

THE INDUSTRIAL TRIBUNALS

CASE REF: 24538/19

CLAIMANT: Anonymised Claimant

RESPONDENT: The Chief Constable of the Police Service of Northern Ireland

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claim of disability discrimination is dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: Employment Judge Sturgeon

Members: Mr T Carlin
Mr N Jones

APPEARANCES:

The claimant was represented by Ms Suzanne Bradley, Barrister-at-Law, instructed by Ms Julie Leonard, Solicitor, of Edwards & Company Solicitors.

The respondent was represented by Mr J Kennedy, Barrister-at-Law, instructed by Ms R Armstrong, Solicitor, of the Crown Solicitor's Office.

BACKGROUND

1. The claimant presented a claim for disability discrimination and sexual orientation discrimination on 24 October 2019. Within her claim form, the claimant recounted the events which gave rise to her claim.
2. The respondent presented a response, resisting the claimant's claims, on 3 February 2020.

THE ISSUES

3. The agreed legal issues for determination, for this tribunal, were as follows:-
 - (i) Was the claimant a disabled person for the purposes of the Disability Discrimination Act 1995?

- (ii) If so, was the respondent under a duty to provide reasonable adjustments in the application of the Absence Management Procedures (Section 4A of the Disability Discrimination Act 1995)?
 - (iii) If so, did the respondent comply with the duty to provide reasonable adjustments?
 - (iv) If the respondent failed in the duty to provide reasonable adjustments, what remedy is the claimant entitled to?
4. Counsel for the claimant, at the outset of the hearing, confirmed that the claimant's claim for sexual orientation was no longer being pursued. Counsel for the respondent, at the outset of the hearing, confirmed that there was no dispute that the claimant had a disability for the purposes of the Disability Discrimination Act 1995.

CONTENTIONS OF THE PARTIES

5. (a) Counsel for the claimant contended that the claimant was a disabled person suffering from postnatal depression. The claimant's case was that the provision, criterion or practice ("PCP"), for the purposes of the reasonable adjustments claim, was the provision within the revised Attendance Management Policy ("AMP") that the claimant must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. Counsel for the claimant argued that application of the trigger points, within the Attendance Management policy, caused a substantial disadvantage to the claimant suffering from a depressive condition in that she was considerably more likely to fall foul of the triggers than a non-disabled person thus exposing her to increased likelihood of recorded disciplinary action and potential dismissal. Counsel also argued that, in her mental condition, she was also more likely to feel that the imposition of a warning was unsupportive and a set back to her mental health and confidence in returning to work. The reasonable adjustments sought, by the claimant, were those at Appendix D of the Attendance Management Policy namely:

- (i) Relaxation of the trigger points;
- (ii) Deferral of management action at that time; or
- (iii) No further action.

Counsel argued that making these reasonable adjustments would have removed the substantial disadvantage to the claimant of an increased likelihood of disciplinary action and dismissal and the consequent worry and stress which could have caused a deterioration in her mental health and impeded her return to work. In respect of injury to feelings, the claimant's counsel contended that compensation should be at the upper end of **Vento**. In addition, counsel sought an award of aggravated damages arguing that the respondent, in full knowledge of the claimant's mental health/depressive condition, had been high handed in its treatment of the claimant. Finally, counsel for the claimant also sought an award of exemplary damages contending that it was a matter of concern that the PSNI, an organisation with public accountability and considerable internal HR management resources, had officers not even trained in the management of the AMP and some not

even aware of the existence of the Management of Staff with Disabilities Guidance.

- (b) Counsel for the respondent did not dispute that the claimant had a disability for the purposes of the Disability Discrimination Act 1995 nor did the respondent dispute the PCP identified by the claimant. Counsel argued that the claimant did not demonstrate any substantial disadvantage to herself when compared to a non-disabled comparator. Counsel argued that there was no disadvantage that was more than minor or trivial and that the claimant was treated at least as well as a non-disabled comparator who had been off for the same period of time. Finally, counsel contended that the reasonable adjustments contended for by the claimant were not reasonable adjustments when properly analysed and their effect objectively considered.

PROCEDURE AND SOURCES OF EVIDENCE

- 6. This case had been case managed and detailed directions had been given in relation to the interlocutory procedure and the witness statement procedure.
- 7. Each witness swore or affirmed and then adopted their previously exchanged witness statement as their entire evidence in-chief before moving on to cross-examination and brief re-examination.
- 8. At the substantive hearing, the claimant gave evidence on her own behalf.
- 9. On behalf of the respondents, the tribunal heard evidence from witness A, witness B, witness C, witness D, witness E and witness F.
- 10. The tribunal also received a bundle of documents containing the claimant's witness statement and her supplementary witness statement, all of the respondent's witness statements, all pleadings in the case and all discovery exchanged between the parties.
- 11. The tribunal heard evidence on Tuesday 1st, Wednesday 2nd and Friday 4th June 2021. Oral submissions were heard on Thursday 1st July 2021. The tribunal also received written submissions from both the claimant and the respondent's representative and a number of legal authorities. The panel met immediately thereafter, on 29th July 2021 and also on 4th November 2021 to reach a decision. This document is the decision.

ANONYMISATION

- 12. At the outset of the proceedings, an application was made by the respondent's counsel to have the names of all witnesses in the case anonymised, but not the name of respondent, given the recent threat to a part-time police officer in April 2021 and the planting of a bomb in the officer's car. There was no objection to this application for anonymisation from the claimant's counsel.
- 13. Rule 44 of Schedule 1 to the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 ("the 2020 rules") sets out the position in relation to anonymisation of the identity of parties. It provides in relevant part:

“44(1) A tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings. Such an order may be made in any of the following circumstances –

- (a) where the tribunal considers it necessary in the interests of justice;*
- (b) in order to protect the Convention rights of any person; -*

(2) In considering whether to make an Order under this Rule, the tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such Orders may include –

- (a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;*
- (b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of the hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;*
- (c) An order for measures preventing witnesses at a public hearing being identifiable by members of the public;*
- (d) A Restricted Reporting Order within the terms of Article 13 or 14 of the Industrial Tribunals Order; -”*

14. The Supreme Court, in **A v British Broadcasting Corporation [2014] 2 WLR 1243**, determined that:

23 “It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy.”

15. The EAT determined in the decision of **British Broadcasting Corporation v Roden UKEAT0358/14/DA**:

“22. The principle of open justice is accordingly of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice.”

23. Where anonymity orders are made, three Convention Rights are engaged and have to be reconciled. First, Article 6 which guarantees the right to a fair hearing in public with a publicly pronounced judgment except where to the extent strictly necessary publicity would prejudice the interest of justice. Secondly, Article 8 which provides the qualified right to respect for

private and family life. Thirdly, Article 10 which provides the right to freedom of expression and again is qualified.”

16. In Northern Ireland, Mc Closkey J (as he then was) set out the approach to be followed when determining civil rights and obligations :

*“6. Where applications of this kind are based on the need to protect fundamental human rights – such as those safeguarded by Articles 2 and 3 ECHR – it will be incumbent on the court to act in accordance with its duty under Section 6 of the Human Rights Act 1998 recognised by Lord Scarman in **Scott**. This issue was considered in the decision of the House of Lords in **Re Officer L** [2007] UKHL 36, where the factual matrix was somewhat different. This case concerned the exercise of an inquiry panel’s power to compel the attendance of certain witnesses at a public inquiry investigating a controversial and sensitive death. The witnesses in question were serving and retired police officers and, in response to the subpoenae served on them, they contended for the grant of protection by anonymity on the basis that, absent this measure, they would be exposed to an increased risk of terrorist attack. If one pauses at this juncture, some analogy, perhaps tenuous, with the present case emerges. In support of their claim, they asserted their rights under Article 2 ECHR, together with the common law duty of fairness to witnesses. The unanimous decision of the House of Lords is contained in the opinion of Lord Carswell. Having noted that the appeal engaged the positive dimension of Article 2 ECHR, his Lordship rehearsed **Osman –v- United Kingdom** [1998] 5 BHRC 293, paragraphs 115-116, before formulating two basic principles, at paragraph [20]:*

- (a) The positive obligation arises only when the risk asserted is real and immediate: this denotes a risk that is objectively verified, present and continuing. To establish such a risk a high threshold must be overcome.*
- (b) Secondly, the principle of proportionality arises in this context. This involves “... striking a fair balance between the general rights of the community and the personal rights of the individual, to be found in the degree of stringency imposed upon the state authorities in the level of precautions which they have to take to avoid being in breach of Article 2”: see paragraph [21]. This entails assessing the acts and omissions of the relevant state authorities by reference to the standard of reasonableness. Thus the undertaking of an unduly burdensome obligation is not demanded: see paragraph [21].*

*[7] In **Re Officer L**, the Appellants were in a position to establish that two separate duties were owed to them by the Tribunal. The first was the duty owed as a public authority under Section 6 of the Human Rights Act 1998, with Article 2 of the Convention engaged. The second was the Tribunal’s Common law duty of fairness towards persons whom it proposed to call to give evidence. As regards the first of these duties, their Lordships endorsed the correctness of the Tribunal’s approach, which had adopted as its starting point the premise that while there was some pre-existing risk to the witnesses in question this was not sufficiently severe to reach the Article 2 level of a real and immediate risk to their lives, followed by posing the question whether in respect of any of the witnesses the risk to life would be*

materially increased by giving evidence without anonymity. The Tribunal had also been correct in applying the same test in the application of its common law duty. This exercise permitted the intrusion of a greater range of factors, including the witnesses' professed subjective fears. Having considered all the evidence, the Tribunal conducted a balancing exercise, concluding – unassailably – that the balance favoured the withholding of anonymity.

*[8] Applications of the present kind, in which a litigant invokes Article 2 ECHR, should, in my view, be determined by reference to the decision in **Officer L**. Accordingly, the first question for the court is whether there exists an objectively verified, present and continuing risk to the life of the litigant concerned. If the court answers this question in the affirmative, it will then have to consider whether, in the particular circumstances, this gives rise to a positive obligation on the part of the court as a public authority under Section 6 of the 1998 Act. This exercise will, predictably, involve consideration of whether there is any nexus between the existence or possible escalation of the risk to the life of the litigant and his pursuit of the proceedings concerned without the protection of anonymity. If this test is determined in the litigant's favour, it will be incumbent on the court to apply the **Osman** reasonableness test. In **Officer L**, the only protective measure requested of the Tribunal was the conferral of anonymity on the witnesses in question. Anonymity is not the only protective measure which could conceivably arise in a litigation context – others include hearings in chambers or in camera and reporting restrictions. Self-evidently, there is no resource element in acceding to an application to confer anonymity on a litigant. In this respect, there is a clear distinction between the court and other public authorities such as the Police Service (as the decision in **Osman** makes clear).*

17. There is also a requirement for the risk to be real and immediate – the meaning being summarised by Weatherup J (as he then was) in *RE W's Application [2004] NIQB 67* as “...a real risk is one that is objectively verified and an immediate risk is one that is present and continuing.”
18. In the recent tribunal case of **McNicholl v 1. Bank of Ireland 2. F 1871/16 and 2/17**, the Court of Appeal had remitted the question of anonymisation to the tribunal “for the purpose of reconsidering the contentious anonymisation decisions and, if considered appropriate, rescinding same and making fresh decisions”. On remittal, the tribunal stated that:

“The tribunal is satisfied that, when considering whether it is appropriate to make any Anonymity Orders, pursuant to the said rule, it is necessary to have regard to the basis under which any such Order should be made and, in particular, the importance of the principle of open justice, giving full weight to it and the right of freedom of expression. It is clear, under the said rule, the restriction on public disclosure can only be imposed insofar as the tribunal considers it necessary (1) in the interests of justice or (2) to protect the convention rights of any person. – A tribunal is therefore required, when determining this issue, to consider the competing rights and balance one against the other before reaching a decision.”
19. The application for anonymisation, made by the respondent, in this case, was not contested by the claimant. Moreover, the tribunal is satisfied that there has been a

recent real and immediate threat to a current serving police officer. That risk would ultimately have resulted in a risk to life or very serious harm being occasioned.

20. The tribunal is also satisfied that the order sought, in this case, is a very limited one as it allows the name of the respondent to be preserved together with the branch and rank of those witnesses identified. The tribunal is therefore satisfied that the relevant detail is retained in this case for the purposes of the decision ultimately reported.
21. The tribunal therefore grants an order, under rule 44(3) of schedule 1 of the 2020 rules, that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public in any document entered on the register or otherwise forming part of the public record.

STATEMENT OF RELEVANT LAW

Disability Discrimination and the duty to make reasonable adjustments

22. The relevant law on disability discrimination is contained in the Disability Discrimination Act 1995 (“the DDA”), as amended.
23. For the purposes of a reasonable adjustments claim, a person discriminates against a disabled person if he fails to comply with the duty to make reasonable adjustments imposed on him in relation to the disabled person (**Section 3A(2) Disability Discrimination Act 1995, as amended**).
24. Where a provision, criterion or practice applied by, or on behalf of the employer, places the disabled person concerned at a substantial disadvantage, in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice or feature having that effect. For the purposes of this section, the disabled person means a disabled person who is an employee of the employer concerned (**Section 4A(1) and (2) Disability Discrimination Act 1995, as amended**).
25. Section 18B of the 1995 Act provides:-
 - “(1) *In determining whether it is reasonable for a person to take a particular step in order to comply with the duty to make reasonable adjustments, regard should be had, and in particular, to –*
 - (a) *the extent to which taking the step would prevent the effect in relation to which the duty is imposed;*
 - (b) *the extent to which it is practicable to take the step;*
 - (c) *the financial and other cost which will be incurred by him taking the step and the extent to which taking it would disrupt any of his activities;*
 - (d) *the extent of his financial and other resources;*

- (e) *the availability to him of financial or other assistance with the respect of taking step;*
 - (f) *the nature of his activities and size of his undertaking;*
 - (g) *...*
- (2) *The following are examples of steps which a person may need to take in relation to a disabled person in order to comply with duty to make reasonable adjustments –*
- (a) *making adjustments to premises;*
 - (b) *allocating some of the disabled person’s duties to another person;*
 - (c) *transferring him to fill an existing vacancy;*
 - (d) *ordering his hours of working or training;*
 - (e) *assigning him to a different place of work or training;*
 - (f) *allowing him to be absent during working or training hours for rehabilitation, assessment or treatment;*
 - (g) *giving, arranging for, training or mentoring (whether for the disabled person or any other person);*
 - (h) *acquiring or modifying equipment;*
 - (i) *modifying instructions or reference manuals;*
 - (j) *modifying procedures for testing or assessment;*
 - (k) *providing a reader or interpreter;*
 - (l) *providing supervision or other support.”*

26. It should be noted that the list of examples given, at Section 18B(2), of the DDA, of the steps which employers may need to take to comply with the duty to make reasonable adjustments is not an exhaustive list.

27. The ***Disability Code of Practice on Employment and Occupation*** (“the Code”) gives guidance on what those steps might mean in practice. The Tribunal is bound to take into account the provisions of the Code as they are relevant to the proceedings. The tribunal finds the following provisions relevant to this case:

- (a) The Code states at paragraph 5.18: *“Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one adjustment. It is advisable to agree a*

proposed adjustment with the disabled person in question before they are made.”

- (b) At paragraph 5.24 of the Code, it further states: *“Whether it is reasonable for an employer to make any particular adjustment will depend on a number of things such as its cost and effectiveness. However, if an adjustment is one which it is reasonable to make, then the employer must do so. Where a disabled person is placed at a substantial disadvantage by a provision criterion or practice of the employer or by a physical feature of the premises it occupies the employer must consider whether any reasonable adjustments can be made to overcome that disadvantage. There is no onus on the disabled person to suggest what adjustments should be made (although it is good practice for the employer to ask), but, where the disabled person does so, the employer must consider whether such adjustments would help overcome the disadvantaged and whether they are reasonable.”*

28. The EAT provided guidance to tribunals on how they should approach the issue of reasonable adjustments in the case of ***Environment Agency v Rowan [2008] IRLR 20***. The EAT stated, at paragraph 27, that a Tribunal considering a claim that an employer has failed to make a reasonable adjustment must identify:-

- (i) *the provision, criterion or practice (PCP) applied that has put the claimant at a disadvantage compared to those who are not disabled;*
- (ii) *the physical feature of premises occupied by the employer; or*
- (iii) *the identity of non-disabled comparators (where appropriate); and*
- (iv) *the nature and extent of the substantial disadvantage suffered by the claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the “provision, criterion or practice applied by or on behalf of the employer and the physical feature of premises”, so it would be necessary to look at the overall picture.”*

29. The EAT also stated:-

“In our opinion, an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process. Unless the employment tribunal has identified the four matters we have set out above, it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, placing the disabled person concerned at a substantial disadvantage.”

30. PCP's include arrangements on which any benefit is offered or afforded. Only substantial disadvantages give rise to the duty, that is, those that are not minor or trivial. The question is **not** whether the PCP is capable of causing a substantial disadvantage to the disabled person in question but whether it actually has this effect on him. Whether a disadvantage exists is a question of fact (***Disability Code of Practice on Employment and Occupation***).
31. The EAT confirmed, in ***Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley [2012] UKEAT***, that if a non-disabled person would be affected by the PCP in the same way as a disabled person then there is no comparative substantial disadvantage to the disabled person and no duty to make reasonable adjustment arises. The mere fact that a particular rule affects more disabled people means that it may be indirectly discriminatory but does not mean necessarily that the duty to make reasonable adjustments arises. Furthermore, the substantial disadvantage of the disabled person in comparison with persons who are not disabled has to be because of the disability
32. At paragraph 76, Birtles J stated:
- “The duty to make reasonable adjustments in Section 4A is, of course, expressed not in terms of the duty to alleviate disadvantage arising in consequence of a disability or for a reason relating to disability or (to borrow the language now in the Equality Act 2010) arising from disability. The duty arises only where the disabled person is substantially disadvantaged in comparison with persons who are not disabled. A disadvantage has to be because of the disability.”* (Tribunal emphasis added)
33. The issue of substantial disadvantage was further considered in the case of ***Royal Bank of Scotland v Ashton 201 ICR 632*** where Langstaff J stated that:-
- “An Employment Tribunal – in order to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination – must be satisfied that there is a provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled”.*
34. If the duty arises, the Tribunal will then determine whether the proposed adjustment is reasonable to prevent the PCP placing the claimant at that substantial disadvantage. In ***Smith v Churchill Stairlifts PLC [2006] ICR 524***, the Court of Appeal confirmed that the test of reasonableness is an objective one and it is ultimately the Employment Tribunal's view of what is reasonable that matters.
35. Reasonable adjustments are limited to those that prevent the provision, criterion or practice (PCP) or feature placing the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled. Any proposed reasonable adjustments must be judged against the criteria that they must prevent the PCP from placing an employee at a substantial disadvantage.

36. A proper assessment of what is required to eliminate the disabled person's disadvantage is a necessary part of the duty of reasonable adjustment ***Southampton City College v Randall [2006] IRLR 18.***
37. In ***Nottingham City Transport Limited v Harvey UKEAT/0032/12*** Mr Justice Langstaff (stated at paragraph 17):
- “Although a provision, criterion or practice may as a matter of factual analysis and approach be identified by considering the disadvantage from which an employee claims to suffer in tracing in back to its cause, ... it is essential, at the end of the day, that a tribunal analyses the material in light of that which the statute requires; **Rowan** says as much, and **Ashton** reinforces it. The starting point is that there must be a provision, criterion or practice; if there were not, then adjusting that provision, criterion or practice would make no sense, as is pointed out in **Rowan**. It is not sufficient merely to identify that an employee as being disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. **Section 4A(1) provides that there must be a causative link between the PCP and the disadvantage. The substantial disadvantage must arise out of the PCP**”.* (Tribunal emphasis added).
38. The EAT in ***Bray v Camden London Borough EAT [1162/01]*** confirmed that disability related absences do not have to be discounted entirely when applying absence management procedures. The EAT observed that, if the contrary were the case, the logical consequences would be that a disabled employee could be absent throughout the working year without the employer being able to take any action in relation to that absence.
39. Furthermore in the ***Royal Liverpool Childrens NHS Trust v Dunsby [2006] IRLR 351***, the EAT held at paragraph 17:
- “In the experience of this tribunal, it is rare for a Sickness Absence Procedure to require disability related absences to be disregarded. An employer may take into account disability related absences in operating a Sickness Absence Procedure”.*
40. Exempting employees from Absence Management Procedures was held not to be a reasonable adjustment by the EAT in ***Jennings v Barts and the London NHS Trust UKEAT/0056/12/DM.***
41. In ***Griffiths –v- Secretary of State for Work and Pensions [2017] ICR 160 CA*** – the Court of Appeal considered the application of a sickness absence management policy and the identification of the relevant PCP. It was considered that, where an employee's disability makes them more likely to be absent from work than a non-disabled colleague, the duty to make reasonable adjustments for a disabled employee may apply to an attendance management policy. In looking at the potential adjustment of dis-applying or disregarding disability related absence, in that case 62 out of 66 days, it was found that the adjustments sought were not within the scope of the statute which was designed to allow for the disabled employee to return to work or carry out their work. Lord Justice Elias stated:

“There are in my view two assumptions behind the EAT’s reasoning, both of which I respectfully consider to be incorrect. The first is that the relevant PCP was the general policy itself. If that is indeed the correct formulation of the PCP, then the conclusion that the disabled are not disadvantaged by the policy itself is inevitable given the fact that special allowances can be made for them. It may be that this was the PCP relied upon in the Ashton case. But in my view formulating the PCP in that way fails to encapsulate why a sickness absence policy may in certain circumstances adversely affect disabled workers – or at least those whose disability leads to absences from work. Moreover, logically it means that there will be no discrimination even where an employer fails to modify the policy in any particular case. The mere existence of a discretion to modify the policy in the disabled worker’s favour would prevent discrimination arising even though the discretion is not in fact exercised and the failure to exercise it has placed the disabled person at a substantial disadvantage. (Paragraph 46)

In my judgment, the appropriate formulation of the relevant PCP in a case of this kind was in essence how the ET framed it in this case: the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That is the provision breach of which may end in warnings and ultimately dismissal. Once the relevant PCP is formulated in that way, in my judgment it is clear that the minority member was right to say that a disabled employee whose disability increases the likelihood of absence from work on ill health grounds, is disadvantaged in more than a minor or trivial way. Whilst it is no doubt true that both disabled and able bodied alike will, to a greater or lesser extent, suffer stress and anxiety if they are ill in circumstances which may lead to disciplinary sanctions, the risk of this occurring is obviously greater for that group of disabled workers whose disability results in more frequent, and perhaps longer, absences. They will find it more difficult to comply with the requirement relating to absenteeism and therefore will be disadvantaged by it.” (Paragraph 47) (Tribunal emphasis)

42. Lord Justice Elias further stated at paragraph 58 of the judgement:

“The nature of the comparison exercise in the former case is clear: one must simply ask whether the PCP puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled, or a category of them, than it does on the able bodied. Of course, if the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability. But if the disability leads to disability-related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by that category of disabled employees.” (Tribunal emphasis)

43. Lord Justice Elias also set out at paragraph 68:

“I would accept that whilst a disabled person may suffer disadvantages not directly related to the ability to integrate him or her into employment, the

steps required to avoid or alleviate such disadvantages are not likely to be steps which a reasonable employer can be expected to take. The O'Hanlon case, referred to above, provides an example... Hooper LJ also approved an observation by the EAT that: 'The Act is designed to recognise the dignity of the disabled and to require modifications which enable them to play a full part in the world or work, important and laudable aims. It is not to treat them as objects of charity which, as the tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work.'

Also at paragraph 76:

"I would observe that it is unfortunate that absence policies often use the language of warnings and sanctions which makes them sound disciplinary in nature. This suggests that the employee has in some sense been culpable. That is manifestly not the situation here, and will generally not be the case, at least where the absence is genuine, as no doubt it usually will be. But an employer is entitled to say, after a pattern of illness absence, that he should not be expected to have to accommodate the employee's absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee's absence record when making that decision. As I mention below, the fact that some of the absence is disability-related is still highly relevant to the question whether disciplinary action is appropriate."

44. In the case of ***Carphone Warehouse v Martin [2013] EqLR 481 EAT***, the EAT found that the company's failure to pay a disabled employee the correct amount was not capable of amounting to a reasonable adjustments claim for the purposes of the DDA:

*"19. What the Employment Tribunal found, in effect, was that the lack of competence or understanding by The Carphone Warehouse in preparing the Claimant's wage slip for July 2010 was capable of being a "practice" within the terms of section 4A and that the reasonable step that they should have taken was the step of not delaying payment of the correct amount of pay. Mr Hutchin says, in effect, that this approach is misconceived. We are afraid we agree with him in this contention, for two related reasons. First, a lack of competence in relation to a particular transaction cannot, as a matter of proper construction, in our view amount to a "practice" applied by an employer any more than it could amount to a "provision" or "criterion" applied by an employer. Secondly, the obligation created by section 4A is to take steps, or such steps as are reasonable. However it is phrased, what the Employment Tribunal were saying, in effect, was that The Carphone Warehouse had failed to take proper care in preparing Mr Martin's pay packet in July 2010. Taking care cannot be properly described, in our view, as taking a step or steps for the purposes of section 4A(1) of the DDA. **What the Employment Tribunal is seeking to do, perhaps understandably, is to give the Claimant a remedy for what they regard as rather egregious incompetence by The Carphone Warehouse, but we do not think the facts can be shoehorned into the relevant provisions of the DDA. Therefore, that finding of discrimination, in our view, cannot stand.**"*
(Tribunal emphasis)

45. Finally, the breadth and extent of the duty to make reasonable adjustments was demonstrated in the case of **Archibald v Fife Council [2004] UKHL 32, [2004] IRLR 651 [2004] ICR 954**. In that judgment, the House of Lords recognised that the duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs. It is thus not just a matter of introducing a 'level playing field' for disabled and non-disabled alike, because that approach ignores the fact that disabled persons will sometimes need special assistance if they are to be able to compete on equal terms with those who are not disabled ... (**Harvey on Industrial Relations and Employment Law L at [398.01]**).

Burden of Proof

46. Section 17A(1) of the DDA Act provides that where a claimant proves facts from which the tribunal could, apart from that subsection, conclude in the absence of an adequate explanation that the respondent has acted in a way which is unlawful under this part, the tribunal shall uphold the complaint unless the respondent proves that he did not so act. The EAT in **Tarbuck v Sainsbury's Supermarkets Limited [2006] IRLR 664** suggested that, in a reasonable adjustments case, the burden of proof will shift to the respondent employer if an adjustment could reasonably have been made and it would then be up to the employer to show why it had not been made.
47. The Employment Appeal Tribunal, in the case of **Project Management Institute v Latif [2007] IRLR 579**, when dealing with a reasonable adjustment case, concluded that:-

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

Shifting Burden of Proof

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

"22 This provision and its English analogue have been considered in a number of authorities. The difficulties which Tribunals appear to continue to have with applying the provision in individual cases indicates that the guidance provided by the authorities is not as clear

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

- 23 In the post-**Igen** decision in **Madarassy v Nomura International PLC [2007] IRLR 247** the Court of Appeal provided further clarification of the Tribunal's task in deciding whether the Tribunal could properly conclude from the evidence that in the absence of an adequate explanation that the respondent had committed unlawful discrimination. While the Court of Appeal stated that it was simply applying the **Igen** approach, the **Madarassy** decision is in fact an important gloss on **Igen**. The court stated:-

'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient matter from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination; 'could conclude' in Section 63A(2) must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage, the Tribunal needs to consider all the evidence relevant to the discrimination complaint such as evidence as to whether the act complained of occurred at all,

evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the complainant were of like with like as required by Section 5(3) and available evidence of all the reasons for the differential treatment.'

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

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

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

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

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

*"(71) There still seems to be much confusion created by the decision in **Igen v Wong**. What must be borne in mind by a Tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the Tribunal on the balance of probabilities that certain treatment had been by reason of race.*

...

(73) *No doubt in most cases it would be sensible for a Tribunal to formally analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in **Network Road Infrastructure v Griffiths-Henry**, it may be legitimate to infer he may have been discriminated against on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single answer and Tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.*

...

(75) *The focus of the Tribunal's analysis must at all times be the question whether they can properly and fairly infer race discrimination. If they are satisfied that the reason given by an employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is an end of the matter. It is not improper for a Tribunal to say, in effect, 'there is a real question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he believed or he did and it has nothing to do with race'.*

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

51. In **Frank McCorry and Others v Maria McKeith [2016] NICA 47**, the Court of Appeal in Northern Ireland approved what was said in **Madarassy**.

RELEVANT FINDINGS OF FACT

52. Having considered the evidence given by all the witnesses and the content of relevant documents referred to by the parties along with the submissions of counsel for both parties, the tribunal found the following relevant facts proven on the balance of probabilities. This judgment records only those findings of fact necessary for determination of the issues. Save as were indicated, the facts set out herein were not in dispute.

Background

53. The claimant is a Detective Constable in the Police Service of Northern Ireland currently attached to Legacy Investigation Branch. The claimant commenced

employment with the PSNI in September 2008.

54. The claimant's first child was born in November 2016. Following the birth of her first child, the claimant suffered an extremely traumatic period of time. Her father was diagnosed with an aggressive form of cancer, she herself was investigated for ovarian cancer, she was protecting her father from an abusive relationship with her mother and the claimant also suffered a miscarriage.
55. On 2 May 2017, the claimant reported unfit for duty suffering from a post-natal debility, specifically post-natal depression. During this period of illness, the claimant was subjected to absence management procedures by the respondent. At that stage, the claimant was in the Public Protection Branch.
56. The claimant's father sadly passed away on 21 September 2017. Two weeks later, the claimant was visited at home by her then line manager, Detective Sergeant G, and a Senior Officer, Detective Superintendent H and a first stage absence meeting took place. At this meeting, the claimant's line manager informed the claimant that she intended to issue a written improvement notice (WIN), to the claimant, as her absence was deemed to be unsatisfactory.
57. This written improvement notice was subsequently rescinded as Human Resources informed her line manager that the breach should never have been triggered as the claimant was pregnant at the time of the trigger.
58. At this stage, the claimant had not been given Disability Discrimination Act (DDA) status but Detective Sergeant G, her line manager, subsequently requested that OHW assess this.
59. On 22 November 2017, OHW expressed the opinion that the claimant was disabled under the DDA 1995.
60. The claimant's absences, throughout 2017 and 2018, have never been amended to reflect the fact that the claimant was in a protected period during this time or that she was disabled.
61. On 12 February 2018, the claimant submitted a transfer request from her role in the Public Protection Branch to the Legacy Investigation Branch. On this transfer request, the claimant stated that she suffered from a mental illness and was disabled.
62. The claimant transferred to the Legacy Investigation Branch on 2 July 2018. This was also the first day of the claimant's second maternity leave and her second child was born on 20 July 2018. At this time, the claimant's immediate line manager became witness A.
63. The claimant's second period of maternity leave consisted of a period of Occupational Maternity Leave until 9 January 2019, followed by a period of annual leave carried over from the previous year.

Attendance Policy

64. The respondent has an Attendance Management Policy (AMP) as a measure to

address and minimise occurrences of sickness absence. The AMP was revised in February 2019. Its underlying purpose is to:

“..... assist officers and staff (at all ranks and grades) decide how and when to use the formal procedures contained in the Police (Performance and Attendance) Regulations (NI) 2016.”

“.....assist line managers support officers and staff to stay in work or if absent return to work at the earliest opportunity.”

65. The aims of the AMP are to:

- Give a clear understanding of the Attendance Management Process;
- Encourage individuals, where possible, to seek support from Line Managers at an early stage, ideally before any need to report sick;
- Encourage individuals to explore options and/or reasonable adjustments that could reduce the requirement for sickness absence;
- Outline the support that is available to individuals who are unwell.

66. The AMP identifies the following trigger points for employees:

- Stage 1 – 28 days/3 absences in a twelve month rolling period
- Stage 2 – 18 days/2 absences in a twelve month rolling period
- Stage 3 – 6 days/1 absence in a twelve month rolling period

67. In practice, what this means is that if an employee has been off for 28 days or has three absences, in a twelve month rolling period, she or he will attend a first stage meeting under the AMP.

68. There are two possible outcomes to the first stage meeting. These are either:

- (i) No further action (NFA) is taken; or
- (ii) An employee is given a Formal Written Improvement Notice (FWIN).

69. If a FWIN is issued at the first stage meeting, an employee's absence monitoring trigger is reduced to 18 days or two absences in a twelve month rolling period. The two outcomes to the second stage meeting are the same as the first stage meeting.

70. If a FWIN is issued at the second stage meeting, an employee's absence monitoring trigger is reduced to 6 days or one absence in a twelve month rolling period.

71. The outcomes of the third stage meeting are either:

- (i) Dismissal of the member with notice;
- (ii) Dismissal of the member with immediate effect;
- (iii) An extension of the FWIN;
- (iv) The issuing of a FWIN and a review in 3 months; or
- (v) Redeployment (including a reduction in rank).

72. It is common case that the respondent's AMP, at Appendix D, provides for Disability Discrimination Act (DDA) considerations and reasonable adjustments including:
- *Relaxation of the trigger points (OHW/HR opinion should be factored).*
 - *Impact of altering working patterns.*
 - *Deferral of management action at that time.*
73. Within the AMP, at part 4, it is clearly stated that if officers or staff have a disability, those should be considered and line managers should refer to the "Managing Staff with Disabilities Guidance ("the Guidance").
74. Furthermore, it is also very clearly stated, at section 7.4.1 of the Attendance Management Policy that form 98/1 (i.e Assessment for Reasonable Adjustment Form) should be completed by the Line Manager if permanent duty adjustments are being considered.
75. Page 18 of the AMP provides guidance to managers on the first stage trigger meeting. It is clearly set out within this guidance that, if applicable, reasonable adjustments should be discussed and that a Reasonable Adjustment Request Form 98/1 should be completed. There is no mention made here of form 98/1 applying only to permanent duty adjustments.
76. Moreover, page 18 of the policy also states that, at the first stage meeting, the line manager should "*consider whether the absence(s) fall within the mitigating circumstances (e.g. disability related.....*"
77. Page 18 of the policy further states that "*Where appropriate reference should be made to other supporting policies such as "Managing Staff with Disabilities....."*"

Guidance on Managing Staff with Disabilities ("the Guidance")

78. The respondent's Guidance outlines the actions the respondent is required to take to comply with its statutory duty to make reasonable adjustments. The policy expressly applies to all police officers and police staff and outlines the relevant factors to consider when determining whether adjustments are reasonable and the process for managing staff with a disability. In doing so, the line manager may seek input from a range of sources which may include the individual, the individual's GP, Occupational Health & Welfare (OHW), Health and Safety Personnel and HR Managers.
79. Within this Guidance, there is a form 98/1 – it states that "*this form MUST be completed for all requests for a reasonable adjustment.*"
80. Both witness A, the claimant's line manager who subsequently issued her with a FWIN, and witness E, the appeal manager who approved the FWIN confirmed, in their evidence, that they did not refer to this Guidance when dealing with the claimant nor were they aware that they had to complete the mandatory Disability Guidance form 98/1. Both witnesses confirmed in evidence that they believed that a

form 98/1 need only be completed in cases of long term adjustments. The tribunal finds no logical explanation for this assumption as the form is very clear that it **MUST** be completed for all adjustment requests.

81. Moreover, witness C, the senior local officer who signed off on the claimant's stage absence forms, confirmed to the tribunal that he was unaware of the existence of the Guidance on Managing Staff with Disabilities or that a form 98/1 had to be completed.

The Claimant's 2019 absence

82. The claimant was due to return to work on 1 April 2019, on the expiry of her annual leave, but she reported unfit for duty suffering from post-natal depression. On 29 April 2019, the claimant was informed by her new line manager, witness A, that she would be subject to the first stage of the absence management procedures due to her 37 days' absence. The trigger for the first stage was 28 days.
83. There is a dispute between the parties as to when the actual first stage meeting took place. Witness A's evidence is that he first met with the claimant on 7 May 2019 at a local café. Witness A stated that he was not aware, either prior to or during the meeting, that the claimant suffered from a disability. Witness A stated that he only became aware of the claimant's disability after the claimant submitted a 90/1 form on 22 May 2019. The tribunal finds no reason to doubt the evidence of witness A that he was not aware of the claimant's disability, prior to the meeting, or that he had no access to the claimant's previous absence management records which confirmed that the claimant had a disability.
84. The claimant's competing evidence was that she first met with witness A on 21 May 2019 during which she asked him to defer management action and relax the monitoring of the trigger points.
85. Witness A has produced three 28 day review notes which outline the various steps he took to deal with the claimant's first 28 day absence. These review notes are dated 8 May, 6 June and 26 June 2019. Based on the content of these notes, the tribunal concludes that there may be some confusion on the part of the claimant as to when the first meeting, between herself and witness A, took place. The tribunal concludes that it is more likely that the first meeting between the claimant and witness A took place on 7th May 2019.
86. However, regardless of the date of the first stage meeting, the date of the meeting has no impact on the outcome of this case. The overall outcome of that meeting was that witness A issued the claimant with an outcome of No Further Action (NFA). The tribunal finds that this was in line with the respondent's AMP and that it was a reasonable response, by witness A, at that time, given the claimant's circumstances.
87. That said, despite the fact that witness A granted the claimant a NFA, on this occasion, the tribunal finds that he did so without fully complying with all of the respondent's policies for dealing with disabled employees. As soon as witness A became aware that the claimant had a disability for the purposes of the DDA 1995, he should have immediately referred himself to the respondent's Guidance for Managing Employees with a Disability. He did not do so. When cross-examined as

to why he did not do so, witness A displayed, at best, a very vague understanding of what he was required to do under either the Guidance or under references to the guidance within the AMP. It was clear, from witness A's evidence, that he gave no consideration to the Guidance whatsoever. The tribunal finds that he was completely unaware of its existence.

88. Moreover, witness A also stated, in evidence, that he had no recollection of ever having read the support bulletin that was issued in conjunction with the updated February 2019 version of the AMP.

89. The AMP was triggered for a second time on 19 June 2019. On this occasion, the claimant's line manager, witness A, had the guidance from OHW as to her condition being a disability.

90. On 18 July 2019, the claimant attended a further 28 day first absence management meeting with witness A. Before attending this meeting, the claimant made a further written submission on a form 90/1, dated 2 July 2019, asking that her absence be considered as per the Disability Discrimination Act. At the meeting, the claimant also asked for a relaxation of the triggers relating to the AMP.

91. However, this request was refused by witness A. Witness A, in responding to this request, stated that:

"This request for a relaxation of the trigger periods has not been supported at this time. The current position of LM is that this request may be better dealt with through the appeal process when [the claimant] can present evidence that this would improve her attendance."

92. The claimant was aggrieved that her request for an adjustment to the policy had not been considered given that witness A acknowledged that the claimant had a disability. The tribunal concludes that the claimant was right to feel aggrieved that this Guidance was not considered. The respondent's Guidance for Managing staff with Disabilities states that line managers should consider what adjustments are required "*seeking opinions, advice and input from a range of sources.*" The tribunal finds that witness A did not, on this occasion, in line with the Guidance, seek any of those opinions and the tribunal finds he clearly did not comply with the respondent's policy in this regard.

93. Accordingly, the claimant was issued with a first written improvement notice (WIN), together with an action plan, on 24 July 2019. The claimant's absence monitoring trigger was reduced from 28 days to 18 days.

94. The claimant appealed this formal written improvement notice by email dated 2 August 2019. Before the claimant's appeal was heard in relation to the WIN, the claimant returned to work in the Legacy Investigation Branch ("LIB") on 30 August 2019.

95. On 2 September 2019, the claimant attended an appeal meeting with her second line manager, witness E, regarding the issue of a first written improvement notice (FWIN). Prior to this appeal, the claimant made a written submission asking that her absence be considered as per DDA and asking for adjustments suggested in the HR Support Bulletin, namely:

1. Relaxation of the trigger points.
2. Deferral of management action at that time.
3. No further action if considered reasonable by the line manager.

96. Despite witness E being on clear notice that the claimant had a disability for the purpose of the DDA, like witness A, as soon as witness E became aware that the claimant had a disability for the purposes of the DDA 1995, she should have immediately referred herself to the respondent's Guidance for Managing Employees with a Disability. Like witness A, she did not do so. Again, like witness A, when cross-examined as to why she did not do so, witness E seemed completely unaware of the existence of the Guidance.
97. Witness E also failed to complete a reasonable adjustment request form 98/1 with the claimant. The tribunal finds that witness E considered only the information she was presented with and made no attempt to give any consideration to the adjustments in the HR Support bulletin or seek the support or opinions of those in OHW/Attendance Team or HR. The tribunal finds that the actions of Witness E were no more than a "rubber stamping" of witness A's decision.
98. On 4 September 2019, the claimant was informed by witness E that her appeal had not been upheld.
99. Witness E also carried out a Stage 2 absence meeting on this occasion and issued an NFA on that date thereby drawing a line under the claimant's absence.

CONCLUSIONS

100. The tribunal applied the relevant principles of law to the findings of fact set out above in order to reach the following conclusions.-

Disability

101. There was no dispute between the parties that the claimant is a disabled person for the purposes of the Disability Discrimination Act 1995 and that the claimant's disability was that of post-natal depression.

The duty to make reasonable adjustments

102. The role of the tribunal, in this case, was to establish whether or not the respondent had a duty, to the claimant, to make reasonable adjustments in the application of the Absence Management Procedures. In line with the guidance given in **Environment Agency v Rowan [2008] IRLR**, the tribunal has considered each aspect of Section 4A of the DDA in order to determine whether and when the duty to make reasonable adjustments arose in this case. The tribunal is very mindful of the guidance given in **Rowan** that "*an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process.*"
103. Firstly, the tribunal considered whether there was a relevant provision, criterion or practice ("PCP") applied by the employer. In this case, the tribunal had little hesitation in concluding that the PCP, which was of relevance in this case, is the

provision, within the revised attendance management policy, that the claimant must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. There was no dispute between the parties in this regard.

104. The next question which this Tribunal had to consider was whether the PCP, in question, placed the claimant at a substantial disadvantage compared to persons who are not disabled.
105. The first identified disadvantage relied upon by the claimant was that, as someone suffering from a depressive condition, she was considerably more likely to fall foul of the triggers than a non-disabled officer, thus exposing her to the increased likelihood of recorded disciplinary action and potentially dismissal. It was also submitted that, in her mental condition, she was also more likely to feel that the imposition of a warning was unsupportive and a setback to her mental health and confidence in returning to work.
106. In assessing this disadvantage, the tribunal is mindful of the decision in **Nottingham City Transport Limited v Harvey** which states that there must be a causative link between the PCP and the disadvantage. If a non-disabled person would be affected by the PCP in the same way as a disabled person, then there is no comparative disadvantage to the disabled person. In this case, there was no evidence put before the tribunal, medical or otherwise, to demonstrate that the claimant was more likely to fall foul of the attendance triggers than a non-disabled officer. In the absence of medical evidence from the claimant to demonstrate a substantial disadvantage, the tribunal must take a step back and assess this objectively. On doing so, the tribunal finds that a non-disabled person, subject to an absence management process and a written improvement notice, was highly likely to have experienced the same upset and distress as the claimant.
107. Next, the tribunal examined who were the relevant comparators in this context. The proper comparator is a non-disabled person who, by reason of illness, was subject to the same Attendance Management Policy. In this case, the tribunal was presented with six comparators none of whom were disabled. Two of the comparators were managed under the Bradford scheme while the other four were managed under the current revised Attendance Management Policy. Of the four managed under the revised scheme, while all had breached the triggers, all four had absences considerably shorter than the claimant's 115 days, which was the level of absence incurred by the claimant at the date of issuing the FWIN. The comparators were each issued with a "NFA." The tribunal notes that the claimant was also issued with a NFA in relation to her first absence in May 2019 and again in relation to her second absence in September 2019.
108. Accordingly, in line with the legal test espoused in **Rowan**, the tribunal therefore determines that the duty to make reasonable adjustments has not been triggered as the claimant has demonstrated no substantial disadvantage whether compared to a non-disabled comparator or otherwise.
109. Moreover, the tribunal is mindful of the EAT decision in **Bray v Camden London Borough EAT** that an employer cannot always discount disability related absences. The purpose of an Attendance Management Policy is to get employees back to

work and the respondent's AMP had that effect in this case. The claimant returned to work shortly after the FWIN was issued and, at the date of the tribunal, had had no further absences.

110. That, however, is not the end of the matter. While there is no requirement under the statutory disability discrimination legislation to complete a form 98/1, by not completing such a form, in this case, the tribunal is very clear that the respondent has not complied with its own Guidance for Managing Employees with a Disability.
111. That does not get the claimant over the hurdle of successfully bringing a reasonable adjustments disability claim. Not considering a policy is **not** a failure to make a reasonable adjustment as per ***Carphone Warehouse v Martin [2013] EqLR 481 EAT***. The law is very clear, under ***Environment Agency v Rowan [2008] IRLR***, that in order to succeed in a reasonable adjustment claim, consideration needs to be given to each aspect of section 4A of the Disability Discrimination Act . Like the ***Carphone Warehouse*** case, the tribunal can't "shoehorn" the facts of this case, and the respondent's complete disregard for its Guidance on Managing Employees with a Disability, into the relevant provisions of section 4A of the Disability Discrimination Act.
112. That said, had the tribunal found that the duty to make reasonable adjustments had been triggered, the tribunal would have found that the particular steps identified by the claimant (namely relaxation of the trigger points, deferral of management action, no further action) were reasonable adjustments as they are in line with those reasonable adjustments set out at Appendix D of the Attendance Management Policy.

Concluding Comments

113. This is a case in which the tribunal unanimously felt that the claimant had been let down by each manager's lack of awareness of the respondent's Guidance on Managing Staff with Disabilities. The tribunal was shocked that some of the respondent's witnesses were totally unfamiliar with the respondent's policies on disability. There appeared to be an apparent disconnect between looking at the Attendance Management Policy and its connection to the Guidance on Managing Staff with Disabilities.
114. The Disability Discrimination Act 1995 has been in operation now for over 25 years. Given that the respondent is a major employer in Northern Ireland, the tribunal would suggest that serious consideration should be given, by the respondent, to better educating and training its managers about its disability policies.
115. The tribunal unanimously felt that, if proper consideration had been given to the Guidance on Managing Staff with Disabilities, together with Appendix D of the Attendance Management Policy, the hurt and upset felt by the claimant, at not having her disability even considered/acknowledged, could have been alleviated.
116. The tribunal would suggest that the respondent should review the concerns which emerge from this decision and consider appropriate training in relation to the application of the Attendance Management Policy in conjunction with its Guidance on Managing Staff with Disabilities.

117. As a matter of courtesy to the claimant, the tribunal also suggests that the respondent review its attendance records to ensure that they are accurate and that no warnings, issued in error, remain on the claimant's file. The claimant should be advised of the outcome of any such review.

Employment Judge:

Dates and place of hearing: 1 June, 2 June, 4 June & 1 July 2021, Belfast.

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