

44. It is a recurring feature of this case that ordinary common sense procedures, which are followed by other employers in all areas of employment, and which make matters simpler and clearer for all parties, were not followed by this employer. All attempts by this tribunal to elicit a rational explanation for these failures were unsuccessful.

45. The meeting on 2 August 2018 in the Dunsilly Hotel had been an important meeting, at which the return to work of a disabled employee was to be discussed and at which a variation to the employee's contract and the terms of a phased return were to be determined. The employer had been aware that the claimant had been seriously ill. The employer had been aware that the claimant had been diagnosed with a serious and chronic condition and that this had not been a matter to be treated casually. Yet, as indicated above, no notes were taken, no record kept and no outcome written down and issued to the claimant. This amateurish approach to a serious issue is regrettable and clearly started the process of destroying the necessary level of trust and confidence between an employer and employee.

46. The claimant sought to confirm what had been agreed in the course of this meeting on 2 August 2018 by setting out what she felt had been agreed in a minute of 20 September 2018 (some seven weeks after the meeting). Even at the stage of the final hearing before this tribunal, confusion still reigned. The claimant gave evidence in her witness statement that both the four day working week and the one day working at home had been agreed on a permanent basis in the course of the meeting on 2 August 2018. However it seems clear from the minute eventually issued by the claimant seeking clarification on 20 September 2018, that the request for one day working at home had only been made at that stage. From the respondent's point of view, Ms McDaid was clear in cross-examination that she had been fully aware that the purpose of the variation request had been the claimant's chronic medical condition ie UC. That was despite evidence from the CEO, Ms Collins, in cross-examination to the effect that she only become aware of the claimant's medical condition being an issue in relation to the variation of the contract at a much later stage and despite the claimant being cross-examined on the basis that she had only ever looked for a variation in her contractual terms because of child care issues.

47. The respondent did not respond to the minute of 20 September 2018 either promptly or at all until the claimant sent a reminder some two weeks later on 4 October 2018. Ms McDaid replied to the claimant on that same day to state that the four day working week had been only agreed on a trial basis for six months and that her application to work at home for one of those four days had been refused.

48. The claimant did not challenge this response. The tribunal accepts the evidence of the claimant and concludes that the claimant had decided to hope that the six month trial period would simply result in a confirmation of the variation to a four day working week.

49. The tribunal concludes that it is improbable that the meeting on 2 August 2018 had actually resulted in a temporary variation of the contract rather than a permanent

variation. Firstly, it is clear the claimant had sought a permanent variation during that meeting. She would have had no reason to ask for a temporary variation. A temporary variation would have made no sense in the circumstances of her medical condition which was chronic and was not going to improve. Furthermore, if it had been agreed that there would be a temporary variation, as expressed in Ms McDaid's letter of 4 October 2018, on a trial basis, measures would have been put in place to check and record the operation of that *"trial"*. No such measures were put in place. No specific supervision was arranged, and no reports were arranged to monitor any such *"trial"*. Ms McDaid, who at that stage had been the claimant's line manager, operated from the Derry office and the claimant operated in the Belfast office. It is entirely unclear how any such *"trial"* would have operated. Therefore, and to the extent it matters in this case, the tribunal concludes on the balance of probabilities that it had been agreed in the course of the meeting on 2 August 2018, that a variation to change the claimant's working arrangements to four days a week had been agreed on a permanent basis before being rescinded and changed to a temporary variation. The application to work for one day a week at home had only been made on 20 September 2018 and was refused on 4 October 2018.

50. At some point, approximately two weeks after 4 October 2018, the claimant, as part of her normal duties, met with Mr Bernard McAnaney, the Chairman of the Board of the respondent company to prepare him for a media interview. In the course of that meeting, the claimant and Mr McAnaney discussed her application to vary her working hours and location. That discussion took place in the context of the claimant's chronic condition which was a matter which was already known to Ms McDaid her line manager and to the respondent organisation as a whole. Mr McAnaney was sympathetic to the claimant's request to work at home for one of the four working days.

51. Although the respondent did not choose to call Mr McAnaney to give evidence to explain his part in this matter, it is clear that Mr McAnaney raised this matter with Ms McDaid. Ms McDaid wrote a short note to the claimant on 23 October 2018 advising her that the respondent would grant one day working at home each week up to Christmas 2018. That note did not refer to either Ms McDaid previous refusal of this request or to Mr McAnaney's intervention. Similarly, the note did not mention the claimant's disability, which had clearly been known to Ms McDaid and had been the reasons for the claimant's request to vary her working hours and working location. It did not mention the 1995 Act.

52. That variation to allow one day working from home was further extended in another brief note on 21 December 2018 to the end of March 2019. Again no mention was made of a disability or an adjustment under the 1995 Act. It was instead described as *"part of your phasing back to work"*.

    For the sake of brevity both variations; one to four days per week, and one to one day homeworking, will hereinafter be referred to as *"the variation".*

53. As with much of the rest of this case, documentation is incomplete and/or missing. The variation, was clearly renewed and remained in place thereafter until July 2019. However no record apparently exists of all of the relevant extensions. Similarly no record exists of any *"trial"* or of any supervision of *"phasing back to work"*.

54. Following the appointment of the new CEO, Ms Collins, a process began on 22 May 2019 to review the job descriptions of all employees. On 20 June 2019, Ms McDaid met the claimant to discuss her particular job description in the context of this review exercise. The claimant and Ms McDaid agreed a redraft of the job description. That was not a final agreement but had been reached between the claimant and her line manager. Ms Collins, the CEO, substantially amended that job description.

55. On 8 July 2019, the claimant wrote to Ms McDaid expressing dissatisfaction at the changes made to the redrafted job description by Ms Collins. The claimant felt that the post of Communications Officer had been downgraded.

56. Separately from the job description review exercise, the claimant had been asking Ms McDaid for the variation to her working arrangements, which had been in operation for almost one year, to be made permanent. The Senior Management Team decided not to grant that request. Again no particular documentation of that discussion or that decision exists, or at least has been brought to the attention of the tribunal.

57. Ms Collins and Ms McDaid stated in evidence to this tribunal that there had been difficulties in the operation of the variation in the claimant's working hours and location. They alleged in evidence that the claimant had not been contactable on her one day a week working at home and that the one day a week where the claimant had not been working at all caused difficulties in arranging meetings and conducting business. The tribunal does not find that evidence credible.

58. Neither Ms Collins nor Ms McDaid could point to any specific, dated, or documented difficulty. Both agreed that the alleged difficulties had never been raised with the claimant. Both agreed that no documentary records were kept of the alleged *"trial"*. It is clear that even when the finalised job description was sent to the claimant on 23 July 2019 and when Ms McDaid wrote separately to the claimant on the same date, and later on 3 October 2019, to confirm that the Communications Officer post was regarded as full-time and office based, no mention was made of difficulties in contacting the claimant when she had been working at home and no mention was made of difficulties in arranging meetings or conducting business when the claimant was not working on one day a week.

59. If there had been a genuine *"trial"* of the variation in the claimant's employment contract, there would have been some form of documentary evidence. If the variation, or any part of it, had been part of a phased return to work, there would have been some evidence to explain why a phased return of that length had been necessary. There was none. If there had genuinely been difficulties in contacting the claimant on the one day a week when she had been working at home, those difficulties would have been identified with more precision than vague references to *"fundraising"*. There was no such identification. If there had genuinely been difficulties with arranging meetings or conducting business on the one day per week when the claimant had not been working, those precise difficulties would have been documented and identified; they were not. Above all, if there had been actual difficulties in a genuine *"trial"*, those difficulties would have been raised contemporaneously with the claimant to enable her to improve and to enable any such difficulties to be resolved. At the very least, those difficulties would have been raised with the claimant when the variation had been extended. None of this

happened. Furthermore, if specific difficulties had genuinely existed in the operation of the variation, they would have been raised in the correspondence of 23 July 2019 and 3 October 2019. They were not.

60. When Ms McDaid and Ms Collins were asked to explain why these matters had not been raised with the claimant when they had allegedly occurred, Ms Collins in particular stated that she had trying to be *"positive"*. If the respondent organisation had been trying to be *"positive"*, it would have identified any difficulties, as they had emerged, to seek a resolution at the time. The tribunal can only conclude that these alleged difficulties were at best an exaggeration on the part of the respondent in an exercise in ex-post facto rationalisation.

61. The correspondence of 23 July 2019, despite the fact that the variation in the working arrangements had then been in operation for almost one year, advised the claimant to apply, if she wished to do so, for a variation of her contract under the internal policy for flexible working.

62. The Flexible Working Policy to which the claimant had been directed is a peculiar document. It is primarily a policy for applications under Article 112F of the 1996 Order. As such, an application has specific statutory requirements. It must state that it is such an application (a statutory application to vary hours or home working); it must specify the change applied for and the effective date; it must explain the effect the proposed variation would have on the employer and how such an effect would be dealt with by the employer. Furthermore, only one such application can be made in a 12 month period. There is a detailed and timetabled procedure for dealing with any such statutory application under the 1996 Order and, in particular, the application can only be refused on specified grounds. The legislation also provides for a specific appeal procedure.

63. A statutory application for flexible working under Article 112F of the 1996 Order is entirely separate from and distinct from the consideration of reasonable adjustments under the 1995 Act. None of the matters set out in the preceding paragraph apply to the consideration of reasonable adjustments under the 1995 Act.

64. The two legislative codes need to be considered separately. It is unfortunate that the respondent chose to amalgamate the two in one policy. Effectively, the reference to the consideration of reasonable adjustments under the 1995 Act appears to have been added to the consideration of applications for flexible working under the 1996 Order by the inclusion of the following paragraph in the Policy:

> *"If you are requesting a change in your working pattern as a reasonable adjustment in relation to a disability or in order to assist you in caring responsibilities for a child or other relative, it would be useful if we were provided with this information so that it can be taken into account when the request is being considered."*

The remainder of the Flexible Working Policy set up by the respondent replicates the conditions applicable to applications under Article 112F of the 1996 Order, such as the timetabled procedure, the limited grounds for refusal, the effect of a withdrawal and the specific appeal procedure.

65. It is regrettable that the respondent chose to confuse these two separate and distinct legal codes and to misdirect both itself and the claimant in so doing. It is even more regrettable that the respondent was apparently following Equality Commission advice in doing so. The tribunal was referred to a Model Policy and Procedure for Handling Requests for Flexible Working which had been published by that organisation and which appeared to amalgamate without clear distinction, applications under Article 112F of the 1996 Order and the consideration of reasonable adjustments under the 1995 Act.

66. The correspondence of 23 July 2019 from Ms McDaid to the claimant also included the following:

> *"Also I have arranged for you to attend the SMT meeting on Thursday 1 August 2019 to discuss your queries as outlined in your email dated 8 July 2019. I will confirm a time later in the week with you."*

67. The claimant refused to attend that meeting. She replied on 31 July 2019 to state:

> *"I have been thinking about your offer for me to meet with the Senior Management Team on Thursday 1 August to further discuss my job description and after much deliberation, I have decided not to proceed with this. When we met on Tuesday 23 July, you presented me with a Job Description which had further changes made to it following a meeting with the Senior Management Team the week previous to that. You opened up the meeting by telling me that there will be absolutely no change made to the job title and salary of the post. I have been thinking about this meeting with SMT a lot and at times find myself feeling upset and therefore as a result, at this stage, I don't feel that me presenting at the SMT meeting is going to have any bearing on potential changes to my job title or job description but may only cause me further upset and stress.*
>
> *I would be keen to meet with you to resolve and make changes to my job description in the hope of finalising it as this has already caused me a considerable amount of anxiety and stress and as had an adverse effect on my overall general health."*

68. At this point, the variation to the claimant's hours and homeworking had been in operation for almost a year. As indicated above, no difficulties had been drawn to the claimant's attention and there was no record of any such difficulties. The claimant had been told in clear terms that the SMT had determined that her post was a full-time post for five days per week and that it was office based. The tribunal can fully understand that the claimant quite reasonably felt that making her case to the SMT and indeed using an entirely inappropriate procedure (the Flexible Working Policy) would be futile.

69. On 2 August 2019, one year after this saga began, the claimant went on sick leave. The sick note which was provided for one month from 8 August 2019 referred only to *"stress at work"*. However the tribunal is content having heard the evidence of Ms McDaid that she had been fully aware of the impact of stress on the claimant's underlying disability ie UC and that the variation had been sought by the claimant to manage that stress in the context of UC.

70. On 22 August 2019, Ms McDaid emailed the claimant to inform her that the respondent would like to refer her to Occupational Health. At that point, the claimant had been absent from work for a relatively short period ie three weeks. A referral to Occupational Health after an absence of only three weeks is, in the collective experience of the tribunal, somewhat unusual.

71. The Occupational Health appointment was arranged for 19 September 2019.

72. The referral letter from the respondent to its Occupational Health doctor had not been included in the trial bundle and indeed had not been disclosed to the claimant's solicitors. The tribunal directed that it should be produced. The tribunal is concerned that the referral of the claimant to Occupational Health at best glossed over her underlying and serious disability. The referral read as a referral primarily in relation to *"stress".* The only reference to the claimant's disability was the following:

> *"We are aware that Michelle has an underlying health condition but she has not made us aware of any impact on her mental health and/or within work."*

73. In relevant part, the referral records:

> *"Michelle has presented a sick line for four weeks advising of work related stress. She is due back to work on 9 September. She has previous absences for work related stress."*
>
> *"Michelle is employed as a Communications Officer within AWARE. She leads on our communication activity which will include liaison with external parties (media, designers) and developing plans in conjunction with internal departments. She has no managerial responsibility but is required to work autonomously to a significant degree. Her role is 8-4 Monday to Thursday and 8-1.15 pm Friday and is office based. However she has been accommodated by working part-time (not working Wednesday) and working one day per week from home. This cannot be supported [Tribunal's emphasis] though going forward. [This may be part of her stress however she has been advised of the new Flexible Working Policy but has not applied under it.]"*
>
> *"Background is that the Agency needs Michelle to return to full-time hours and we have been conducting a job review process."*
>
> *[Tribunal's emphasis]*

74. It is clear from the above that the respondent had, as it had indicated to the claimant, made its mind up in respect of the requested variation to hours and home working. It stated in plain terms in this referral that the temporary variation *"cannot be supported though going forward"*. It also stated that *"her role is 8-4 Monday to Thursday and 8-1.15 pm a Friday and is office based"* and that it required the claimant *"to return to full-time hours."*

In circumstances where the variation in working arrangements had been in operation for almost a year, and where the matter had been discussed and determined by SMT, the claimant had been entirely justified in concluding that the matter had been effectively and finally determined and that the reference to both a

proposed meeting with SMT and the reference to an entirely unsuitable internal policy had been little more than window dressing.

75. The Occupational Health report issued on 29 September 2019. It recorded in relevant part:

> *"She tells me that she initially had worked full-time Monday to Thursday and Fridays until 1.15 pm in the office but for the last year has been working four days a week with one day from home which has worked out well for her. She tells me that she has tried to get this formalised in the contract but there has been uncertainties over this arrangement and I understand there is a job review process going on due to the company's request that the arrangement has to change and for her to work full-time once more."*
>
> *"She had symptoms of feeling unwell with high blood pressure and breathlessness."*
>
> *"She also has a number of other medical conditions of note. She has an inflammatory bowel condition diagnosed since December 2017 for which she is reviewed by hospital specialists as well as a specialist nurse on an eight weekly basis and she has regular immunotherapy infusions every eight weeks for this. After the infusion she can be fatigued and she is vulnerable to picking up viruses in the environment due to the immune suppression."*
>
> *"Her bowel condition is subject to relapses triggered by stress [Tribunal's emphasis] and as she is experiencing this at work she wants to avoid a further complication to a bowel condition and avoid hospitalisation and therefore went off sick removing herself from the working environment. Her bowel condition flared up in the three months prior to going off sick."*
>
> *"Since being off work she is sleeping much better, eating better with improved mood and anxiety although this reoccurs when she receives communications from employers and she has anxieties and concerns over return to work on a five day week basis."*
>
> *She enjoys the job and was happy with the previous arrangement and does not like to be off work but the uncertainties over the terms and conditions and the job review process is giving her anxieties and stress. She tells me she feels only able to return back to the same working conditions."*

76. Under the heading *"Opinions and Recommendations"*, the Occupational Health physician stated:

> *"She has significant anxiety and low mood and stress which is secondary to mainly work related factors. She is currently taking effective anti-depressant medication at low dose and is on the waiting list for cognitive behavioural therapy. She has an inflammatory bowel condition which is subject to relapses and can be triggered by stress [Tribunal's emphasis] which can significantly affect activities of daily living and cause fatigue and requires strong immunotherapy every eight weeks which renders her susceptible to infections. As she has this condition as well as the anxiety which is also*

subject to relapses and affect activities of daily living and is chronic in nature, equality legislation is likely to apply in this case. Her functional capacity is good.

She would be fit for work immediately if she were to be supported in returning to work on the same conditions as previously with clear clarification as to the terms and conditions. [Tribunal's emphasis] If she were able to return in this arrangement I suggest she has a phased return to work with stress risk assessment taking place with the manager."

77. Despite the clear recommendation that the claimant should return to work on the same conditions as previously, and despite the clear indication that *"equality legislation"* was likely to apply in this case, the respondent wrote to the claimant on 3 October 2019 to confirm that as a result of the Occupational Health report they would like her to return on a phased basis with a view to her being a full-time worker by 21 October; less than three weeks later.

78. It would appear from the case put forward on behalf of the respondent in the course of the hearing that the respondent concentrated on the part of the Occupational Health report which read separately:

> *"Reasonable adjustments to manage her chronic condition would be time off for appointments with her specialists and for the hospital treatment, and increased allowances sickness absences allowed due to the after affects from the immunotherapy."*

If the respondent felt that that had been the only matter recommended as a reasonable adjustment, that had been an inaccurate reading of the report from the Occupational Health physician. The report stated that the claimant would be *"fit for work immediately if she were to be supported in returning to work on the same conditions as previously –".* It is perhaps sufficient to note that the letter from Ms McDaid of 3 October 2019 does not refer to reasonable adjustments at all or indeed to the 1995 Act. In particular it does not even refer to the three lines in the report which refer to time off for appointments with specialists and an increase in allowances to deal with the after effects of immunotherapy and does not argue that those measures would be the only reasonable adjustments, or that they would be put in place.

79. On 4 October 2019, the claimant wrote to the respondent to express her disappointment. The claimant stated:

> *"The email says you have considered the Occupational Health report but given that you have made it clear that AWARE is not willing to make any reasonable adjustments to my work pattern despite the recommendations given by the doctor who conducted the OH report, I do not believe that AWARE has considered the report at all. You instead invited me to 'apply' for a change to my working pattern which confused me as I would have thought a medical report supersedes any other type of request or application.*
>
> *I would like to make one last request that you consider the recommendations made in the OH report by making a reasonable adjustment to my working pattern and by allowing me to work four days a week as I have been doing*

so for the last year. If this is not granted, having sought advice from the Equality Commission, this may amount to unlawful discrimination on the grounds of disability in accordance with the Disability Discrimination Act 1995."

80. The response from the respondent to this specific reference to 1995 Act, and to the specific reference to reasonable adjustments in the light of the OH report, was an email from Ms McDaid on 9 October 2019 which stated:

> *"Thank you for your email. I appreciate that my email was disappointing for you to receive. You will note that the Occupational Health report does recognise that your requested working pattern may not be operationally feasible. While a phased return may be possible, if you wish to have your working pattern varied on a permanent basis, the way to approach that is to make an application in accordance with our flexible working procedure. I can assure you that this will be given full consideration. We remain willing to offer a phased return pending the outcome of this flexible working application."*

Ms McDaid made no mention of reasonable adjustments or of the 1995 Act or of the claimant's disability in the course of this brief reply.

81. On 16 October 2019, the claimant resigned. In her letter of resignation, she did not refer to the 1995 Act or to the failure to make reasonable adjustments. However the claimant had already made the position plain to Ms McDaid, and therefore to the respondent, in her email of 4 October 2019 where she had specifically referred to *"unlawful discrimination on the grounds of disability in accordance with the Disability Discrimination Act 1995."*

82. The claimant had applied for other posts where she would have been able to work part-time to manage her condition. She was provisionally offered a post in the Food Standards Agency and that was subsequently confirmed on 16 October 2019. She commenced employment with the Food Standards Agency immediately after the effective date of her resignation. That post was better remunerated than her post with the respondent and there is no loss of income.

83. Mr Tom McEneaney had been employed by the respondent as an Education and Training Officer on a full-time basis. There was no evidence before the tribunal that Mr McEneaney had been disabled at any point for the purposes of the 1995 Act. Nevertheless, he had been permitted a variation of his terms and conditions of service on 23 May 2018 to work for 19 hours per week. That temporary variation was described as an interim measure until the recruitment of the CEO.

84. On 4 October 2019, the CEO Ms Collins wrote to Mr McEneaney in the following terms:

> *"I think I've mentioned to you briefly before about formalising your amended hours of work from 26 down to 19. You indicated that you would like this to be permanent and there is no difficulty with this. However just to keep the paper trail correct and to apply the same process for all staff could you consider the Flexible Working Policy in the Staff Handbook – and complete and return the flexible working request form.*

Just a formality."

85. Mr McEneaney and the claimant were therefore in a similar position. The correspondence to both was contemporaneous. Both were operating on what had been expressed to be a temporary or interim variation pending the appointment of the new CEO and the following job description exercise. No difficulties with the varied conditions had been raised with either. Nevertheless, the claimant had been told in plain terms that her post was full-time and office based but that she could nevertheless, if she wished to do so, apply under the Flexible Working Policy. Any such application would be given *"full consideration".* In contrast, Mr McEneaney was given an absolute assurance that his variation would be permanent and that the use of the Flexible Working Policy was *"just a formality"*. In plain terms, Ms Collins had told Mr McEneaney that the only purpose of the exercise was to *"keep the paper trail correct".*

86. The tribunal is satisfied that there had been a clear difference in treatment between the claimant and Mr McEneaney and that the claimant had been treated less favourably than Mr McEneaney in analogous circumstances.

87. The claimant was eventually replaced as Communication Officer by a Ms Leah Catterson who, after an initial period, worked for 3 days per week with the assistance of a Communications Assistant. There was no evidence that Ms Catterson had been disabled.

The CEO worked on a part-time basis. There was no evidence that Ms Collins had been disabled.

DECISION

Reasonable Adjustments

88. The claimant at all relevant times had suffered from a disability for the purposes of the 1995 Act. That condition, UC, required regular hospital treatment and medication. It had also been exacerbated by stress.

89. The respondent had been aware of that condition at all relevant times. Ms McDaid, the claimant's line manager, approved the initial variation of her contract during her meeting with the claimant on 2 August 2018 in the Dunsilly Hotel because of the claimant's need to manage that condition. Ms McDaid had been aware in some detail of the claimant's chronic medical condition. She had been the line manager for the claimant throughout her extended period of maternity pay and sick leave and had been fully aware of the claimant's diagnosis of UC and of her serious ill health following that diagnosis.

90. Ms McDaid had also been aware that the reason for the variation sought by the claimant had been to reduce the stress which would exacerbate that chronic medical condition. The claimant did not at any stage ask for a temporary variation of her working conditions. A temporary variation would have made no sense for her, given the chronic nature of her medical condition.

91. The variation was initially granted for a four day working week and that variation was subsequently amended on 23 October to include one of those four days working from home. As indicated above there is a significant dispute as to whether or not the variation had initially been agreed for four days working per week on a permanent basis or on a temporary basis. It is clear that the claimant had sought a permanent variation. The absence of any contemporaneous note or record of the meeting further adds to the confusion. However, to the extent that it matters, the tribunal concludes that the initial variation of four days working per week had been a permanent variation until it was rescinded.

92. As indicated earlier in this decision, the tribunal has concluded that there had been no significant problems with the operation of the variation of the claimant's working hours and location. It had been extended without comment on more than one occasion. No problems had been mentioned by the respondent on 23 July 2019 or 3 October 2019 when it indicated clearly to the claimant that the post was to be five days per week and office based. In fact, no difficulties with the operation of the variation were raised by the respondent until this litigation was well underway. It is notable that even in the response the only difficulty in the operation of the variation put forward by the respondent was that:

> *"It was also putting other staff under more pressure to have the claimant working from home one day per week as the respondent had a shared approach to answering phones and welcoming visitors to the office which the claimant was not able to contribute to during the day when she worked at home."*

There was no mention of a difficulty in contacting the claimant when she was working from home in relation to fundraising or in relation to any other matter. There was no mention of any difficulty in arranging meetings or progressing business during the one day per week when the claimant had not been working, either at home or in the office. A reference to a *"shared approach to answering telephones and welcoming visitors,* is not the same as alleging that the claimant could not be contacted while homeworking.

93. Given the terms of the correspondence on 23 July 2019 and 3 October 2019 and the terms of the referral letter to the Occupational Health physician, it is clear that the respondent had made up its mind not to grant a permanent or further variation of the claimant's working arrangements. The suggestion that she should use an entirely unsuitable internal policy to simply repeat what she had already asked for and which had been in place for about a year, had been no more than window dressing, or, to use the terminology employed by the respondent in relation to Mr Tom McAnaeney, had been intended to "*keep the paper trail correct"*.

94. It is equally clear that the post has subsequently been operated on a part-time basis and that adjustments such as the appointment of a Communications Assistant had been latterly put in place.

95. The respondent failed to address its statutory responsibility to put in place a reasonable adjustment from the start of this saga on 2 August 2018 and persisted in that failure even after the OH report and even after the claimant had specifically raised the question of reasonable adjustments and the 1995 Act on 4 October 2019. An adjustment could clearly have been made; it had been in

operation for almost a year and adjustments were put in place after the claimant's resignation. The onus of proof has shifted to the respondent (see ***Tarbuck*** above) and it has not been rebutted by the respondent.

The tribunal therefore concludes that the respondent has failed in its duty to put in place a reasonable adjustment as required by the 1995 Act.

Direct Discrimination and Discrimination for a Disability related Reason

96. Since the tribunal has already determined that the claimant had been unlawfully discriminated against contrary to the 1995 Act, and since this is, in relation to the 1995 Act, an injury to feelings case only, considering others type of discrimination under that Act will have no real effect. However, to address all the arguments, the tribunal would do so. After the decision of the House of Lords in ***Lewisham Borough Council v Malcolm [2008] UKHL 43***, direct discrimination and disability related discrimination can, for practical purposes, be considered together.

97. Turning to the claim of unlawful direct discrimination and disability related discrimination, the shifting burden of proof is going to be crucial.

98. There needs to be something more, on the evidence, than the mere possibility of unlawful discrimination (see ***Madarassy***). There needs to be something on which a reasonable tribunal can properly conclude or infer that there had been unlawful discrimination. The Directive refers to facts from which discrimination can be "*presumed*". Brexit notwithstanding the tribunal must consider the purpose of the Directive when construing the implementing domestic legislation. There is rarely a '*smoking gun*' or an admission of unlawful discrimination in these cases. The purpose of the Directive was to shift the normal onus of proof on to the respondent once a prima facie case has been established. The purpose of the Directive was not to simply replicate the pre-existing status quo where the onus of proof fell on the claimant. In determining whether facts have been established from which an inference of unlawful discrimination could be drawn, the tribunal must at that preliminary stage disregard explanation from the respondent. The onus of proof then moves to the respondent.

99. The Court of Appeal (GB) in ***Deman*** (above) concluded that the "*more*", in addition to a simple difference in status and a difference in treatment, need not "be a great deal".

100. When analysing whether a prima facie case of unlawful discrimination has been established, the tribunal must focus on its task of determining whether or not there has been unlawful discrimination – (see ***Curley v Chief Constable [2009] NICA 8). In Laing V Manchester City [2006] IRLA 748***, the EAT stated:

> "*There seems to be much confusion created by the decision in **IGEN**. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of [race] discrimination. The shifting of the burden of proof simply recognises that there are problems of proof facing an employee which would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been because of [race].*"

101. The facts of the current case are not such that the tribunal could properly sidestep the issue of a shifting burden of proof. In ***Hewage v Grampian Health Board [2012] ICR 1054***, Lord Hope approved the obiter comments of Underhill J. In ***Martin v Devonshire Solicitors [2011] ICR 352***, para 39, that it is important not to make too much of the burden of proof provisions. Lord Hope said [para 32];

> "*They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence on way or another*."

The present case is not one where positive findings on the issue of unlawful discrimination readily present themselves. There is no avoiding it. The issue of a potential shifting of the burden of proof requires "careful attention".

102. Council Directive 2000/78 stated in its preamble:

> *"(31) The rules on the burden of proof must be adapted where there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.*"

103. In Article 10 of the Directive:

> *"1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there had been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment".*

104. Section 17A (1c) of the 1995 Act implemented that part of the Directive.

105. So in a case of this type, where the evidence does not conclusively determine the matter one way or another, the claimant is entitled to the benefit of S.17A (1c). She must establish a prima facie case, or facts on which discrimination could reasonably be presumed. She does not have to fully discharge the normal burden of proof on the balance of probabilities before the burden of proof shifts to the respondent. If she had to do so, this would be little point in S.17A(1c).

106. The respondent treated the claimant less favourably than it treated others. In particular, Mr McAnaeney had been invited to simply go through the motions of using the flexible working policy. There was no evidence that Mr McAnaeney had been disabled and yet he had been afforded preferential treatment in that his adjustments had been agreed before the application had been submitted and that application was patently no more than a rubber stamping exercise. His situation had been no different from the claimant's. In both cases, the variations had been in operation for some time with no recorded difficulty and in both cases the variations had been feasible.

107. That startling difference in treatment, which has not been adequately explained by the respondent, is sufficient, of itself to shift the onus of proof in respect of both direct discrimination and disability related discrimination to the respondent. In particular, the references in correspondence to Mr McAnaeney to the application being a *"formality"* and to establishing a *"paper trail"* are more than enough to establish a prima facie case and to shift the burden of proof. Those references are a classic *'smoking gun'* and can only be consistent with a deliberate effort to conceal different treatment. There was a difference in status (one was disabled, one was not) and a difference in treatment which was not explained. There was prima facia evidence that the claimant had been discriminated against directly on the ground of her disability or on the ground of a reason related to her disability; her inability to work full-time. In relation to the latter, no objective justification had been shown.

109. While the differential treatment of Mr Anaeney, as set out in the two preceding paragraphs, is sufficient on its own to establish a prima facie case of unlawful discrimination, the following matters are also supportive of that prima facie case:

(i) the respondent's failure to treat the meeting on 2 August 2018 seriously, as a meeting to manage the return of a colleague from a lengthy period of sick leave, by failing to make a record of that discussion and failing to notify the claimant in writing of the outcome of that meeting until two months later;

(ii) the respondent's decision to rescind the agreement at that meeting for a permanent variation to four days per week;

(iii) the respondent's argument that the variation to four days a week had been a *"trial"* and that the variation to include one day's homeworking had been part of an "*phased return",* when no records were produced in relation to any such *"trial"* or *"phased return"*;

(iv) the respondent's evidence at tribunal that the claimant had not been contractable on her day homeworking, when that had not been raised with the claimant when she was in employment, either verbally or in the correspondence of 23 July 2019 or 3 October 2019;

(v) the terms of the referral letter to the Occupational Physician which did not refer the doctor to the specific disability when the respondent had been aware of that disability;

(vi) the response to the report of the Occupational Physician's report which did not address either *"equality legislation"*, the reference to the *"bowel condition"* being "*exacerbated by stress"* or the reference to the claimant *"returning to work on the same conditions as previously"*;

(vii) the response to the claimant's email of 4 October 2019; in particular to her reference to *"a reasonable adjustment"* and to her reference to the 1995 Act;

(viii) the part-time working allowed to the claimant's replacement.

110. That onus of proof has not been rebutted by the respondent. It may be the case that there had been some other reason for the difference in treatment afforded to the claimant. However, it is not for the tribunal to speculate without evidence about what the reason might be. There was no evidence that Mr McEnaeney had done anything that the claimant had not done. There was no evidence to explain why a variation could be offered to Mr McAnaeney and not to the claimant, particularly when the variation had already been in operation for a lengthy period and the claimant's replacement could eventually work part-time. As a result of the provisions in relation to the shifting burden of proof, the respondent cannot be afforded the benefit of the doubt in this regard. It is for the respondent to put forward evidence which can rebut the onus of proof which has shifted to the respondent. No convincing evidence of any non-discriminatory reason was put forward by the respondent.

111. The tribunal therefore concludes, in the absence of any such rebuttal, that the respondent discriminated against the claimant both directly on the ground of her disability and for disability related reasons.

Constructive Unfair Dismissal

112. The tribunal concludes that there had been a fundamental breach of contract ie the failure on the part of the employer to put in place reasonable adjustments and the actions of the employer in directly discriminating against the claimant on the ground of her disability and discriminating against the claimant for disability related reasons. Any of these breaches of the 1995 Act would have been sufficient, on its own, to establish a fundamental breach of contract entitling the claimant to treat her contract as repudiated.

113. It is clear that one of the reasons, and in fact the primary reason, for the claimant seeking alternative employment and taking up alternative employment with the Food Standards Agency was that repudiation of contract on the part of the respondent. There was no significant delay and the claimant has not waived that repudiation.

114. The tribunal therefore concludes that the claimant had been constructively and unfairly dismissed.

Remedy

Injury to Feelings

115. The practice in this jurisdiction is to use the appropriate ***Vento*** guidelines to fix compensation for injury to feelings. That approach has been endorsed by the Northern Ireland Court of Appeal in ***Breslin v Loughrey [2020] NICA 39.***

116. The appropriate ***Vento*** guidelines for a claim lodged on 25 November 2019 are as follows:

    (i) less serious cases £900.00 to £8,800.00;

    (ii) serious cases £8,800.00 to £26,300.00;

(iii) most serious cases £26,300.00 to £44,000.00.

117. The claimant had requested a variation in her working conditions on 2 August 2018 on her return to work after an extended period of maternity leave and sick leave. That request had been a request for a permanent variation in those conditions. It had not been expressed as a request under the 1995 Act or specifically a request for a *"reasonable adjustment"*. However the respondent had clearly been aware of the claimant's diagnosis of UC and had clearly been aware of the long and serious period of illness immediately preceding that date. Unlike a request under Article 112F of the 1996 Order, there is no requirement on a disabled employed seeking a variation to state that it was a statutory application. The duty is on the employer to comply with the 1995 Act.

118. That request was never addressed properly by the respondent. The claimant in the first instance had to chase Ms McDaid for a proper response to her meeting on 2 August 2018. As indicated above, it is more likely than not that the claimant had been granted a permanent variation to four days per week. That was eventually expressed as a *"trial"* for six months; although there is no evidence of any such trial ever taking place or being documented. The request for one day working from home was refused by the respondent but that refusal was eventually altered after the intervention of Mr Bernard McAnanay. The basis of that particular variation was unclear. It was expressed as *"part of your phasing back to work".* As part of a phased return to work, it lasted a remarkably long time.

119. In respect of both parts of the variation to working conditions, the claimant was kept in a state of uncertainty and the respondent at no point thought to address the issue of a reasonable adjustment under the 1995 Act properly, or at all. It eventually rejected a permanent variation and directed the claimant to return to work on a full-time basis with no homeworking. It also directed the claimant to a pointless exercise in using an inappropriate procedure even though it had already reached a firm and settled decision; at least in relation to the claimant.

120. It is clear therefore that the claimant had been subjected to unlawful discrimination over a significant period. That said, during that particular period, the temporary variations had been put in place by the respondent. However, the claimant had been subjected to a lengthy period of uncertainty and her disability had not been properly considered. The claimant therefore had to seek other employment and to change her employer when she clearly did not wish to do so. There had been no lasting psychiatric damage but some significant damage to the claimant's feelings.

121. The tribunal therefore considers the injury to feelings as a result of the respondent's breaches of the 1995 Act to fall with the lower category but towards the upper end of that category.

122. The tribunal therefore awards the sum of £7,000.00 in respect of injury to feelings.

Unfair Dismissal Compensation.

123. The tribunal awards six weeks' gross pay as the basic unfair dismissal award in this matter. The tribunal was not referred to a Schedule of Loss, but on the basis of the figures in the pleadings, that basic award amounts to £2,420.30. The claimant is also awarded £500.00 in respect of loss of statutory rights. There is no

compensatory award in respect of the loss of earnings given that the claimant moved immediately into other employment which was better paid.

Interest

124. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990 and the Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996.

Vice President:

Date and place of hearing: 26, 27 and 28 July 2021, Belfast.

This judgment was entered in the register and issued to the parties on: