

THE INDUSTRIAL TRIBUNALS

CASE REF: 1937/16

CLAIMANT: Rachael Rogan

RESPONDENT: Mercury Security Management Ltd

DECISION

The unanimous decision of the tribunal is that the claimant's claims of unlawful discrimination on the ground of pregnancy and being subjected to detrimental treatment for a reason related to pregnancy, childbirth, maternity or maternity leave should be dismissed as set out in paragraph 8 of this decision.

Constitution of Tribunal:

Employment Judge: Employment Judge Crothers

Members: Mrs C Stewart
Mr I Rosbotham

Appearances:

The claimant was present and represented herself at the hearing on 27-28 June 2017. The claimant was represented by Mr E McCarthy, Barrister-at-Law on 19 September 2017, instructed by John J McNally & Co. Solicitors.

The respondent was represented by Mr P Moore LLP, of MCL Associates.

The claim

1. The claimant claimed that she had been unlawfully discriminated against on the ground of pregnancy. The respondent denied all such allegations.

The issues

2. The issues were agreed by the parties as follows:-

Legal Issues

- (1) *Did the respondent discriminate against the claimant on the ground of her pregnancy contrary to Article 5A of the Sex Discrimination (Northern Ireland) Order 1976 ('the 1976 Order')*?
- (2) *Has the claimant brought her claims of discrimination within the period required by Article 76 of the 1976 Order, and, if not, is it just and equitable to extend time?*
- (3) *Was the claimant subjected to detrimental treatment for a reason that relates to pregnancy, childbirth, maternity or maternity leave contrary to Article 70C(1) & 70C(2)(a) of the Employment Rights (Northern Ireland) Order 1996?*

Factual Issues

- (1) *Did the respondent treat the claimant less favourably on the grounds of her pregnancy by requiring the claimant to work 14 hours in a row without a break on 26 January 2016?*
- (2) *What was the exchange between David Appleyard and the claimant on 26 January 2016?*
- (3) *Did the respondent fail to implement uninterrupted breaks for the claimant after the health and safety risk assessment on 10 February 2017?*
- (4) *Did the respondent fail to provide an appropriate chair to support the claimant's back after the health and safety risk assessment on 10 February 2017?*
- (5) *Did the respondent fail to contact the claimant after the risk assessment until the claimant contacted Dave Appleyard on 30 April 2016?*
- (6) *Did the respondent fail to inform the claimant before 3 June 2016 that breaks had been arranged, notwithstanding that the claimant was going on maternity leave on 4 June 2016?*
- (7) *If an adequate risk assessment was carried out, was it carried out within a reasonable timescale?*
- (8) *Was the claimant ever told of the process for getting cover for her breaks?*
- (9) *Was the claimant ever told about how to get a new modified chair while pregnant?*

- (10) *Was there a miscommunication between the claimant and respondent in relation to her new chair and getting cover for her breaks?*
- (11) *What loss has the claimant sustained? What injury to her feelings has the claimant as a consequence of any acts of discrimination?*

Sources of evidence

3. The tribunal heard evidence from the claimant and, on the respondent's behalf, from Patrick Moore, Managing Director of MCL Employment Law, Dave Appleyard, the claimant's line manager, and Frank Cullen Jnr, Director. The tribunal was also presented with an agreed bundle of documents, and additional documents in the course of the hearing.

Findings of fact

4. Having considered the evidence, insofar as same related to the issues before it, the tribunal made the following findings of fact, on the balance of probabilities:-
- (i) The claimant commenced employment with the respondent as an ARC Controller on 1 December 2010. On 19 December 2015 the claimant advised Dave Appleyard, in correspondence, that she was pregnant and wished to take maternity leave. She explained that her baby's due date was in the week commencing 26 June 2016. She continued in the correspondence to state that:-

" ...

I will give you my MAT B1 certificate signed by my doctor or midwife which confirms this date when I receive it. I've been told this won't be until I'm 25 weeks pregnant.

I would like to start my maternity leave (and maternity pay if I qualify) on Monday 27th June. If I want to change this date, I will give you at least 28 days' notice.

According to my research I am entitled to 52 weeks statutory maternity leave, can you please confirm this?

Please let me know if I qualify for maternity pay, the duration of maternity leave and what amounts I will receive. I also need to clarify my holiday entitlement during this period.

I trust that you will investigate and adhere to any health and safety regulations that may be relevant to me over the coming months.

I also trust that this information will remain confidential until I choose to publicise it.

I look forward to hearing from you.”

- (ii) On 26 January 2016 the claimant worked her 12 hours shift from 1830 pm to 0630 am. However, at 0435 am the girlfriend of the controller who was supposed to relieve the claimant contacted the respondent stating that he was sick. The claimant sought to contact her line manager, Dave Appleyard. The tribunal has no reason to doubt his evidence that he received 30 calls to his work mobile and 18 separate calls to his personal mobile from 0422 am until he answered the claimant’s call at just after 0645 am. At that point the claimant advised him that one of the day controllers had called in sick and that she had stayed on to cover the situation. Dave Appleyard advised the claimant that he would not be able to get into work until after 0800 am as he had to convey his daughter to the train station prior to coming to work – his normal starting time being 0900 am. The claimant was clearly disappointed that Dave Appleyard could not come into work earlier. Dave Appleyard arrived in work at just before 0830 am having been delayed by rush hour traffic and flooded roads after an overnight storm.
- (iii) The tribunal accepts that the claimant was tired and not feeling well. Dave Appleyard enquired why the second night controller had not stayed on. He was told that this individual had something planned for that morning. However, it appears that a coin was tossed to see who would stay on. The claimant made it clear that she would not be in until 0830 pm that evening to commence another shift. She was advised that the shift was due to start at 0630 pm and that she would be required to come in at that time. Dave Appleyard subsequently walked into the control room and stated to the controller that the claimant had said she was not coming in until 0830 pm. The tribunal does not accept that any such statement was made in a derogatory manner but was made in an effort to inform the controller, given the likelihood that he would have to stay until the claimant came that evening. The claimant subsequently came back into the control room and, in front of the controller, complained that she did not like to be spoken about. She was advised of what was said and the reason behind it and she then left. At approximately 0215 pm the claimant phoned the respondent to advise that she would not be in work for the night shift due to sickness, dizziness and light-headedness. There is no satisfactory evidence before the tribunal to suggest that up to this point, at least, the respondent had not reasonably accommodated the claimant in her requests from when she informed Dave Appleyard of her pregnancy.
- (iv) The tribunal found Dave Appleyard to be a credible witness and accepts his evidence that at no time during the normal working week when he was in the control room did the claimant request a break from her duties. Had she done so, cover would have been arranged. Furthermore, the tribunal accepts Dave Appleyard’s evidence that he was never informed that cover for a break was requested on a night or

weekend. Moreover, the tribunal accepts that the only time the claimant mentioned anything about the control room chair causing discomfort was in an e-mail to Dave Appleyard dated 30 April 2016, which he forwarded to Eoin O'Brien and Francis Cullen on 3 May 2016. The claimant also sent an e-mail to him on 7 May 2016 about the right arm of the chair at Station 1 being broken making it hazardous if anyone was to lean on it. Dave Appleyard had advised her to swap the chair for a spare chair pending any repair that had to take place.

- (v) The tribunal accepts the respondent's evidence that the claimant was not hysterical following the events of 26/27 January 2016 and does not accept her evidence that she had difficulty in driving home.
- (vi) The claimant had a meeting with Eoin O'Brien and Helen Wells (as note taker) of the respondent company on 1 February 2016 as Eoin O'Brien wanted to find out what had happened on 26/27 January 2016. The claimant also raised the issue of a risk assessment. At a further meeting on 9 February 2017, Liam Cullen, Director, explained to the claimant that the events of 26/27 January 2016 were as a result of a breakdown in communication which was accepted by the claimant. Importantly, the claimant also raised the issue about uninterrupted breaks and that she expected that she would not have to answer phones or look at screens while on lunch. She was also informed that a risk assessment was to be carried out by MCL Associates.
- (vii) Patrick Moore did carry out a health and safety risk assessment on 10 February 2016. At that risk assessment the claimant requested uninterrupted breaks and a chair to support her back. The tribunal is satisfied that the risk assessment was carried out on the early morning of 10 February 2016 and not in the afternoon as suggested by the claimant. Patrick Moore was in the premises from 0830 am and took time to familiarise himself with the claimant's workplace. When shown the record of the risk assessment, the claimant questioned why it had not been signed by her and suggested that entries in the risk assessment sheets had been fabricated. However, the tribunal found Patrick Moore's evidence regarding the risk assessment process to be credible and there is no satisfactory reason for the tribunal not to accept the accuracy of the entries made in the risk assessment sheets.
- (viii) Furthermore, the tribunal accepts that the claimant informed Patrick Moore, during the risk assessment, that she was being afforded breaks and that what she required were extra breaks. It appears that the claimant was availing of breaks including breaks in her car and that, on occasions, she used the coin toss-up method to establish which of the two on duty should cover the other. Furthermore, Patrick Moore left the claimant during the risk assessment to address certain issues with Frank Cullen Jnr regarding

the claimant contacting mobile patrol security officers to afford her appropriate breaks. When Patrick Moore returned to the room the claimant had already returned to her workstation, hence the reason for the appropriate risk assessment sheet not having been signed by her. Patrick Moore subsequently approached Frank Cullen Jnr to deal with the matter and to obtain the claimant's signature. This, however, was not done.

- (ix) Patrick Moore was clearly upset by the claimant's suggestion that risk assessment entries had been fabricated and asserted that the claimant had gone through both sets of documents shown to the tribunal, which the tribunal accepts. The tribunal also accepts that Patrick Moore contacted Modern Office Supplies and obtained an assurance that the chair being used by the claimant was suitable for pregnant women. Modern Office Supplies also suggested that should the claimant attend their office they would allow her to try a number of chairs. Another option was for the claimant to go online and view the catalogue for Modern Office Supplies or to access other furniture shops or office suppliers to see if there was a different chair she would prefer. The respondent offered to buy her such a chair and to pay her for the time spent in her endeavours to obtain such a suitable chair. The claimant indicated that she would attend Modern Office Supplies offices and that she was happy with the arrangements.
- (x) Patrick Moore contacted the claimant following the risk assessment. As an ARC Controller she had contact with all mobile patrol security officers. Patrick Moore explained, should she need a comfort break, that the claimant could make radio contact with mobile patrol security officers to provide cover. The tribunal accepts that the claimant made it clear to Patrick Moore and to Frank Cullen Jnr that she was satisfied with these arrangements. It appears from the respondent's evidence that the conversation with the claimant regarding a mobile patrol security officer providing cover and visiting Modern Office Supplies took place on 11 February 2016. However, the risk assessment sheets completed and signed by Patrick Moore on 10 February 2016 had also, under 'Summary and Conclusions' included the following:-

"NB Rachel can attend Modern Office Supplies and test other chairs however explained that the chair she has is chiropractor approved.

Also told to contact mobile patrols if she needs to take an extended tea break as per Frank Cullen Jnr."

- (xi) It appears that the claimant did not advance the suggestions made to her by Mr Moore regarding either the mobile patrol cover or the issue regarding the chair. This is reflected in the e-mail sent by the claimant to Dave Appleyard on 30 April 2016 as follows:-

"Dave

I had a risk assessment with Pat Moore on 10th February 2016, I expressed concerns at this time that the chairs in the ARC don't support my back, I also expressed concerned [sic] at the fact that I don't get uninterrupted breaks in a 12 hour shift. Pat at this time asked me to give him a few weeks to arrange a new chair and also to sort out a way of allowing scheduled uninterrupted breaks (as cover would have to be provided), I have yet to hear back from either Pat Moore or anyone within Mercury Security on these two matters.

Can you please look into this for me as I am increasingly suffering with back pain during my shifts. My midwife has stressed the importance of good posture and back support throughout my pregnancy which I feel is impossible during working hours with the existing chairs.

Many thanks

Rachael"

Dave Appleyard replied to this e-mail on 3 May 2016 stating that he would pass on the claimant's concerns to the relevant individuals. At the same time the tribunal acknowledges that the matters discussed between Patrick Moore and the claimant on 11 February 2016 were not followed up in writing nor was the claimant invited to sign the assessment sheets.

- (xii) The claimant then raised a formal grievance on 27 May 2016 regarding the way she had been allegedly treated during her pregnancy as follows:-

"To whom it may concern,

I am writing to tell you that I wish to raise a grievance about the following:

Maternity Rights / Risk Assessment.

On the 10th February 2016 I had a risk assessment interview with Pat Moore, at this meeting I raised concerns about the chairs in the ARC and the fact that they don't support my back. I also requested uninterrupted breaks during my 12 hour shifts. Pat advised me on this date that after speaking to Mercury personnel I would hear back from him and asked that I gave him a couple weeks to arrange my requests. I never heard from Pat or Mercury again reference this. I emailed my own line Manager Dave Appleyard on the 3^d May enquiring about an update on the outcome of the risk assessment but Dave advised it wasn't himself dealing with this and would therefore

forward on my request to the relevant department. Again I have received no further communication in relation to my requests.

I had to request twice that this risk assessment was carried out in the first place. First of all in my letter to Dave on 19th December when I first notified him of my pregnancy and again on 1st February at a HR meeting held by Eoin O'Brien and Helen Wells.

I am requesting a hearing to discuss this matter. Please reply within 5 days of the date of this letter.”

(xiii) In an e-mail dated 1 June 2016 from Dave Appleyard to Francis Cullen, Dave Appleyard replied to certain aspects of the claimant's comments as follows:-

“ • *After the initial Risk Assessment I was instructed that if Rachael requested a break as she was tired then this was to be facilitated. At no time has Rachael asked me for a break when on a Day Shift. The Mobile Response Manager was advised that a break may be asked for during a night shift at which time a Response Driver would return (if possible) and become the second person in the ARC (answering phone calls only) while Rachael took a break. Again I am not aware of any request been received and this has been confirmed by the Response Manager.*

• *In relation to the ARC Chairs Rachael has never mentioned to me that they weren't supporting her back.*

...

• *Points not mentioned are that I have arranged cover for every anti natal / hospital appointment that Rachael has requested.”*

(xiv) A meeting was convened to consider the claimant's grievance on 3 June 2016. It was conducted by Francis Cullen. Angus Beggs (Mobile Response Manager) was also present. The tribunal considered the notes of this meeting which reflect the claimant's view that she had not been listened to in relation to her request for uninterrupted breaks and an appropriate chair. However it appears that by this stage Dave Appleyard had already replied to the claimant's e-mail of 7 May 2016 referring to the broken chair at Station 1 and advising her to swap it for a spare chair in the control room pending any repairs to the chair. In addition, the tribunal is satisfied that the claimant could and should have taken the initiative in her own interests in respect of mobile patrol cover and in acquiring a suitable chair long before her e-mail correspondence of 30 April 2017,

already referred to, and the subsequent grievance and correspondence culminating in the meeting on 3 June 2016.

- (xv) The claimant began a period of annual leave on 4 June 2016 and her baby was born on 10 June 2016 prematurely. Her maternity leave was to begin on 24 June 2016 but it actually began on 10 June 2016. The claimant complained that the respondent had not complied with its own grievance policy in relation to notifying her of its decision within ten working days from 3 June 2016 or of her right of appeal. The tribunal found the respondent's explanation as articulated by Patrick Moore to be reasonable, in light of the claimant's baby being born on 10 June 2016. Patrick Moore's view was that in these circumstances it was inappropriate to write to the claimant to state that her grievance had not been upheld and that such communication should be made after the period of maternity leave.
- (xvi) In areas of conflict of evidence, particularly involving the period from the risk assessment and subsequently, the tribunal preferred the evidence of the respondent.
- (xvii) The claimant's next correspondence to the respondent appears to be an e-mail to Francis Cullen on 22 August 2016 wherein she states that:-

"I believe my treatment may amount to grounds of pregnancy discrimination after speaking with the Equality Commission."
- (xviii) The claimant presented her claim to the tribunal on 1 September 2016. In her claim form she had specified 3 June 2016 as the most recent date on which the alleged discrimination had taken place. The claimant did not allege discrimination after that date in paragraph 7.2 of her claim form.
- (xix) The tribunal was also assisted by an agreed chronology which is attached to this decision.

The Law

5. (1) Article 76 of the Order, in so far as relevant, states as follows:-

"Period within which proceedings to be brought.

76.—(1) An industrial tribunal shall not consider a complaint under Article 63 unless it is presented to the tribunal before the end of

- (a) the period of three months beginning when the act complained of was done;

(5) A court or tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(6) For the purposes of this Article—

...

(b) any act extending over a period shall be treated as done at the end of that period, and

(c) a deliberate omission shall be treated as done when the person in question does an act inconsistent with doing the omitted act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the omitted act if it were to be done.”

(2) Harvey on Industrial Relations and Employment Law states in Vol. 2L as follows:

“[830]

The tribunal has a broad discretion to extend the time limit where it considers it 'just and equitable' so to do; EqA 2010 s 123(1)(b). (See PI [277].) This formula is much broader than the test for example in unfair dismissal claims where the relevant question is whether it was 'reasonably practicable' to have presented the claim within time, and the discrimination 'just and equitable test' allows consideration of circumstances which would not fall within the unfair dismissal test.

[831]

In claims before civil courts, s 33 of the Limitation Act 1980 provides that in considering whether to allow a claim which has been presented outside the primary limitation period to proceed, the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and 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 party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action (see *British Coal Corpn v Keeble* [1997] IRLR 336, at para 8). In the context of the 'just and equitable' formula, the Court of Appeal in *Southwark London Borough v Alfolabi* [2003] IRLR 220, held that while these factors will frequently serve as a useful

checklist, there is no legal requirement on a tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion'

[832]

The following is a non-exhaustive list of factors which may prove helpful in assessing individual cases:

- the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings);
- the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed;
- the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application;
- the conduct of the claimant over the same period;
- the length of time by which the application is out of time;
- the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim;
- the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given.

Whichever factor is relevant to be taken into account, it must be responsible for causing the time limit to be missed, see for example, *Hunwicks v Royal Mail* [2007] All ER (D) 68 (Jun), a DDA 1995 case, in which it was held that incorrect legal advice was not a good reason for extending time because that advice had been received after the time limit had already expired and did not therefore cause it to be missed. (See also *Wright v Wolverhampton City Council* UKEAT/0117/08, [2009] All ER (D) 179 (Feb), EAT.)”

- (3) (i) In relation to the out of time issue, the tribunal, also took into account the the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner***[2002] EWCA Civ 1686, in which Mummery LJ stated as follows:-

“(The claimant) is entitled to pursue her claim beyond the preliminary stage on the basis that the burden is on her to prove either by direct evidence or by inference from primary fact that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an act

extending over a period ... the question is whether there is an act extending over a period as distinct from a succession of unconnected and isolated specific acts for which time would begin to run from the date when each specific act was committed”.

- (ii) In **Hendricks** the Court of Appeal cautioned tribunals against applying the concepts of “policy, rule, practice, scheme or regime” too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period. According to Mummery LJ, the above terms were mentioned in the authorities as examples of when an act extends over a period “should not be treated as a complete and constricting statement of the indicia’ of such an act. In cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for a claimant to establish the existence of some ‘policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken’. Rather, what he has to prove, in order to establish a continuing act, is that (a) the incidents are linked to each other, and (b) that they are evidence of a ‘continuing discriminatory state of affairs’. This will constitute ‘an act extending over a period’.

- (4) Article 5A of the Order as amended by the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2008 provides as follows:-

“(1) In any circumstances relevant for the purposes of a provision to which this paragraph applies, a person discriminates against a woman if -

- (a) at a time in a protected period, and on the ground of the women’s pregnancy, the person treats her less favourably”.*

- (5) The tribunal was mindful that the amendment to Article 5A of the Order does not require a comparator.

- (6) Article 70C of the Employment Rights (Northern Ireland) Order 1996 (‘the 1996 Order’) provides as follows:-

“(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.

- (2) A prescribed reason is one which is prescribed by Regulations made by the Department and which relates to –*

- (a) pregnancy, childbirth or maternity,*
(b) ordinary, compulsory or additional maternity leave.”

Burden of proof Regulations

6. Article 63A of the Order states:-

“(2) *Where, on the hearing of the complaint, the complainant proves facts from which the Tribunal could, apart from this Article, conclude in the absence of an adequate explanation that respondent –*

(a) *has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part III or*

(b) *is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination or harassment against the complainant, the Tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, he is not to be treated as having committed that act”.*

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

(ii) The tribunal also considered the following authorities, **McDonagh and Others v Hamilton Thom Trading As The Royal Hotel, Dungannon [2007] NICA**, **Madarassy v Nomura International Plc [2007] IRLR 246 (“Madarassy”)**, **Laing v Manchester City Council [2006] IRLR 748** and **Mohmed v West Coast Trains Ltd [2006] UK EAT 0682053008**. It is clear from these authorities that in deciding whether a claimant has proved facts from which the tribunal could conclude in the absence of an adequate explanation that discrimination had occurred, the tribunal must consider evidence adduced by both the claimant and the respondent, putting to the one side the employer’s explanation for the treatment. As Lord Justice Mummery stated in **Madarassy** at paragraphs 56 and 57:-

“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.

‘Could conclude’ in s.63A(2) 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..., 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 complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.”

- (iii) The tribunal received valuable assistance from Mr Justice Elias’ judgement in the case of ***London Borough of Islington v Ladele & Liberty (EAT) [2009] IRLR 154***, at paragraphs 40 and 41. These paragraphs as set out in full to give the full context of this part of his judgement, **even though Article 5A of the Order no longer require a comparator in a case involving pregnancy.**

“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.*
- (7) *As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ashan* [2008]*

IRLR 243, a case of direct race discrimination by the Labour Party. Lord Hoffmann summarised the position as follows (paragraphs 36-37):-

- '36. The discrimination ... is defined ... as treating someone on racial grounds "less favourably than he treats or would treat other persons". The meaning of these apparently simple words was considered by the House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285. Nothing has been said in this appeal to cast any doubt upon the principles there stated by the House, but the case produced five lengthy speeches and it may be useful to summarise:-*
- (1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the "statutory comparator") actual or hypothetical, who is not of the same sex or racial group, as the case may be.*
 - (2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant ...*
 - (3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated: see Lord Scott of Foscote in Shamoon at paragraph 109 and Lord Rodger of Earlsferry at paragraph 143. This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the "evidential comparator") to those of the complainant and all the other evidence in the case.*
- 37. It is probably uncommon to find a real person who qualifies ... as a statutory comparator. Lord Rodger's example at paragraph 139 of Shamoon of the two employees with similar disciplinary records who are*

found drinking together in working time has a factual simplicity which may be rare in ordinary life. At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are “materially different” is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator.’

The logic of Lord Hoffmann’s analysis is that if the tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then again it is unnecessary to determine what are the characteristics of the statutory comparator. This chimes with Lord Nicholls’ observations in **Shamoon** to the effect that the question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:-

“employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was’ (paragraph 10).

This approach is also consistent with the proposition in point (5) above. The construction of the statutory comparator has to be identified at the first stage of the *Igen* principles. But it may not be necessary to engage with the first stage at all”.

- (iv) 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".

- (v) The tribunal also considered the authorities referred to in the skeleton arguments by way of submissions annexed to this decision and Harvey on Industrial Relations and Employment Law at J134.

Submissions

- 7. The parties had no submissions to make to the tribunal at the hearing on 27-28 June 2017. However the tribunal found it necessary to reconvene on 19 September 2017 to consider submissions from both parties on the out-of-time issues. Copies of the written submissions are annexed to this decision, and include references to authorities which the tribunal considered.

Conclusions

- 8. The tribunal, having carefully considered the evidence and applied the principles of law to the findings of fact, concludes as follows:-
 - (i) Although the claimant has shown that the alleged incidents relied on from 26-27 January 2016 until 3 June 2016 can be linked, she has not proved either by direct evidence or inference from primary fact that the alleged incidents are evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period. In the absence of such an act extending over a period, the tribunal finds that the separate alleged incidents are out-of-time, except for the allegation relating to 3 June 2016. Having also carefully considered the matter in light of the relevant authorities, the tribunal is satisfied, on balance, that time should be extended on a just and equitable basis in all the circumstances of the case in relation to the alleged incidents in the period between 26/27 January 2016 and 3 June 2016.
 - (ii) Apart from the out-of-time issue, the tribunal is not satisfied that the claimant has, in any event, proved facts from which the tribunal could conclude in the absence of an adequate explanation from the respondent that the latter has committed an unlawful act of discrimination in treating the claimant less favourably on the ground of her pregnancy, or had subjected her to any detriment by any act, or any deliberate failure to act, or for a prescribed reason relating to her pregnancy, childbirth, maternity or maternity leave.
 - (iii) After carefully weighing the evidence the tribunal is satisfied, as reflected in the findings of fact, that the respondent's evidence is to be preferred in areas of conflict. It is satisfied that the claimant is unable to establish less favourable treatment on the ground of pregnancy

under the 1976 Order, or for a prescribed reason under Article 70C of the 1996 Order. Accordingly, the burden of proof does not shift to the respondent in relation to the allegations of unlawful discrimination, and the claimant's claims are therefore dismissed in their entirety.

- (iv) The tribunal is satisfied that the claimant's application for costs, incorporated in her written submissions, is without merit in the overall circumstances leading to the case being reconvened on 19 September 2017, when the claimant was legally represented in relation to the out-of-time issue. Mr Moore's explanation for not making submissions at the substantive hearing was because the claimant was unrepresented at that stage.

Employment Judge:

Date and place of hearing: 27–28 June 2017 and 19 September 2017, Belfast.

Date decision recorded in register and issued to parties

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS
& THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN:

RACHAEL ROGAN

Claimant

-v-

MERCURY SECURITY MANAGEMENT LTD

Respondent

AGREED CHRONOLOGY

30th April 2016 – The Claimant sent an email to David Appleyard, querying what was going on in relation to her breaks and her new chair. She stated that she hadn't received any correspondence since the risk assessment.

27th May 2016 – The Claimant raises a formal grievance in relation to the way she had been treated during her pregnancy.

3rd June 2016 – The Claimant has a meeting with director Francis Cullen and Angus Beggs (Mobile Response Manager). This meeting was in relation to the grievance raised.

4th June 2016 – The Claimant had booked annual leave to begin on this date until 23rd June 2016

10th June 2016 – The Claimant has her baby.

24th June 2016 – The Claimant's maternity leave was supposed to begin on this date but due to the premature birth of her child, it began on 10th June 2016.

22nd August 2016 – The Claimant emails Francis Cullen and enquires into what was done about her complaints after the meeting on 3rd June 2016.

1st September 2016 – The Claimant lodges an application with the Office of the Industrial Tribunals and the Fair Employment Tribunal, claiming sex discrimination.

IN THE OFFICE OF INDUSTRIAL TRIBUNAL & THE FAIR EMPLOYMENT
TRIBUNAL

Ref: 1937/16

Between:

Rachael Rogan

Claimant

-and-

Mercury Security Management Ltd

Respondents

Submissions of Claimant

ISSUE

- This matter was heard on 27th and 28th June 2017. A decision was to be given within 12 weeks. However, a dispute has arisen regarding the Respondent's allegation that part of the Claimant's claim was out of time. This point was not raised at the hearing. The matter is listed again to deal with this point that part of the Claimant's claim is out of time.
- The Claimant submitted her ET1 on 1st September 2016. The sole claim in the ET1 is one of sex discrimination on the grounds of pregnancy. From the agreed chronology submitted and the Claimant's witness statement, the Respondent was informed that the Claimant was pregnant on 19th December 2015. There then followed an incident involving the Claimant and her line manager, David Appleyard on 26th/27th January 2016. A number of meetings were held subsequent to this, to deal with this incident, as well as a number of meetings addressing the lack of a risk assessment and the Claimant's requests. The Claimant gave birth on 10th June 2016 and her maternity leave started on this date. The Tribunal has heard evidence on all of these incidents.
- The question for the Tribunal to determine is whether all the incidents and meetings stretching from 26th January to 10th June 2016 can be seen together as a discriminating act extending over a period of time, as per Article 76 (6) of the Sex Discrimination (NI) Order 1976.
- If the Tribunal does not believe this was a continuing act, then the question to be determined is whether it is just and equitable in all the circumstances to consider

the claim in its entirety, as per Article 76(5) of the Sex Discrimination (NI) Order 1976.

LAW IN RELATION TO THE 'OUT OF TIME' ISSUE

- Article 76 (6) of the Sex Discrimination (NI) Order 1976 states;
“For the purposes of the Article-
... any act extending over a period shall be treated as done at the end of that period.”

- The Court of Appeal in *Hendricks v. Metropolitan Police Commissioner* [2002] EWCA 1686 considered what was meant by an ‘act extending over a period’. Mummery J held;

“(The claimant) is entitled to pursue her claim beyond the preliminary stage on the basis that the burden is on her to prove either by direct evidence or by inference from primary fact that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period . . . The question is whether there is an act extending over a period as distinct from a succession of unconnected and isolated specific acts for which time would begin to run from the date when each specific act was committed.”

This approach was followed by the Court of Appeal in this jurisdiction in *Deman v Association of Teachers* [2009] NICA 29. Girvan LJ held that;

“Each case is fact specific and to answer the questions whether there is a continuing act of discrimination must depend on the findings of fact made in each case and the inferences which may reasonably be drawn from those facts.”

APPLICATION TO FACTS

- In this case, the first incident of discrimination occurred on 26th/27th January 2016 when the Claimant was forced to work a 14-hour shift without breaks, finishing at 8.30am. She was then expected to start her next shift at 6.30pm that same day. Following that, there were meetings on the 1st, 9th and 10th February to discuss the 26th January incident and to also have a risk assessment carried out. At the risk assessment meeting of 10th February 2016, the Claimant requested uninterrupted

breaks and a supportive chair for her back. The Claimant was told that either Pat Moore or a representative from the Respondent would be in touch in the near future.

- The Claimant did not receive any contact whatsoever from either Pat Moore or the Respondent. On 30th April 2016, she emailed David Appleyard, seeking an update in relation to her requests for uninterrupted breaks and a new chair. She had been told by Pat Moore on 10th February that this may take a number of weeks, which explains why she waited so long to contact Mr Appleyard. Mr Appleyard replied on 3rd May 2016, stating that he would pass on her concerns to Eoin O'Brien and Frank Cullen Junior.
- Subsequent to thus, the Claimant received no contact from anyone from the Respondent, or from Pat Moore. Therefore, the Claimant raised a formal grievance on 27th May 2016. A meeting was convened on 3rd June 2016 to deal with the grievance raised. This was the last day the Claimant was to work before taking annual leave and then maternity leave.
- The Claimant then gave birth on 10th June 2016.
- The Claimant emailed Francis Cullen on 22nd August 2016, enquiring as to what had been done since the meeting on 3rd June to deal with her grievances.
- It is submitted that this is a clear case of a discriminating act extending over a period of time. That period began at the first incident on 26th January and continued on until 22nd August, when the Claimant emailed Francis Cullen to enquire as to what had been done to deal with her grievance. If 22nd August is not accepted as the end date of the discrimination, then I would submit that the discriminating act was certainly continuing at least until the grievance meeting on 3rd June.
- The ET1 was submitted on 1st September 2016. The 3rd of June date is within the three-month time limit, and it is submitted that all discriminatory acts from the 26th January onwards should be seen as an act extending over a period. There is clear evidence that there was a continuing discriminatory state of affairs that lasted up to and including the time the Claimant took off for maternity leave.

LAW ON THE 'JUST AND EQUITABLE' ISSUE

- Article 76 (5) of the Sex Discrimination (NI) Order 1976 states;

"A court or tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so."

- It was held in *Hutchinson v Westward Television Limited* (1977) IRLR 69 that this gives the Tribunal;

“a wide discretion to do what it thinks is just and equitable in the circumstances ... they entitle the [employment] tribunal to take into account anything which it judges to be relevant”

- In *Apelogun-Gabriels v London Borough of Lambeth* [2001] EWCA Civ 1853, the Court of Appeal approved the judgement in *Robinson v Post Office* [2000] IRLR 804 where it was held that;

“delay caused by a claimant invoking an internal grievance or disciplinary appeal procedure prior to commencing proceedings may justify the grant of an extension of time but it is merely one factor that must be weighed in the balance along with others that may be present”.

- There is no hard and fast rule as to when a tribunal should exercise its ‘just and equitable’ discretion, and each case must be judged on its own facts.

APPLICATION TO FACTS

- If the Tribunal is not convinced that there was a continuing act of discrimination in this case, then it is nevertheless submitted that it would be just and equitable in this case to consider the Claimant’s claim. The fault for the delay in issuing proceedings lies at the door of the Respondent. The Claimant invoked a number of internal grievance procedures to address the unfair treatment she felt she was being subjected to. It is the Respondent’s fault that there was a delay of 11 weeks between 10th February 2016 and 30th April 2016. It was the Claimant’s belief during this time that her grievances and requests were being looked at and addressed. However, when no contact was forthcoming, she contacted her line manager to seek an update.
- There then was a delay of 4 weeks, and again there was no contact from the Respondent to the Claimant in regards to her requests and grievances. The Claimant then issued another grievance, which was addressed at the meeting of 3rd June.
- It is submitted that it is understandable that the Claimant did not press the issue during the weeks following this, due to the birth of her baby on the 10th June 2016. Francis Cullen and Angus Beggs had assured her on 3rd June that they would look into her requests. The Claimant then emailed Mr Cullen on 22nd August to find out what had been done. When she realised that nothing had been done, she sought advice and issued proceedings on 1st September 2016.

- The tribunal has a wide discretion to allow a claim to proceed when it is out of time. I would invite the Tribunal to exercise its discretion in this case. The Claimant attempted to have the dispute sorted through the Respondent's internal grievance procedure. Due to the delay from the Respondent, this took some time. She should not be penalised for the failures of the Respondent to respond to her grievances in an appropriate and expeditious manner. It would be just and equitable to allow the Claimant's case to be determined.

COSTS ORDERS

- Rule 38 of the The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 gives the Tribunal the power to make an order that a party make a payment in respect of the costs incurred by another party.

- Rule 40 goes on to say;

When a costs order may be made

- 40.—(1) A tribunal or chairman may make a costs order when on the application of a party it or he has postponed the day or time fixed for or adjourned a hearing under rule 26 or pre-hearing review. The costs order may be against or, as the case may require, in favour of that party as respects any costs incurred or any allowances paid as a result of the postponement or adjournment.
- (2) A tribunal or chairman shall consider making a costs order against a paying party where, in the opinion of the tribunal or chairman (as the case may be), any of the circumstances in paragraph (3) apply. Having so considered, the tribunal or chairman may make a costs order against the paying party if it or he considers it appropriate to do so.
- (3) The circumstances referred to in paragraph (2) are where the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived.
- (4) A tribunal or chairman may make a costs order against a party who has not complied with an order or practice direction.
- It is submitted that the Respondent has acted unreasonably by failing to address the 'out of time' point in the substantive hearing on 27th and 28th June 2017. If the Respondent was making that argument, then it logically should have been done at the hearing. At a Case Management Discussion of this case on 21st December

2016, it was agreed that there was no need for a Pre Hearing Review on the 'out of time' issue, and that the matter could be addressed at the full hearing.

- The Respondent was aware that if they wanted to raise that point, it must be done at the hearing. They did not do so. The issue was only raised after the hearing was concluded. This has led to the matter having to be relisted to deal with the 'out of time' issue.
- I would therefore invite the Tribunal to make a costs order under Rule 40 against the Respondent to cover the Claimant's legal costs of today.

CONCLUSION

- It is submitted that the acts of discrimination that occurred from the 26th January and continued into the Claimant's maternity leave should be seen as an act extending over a period of time, as per Article 76 (6) of the Sex Discrimination (NI) Order 1976 and that the Tribunal should consider all the incidents when determining this case
- In the alternative, if the Tribunal does not agree with the above point, it is submitted that due to the reasons as set out above, it would be just and equitable to consider the Claimant's case even if it is determined to be out of time, as per Article 76 (6) of the Sex Discrimination (NI) Order 1976.
- I would invite the Tribunal to make a costs order under Rule 40 of The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 against the Respondent as they have acted unreasonably in not addressing this 'out of time' issue at the substantive hearing, and due to this has made it necessary to hold a further hearing on this point.

Eoghan McCarthy BL

Counsel for the Claimant

RACHEL ROGAN

V

MERCURY SECURITY MANAGEMENT LTD

1937/16

SUBMISSION ON BEHALF OF THE RESPONDENT

1. It is submitted that the claimant was not discriminated against on the grounds of pregnancy and/or gender.
2. The Respondent's would respectfully submit that the events of 26th January 2016 cannot amount to discrimination of any kind as the events as described by the claimant came about as an unforeseen result of a colleague ringing in sick.
3. The Respondents would further submit that even if the events of 26th January 2016 as alleged by the claimant did amount to discrimination which is strenuously denied the tribunal do not have jurisdiction to determine this head of claim as it is significantly out of time, given that the claim form was not submitted until 1st September 2016.
4. The Respondent's would also submit that it is not just and equitable to extend time allowing this head of claim to be determined as the claimant has given no indication or reasoning as to why she has submitted her claim late even though she was being advised by both a solicitor and a barrister.

THE CHAIR AND THE EXTENDED BREAKS HEADS OF CLAIM

5. These heads of claim cannot be attached to the events of 26th January 2016 when a colleague rang in sick as they are not associative and do not give any indication of a continuing series of acts.
6. It is respectfully submitted that the Respondent cannot be held responsible for a work colleague ringing in sick at short notice which resulted in the claimant having to work for an additional two hours until cover could be obtained.

7. The claimant was not forced to do anything – she certainly wasn't happy about her colleague ringing in sick at short notice but that responsibility cannot be laid at the door of the Respondent's as there are occasions in every work environment when colleagues sometimes ring in sick at short notice. It is respectfully submitted that the actions of her colleague in ringing in sick cannot amount to conscious, unconscious or sub-conscious discrimination.
8. In *Hendricks v. Metropolitan Police Commissioner* [2002] EWCA 1686 the learned judge outlined what needed to be asked in this regard when it stated,

The question is whether there is an act extending over a period as distinct from a succession of unconnected and isolated specific acts for which time would begin to run from the date when each specific act was committed.

9. It is submitted that there is no connection whatsoever between the events of the 26th January 2016 when a work colleague rang in sick and a risk assessment being carried out on 10th February 2016.
10. The fact that the claimant did not avail of the accommodations put in place by the Respondent's following her risk assessment cannot be attributed to or associated with a colleague ringing in sick at short notice.
11. Equally the grievance meeting which took place on June 3rd 2016 can only be associated with the risk assessment and the claimant's failure to avail of the accommodations which were put in place.
12. It is submitted that these were isolated and specific acts which did not constitute any form of discrimination.
13. Very clear and cogent evidence was given by both Mr Moore and Mr Cullen that they had attended with the claimant on the 10th of February 2016 to carry out a risk assessment on the claimants work station and facilities.
14. At that meeting the claimant indicated that because she was pregnant that she might need to take extended breaks – not uninterrupted breaks as she tried to allege in her oral evidence. (see risk assessment sheets)
15. All of the facilities were already in place for the claimant to take an uninterrupted break but it was in the event that she needed an extended break that she was authorised to contact the mobile security crew and ask them to come in and provide cover while she took an

extended break. She never availed of this facility which was put in place to accommodate her request at her risk assessment.

16. The claimant also claimed at the risk assessment meeting that the chair she was using was uncomfortable however it was explained to her by Mr Moore that the chair she was using was "high-end and chiropractor approved" but she could attend Modern Office Supplies and try out their chairs and if there was a more comfortable one then the company would buy it for her. She was also given the option of attending any furniture supplier and test out their chairs but she never availed of this offer either. (see page 93 of the bundle)
17. The tribunal panel are asked to note that during the course of cross-examination the claimant changed her stance in respect of the chair and tried to maintain that the chair she was using was broken however it was quickly pointed out to her that there were a number of other identical chairs at her work station and if her chair had been broken it would have been a simple matter of changing them around until the broken one could be removed and replaced.
18. It is the claimant's position that her claim is within time because it is within the three months of the meeting of 3rd June 2017.
19. However when the claimant raised a grievance with the Respondent, Frank Cullen Jnr met with her on 3rd June 2016.
20. Mr Cullen went on to explain at this meeting that she was the only one that could possibly know if she needed an extended break but that she had never availed of the facility that was put in place.
21. Mr Cullen went on to explain that the chairs in the ARC (the claimants work station) were "high-end" 24 hour approved chairs.
22. The claimant accepted Mr Cullen's explanations but went on to say "That she felt she was not being listened to". A claim which made no sense given the accommodations which were put in place at her request.
23. It is respectfully submitted that dealing with a grievance appropriately cannot amount to an ongoing act of discrimination and therefore the meeting of the 3rd June cannot bring her claim within time.
24. The claimant went off on maternity leave the following day and then submitted her claim on 1st September 2016 which the Respondents would submit is eight months after the events of 26th January 2016 when a colleague failed to attend and seven months after the facilities were put in place to accommodate the claimant if she needed an extended break or if she wanted a different chiropractor approved chair.

25. The Respondent's would respectfully submit that it cannot amount to discrimination if the claimant has been accommodated yet fails to avail of that accommodation.
26. It remains the Respondent's position in that they addressed all concerns raised by the claimant however she never availed of any of the systems which were put in place therefore her claims are unmeritorious.

Statement of Law

Whether claim was presented in time

The Sex Discrimination (Northern Ireland) Order 1976, as amended ("the SDO")

Article 76 provides:-

"(1) An industrial tribunal shall not consider a complaint under Article 63 unless it is presented to the tribunal before the end of

(a) the period of three months beginning when the act complained of was done

...

(5) A tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(6) For the purposes of this Article —

27. In this case, the claimant argued that the events of 26th January 2016, the risk assessment and her failure to avail of the accommodations which were put in place in respect of extended breaks and a replacement chair in addition to the grievance meeting of the 3rd June 2016 amount to a continuing series of discriminatory acts.

As stated earlier it is the Respondents position that this cannot be the case as there is no direct evidence that any of these events constituted discrimination and that the tribunal cannot draw inferences from these events that the claimant suffered discrimination either by way of her gender or pregnancy.

28. In the case of *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96, it was held that the claimant must prove either by direct evidence or by inference from primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs amounting to 'an act extending over a period'. It was also held that in seeking to distinguish between a continuing series of acts and a series of one off incidents, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs.

The Respondents would submit that there was no ongoing policy, rule, practice, scheme or regime which could constitute 'an act extending over a period'.

29. In the case of *Bahous v Pizza Express Restaurants* UKEAT/0029/11/DA, the EAT accepted that a grievance process carried out by an employer arising from an act of discrimination could form part of a continuing act of discrimination against the claimant.

30. It is again respectfully submitted that the grievance hearing of 3rd June 2016 when it was explained to the claimant that she hadn't availed of the extended breaks or contacted the company about possibly changing her chair which was something that was within her remit by agreement and therefore could not amount to discrimination.

31. In determining whether there is a continuing series of acts of alleged discrimination and hence whether the claim is in time, the test to be applied by the tribunal is:-

" ... the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs: see Ma v Merck Sharpe and Dohme Ltd [2008] EWCA Civ 1426 at paragraph 17." (see Aziz v FDA [2010] EWCA Civ 304 per Jackson LJ)

32. If the tribunal determines that the claim has been brought out of time, it is then necessary for the tribunal to consider whether it is just and equitable to extend time.
33. It is the Respondent's position that her claims are significantly out of time and that the discretion to extend time under the just and equitable rule is the exception rather than the rule.
34. The relevant principles were summarised in the judgment of Mrs Justice Laing in the case of *Miller and Others v Ministry of Justice and Others* [UKEAT/0003/15] as follows:-

"There are five points which are relevant to the issues in these appeals:-

- (i) *The discretion to extend time is a wide one: Robertson v Bexley Community Centre* [2003] EWCA Civ 576; [2003] IRLR 434, Paragraphs 23 and 24.
- (ii) *Time-limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule (ibid, Paragraph 25). In Chief Constable of Lincolnshire v Caston* [2010] EWCA Civ 1298; [2010] IRLR 327 Wall LJ (with whom Longmore LJ agreed), at paragraph 25, put a gloss on that passage in *Robertson*, but did not, in my judgment, overrule it. It follows that I reject Mr Allen's submission that, in *Caston*, the Court of Appeal "corrected" paragraph 25 of *Robertson*. ...
- (iii) *If an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, "perverse", that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence. No authority is needed for that proposition.*
- (iv) *What factors are relevant to the exercise of the discretion, and how they should be balanced, are for the ET (DCA v Jones* [2007] EWCA Civ 894; [2007] IRLR 128). *The prejudice which a Respondent will suffer from facing*

a claim which would otherwise be time barred is “customarily” relevant in such cases (ibid, Paragraph 44).

- (v) *The ET may find the checklist of factors in section 33 of the Limitation Act 1980 (“the 1980 Act”) helpful (British Coal Corporation v Keeble [1997] IRLR 336 EAT; the EAT (presided over by Holland J) on an earlier appeal in that case had suggested this, and Smith J (as she then was) recorded, at paragraph 8 of her Judgment, that nobody had suggested that this was wrong. This is not a requirement, however, and an ET will only err in law if it omits something significant: Afolabi v Southwark London Borough Council [2003] ICR 800; [2003] EWCA Civ 15, at Paragraph 33.” (See Paragraph 10 of the judgment.)*

The ‘Keeble Guidance’ advice (see above) is as follows:-

“8 ... It requires the Court to consider the prejudice which each party would suffer as the result of the circumstances of the case and, in particular, inter alia, to:-

- (a) the length and 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 party sued had co-operated with any requirements for information;*
- (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
- (e) the steps taken by the plaintiff to obtain appropriate professional advice area he or she knew of the possibility of taking action.*

35. In *Lindsay v London School of Economics and Political Science [2014] IRLR 218* the Court of Appeal held that:-

“An extension of time will not automatically be granted simply because it results in no prejudice to the respondent in terms of a fair trial. If a claim is brought out of time it is for the claimant to show that it is just and equitable for the extension to be granted. This is a multifactorial assessment where no single factor is determinative.”

(a) has committed an act of discrimination [or harassment] against the complainant which is unlawful by virtue of Part III, or

(b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination [F2 or harassment] against the complainant, the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.”

this

In the case of *Iqen v Wong [2005] EWCA Civ 142, [2005] IRLR 258, [2005] ICR 931*, the English Court of Appeal approved, with certain minor modifications, the general guidelines laid down in the previous case of *Barton* as to the impact of provisions relating to direct discrimination. The Court of Appeal confirmed that a two-stage process is required of tribunals in cases where direct discrimination is alleged. First, the claimant has to prove facts from which the tribunal could conclude there had been unlawful discrimination.

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Once the tribunal is satisfied on that basis, the burden of proof shifts to the respondent (employer) who has to show that he did not commit (or is not to be treated as having committed) the unlawful act. In considering whether the claimant has proved facts from which the tribunal could conclude that the respondent had committed an act of unlawful discrimination, the tribunal can draw appropriate inferences from the primary facts. In considering what inferences it is appropriate to draw from the primary facts, the tribunal should proceed on the basis that there is no adequate, non-discriminatory explanation for those facts.

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It is respectfully submitted that the claimant has not proved facts from which the tribunal could conclude there had been unlawful discrimination and that their explanations for the events of the 26th January 2016, the risk assessment and the claimants failure to avail of the accommodations which were put in place and the meeting of the 3rd June 2016 were adequate and non-discriminatory.

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The approach which a tribunal should take to the burden of proof was further clarified by the Court of Appeal in the case of *Madarassy v Nomura International PCL 2007 IRLR 246* where Mummery LJ stated as follows:-

“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”.

In the case of *London Borough of Islington v Ladele* 2009 ICR 387 (upheld by the Court of Appeal), the EAT provided the following guidance:-

- “(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] ICR 877, 884E – “this is the crucial question”. He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) 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.886F) as explained by Peter Gibson LJ in Igen v Wong [2005] ICR 931, para 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 employee has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne Wilkinson pointed out in Zafar v Glasgow City Council [1997] ICR 120:*

“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, paras 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] ICR 897 paras.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. para.10.*
- (7) *As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in Watt (formerly Carter) v Ashan [2008] ICR 82, a case of direct race discrimination by the Labour Party.”*

It is respectfully submitted that the tribunal should determine that the claims outlined in her originating application are significantly out of time however if the tribunal decide that they are within time then the tribunal are asked to return a decision that the claimant did not suffer any form of discrimination.

Submitted by:

Patrick Moore LL.B.

On behalf of the Respondent's

18th September 2017