Ref:	WEA10101

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	29/11/2016

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM A DECISION OF AN INDUSTRIAL TRIBUNAL

BETWEEN:

FRANK McCORRY & ORS

as the committee of the ARDOYNE ASSOCIATION

Appellant/Respondent

and

MARIA McKEITH

Respondent/Claimant

Before: GILLEN LJ, WEATHERUP LJ and WEIR LJ

WEATHERUP LJ (delivering the judgment of the court)

[1] This is an appeal from a decision of an Industrial Tribunal dated 21 March 2016 which found that the Ardoyne Association, as employer of Maria McKeith, had dismissed Ms McKeith in circumstances that were automatically unfair, substantially unfair and amounted to disability discrimination. Mr Coll QC and Mr Acheson appeared for the Ardoyne Association and Ms McGrenera QC and Ms Bradley appeared for Ms McKeith.

The proceedings before the Industrial Tribunal.

[2] The Ardoyne Association provides advice services in the Ardoyne area of Belfast. It is an unincorporated body managed by a committee and in March 2015 had seven employees who were assisted by a number of volunteers. The employees included Ms McKeith who was a part-time advice assistant and Elaine Burns who was the manager.

[3] Ms McKeith was employed as a part-time advice assistant from 1 November 2010 until 27 March 2015 when she was dismissed on the ground of redundancy. The reason for the redundancy was stated to be the absence of confirmed funding for the association and this reason was disputed by Ms McKeith.

[4] Ms McKeith was a single mother employed for 16 hours per week, being 4 mornings per week with Wednesdays off. She has a disabled daughter who was looked after by a family friend while Ms McKeith was at work. In the months prior to her dismissal Ms McKeith had been required by Ms Burns to remain absent from work for some periods to care for her daughter. These absences were against the wishes of Ms McKeith.

[5] The reason for the dismissal, according to Ms McKeith, was that Ms Burns as manager believed that there would be future absences from work by Ms McKeith to care for her disabled daughter, which absences would be disruptive of the organisation of the Ardoyne Association and thus she was removed.

[6] The Industrial Tribunal found that the dismissal of Ms McKeith was automatically unfair. The Ardoyne Association did not comply with the statutory procedure set out in Schedule 1 to the Employment (NI) Order 2003 and the Code of Practice on Disciplinary and Grievance Procedures.

[7] Further, the Industrial Tribunal found that the dismissal of Ms McKeith was substantially unfair because, first of all, her selection for redundancy was unfair, secondly, there had been no effective consultation in relation to the proposed redundancies and thirdly, there had been no consideration of alternative employment for Ms McKeith.

[8] In addition, the Industrial Tribunal found that the dismissal of Ms McKeith involved disability discrimination, namely, associative direct disability discrimination. The associative discrimination was based on the disability of Ms McKeith's daughter. It was direct discrimination because Ms McKeith was found to have been treated less favourably because of her disabled daughter.

The Grounds of Appeal.

[9] This appeal is not concerned with the finding that the dismissal was automatically unfair or with the finding that the dismissal was substantially unfair. The appeal is only concerned with the finding of disability discrimination.

[10] The grounds of appeal are stated as follows -

(i) The Tribunal erred in its application of the burden of proof in respect of direct discrimination.

(ii) The Tribunal erred in its application of the correct comparator in respect of direct discrimination.

(iii) The Tribunal erred in finding a claim of associative discrimination pursuant to the Disability Discrimination Act 1995.

(iv) The Tribunal erred in taking into account irrelevant considerations in respect of other individuals who were also made redundant.

(v) In light of the evidence the Tribunal's finding of direct discrimination was perverse.

The approach to discrimination

[11] The Disability Discrimination Act 1995 provides:

"3A(1) .... a person discriminates against a disabled person if –

(a) for a reason that 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.

(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."

[12] The approach to be taken to discrimination claims was considered in Shamoon v Chief Constable of the RUC [2003] UKHL 11. The applicant was a Chief Inspector of Police who carried out staff appraisals. Following complaints about her

appraisals her superior officer conducted the appraisals himself whereas two male Chief Inspectors in other divisions continued to carry out appraisals. She complained to an Industrial Tribunal that she had been unlawfully discriminated against on the grounds of her sex. The House of Lords found that the circumstances of the applicant's case were different from those of the two male Chief Inspectors in that no complaints or representations had been made about their performance of appraisals. The applicant's complaint was dismissed.

[13] Lord Nicholls considered the statutory definition of discrimination at paragraph 7 –

> "When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the "less favourable treatment" issue) and then, secondly, whether the less favourable treatment was on the relevant prescribed ground (the "reason why" issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant."

[14] However it was recognised in Shamoon that this two stage process may not always be helpful. It was stated to be impossible to decide whether Chief Inspector Shamoon was treated less favourably than the hypothetical male Chief Inspector without identifying the ground on which she was treated as she was. This led Lord Nicholls to state at paragraph 11 –

> "This analysis seems to me to point to the conclusion that Employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the prescribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually no difficulty in deciding whether the treatment afforded to the claimant on the prescribed ground was less favourable than was or would have been afforded to others."

[15] The approach taken in Shamoon was later summarised by Lord Hoffman in Watt (Carter) v Ahsan [2008] 1AC 696 at paragraph 36 as follows –

> "(1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the "statutory comparator") actual or hypothetical, who is not of the same sex or racial group, as the case may be.

(2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in each case should be (or be assumed to be) the same as, or not materially different from, those of the complainant....

(3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated..... This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the "evidential comparator") to those of the complainant and all the other evidence in the case."

[16] Mr Coll for the Ardoyne Association contended that the Tribunal adopted the wrong comparator in the present case. The Tribunal made comparisons with "another employee who had a distressed but non-disabled child" (paragraph 146) and "another employee with a sick or distressed child ... where that other employee's child did not have a disability" (paragraph 132).

[17] It was the contention on behalf of the Ardoyne Association that the appropriate formulation of the characteristics of the true comparator would be "an employee who is the primary carer for their child who is not disabled but has necessitated the employee's absence and in respect of whom it is anticipated that there will be further difficulties resulting in further absence and disruption."

[18] Thus the Ardoyne Association defined the characteristics of the comparator with a focus that is not only on a child who is not disabled but also on the disruption occasioned by future absences from work. Before turning to the validity of this definition it is necessary to set out how the argument was then developed on behalf of the Ardoyne Association.

Different treatment by reason of a consequence of disability.

[19] The Ardoyne Association contended that the reason for different treatment of Ms McKeith related to disruption of the work of the Ardoyne Association. Accordingly the reason for her treatment was not disability as such. Rather, the reason for her treatment was the consequence of that disability, namely the additional care demands on Ms McKeith leading to absences from work and disruption of the organisation.

[20] Attention then turned to London Borough of Lewisham v Malcolm [2008] UKHL 43 for the proposition that action arising from a consequence of disability did not amount to disability discrimination. The applicant was a secure tenant of a Council flat and suffered from schizophrenia. He sublet the flat in breach of the

tenancy agreement. The Council was unaware that he suffered from schizophrenia. The Council served a notice to quit for breach of the tenancy agreement. In his defence he claimed that he had only sublet the flat because he had not taken his medication and that the Council's attempt to obtain possession of the flat constituted unlawful disability discrimination. The House of Lords held that the correct comparator was a secure tenant of the Council without a mental disability who had sublet his property. It was clear that the Council would have claimed possession against any non-disabled secured tenant who had sublet and that the Council was unaware of the disability at the date of claiming possession. The complaint of discrimination was dismissed.

[21] In the course of his judgment Lord Bingham considered whether the reason for the Council's action related to the disability. Section 20(1) of the 1995 Act, relating to discrimination in the provision of goods facilities and services, states that a person discriminates against a disabled person if "…. for a reason which relates to the disabled person's disability, he treats him less favourably…." The connection between the reason for the treatment and the disability was to be found in the expression "relates to". That expression was said to denote "…. some connection, not necessarily close, between the reason and the disability." It was noted that in borderline cases it will be hard to decide whether there was or was not an adequate connection (paragraph 10). It was accepted that, but for his mental illness, the tenant would probably not have behaved so irresponsibly as to sublet his flat. However the decision to seek possession was stated to be a pure housing management decision which had nothing whatever to do with his mental disability (paragraph 11).

[22] It will be noted that the present case is concerned with discrimination in the area of employment where section 3A of the 1995 Act applies as set out above. The meaning of discrimination for the purpose of employment includes section 3A(1), which is in the same terms as section 20(1) dealing with discrimination for the purposes of goods, facilities and services and concerns less favourable treatment "for a reason which relates to" the disabled person's disability. However employment discrimination also includes, at section 3A(5), direct discrimination, meaning less favourable treatment "on the ground of" the disabled person's disability. We pause to note this difference without reaching any conclusion at this stage on its significance for the argument.

[23] The next step in the argument for Mr Coll was to refer to section 15 of the Equality Act 2010 which has been introduced in England and Wales but not in Northern Ireland. Section 15 provides that –

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

[24] Thus, the argument on behalf of the Ardoyne Association proceeds on the basis that if, as is said to be the present case, the reason for the treatment of a complainant is not disability but is a consequence of disability (such as the disruption of the organisation caused by absences to take care of a disabled child), then there is not a sufficient connection between the reason for the treatment and the disability. This lack of connection is said to have been addressed in England and Wales by section 15 of the Equality Act 2010 where it extends the definition of discrimination to less favourable treatment ".... because of something arising in consequence of B's disability". However, the issue of a lack of connection between the reason for the treatment and the disability has not been addressed in Northern Ireland. Consequently, the argument goes, there is no discrimination in the present case as the approach taken in London Borough of Lewisham v Malcolm applies, unaltered by section 15 of the 2010 Act.

[25] This Court does not accept Mr Coll's approach on behalf of the Ardoyne Association because of the factual findings of the Tribunal. This was not found to be a dismissal based on disruption of the organisation or a belief that there would be disruption of the organisation. While there was a dispute as to whether Ms McKeith had been absent from work in order to care for her disabled daughter on regular occasions, as the Ardoyne Association alleged, or whether she had been absent for this reason for 2 or 3 odd days in the previous year, as Ms McKeith alleged, the Tribunal found that any relevant absence was infrequent, accepting Ms McKeith's evidence. In any event the Tribunal pointed out that it had not been argued that her dismissal had been prompted by her attendance record but rather by funding difficulties (paragraph 50).

[26] Ms Burns, the Manager, did believe, first of all, that Ms McKeith's place was at home with her disabled daughter rather than at work and secondly, that the caring responsibilities could present a problem in the administration of the organisation. Other staff were permitted time off to look after their children, deal with illnesses and dental appointments, medical appointments, school plays but no other member of staff was instructed to stay off work to look after a child. Ms Burns agreed that she insisted that Ms McKeith take time off because her child was disabled (paragraph 60). Further Ms Burns felt there would be further disruption in relation to the disabled daughter and as the Tribunal put it ".... she preferred the assurance of having the service covered without the possibility of further disruption caused by the claimant's position as primary carer of her disabled daughter" (paragraph 68).

[27] Ms McKeith's claim was limited to the actual dismissal and did not extend to actions that pre-dated the dismissal decision, although the Tribunal did take into account the latter in reaching a conclusion on the dismissal. Further, the dismissal claim as presented to the Tribunal was limited to 'direct disability discrimination' in relation to the dismissal and did not extend to 'disability related discrimination' in relation to the dismissal.

[28] Ms McKeith was found to have established a prima facie case that she had been directly discriminated against because she had been the primary carer of her disabled daughter (paragraph 147).

[29] Ms Burns denied Ms McKeith the opportunity to work because of her disabled daughter. Her attitude to Ms McKeith was profoundly wrong and that was the immediate background to the redundancy (paragraph 149).

[30] The Tribunal recognised that Ms Burns may have acted with the best of intentions but she was treating Ms McKeith differently because of her daughter's disability and because of Ms Burns' belief that Ms McKeith's position was not properly in the workplace (paragraph 149). In finding that Ms McKeith's dismissal was a case of direct disability discrimination the Tribunal commented that "such discrimination can be based, not just on malice, but on misplaced and inappropriate charitable intentions. In this case, Ms Burns felt the claimant's place was with her daughter and not at work. The claimant had been sent home for extended periods for that reason. While she had been paid she had been denied the opportunity to work and had been treated as "an object of charity"" (paragraph 152).

[31] Before the Tribunal, the Ardoyne Association contended that Ms McKeith had been dismissed because of a lack of funding commitment. The Tribunal rejected that reason and was satisfied that the funding was in place. The Tribunal found that the management view was that Ms McKeith should be at home looking after her daughter. On the appeal, Ardoyne Association contended that the dismissal was because of concerns about future disruption of the organisation by reason of absences to care for a disabled child, a reason that it was said did not relate to disability but was a consequence of disability that did not amount to discrimination. However the Tribunal made no finding that the reason for the dismissal was based on disruption or on a belief that there could be future disruption. Rather, the Tribunal found that management took the view that Ms McKeith's place was at home with her disabled daughter and not at work, a view described by the Tribunal as "profoundly wrong". This was the basis of the direct disability discrimination.

[32] Accordingly the Ardoyne Association has not established a factual basis on which to advance the argument based on London Borough of Lewisham v Malcolm and the absence of section 15 of the Equality Act 2010 in Northern Ireland. There was no finding that the reason for the treatment was a concern for disruption of the organisation and thus no foundation for the argument that the reason was related to a consequence of disability rather than disability as such.

[33] Thus the comparator, as defined by the appellant above, is incorrect, being based on circumstances that were found not to arise.

Associative Discrimination.

[34] The Disability Discrimination Act 1995 did not on its face apply to associative discrimination so that, when a legal secretary, working for a firm of solicitors and being the principal carer for her disabled son, claimed that she had to resign because of unlawful discrimination by her employer on account of her son's disability, the issue was referred to the European Court of Justice. The issue was whether the relevant EU Directive, Council Directive 2000/78/EC known as the "Framework Directive" applied to associative discrimination. On 17 July 2008 in Coleman v Attridge Law (2008) ICR 1128 the Court of Justice held that associative discrimination did fall within the terms of the Directive The claim then made its way to the Employment Appeal Tribunal on the issue of whether the 1995 Act could be read in a manner that applied to associative discrimination. It was held that the 1995 Act could be so interpreted, as reported in EBR Attridge LLP v Coleman [2010] ICR 242. The proceedings were remitted to a Tribunal to consider the merits of the substantive claim.

The Shifting Burden of Proof.

[35] While Ms McKeith did not advance a claim for disability related discrimination in relation to the period before the dismissal decision, her background treatment in the preceding months did inform the approach of the Tribunal in relation to the dismissal decision. The background included the requirement that Ms McKeith remain absent from work for periods to look after her disabled daughter. Had it arisen for decision, the Tribunal would have concluded that the previous treatment of Ms McKeith amounted to disability related discrimination (paragraph 132).

[36] On taking into account that background and the evidence in relation to the dismissal of Ms McKeith, the Tribunal stated that "the shifting burden of proof is going to be crucial" (paragraph 136).

[37] The Burden of Proof Directive (EEC) 97/80 was extended to the United Kingdom in 1998 and Article 4(1) provided -

> "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them established,

> before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

[38] Section 17A(1B) of the 1995 Act provides –

> `Where, on the hearing of a complaint under sub-section (1), the complainant proves facts from which the tribunal could, apart from this sub-section, conclude in the absence of inadequate 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.'"

[39] The approach to the shifting burden of proof was considered by the Court of Appeal in England and Wales in Wong v Igen Ltd (2005) EWCA Civ 142. It was stated that the statutory amendments required a two-stage process. The first stage required the complainant to prove facts from which the Tribunal could, apart from the section, conclude, in the absence of an adequate explanation, that the employer had committed, or was to be treated as having committed, the unlawful act of discrimination against the employee. The second stage, which only came into effect on proof of those facts, required the employer to prove that he did not commit or was not to be treated as having committed the unlawful act, if the complaint is not to be upheld.

[40] The issue was revisited by the Court of Appeal in England and Wales in Madarassy v Nomura International plc [2007] EWCA Civ 33 which set out the position as follows (*italics added*) –

> "56. The Court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent `could have' committed an unlawful act of discrimination. *The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal `could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> 57. `Could conclude' [in the Act] must mean that `a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex

> discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. *Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint*; for example, evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the complaint to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by [the Act]; and available evidence of the reasons for the differential treatment.
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> 58. *The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent.* The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. *The burden is on the respondent to prove that he has not committed an act of unlawful discrimination.* He may prove this by an adequate non discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

[41] The Tribunal was satisfied that Ms McKeith had established a prima facie case that she had been directly discriminated against because she had been the primary carer of her disabled daughter (paragraph 147). The Tribunal then found that the Ardoyne Association had not put forward any convincing or coherent explanation for its decision to make Ms McKeith redundant (paragraph 148). It was accepted on the hearing of the appeal that, if this was a case where the burden of proof shifted to the employer, there had not been a sufficient explanation. Accordingly, the challenge was concerned with whether the evidence before the Tribunal was such that a prima facie case of associative direct discrimination had been made out.

[42] In this regard the Tribunal set out a number of facts which concerned Ms McKeith having been sent home on previous occasions because of her disabled daughter, Ms Burns' belief that she should be at home with her disabled daughter, the reluctant piecemeal and incomplete nature of discovery, the other two persons who were made redundant at the same time were first re-engaged as volunteers and then rehired, the evasive and unconvincing evidence of the Manager and the non-compliance with statutory dismissal procedures. The Tribunal stated ".... if this is

not a case where the burden of proof should shift, no such case exists" (paragraph 147).

[43] We are satisfied that, as outlined by the Tribunal, there was such evidence of a difference in status, a difference in treatment and a reason for differential treatment that, in the absence of an adequate explanation, a Tribunal could conclude that the employer committed an unlawful act of associative disability discrimination. The burden on the Ardoyne Association was not discharged. It followed that the Tribunal would find disability discrimination.

[44] We are not satisfied on any of the appellant's grounds of appeal. The appeal is dismissed.