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Judgment: approved by the Court for handing down | *Delivered:* **14/05/2013**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

COLIN TENNER

Appellant;

-and-

PRICEWATERHOUSECOOPERS LLP

Respondents.

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ (giving the judgment of the Court)

[1] This is an appeal against the dismissal, by an Industrial Tribunal, on 23 June 2011 of the appellant's claims of,

(a) direct disability discrimination on the basis of his illness;

(b) failure to make reasonable adjustments

(i) in the steps to be taken before he returned to work,
(ii) by failing to obtain a full and appropriate medical report and
(iii) by offering a job without modification; and

(c) victimisation in that the respondent failed to award him performance pay for the financial year 2009 because he had instituted proceedings against it.

An appeal against the dismissal of an associative disability discrimination on the basis of his mother's ill health was not pursued.

Background

[2] The background is taken from the findings of the tribunal. The appellant, a chartered accountant, joined the respondent firm in 1987 and was admitted as an equity partner on 1 July 2006. His partnership was terminated on 27 February 2010. Prior to, and subsequent to, the appellant's admission as a partner, he was consistently graded as an outstanding performer. From 10 September 2007 until the date of termination he was off work on sick leave.

[3] In March 2004 the appellant was appointed as lead advisor on the Belfast Education & Library Board Strategic Partnership Project (the BELB Project). Mr Hugh Crossey was an engagement or assignment partner for the duration of the project. The tribunal accepted that the BELB Project was extremely difficult and stressful because of its complexity and other factors including difficulties the appellant experienced with a person referred to as AB, who fulfilled a lead role for one of the client entities. Once he became a partner the appellant was the leader of the project.

[4] The appellant contended that Mr Crossey downplayed the problems of the project and that, despite the appellant's requests to be taken off the project, he was required by Mr Crossey to devote even greater amounts of time to it which ultimately led to a breakdown of his mental health, causing him to go on sick leave. Mr Crossey characterised the project as no more challenging than other complex projects although the Tribunal noted his later descriptions of the project as 'a very hostile environment', a 'volatile situation' and 'a very stressful environment'. Mr Crossey thought that there was a personality clash between the appellant and AB.

[5] The Tribunal noted e-mail correspondence and various meetings from 2005 to 2007 which indicated that the appellant offered to come off the project if that would move it forward. The Tribunal found it significant that in August 2007 the respondent suggested two replacements (one of whom ultimately completed the project) both of whom were rejected by the appellant. The Tribunal did not accept that Mr Crossey was unsupportive of or undermined the appellant. It found that as oversight partner he had concerns about the project going wrong and generally made himself available as a sounding board for the appellant and was ready to give advice. The Tribunal accepted his evidence that the appellant did not always wish to hear the advice and continued to run the project as he felt best.

[6] The tribunal identified three interventions by Mr Crossey which the tribunal considered reasonable and appropriate. In or around 12 January 2006 Mr Crossey agreed with AB that the appellant would work on site three days a week for five weeks, although in fact the period turned out to be for some months. The project at that stage was in crisis and the appellant wanted to withdraw from it. Mr Crossey

considered that the reputation of the firm would be damaged and the tribunal considered that there was a business imperative for his actions.

[7] As indicated at paragraph 5 above in August 2007 the appellant met Mr Crossey to discuss possible replacements for him on the project. Two names were put forward. Both were rejected by the appellant who was then the partner leading on the project. The tribunal noted that Mr Crossey did not overrule the appellant on this. In fact one of those identified subsequently took over and completed the project satisfactorily.

[8] At a meeting on 3 September 2007 the appellant and Mr Crossey had a difficult meeting with the Strategic Investment Board. AB insisted that the project be completed by November 2007. The appellant suggested March 2008 as a more realistic alternative. Mr Crossey stated that PwC would do all it could to complete the project in November 2007. The tribunal did not accept that Mr Crossey had undermined the appellant by agreeing to that date as there were conditions attached to the undertaking which it was likely that the client could not achieve. The tribunal found that the appellant sought Mr Crossey's help and advice but rejected it when he came up with a solution.

[9] On 4 and 5 September 2007 the appellant met both Mr Crossey and Mr Terrington to discuss his unhappiness about the way he was being treated on the project. On 7 September he received an email from one of the directors of the BELB project making it clear that it had to be completed by November 2007.

[10] On 10 September 2007 the appellant went off work. He emailed Mr Terrington to advise him that he had taken a week off to consider his position with the firm. On 18 September 2007 he indicated that he felt unwell and on 21 September stated that his doctor considered him to be suffering from work-related stress. He did not return to work prior to the termination of his partnership. The respondent accepts that he was disabled by reason of mental illness at all material times.

[11] The appellant claimed that the respondent had an unsympathetic view of staff illness. He relied, inter alia, on an email from Mr Crossey when the appellant had had a minor ailment that someone should tell him that 'real partners don't get sick'. This referred to an earlier period of absence by the appellant in respect of a short physical illness. In evidence Mr Crossey characterised this as light-hearted banter, but accepted it was tactless. The Tribunal was not satisfied that anything turned on this comment, noting the official response to the appellant in September 2007 that he should contact Partner Affairs who would provide advice and support with a view to getting him back to work.

[12] The appellant saw Dr Ferrante, the respondent's Chief Medical Officer, who informed Partner Affairs on 4 October 2007 that the appellant was clearly unfit to

work and would remain so until December 2007. The appellant began treatment with Dr Mitchell, a psychologist. Over this period he had meetings with Partner Affairs in which he complained about lack of support in the BELB Project. In mid-November 2007 he suggested to Mr Terrington of the Belfast office that he would not be back to work before February /March 2008 if at all. The Tribunal found it significant that the appellant was indicating at this early stage that he may not return.

[13] There were internal emails between Mr Terrington and Mr Crossey about the need for a 'Plan B'. The Tribunal was not satisfied that this was evidence that the respondent had resolved to get rid of the appellant at an early stage. The Tribunal accepted as genuine both of the respondent's stated concerns of trying to manage the business affairs in the absence of any real contact from the appellant or Partner Affairs and Mr Terrington's concern for the appellant's health.

[14] The Tribunal described a series of meetings between the appellant and senior personnel of the respondent beginning on 17 January 2008, concerned with finding a way forward. The appellant required four elements to bring about his successful return to the Belfast office: (1) a change in role whereby he would remain as a partner; (2) action to be taken on the alleged bullying by the client in the BELB Project; (3) new support structures to be put in place to help him to move forward; and (4) acknowledgement from Mr Crossey that things had not been handled properly and that lessons had been learned.

[15] From an early stage it was indicated by Partner Affairs, who thought discussion should focus on the first three elements, that the appellant was unlikely to receive an apology from Mr Crossey. The appellant placed emphasis on the fact that Mr Crossey accepted during cross-examination that he would have been prepared to give a number of forms of apology to Mr Tenner, including: (a) an apology for not having realised how unwell Mr Tenner was before he went on sick leave; (b) an acknowledgement that, had he realised how unwell Mr Tenner was, he would have taken him off the BELB Project; (c) an apology for failing to send Mr Tenner a personal email while he was off sick; and (d) an acknowledgement that lessons had to be learned. However the Tribunal found that the claimant wanted a full apology and did not resile from that demand at any time up to October 2008. As indicated at paragraph 5 above the tribunal found that Mr Crossey had not been unsupportive of the claimant as the appellant alleged nor had he tried to undermine him.

[16] Meetings on 7 and 17 April 2008 seemed to be positive. However the Tribunal noted the appellant's view that Mr Terrington had given him only a limited apology while Mr Terrington expressed concern that the appellant appeared to be laying down conditions for a return to work and was fixated on a full apology from Mr Crossey or some form of public apology. The second meeting included further discussions about alternative roles, but by October 2008 these opportunities had ceased. The Tribunal was satisfied that in this meeting Mr Terrington acted in good

faith. He had also indicated it would be difficult if not impossible to get an apology. The appellant was asked to come back about interim roles but did not do so.

[17] The Tribunal decision described various events which followed including:

(i) the appellant discussing issues with a neighbour who was a Belfast partner in the firm;
(ii) the Tribunal's view that Mr Terrington became exasperated with the appellant saying different things to different people;
(iii) Mr Terrington's belief that the appellant might actually prefer a role in London;
(iv) the appellant's increasing concern that he would be unable to return to work in Belfast because no–one seemed to accept that mistakes had been made; and
(v) the appellant's indication that his health had deteriorated.

The Tribunal formed the view that the appellant was backing away from returning to work. The appellant attributed his relapse to a failure to address those issues which had caused him concern.

[18] The Tribunal noted that around May 2008 internal PwC communications began to allude to the possibility that the appellant may not come back at all. In an email from Partner Affairs to Dr Ferrante, it was stated that Mr Crossey and others did not feel sympathetic to the situation which had caused the appellant's illness. The Tribunal noted that there appeared to be a culture that people had to cope by knuckling down and getting on with it though there was also evidence of concern for colleagues.

[19] By early June 2008 a collective view appears to have emerged that it would be best if the appellant left the firm. Around this time the appellant's mother suffered a stroke, with the consequence that he was not sure that working in London would be viable, and the appellant's health deteriorated. He told Partner Affairs that he was suffering from depression the main cause of which was disappointment at the level and nature of engagement with the firm. Ann Cottis of Partner Affairs was of the view that things had moved backwards and that nothing would satisfy the appellant short of a public announcement that PwC would withdraw from the BELB Project and other public sector work. The appellant denied this in relation to public sector work generally. Subsequent events included Partner Affairs encouraging the appellant to return to work in Belfast in August 2008 because, owing to uncertainties in the economy, there was the prospect of redundancies. The Tribunal also records a comment made by the appellant to his neighbour in July 2008 that he would not be back to work soon if ever.

[20] The Tribunal referred to further internal PwC discussions indicative of a suspicion that the appellant was not as ill as he claimed. In August 2008 Dr Ferrante

noted that there was stalemate but that it would be possible to construct a return to work programme, although the appellant remained resistant to this on the basis of unresolved business from his departure. Dr Ferrante suggested a way forward might be to instigate a brief investigation of his circumstances. Mr Crossey expressed surprise that this recommendation was being made a year into the situation and stated it was in no-one's interest for the situation to drag on. An exchange of further internal e-mails included a statement that the appellant was on the list of those to be exited. This was a reference to the anticipated commencement of Project Sand which was concerned with partner-level redundancies throughout the UK. The Tribunal found that however unsympathetic his colleagues may have been, it was unsurprising that they were considering the possibility that he might leave given that he had mentioned this himself.

[21] In September 2008 Ann Cottis of Partner Affairs met several times with the appellant. At one meeting the appellant provided detailed information on what had happened during the BELB Project. Lessons that might be learned were discussed and it was agreed they would meet again in October. The appellant was invited to consider the options available to him as a return to the Belfast office might not be possible. In October the appellant contacted Mr Thompson of the London office stating that he was well on the road to recovery, ready to begin the process of exploring how and when to return to work, and suggesting an agenda that included discussion of the difficulties experienced on the BELB Project.

[22] The appellant met with Mr Thompson on 17 October 2008. Mr Thompson told the appellant there was no longer a role for him at PwC and he was being made redundant. The Tribunal was satisfied that in the summer of 2008 Mr Thompson had begun to look at partner roles and numbers engaged in consulting nationally. He was of the view that the public private partnership (PPP) workload in Northern Ireland could not sustain an equity partner.

[23] The appellant's business case as set out in his application for admission as a partner had not developed as forecast. He had anticipated revenues of £3.2 million in the financial year 2009 but because of the economic slowdown future levels of fees were likely to be less than £1 million per year. The target income for a partner was £2.5 million per year. PwC won all but one of the available assignments during the period of the appellant's absence so his absence through illness made no difference to achieving target income. The PPP role in Scotland did not survive Project Sand. The Tribunal noted that the equity partner in Scotland was not disabled and that other partner roles in Northern Ireland were looked at as part of Project Sand. The Tribunal found that the redundancy process was genuine and rejected the appellant's case that it was a sham.

[24] The appellant complained that Mr Thompson had not complied with protocol in that a business plan had not been prepared prior to the decision. However the Tribunal stated that the meeting had been arranged at the request of the appellant

and accepted that Mr Thompson thought it would be unfair and misleading to discuss a return to work. Mr Thompson knew the procedure and, on one view, the appellant was being told in advance of the proposal to make him redundant. No weight was attached to this one way or another. While the Tribunal found that the business case ultimately did involve two breaches of procedure, it did not draw any adverse inferences from them in view of the explanations given.

[25] On 12 November 2008 the Partner Affairs Committee approved the redundancy proposal for recommendation to the Supervisory Board. It was considered important to be able to show that they had taken into account the appellant's skills in relation to opportunities in Great Britain. Further correspondence and meetings flowed from this which resulted in identification of an opportunity to work as a partner in London on a full-time permanent basis. The appellant saw this as an attempt to bolster PwC's legal position and felt it unrealistic given his mother's condition and advice in relation to his own condition. While it was the appellant's case that the job was offered to him knowing he could not take it, the Tribunal was satisfied that notwithstanding that no element of flexibility was mentioned, he could have performed the role on a '3/4/5' basis (i.e. working 4 days in London and 1 in Belfast) as this was a common working arrangement of which the appellant would have been aware.

[26] The doctors commented on the proposal. Dr Ferrante was of the view that the appellant was fit to take up the post in London. Dr Miller stated that the appellant suffered from a recognisable psychiatric illness in the form of severe depression without psychosis stemming from work-related stress. A part-time short-term deployment to London might benefit him but a long-term deployment outside Northern Ireland could cause a catastrophic response because of his removal from his support mechanisms in Northern Ireland. On this basis the appellant refused the London post on 23 January 2009.

[27] The evidence of Dr Sharkey who was engaged by PwC subsequent to termination of the partnership accorded with Dr Miller's views. Dr Sharkey added that the appellant had suffered from a significant degree of psychological disability between September 2007 and May 2009, that the Disability Discrimination Act 1995 (DDA) was likely to apply and that appropriate adjustments should have been implemented.

[28] On 30 January 2009 the Executive Board confirmed its decision to require the appellant to retire, noting that there had been further efforts to redeploy him. This was confirmed by the Supervisory Board on 19 February 2009, albeit the concern was expressed that Dr Ferrante had not seen Dr Miller's report. It was noted that there was some feeling that the appellant might have been eased back into the business had he been more accommodating, although even then he may still have been included in Project Sand.

[29] The appellant wrote to the Supervisory Board Appeals Panel on 24 April 2009 outlining his grounds for appeal. On 20 May 2009 he was advised that the Appeals Panel would work on the hypothesis that he was disabled as defined in the DDA for the purposes of determining whether management's decision to make him redundant was appropriate. The appeal was heard and rejected on 21 May 2009, the panel being satisfied that his role was redundant, that appropriate efforts had been made to redeploy him and that no reasonable adjustments could be made to the London post which he had been offered to enable him to perform it in Northern Ireland. On 27 February 2010 his partnership in the business was ended.

[30] The respondent refused to pay the appellant any performance income for the financial year ending 2009, it having been assessed at zero. He claimed this was victimisation contrary to Section 55 of the DDA noting that he had been paid target performance pay in accordance with firm policy in year ending 2008 notwithstanding having been off work for most of that year. The appellant started proceedings against PwC on 26 May 2009. The minutes of the Supervisory Board Partners Affairs Committee dated 17 June 2009 record as follows:-

> " … the Executive Board wants to put Colin Tenner on garden leave … he will not agree financial terms. Before the formal letter setting out his garden leave is sent to Colin, Ann Cottis will ring to make sure that he knows the deal offered was at target but if it is not accepted he is unlikely to get any performance income. It is proving difficult to communicate with Colin, who has lodged a claim at the industrial tribunal …."

The Supervisory Board minutes of 29 June 2009 (referring to the claimant and another partner) state:-

> "It was inappropriate to have partners who were in dispute with the firm coming into the office. The proposal to put both partners on leave was advised and supported by the firm's in house lawyers. When we put partners on leave we could decide not to award performance income for the period of leave. That was forward looking rather than in respect of the current year, which would be moderated in the normal way. The ground for leave was detriment to the business, which appeared clear. Neither party had anything to do and both had either started or threatened [Tenner] legal proceedings."

[31] The appellant relied on these minutes as showing that the reason he was placed on garden leave and not paid performance pay as in the previous year was because he had started legal proceedings. The tribunal considered, however, that the references in the minutes were forward looking and were not material to the decision about performance pay in the year from 1 July 2008 to 30 June 2009. Ms Cottis stated that in respect of that year the view was taken that performance pay should not be paid for a second year of absence where no work had been carried out by the appellant. The tribunal accepted her evidence on that point.

The conclusions of the tribunal

[32] The tribunal noted that the appellant had given loyal and devoted service to PwC, worked hard to achieve partnership status and lost it through no fault of his own. There was a 'macho' culture within the firm. However there was no evidence that the respondent's witnesses showed animosity, prejudice or intolerance to disabled workers. Prior to Project Sand, there was a clear desire on the part of management to get the appellant back to work. His illness did not colour management's attitude to him. From April 2008 it became unclear whether or not the appellant wished to come back to work. The appellant became entrenched in his demand for an apology on his terms.

[33] There was a limit into how effective an investigation in the BELB Project could be, given that the conduct at issue was that of persons not employed by PwC. In respect of the failure to carry out an investigation, there was no evidence that the respondent would have acted differently had the appellant not been someone who was suffering from any disability, or a person suffering from a different disability.

[34] As regards the dismissal, the Tribunal accepted that the respondent's patience with the appellant began to wear thin. However the Tribunal concluded that the appellant had not adduced any evidence to lay the basis for his claim that a non-disabled person, or a person suffering from another disability, would have been treated any differently. The Tribunal was satisfied that by the time of the redundancy the situation had moved on and that there was no evidence that the appellant's disability played any part in the decision of Mr Thompson. The Tribunal did not accept that the redundancy was a sham.

[35] At the appeal hearing, the panel worked on the hypothesis that the appellant was disabled (rather than treating him as disabled in fact) so there was no prejudice to him in this respect. While the appellant criticised the Appeal Panel because it did not obtain additional medical evidence, there was no requirement upon it under the DDA to do so.

[36] The Tribunal was convinced of the efforts to redeploy the appellant and did not consider that the legislation required the respondent to create a new role for the appellant, his position of partner being somewhat different to that of employee. The

Tribunal did not accept that the offer of a position in London would have required relocation. Notwithstanding that Dr Ferrante's reports were laconic, the respondent was entitled to rely on and prefer them. There was no evidence that in assessing medical evidence or offering the appellant a job opportunity mainly based in London, the respondent would have treated a non-disabled person or a person with a different disability any differently.

[37] The appellant's victimisation claim failed on the basis that the Tribunal viewed the respondent's explanation that he should not be paid for a second year because he had done no work in that year as genuine and reasonable. The Tribunal was satisfied that the institution of proceedings was not the reason for non-payment of performance pay.

[38] In relation to the claim for reasonable adjustments the Tribunal noted that the appellant wanted an acknowledgement and allowance for the manner in which he had been mistreated by the respondent. At the hearing this focused on the allegations of lack of support and undermining by Mr Crossey and the absence of an apology. However as set out at paragraph 15 above the tribunal rejected those allegations. In respect of the issue of an investigation of the BELB project the tribunal found that the appellant had unrealistic expectations. The tribunal concluded that it was difficult to see how the respondent could carry out any meaningful investigation into the staff of another autonomous organisation. In relation to the argument that the respondent had made no appropriate allowance for the appellant's disability the tribunal put emphasis on the regular meetings with the firm and in particular those with Mr Terrington in April 2008.

[39] The Tribunal also rejected a complaint that there was a requirement placed on the appellant to move to London in order to take up the alternative employment on offer. The tribunal found that the job in London could have been done on a 3/4/5 basis and that the appellant was fully aware of this common working arrangement. He was specifically told this at the appeal hearing.

The appellant's case

[40] At the heart of the appellant's case was the submission that the tribunal failed to grasp the point that the appellant suffered a mental illness and the thrust of the appellant's case was that he was treated less favourably than someone with a physical illness. This was a case where the appellant maintained that stereotypical assumptions about the disability and its effects were the basis for the direct discrimination.

[41] This was also a case in which the burden of proof provisions of the DDA applied. Guidance on the application on the burden of proof was given in Igen v Wong [2005] ICR 931 which set out a two stage process. The appellant submitted that the tribunal failed to apply that approach in this case and looked for direct or

overt evidence of direct disability discrimination. In any event it was submitted that the conclusion of the tribunal was perverse on the direct discrimination question as the evidence was overwhelming and finally on this issue that the tribunal had taken into account an immaterial consideration in finding that Mr Crossey's wife had been a mental health worker.

[42] In relation to reasonable adjustments the appellant relied on the failure to take the steps requested by him to assist him in returning to work. No approach had been made to Mr Crossey who would have been prepared to offer some apology in not realising how ill the appellant was at the time and not sending him a personal email. It was submitted that the tribunal must go through the four stage process set out in Environment Agency v Rowan [2008] ICR 218 but that it had failed to do so.

[43] The issue of a requirement on the respondent to obtain a full report from Dr Ferrante rather than rely on the laconic note provided by him which gave his opinion that the appellant was fit to take up employment in London was pursued on appeal as a reasonable adjustment issue. It was common case that there was no overriding duty on the respondent to obtain such medical evidence but in light of the dispute between Dr Ferrante and Dr Miller it was submitted that in this case such a course was necessary.

[44] The appellant also submitted that the finding that the alternative job offer was genuine and reasonable was perverse, that the burden of proof provisions also applied to the victimisation claim but were ignored by the tribunal and that the conclusion on victimisation was in any event perverse.

Discussion

[45] There is very little dispute on the applicable law which was identified by the tribunal. Section 3A(5) of the DDA 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."

Section 6A(1) deals with partners.

> "It is unlawful for a firm, in relation to a position as partner in the firm, to discriminate against a disabled person-

> …(d) in a case where the person already holds that position-
>
> (i) in the way they afford him access to any benefits or by refusing or deliberately omitting to afford him access to them; or
>
> (ii) by expelling him from that position, or subjecting him to any other detriment."
>
> A person discriminates against another directly on the ground of disability where the person's disability is the reason for the less favourable treatment. It is sufficient that the disability is a material factor in the decision that is taken."

[46] Section 17A(1B) of the DDA deals with the burden of proof.

> "Where, on the hearing of a complaint under subsection (1), the complainant proves facts from which the tribunal could, apart from this subsection, conclude in the absence of an adequate explanation that the respondent has acted in a way which is unlawful under this Part, the tribunal shall uphold the complaint unless the respondent proves that he did not so act."

[47] The equivalent English provisions were considered by the Court of Appeal in Igen v Wong [2005] All ER 812. The court pointed to the need for a Tribunal to go through a two stage decision making process. The first stage requires the complainant to prove facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. Once the Tribunal has so concluded the evidential burden shifts and the respondent has to adduce material to demonstrate that he did not commit the discriminatory act.

[48] Igen v Wong was considered by Elias J in Laing v Manchester City Council [2006] IRLR 748. That was a race discrimination case in which it was accepted by the tribunal that the applicant's supervisor had not acted appropriately to him. She was white and he was black. It was argued that the tribunal should not have taken into account evidence from the respondent that the supervisor had behaved in similar fashion to other white employees. The tribunal rejected the application and the appeal was dismissed. Elias J dealt with the Igen v Wong test at paragraph 71 et seq.

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

[73] No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure v Griffiths-Henry* (at paragraph 17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages…

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

[49] Laing was approved in Madarassy v Nomura International Ltd. [2007] EWCA Civ 33. At paragraph 81 Mummery LJ recognised that there were cases where the two stage test need not be applied.

> "Elias J clarified this point in Laing v Manchester City Council [2006] ICR 1519, para 74, in his valuable discussion of cases in which "it might be sensible for a tribunal to go straight to the second stage". He gave as an example the case where the complainant is seeking to compare his treatment with that of a hypothetical comparator. He said that, as Lord Nicholls pointed out in Shamoon, the question whether there is a hypothetical comparator is often inextricably linked to the issue of the explanation for the treatment. He added that "it must surely not be inappropriate for a tribunal in such cases to go straight to the second stage". While it would often be desirable for a tribunal to go through the two stages suggested in Igen Ltd v Wong [2005] ICR 931 , it would not necessarily be an error of law to fail to do so acting on the assumption that the burden may have shifted to the respondent and then considering the explanation put forward by the respondent."

[50] In McDonagh v Royal Hotel Dungannon [2007] NICA 3 this court commended adherence to the Igen guidance but recognised that there were cases where it was appropriate to depart from it relying on paragraph 7 of Lord Nicholls' comments in Shamoon v Chief Constable [2003] UKHL 11.

> "[7] … In deciding a discrimination claim one of the matters employment tribunals have to consider is whether the statutory definition of discrimination has been satisfied. 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 proscribed 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. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the

> claimant was afforded the treatment of which she is complaining.
>
> [8] No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined."

All of this case law was approved by this court in Nelson v Newry & Mourne District Council [2009] NICA 24 and Curley v Chief Constable [2009] NICA 8 where the court emphasised that it was necessary to keep in mind that the claim put forward is one of unlawful discrimination.

[51] It is common case that the tribunal did not come to its conclusions by following the two stage Igen approach. This was a case where the appellant relied on a hypothetical comparator being someone who did not suffer a disability or someone suffering from a physical disability. The appellant based his claim on his submission that the redundancy process which led to his dismissal was a sham, that the offer of an alternative job based in London was disingenuous, that there was no serious attempt to find an alternative post for him and that his retention in the firm was impaired because he was suffering from a mental as distinct from a physical disability. In our view this was a case where the tribunal was inevitably drawn into making a finding as to the validity of these complaints and concluded that the redundancy was genuine, the offer of the job in London was open to the appellant on a 3/4/5 basis and that there was no other alternative post available for him.

[52] The appellant criticises the tribunal for the emphatic manner in which it presented its conclusions. At paragraph 28(v) of its decision the tribunal stated that the appellant had not laid the basis for a claim that a non-disabled person or a person suffering from another disability would have been treated differently. If one had separated the issues out in order to follow the Igen approach the respondent accepted that it would have been possible to get to stage two. By the time it expressed its conclusions, however, the tribunal had considered all the evidence including the reasons for the various steps taken by the firm. The emphasis in the finding is simply an indication of the confidence of the tribunal in its findings on the claims made by the appellant. The same emphasis can be found at paragraphs 28(x) dealing with the assessment of medical evidence and the job in London. At

paragraph 29(ii) the tribunal uses the same language in relation to the influence of his mother's stroke on the treatment about which the appellant complained.

[53] We do not therefore accept that the tribunal looked for evidence of direct or overt discrimination. The principal passage upon which the appellant relies is at paragraph 28(ii) of the decision.

> "On a general level, there is no evidence that any of the respondent's witnesses showed any animosity, prejudice, or intolerance to disabled persons. Indeed, Mr Crossey's wife had been a mental health social worker. While, as we have said, some of the e-mails about the claimant (particularly those written in the Summer of 2008 when matters were reaching a head) were characterised by crassness and insensitivity, we find it significant that key players who were otherwise casual and careless about what they committed to print made no specific disparaging mention of disability."

[54] We accept that this passage on its own is looking at the existence of direct evidence and concluding that there is none. It was entirely proper for the tribunal to consider this and it would rightly have been criticised if it had not done so. The reference to Mr Crossey's wife is in our view of no material weight in this case. It is clear, however, that the Tribunal went on to consider in detail the evidence showing the steps taken by the firm to support the appellant in his efforts to get back to work and there is a specific finding that those efforts by the firm were genuine. There was detailed consideration of the appellant's fixation with a full apology for the BELB project which the Tribunal considered could not be delivered. The consideration of the redundancy situation reviewed the various criteria and the Tribunal examined carefully the issue of redeployment. We do not accept that the Tribunal misdirected itself by looking only for direct evidence of discrimination. The argument on perversity is without merit.

[55] The appellant submitted that the tribunal failed to take on board the fact that the discrimination in this case was centred on the mental illness of the appellant. In support of that submission the appellant referred to two emails from Jean Harvey to Dr Ferrante which suggested that there was a view in Northern Ireland that the appellant was not as ill as he claimed and that there was a lack of sympathy for him.

[56] The tribunal noted, however, the emails from Mr Terrington who was based in the Belfast office noting the stresses on partners which remained a matter of ongoing concern and referring specifically to the appellant in this context. There was also clear evidence of support for the appellant noted by the Tribunal particularly in the period around April 2008 when it appeared that here was some prospect of the

appellant being well enough to come back to work. The Tribunal carefully examined whether there was any less favourable treatment on this basis and found none.

[57] Section 3A(2) of the DDA provides that a person discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person. The duty to make reasonable adjustments in relation to partnerships is set out under section 6B(1) of the DDA, which provides:

> "Where –
>
> (a) A provision, criterion or practice applied by or on behalf of a firm … places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the firm to take such steps as it is reasonable, in all the circumstances of the case, for them"

[58] In Environment Agency v Rowan [2008] ICR 218 the EAT held that when considering a claim that an employer had discriminated against an employee pursuant to sections 3A(2) and 4A(1) of the Disability Discrimination Act 1995 by failing to comply with a duty to make reasonable adjustments, a tribunal could not properly judge whether any proposed adjustment was reasonable without first identifying the provision, criterion or practice applied by the employer, or the relevant physical features of the premises, the identity of non-disabled comparators, where appropriate, and the nature and extent of the substantial disadvantage suffered by the claimant.

[59] The tribunal looked at length at the appellant's fixation with a full apology in respect of the BELB project and his demand for an acknowledgement that he had been mistreated. The tribunal rejected the submission that he had been mistreated by Mr Crossey and found that his disability had been acknowledged. It was submitted that some lesser form of apology should have been sought from Mr Crossey which fell far short of that sought by the appellant and which would not have acknowledged any mistreatment. At paragraph 6(iv) the tribunal noted that a limited apology from Mr Thompson had not satisfied the appellant in April 2008. In those circumstances it is clear from the tribunal's conclusions at paragraph 31(iii) that it would not have been reasonable to require an apology for mistreatment or failure to acknowledge disability in light of the Tribunal's findings that anything less than a full apology would not have satisfied the appellant.

[60] For the reasons already given we do not accept that the finding by the Tribunal that the alternative job offer was genuine and reasonable could be characterised as perverse. The circumstances in which the offer emerged were

carefully examined and the witnesses subject to cross examination. The Tribunal was entitled to form the view that this was a realistic alternative which did not require relocation. This is relevant to the issue about the requirement for a full medical report from Dr Ferrante. Quite apart from the fact that Dr Ferrante had made his position clear the issue between Dr Ferrante and Dr Miller was the effect of long term relocation to London on the appellant's mental health. The Tribunal found that the appellant knew that the alternative job did not require relocation so the medical issues on relocation were not material to the offer. Proceeding with the offer without further medical evidence was therefore of no substantial disadvantage to the claimant.

[61] The appellant argued that the Igen approach should have been followed in respect of the victimisation complaint. The issue in that case was whether the respondent satisfied the Tribunal that the reason for the non-payment was not related to the disability. In other words this was a straightforward move to stage two of the Igen process. The Tribunal had the benefit of the evidence of Ms Cottis. They were properly entitled to construe the emails upon which the appellant relied as forward looking. We do not consider that there was any error in the tribunal's approach.

Conclusion

[62] For the reasons given we do not consider that any of the grounds of appeal have been made out. The appeal is dismissed.