THE INDUSTRIAL TRIBUNALS

CASE REF: 18174/21

CLAIMANT: **Anonymised**

RESPONDENT: **Department of Justice**

JUDGMENT

The unanimous judgment of the tribunal is that:

1. The respondent did not discriminate against the claimant on the grounds of disability.

2. The respondent did not unfairly constructively dismiss the claimant.

3. The claimant's complaints are therefore dismissed in their entirety.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Browne**

Members: **Mr N Jones**
Mr M McKeown

APPEARANCES:

The claimant was represented by Ms T Graham, Barrister-at-law, instructed by MMW LLP.

The respondent was represented by Mr C Summers. Barrister-at-law, instructed by the Departmental Solicitors Office

ISSUES AND EVIDENCE

1. With the consent of the parties, the identity of the claimant is ordered by the Tribunal to be anonymised, in order to protect the identity of a member of her immediate family who was the victim of a serious assault by a person convicted of that offence, the occurrence of which events plays a material part in the facts of this case.

2. The Tribunal refuses an application to direct that the name of the respondent also should be anonymised. It considers that, notwithstanding any agreement between

the parties that such an order be made, in the interests of open justice, the balance tips in favour of including the name of the respondent employer and its witnesses in this case. In doing so, the Tribunal is satisfied that the evidence can properly be expressed in terms which accurately reflect the evidence and conclusions, without the identity of the claimant or of her family being revealed or pieced together. No other ground for the anonymization of the identity of the respondent or its witnesses was advanced by the parties.

3. The tribunal is satisfied that the safeguards in place regarding the claimant's identity are sufficient to prevent the potential jeopardy cited in the application to conceal the identity of the respondent and its witnesses. The tribunal considers that such an order would improperly allow a party to shield behind it, especially where that party is found by the tribunal to have breached the law.

4. Such an order additionally would make it likely that setting out the tribunal's analysis and conclusions in the present case would make the judgment almost incomprehensible, which situation is highly undesirable, running contrary to what is supposed to be a system of open, transparent justice.

5. The claimant was employed by the respondent as a prison officer from November 2008 until October 2020, at which time she medically retired on the ground of ill-health.

6. The claimant's complaint of unfair constructive dismissal was grounded in what she described as her having no alternative but to apply for Ill Health Retirement ("IHR"). Her decision to do so was not advanced by her as being because of any misconduct by the respondent, but based upon tactical advice from her union representative, Ivor Dunne. Mr Dunne was not called by the claimant to give evidence that he had given such advice; nor was there evidence that he otherwise considered such action by the claimant to be her only option.

7. The claimant's case in support of her complaint of less favourable treatment on the grounds of disability was that she at the material time was disabled, on the basis of her mental health.

8. The respondent at the tribunal hearing accepted that the claimant was disabled at the material time, but was clear that it had no prior knowledge of her condition; nor was a request form ever submitted by or on behalf of the claimant for any reasonable adjustment to be made to her working arrangements.

9. The clamant in evidence explained the absence of such a request as being due to a verbal arrangement she had made with her line manager about not being required to work in a location likely to bring her in to contact with any perpetrator of a criminal assault similar to that upon a member of the claimant's family.

10. The claimant's adverse mental condition arose from stress, brought on by the worry about that close family member having been the victim in 2017 of a serious criminal offence, perpetrated by a relation, who later was convicted and imprisoned after a trial, on the evidence of the victim.

11. The claimant gave evidence that, a few days after the commission of the offence, she had made a verbal agreement with her line manager, Senior Officer Rainey, that the claimant would not be assigned to duties in the facility where perpetrators of similar offences were detained. She further asserted in evidence that Mr Rainey had informed her that he had issued instructions to staff responsible for allocating rotas, to ensure that the claimant would not be detailed to carry out work at that location.

12. The respondent denied any knowledge of such an arrangement, and the claimant did not call Mr Rainey to give evidence that he had agreed to any such arrangement, or that he had issued instructions to that effect.

13. The claimant's duties at work, prior to going on extended sickness absence from 13 March 2019, included driving duties, including some away from the main prison site. She described in evidence how such duties gave her some privacy, if she became upset about the impending court case. The claimant gave evidence that, if she was in a vehicle on her own between work journeys, she could stop off and have a cry and then compose herself sufficiently to return to her duties.

14. It was common case that there had been no complaints by the respondent as to the quality of the claimant's performance. It was in fact the respondent's case that, regardless of whatever inner turmoil the claimant was experiencing between 2017 and 2019, her resilience in dealing with it by herself and out of sight in fact prevented the respondent from being in a position to recognise that she was struggling.

15. The episode which formed the basis of the claimant's complaint of less favourable treatment on the grounds of disability came to a head on 8 March 2019.

16. The build-up included 25th February 2019, when recently promoted Prison Head Governor Megrath contacted the claimant by telephone at work, as well as other staff based in the same facility as the claimant. Despite being under no obligation to do so, she wanted to discuss with them her decision to move staff, including the claimant, to other duties.

17. That decision, approved by her Governing Governor, was based upon an operational need to have more male prison officers to conduct searches of male prisoners who were returning from outside the prison on temporary release schemes.

18. The Governor, as part of her new duties, had identified such returns as potentially vulnerable to exploitation by returning male prisoners in smuggling in prohibited substances, because the lack of male prison staff in that facility meant that they could not always be searched.

19. Governor Megrath gave evidence that it was very obvious to her, even before she raised the proposed moves during her telephone conversation with the claimant, that the claimant was already crying while on duty.

20. Governor Megrath gave evidence that, during that conversation, the claimant, whose personal circumstances Governor Megrath previously knew nothing, told her

about the court case, which had just recently concluded in a conviction, with sentencing awaited. The claimant told her that she was seeking alternative employment, and Governor Megrath assured her that she would make sure that the prisoner would never be sent to the same prison where the claimant worked. It appears that Governor Megarth's evidence as to the trial was factually incorrect, since the trial was, in fact, imminent, not concluded.

21. At the conclusion of the conversation about staff moves, Governor Megrath was sufficiently concerned to make enquiries as to the possibility of obtaining Police Rehabilitation and Retraining Trust (PRRT) counselling for the claimant.

22. Such counselling is normally only made available to prison staff on long term sickness absence. Governor Megrath felt however that it might supplement counselling which the claimant told her she was already undertaking but felt was not meeting her needs. The claimant in evidence accepted that this course was unusual, and acknowledged it, but her view was that the counselling course took a long time to arrange, and Governor Megrath's action in arranging it was indicative of the respondent's knowledge of her disability.

23. On 7 March 2019, the claimant's line manager, Senior Officer Rainey, spoke to Governor Megrath, and told her that the claimant wished to make representations to the Governing Governor, seeking permission to remain at the facility from which Governor Megrath planned to move her in furtherance of the need to have more male prison officers to conduct searches.

24. Governor Megrath considered that she could not permit the claimant to remain in post, not least because the other staff had also objected to being moved. After consulting the Governing Governor, Governor Megrath informed Senior Officer Rainey that the claimant's request would not be accepted.

25. On 8 March 2019, Governor Megrath attended the facility where the claimant was based, in order to speak to a prisoner. When she arrived, the claimant, who was on duty, was, in Governor Megrath's assessment, already in a highly emotional state, and had visibly already been crying for some time, clearly visible to the prisoners in her care.

26. Governor Megrath arranged for another officer on duty to take over from the claimant, so that the claimant could go into the relative privacy of the staff rest area.

27. The claimant's evidence was that she had reported for duty on 8 March, only to discover that she had been rostered to same facility which she previously had arranged with Senior Officer Rainey not to be assigned to. The claimant stated in evidence that she "*completely broke down and was in hysterics*" in front of Senior Officer McKinney, and told him that she could not work in that part of the prison.

28. The claimant did not call any witness to confirm that she had complained about being wrongly rostered that day; nor was there any evidence as to swapping locations with a colleague. It seems reasonable to expect that such a swap would have required approval from the line managers of both members of staff.

29. The claimant's evidence was that she then took it upon herself to contact a colleague at work in another facility within the prison, and he agreed to swap places with her.

30. After she had spoken to the prisoner she had come to see, Governor Megrath spoke to the claimant, whom she described in evidence as still very emotional and tearful.

31. Governor Megrath was specific in stating in evidence that the claimant told her only that her distress was due to the court case and to the prospect of being moved. She stated that the claimant had not mentioned anything about having been rostered to the *"wrong"* facility that day.

32. Governor Megrath also denied the claimant's evidence that she had suggested to the claimant that she should take some time off. On her evidence, she suggested only that the claimant should go home; in order to facilitate this, Governor Megrath arranged for one of the claimant's colleagues to accompany her through the facility to the colleague's car, who then drive her to the female staff changing area, close to the car park.

33. Governor Megrath's evidence was that she devised this method on the spot, intending that it would cause the claimant as little embarrassment as the circumstances and layout of the prison permitted.

34. It was however the claimant's case that this action exposed her to being seen in such a distressed state by colleagues and prisoners alike, and that it consequently amounted to humiliating and demoralising treatment of her, resulting in a detrimental effect on her mental health. In her view, the entire wing ought to have been shut down by using grilles, so that her exit would not have been seen by so many people.

35. The respondent's case was that the approach suggested by the claimant was wholly impractical, and would in fact have drawn attention by ordering the prisoners to vacate the area. It also contended that the claimant's distressed state had already been clearly visible over a prolonged period by staff and prisoners alike.

36. The claimant was absent from work from 13 March 2019, due to what was described in her sickness absence certificates as anxiety with depression and work-related stress. Up until that time, any sickness absence taken by her was in fact by using annual leave or special leave, apart from a period of post-natal depression.

37. In accordance with the respondent's sickness policy, on 12 April 2019, the claimant was invited to a review meeting. The claimant could not face attending the prison in person, so she was permitted to email her written submissions.

38. As a result of her absence, the respondent arranged her first attendance with Occupational Health (OHS) on 15 April 2019, which concluded that any improvement in her condition would be slow and gradual, and that she would benefit from the PRRT sought by Governor Megrath on her behalf.

39. The claimant in evidence described the considerable toll her mental condition took upon her and her family life.

40. In May 2019, again in compliance with the respondent's absence policy requirements, the claimant was permitted to email further submissions.

41. On 24 June 2019, in accordance with absence policy, the claimant received a letter from the respondent, telling her that the next stage in the process was referral to the prison Governor for final review. The letter informed her that, if he could not sustain her sickness absence, the matter then would be referred to the respondent Department's head of personnel (Mr Brian Millard). The letter included the option that the claimant might then be dismissed.

42. On 26 June, the claimant received an invitation to a final review meeting on 4 July, which later was postponed until 11 July.

43. At an OHS appointment on 5 July 2019, the claimant was certified as not presently being fit to return to work for several months.

44. On 7 August 2019, the claimant attended her first PRRT session, as suggested by OHS and Governor Megrath. In order to enable her to attend that counselling, no decision was taken by the Governor at the final review meeting of 11 July 2019, which he adjourned for six weeks.

45. On 27 September 2019, a final review meeting was held at a neutral venue, so that the claimant did not need to attend prison premises. By that date, the claimant had attended three PRRT sessions. The purpose of the meeting was to establish if the claimant could set a date for her return to work, but she was unable to. Governor Megrath attended the meeting, but decided not to progress any recommendation to dismiss the claimant, in order that she might continue with her counselling, funding for which would be withdrawn if she were dismissed at that point.

46. On 26 November 2019, the claimant attended a Consideration of Dismissal Interview (CODI) with Mr Millard, on foot of a letter sent to her on 13 November 2019. That letter set out the possible options open to the Head of Personnel, which included the possibility of dismissal. Such an interview was described in evidence by Mr Millard as being the normal procedure following lengthy or repeated absences. Mr Millard's evidence was that his priority is to ensure that the subject of such an interview knows that this is a possibility, but also to explore every avenue with them, to allow them to return to work if at all possible.

47. The OH conclusion was considered, in that it found the claimant then to be unfit to return to work for at least several months, and she was deemed ineligible for Early Retirement on Medical Grounds (ERMG).

48. Mr Millard decided to permit the claimant to attend further PRRT sessions, and therefore deferred making a decision, which also would give time to have another OH assessment, to enable the claimant's Governor to have a fuller picture before making a final decision.

49. On 7 January 2020, Mr Millard conducted another CODI interview, by which time there was no improvement in the claimant's condition. Governor Taylor by that stage had recommended dismissal. In line with the respondent's absence policy, Mr Millard referred the matter again to the OHS, and again deferred his decision.

50. On 10 February 2020 the claimant attended another OHS appointment, by which time she had been notified that she could start psychological therapy on 25 March 2020, but, due to the pandemic, this was postponed. The claimant gave evidence that her union representative, Ivor Dunne, then advised her to submit an ill health retirement appeal against the determination that she was ineligible to receive ERMG.

51. The claimant's case that the last meeting with Mr Millard had made her feel that she otherwise was about to be dismissed. There was no evidence that, other than being a possible option, that any such statement was made to her, nor was there any evidence that such a final decision had been taken by Mr Millard.

52. Despite that feeling, in fact the claimant still was permitted by the respondent to attend her PRRT counselling, and in May was contacted by the respondent, seeking an absence review, to which the claimant again was allowed to reply by email.

53. On 16 July, the claimant was informed that her appeal for ERMG had been successful, and her last working day was set as 20 October 2020.

THE LAW

Unfair Dismissal

54. The Employment Rights (Northern Ireland) Order 1996 provides:

> *"126-(1) An employee has the right not to be unfairly dismissed by his employer.*
>
> *127(1) For the purposes of this part an employee is dismissed by his employer if –*
>
> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*
>
> *129-(1) Subject to the following provisions of this Article in this Part "the effective date of termination"*
>
> *(a) in relation to an employee whose contract of employment is terminated by notice, whether given by*

his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect,"

Constructive Unfair Dismissal

55. To succeed in a claim of constructive unfair dismissal, an employee must establish that his employer had committed a repudiatory breach of contract. That is a significant breach going to the root of the contract. (***Western Excavating (ECC) Limited v Sharp [1978] ICR 221)***.

56. In this respect, the contract is taken to include not just the written and specific terms laid down in that contract but also an implied term of "trust and confidence" between the employer and the employee. In ***Woods v W M Car Services (Peterborough) Limited [1981] IRLR 347,*** the EAT stated;

> *"17. In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee:* ***Courtaulds Northern Textiles Limited v Andrew [1979] IRLR 84.*** *To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see* ***British Aircraft Corporation Limited v Austin [1978] IRLR 332*** *and* ***Post Office v Roberts [1980] IRLR 347.*** *The conduct of the parties has to be looked at as a whole and its cumulative impact assessed:* ***Post Office v Roberts (Supra) paragraph 50."***

57. In determining whether there has been a fundamental breach of contract, unreasonable conduct alone is not sufficient (see ***Claridge v Daler Rowney Limited [2008] IRLR 672 EAT****);* it has to amount to a breach of contract that fundamentally undermines the employment relationship; something which has to be determined objectively by the tribunal as a question of fact.

The EAT stated:

> *"39. It is well established that unreasonable conduct alone is not enough to amount to a constructive dismissal; see* ***Western Excavation v Sharpe [1978] IRLR 27****. As that case makes clear, it must be unreasonable conduct amounting to a breach of contract, and in this context of the breach of the trust and confidence term that means that it should fundamentally undermine the employment relationship. If an employer has acted in a way in which the tribunal considers a reasonable employer might act, then we would suggest that it cannot*

be a proper inference that an employee is entitled to say that nonetheless this was so fundamental a breach of the employer's obligation towards him that he should not be expected to remain in employment. Once the tribunal concedes to itself that there may be more than one view as to whether the conduct is sufficiently unreasonable, that undermines its conclusion that the employment relationship has been sufficiently damaged."

That task does not, however, import a range of reasonable responses test (as applied ordinarily when determining the fairness of a dismissal for the purposes of 1996 Order). The House of Lords has determined in ***Malik v BCCI SA [1997] ICR 606*** that that test is not appropriate when considering whether there has been a fundamental breach of the implied obligation to maintain trust and confidence. The test to be applied is therefore whether the employer has, without reasonable and proper cause, conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee."

Lord Steyn stated at page 623d:

"But Mount LJ (below) held, at p411, that the obligation

"may be broken not only by an act directed at an individual employee but also by conduct which, when reviewed objectively, is likely seriously to damage the relationship of employer and employee."

That is the correct approach. The motives of the employer cannot be determinative, or even relevant, in judging the employee's claim for damages for breach of the implied obligation. If conduct objectively considered is likely to cause serious damage to the relationship between employer and employee, a breach of the implied obligation may arise."

58. In ***Omilaju v London Borough of Walthan Forest [2005] ICR 481,*** the Court of Appeal (GB) stated at paragraph 14;

"1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: ***Western Excavating (ECC) Limited v Sharp [1978] ICR 221.***

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 calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, ***Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, 610E-611A (Lord Nichols of Birkenhead) 620H-622C (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 Brown-Wilkinson J in ***Woods v W M Car Services (Peterborough) Limited [1991]***

ICR 66, 672A. *The very essence of a 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* ***Mahmud****, at page 610H, 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 in Harvey and Industrial Relations and Employment Law paragraph D1 [480]:*

> *"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 itself be insufficient to justify his taking that action, but when viewed against a 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.""*

59. At paragraph 16 of the judgement in ***Omilaju,*** Dyson LJ said;

> 16. *Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle is 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".*

At paragraph 19, he said;

> *"19. 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."*

60. The Court of Appeal (GB) stated in ***Lewis v Motorworld Garages Limited [1986] ICR 157*** *that;*

> *"If the employer is in breach of an express term of the contract of employment, of such seriousness that the employee would be justified in leaving and claiming constructive dismissal, and the employee does not leave and accepts the altered terms of employment, and if subsequently a series of actions by the employer might constitute together a breach of the implied obligation of trust and confidence, the employee is entitled to treat the original action by the employer which was a breach of the expressed terms of the contract as a part – the start – of a series of actions which, taken together with the employer's other actions, might cumulatively amount to a breach of the implied terms."*

The application of the final straw principle requires that the series of actions relied on constitute conduct of such seriousness that, taken together, and viewed objectively, they can constitute a breach of contract of sufficient gravity.

61. It is not enough to show merely that the employer has behaved unreasonably or thoughtlessly. However the Court of Appeal (GB) in ***Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445*** *stated:*

> *"Reasonableness is one tools in the Employment Tribunal's factual analysis kit for deciding on whether there has been a fundamental breach".*

In ***Brown v Merchant Ferries Ltd [1998] IRLR 682,*** the Court of Appeal (NI) 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 had been a breach of contract.

62. A breach of contract may be anticipatory rather than an actual breach of contract which has already occurred. It is sufficient that an employer has indicated a clear intention not to fulfil the terms of the contract in future, if the employee accepts that intention to commit a breach as bringing the contract to an end.

63. If a repudiatory breach of contract, including a breach of the implied term of trust and confidence, has been established, the employee must show that he has left his employment because of that breach. The test is whether or not the breach of contract "played a part" in the claimant's decision to resign – see ***Nottinghamshire County Council v Meikle [2004] IRLR 703*** and ***Wright v North Ayrshire Council [2014] IRLR 4*** at paragraphs 8-20. Care needs to be taken to avoid an "effective cause" test being applied.

DISABILITY DISCRIMINATION

64. It is the claimant's responsibility to prove facts from which the Tribunal could conclude, in the absence of an adequate alternative explanation, that the respondent's 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 **(Madarassy v Nomura International Plc [2007] IRLR 246)**.

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?".

65. 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 24. Referring to the Madarassy decision (supra) he states at paragraph 24 of his judgment:-

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

FINDINGS AND CONCLUSIONS

66. As regards the disability discrimination, the tribunal concluded that the claimant had failed to establish that the respondent knew or ought to have known that she was disabled. Whilst the respondent at the tribunal hearing accepted that the claimant was disabled at the material time, it refuted that it had any such information throughout that period.

67. To her credit, the claimant kept working from 2017 until her departure on sickness absence in March 2019. Throughout that time, she did not take sickness leave, instead using annual or special leave. By doing so, she did not need to submit a doctor's certificate; nor did she provide any information from which the respondent reasonably could be expected to know that she was suffering from mental disability. That view was reinforced by the fact that at no stage from 2017 did the respondent become aware of any issue regarding the claimant's performance of her duties at work.

68. In addition, she never submitted a reasonable adjustment request, stating in evidence that she did not know that such a process existed. This was despite the

fact that she throughout was relying upon her union representative, and presumed that any interventions by him would suffice.

69. The tribunal considered that such an absence of knowledge from and by her union representative, Mr Dunne, was highly unlikely. The claimant did not call Mr Dunne to give evidence that his advice did not include any discussion around a formal reasonable adjustment request.

70. The tribunal further concluded that the assertion by the claimant that she had a specific arrangement with Mr Rainey to permit her not to be allocated to a particular part of the prison was further unsupported by any evidence other than the claimant's assertion. She did not call Mr Rainey or any other colleague to confirm it, and knowledge of it was denied by the respondent.

71. The tribunal also considered it unlikely that the rota-swap asserted by the claimant on 8 March would have been made without at least some evidence from those involved, or a note of it in rota records. Such a move might reasonably be expected to be recalled, or recorded at the time, but no such evidence was produced or sought by the claimant.

72. The tribunal further concluded that the proposed changes by Ms Megrath to the duty station of the claimant and other colleagues were made without actual or deemed knowledge of the claimant's disability. They further were found by the tribunal to be a practical deployment of staff resources to address a potential flaw in prison security, applicable to all staff on that rota. The plans had met resistance from a majority of those staff, between whom Ms Megrath was found by the tribunal entirely reasonable in concluding that she did not have any material grounds to differentiate.

73. Whilst it was realized by Ms Megrath that the claimant was extremely upset by issues in her personal life, that could not in the opinion of the tribunal reasonably amount to her knowing or being deemed to know that the claimant was or might be disabled.

74. The tribunal found that the successful efforts made by Ms Megrath to have the PRRT scheme extended to the claimant, was supportive of the view that the respondent attempted to assist her to overcome her difficulties.

75. The focus of the claimant's complaint about the respondent's treatment of her was the incident on 8 March. In her view, the section of the prison ought to have been closed down, so that she could leave with some dignity. The wording used by the claimant was that she felt she was "*being escorted off the premises for doing something wrong*".

76. The tribunal concluded however that the actions taken by Ms Megrath were entirely reasonable, in facilitating the claimant to leave with a minimum of attention being drawn to her, nothwithstanding that the tribunal was satisfied that she for some time had remained visibly upset in front of the prisoners and other staff. The alternative proposed by the claimant was neither practical, nor was it likely to address what had already been visible to all present for some time.

77. The second of the claimant's complaints that she had no option but to resign was considered by the tribunal as not standing up to scrutiny.

78. The respondent was found by the tribunal not to have been informed by the claimant that she was suffering from a disability; nor did she make any request for reasonable adjustments. The claimant's decision to utilize annual or special unpaid leave instead of sickness absence, had the effect, deliberate or not, of concealing her condition from the respondent. Such a position did not require the claimant to report her illness, which consequently did not require the respondent to trigger its sickness absence policy and procedure.

79. The respondent at all times abided by its published sickness absence policies, and was found by the tribunal to have exercised a high degree of flexibility in the claimant's favour when applying its procedures.

80. The claimant's particular criticism was levelled at Mr Millard, head of overall personnel in the respondent department, to whom her case eventually was referred, after there had been no resolution within the Prison Service.

81. It was asserted on behalf of the claimant that, by including notification to the claimant that one option was dismissal, she had felt that that course was inevitable. Mr Millard's evidence, that it was only proper to warn her that such an option was possible, was standard practice, was found by the tribunal to be consistent with published policy and practice. The tribunal further accepted Mr Millard's evidence that his top priority was to assist the claimant to return to work, and not to dismiss her. That possibility in the mind of the claimant, and others in such a situation, was reasonable, as a warning, and as an incentive to make every effort to return.

82. The tribunal concluded that Mr Millard's evidence of his reluctance to dismiss the claimant was strongly supported by the repeated deferral of making any decision, to enable the claimant to complete the PRRT counselling, which in any event was above and beyond its usual usage. That further was reinforced by Ms Megrath's evidence, accepted by the tribunal, that she also was reluctant for a dismissal, as that course would automatically deprive the claimant of the PRRT counselling.

83. The claimant in evidence in support of her claim of constructive unfair dismissal relied upon seeking ERMG as being her only option, as advised by her union representative Mr Dunne. Again, that assertion was not supported by any evidence from Mr Dunne, to address what the nature of his advice had been.

84. The tribunal further noted that the claimant appealed against the initial refusal of her eligibility medical retirement. The successful outcome of that appeal, and her acceptance of it, resulted in her resignation, while the process of her counselling and further OH examinations was still being facilitated by the respondent. The final outcome was in the view of the tribunal far from being concluded, in a process in which the claimant's recovery, facilitated by the respondent, whilst slow, remained as a live possibility.

85. The tribunal therefore concluded that the respondent's conduct was in line with its published policies and procedures; it had shown considerable flexibility and forbearance; and the claimant failed to establish that the conduct of the respondent

fell within that required to satisfy the tribunal that a constructive dismissal had been established.

86. The claimant's claims are therefore dismissed in their entirety.

87. In light of the tribunal's decision regarding anonymization of the respondent in this case, the judgment will not be made public until after fourteen days from the date it is issued to the parties.

Employment Judge: *TGBrowne*

Date and place of hearing: **8-10 March 2022, Belfast.**

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