THE INDUSTRIAL TRIBUNALS

CASE REF: 7324/17IT

CLAIMANT: **Celia Luisa Pereira Da Costa**

RESPONDENT: **Summer Garden Salads Limited**

DECISION

The unanimous decision of the tribunal is that the claimant was automatically unfairly dismissed and that the respondent failed in its duty to make reasonable adjustments, pursuant to the Disability Discrimination Act 1995, as amended. The claimant's claims in respect of direct disability discrimination, notice and holiday pay are not well founded and are dismissed. The claimant is awarded compensation of £11,852.15.

Constitution of Tribunal:

Employment Judge: **Employment Judge Bell**

Members: **Mr I Carroll**
Mr D Walls

Appearances:

The claimant was represented by Mr G Grainger, Barrister-at-Law, instructed by the Equality Commission for Northern Ireland.

The respondent was represented by Mrs Bridie Donaghy a manager of the respondent company accompanied by Ms Anne Shields.

1. The claimant in her claim complained that she was unfairly dismissed, subjected to disability discrimination and that the respondent had failed to pay her £360 in lieu of proper notice, £504 holiday pay and £127.30 arrears of pay.

2. The respondent in its response contended that the claimant's employment commenced on 6 April 2018 following a previous partnership having ceased to operate, resisted the claimant's claims on the basis it had been fully aware of her disability when it had employed her, that a change in production processes were aggravating her existing glaucoma and respondent unable to offer her alternative work in production, but conceded that some payment for insufficient notice was due.

3. At a Case Management Discussion on 6 February 2018 the respondent accepted the claimant was owed notice pay of £360 (equivalent to 3 week's pay) following which payment thereof was made to the claimant. The parties as ordered submitted thereafter an agreed statement of the legal and factual issues.

4. At a Case Management Discussion on 8 May 2018 the respondent accepted that the claimant was disabled at the relevant time for the purpose of the Disability Discrimination Act 1995; that the claimant started to work for the claimant in November 2012 and no TUPE issue arose; and that the claimant was dismissed in breach of the statutory dismissal procedures.

5. At the outset of the substantive hearing it was confirmed on behalf of the respondent that no time point/ jurisdiction issue as raised in the agreed statement of issues was being pursued and in any event prima facie clear that the claim was presented in time.

6. At a panel meeting immediately following conclusion of the substantive hearing on 15 June 2018 the tribunal in relation to the dispute of fact whether a meeting took place in or around 21 July 2017 made as a finding of fact that the respondent's evidence was on balance more probable than that of the claimant, that the claimant's comment, 'one day, one week, one year..', as to when she would be fit to return to work, was made at a meeting which took place prior to her dismissal (on 18 August 2017) rather than after.

7. The Office of the tribunals received on 25 June 2018 correspondence from the respondent requesting that an itemised copy record of the respondent's land line calls made between July 2017 to September 2017 highlighting a call made on 21 July 2017 purported to have been made to the claimant's number, be passed on to the Employment Judge. The claimant by correspondence dated 25 June 2018 objected to the claimant's attempt to introduce documentation after the conclusion of the case upon which they had not had the opportunity to cross examine and test the authenticity thereof and contended in any event it could have no bearing on whether a meeting took place between the claimant and Mrs Donaghy on 21 July 2017 and that Mrs Donaghy's witness statement had referred to a text message rather than phone call on that date. The tribunal at a panel meeting on 25 July 2018 noted the claimant's objections and concluded that in any event the post hearing correspondence would be of no bearing given the tribunal's earlier determination that the respondent's evidence was more probable, as set out above.

8. The tribunal by correspondence sent to the parties on 2 August 2018 directed parties be allowed the opportunity to provide a further written submission no later than 16 August 2018 to address in relation to the case:

   - 'Whether Working Tax Credit is properly a loss which could be added to loss of earnings?'

   - 'Whether since dismissal the claimant has been fit for work?' (In light of continuing certification as unfit for work at the date of dismissal, assessment in November 2017 as having a limited capacity for work, ongoing receipt of ESA and limited documentary evidence of seeking work).

   Replies were received and considered thereafter from both parties.

THE ISSUES

9. The narrowed issues remaining for determination by the tribunal at substantive hearing in summary were:-

   (1) Did the respondent directly discriminate against the claimant on grounds of disability?

   (2) Did the respondent have a duty and fail to make reasonable adjustments in respect of any disability of the claimant?

   (3) Was the claimant unfairly dismissed? (Absent procedural flaws would the claimant have otherwise been fairly dismissed?)

   (4) Did the respondent fail to give the claimant proper notice?

   (5) Did the respondent fail to pay the claimant in respect of holidays accrued due?

   If so,

   (6) What is the claimant's injury to feeling and/or loss?

SOURCES OF EVIDENCE

10. The tribunal considered the claim; response; agreed bundle of documentation and written statements of Mrs Bridie Donaghy (part time technical manager) and Ms Ann Shields (formerly responsible for accounts and payroll) Ms Brenda Barnard (former production manager), Ms Bernadette O'Hanlon (Office Assistant) and Ms June Rafferty (Assistant Manager of Southern Health and Social Care Trust), on behalf of the respondent, together with those of the claimant and Ms Andreia Filipa on behalf of the claimant; and the oral testimony of Mrs Donaghy, Ms Shields, the claimant (through an interpreter) and Ms Filipa. No medical evidence was adduced by the claimant. The weight attached by the tribunal to written statements in respect of which no witness was called and evidence unable to be tested under cross examination was limited.

FINDINGS OF FACT AND CONCLUSIONS

The tribunal found the following relevant facts proven on a balance of probabilities:

11. The claimant is a Portuguese national who was born in November 1976. Since the age of 16 the claimant has had glaucoma and chronic uveitis in both her eyes. At 23 years of age the Claimant lost 100% vision in her left eye and so is monitored regularly by medical professionals.

12. The claimant was disabled at the relevant time for the purposes of the DDA 1995. The relevant conditions were glaucoma and chronic uveitis both medical conditions relating to her eyes.

13. The respondent was a small family owned business producing salads, coleslaws and stuffing. In a first interview with the respondent arranged through a Steps to Work Programme with the South West College, the claimant informed Mrs Donaghy of her glaucoma, that she was blind in her left eye and was being monitored at the Royal Victoria Hospital. It is unclear whether the claimant also made the

respondent aware that she had uveitis (an infection in the cornea causing inflammation and pain). In any event the claimant was told to start work for the respondent the following week which she did in November 2011 as a janitor, initially working for 16 hours per week carrying out cleaning duties and continuing to attend College. The claimant shortly thereafter began also to help out in production and learnt how to make stuffing sauce, prepare and pack stuffing, make breadcrumbs, dry stuffing and salad coleslaw.

14. Mrs Donaghy found the claimant very reliable, willing to learn, conscientious, cooperative and always ready to support her workmates. The claimant told Mrs Donaghy that she wanted to provide for her family herself and never wanted to claim benefits.

15. Upon leaving the Steps to Work Programme the claimant on 19 November 2012 entered into a written contract of employment with the respondent as a production operative to work Monday to Thursday 9am to 12 noon. Her contract provided that she was to receive eleven days holiday per year accruing at the rate of one-twelfth per month, rounded up to the nearest half day. It was provided therein that the claimant had a legal duty to take reasonable care of her own health and safety and must fully observe the respondent's health and safety policy at all times (which included therein the requirement to use protective clothing and equipment provided by the Employer to minimise known risks to health and safety).

16. The respondent thereafter compiled a Company Handbook including therein an updated statement of main terms and conditions of employment. Provision therein included: Actual hours of work required to be worked would be subject to change in order to meet operational requirements; Customary Holidays for which payment would be made for qualifying employees but not counted for calculations on termination of employment; 28 days paid Annual Holidays per holiday year 1 January to 31 December; that where paid annual holidays had been taken in excess of accrued paid entitlement at the date of termination of employment such excess shall be deducted from monies due; the accrual of one week of notice entitlement per year of continuous service between one and twelve years; appended disciplinary rules and procedure; that individual written notification would be given within one month of any change in the main terms and conditions in the statement. The respondent's Equality of Opportunity Policy was set out at Appendix 4 of the respondent's Company Handbook and named Mrs Donaghy as having specific responsibility for implementation of the policy.

17. In the 2012/13 tax year the claimant began to work on flexible annualised hours, as such, time off was given rather than payment for overtime, in addition to her contractual holiday entitlement. It was in dispute whether this arrangement was agreed at the request of the claimant but in any event it commenced and was operated from then without objection with the respondent keeping a running record from clock cards of hours worked, holiday hours paid and hours paid each week, and payment made to the claimant for 16 hours each week whether she worked more or less. From February 2014 the claimant's paid hours were increased to 24 per week and a written amendment was noted upon her signed contract of employment of the increase of her hours to 24 per week and hourly rate of pay to £7.10.

18. On completion of building works the respondent's factory was divided into two areas in or around 2015/16: Gluten and Gluten Free. The claimant on being given the

choice opted to stay in the Gluten Area in which she without difficulty carried out a range of production work.

19. In 2016 a Bratt Pan, which is a large cooking vessel, was bought by the respondent and placed in the 'Stuffing Room', a separate area in the Gluten part of the factory in which the claimant worked, but was not at that stage put into working condition. It was the respondent's intention to ultimately have all production work to do with stuffing completed in the Gluten Area including the peeling and cooking of onions which was currently done in the Gluten Free Area.

20. On 5 August 2016 the claimant underwent laser surgery on her left eye and was absent from work for a short time thereafter, subsequently returning to work and undertaking all duties required of her without any issue.

21. Mrs Donaghy considered the claimant a good reliable and hard worker and no issue was raised at any time with the claimant regarding her work or performance.

22. In or around the end of 2016 the respondent replaced the use of dried onions with frozen for the preparation of its stuffing sauce. At times the claimant was asked to go and help in the Gluten Free Area where she prepared vegetables, washing them and producing salads, readymade meals, mayonnaise, gluten free stuffing and cooling the sauce for the stuffing. Fresh onions were used in the Gluten Free Area but the claimant had no contact with them.

23. In early 2017 Ms Barnard the production manager discussed with the claimant the respondent's plan to have everything to do with the stuffing sauce completed in the Gluten Area. The claimant understood that she would be responsible for cooking the sauce, she had no problem with handling and cooking onions and did not anticipate that she would have to peel or chop onions as part of this move and so did not raise any concern with the respondent's proposal, nor indeed did the respondent have any idea as to the effect peeling the onions would have on the claimant's eyes.

24. From the week ending 17 February 2017 the claimant's working hours reduced to 16 hours per week.

25. In or around February / March 2017 the respondent changed from using frozen to fresh onions. These were washed chopped and cooked in the Gluten Free Area. The onions used by the claimant came to her from the Gluten Free Area already chopped ready for preparation of the stuffing sauce. Around this time Ms Barnard asked the claimant whether she would prefer to peel the onions or make breadcrumbs, the claimant replied that she preferred to make the breadcrumbs because peeling the onions was more difficult for her, although not specifying, meaning this to be because of her eye condition. The claimant as part of the protective equipment supplied to her by the respondent had eye goggles and whilst she was careful to wear these whilst making breadcrumbs she found she needed to wear her glasses when peeling onions and experienced difficulty with her glasses steaming up if she placed the goggles over them. Ms Barnard agreed for the claimant to make the breadcrumbs.

26. At first the fresh onions used by the respondent were large and when the claimant sometimes helped to peel them she did so without discomfort as she found them to have very little acid. In April / May 2017 the fresh onions supplied to the respondent became smaller and more acidic.

27. On 7 June 2017 due to a lack of staff the claimant was asked to help in the Gluten Free Area to peel onions and felt that she had no option but to help. When peeling the onions the claimant experienced a lot of discomfort and was unable to finish the task because of the pain and discomfort in her eyes. The claimant left work that afternoon and the next morning had to go to the eye clinic in Belfast Royal Victoria Hospital because she found the pain in her eye unbearable and she could not control it. She was treated with drops and steroids and an appointment was arranged for her with Mr White, Consultant Ophthalmic and Oculoplastic surgeon.

28. Consequently the claimant had to remain at home to recover and on Monday 12 June 2017 sent a text message to Ms Barnard to advise that she would not be in work because she was sick. A Statement of Fitness for Work assessing the claimant on 12 June 2017 as unfit for work for two weeks because of glaucoma was issued by the claimant's GP, Dr Thompson, to the claimant on 12 June 2017 and hand delivered by the claimant to the respondent on 13 June 2017. Mrs Donaghy was absent from the workplace during this time due to illness.

29. By text message on 22 June 2017 Mrs Donaghy asked the claimant to give her a call. The claimant telephoned Mrs Donaghy and we accept on balance Mrs Donaghy was concerned that there may be a risk to the claimant's eye health with consequent health and safety implications and did wish that the claimant communicate the type of work she was doing to her doctor and told the claimant it was important that she tell her doctor the type of work she was doing and to get a letter from her doctor, rather than the claimant's evidence that Mrs Donaghy had told her *not* to tell her doctor.

30. On 26 June 2017 Dr Thompson issued the claimant a further statement that she was not fit for work for another two weeks because of her glaucoma and he also wrote a letter which set out:

> *"Celia has recently been off work due to problems with her eye, having attended the Royal Victoria Hospital Eye Casualty. She is due to return to work but finds that peeling onions causes severe discomfort in her eyes and I should therefore be grateful if she could be excused this.*
>
> *She is fit to return to normal duties otherwise."*

The claimant hand delivered both to the respondent.

31. Ms Barnard after the events of 7 June 2017 discussed with Mrs Donaghy and identified that an adjustment could be made for the claimant, the other employees having agreed to peel the onions, although this was not communicated to the claimant. It then became clear to the respondent that the claimant was still experiencing problems with her glaucoma and unable yet to return to work.

32. The claimant on 10 July 2017 sent a text message to Ms Barnard stating that she would not be going to work because she was sick. A Statement of Fitness for Work assessing the claimant on 7 July 2017 as unfit for work for two weeks because of glaucoma was issued by the claimant's GP practice to her on 10 July 2017 signed and stamped by Dr CJ Sands and thereafter hand delivered by the claimant to the respondent.

33. Mrs Donaghy attempted without success to contact the claimant's GP, Dr Thompson, by telephone, to seek clarification directly from him on the claimant's condition.

34. In July 2017 to progress its plan to have two entirely separate food operations the respondent commissioned the Bratt Pan in the Gluten Area.

35. On 19 July 2017 the claimant attended a review appointment with Mr White.

36. It was in dispute whether a meeting took place between the claimant and Mrs Donaghy on or about 21 July 2017 at which Mrs Donaghy asked the claimant following receipt of Dr Thompson's letter stating that the claimant would be fit to return to work if excused from peeling onion, why she was not back at work. Mrs Donaghy's evidence was that the claimant said her glaucoma was still giving her bother, had shrugged her shoulders and had, commented that she could be back to work in *one week, one month or a year* which Mrs Donaghy considered gave the impression that the claimant possibly wanted to leave. The claimant confirmed she made this comment but contended she did so after she had been dismissed in the context of a later meeting on 25 September 2017, this was not however supported by the agreed transcript of that meeting, nor recorded as having been made in the transcript of a meeting which took place on 11 August 2017 and we find supported by the transcripts of the August and September meetings the evidence of Mrs Donaghy more probable that the comment was in fact made at a meeting in or around 21 July 2017 prior to the claimant's dismissal in the context of the claimant explaining that she continued to feel unwell, had been to an appointment with her consultant and was waiting to see what he said about her glaucoma before making a decision about returning to work.

37. On 24 July 2017 the claimant sent a text message to Ms Barnard stating that she would not be going to work because she was sick and hand delivered a Statement of Fitness for Work assessing her on 24 July 2017 as unfit for work for two weeks because of glaucoma issued by her GP practice, signed by Dr CJ Sands, on 24 July 2017.

38. By letter of 28 July 2017 Mrs Donaghy, unbeknown to the claimant, wrote to Dr Thompson:

> *"Thank you for your letter dated 26th, June 2017 in regards to our employee Mrs Celia De Costa.*
>
> *At the time we could have possibly provided alternative work as she was a valued member of our team. However as Celia remains off work due to her Glaucoma, we are no longer able to offer this opportunity, as unfortunately the area in which she works is not as busy."*

39. Mr White subsequently reported to the claimant's GP by letter typed on 25 July 2017 in respect of the claimant's Uveitis that her left eye was still a little uncomfortable and confirmed medication that he had asked her to use until review in one month's time.

40. On 3 August 2017 Mrs Donaghy sent a text message to the claimant 'could you call around 10:00 this morning'. The claimant phoned Mrs Donaghy who asked that she call to collect her sick pay. The claimant called in and Mrs Donaghy accompanied by Mrs Shields brought the claimant into a meeting room. Mrs Donaghy queried

why the claimant's sick lines had been signed by different doctors, the claimant did not know and confirmed that that they had been issued to her at reception without her actually seeing her GP. Mrs Donaghy told the claimant that she did not have any work for her because the factory had changed, the claimant could not understand because the factory had not to her knowledge changed. Mrs Donaghy asked the claimant to ask her GP to write another letter about her health condition, the claimant said she would try but did not think her doctor would because he had already provided a letter; The claimant left without her sick pay, but it was later paid by the respondent into her bank account and the claimant sent an email that evening to thank Mrs Shields.

41. A Statement of Fitness for Work assessing the claimant on 7 August 2017 as unfit for work for four weeks because of shoulder pain and glaucoma was issued by the claimant's GP practice, signed by Dr CJ Sands, to her on 8 August 2017 and hand delivered thereafter by the claimant to the respondent.

42. On 8 August 2017 Mrs Donaghy texted the claimant, 'Celia would you please call in to see me tomorrow afternoon at 4.30'.

43. On 11 August 2017 the claimant attended a meeting with Mrs Donaghy, which the claimant recorded without the respondent's knowledge. The agreed 3 page transcript sets out therein :-

"B: Did you go to your doctor?

C: Yes, yesterday

B: Dr Thompson

C: Yes. He said nothing … . I asked about the weather … Sick note. Trying again.

B: I was just following up on his letter that's all I was doing Celia ... . So basically … So you went to the doctor on 26 June. (Reads letter) – 'peeling onions …' so ok, if not peeling onions you are fit otherwise I sent him a letter, tried to ring him a few times. He's not easy got. I wrote to GP (reads letter). Basically Celia because of your glaucoma we don't have any work basically. So at this stage for you … doctor has copy.

C: Doctor told me nothing of your letter.

B: I'll give you a copy of my letter. So Celia, you're off sick, you will continue to be off sick ... if things ... but … if things get better for you and you feel you can come back to me, there's no problem to come back to work.

C: Of course I want to come back to work.

B: At this moment in time because you're off and you're off because you can't do this job because of your eye and I have … no work for you, now

C: And?

B: And so I'm just telling you now Anne is going to pay you your sickness today and she'll pay your sickness for next week and thereafter you'll have to take your line to the benefits office to get your sickness

C: Oh, I not work no more here?

B: Not here

C: Alright. Just need to write a letter and give me

B: See this letter here, this is in response to your doctor's letter

C: This is for my doctor but I want one for myself

B: That's not for your doctor. This is explaining to the doctor. Read it again.

C: This letter is for Dr Thompson. Send letter to me and say I don't work here anymore.

I can work here?

B: No

C: Alright, send me a letter Bridie I need find another job and whatever

B: Of course. Part about it is Celia, you want to get yourself better again

C: But when I started you knew about my problem

B: I know. That's true. I knew about your problem but it was never an issue until now.

It's only become an issue now.

C: Before I just start peeling onions now. Before I did everything

B: I know. Even though you were not going to be peeling onions, your glaucoma is still an issue

C I just can't peel onions, the rest I can do everything, like before I started peeling onions, I do everything. I do make salads, I make stuffing, everything … .

B: I know you can do everything but even though you could have been back here and not peeling the onions, you still weren't back. Because your glaucoma's still bothering you. I understand that.

… Point is, it's still bothering you now and you've been off work quite a while now and it still remains a problem.

I don't have work at the minute. I could maybe have given you cleaning or something else … but at the minute I'm not that busy at the minute anyway

44. A few days later the respondent gave the claimant a letter, her P45, a Statutory Sick Pay form and employee's claim for benefit. In the letter dated 17 August 2017 Mrs Donaghy set out,

> *"TO WHOM IT MAY CONCERN*
>
> *17 AUGUST 2017*
>
> *Celia Da Costa's employment with Summer Garden Salads had been terminated from 18 August 2017.*
>
> *Celia's continuing health problems (Glaucoma) has made it impossible for us to continue to employ her in her role as a production operative. Her doctor (see copy of letter attached) has stated that the handling of onions causes her severe discomfort and unfortunately onions are handled in all parts of our production process and we have no other alternative work available."*

45. Solicitors wrote to the respondent on behalf of the claimant by letter dated 30 August 2017 raising that her employment had been unlawfully terminated and seeking confirmation that the respondent would continue to pay sick pay until resolution of her medical condition.

46. On 14 September 2017 and again in the absence of a reply on 21 September 2017 the claimant wrote to the respondent seeking an appeal hearing of the decision to terminate her employment on 18 August 2017 and in particular pointed out she previously carried out work which did not involve handling onions regularly and believed an alternate role could have been offered to her.

47. On 22 September Mrs Donaghy texted the claimant, '*Celia will you come down on Monday as you have requested a meeting with us take Ricardo* [the claimant's boyfriend] *with you'*.

48. The claimant accompanied by Ms Andrea Filipa attended a meeting with Mrs Donaghy on 25 September 2017. The meeting by agreement was recorded and the 22 page transcript thereof included in agreed documentation. Included therein:

> Mrs Donaghy set out by way of background '*So Celia had been working in Summer Garden Salads Limited from 2012. She has worked in all areas of the factory and took ownership of the task in hand. I saw her as reliable, a good time keeper and co-operative always ready to support her work mates. Over the past year, Celia has had to deal with family pressures which we as a company supported her. Well in fact we did. Celia has Glaucoma and in fact no sight in one eye and I have always admired her spirit and the fact that she wanted to provide for her family. Would you agree that I have always felt that way towards you?*' (Page 2, lines 8-15).
>
> Also, '… *so Celia went off as her Glaucoma had flared up. When I heard that cutting onions was causing this … I told her I was concerned, and I was concerned about her eye and the fact she had only one eye. Em that it was important to let her doctor know what type of work she did in Summer Garden. Dr Thompson gave Celia a letter too for Summer Garden when I was off on holidays. He suggested that if Celia did not have to cut onions she could come back to work immediately*.' (Page 2, lines 22-28).

The claimant commented *'When I feel well and I tell you …' (*Page 3, line 4).

Mrs Donaghy pointed out '*I have no problem with you working here, I want to tell you that … you know I never had …' (*Page 3, line 9-10).

Mrs Donaghy read out Dr Thompson's letter of 26 June 2017 and said '*So it was ok then, so the girls agreed that it was ok for you not to do the onions but Celia did not come back to work the next day, the next week. She didn't come back again' (*Page 4, line 1-4).

The claimant replied pointing out that she had however given the respondent sick notes with which Mrs Donaghy agreed but raised that they were from a different doctor which the claimant had told her she was able to get at the counter without actually seeing the doctor, the claimant pointed out that she had been for an appointment in Belfast and *'I go see what the doctor is going to tell about my glaucoma and after that I can come back.'* Mrs Donaghy clarified *'I am just going by this one doc'* and Ms Filipia acknowledged her understanding that Mrs Donaghy had wanted this doctor to say the claimant was ok. The dates of the sicklines were run through and Mrs Donaghy again clarified her point was that the claimant did not see the doctors but got the sickliness across the counter and that Mrs Donaghy had said it was important for the claimant to go and see Dr Thompson because he was the one that sent Mrs Donaghy the letter in the first place. Mrs Donaghy continued that when she had spoken to the claimant about what her Doctor had said in his letter that the claimant, '*said that her calome, calome, her glaucoma was still giving her bother and she could be back to work in one week, one month or a year … you know and I said, eh from, and from speaking to Celia, I got the impression, she wanted to possibly leave work, but be in a position to get other benefits which may be available to her provided she left work in a good way. You know if you just leave your work you get nothing' (*Page 6, line 27 – 32).

Mrs Donaghy acknowledged however that the claimant did not come to say she wanted to leave work, Mrs Donaghy explained that she had wanted the claimant to go to see Dr Thompson because of the letter he had given her, that Mrs Donaghy had thought possibly the claimant had wanted to leave work but could not say so, that at that time Mrs Donaghy had been happy to give the claimant cleaning work to do but as time went on Mrs Donaghy got fortnightly sick lines which she realised although doctor stamped, no-one actually saw the claimant, only Dr Thompson had. Ms Filipia pointed out however the claimant had been to see her specialist in Belfast, Mrs Donaghy acknowledged this but explained clarification was sought from her family doctor to see if the claimant was able to come back to work when she could come back.

The claimant remarked*, 'I never say I go leave my work, never'* (Page 8, line 3), which Mrs Donaghy acknowledged and proceeded to ask whether the claimant wanted to come back to work. The claimant asked if Mrs Donaghy wanted her to. Mrs Donaghy replied, *'Of course. Are you fit to come back to work'* (Page 8, line 16). In response the claimant questioned why the respondent had sacked her and raised concern that there would be bad feeling and then pointed out that she had a continuing sick note and said *'… I continually sick note for more two months'* (Page 8 Line 29), Mrs Donaghy agreed, the claimant again repeated *'two months'* and Mrs Donaghy sought clarification asking, *'Have you got a sick note for two months'* (Page 9 line 3). The claimant replied *'Two months'*, Mrs Donaghy asked *'Now?'* the claimant replied *'Yes'*.

The claimant again raised that she did not think it would be the same. The claimant said she had come to the meeting with Mrs Donaghy because she did not realise Mrs Donaghy would send her away. Mrs Donaghy explained she had sent a letter to the claimant's doctor in July and told the claimant it was important to go and see him, she had tried to ring him, get appointments and to talk to him and claimant knew all of this because Mrs Donaghy wanted to get it clarified. The claimant responded, *'he is not going to tell you nothing …'* (Page 10 line 2). Mrs Donaghy explained she was just responding to the letter the doctor had sent her, she referred to the wording of her reply and that she had told the claimant to make an appointment to go and see her doctor and discuss the letter, and she was going to go by whatever he said but when the claimant came back the letter had not been discussed. Mrs Donaghy again asked *'The bottom line is Celia; Number one, do you want to come back to work?'* the claimant responded that at her appointment with the doctor the day before her dismissal meeting he had told her nothing of a letter.

Mrs Donaghy asked the claimant again *'Do you want to work in Summer Garden?'* (Page 11, line 20) the claimant replied, *'Just you can answer about this because you sent me away before'*. Mrs Donaghy replied that they had *'moved past that now. We're back on a new page'*. The claimant expressed concern that it would not be a good situation for either of them for her to come back and asked did Mrs Donaghy want her to return, Mrs Donaghy queried what the claimant wanted, Ms Filipia responded that the claimant had to appeal but just wanted her money sorted out. Notice and holiday pay were raised and Mrs Donaghy acknowledged that it was not fair if the claimant was owed money. Ms Filipia stated they just wanted to sort out the money and *'then maybe can talk'*.

The claimant in response to Mrs Donaghy's comment that it sounded terrible if they had terminated her employment and did not give the claimant all the money owed to her said *'It's very, very … I fe[e]l very, very down, very down. It's because I tell you, yes I come, I, I it's possible I come back …'* (Page 13, line 15) and *'… but I not go feel well, and I think you not go feel well till well'* (Page 13, line 18), *'I feel go away and that's it'* (Page 13, line 22) and *'I, I not feel a person and I think I do too much for this factory. I do everything before and peeling onion and you know this …'* (Page 13, line 24).

Mrs Donaghy asked the claimant, *'Did you enjoy your work here?'*, the claimant responded*, 'I (unsure of word) sick note at moment, I go think about this … and after, I have two months and sick note because I'm not well … and oh sometimes I think you don't believe I'm sick …'* (Page 14, Line 4) *'… and if I stay home for, eh because my glaucoma, because my glaucoma peeling onions for me and I , you know about this, peeling onions for me, it's very, very hard ...'* (Page 14, line 18), *'… and I remember very well, I, my last day, it's in Wednesday, I peeling onions, I'm not finish because I leave another two bags and go home and next day, I need go to em (unsure of word- emergency?) in hospital, and you know about this, em of course, and after I start put very, very strong drops … and with these drops I feel very bad …'* (Page 14, line 22), and *'… and I not feel well about my eyes, continue not feel well and I come tell you because you call me. I tell you, I wait for my appointment in Belfast for my doctor, Mr Wright, and after I go check, sorry what's the doctor he's go to tell me and after, maybe I come back, I don't know … because when I go to emergency, the doctor tell me I go make the surgery because my glaucoma, it's very high'* (Page 14, line 28). The claimant continued *'And I say no because I want to wait for my doctor. And after I have another problem. It's my shoulder. I start with (cough) physio. I make the injection … and I wait for get (stay) well. It's my*

plan for comeback work …' (Page 15, line 2), *'… and continue everything'* (Line 6). The claimant continued, that Mrs Donaghy had however called her and told her *'you need ask for … one letter to doctor …'* Mrs Donaghy queried *'do you understand how important it was for the doctor and the hospital in Belfast to know the type of work she does ... with her eye, probably because it was never raised before … you know as an issue …'*

The claimant went on to again state she never said she was going to leave work and Mrs Donaghy expressed that she did not know where she had got it from but did feel the claimant had wanted to leave but could not say. The claimant emphasised that she did not want benefits, just work. Mrs Donaghy referred to there being no animosity in the factory and assured the claimant she would check out the situation with her pay. Mrs Donaghy acknowledged that the claimant liked to work.

Their conversation continued:

Page 17, line 22: Celia: *'At moment I need sick note for two months'*

Bridie: '*Yeah, and you'd see you after that. Is that what you're saying to me?'*

Celia: *'I don't know, I don't know.'*

Bridie: '*Well I want to say to you now that I could offer you cleaning job if, if it's a case that you're not able to work down in the factory, like the onions are right through the factory…'*

Ms Filipia pointed out that the claimant *'can work with cooking onions, just peeling onions that is not good'* and the clamant that she had told Mrs Donaghy that when she had sent her away, which Mrs Donaghy acknowledged, but explained that she was doing what she thought best for the claimant. Mrs Donaghy again told the claimant if she wanted to come back she could. The claimant queried why now, Mrs Donaghy referred to her conversation with the claimant when she was sent away *'So she said she would come back. She could come back to work in one week, one month or a year….And I think I even said to you that I would have to think what was best for you and Summer Garden, A year?'* (Page 20, line 4).

The claimant responded that a two month sick line was not too long. Mrs Donaghy referred back to the doctor saying she was capable of coming back to work but did not, said her glaucoma was still bothering her and that she could come back in one week, one month or one year, from which she got the impression she wanted possibly to leave work, but be in a position to get other benefits which may be available to her providing she left in the correct way. The claimant protested that *'possible leave ... is not leave'*.

The meeting ended with Mrs Donaghy again confirming they would sort out any money owing to the claimant.

49. The claimant confirmed on cross examination that when Mrs Donaghy at the meeting on 25 September 2017 asked the claimant to come back, she told Mrs Donaghy that she would think about it because she was still on sick leave.

50. The claimant also confirmed in her evidence on cross examination that she did not return to work after Dr Thompson had said she would be fit if excused from peeling

onions because she did not feel fit to go back, that her glaucoma problem was a persisting condition which for example at the date of the substantive hearing she felt was very elevated, so she did not go back because she was not able to, and stated 'even the sicklines after I had other complications like my shoulder, I had physiotherapy, I was on steroid injections and this problem takes a while to resolve,' and confirmed that her shoulder and uncontrolled glaucoma were the reason she did not go back to work.

51. Whilst outstanding payments being due for notice and holidays were raised by the claimant with Mrs Donaghy at the meeting on 25 September 2017 no payment was made until following a Case Management Discussion on 8 May 2018 when the respondent paid the claimant £360 for three of a total four weeks statutory notice entitlement due.

52. It was the claimant's evidence that she felt deeply offended by suggestions made by Mrs Donaghy on 25 September 2017 that she had failed to deliver the sick line on 26 June 2017.The meeting transcript however records a conversation which involved a run through of the dates of the sick lines provided, the point being made by the respondent that the sickliness provided were without the claimant being seen by the doctor, rather than failure to deliver a sick-line.

53. The effective date of termination (EDT) of the claimant's employment by the respondent was 18 August 2017.

54. As per records compiled by the respondent from clock cards the claimant at the date of termination of her employment had been overpaid in respect of actual hours worked and paid holidays taken, well in excess of the claimant's balance pro rata holiday entitlement for the 2017 holiday year.

55. At the time of the claimant's dismissal the respondent employed approximately five part time employees.

56. The Department for Social Development in correspondence dated 10 September 2017 confirmed to the claimant that they could pay her ESA (a benefit paid where ability to work is limited by ill health or disability) from 18 August 2017 of £73.10 per week and advised that she must provide medical certificates until a work Capability Assessment was carried out. In correspondence dated 29 November 2017, following a capability for work assessment the DSD confirmed that the claimant was placed in the work related activity group 'because your ability to work is limited by your condition' and advised that being in the work related activity group did 'not mean you have to look for work now'. The claimant was advised that an employment advisor would consider what kind of work-related activity she might be able to get involved in to prepare for the future and need not do anything else until they contacted her. The DSD also set out that no more medical statements or fit notes were required from the claimant's doctor.

57. Permitted work for under 16 hours per week with earnings less than £125.50 may be carried out by an ESA recipient without affecting their entitlement.

58. The claimant's claim was presented to the office of the tribunals on 3 November 2017.

59. The earliest job application following the EDT for which supporting documentary evidence was provided by the claimant was an application submitted for a cleaner

store person through Mount Charles at Moy Park Dungannon in or around February 2018 - closing date 19/02/2018, and only other application thereafter in April 2018 through Compass Group for a cleaner position at South West College Dungannon. The claimant remains on ESA which she is eligible to receive until 18 August 2018 and has not obtained further employment.

THE LAW

Disability Discrimination

Direct Discrimination

60. Section 3A (5) of the Disability Discrimination Act 1995 as amended (DDA) prohibits direct discrimination. It provides:-

> *"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."*

Direct Discrimination occurs where a person's disability is the reason for the less favourable treatment. It cannot be justified.

61. The comparator may be actual or hypothetical and is someone who is not disabled, or who did not have the same disability as the claimant. (***London Borough of Lewisham v Malcolm [2006] IRLR 701*** and the *Disability Code of Practice (Employment and Occupation) Paragraphs 4.8 and 4.13*.) Where there is no actual comparator the tribunal must identify the characteristics of the hypothetical comparator. However it is open to the tribunal to focus on the reason for the claimant's treatment; *"… 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 proscribed ground which is the foundation of the application? Or was it for some other reason? If the latter the application fails. If the former, there will usually be no difficulty in deciding whether the treatment afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."* Per Lord Nicholls at Paragraph 11 ***Shamoon -v- Chief Constable of the RUC 2003 IRLR 285.***

62. Direct discrimination will often occur where the employer is aware that the disabled person has a disability, and this is the reason for the employer's treatment of him or her. Direct discrimination need not be conscious- people may hold prejudices that they do not admit, even to themselves. Thus, people may behave in a discriminatory way whilst believing that they would never do so. Moreover, direct discrimination may sometimes occur even though the employer is unaware of a person's disability (the *Disability Code of Practice (Employment and Occupation) Paragraphs 4.11).*

63. Section 4A of the DDA imposes a duty to make reasonable adjustments:-

> *"(1) Where –*

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

… places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled,

it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to take in order to prevent the provision, criterion or practice, or feature, having that effect."

64. The duty to make reasonable adjustments is triggered where an employee becomes so disabled that she can no longer meet the requirements of her job description and hence liable to be dismissed. The duty may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability, involving a degree of positive action. Steps might include transferring the employee to another job. The comparative exercise to be carried out differs from that in direct discrimination. It is not necessary for the claimant to satisfy the tribunal non-disabled people doing the same job would have been treated differently. In many cases the facts will speak for themselves and the identity of the non-disabled comparators will be clearly discernible from the PCP in play (***Archibald v Fife Council [2004] IRLR 65***).

65. In ***Environment Agency v Rowan [2008] IRLR 20*** the EAT set out that a tribunal considering a claim that an employer has failed to make a reasonable adjustments 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."

66. If the duty arises then the tribunal goes on to consider if any proposed adjustment is reasonable to prevent the PCP placing the disabled person at the substantial disadvantage.

67. The factors to be taken into account 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 a reasonable adjustment and a non-exhaustive list of examples of reasonable adjustments are set out at Section 18B of the DDA. It is for the tribunal to decide whether something is a reasonable adjustment, objectively, on the facts of the particular case.

68. A dismissal can itself be an unlawful act of discrimination by reason of a failure to make reasonable adjustments (**Fareham College Corporation Walters [2009] IRLR 991 EAT**).

69. The burden of proof provisions apply to these proceedings. In ***Igen Ltd & Ors v Wong, Chamberlin Solicitors v Emokpae, Brunel University v Webster [2005] EWCA 142***, the England and Wales Court of Appeal gave guidance on the interpretation and application of the statutory provisions shifting the burden of proof in direct discrimination cases in relation to sex, race, and disability discrimination and revised and approved the guidance given in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] 2003 ICR 1205**.

70. In summary, the claimant must prove facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent has committed an unlawful act of discrimination. The tribunal will also consider what inferences it is appropriate to draw from the primary facts which it has found. Such inferences can include inferences that it is just and equitable to draw from the provisions relating to statutory questionnaires, a failure to comply with any relevant Code of Practice, or from failure to discover documents or call an essential witness.

71. If the claimant does prove facts from which the tribunal could conclude in the absence of an adequate explanation from the respondent that the latter has committed an unlawful act of discrimination, then the burden of proof moves to the respondent. To discharge that burden the respondent must show, on the balance of probabilities, that the treatment afforded to the claimant was in no sense whatsoever on a proscribed ground (here disability). The tribunal must assess not merely whether the respondent has proved an explanation for the facts from which inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that disability was not a ground for the treatment in question. Since the facts necessary to prove an explanation will normally be in the possession of a respondent, a tribunal will normally expect cogent proof to discharge the burden of proof.

72. Although the above logically establishes a two-stage process, it is not to be applied slavishly or mechanically, and in deciding whether the claimant has made out a prima facie case the tribunal must put to one side the employer's explanation for the treatment, but should take into account all other evidence, including evidence from the employer. (***Laing v Manchester City Council [2006] IRLR 748 EAT; Madarassy v Nomura International Ltd [2007] IRLR 246***; and ***Arthur v Northern Ireland Housing Executive and Anor [2007] NICA 25***.)

73. The Northern Ireland Court of Appeal in both ***Curley v Chief Constable of the Police Service of Northern Ireland and Anor [2009] NICA 8*** and ***Nelson v Newry & Mourne District Council [2009] NICA 24*** emphasised the need for tribunals hearing cases of this nature to keep firmly in mind that such claims are grounded upon an allegation of discrimination. The tribunal is required to look at the totality of the evidence and look carefully at the explanation put forward by the Respondent.

74. In **Hewage v Grampian Health Board [2012] IRLR 870 UKSC [2012] EqLR 884 UKSC** the Supreme Court affirmed the approach to interpreting the burden of proof remains that set out in **Igen** and **Madarrassy** (the 'revised Barton guidance').Whether situations are comparable is a question of fact and degree. It is important not to make too much of the role of the burden of proof provisions. Whilst they will require careful attention where there is room for doubt as to the facts necessary to establish discrimination, they may have nothing to offer where the

tribunal is in a position to make positive findings on the evidence one way or another.

75. The burden of proof in relation to the duty to make reasonable adjustments, was specifically considered in ***Project Management Institute v Latif [2007] IRLR 579***. The position as summarised in *Harvey on Industrial Relations and Employment Law, is*:-

> *"… a claimant must prove both that the duty has arisen, and also that it has been breached, before the burden will shift, and require the respondent to prove that 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; in fact it is permissible … for claimants to propose reasonable adjustments on which they wished to rely at any time up to and including the … hearing itself."*

76. Possible remedies a tribunal may grant on finding a complaint under the DDA well founded, where it considers it just and equitable, are set out at Article 17 (2), these include compensation, which where ordered shall be calculated applying the principles applicable to the calculation of damages in claims in tort (Article 17 (3)), that is, to put the employee insofar as is possible in the position he would have been in had the unlawful act not occurred. Compensation may include an award for injury to feeling (Article 17 (4)). Awards should be just to both parties (HM Prison Service v Johnson [1997] IRLR 162 EAT). In *Vento v The Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871 the Court of Appeal identified three broad bands of compensation for injury to feelings. Presidential Guidance issued for England and Wales and Scotland in September 2017 uprated the *Vento* bands in respect of claims presented on or after 11 September 2017 to a lower band of £800 to £8,400; middle band of £8,400 to £25,200 and an upper band of £25,200 to £42,000, with the most exceptional cases capable of exceeding £42,000. (Bands have been updated further since then for claims on or after 6 April 2018 to £900 to £8,600; £8,600 to £25,700; and £25,700 to £42,900).

77. Under the Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996 where a tribunal makes an award under the DDA it is obliged to consider the inclusion of interest thereon.

Unfair Dismissal

78. Under Article 126 of the Employment Rights (Northern Ireland) Order 1996 (**ERO**) an employee has the right not to be unfairly dismissed by his employer.

79. The Employment (Northern Ireland) Order 2003 (**EO**) at Schedule 1 sets out the statutory dismissal and disciplinary procedures (SDDP) to be followed as a bare minimum where applicable, by an employer contemplating a dismissal. The SDDP apply in this case. Failure wholly or mainly attributable to an employer to comply with requirements so as to complete the 3 step statutory dismissal procedure where an employer is contemplating a dismissal may render a dismissal automatically unfair under Article 130A (1) **ERO** unless under Article 130A (2) **ERO** the employer shows that he would have decided to dismiss the employee if he had followed the procedure in relation to the dismissal of an employee.

80. In relation to 'ordinary' unfairness of a dismissal, Article 130 **ERO** provides:-

"(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 reasons (or if more than one the principal reasons) 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 –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,"

81. Where a potentially fair reason is shown under Article 130(1), then determination under Article 130 (4) of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer:-

a) depends on whether 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.

82. A 'Polkey' deduction describes in unfair dismissal cases the reduction in any compensatory award for future loss to reflect the chance that the particular employee would have been dismissed fairly in any event had the unfairness not occurred (**Polkey v Dayton Services LTD 1987 3 All ER 974 HL)**. It requires assessment of: - if a fair process had occurred it would have affected when the claimant would have been dismissed; and the percentage chance a fair process would still have resulted in the claimant's dismissal.

83. In **Software 2000 Ltd v Andrews [2007] IRLR 568 EAT**, the EAT held that in the Article 130(4) "exercise of determining whether the employer has shown that the employee would have been dismissed if a fair procedure had been followed, and the assessment of whether, instead, the dismissal is unfair but subject to a Polkey reduction, are exercises which run in parallel". There are five possible conclusions that a tribunal may reach, according to Mr Justice Elias. Firstly, the evidence from the employer may be so unreliable that the exercise of seeking to reconstruct what might have been is too uncertain to make any prediction. Secondly, the employer may show that if fair procedures had been complied with, the dismissal would have occurred in any event. The dismissal will then be fair in accordance with Article 130(A). Thirdly, the tribunal may decide there was a chance of dismissal but that it was less than 50%, in which case compensation should be reduced in accordance with the **Polkey** principles. Fourthly the tribunal may decide that employment may have continued, but only for a limited period. Finally the tribunal may decide that the employment would have continued indefinitely because the evidence that it might have terminated earlier is so scant that it can effectively be ignored.

84. Article 17 of the Employment (Northern Ireland) Order 2003 requires an uplift to be applied to awards in proceedings before an Industrial Tribunal relating to a claim under applicable jurisdictions listed in Schedule 2 by an employee where it appears to the Industrial Tribunal that a claim to which the proceedings relate concerns a matter to which one of the statutory procedures applies, the statutory procedure was not completed before the proceedings were begun, and the non-completion of the statutory procedure was wholly or mainly attributable to failure by the employer to comply with a requirement of the procedure, in which case it shall (save where there are circumstances which would make an award or increase of that percentage unjust or inequitable) increase any award which it makes to the employee by 10% and may, if it considers it just and equitable in all the circumstances to do so, increase it by a further amount, but not so as to make a total increase of more than 50%.

85. Mr Grainger and Mrs Donaghy provided written and oral submissions. The following authorities were referred to and taken into consideration:-

Claimant:-

Fareham College Corporation v Walters [2009] IRLR 991, EAT

James v Eastleigh Borough Council [1990] 2 AC 751

Archibald v Fife Council [2004] ICR 954, HL

Morse v Wiltshire County Council [1999] IRLR 352 EAT

Project Management Institute v Latif IRLR 579

Wong v Igen Ltd; Emokpae v Chamberlain Solicitors; Webster v Brunel University [2005] ICR 931; [2005] EWCA 142; [2005] 149 SJ 265

Hewage v Grampian Health Board [2012] ICR 1054,SC

Sarah McCrossan v Department for Social Development 62/15 FET & 23/28

Maria McKeith v McCorry and Others as the committee for the time being of the Ardoyne Association 1188/5IT

Nelson v Newry & Mourne District Council

Madarassy v Nomura International plc [2007] IRLR 246

Shamoon v RUC [2003] ICR 377

Islington Borough Council v Ladele [2009] ICR 387

British Transport Commission v Gourley [1956] AC 185

Cox v Hockenhull [2000] 1 WLR 750

Kenneth Crabbe v Lorraine and Oswald Smyth t/a Galgorm Castle Bar and Restaurant CRN 5780/09

Sheffield Forgemasters International Ltd v Fox; Telindus Ltd v Brading [2009] IRLR EAT

Cooper Contracting Ltd v Lindsey EAT/A 0184/15

Fyfe v Scientific Furnishing Ltd [1989} IRLR 331

Respondent:-

Polkey v A E Dayton Services Ltd 1987

APPLYING THE LAW TO FACTS FOUND

86. Whilst the claimant overall came across as honest and straight-forward in her evidence in relation to the circumstances surrounding her dismissal we consider that she was incorrect in her evidence in particular that Mrs Donaghy told her *not* to tell her doctor about the type of work she was doing whereas it is apparent from meeting transcripts that Mrs Donaghy *did* wish that the claimant communicate the type of work she was doing to her doctor and we consider was in fact concerned that there may be a risk to the claimant's eye health with consequent health and safety implications; also, in her evidence that she indicated uncertainty to Mrs Donaghy as to when she might be fit to return to work using the term *a day a week a year* in September 2017 rather than July 2017 which is not supported by meeting transcripts.

87. There were also inconsistencies in the evidence of the respondent, in particular with new arguments being raised not supported by objective evidence.

Direct discrimination

88. Mr Grainger contended *"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"* as per Lord Nicholls in Shamoon and Mr Justice Elias in **Islington Borough Council v Ladele [2009] ICR 387** at paragraph 41 referring to the reasoning of Lord Hoffman in **Watt (formerly Carter) v Ashan [2008] ICR 82** and as such this a case where it is open to the tribunal to focus on the reason for the claimant's treatment; *"…Was it on the proscribed ground which is the foundation of the application? Or was it for some other reason?" He contended otherwise the correct comparator would be someone without the claimant's disability in circumstances not materially different, who had been sick with another condition; that the respondent says that it would have treated anyone with the same severe prolonged reaction to raw onions this way, however there was no evidence before the respondent when it made the decision to dismiss. The claimant had gone off work with a reaction to onions and she had glaucoma in any event, the respondent did not seek any medical evidence and decided to dismiss her in the absence of medical evidence on the purported basis that she could not handle onions whereas her doctor had only highlighted an issue with her peeling them.*

89. We consider that the facts in this case do speak for themselves: The claimant had glaucoma; the respondent was aware of the claimant's glaucoma and had irrespective of it provided her a job under the steps to work programme, and thereafter employed her; the claimant suffered a severe reaction to onions causing

her to go off work; Doctor Thompson confirmed discomfort experienced by the claimant *peeling* onions and indicated she would be fit if excused from this; Ms Barnard at that stage identified an adjustment could be made to allow the claimant to return to work; the claimant contrary to Dr Thompson's letter was also issued and provided the respondent a further certificate assessing her as continuing to be unfit for work by reason of her glaucoma; in July 2017 the Bratt Pan in the Gluten Area was commissioned as part of the respondent's plan toward total separation of its gluten and gluten free food production operations; it was unclear to the respondent at this point whether the continuing issue with the claimant's glaucoma was as a result of peeling onions or unrelated to onions; Mrs Donaghy had wanted the claimant to communicate the type of work she was doing to her doctor; the respondent thereafter proceeded to dismiss the claimant. We consider that the reason for the claimant's treatment was her *continuing absence* (a *consequence* of her glaucoma), coupled with a belief in there being a *health and safety risk* (given the claimant's severe reaction when peeling onions) arising in relation to the claimant working in an environment with onions given its recent progress such that onions would ultimately be peeled and chopped in both food production areas, not just Gluten Free, albeit that the respondent had not properly substantiated its belief nor considered what reasonable adjustment could be made. We consider the continuing absence due to sickness and perceived health and safety risk following a severe reaction to onions are both relevant circumstances and are not persuaded the claimant was treated by the respondent less favourably than it would have treated a hypothetical comparator in the same circumstances on the *ground* of the claimant's disability and as such find that a prima facie case of direct disability discrimination has not been established.

Reasonable adjustment

90. The PCP was a requirement to peel and chop onions.

91. The PCP put the claimant at a substantial disadvantage of serious aggravation of her eye condition/s, in comparison to persons who are not disabled.

92. The respondent had provided the claimant with protective goggles but she had difficulty wearing these with her glasses. We consider that the respondent knew or could reasonably have been expected to know of the claimant's disability arising out of the events of June 2017 and that she was likely to be placed at this disadvantage giving rise to a duty for the respondent to then take such steps as were reasonable in all the circumstances, in order to prevent the PCP having that effect.

93. Mr Grainger contended it would have been reasonable for the respondent to have adjusted workplace procedures by providing someone to help or assist the claimant to peel and chop onions in the Gluten Area, such as someone with another duty re-allocated; or, to arrange for the peeling and chopping of onions to take place somewhere else and to have then been placed into a position where they could be used by the claimant.

94. The respondent contended it was not financially possible to employ someone to peel and chop onions for the claimant or to bring onions from one factory to another due to the risk of microbial contamination, the factory having been divided into two separate isolated units, Gluten and Gluten Free in July 2017, and to do so would involve a changing out of and into protective clothing in the different area and vice versa to facilitate the movement of onions to the claimant. We accept no evidence was presented to support prohibitive cost, microbial cross contamination or absence

of any safe area where chopped onions could have been left for the use of the claimant. We accept on balance that the suggested adjustments would have been of little or no cost, and despite the small size of the undertaking any associated cost not disproportionate, and in any event that costs were not in fact even considered or investigated by the respondent including the possibility of grant aid for example through Disability Action.

95. We consider that the adjustments suggested would have been effective in preventing the substantial disadvantage to the claimant, would have been on balance practicable and overall reasonable.

96. We accept that the claimant has proven both that the duty to make a reasonable adjustment arose; that the duty has been breached and burden of proof has shifted to the respondent to prove that it complied with the duty.

97. It was apparent that the disadvantage suffered by the claimant had occurred despite the provision by the respondent of protective goggles. Despite this and the initial identification by Ms Barnard after receipt of Dr Thompson's letter that onions could be peeled and chopped by other employees, no adjustment whatsoever was thereafter suggested or discussed at any point with the claimant with a view to preventing the aggravation of her eye condition, with the respondent instead proceeding to dismiss the claimant due to her continuing health problems (glaucoma) and purported severe discomfort caused by the *handling* of onions (as opposed to the *peeling there* of). In the circumstances we find that the respondent has failed to prove that it complied with the duty to make a reasonable adjustment.

Unfair Dismissal

98. It was conceded that the respondent failed to complete the statutory dismissal procedures and hence the dismissal was automatically unfair under Article 130A(1) **ERO** 1996. The respondent however contended if it had followed a fair process that the dismissal of the claimant would have occurred in any event fairly on grounds of capability and otherwise a Polkey reduction to the compensatory award appropriate to reflect the likelihood of this.

99. Capability is a potentially fair reason for dismissal under the **ERO** 1996. The respondent relied on the claimant's own evidence as to her being disabled for the purpose of the DDA in support of its contention that the claimant's employment might have otherwise fairly terminated early on grounds of capability. A dismissal must however be both substantively and procedurally fair. The respondent we accept had failed to carry out reasonable investigations or consultation with the claimant into her capability so as to substantiate its belief in her incapacity and we consider the evidence that the claimant's employment might have otherwise fairly terminated early on grounds of capability is so unreliable that the exercise of seeking to reconstruct what might otherwise have been is too uncertain to make any prediction and accordingly find that the claimant's dismissal was automatically unfair for failure to complete the SDDP.

Holiday pay

100. The claimant sought payment for holidays accrued due to her in 2017 which the respondent contested. Mr Grainger submitted that it was for the tribunal to decide whether the claimant had agreed to the differing arrangement operated by the respondent of flexible working with annualised hours with time off given in lieu of

overtime, in the absence of formal amendment of the claimant's contract of employment. The tribunal considers, albeit not confirmed in writing, that the claimant's contract of employment was varied orally and by conduct to one of annualised hours as operated without objection from 2013, and allowing for the overpayment for hours and holidays made by the respondent to the claimant against her pro rata annual holiday entitlement there is no balance remaining due to the claimant.

Notice pay

101. At hearing the claimant sought a further week's pay in lieu of notice which the respondent resisted on the basis that one week's notice of termination of employment had been verbally given to the claimant on 11 August 2017 that her employment would terminate on 18 August 2017 along with the later payment in lieu of three weeks. Mr Grainger submitted that it was for the tribunal to decide whether the purported notice given was in fact clear and unambiguous providing the claimant an ascertainable date of termination. The tribunal considers that the respondent on 11 August 2017 clearly conveyed orally to the claimant in unambiguous terms, and from which the claimant understood, that her employment would terminate in one week's time on 18 August 2017 as supported by the claimant's request for a letter confirming her dismissal and that the claimant's claim for further notice pay is not well founded.

Further findings relevant to remedy and conclusions

102. The claimant from the week ending 23 June 2017 until the week ending 18 August 2018 was in receipt of SSP together with Working & Child Tax Credit of £121.01. Working Tax Credit eligibility is subject to being in paid work for a required number of hours per week, the minimum being 16 hours. The standard weekly rate of SSP in 2017/18 was £89.35. An employee off work because of illness in receipt of SSP will still count as being in work for WTC purposes. SSP may be paid for up to 28 weeks. The claimant continued to receive Working & Child Tax Credit until 12 October 2017 after which she no longer received WTC, just Child Tax Credit of £55.66 per week, increasing to £64.04 from 11 April 2018.

103. The claimant had a strong work ethic, enjoyed and greatly valued her job with the respondent viewing the factory as her livelihood, always giving it her ' sincerity, fidelity and best'. We accept however that the claimant felt 'disposable' as a result of the respondent dismissing her and felt offended and annoyed by the suggestion that she had wanted to leave work and claim benefits. The claimant has suffered hurt to her feelings, considering herself to have been dismissed without regard, causing her financial difficulties at a difficult time, in particular with her son changing schools, having to make cutbacks, borrow and rely upon charity. She has experienced feelings of depression, embarrassment, guilt and worthlessness, viewing herself as having been discarded after many years of service for a condition she cannot control.

104. The claimant asserted in her evidence at the substantive hearing that she had told Mrs Donaghy in September 2017 that it could be '*one day, one week, one year*' before she would be fit to return to work

105. The claimant was unlawfully discriminated against when the respondent failed in its duty to make reasonable adjustments, instead proceeding to dismiss her and was

automatically unfairly dismissed for failure by the respondent to complete the SDDP.

106. The respondent has not shown the claimant to have failed to mitigate her loss.

107. The Claimant sought compensation by way of remedy. Where a dismissal is both unfair and an act of unlawful discrimination, the tribunal would ordinarily award compensation on the basis of discrimination. Recoupment and the statutory cap do not apply and 'restoring the claimant's position' could produce a higher figure than the just and equitable test (see **D'Souza v London Borough of Lambeth [1997] IRLR 677**). We consider it is appropriate in this case to award compensation on the basis of discrimination and find it just and equitable to award compensation by way of remedy.

108. In assessing the claimant's actual loss the tribunal has to consider what sums the claimant would have received had the unlawful act not occurred, this is not an exact exercise and tribunal has adopted a broad brush approach.

109. Allowing for the effect of the respondent's unlawful actions upon the claimant we do not however on balance accept that the claimant would otherwise have been fit to return to work as from the EDT. We note in particular: the claimant's assertion that she had told Mrs Donaghy in September 2017 that it could be 'one day, one week, one year' before she would be fit to return to work (albeit we consider this more likely to have been stated in July 2017); the claimant's confirmation that she had a continuing 2 month sick line when Mrs Donaghy at their meeting in September 2017 asked if she wished to return to work; the claimant's first job application in February 2018 and second application made thereafter in April 2018 (following assessment as eligible for ESA in November 2017). We consider had the unlawful act not occurred the claimant would have continued not to feel sufficiently well so to return to work until at the earliest late February/early March 2018.

110. The respondent objected to the claimant's claim for loss of Working Tax Credit because it had not been aware at the time of benefits she had been in receipt of. The tribunal accepts however that WTC is a benefit conditional upon working intended to top up the income of low income workers and treated as income by HMRC. We accept on balance that the claimant incurred a financial loss in respect thereof arising naturally and directly from her dismissal up to when it would have otherwise ended on exhaustion of SSP and are not persuaded that foreseeability is a bar to its award for that period. We consider that causation thereafter is not however attributable to the respondent's unlawful act and that the claimant would not have been eligible for WTC following the end of SSP, until returning to work for 16 hours per week, whereupon ESA paid from the discontinuance of SSP would have ended or had the claimant instead returned to work for less than 16 hours per week and preserved entitlement to ESA, she would not have met the minimum working hours to qualify for WTC, either way we consider adopting a broad brush approach that from March 2018 onwards the claimant's approximate net loss is that of wages only.

111. We assess the claimant's actual loss as 19 weeks SSP and 11 weeks WTC until 29 November 2017, less ESA received to then, and thereafter wages for approximately 12 weeks (ESA effectively cancelling out any loss of WTC) up to the hearing.

112. There is no evidence of circumstances before the tribunal which would make an increase under Article 17 of the 2003 Order unjust or inequitable; or such that it would be just and equitable to increase an award under Article 17 by more than 10% if compensation were awarded under the ERO.

113. Taking into account the claimant continuing as unwell for a period after the EDT, we consider as the mid-point of probabilities that on making reasonable efforts to mitigate her loss the claimant could be expected to secure other work at a similar rate of pay within a period of 52 weeks from the EDT and award 12 weeks' pay for future loss.

114. We accept the claimant's evidence that she has experienced feelings of depression, embarrassment, guilt and worthlessness, viewing herself as having been discarded after many years of service and that she has suffered injury to feelings caused by her knowledge that she was discriminated against, albeit we consider that the respondent acted out of ignorance rather than malice or with intent and it was a singular act of discrimination albeit it with continuing consequences. We consider that the claimant's injury to feeling falls in the middle to high end of the lower band of ***Vento*** and feel that an appropriate amount of compensation is £ 6,000.

115. The tribunal is obliged to consider making an award of interest. There is no evidence before the tribunal amounting to exceptional circumstances such that serious injustice would be caused if an award of interest were made. Accordingly the tribunal accedes to the claimant's request that interest be awarded.

116. Accordingly the tribunal awards as follows:-

117. COMPENSATION

(A) **Compensatory award**

(1)	Loss of statutory rights		£ 250.00
(2)	Financial Loss		
	To 29 December 2017, say		
	19 weeks SSP @ £89.35 =	£ 1,697.65	
	11 weeks WTC @ £66.01 =	£ 726.11	
		£ 2,423.76	
	Less 19 weeks ESA @ 73.10 = -	£ 1,388.90	
	Net Loss	£ 1,034.86	
	Thereafter to hearing date, say		
	12 weeks wages @ £120 =	£ 1,440.00	
	Total		£ 2,474.86

(3) Future loss, say

12 weeks wages @ £120 =	£ 1,440.00	
Total		£ 4,164.86

(4) 10 % uplift on compensatory award: £ 416.49

Total compensatory award **£ 4,581.35**

(B) **Interest on compensation (other than injury to feelings) from mid-point date to calculation date:**

31 weeks @ 8% p.a.: £ 218.50

(C) **Injury to feelings compensation:** £6,000.00

(D) **Interest on injury to feelings award from date of discrimination to date of calculation:**

62 weeks @ 8 % p.a.: £ 572.30

Total discrimination compensation **£ 11,372.15**

(E) **Unfair Dismissal Basic award:**

4 years (continuous employment) x 1 (age factor)
x £120 (gross wage) = **£ 480.00**

118. Total Compensation: **£11,852.15**

CONCLUSION

119. The claimant was automatically unfairly dismissed for failure to complete the SDDP and the respondent failed in its duty to make reasonable adjustments. The claimant's claims in respect of notice and holiday pay are not well founded and are dismissed. The claimant is awarded in total compensation of **£11,852.15.**

120. This is a relevant decision for the purposes of the Industrial Tribunals Interest Order (Northern Ireland) 1990 and the Industrial Tribunals Interest in Awards in Sex and Disability Discrimination Cases (Regulations) (Northern Ireland) 1996.

Employment Judge:

Date and place of hearing: 29, 30 May 2018, 14 and 15 June 2018, Belfast.

Date decision recorded in register and issued to parties: