THE INDUSTRIAL TRIBUNALS

CASE REF: 7124/19

CLAIMANT: **Linda Margaret Taylor Sterling**

RESPONDENTS:
1. **Logan Wellbeing Belfast Limited**
2. **Ruth-Ellen Logan/Rutherford**
3. **Lauren Troughton**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims of unfair dismissal, unlawful disability discrimination, and public interest disclosure detriment are dismissed in their entirety against all respondents. The respondent's application for an award of costs against the claimant is refused.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Crothers**

Members: **Mr R McKnight**
Mr D Walls

APPEARANCES:

The claimant was present and represented herself.

The respondents were represented by Mr N Richards, Barrister-at-Law, instructed by McCartan Turkington Breen Solicitors.

TITLE

1. The title of the first-named respondent was amended to that shown above.

BACKGROUND

2. The case has a substantial background of multiple Preliminary Hearings and Case Management Discussions.

MEDICAL EVIDENCE

3. The tribunal bore in mind the report of Mary Rooney (Chartered Psychologist) dated 10 January 2020 in relation to the claimant, and afforded her necessary time and

flexibility. It conducted the hearing in accordance with its overriding objective.

COSTS APPLICATION

4. The record of a judgment on a preliminary issue date 25 November 2020 records as follows:-

(i) *"15. The respondent sought costs in relation to the second in the long line of Case Management Discussions which had occurred on 4 November 2019. The basis of that application was that the claimant's solicitor and Counsel had indicated at that Case Management Discussion that they had been unable to take instructions from the claimant between 8 August 2019 and date of that Case Management Discussion on 4 November 2019. The time of the respondents and indeed the time of the tribunal had been totally wasted in that respect on 4 November 2019. The purpose of that Case Management Discussion had been to determine whether or not there had indeed been a claim of protected interest disclosure within the claim form and that had been not addressed. The claimant indicated that she had been unwell and "all over the place" at that time. No medical evidence had been produced previously or indeed in the course of this Preliminary Hearing.*

16. I directed that that costs application would be dealt with at the start of the full hearing but that the claimant must be in a position to provide medical evidence by way of report or otherwise at that stage which indicated that she was unable to provide instructions to her solicitor between 8 August 2019 and 4 November 2019 or otherwise to explain why she had been incapable of dealing with that matter on 4 November 2019."

(ii) The tribunal was presented with medical evidence by the claimant in relation to the Costs Application brought by the respondent under Rule 73 of the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020. The tribunal also took into account Rule 81 in relation to the claimant's ability to pay.

(iii) The tribunal must go through a two stage process in determining whether to award costs. The tribunal must firstly determine whether the claimant, (in this case) acted vexatiously, abusively, disruptively or otherwise unreasonably in … the way that the proceedings (or part) have been conducted. The tribunal must then decide whether or not it is appropriate to exercise its discretion to award costs in the particular circumstances of the case ***(Criddle v Epcot Limited UKEAT/0275/05 and Khan v Kirklees BC [2007] EWCA Civ. 1342).***

(iv) The tribunal is satisfied that the claimant did act unreasonably. The respondents' application was for £350.00 in respect of counsel fees and £500.00 for Solicitor's costs. The tribunal established that the claimant had been receiving benefit from her effective date of termination of employment with the first-named respondent amounting at the time of hearing to £500.00

per month. In these circumstances the tribunal was satisfied that no award of costs should be made.

THE CLAIM

5. The claimant claimed that she had been unlawfully discriminated against on the ground of disability, that she had been subjected to a detriment by virtue of Article 70B of the Employment Rights (Northern Ireland) Order 1996 ("the Order") and that she had been unfairly dismissed by the first-named respondent ("Logan Wellbeing"). The respondents denied her claims in their entirety and contended that her disability discrimination and public interest disclosure claims were out-of-time. In her claim form to the tribunal, presented on 7 March 2019, the claimant, in addition to unfair dismissal, ticked boxes relating to age and disability discrimination. In a judgment on a preliminary issue, incorporating a section on case management, dated 27 May 2021, it is recorded as follows:-

"***The Claimant's Statement and The Protected Disclosure/Whistleblowing Claim***

9. At the outset of the hearing Mr Richards indicated that he intended to make application to have parts of the claimant's witness statement struck out on grounds of relevance ie that a large part of the narrative in that statement did not relate to the claims before the tribunal. Mr Richards also pointed out that the claimant made little or no mention of her disability nor of the dismissal process in her statement.

10. Mr Richards also stated that the focus of his application in relation to the claimant's statement would be on the scope of the protected disclosure claim. A Notice for Additional Information in relation to the protected disclosure claim was served in March 2021 and, whilst the claimant at first could not recollect having received that, she did then confirm[ed] that she had received it. Mr McShane undertook to provide a further copy of that Notice for Additional Information (which is one page long and is drafted in uncomplicated language) by 5.00 pm on the day of the hearing.

11. The tribunal Ordered that the claimant must provide written Replies to that Notice of Additional Information ***by 17 June 2021****. I went through the information requested on the Notice and explained it and the claimant indicated that she understood what was required of her.*

12. Given that the scope of the protected disclosure claim had not been clarified by the claimant I declined to deal with any application to strike out parts of the claimant's statement because it would not be possible to assess the relevance parts of the statement without the clear delineation of the protected disclosure claim.

13. When the respondent receives Replies to the Notice for Additional Information the respondent can decide whether or not it intends to request a Deposit Order Hearing in relation to the whistleblowing claim as Mr Richards indicated that that had previously been considered by the respondent at one point."

THE ISSUES

6. The issues before the tribunal were as follows:-

   (1) Was the claimant subjected to unlawful disability discrimination by the respondents?

   (2) Are any such claims in time, or, if not, should time be extended on a just and equitable basis?

   (3) Was the claimant subjected to a protected disclosure detriment by virtue of Article 70B of the Order?

   (4) Is the claim under Article 70B in time, or, if not, should time be extended under Article 71(3) of the Order?

   (5) Did Logan Wellbeing unfairly dismiss the claimant?

SOURCES OF EVIDENCE

7. The tribunal heard evidence from the claimant and on the respondents' behalf from Ruth Ellen Logan, Complementary Fertility Practitioner and Wellbeing Consultant with Logan Wellbeing and Felicity Lynch, Manager, with Logan Wellbeing. The tribunal also received a bundle of documentation, together with other correspondence in the course of the hearing. A statement was also adduced from Dr Jeremy Hamilton

8. (i) During the hearing the Tribunal referred to the Northern Ireland Court of Appeal decision in **Patrick Joseph Rogan v South Eastern Health and Social Care Trust ('Rogan')** – judgement delivered on 13 October 2009.

   In paragraphs 15 and 26 of his judgement, Morgan LCJ states:-

   [Referring to Article 130 of the Employment Rights (Northern Ireland) Order 1996]

   > *"Those provisions make it plain that the burden of proof is on the employer to establish the reason for the dismissal and …… to demonstrate that it was a reason relating to the conduct of the employee. If the employer successfully does so the Tribunal then applies its judgment as to whether the employer acted reasonably in treating the conduct as a sufficient reason for dismissal…*
   >
   > *The judgement as to the weight to be given to evidence was for the Disciplinary Panel and not for the Tribunal. In this instance it appears that the Tribunal has strayed into the forbidden territory of making its own determination of the evidence."*

   (ii) The Tribunal therefore sought to avoid straying into the 'forbidden territory' of making its own determination of the evidence.

FINDINGS OF FACT

9. 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 was employed by the respondent from June 2017 until 22 February 2019.

(ii) Logan Wellbeing provides Complementary Therapies with a focus on Fertility. The claimant worked for the respondent as a Fertility Practitioner for less than two years and was based at a clinic on the Lisburn Road, Belfast. The respondents contended that difficulties were experienced with the claimant from the commencement of her employment in connection with her attitude and conduct towards other staff members and clients. They contended that these difficulties continued throughout her period of employment and included elements of aggression and bullying, complaints from clients regarding appointments not being carried out to the relevant standards and inappropriate comments being placed on the Logan Wellbeing WhatsApp Group site. It appears on the respondent's case, that the foregoing problem began in or about September 2017.

(iii) In or about February 2018 the claimant informed the respondent that she had been diagnosed with Hodgkin's Lymphoma. The claimant took sick leave from 21 February 2018 to 19 April 2018. There was no dispute about the claimant having a disability for the purposes of the tribunal proceedings. The claimant worked reduced hours upon her return and she was assured that she could rest and take breaks when required. The tribunal is satisfied that Logan Wellbeing kept in regular contact with her and that she did not request any further adjustments. She indicated in or about September 2018 that her condition had improved. The tribunal was referred to documentation pertaining to specific complaints by staff members against the claimant. In her evidence the claimant denied that she received a phased return to work. However, the tribunal was referred to documentation which, taken together with the respondents' evidence, proves otherwise. The tribunal also accepts that Ruth Ellen Logan and the Director, Mr Rutherford, arranged an advance of wages to the claimant in or around June 2018 which enabled her to embark upon a holiday break. The claimant, in her witness statement, and in her evidence made multiple allegations against the respondents, which the tribunal considered. The tribunal was shown documentary evidence of Ruth Ellen Logan having issued the claimant with verbal and written warnings between July and September 2018 during Felicity Lynch's maternity leave. The claimant denied receiving such warnings. However the notes of an appraisal meeting held between Mrs Lynch and the claimant on 23 October 2018 contain the following:-

> *"discussed other staff feeling. Linda could be aggressive at times – raised on final warning … did not need to get into any more trouble at work … Felicity raised inappropriate messages Linda put on work WhatsApp Group."*

The claimant eventually agreed in her evidence that such matters had been discussed.

(iv) One of the allegations raised by the claimant was that Ruth-Ellen Logan had called her "Wiggy". The tribunal is satisfied, on balance, that the claimant herself introduced this term and she was still making jokes about it in December 2018, as documentation shown to the tribunal reveals. It also seems to have been referred to in exchanges between Ruth Ellen Logan and the claimant without apparent offence or objection.

(v) The tribunal considers it significant that a Facebook screenshot of a message between the claimant and Ruth Ellen Logan at the end of 2018 reads:-

> *"Loved this … Happy Christmas Ruth-Ellen thank you for all that you do and for just being you"*

(vi) A further Facebook screenshot shown to the tribunal contains further messages from the claimant to Felicity Lynch in the same tenor, and includes the following:-

> *"Felicity I had an amazing day your energy was amazing … Keep on looking hot for 2018 that's my plan too ?? I am so looking forward to 2019 .. my last two years almost have been busy emotional hurtful .. but know what Logan supported my life .. and I will give that back to 2019 with support and with a good heart .. have a real nice few days off … and happy new year to you and your family …???"*

Such screen shots indicate, in the tribunal's view, that Ruth-Ellen Logan did not unlawfully discriminate against the claimant. The claimant admitted that she was not accusing Felicity Lynch of treating her badly. The claimant asserted in the tribunal that the message to Ruth-Ellen Logan was a sham. In the tribunal's view, this assertion lacks credibility.

(vii) Earlier, on 31 January 2019, a further meeting was held between David Rutherford, Ruth-Ellen Logan and the claimant regarding a complaint from a client's husband. In the typed notes of that meeting it is recorded as follows:-

> *"David – 'Do you understand the seriousness of the allegation?'*
>
> *Linda – 'Yes, but I don't remember giving out any other client's personal information'*
>
> *David – 'Well the client says otherwise, and it is extremely difficult for us to prove we didn't if he wants to put it up on social media, negative publicity like that can be very damaging to a clinic like this.'*
>
> *Linda – 'I understand that, I forgot to pass on the message as you were on holiday and he was wanting to talk to Ruth-Ellen. He wanted a refund anyway.'*

David – 'Maybe so, but you are providing a service. That man deserved a courtesy call to check on him and his wife. In future an incident of this seriousness will be viewed as gross misconduct as you are failing to fulfil the standard of service customers expect. Do you understand?'

Linda – 'Yes, I understand, sorry.'"

(viii) In the course of the evidence, when confronted by the complaints made by colleagues, the claimant contended that they were lying and when confronted with certain documentation including warnings, meeting notes and text messages she maintained they were fabricated. The claimant repeated several times in her evidence that Logan Wellbeing was exploiting vulnerable women and disclosed her intention of publicising such matters. No satisfactory evidence was before the tribunal to substantiate these allegations. The claimant also engaged in post-dismissal harassment against Ruth-Ellen Logan/Rutherford as a result of which she was convicted before a Magistrate's Court. The certificate of conviction contains the following:-

"*The Court hereby orders that:-*

"The defendant is forbidden to intimidate, harass or pester Ruth-Ellen Rutherford and must not instruct, encourage or, in any way suggest that any other person should do so. Conditional discharge: conditional discharge for two years"."

(ix) It appears that the claimant pleaded not guilty on 21 October 2020 but was made the subject of a Restraining Order on 7 April 2021, to last until 7 October 2022. The Certificate of Conviction is dated 18 August 2021.

(x) The tribunal assessed the claimant as lacking credibility during substantial parts of her evidence and is satisfied, in areas of conflict, that the respondents' evidence is to be preferred.

(xi) The tribunal considered all of the claimant's allegations referred to during her evidence. Although, in her claim form to the tribunal, which included allegations of age discrimination (subsequently withdrawn) and disability discrimination, she inserts a time period between April 2018-November 2018, there is also a specific reference to September 2018. The tribunal finds, on the evidence, that any allegations of failure to make reasonable adjustments pertain to the period between February and September 2018, which is in excess of three months prior to the presentation of her claim form on 7 March 2019. The tribunal, particularly in light of its findings regarding the claimant's exchanges with Ruth-Ellen Logan at the end of December/beginning of January 2019 and subsequently, when taken together with confirmation from the claimant during her evidence that she was not accusing Felicity Lynch of treating her badly, finds that there is no substance in her claim of direct disability discrimination or in relation to the alleged failure to make reasonable adjustments. This is altogether apart

from the out-of-time issue. The tribunal is satisfied, that no foundation has been laid by the claimant in her evidence for an extension of time on a just and equitable basis to present her disability claim.

(xii) The tribunal is satisfied that the claimant was pursuing a public interest disclosure claim to advance her investigation primarily into Logan Wellbeing's business ethnics. It accepts the evidence of Felicity Lynch and Ruth-Ellen Logan that almost none of the issues relied on by the claimant during her evidence in an effort to establish a public interest disclosure claim were raised by her during her employment. In relation to the claimant's public interest disclosure claim, the tribunal reminded itself that a worker has the right not to be subjected to detriment by any act, or deliberate failure to act, by her employer or by a co-worker acting in the course of their employment on the ground that the worker has made a protected disclosure. Such a disclosure must be a qualifying disclosure which is "a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more" of six specific categories.

(xiii) A protected disclosure can be made to the employer irrespective of whether the recipient already knows about what is being disclosed. However, there needs to be a communication of information with sufficient factual content and specificity, rather than pure opinion or allegation. The information does not have to be true, although this factor may have a bearing upon whether the worker reasonably believes that the information tended to show a relevant failure.

(xiv) In relation to "public interest", the questions are:-

(a) whether at the time of the disclosure the worker believed it to be in the public interest, even if that was not her predominant purpose; and
(b) if so, whether her belief was reasonable.

Factors to be considered include the number of people whom the disclosure served, the nature of the wrong doing, and interests which it affected, and the identity of the alleged wrong doer. Furthermore, the protected disclosure must be the reason why the employer acted or deliberately failed to act. It must materially influence the treatment of the worker. The onus is on the claimant to prove that she made protected disclosures and suffered a detriment due to an act or deliberate omission by the employer. Should she be able to do so, the burden then shifts to the respondent employer to show that the protected disclosures played no part in how she was treated.

(xv) The tribunal is satisfied that the claimant was pursuing a public interest disclosure claim to advance her investigation primarily into Logan Wellbeing's business ethics. It also reiterates its acceptance of the evidence of Felicity Lynch and Ruth-Ellen Logan that almost none of the issues relied on by the claimant during her evidence in an effort to establish a public interest disclosure claim, were raised by her during her employment.

(xvi) A judgment of the tribunal on a preliminary issue, held on 25 November 2020

ruled, on balance, that there was a claim of alleged public interest disclosure before the tribunal. The amended response, presented to the tribunal in March 2021, denied the claimant's public interest disclosure allegations and pointed out that the only issues "reported" by the claimant related to a colleague allegedly sleeping at work and/or being under the influence of alcohol. The amended response went on to point out that the claimant had neither identified any qualifying disclosure nor how such alleged disclosures were in her reasonable belief in the public interest, or how such alleged disclosures influenced any alleged mistreatment.

(xvii) The claimant made the case that she had not received relevant training but this is contradicted in a training and development form dated 15 November 2017 and cannot be relied on in the context of a public interest disclosure argument. Furthermore, the suggestion by the claimant that Ruth-Ellen Logan was posing as a doctor is without substance. The signs on the Consultation Room doors were left by previous occupants and were subsequently removed. The tribunal is further satisfied that blood test slips from the Royal Victoria Hospital were in their nature generic and administrative and labelled everyone as "DR". The claimant also made allegations regarding Doctor Barnish's involvement with Logan Wellbeing. However, as a prescriber of franchise drips, there was nothing inherently wrong or inappropriate in his name appearing on the company's website or on paperwork in light of the fact that he wished to retain ownership of his brand for legitimate business reasons. The tribunal finds, at any rate, that the claimant did not approach her employer regarding these matters. The tribunal also finds, on the evidence, that even if such allegations reached the threshold of "disclosure of information", the claimant did not have a reasonable belief that either of these issues tended to show fraud.

(xv) During her evidence, the claimant also stressed on several occasions that she was instructed to treat a bleeding client and refused. In the first place the tribunal was satisfied that this client had what was known as common brown "spotting" and not bleeding. The client was not at risk, and a Consultant had confirmed this. When the claimant refused to deal with this client, Felicity Lynch decided to swap clients with her in order to ensure treatment for the client. The tribunal is satisfied on the evidence (which included text messages), that this episode occurred on 8 November 2018 and not closer to the time of the claimant's dismissal as indicated by her in her evidence. In one text, on 8 November 2018, (omitting the identity of the individual concerned) Ruth-Ellen Logan states:-

> *"Linda, all I am saying is you should be confident to treat […] and we will offer more training as required. All the other stuff, I treat you all equally and quite frankly meet myself backwards most days I am so busy."*

She added in another text:-

> *"Don't worry Linda I spoke to Felicity and I know […] was well treated xx."*

(xvi) In another (earlier) text exchange the claimant states:-

> *"Then felicity cones [sic] at me telling me I'm doing it a day she's stood with an angry face saying she's not happy with me…*
>
> *What more do yous (sic) want I try my best and do whatever hours possible and but nothing is [sic] seem to do is good enough this hurts me to the core of my being and I hide it."*

Ruth-Ellen Logan replies as follows:-

> *"That's not true Just know your method*
>
> *I just want you to know that you can treat […]*
>
> *There's no bother."*

(xvii) The tribunal is not satisfied, if the claimant refused to treat this client, that she could justifiably entertain a reasonable belief that the health and safety of the client was likely to be endangered. There is no evidence in any event of any detriment being suffered by the claimant in consequence. Furthermore, contrary to what the claimant was seeking to advance, it appears that she brought up the issue of her wages and used the idea of vulnerable clients to argue for more money. The tribunal was also referred to a number of texts in this regard. The claimant had misleadingly contended that it was in response to her complaining to Ruth-Ellen Logan about being unhappy, and not being medically trained to treat vulnerable clients and being asked questions, that Ruth-Ellen Logan promised her a pay rise. The tribunal, in not accepting the claimant's evidence in this regard is also satisfied that the claimant was not, in this instance, or on other occasions, acting as a whistle-blower on behalf of clients. It does not accept that Ruth-Ellen Logan was trying to silence her.

(xviii) Apart from the substantive finding pertaining to the claimant's public interest disclosure case, there is no credible basis laid before the tribunal as to why it was not reasonably practicable for the claimant to have presented such a complaint, even if such properly existed, prior to 7 March 2019.

(xix) The tribunal also considered the claimant's allegations against the third-named respondent in the context of her disability discrimination claim. Ms Troughton was dismissed on 19 November 2018 and therefore any claim against her is also out-of-time. Again, no satisfactory basis was laid before the tribunal as to why time should be extended on just and equitable basis.

(xx) In relation to the unfair dismissal claim, the claimant did not have a clear disciplinary record. The tribunal was shown an undated record of a verbal warning, together with evidence of a written warning in correspondence of 31 July 2018 and a further written warning dated 12 September 2018 which was to remain on her file for 12 months. The tribunal has already referred to another warning administered at a meeting on 31 January 2019. On this

basis, it is clear to the tribunal that the claimant's disciplinary record did not assist her in terms of mitigation. It is obvious to the tribunal that Logan Wellbeing, in dismissing the claimant for gross misconduct on 22 February 2019, considered that there were no mitigating factors in the claimant's favour at the time of her dismissal.

(xxi) The claimant denied having received correspondence dated February 2019 from the respondent which reads as follows:-

"Dear Linda

Disciplinary Meeting

A meeting has been scheduled for Friday 22nd February at 9am. The meeting will be held at Logan wellbeing & Medical, 354 Lisburn Road. The meeting is [sic[relation to an incident on Saturday 2nd February, the staff opening the clinic that morning arrived to find your key in the front door.

The company takes this very seriously as this leaves the company-

1. vulnerable to break in and theft.

2. Without insurance if an incident occurs.

You will be given an opportunity to answer the above at the meeting with the clinic director, David Rutherford. If the company deems this to be gross misconduct it may result in dismissal.

You have the right to be accompanied by a witness.

Regards
Felicity Lynch"

(xxii) The tribunal was shown handwritten notes of the disciplinary hearing which referred, inter alia, to a final written warning. The notes also show that the claimant herself referred to three written warnings. The tribunal is satisfied, on the evidence before it, that the claimant was aware of the correspondence convening this meeting and therefore, the reason for convening it. There is also no evidence in the notes that she complained or raised any issue about not having received the correspondence convening the meeting. Logan Wellbeing employed the services of a Human Resources consultant to guide and advise throughout the disciplinary process.

(xxiii) The tribunal finds it appropriate to set out the disciplinary outcome letter dated 25 February 2019 in its entirety bearing the mind the judgment of Morgan LCJ in ***Rogan*** that the judgment as to the weight to be given to evidence was for the disciplinary panel and not for the tribunal.

"Dear Linda

TERMINATION OF EMPLOYMENT

You were invited to attend a meeting with the clinical director, David Rutherford, regarding an incident where you left the key in the front door of the clinic overnight. Just prior to the meeting, David Rutherford called the clinic and spoke with myself, Felicity, clinical manager and notified me, an emergency had arisen, and he was unable to attend without a witness, I approached you in reception and asked if you would be happy to proceed with the meeting as a witness and indeed to take notes. To which you agreed.

In the meeting, I outlined that the meeting was regarding an incident on the evening of 1st February where you left the clinic at the end of shift and failed to remove the key from the front door. I outlined the management took this very seriously as it left the clinic vulnerable to theft, vandalism, and prescription medication being potentially at risk of being stolen. The clinic would also be left without insurance cover if an incident did occur as the keys were available in the door.

You said you thought you had either left the key in the door or dropped it.

You then admitted you had been distracted and had left it in the door as you were getting ready to go on holiday the next day.

I also raised that you had not reported your key missing. Instead on the 11th February, when you returned to work you asked, Ceara, another member of staff for her key and said, 'yours had been taken from your purse.'

I excused myself to consider my decision, I had no other option than to dismiss you with immediate effect due to the severity of the incident.

Having very carefully considered the incident and your comments I felt I had no alternative but to terminate your employment on the grounds of gross misconduct and with immediate effect.

This letter confirms the decision.

You do have a right of appeal and if you wish to do so you should contact David Rutherford, Managing Director, in writing within 7 days of receipt of this letter.

Regards,

Felicity Lynch
Clinical Manager".

(xxiv) Although the claimant did forward a letter of appeal to David Rutherford dated 22 February 2019, she chose not to proceed with an appeal.

THE LAW

10. (1) The law in relation to unfair dismissal is set out in ***Rogan*** as follows:-

(i) *"… the statutory provisions governing the determination of the fairness of the dismissal were found in article 130 of the Employment Rights (Northern Ireland) Order 1996."*

*"**130.**— (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this paragraph if it—

(b) relates to the conduct of the employee, ...

(4) ... Where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

Those provisions make it plain that the burden of proof is on the employer to establish the reason for the dismissal and in this case to demonstrate that it was a reason relating to the conduct of the employee. If the employer successfully does so the Tribunal then applies its judgment to whether the employer acted reasonably in treating the conduct as a sufficient reason for dismissal.

[16] The manner in which the Tribunal should approach that task has been considered by this court in **Dobbin v Citybus Ltd [2008] NICA 42**. Since there was no dispute between the parties in relation to the relevant law I consider that it is only necessary to set out the relevant passage from the judgment of Higgins LJ.

"[48] The equivalent provision in England and Wales to Article 130 is Section 98 of the Employment Rights Act 1996 which followed

equivalent provisions contained in Section 57 of the Employment Protection (Consolidation) Act 1978.

[49] The correct approach to section 57 (and the later provisions) was settled in two principal cases - British Homes Stores v Burchell [1980] ICR 303 and Iceland Frozen Foods Ltd v Jones [1983] ICR 17 – and explained and refined principally in the judgments of Mummery LJ in two further cases - Foley v Post Office and HSBC Bank Plc (formerly Midland Bank Plc) v Madden reported at [2000] ICR 1283 (two appeals heard together) and J Sainsbury v Hitt [2003] ICR 111.

[50] In Iceland Frozen Foods Browne-Wilkinson J offered the following guidance –

> *"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial Tribunal to adopt in answering the question posed by section 57(3) of the Employment Protection Consolidation) Act 1978] is as follows:-*
>
> *(1) the starting point should always be the words of section 57(3) themselves;*
>
> *(2) in applying the section an industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial Tribunal) consider the dismissal to be fair;*
>
> *(3) in judging the reasonableness of the employer's conduct an industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
>
> *(4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
>
> *(5) the function of the industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."*

[51] To that may be added the remarks of Arnold J in *British Homes Stores* where in the context of a misconduct case he stated -

> *"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure," as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt." The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."*

(ii) At paragraph 26 of ***Rogan,*** Morgan LCJ states as follows:-

> *"The judgment as to the weight to be given to evidence was for the disciplinary panel and not for Tribunal. In this instance at appears that the Tribunal has strayed into the forbidden territory of making its own determination on the evidence".*

Again at paragraph 27 of his judgment, Morgan LCJ states:-

> *"In our view the conclusion by the Tribunal that 'the panel found as proven fact incidents of assault as having occurred against the clear weight of the evidence' is a firm indication that the Tribunal engaged in the weighing of these matters when it was for the disciplinary panel to carry out that task".*

In paragraph 28 he continues:-

> *"The Tribunal's conclusion that the disciplinary panel had not approached this matter in a fully open and enquiring manner appears to have been reached because of its view about the weight of the evidence. None of this is an indicator of a lack of reasonable investigation".*

Girvan LJ in paragraph 7 of his judgement states as follows:-

> *"The investigation was one which was reasonable in the circumstances. It is clear from the authorities that the employer's reasoning must not be subjected to the kind of scrutiny to which an appellate court would subject a Tribunal decision."*

11. In her Majesty's Court of Appeal in Northern Ireland judgment in ***David Rice v Dignity Funerals Ltd*** (reference STE10750 delivered 07/11/2018) Stephens LJ stated as follows:-

> *"(49) However whilst the tribunal must not substitute its decision as to the right course to adopt for that of the employer this does not mean that there is a requirement of such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within Article 130(4). This is not the law. The question in each case is whether the Industrial Tribunal considers the employer's conduct to fall within the band of reasonable responses, see* ***Iceland Frozen Foods Limited v Jones*** *at Page 25.*
>
> *(50) As stated in* ***Connolly****, application of the overall test does "not exclude consideration of a less sanction as a relevant consideration." Ordinarily the determination of the question whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for the dismissing the employee "in accordance with equity and the substantial merits of the case" involves consideration as to "whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct".*
>
> *(51) The character of gross misconduct was considered in* ***Sandwell and West Birmingham Hospitals NHS Trust v Mrs A Westwood [2009] UKEAT/0032/09/LA.*** *It was stated that "the question as to what is gross misconduct must be a mixed question of law and fact …". The legal test is that "gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee." That is "something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract" or "conduct repudiatory of the contract justifying summary dismissal." In the disobedience case of* ***Laws v London Chronicle (indicator Newspapers Ltd [1959] 1WLR 698*** *at Page 710 Evershed MR said that:- the disobedience must at least have the quality that it is "wilful": it*

does (in other words) connote a deliberate flouting of the essential contractual conditions."

12. **Protected Disclosures**

(i) The legislative provisions governing protected disclosures are contained in the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order"). Whistleblowing protection extends to "employees" and "workers" as defined in the Order.

(ii) The following provisions are relevant:-

*"**67A. Meaning of "protected disclosure"***

In this Order a "protected disclosure" means a qualifying disclosure (as defined by Article 67B) which is made by a worker in accordance with any of Articles 67C to 67H.

Disclosures qualifying for protection

***67B.**—(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:-*

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding sub-paragraphs has been, is being or is likely to be deliberately concealed."

"Disclosure to prescribed person

***67F.**—(1) A qualifying disclosure is made in accordance with this Article if the worker—*

(a) makes the disclosure to a person prescribed by an order made by the Department for the purposes of this Article, and

(b) reasonably believes:-

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and

(ii) that the information disclosed, and any allegation contained in it, are substantially true.

(2) An order prescribing persons for the purposes of this Article may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.

Disclosure in other cases

67G.—*(1) A qualifying disclosure is made in accordance with this Article if:-*

…

(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in paragraph (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in paragraph (1)(d) are:-

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with Article 67F,

(b) that, in a case where no person is prescribed for the purposes of Article 67F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information:-

(i) to his employer, or

(ii) in accordance with Article 67F.

(3) In determining for the purposes of paragraph (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to:-

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within paragraph (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with Article 67F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within paragraph (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this Article a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in paragraph (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure."

"Protected disclosures

70B.—*(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*

(2) . . . this Article does not apply where:-

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part XI).

(3) For the purposes of this Article, and of Articles 71 and 72 so far as relating to this Article, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by Article 67K."

"Complaints to industrial tribunals

71.*(3) An industrial tribunal shall not consider a complaint under this Article unless it is presented—*

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months ….

(4) For the purposes of paragraph (3):-

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed 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 failed act if it was to be done."

Protected disclosure

134A. *An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

(iii) Harvey at C(iii) provides useful guidance as follows:-

"[93] *If it can be established that a worker has made a protected disclosure, as defined, it then becomes necessary to consider whether or not the worker has been subjected to an unlawful detriment as a result. When considering this question it is important that a tribunal should, in reaching and explaining its conclusions, set out separately the elements necessary to establish liability and consider them separately and in turn (see Harrow London Borough v Knight [2003] IRLR 140, EAT). This general approach was subject to more extensive guidance to tribunals dealing with these cases from Judge Serota in Blackbay Ventures Ltd v Gahir [2014] IRLR 416, EAT, which is worth setting out in full. Taking into account the amendments to this law in June 2013 (see para 42) he put it thus:-*

"a. Each disclosure should be separately identified by reference to date and content.

b. Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an

individual having been or likely to be endangered as the case may be should be separately identified.

c. *The basis upon which each disclosure is said to be protected and qualifying should be addressed.*

d. *Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a checklist of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.*

e. *The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in s43B(1) of ERA 1996, under the "old law" whether each disclosure was made in good faith; and under the "new" law introduced by s17 Enterprise and Regulatory Reform Act 2013 (ERRA), whether it was made in the public interest.*

f. *Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to indentify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.*

g. *The Employment Tribunal under the "old law" should then determine whether or not the Claimant acted in good faith and under the "new" whether the disclosure was made in the public interest."*

[94.01] *Simplifying the above, it could be said that once a protected disclosure in an employment contract has been found to exist it needs to be shown that:-*

– *the worker has been subjected to a detriment;*

– *the detriment arose from an act or deliberate failure to act by the employer, other worker or agent (as the case may be); and*

– *the act or omission was done on the ground that the worker had made a protected disclosure."*

The ordinary meaning of giving information is conveying facts (See **Cavendish Munro Professional Risks Management Team v Geduld [2010] ICR 325 (EAT)**. In the EAT decision in the case of **Kilraine v London Borough of Wandsworth [2016] IRLR 422**, Mr Justice Langstaff states at paragraph 29 of his judgement:-

> *"The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggests that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information".*

Therefore, a tribunal has to take care to ensure that it does not fall into the trap of thinking post **Cavendish Munroe v Geduld** (supra) that an alleged disclosure had to be either allegation or information, when reality and experience taught it may well be both.

Mere allegations, expressions of opinion, or raising of grievances or a statement of position may not qualify. There can be an admixture of fact and opinion. As noted in **Bowers** in **Whistleblowing The New Law (C.3 at paragraph 3.02).**

> *"... the whistleblower may have a good hunch that something is wrong without having the means to prove it beyond doubt or even on the balance of probabilities ... The notion behind the legislation is that the employee should be encouraged to make known to a suitable person the basis of that hunch so that those with the ability and resources to investigate it can do so".*

(iv) A series of communications can collectively amount to a disclosure of information (**Shaw v Norbrook Laboratories (2014) ER 139**). A disclosure of information can also take place where the information is given to someone who already has that information.

(v) The categories of relevant failure contained in Article 67B of the 1996 Order have to be considered insofar as relevant. Article 67B(1)(b) refers to the fact

that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject. This can include a breach of any statutory obligation, common law obligation, such as negligence, nuisance or defamation and administrative law requirements such as a duty to consult. There is no requirement that the obligation has to be of a particular level of seriousness. However the more trivial the alleged failure, the more likely an employer will argue lack of good faith. It can include breach of the contract of employment including the implied duty of trust and confidence. In **Parkins v Sodexho Ltd [2002] IRLR 109**, it was confirmed that this category was wide enough to cover obligations under the claimant's contract of employment. If the relevant failure is in connection with a breach of legal obligations, its scope is wide (see **Hibbins v Hester's Way Neighbourhood Project [2009] IRLR 198 EAT**). In that case, where the relevant failure did not need to be by the employer.

(vi) In relation to health and safety risks, no actual breach of health and safety legislation is required. This appears to be potentially a wide category. There is nothing to exclude trivial concerns being raised. If a trivial concern is raised, the tribunal can also look at whether the worker genuinely believed that there was a danger to health and safety and whether that belief was reasonable.

REASONABLE BELIEF

(vii) The principles involved in assessing the reasonable belief element can be summarised as follows:-

(1) The test involves both a subjective test of the worker's belief and an objective assessment of whether the belief could reasonably have been held **(Babula v Waltham Forest College [2007] EWCA Civ 174) ("Babula")**.

(2) The worker can be wrong yet still hold a reasonable belief (**Darnton v The University of Surrey [2003] IRLR 133 EAT**) **("Darnton").**

(3) The test of reasonable belief applies to all elements of the test of whether the information disclosed tends to show a relevant failure including whether the relevant criminal offence or legal obligation in fact exists (**Babula**).

(4) Reasonableness of the belief is to be tested having regard not only to what was set out in the disclosure but also to the basis for that information and any allegation made (**Darnton** and **Babula**).

(5) What is reasonable depends on all the circumstances assessed from the perspective of the worker at the time of making the disclosure and it is for the tribunal to assess this. This may include consideration of the circumstances in which the disclosure was made, to whom the disclosure was made,

the context and extent to which the worker claims to have direct knowledge of the matters disclosed and a comparison with how the worker would be expected to have behaved if he genuinely and reasonably believed in the truth of the matter disclosed and that they tended to show a relevant failure (**Darnton** and **others**).

(6) The truth or falsity of the information disclosed and whether or not the relevant failure in fact occurred may be relevant when assessing reasonable belief. In other words it can be used as a tool to assess the reasonableness of the belief of the claimant at the relevant time **(Darnton)**. It is therefore relevant to the tribunal to find out if the allegation turned out to be true as this may strengthen a claimant's claim that it was reasonable to make the allegation. If the allegation turns out to be false, it does not necessarily mean that the allegation was unreasonable based on the information and circumstances at the time the claimant made the disclosure.

(7) The worker must exercise a judgement consistent with the evidence and resources available, including the expertise and seniority of the worker, their ability to investigate further, and whether it is appropriate in all the circumstances instead to refer the matter to someone else to investigate (**Darnton**).

(8) The standard to be applied has to take into account that it is only necessary to have a reasonable belief that the information 'tends to show' the relevant failure, rather than that it positively establishes that failure (**Babula**). Note however that reasonable belief in this context relates to whether or not a disclosure is a qualifying disclosure. If a worker seeks protection for wider disclosure under Articles 67F to 67G, there is an additional requirement for a reasonable belief that the information disclosed and any allegation contained in it are substantially true.

(9) In the EAT case of **Soh v Imperial College of Science, Technology and Medicine [EAT 0350/14]** a college lecturer alleged that students had told her that another lecturer had told them what would be in an exam. The EAT allowed an appeal against the tribunal decision, holding that the tribunal had erred in focusing on whether the lecturer making the assertions herself reasonably believed that the exam system was being undermined. Instead, the tribunal should have asked whether she reasonably believed that the information she was disclosing tended to show that the other lecturer had done so. As Judge Richardson stated at paragraph 47 of his judgement:-

> *"There is, as Mr Catherwoods submitted to us, a distinction between saying, "I believe X is true", and, "I believe that this information tends to show X is true".*

There will be circumstances in which a worker passes on to an employer information provided by a third party that the worker is not in a position to assess. So long as the worker reasonably believes that the information tends to show a state of affairs identified in Section 43B(1), the disclosure will be a qualifying disclosure for the purposes of that provision".

(10) The burden is on the worker making the disclosure to establish the requisite reasonable belief (**Babula**).

(11) There must be more than unsubstantiated rumours in order for there to be a qualifying disclosure (**Darnton**).

(12) The tribunal has to consider the whistleblower's state of mind based on the facts as understood by him at the relevant time. As it is the reasonable belief of the worker making the disclosure which has to be considered, the tribunal has to look at the individual characteristics of the work input **(Korashi v Abertawe Bro Morgannwg University Local Area Health Board EAT/0424/09, 12/09/11).** Judge McMullan stated in that case (which involved a surgeon) that:-

"There may be things that might be reasonable for a lay-person to have believed, (however mistakenly) that certainly would not be reasonable for a trained professional to have believed".

Detriment

(viii) Detriment is determined using the test in **Shamoon v The Chief Constable of the RUC [2003] UKHL 11**, **("Shamoon")** ie, whether a reasonable worker would, or might, take the view in all the circumstances that the treatment was to the claimant's detriment in the sense of being disadvantaged. There is no requirement to show financial detriment. If an employer's treatment of the whistleblower is to his detriment, it is immaterial that the whistleblower does not know that he is being subjected to a detriment **(Garry v Ealing [2001] IRLR 681 CA)**. An unjustified sense of grievance is unlikely to be regarded as a detriment.

(ix) The legislative provisions in relation to time-limits has been set out above. In relation to acts extending over a period, the case of **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA** is relevant. The issue for the tribunal in that case was whether there was evidence of a continuing discriminatory state of affairs, or:-

"An ongoing situation or a continuing state of affairs in which the female ethnic minority workers in the service were treated less favourably".

(x) Importantly, the detriment suffered must have been inflicted on the ground that the worker made a protected disclosure. The focus is on the reason or reasons for the employer's action. It is therefore important for the tribunal to distinguish between on the one hand detrimental acts which occur in consequence of any disclosure which does not result in liability and on the other hand detrimental acts done on grounds of having made a disclosure. In the case of **Nagaragan v London Regional Transport [1999] ICR 877**, the House of Lords set out the correct approach requiring the tribunal to consider the mental processes of the respondent and the reason why detrimental acts or omissions occurred. The tribunal must consider the motivations of the respondent, whether conscious or unconscious. The key question is whether the detrimental acts or omissions were materially influenced by the fact that the claimant made protected disclosures. The case of **London Borough of Harrow v Knight [2003] IRLR 140, (EAT)** illustrates how important it is to focus on the reason why there was a detrimental act or deliberate failure to act. The issue is whether or not the fact that the protected disclosure had been made caused or influenced the employer to act or not to act in the way complained of. The tribunal in that case should have looked at the reasons for failure to respond to the claimant's letters and for failure to protect him from being cold shouldered by colleagues.

Burden of Proof

(xi) The burden of proof in whistleblowing detriment cases operates in the same way as in the trade union detriment cases. This means that there is, in effect, a lower threshold for a claimant to surmount in order for the burden to shift to the respondent to provide an untainted explanation for any detrimental acts. Thus the initial burden is on the claimant to prove:

(1) that he made protected disclosures, and

(2) that he suffered detriment.

If he proves these two elements the burden shifts to the employer to provide an explanation which is not tainted by the fact of the claimant having made protected disclosures.

Disability Discrimination

13. **Disability Discrimination**

(1) Article 3A of the DDA provides as follows:-

"Meaning of "discrimination"

3A.—(1) For the purposes of this Part, a person discriminates against a disabled person if:-

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

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

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

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

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

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

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

(2) The tribunal found the summary on disability discrimination given by Lord Justice Hooper in the case of **O'Hanlon v Commissioners for HM Revenue and Customs [2007] EWCA Civ 283 [2007] IRLR 404**, to be of assistance. In paragraphs 20-22 of his judgment he states as follows:-

"Section 3A identifies three kinds of disability discrimination. First, there is direct discrimination. This is the situation where someone is discriminated against because they are disabled. This particular form of discrimination mirrors that which has long been found in the area of race and sex discrimination. As with other forms of direct discrimination, such discrimination cannot be justified …

Second, there is disability-related discrimination …

Third, there is the failure to make reasonable adjustments form of discrimination in subsection (2). Here, the employer can be liable for failing to take positive steps to help to overcome the disadvantages resulting from the disability. However, this is once he has a duty to make such adjustments. That duty arises where the employee is

placed at a substantial disadvantage when compared with those who are not disabled".

(3) In the case of **Tarbuck v Sainsburys Supermarkets Ltd [2006] IRLR 664, EAT**, it was held that while it will always be good practice for the employer to consult, and it will potentially jeopardise the employer's legal position if it does not do so, there is no separate and distinct duty on an employer to consult with a disabled worker. The only question is, objectively, whether or not the employer has complied with his obligations to make reasonable adjustments.

(4) The tribunal also took into account relevant sections in the Disability Code of Practice Employment and Occupation ("the Code"), being careful not to use the Code to interpret the legislative provisions.

(5) **Reasonable Adjustments**

(i) The tribunal considered carefully the provisions of Sections 4A and 18B of the Act. Paragraph 5.3 of the Code states:-

"The duty to make reasonable adjustments arises where a provision, criterion or practice applied by or on behalf of the employer, or any physical feature of premises occupied by the employer, places a disabled person at a substantial disadvantage compared with people who are not disabled. An employer has to take such steps as it is reasonable for it to have to take in all the circumstances to prevent that disadvantage – in other words the employer has to make a "reasonable adjustment". Where the duty arises, an employer cannot justify a failure to make a reasonable adjustment ……

… 5.4 It does not matter if a disabled person cannot point to an actual non disabled person compared with whom she/he is at a substantial disadvantage. The fact that a non disabled person, or even another disabled person, would not be substantially disadvantaged by the provision, criterion or practice or by the physical feature in question is irrelevant. The duty is owed specifically to the individual disabled person.

… 5.11 The Act states that only substantial disadvantages give rise to the duty. Substantial disadvantages are those of which are not minor or trivial. Whether or not such a disadvantage exists in a particular case is a question of fact.

… 5.24 Whether it is reasonable for an employer to make any particular adjustment will depend on a number of things, such as its costs 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 employers to ask) but, where the disabled person does so the employer must consider whether such adjustments would help overcome the disadvantage, and whether they are reasonable."

(ii) The tribunal also considered the types of adjustments which an employer might have to make and the factors which may have a bearing on whether it would be reasonable for an employer to make a particular adjustment. These are set out in Section 18B of the Act as follows; (in so far as may be material and relevant)

"Reasonable adjustments: supplementary

18B.—(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, 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 for him to take the step;

(c) the financial and other costs which would be incurred by him in 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 respect to taking the step;

(f) the nature of his activities and the 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 a 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) altering 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, or 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) ….

(l) providing supervision or other support.

(3) ….

(4) ….

(5) ….

(6) A provision of this Part imposing a duty to make reasonable adjustments applies only for the purpose of determining whether a person has discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such."

(iii) The tribunal considered the guidance given to Tribunals in the Employment Appeal Tribunal case of **Environment Agency v Rowan (2008) IRLR 20** where Judge Serota states at paragraph 27 of his judgment:-

"In our opinion an employment tribunal considering a claim that his employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:-

(a) the provision, criterion or practice applied by or on behalf of an employer, or

(b) the physical feature of premises occupied by the employer, or

(c) the identity of non-disabled comparators (where appropriate) and

(d) 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.

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, or feature, placing the disabled person concerned at a substantial disadvantage".

The tribunal also had regard to the code at Section 8.15 relating to managing disability or ill-health and retention of disabled employees. Paragraph 8.16 states, inter alia:-

"If there are no reasonable adjustments which would enable the disabled employee to continue in his or her present job, the employer must consider whether there are suitable alternative positions to which he could be deployed".

BURDEN OF PROOF

14. (i) Section 17A of the DDA and Regulation 42 of the Regulations deal with the burden of proof.

(ii) 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. It also applies to cases of discrimination on the ground of age.

(iii) The tribunal also considered the following authorities, **McDonagh and Others v Hamilton Thom Trading As The Royal Hotel, Dungannon [2007] NICA, Madarassy v Nomur 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.

(iv) The Court of Appeal in **Ladele v London Borough of Islington (2010) IRLR 211 CA**, upheld the following reasoning of the EAT that:

"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 1".

(v) 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".

Again, at paragraph 28 he states in the context of the facts of that particular case, as follows:-

"The question in the present case however is not one to be determined by reference to the principles of Wednesbury unreasonableness but by reference to the question of whether one could properly infer that the Council was motivated by a sexually discriminatory intention. Even if an employer could rationally reach the decision which it did in this case, it would nevertheless be liable for unlawful sex discrimination if it was truly motivated by a discriminatory intention. However, having regard to the Council's margin of appreciation of the circumstances the fact that the decision-making could not be found to be irrational or perverse must be very relevant in deciding whether there was evidence from which it could properly be inferred that the decision making in this instance was motivated by an improper sexually discriminatory intent. The differences between the cases of Mr Nelson and Ms O'Donnell were such that the employer Council could rationally and sensibly have concluded that they were not in a comparable position demanding equality of disciplinary measures. That is a strong factor tending to point away from a sexually discriminatory intent. Once one recognises that there were sufficient differences between the two cases that could sensibly lead

to a difference of treatment it is not possible to conclude in the absence of other evidence pointing to gender based decision-making that an inference or presumption of sexual discrimination should be drawn because of the disparate treatment of Ms O'Donnell and Mr Nelson".

(vi) In the case of **J P Morgan Europe Ltd v Chweidan [2011] EWCA Civ 648**, Lord Justice Elias states as follows:-

> *"5. Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focussing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: See the observations of Lord Nicholls in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 paragraphs 8-12. This is how the tribunal approached the issue of direct discrimination in this case.*
>
> *6. In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie, if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason: See Peter Gibson LJ in Igen v Wong [2005] IRLR 258, paragraph 37".*

(vii) Regarding the duty to make reasonable adjustments the tribunal considered the case of **Latif v Project Management Institute [2007] IRLR 579**. In that case the EAT held that a claimant must prove both that the duty has arisen, and that there are facts from which it could reasonably be inferred, absent explanation, that it has been breached before the burden will shift and require the respondent to prove it complied with the duty. There is no requirement for claimants to suggest any specific reasonable adjustments at the time of the alleged failure to comply with the duty. It is permissible (subject to the tribunal exercising appropriate control to avoid injustice) for claimants to propose reasonable adjustments on which they wished to rely at any time up to and including the tribunal hearing itself.

SUBMISSIONS

15. The tribunal carefully considered the helpful written submissions provided by the respondents which are appended to this decision. The claimant's oral submissions in relation to paragraphs 15-31 of the respondents' written submissions were also considered on 21 October 2021.

CONCLUSIONS

16. The tribunal, having carefully considered the evidence together with the submissions and having applied the principles of law to the findings of fact, concludes as follows:-

(1) The time limit for a disability discrimination claim is three months from the act complained of, extendable on a just and equitable basis. In relation to failure to make reasonable adjustments, time runs from the end of the period in which the employer could reasonably have been expected to comply with the duty, or the point when it should have become clear to the employee that the employer was failing to comply (paragraphs 3, Schedule 3, Disability Discrimination Act 1995; Lord Justice Leggatt's judgment in Abertawe Bro Morgannwg University Local Health Board the Morgan (2018) IRLR1050, paragraphs 14-16).

The tribunal found, on the evidence, that any allegations of failure to make reasonable adjustments pertained to the period between February and September 2018 which is in excess of three months prior to the presentation of the claimant's claim form to the tribunal on 7 March 2019. There was no basis laid before the tribunal to justify an extension of time to present such a claim to the tribunal on a just and equitable basis. The tribunal, in any event, is satisfied, in light of the claimant being afforded a phased return to work in April 2018 together with freedom to take rest breaks or lie down if required, and Mr Rutherford arranging for an advance of wages in around June 2018 to enable the claimant to go on holiday for respite, that there is no substance in the claimant's claim of failure to make reasonable adjustments.

The claimant exonerated the dismissing manager Mrs Lynch and therefore cannot contend that her dismissal was linked to her disability. The third-named respondent, Lauren Troughton was dismissed on 19 November 2018, again in excess of three months preceding the presentation of the claimant's claim to the tribunal on 7 March 2019. There was no basis laid before the tribunal to justify consideration of an extension of time on a just and equitable basis to present such a claim to the tribunal against this respondent.

(2) Apart from any consideration of time limits, in order to be successful in a claim for direct disability discrimination, the tribunal must be satisfied that the claimant was treated less favourably on the ground of her disability. The relevant comparator is someone who does not have the particular disability of a disabled person and whose relevant circumstances are the same as, or not materially different, from those of the disabled person. The tribunal is not satisfied that the claimant has identified a proper comparator or comparators.

Sometimes it will not be possible to decide whether there is less favourable treatment without deciding "the reason why" **(Shamoon v Chief Constable of the RUC (2003) UKHL 11)**. The claimant has not therefore proved facts from which the tribunal could conclude in the absence of an adequate explanation that she had been treated less favourably on the ground of disability and therefore the burden of proof does not shift to the respondents to prove on the balance of probabilities that the alleged detriment was not on the prohibited ground of disability.

(3) Apart from consideration of the out of time issue and conclusions set out above in relation to reasonable adjustments, the case of ***Tarbuck v Sainsbury's Supermarkets Limited*** **(2006) IRLR 664**, EAT, establishes that the duty to consult is not of itself imposed by the duty to make reasonable adjustments. The only question is, objectively, whether or not the employer has complied with his obligations.

(4) Furthermore, as Langstaff J stated in the case of *Royal Bank of Scotland v Ashton* (2010) UKEAT/0542/09, at paragraph 14:-

> *"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 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".*

(5) There is no satisfactory evidence before the tribunal that the claimant was placed at a substantial disadvantage by comparison to a fellow employee who was not disabled. The Employment Appeal Tribunal in the case of **Project Management Institute v Latif (227) IRLR 579**, (already referred to in terms of the burden of proof), held that there must at least be facts before the tribunal from which, absent any innocent explanation, it could be inferred that a particular adjustment could have been made, otherwise the respondents would be placed in the impossible position of having to prove the negative proposition that there was no reasonable adjustment that could have been made. While the tribunal is satisfied that the claimant has proved that a duty to make reasonable adjustments had arisen, she has not proved facts from which it could be reasonably inferred, absent explanation, that the duty has been breached, and, therefore, the burden of proof does not shift to either respondent to prove that the duty has been complied with.

(6) **Public Interest Disclosure**

In a public interest disclosure detriment claim, the time limit is three months from the relevant act or failure to act by the employer, extendable through the "not reasonably practicable" formula (Article 71(3) of the 1996 Order).

On the evidence, the only areas approximating to the subject matter for a qualifying disclosure pertain to a suggestion of fraud pursuant to the claimant's allegation that Ruth-Ellen Logan posed as a doctor, and that

Logan Wellbeing presented Dr Barnish as being involved with the firm. It is clear to the tribunal that "DR" signs on consulting room doors were already present from previous occupation of the property, were not unique to Ruth-Ellen Logan, and were removed. Dr Barnish was a prescriber of franchised drips and therefore there was nothing unremarkable in his name appearing on paperwork or in the company website. Had the claimant made a relevant disclosure, the tribunal concludes that she did not have the basis for a reasonable belief that it tended to show fraud. This is apart from the tribunal's conclusion that the claimant did not raise these issues with her employer.

Moreover, the tribunal is satisfied that the only other allegation which could possibly provide the subject matter for a qualified disclosure relates to the alleged instruction to the claimant to treat a bleeding client and her refusal to do so. Both Felicity Lynch and Ruth-Ellen Logan gave evidence regarding this entire matter, which had occurred on 8 November 2018, well in excess of the time limit of three months for presenting a claim to the tribunal. There was no evidence laid before the tribunal as to why it was not reasonably practicable to present such a claim to the tribunal before 9 March 2019. The tribunal is not satisfied in any event, if the claimant refused to treat this client, that she could justifiably entertain a reasonable belief that the health and safety of the client was likely to be endangered. Moreover, there is no credible evidence that the claimant suffered detriment as a result of any such episode.

(7) The Tribunal, having carefully considered the evidence and the submissions made by the respondent's representative in relation to the unfair dismissal claim and having applied the principles of law to the findings of fact concludes as follows:-

(i) The Tribunal finds it helpful to replicate the statement of issues in paragraph 15 of ***Rogan***, duly adapted as follows:-

(1) *Was the dismissal of the* claimant *by the* respondent *fair in all the circumstances? In determining this primary issue the Tribunal should consider the following:*

(a) Has the respondent shown that the reason relied upon by it in its decision to dismiss the claimant *related to the claimant's conduct?*

(b) Had the respondent a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time of its decision?

(i) Had the respondent reasonable grounds at the time of its decision on which to sustain its belief in the misconduct of the claimant*?*

(ii) At the stage the respondent took the decision to dismiss, had the respondent

carried out as much of an investigation/ enquiry into the matter as was reasonable in all the circumstances?

(c) Was the dismissal a fair sanction in the circumstances?

(d) Was the claimant afforded an effective right of appeal in the circumstances?

(ii) The Tribunal answers all questions in the affirmative and therefore dismisses the claimant's claim of unfair dismissal.

(8) The claimant's other claims are also dismissed in their entirety.

(9) The Tribunal however has every sympathy for the claimant in her difficult personal circumstances.

Employment Judge:

Date and place of hearing: 21-22 October 2021, Belfast.

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