THE INDUSTRIAL TRIBUNALS

CASE REFS: 356/19IT
2889/19IT

CLAIMANT: **Anne Hughes**

RESPONDENTS: **Dr. Robert Carlile, Dr. Sonniva McAlinden and Dr. Valerie Grant practising as Tynan Surgery**

JUDGMENT

1. The Tribunal does not have jurisdiction to consider the claimant's complaint of unfair dismissal. It is therefore dismissed against all of the respondents in its entirety.

2. The Tribunal concluded that the claimant did not lodge her complaint of disability discrimination within three months of its alleged occurrence except for that relating to her allegations of less favourable treatment commencing in September 2018.

3. The Tribunal does not consider it just and equitable in all the circumstances of this case to extend the time limit to allegations as to the respondents' conduct before September 2018.

4. The Tribunal concluded however that the last of the conduct since September 2018 complained of by the claimant, which formed the basis of her complaint lodged with the Tribunal in January 2019, was within the time limit of three months, so the Tribunal has jurisdiction to determine it.

5. The Tribunal concluded that it was not satisfied that such conduct established that the respondents treated the claimant less favourably on the grounds of disability. The claimant's claim of Disability Discrimination is therefore dismissed against all of the respondents in its entirety.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Browne**

Members: **Mrs M O'Kane**
Mr I Atcheson

APPEARANCES:

The claimant attended and represented herself.

The respondents were represented by Ms R Best, Barrister-at-Law, instructed by Worthingtons Solicitors.

ISSUES AND EVIDENCE

The legal issues in this case were:-

(i) Does the Tribunal have jurisdiction to determine the claimant's claim of unfair dismissal?

(ii) Does the claimant satisfy the definition of a disabled person? The respondents at the outset of the Tribunal hearing conceded that the claimant was at the material time a disabled person on the basis of her mental health condition.

(iii) Does the Tribunal have jurisdiction to determine the claimant's complaints of disability discrimination?

(iv) Did the respondents subject the claimant to discrimination on the grounds of her disability?

Question (i). <u>Does the Tribunal have jurisdiction to determine the claimant's claim of unfair dismissal?</u>

<u>Time Limit - Unfair Dismissal Claim</u>

The law in relation to the period for presenting a claim of unfair dismissal is set out in Article 145 of the Employment Rights (Northern Ireland) Order 1996 as follows:-

> ***"145.***—*(1) A complaint may be presented to an industrial tribunal against an employer by any person that he was unfairly dismissed by the employer.*
>
> *145 - (2) Subject to the following provisions of this Article, an industrial tribunal shall not consider a complaint under this Article unless it is presented to the tribunal—*
>
> *(a) before the end of the period of three months beginning with the effective date of termination, or*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."*

"Not reasonably practicable" test

In **Harvey** on Industrial Relations and Employment Law, Division P1, it is stated as follows in relation to the *'not reasonably practicable'* formula:-

> "There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on the applicant (***Porter v Bandridge Ltd [1978] IRLR 271***, ***[1978] ICR 943****, CA*). Second, if he succeeds in doing so, the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable (see para [276] below).
>
> The question of what is or is not reasonably practicable is essentially one of fact for the employment tribunal to decide, and the appellate courts will be slow to interfere with the tribunal's decision (***Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945*, *[1984] IRLR 119, CA*, *Wall's Meat Co Ltd v Khan [1979] ICR 52, CA*, *Riley v Tesco Stores Ltd [1980] IRLR 103*, *[1980] ICR 323, CA***). The tribunal must, however, address its mind to the question of reasonable practicability, where this is the test, and not simply state that it has a 'discretion to extend time', and must, moreover, make a precise finding as to the nature of the complaint in question, and as to the relevant starting date of the limitation period governing it before proceeding to consider whether any extension is appropriate (see ***Taylorplan Services Ltd v Jackson [1996] IRLR 184****, EAT*).
>
> … In ***Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945*, *[1984] IRLR 119*, *[1984] ICR 372*, *CA****, May LJ, who gave the judgment of the court, having undertaken a comprehensive review of the authorities as they were at the time, concluded that (*[1984] ICR at 384, 385*):
>
> > *"[W]e think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done—different, for instance, from its construction in the context of the legislation relating to factories: compare* ***Marshall v Gotham Co Ltd [1954] AC 360****, HL. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [****Singh v Post Office [1973] ICR 437****, NIRC] and to ask colloquially and untrammelled by too much legal logic—"was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"—is the best approach to the correct application of the relevant subsection."*
>
> The possible factors why it might not have been reasonably practicable to bring the claim are many and various, and, as May LJ stated in ***Palmer and Saunders***, cannot be exhaustively described see *[1984] IRLR* at 125, *[1984] ICR* at 385). Some of the most common factors relied upon by claimants are

considered below, namely: (1) ignorance or mistake on the part of the claimant; (2) ignorance or mistake resulting from faulty professional advice (the ***Dedman*** principle); (3) ill health or disability; (4) problems with the post; (5) technological issues; (6) internal appeals; (7) other pending legal proceedings; (8) attempts to negotiate with the employer and avoid litigation; (9) discovery of new facts; and (10) commercial concerns.

(vii) Reasons for missing the time limit: (2) Ignorance or mistake resulting from faulty professional advice (the Dedman principle)

General. When it is argued that a primary time limit has been missed due to ignorance or mistake, consideration must be given to the involvement of any adviser. If there is no adviser the tribunal may enquire why not, and whether it was unreasonable for the litigant to have failed to seek advice (see further para [197] ff above). On the other hand, where a claimant has, in advance of the expiry of the primary time limit, sought and received advice from a skilled adviser, and the reason for the failure to lodge the originating application within that time limit is reliance on erroneous advice or conduct by that adviser, the general rule is that the escape clause will not be available to them. This rule applies however careful the claimant's selection of a professional adviser and however reasonable the decision to rely on professional advice. This seemingly hard doctrine, known as the *Dedman* principle after the Court of Appeal's decision in ***Dedman v British Building and Engineering Appliances Ltd [1974] 1 All ER 520 at 526*****,*** ***[1973] IRLR 379*** (see also the earlier decision of ***Hammond v Haigh Castle & Co Ltd [1973] IRLR 91***), depends on a number of features being present (examined in more detail below), in particular: the adviser must be a professional or skilled adviser (not necessarily a lawyer, but advice from friends or colleagues, for example, will not count); the adviser must themselves have been at fault in the advice which they gave; and the wrong advice must have been the substantial cause of the missed deadline.

Intuitively, the '***Dedman*** principle' seems harsh: a would-be claimant who is diligent enough to secure professional advisers and reasonably places themselves in the hands of those advisers may then find they are in a worse position than had they not done so. In ***London International College v Sen [1993] IRLR 333,*** *CA*, Sir Thomas Bingham MR expressed misgivings about the principle on the basis that he found 'the rationale of that principle very hard to understand. If the test is whether it was reasonably practicable or practically possible or reasonably feasible to present the complaint in time, it would seem to me irrelevant whether or not the complainant had consulted a solicitor' (at 335) (Stephenson LJ had expressed similar strong misgivings about the ***Dedman*** principle, *obiter*, in ***Riley v Tesco Stores Ltd [1980] IRLR 103*****)**. There is force to this criticism since on the plain wording of the legislation it might be thought that where a litigant reasonably relies upon professional, but wrong, advice and reasonably follows that advice, they are therefore reasonably ignorant of the time limit and it was not reasonably practicable for them to lodge their claim in time. On the other hand it can be argued that it would be unjust for a claimant who themselves could have been expected to meet the primary time limit to be able to hide behind an error by their adviser and gain an extension of time that otherwise would not

have been available to them. Why should the finality of a time limit be impeded by negligence on the part of a professional adviser? In any event, the position has been settled, and the ***Dedman*** doctrine authoritatively reaffirmed, by the Court of Appeal decision in ***Marks & Spencer plc v Williams-Ryan [2005] IRLR 562*****,*** ***[2005] ICR 1293*****.** Following a careful review of the criticisms of the principle, the Court of Appeal held that it remains the case, as a proposition of law, that in any situation where the reason for a missed limitation period is the fault of a skilled adviser, that fault is to be visited on the claimant and it must be held that it was reasonably practicable to submit the claim within time.

What has now become the ***Dedman*** principle was first stated by Lord Denning MR in characteristically terse fashion (see ***Dedman*** at 381) that 'If a man engages skilled advisers to act for him – and they mistake the time limit and present [the complaint] too late — he is out. His remedy is against them.' Lord Denning repeated the principle in ***Wall's Meat Co Ltd v Khan [1978] IRLR 499*****,*** ***[1979] ICR 52*** (at 502, 56, respectively), where he said:

> *"I would venture to take the simple test given by the majority in [***Dedman***]. It is simply to ask this question: had the man just cause or excuse for not presenting his claim within the prescribed time? Ignorance of his rights — or ignorance of the time limits — is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."*

Thus where a claimant asserts ignorance of, or a mistaken belief regarding, the time limit, that state of mind will not be held to be reasonable and will not allow an extension of time if it arises 'from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him' (see Brandon LJ in the ***Wall's Meat*** case at 502, 60). On the application of this principle, the claimant in ***Dedman*** was debarred from proceeding with his complaint because of the failure of his solicitors to warn him about the time limit

…

(c) Reasonable time

Where the claimant satisfies the tribunal that it was not reasonably practicable to present his claim in time, the tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. Although, as Lord Denning MR pointed out in the ***Wall's Meat*** case, this is 'very much a matter for the [employment] tribunal', the tribunal must nevertheless exercise its discretion reasonably and with due regard to the circumstances of the delay. The discretion does not give carte blanche to a tribunal to entertain a claim 'however late it was presented' (***Westward Circuits Ltd v Read [1973] 2 All ER 1013*****,*** ***[1973] ICR 301, NIRC***)."

1. This case also had the unusual feature that the respondents raised the issue that the claimant appeared to have prematurely lodged a claim of unfair dismissal, at the same time as alleging disability discrimination. Her unfair dismissal complaint was one of four identical complaint forms lodged on 31 January 2019, in which she confirmed both that her employment was continuing, but also stated that she had been unfairly dismissed (for which the form ET1 also includes constructive dismissal), but did not provide a date of dismissal, or any detail as to when and how she was dismissed.

2. The claimant sent a letter of resignation to the respondents on 1 June 2019, which stated only *"I wish to inform you of my decision to resign from employment at Tynan surgery as of 1 June 2019".*

3. The respondents and the claimant were in contact between the lodging of her January 2019 Tribunal complaints and her resignation in June 2019 regarding an ongoing process of Occupational Health (OH) assessments of the claimant, who was absent from work on sick leave from December 2018. At no point in that process did the claimant inform or remind the respondents that she was no longer employed by them.

4. In the months prior to September 2018, the claimant had also been absent from work for extended periods. Most notably between 1 January 2018 until 7 August 2018, the claimant was absent for sixty days, with sick notes from her GP diagnosing anxiety, depression and panic attacks.

5. As a result of her most recent absence, the respondents' policy required OH assessments. A return to work interview was conducted with the claimant on 4 September 2018, at which she stated that she felt "bored" at work. She also stated that she was on very low medication for her historic mental health issues.

6. The claimant also agreed at that interview to OH assessment. At her first such assessment, the claimant told Dr Jenkinson, the examining OH doctor, on 11 October 2018, that she had suffered from mental health issues all her life, but did not report any recent exacerbation of it, her most recent specialist examination by her consultant psychiatrist having been in June 2018.

7. The focus of her complaints to the OH doctor was workplace issues (echoing her later GP sick notes), namely, not liking her current role, because it involved answering the telephone; and undertaking receptionist duties. It was the claimant's complaint to the Tribunal that her role had been changed by the respondents in or about 2012, which she ascribed to them having become aware that she received mental health in-patient treatment at around that time. It was of note in that regard that the respondents waived the right under their sickness policy to reduce the claimant's pay; she was instead paid at her full rate of pay.

8. Notably, the claimant also told the OH doctor that she had normal memory and concentration, and no cognitive impairment. Dr Jenkinson concluded that the claimant had mild to moderate symptoms of anxiety and low mood. He further concluded that she should be able to return to work, as long as her specialist agreed. He further recommended that the workplace issues complained of to him by the claimant might best be resolved by mediation

9. At the meeting on 20 December 2018 to discuss the OH report, the claimant initially agreed to permit Dr Jenkinson to liaise with the claimant's mental health specialist, in order to identify an appropriate path for her return to work. By way of a text message to the respondents' practice manager, the claimant wrote: *"I will not be signing consent form until I speak to my advisors"*. The consent form, signature of which by the claimant was required to enable Dr Jenkinson to liaise with the claimant's consultant psychiatrist, was never signed, as a result of which such contact could not take place.

10. Dr Jenkinson responded on 14 November 2018 to queries from the respondents as to issues raised by them with the claimant in September 2018 as to her conduct at work, which was drawing adverse comment from colleagues. These included, but were not confined to, being "short" with a patient on the telephone; not communicating or interacting with other staff; and being overheard refusing to make an appointment for an infant's vaccination because the claimant could not find the relevant booking section on the computer system.

11. Dr Jenkinson replied that, whilst the claimant did not seem to him to be suffering from mental illness at that time, he concluded that the types of behaviour complained of were probably impacted by her illness. He expressed the opinion to the respondents that dealing directly with the public "would not be ideal", but that her current illness, whilst temporarily increasing her symptoms of anxiety, would be unlikely to have any long term impact upon her mental health.

12. The claimant during her subsequent absence on sick leave submitted sick notes from her GP, citing her absences as being due to "work related stress, anxiety and depression", with no reference to being dismissed (constructively or otherwise), or to any conduct of the respondent being discriminatory

13. The respondents on 12 November 2018 received a grievance letter from the claimant, in response to which the respondent initiated its grievance policy procedure. The claimant's grievances commenced with reference to what she perceived to be removal in 2012 from her previous role. It was her belief that this was in some way connected to her return from work after sickness absence due to depression. Whilst she stated in her grievance that she had previously complained about it, she had never before formally raised it, either as a grievance or in a complaint to a Tribunal.

14. The claimant went on to state that she was told by the respondents in September not to return to work until she had been assessed by OH, as she had allegedly been *"creating an atmosphere"* at work. She also alleged that she had been told by one of the respondent doctors "*to join a gym or something"*, and that other staff had been rude to her. The respondents emphatically denied that such language or dismissive tone had been used.

15. The claimant in her evidence to the Tribunal brushed aside the respondents' concern on the baby's vaccination issue, stating that it was overblown, as "nobody died".

16. The claimant's grievance letter stated, *"I have been taking guidance from both the Labour Relations Agency and the Equality Commission"*.

17. On 30 November the claimant had a conversation with Pauline Shillington, then a practice nurse in the respondents' surgery. They met by chance in a supermarket car park. Ms Shillington, who retired in June 2019, gave evidence to the Tribunal that the claimant, whom she knew to be off work on sick leave due to workplace problems, appeared to be wheeling a trolley containing alcohol. The claimant told her that, as regards her absence, *"I'm loving it. I'm milking it"*, and that she was *"off home to the fire to drink this"*, nodding towards the alcohol in the trolley.

18. The claimant in her questioning of Ms Shillington, appeared to veer between denying that she had said such things and trying to explain that she had only said them because of her mental condition.

19. The Tribunal had no difficulty in concluding that the conversation had taken place as described by Ms Shillington, whom the Tribunal found to be a wholly credible and truthful witness.

20. The claimant informed the respondents at her grievance meeting on 27 November 2018 that her consultant psychiatrist had confirmed at a recent meeting that the claimant was fit to return to work. The respondents declined her offer to provide a letter to that effect, preferring instead to discuss the way forward with the claimant at their meeting about Dr Jenkinson's OH report.

21. Upon receipt of the claimant's grievance letter, the respondents carried out what the Tribunal concluded was an extensive, detailed and time-consuming investigation, in the course of which office staff and doctors were interviewed, and the claimant was given ample opportunity to put her case.

22. The outcome of the grievance procedure was communicated to the claimant on 12 December 2018.The only aspect of her grievance to be upheld was that the respondents could not establish that the claimant did not handle more telephone calls than other reception staff.

23. The respondents from the outset of these proceedings, in their initial response and during the Case Management and hearing process, denied that the claimant was dismissed, constructively or otherwise, and repeatedly raised the issue of the Tribunal's jurisdiction to determine that issue, on the basis that it initially was premature, and subsequently out of time by reason of its absence.

24. The respondents repeatedly also requested during the Case Management process that the claimant should lodge a full complaint of unfair dismissal, but she did not do so. The respondents were therefore expected to prepare to defend an allegation of unfair dismissal in which there was no provision by the claimant of evidence that she had in fact been dismissed.

25. The Tribunal concluded that the legislation is quite clear in its wording and intent. It requires that the person lodging a complaint "was…dismissed", and that the time to lodge the complaint runs from the effective date of termination.

26. The Tribunal concluded that the claimant in this case was not dismissed when she lodged her claim in January 2019. She failed to produce any evidence to that effect; she continued to provide sick notes, and did not query the arrangement of an OH appointment.

27. The Tribunal further is satisfied that, even if the claimant was alleging that she was constructively dismissed, resulting in her resignation in June 2019, she failed to lodge a complaint of unfair dismissal, in time or at all. This was despite the clear assertion of the respondents to that effect. The claimant did not make any application to the Tribunal for an extension of time.

28. Whilst the claimant suffered from mental health issues, the Tribunal, even applying the most generous interpretation of the reasonably practicable test, could find no reason why it was not reasonably practicable to lodge her complaint. There was cogent evidence that the claimant had sought expert professional advice. Whether or not she heeded it is unknown, but the Tribunal concluded that she must have been well aware of the legal requirements. Her conversation with Ms Shillington was also indicative of a state of mind and an attitude of someone capable of planning the path ahead.

29. Whilst the Tribunal is slow to deprive a party of seeking a remedy, a line has to be drawn somewhere. The Tribunal therefore concluded that the circumstances in this case placed it outside the proper scope of permitting the claimant to pursue her claim of unfair dismissal. The Tribunal therefore does not have jurisdiction to determine that aspect of her case, and her complaint is dismissed in its entirety against all of the respondents.

Question (iii). <u>Does the Tribunal have jurisdiction to determine the claimant's complaints of disability discrimination?</u>

<u>Time Limit - Disability Discrimination Claim</u>

Schedule 3 (3) (1) of the Disability Discrimination Act 1995 provides that:-

> *"3. 1. An Industrial Tribunal shall not consider a complaint under section 17A or 25(8) unless it is presented before the end of the period of three months beginning when the act complained of was done …"*

30. Furthermore, the tribunal may extend this time limit if, in all the circumstances of the case, it considers that it is just and equitable to do so (Schedule 3 (3) (2) of the Disability Discrimination Act 1995.

31. The power to extend the time limit on *"just and equitable"* grounds is a broad discretion to be exercised on the part of the tribunal. There is no presumption in favour of an extension of time. The onus remains on the claimant in each case to persuade the tribunal that it is just and equitable to extend time in all the circumstances of the case, given the overall context that time limits provided by statute are generally meant to be obeyed.

32. In ***Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327,*** Sedley LJ stated:

"There is no principle of law which indicates how generously or sparingly the power to extend time is to be exercised."

33. Langstaff J stated in ***Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*** that a claimant applying for an extension of time must provide an answer to two questions:-

> *"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and, insofar as it is distinct, the second is the reason why after the expiry of the primary time limit, the claim was not brought sooner that it was."*

34. In ***British Co Corporation v Keeble [1997] IRLR 336***, the EAT confirmed that the discretion to grant an extension of time on *"just and equitable"* grounds is as wide as the discretion given to civil courts under the Limitation Acts. On that basis, the tribunal is required to consider the hardship and prejudice which each party would suffer as a result of either granting or refusing the extension and to have regard to all the other relevant circumstances, in particular:-

    (a) the length of and the reasons for the delay;

    (b) the extent to which the cogency of the evidence is likely to be affected by the delay;

    (c) the extent to which the parties sued had co-operated with any requests for information;

    (d) the promptness with which the claimant acted once she knew of the facts given rise to the cause of the action; and

    (e) the steps taken by the claimant to obtain appropriate professional advice once she knew of the possibility of taking action.

35. Whilst a useful guide, the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account (***London Borough of Southwork v Afolabi 2003 ICR 800***).

36. In the recent case of ***Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWWCA Civ23,*** the application of the above so called *"**Keeble** factors"* received further consideration by Underhill LJ. He cautioned against "a rigid adherence to a checklist" which can "lead to a mechanistic approach to what is meant to be a broad general discretion." He commented that the best approach for a tribunal in considering the exercise of the just and equitable discretion is to assess all the factors in the particular case that it considers relevant, including, in particular, the length of, and the reasons for, the delay.

37. Overall, the tribunal should adopt a multifactorial approach and no single factor alone is determinative on principle as to whether the discretion to extend time should be exercised under the just and equitable formula.

38. In the present case, the Tribunal weighed a number of factors.

39. The first was the fact that the claimant now is accepted by the respondents as having a mental disability at the material time. As such, a more benign view of any shortfall in the claimant's compliance with procedures might be taken.

40. The claimant however sought out professional legal and other advice during the course of these proceedings, including at least the Labour Relations Agency and the Equality Commission, although she did not engage any professional services to represent her at the full hearing of the case. At no stage did she make any application or request for an extension of time for her applications; nor did she provide any explanation for their lateness.

41. It is of note that she sought out such professional advice, indicating an awareness of the grounds upon which she based her intention to bring proceedings, which in itself inevitably would have involved discussion around time limits. The claimant at no stage suggested that she was not made aware of time limits; nor that any failure to comply with them was due to the negligence of her advisers.

42. It also was of note that the claimant indicated in evidence that her letter of resignation in June 2019 had been sent upon advice, albeit that the source of such advice was not clear.

43. Regardless of its origins, the fact that the claimant sent her letter at that time, for that reason, significantly undermines the prospect that it was prompted by, or as a direct consequence of, any "last straw" conduct by the respondents. The Tribunal therefore concluded that it was sent more likely than not as a tactical move by the claimant, which fact also dilutes the likelihood of any adverse effect of her mental condition upon the claimant's ability to focus. It is of note that the claimant specifically informed Dr Jenkinson in October that she did not suffer from any cognitive or memory issues.

44. It was also of note that the multiple claim forms, whilst replicated in each successive form, were sent in close proximity in time by the claimant. They were hand written by her, and contained narratives of her complaints against the respondents. There was no evidence that the claimant had required or sought any practical assistance in their preparation.

45. As such, they again undermine any concerns that she might have been so adversely affected by her mental condition that there was any significant impediment to her ability to understand what needed to be done, or to comply with the statutory requirements as to time limits.

46. As regards the alleged less favourable treatment on the grounds of her disability, the Tribunal therefore concluded that there was no credible explanation forthcoming from the claimant, or from the other information available, as to why she did not commence proceedings within three months of the alleged behaviour in 2012.

47. There additionally was a strong sense from the claimant's conversation with Ms Shillington that she was mentally astute, and cynically prepared to draw out the process to suit herself, regardless of the immense drain that her actions would

place on the precious time and resources of the respondents' practice, to say nothing of the potential damage to the collective and individual reputations of the medical and support staff.

48. The delay on that aspect of the case was beyond anything which might properly afford the Tribunal scope to extend time, and the Tribunal refuses leave to extend time on that aspect of the case.

49. On the other hand, the Tribunal considers that the allegations by the claimant (regardless of their merits), in her complaints to the Tribunal in November 2018 and January 2019 as to her alleged treatment by the respondents from September 2018 until her resignation in June 2019, were raised within time. The Tribunal therefore has jurisdiction to determine that aspect of her case insofar as it relates to the period running from September 2018.

Questions (iv) <u>Did the respondents subject the claimant to discrimination on the grounds of her disability?</u>

DISABILITY DISCRIMINATION LEGAL PRECEDENT

50. It is the claimant's responsibility to prove facts from which the Tribunal could conclude, in the absence of an adequate alternative explanation from the respondent, that the treatment of the claimant was on grounds of disability. Once facts have been established from which discrimination could be inferred, the burden shifts to the respondent to show that there is another explanation for the treatment. It is clear that a difference in status is not enough to establish the inference of discrimination ***(<u>Madarassy v Nomura International Plc [2007] IRLR 246)</u>***. Where the claimant relies on actual comparators to show less favourable treatment, it is necessary to compare like with like. In addition, the claimant may rely on the evidential significance of non-exact comparators in support of an inference of direct discrimination. Especially since the ruling of the House of Lords in ***Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL***, there has been a movement towards treating the question of whether less favourable treatment was on the proscribed ground - the "reason why" issue - as the crucial question for tribunals to address (***Aylott v Stockton on Tees Borough Council [2010] IRWR 994 CA***; ***JP Morgan Europe Ltd v Chweidan [2011] EWCA Civ 648)*** rather than focusing on the characteristics of actual or hypothetical comparators. As put by Mummery LJ in Aylott, "Did the claimant, on the proscribed ground, receive less favourable treatment than others?".

The Tribunal received valuable assistance from Mr Justice Elias' judgement in the case of ***London Borough of Islington v Ladele and Liberty (EAT) [2009] IRLR 154***, at paragraphs 40 and 41. These paragraphs are set out in full to give the full context of this part of his judgement.

"Whilst the basic principles are not difficult to state, there has been extensive case law seeking to assist Tribunals in determining whether direct discrimination has occurred. The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:-

(1) In every case the Tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in ***Nagarajan v London Regional Transport [1999] IRLR 572, 575*** – 'this is the crucial question'. He also observed that in most cases this will call for some consideration of the mental processes (conscious or sub-conscious) of the alleged discriminator.

(2) If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in Nagarajan (p.576) as explained by Peter Gibson LJ in ***Igen v Wong [2005] IRLR 258***, paragraph 37.

(3) As the courts have regularly recognised, direct evidence of discrimination is rare, and Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in ***Igen v Wong***. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:-

> *'Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer.'*

If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination. The English law in existence prior to the Burden of Proof Directive reflected these principles save that it laid down that where the prima facie case of discrimination was established it was open to a Tribunal to infer that there was discrimination if the employer did not provide a satisfactory non-discriminatory explanation, whereas the Directive requires that such an inference must be made in those circumstances: see the judgment of Neill LJ in the ***Court of Appeal in King v The Great Britain-China Centre [1991] IRLR 513***.

(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere

fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson pointed out in ***Zafar v Glasgow City Council [1997] IRLR 229***:-

> *'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'*

Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in ***Bahl v Law Society [2004] IRLR 799***, paragraphs 100, 101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself – or at least not simply from that fact – but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

(5) It is not necessary in every case for a Tribunal to go through the two-stage procedure. In some cases it may be appropriate for the Tribunal simply to focus on the reason given by the employer and, if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test: see the decision of the Court of Appeal in ***Brown v Croydon LBC [2007] IRLR 259 paragraphs 28-39***. The employee is not prejudiced by that approach because in effect the Tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.

(6) It is incumbent on a Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in ***Anya v University of Oxford [2001] IRLR 377*** esp paragraph 10."

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

> *"This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the*

whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude in the absence of adequate explanation that the respondent has committed an act of discrimination. In ***Curley v Chief Constable [2009] NICA 8*** *Coghlin LJ emphasised the need for a Tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the Tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The Tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination".*

51. The Tribunal concluded that there was no evidence consistent with an allegation of less favourable treatment by the respondents of the claimant. On the contrary, the evidence was strongly supportive of the respondents' contention that they had complied with their policies and procedures. Their approach in particular to the claimant's grievance was meticulous and painstaking, which the Tribunal, having considered the witness evidence and documentation, concluded was a genuine attempt to investigate and address the issues raised by the claimant.

52. There was no evidence, nor any suggestion from the claimant, that the respondents commenced or contemplated any form of disciplinary proceedings, other than the claimant's repeated failure to provide timely sick notes from her GP. That aspect undermined any notion that there might have been a wish to remove the claimant.

53. The claimant failed to provide evidence of any other colleague who did not share the claimant's protected characteristic, who, during the timeframe set by the Tribunal as to the scope of its determination of her disability discrimination complaint, received more favourable treatment. The Claimant therefore did not identify a relevant comparator.

54. The Tribunal concluded that the claimant had failed to satisfy it of even the first stage of disability discrimination. In those circumstances, the Tribunal concluded that there was, in effect, no case for the respondents to answer. The claimant's claims are therefore dismissed in their entirety against all of the respondents.

Employment Judge:

Date and place of hearing: **31 August to 2 September 2021, Belfast.**

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