

# THE INDUSTRIAL TRIBUNALS

CASE REFS: 557/05  
612/05  
621/05

**CLAIMANT:** A

**RESPONDENT:** XY Ltd

## DECISION

The unanimous decision of the tribunal is as follows:-

- (A) The respondent unfairly dismissed the claimant.
- (B) The respondent unlawfully discriminated against the claimant, contrary to Article 8 of the Sex Discrimination (Northern Ireland) Order 1976, by dismissing her.
- (C) None of the claimant's other claims is well-founded. Accordingly, all of those other claims are dismissed.

### Constitution of Tribunal:

**Chairman:** Mr Buggy

**Members:** Ms Torrens  
Ms Madden

### Appearances:

The claimant was represented by Mr K Denvir, Barrister-at-Law, instructed by Campbell Stafford, Solicitors.

The respondent was represented by Mr R White, Barrister-at-Law, instructed by L'Estrange & Brett, Solicitors.

## **REASONS**

1. Some 'identifying matter' has been deleted from this decision. (See paragraph 197 below.)
2. The claimant was employed by company X from February 1991 onwards. XY Ltd ("XY") was formed in 1999 as the result of the merger of X with another firm. After the merger, the claimant continued to be employed by XY.
3. On 2 August 2004, the claimant made a complaint against Mr B, a senior officer of XY, who was her immediate line manager at the time. In early 2005, she was dismissed from her employment, with effect from 31 March 2005.

## **The cases**

4. The claimant has brought three different cases against XY:-
  - (1) Case 557/05 ('Case 1');
  - (2) Case 612/05 ('Case 2'); and
  - (3) Case 621/05 ('Case 3').
5. In the course of the hearing, the claimant (at the invitation of the tribunal and with the agreement of the respondent) withdrew Case 3, on the basis that paragraph 13 of the Case 1 claim form would thereafter be read as incorporating the contents of paragraph 13 of the claim form in Case 3.

## **The complaints**

6. The complaints which are contained within the augmented Case 1 and in Case 2 can be categorised as follows:-
  - (1) The claimant complains of unfair dismissal, contrary to Article 126 of the Employment Rights (Northern Ireland) Order 1996 ('the 1996 Order').
  - (2) The claimant asserts that the respondent unlawfully discriminated against her by dismissing her, contrary to Article 8(2)(b) of the Sex Discrimination (Northern Ireland) Order 1976 ('the 1976 Order').
  - (3) The claimant asserts that the respondent unlawfully discriminated against her, contrary to Article 8(2)(b) of the 1976 Order by subjecting to her, in various specified respects, to '... any other detriment ...' (within the meaning of that Article).
7. In these proceedings, the claimant now complains only of victimisation discrimination (discrimination by way of victimisation, within the meaning of Article 6 of the 1976 Order).

## **The claims and the defences**

8. The dismissal is criticised by the claimant in the following respects:-

- (1) According to the claimant, the real reason for her dismissal was victimisation discrimination; this is unlawful discrimination and furthermore it is not a potentially fair reason for dismissal (in the sense in which that concept is used within the context of the 1996 Order).
- (2) The dismissal was substantively outside the range of reasonable responses (in the sense in which that concept is used in the context of the 1996 Order).
- (3) The claimant was threatened with termination of employment after only a month's search for alternative employment.
- (4) There was unwarranted delay in the notification of the outcome of the claimant's internal appeal against her dismissal.
- (5) The claimant was not properly supported in her search for alternative roles.
- (6) The claimant should have been transferred (without competition) to an alternative role.
- (7) The internal decision-making process (which ultimately led to the dismissal) was flawed because of bias, because the process was pre-determined, and because improper pressure was put on the claimant not to appeal against her dismissal.
- (8) The claimant should have been appointed to one of the three alternative posts for which she competed.

9. The respondent's defences in respect of the dismissal complaints can be summarised as follows:-

- (1) The claimant's dismissal was unaffected by victimisation discrimination; there was no such discrimination.
- (2) The respondent maintains that there were two alternative potentially fair reasons for dismissal, either medical incapability or 'some other substantial reason'.
- (3) The dismissal was fair, both substantively and procedurally.

10. The complaints in respect of other detriments fall into four categories, which are outlined at paragraphs 11 to 14 below.

11. The claimant says that she was not properly supported in managing work related stress, in the following respects:

- (1) The progress of the claimant's recovery was adversely affected by the "unreasonable" level of repeated inquiry and work related demands of the respondent. This conduct included telephone calls, e-mails and directions to attend meetings and other business-related matters.
- (2) After the claimant's dismissal appeal, she was told to arrange a performance review meeting despite the fact that she was in a clearly distressed condition.
- (3) The claimant wrote to Dr C on 9 February 2005 seeking direction, support and advice. No suitable direction, support or advice was provided in a timely fashion, or at all.

12. The claimant asserts that she was sidelined, isolated and ignored by colleagues in the following respects:-

- (1) The claimant found that after her complaint became known, her team arrived for meetings and field visits without preparation and in an unco-operative manner. For example, D and E both attended an appraisal meeting without any preparation. Their attitude was dismissive and failed to show a professional approach and the respect a line manager would have been entitled to expect in terms of meeting preparation.
- (2) Contrary to established practice, some of the claimant's team sidelined the claimant by going above her head to the next line manager without consulting her. For example, E went to F about matters he should and could have raised with the claimant.
- (3) The claimant's team did not turn up on time for field visits after her complaint against Mr B became known. They attended meetings late and without explanation. On a number of occasions meetings were commenced as much as one and a half hours late because of the late arrival of the claimant's staff. Even on such occasions proper explanations were not proffered. Little attempt was made to make contact with the claimant as line manager as a matter of courtesy or good practice to explain such delays. In addition, telephone calls asking about their whereabouts went unanswered or were not responded to. Some telephone calls about other matters the claimant wanted to raise as part of their duties were ignored completely.
- (4) There was no initiation of phone calls to the claimant herself from the team itself. This became a significant change in the way the relationship between the claimant and her team developed after it became known that she had made a claim against her line manager.
- (5) A leaving card was sent to the claimant to her home address from a customer in September 2004 expressing sorrow that she was "leaving". This was not true but the claimant believes that it may have been based on company rumour. Nothing was ever done about it.

- (6) Another significant change in the way the relationship between the claimant and her team developed after it became known that she had made a formal complaint was in the coldness displayed towards her. Post-complaint, the claimant's team members did not want to be in a social or work context with her.
- (7) In particular, the team did not want to go out with the claimant for the traditional work night out in Christmas 2004.
- (8) The claimant believes that the strained and hostile atmosphere was partly based on the fear she felt was rife in the company over her complaint. During the course of the investigation into her internal complaint, and afterwards, colleagues were keeping "their heads down". This was particularly evident in the case of the employee who had represented her at her internal disciplinary hearing.
- (9) The claimant was not copied into e-mails regarding the outcome of the disciplinary case for fraud for one of her own team members, a Mr E.
- (10) The claimant was ignored at local meetings by the Northern Ireland team in Cookstown in January 2005. (In this regard, reference is made to G, H and I). There were around 40 employees at this event and those present made deliberate efforts to avoid interaction with the claimant. Some avoided her by moving off sharply as she approached a group. Others made excuses that they had to go to the toilet or make a telephone call. Particularly in a social context, she was not welcome to join individual groups and those colleagues present were even avoiding eye contact.
- (11) The claimant was separated from other managers and representatives within the Northern Ireland team at a meeting held in St Andrews, Scotland, in February 2005. She tried to speak to other managers such as Mr G, Mr J and Ms K. She was ignored and given a cold response. Her team and herself were put in a different hotel, well away from the main party, which had the effect of isolating her team from the other Northern Ireland team members.
- (12) She had to walk on her own to and from the conference centre. Socially, a similar situation to the Cookstown meeting was prevalent. (In this context, the claimant makes reference to Mr D, Mr L and Ms M). There was a hostile atmosphere.
- (13) The claimant was ignored at management meetings. In this connection, the claimant refers to N at a meeting at the Elstree Moat House, England, in November 2004. As she approached him, Mr N left to make a phone call and at the table she was not included in conversations and eye contact was avoided. In particular, when she tried to contribute to a conversation, this was ignored and no effort was made to include her.

- (14) The claimant's appointment with Occupational Health, on a date in January 2005, was deliberately timed to coincide with a managerial meeting at the Celtic Manor Hotel, Wales.
- (15) When the claimant asked a fellow employee, O, to provide support for her at the internal "dismissal" meeting with Mr P, he asked that she not get him any further involved as he feared "repercussions" from Mr P. Furthermore, she had difficulty in getting Mr O to produce agreed notes of that meeting. Mr O failed to provide her with the support she might have been entitled to expect from a colleague in such circumstances. He was more concerned about how his participation in the hearing would affect his career in the company.
- (16) Prior to the investigation into internal complaints, she had received regular telephone calls, conversations and meetings with members of her team and other managers in the course of her work. These largely ceased after the claimant returned to work in September 2004, and after interviews (held in connection with the internal complaints) with the staff concerned had been concluded. In particular, prior to the investigation she had spoken to Mr G daily by telephone. After she returned to work in September 2004, she had no more than a dozen telephone calls with Mr G. Furthermore, from that time onwards, whatever conversations that did take place were characterised by their functional nature. There was no interaction at meetings and no humour in the telephone calls.

13. The claimant claims that the respondent has tried to undermine her in the following respects:-

- (1) The respondent failed to take her Complaint seriously. It failed to protect her against the action of other employees. It tolerated a culture of distrust and fear. It failed to allow a fair and transparent grievance system to operate. The decision of Mr Q, at the second stage of the internal grievance procedure, was notified to the claimant with indecent and inappropriate haste; indeed, that decision had been pre-determined before the meeting on 17 December. The claimant was inappropriately advised, by Ms R, by Mr Q and by Mr S, not to pursue the internal grievance appeal processes.
- (2) The claimant complains in respect of aspects of her interview for an SMA post, which was held on 11 March 2005. The interview was delayed and the claimant was treated rudely in that connection. The interview was not nearly long enough. The demeanour of the interviewers was very dismissive.
- (3) The respondent pursued the claimant, in a petty and vindictive manner, about telephone bill expenses.

14. The claimant says that she received no support from senior management in relation to a grievance regarding her salary review for 2003.

15. In the context of the claimant's pay award in respect of the year 2004, she makes two complaints:-
  - (1) She asserts that her performance was not fairly assessed.
  - (2) She asserts that the pay review was not conducted in a timely fashion.
16. The respondent's defences in respect of those various 'other detriments' discrimination claims can be summarised as follows:-
  - (1) In many instances, the relevant allegation is not factually well-founded.
  - (2) The claimant was treated fairly by XY.
  - (3) In any event, the claimant was not treated less favourably than the respondent would have treated an appropriate comparator. Furthermore, the treatment which was accorded to the claimant was in no way affected by victimisation discrimination.

#### **The questions for determination at this stage of the case**

17. It was originally agreed that we would deal with the following issues at this stage of the case:-
  - (1) The liability issues.
  - (2) Any 'Polkey' issue which might arise (in the light of our conclusions on liability) in the context of unfair dismissal.
18. Upon reflection, we have decided not to arrive at any conclusions in respect of the 'Polkey' issue at this stage of the case, because of the following facts and circumstances.
19. It emerged at a late stage of the hearing that XY would wish, in the context of the Polkey question, to make substantial submissions as to the effect of recent (post-dismissal) reorganisation within XY. However, the respondent had not provided comprehensive discovery to the claimant in respect of that aspect of the matter.
20. After discussion with the parties, the tribunal decided in June, with considerable misgivings, that it would decide the Polkey question at this stage, subject to the following reservation (which, by agreement, was deemed to be incorporated within a "Composite statement of Claim" which had been prepared by the tribunal with the assistance of the parties):-
  - "10A. However, at this stage of the case the Polkey issue is deemed not to include any implications arising out of Project Bevan. Any such implications will be left for determination at the next stage of the case (if any)."

21. Upon reflection, our initial misgivings (regarding the artificial splitting of what should be a single question) have intensified. We have now come to the firm conclusion that it would not be appropriate to determine the Polkey issue until we have received all appropriate evidence and submissions in respect of Project Bevan. Therefore, we have decided that we will not address the Polkey issue at this stage of the case.

### **The sources of evidence and the arguments**

22. It is necessary to identify our designations of various posts within the respondent company:-
- (1) SMA and SMB are both first level ('Level 1') sales management posts.
  - (2) SMAs and SMBs report to a higher level ('Level 2') sales management post, the L2SM post.
  - (3) L2SM post holders report to a higher level ('Level 3') sales management post, the L3SM post.
  - (4) XY provides goods to a particular service industry. That industry consists of two main sectors. An SMA deals mainly with sales within one of those sectors ('sector A') while an SMB deals mainly with sales within the other main sector ('sector B').
23. We received oral testimony from the claimant, who gave evidence on her own behalf. On behalf of the respondent, we received oral testimony from the following witnesses:-
- (1) Mr G (XY's SMB in Northern Ireland)
  - (2) Mr T (the respondent's Vice President in Global Marketing)
  - (3) Ms U (XY Level 2 Sales Manager : L2SM)
  - (4) Mr I (Sales Representative within the respondent company)
  - (5) Mr W (Human Resources Officer within XY).
  - (6) Mr O (a Professional Relations Manager within XY)
  - (7) Ms Z (Level 3 Sales Manager : L3SM, with the respondent company)
  - (8) Ms AA (an L2SM within the respondent company)
  - (9) Mr BB (an 'Employee Relations Consultant' with XY)
  - (10) Ms F (an L2SM within the respondent company in Scotland)
  - (11) Dr C (a Consultant Occupational Health Physician employed by XY)
  - (12) Mr N (an SMB within the respondent company)

- (13) Mr S (a trade union representative who was also an employee of XY)
- (14) Ms CC (an 'Employee Relations Consultant' within XY)
- (15) Mr H
- (16) Ms R (an L3SM within the respondent company)
- (17) Mr P (an L3SM within XY)
- (18) Mr J (an SMB within the respondent company)
- (19) Ms K (an SMA in XY)

24. We saw the following documents:-

- (1) eight bundles of documents, consisting of over 2,000 pages in total;
- (2) and various miscellaneous documents.

We told the parties that we would only have regard to any document within a bundle if our attention was specifically drawn to that document.

25. The parties exchanged written submissions ('the Submissions'). At a hearing on 31 August 2007, each party had the opportunity to comment on the other party's Submission. At the same hearing, each party responded to queries from the tribunal in relation to that party's Submission. In arriving at our decision, we have taken careful note of all of the arguments which have been made to us, whether in the course of a Submission, or in the course of oral argument. Specific reference has been made to some of those arguments below. The Submissions provide a permanent record of each party's arguments. In those circumstances, it is unnecessary to provide comprehensive details of all of the arguments in this decision.

### **The facts**

26. We now set out findings of fact which are relevant to the questions which we have determined at this stage of the case:-

- (1) The claimant has an honours degree in biochemistry. Until her dismissal in March 2005, she had been working for XY and for its pre-merger predecessor, company X, for 13 years.
- (2) Initially, the claimant worked as a sales representative for company X. However, she became an XY SMA in Wales in February 2000. In January 2002, she became the SMA for Northern Ireland. She held the latter post until the beginning of February 2005.
- (3) The main function of an SMA is to lead a team which is responsible for selling products (within the geographical area for which that particular SMA team is responsible) to the sector for which SMAs are

responsible. An SMB carries out a similar role, but an SMB's team sells within a different sector. (See paragraph 22 above.)

- (4) Typically, an SMA leads a small team. In her Northern Ireland role, the claimant had four people reporting to her. Typically, an SMA has more direct reports than that. However, teams no greater than ten staff are the norm.
- (5) The claimant is an extremely good salesperson. She is ambitious and dedicated and conscientious. She showed great commitment to XY. She usually met the sales targets which had been set for her and, under her leadership, her team often significantly over-achieved in relation to such targets. She was praised on many occasions, by a number of senior officials of XY, for her performance.
- (6) Because of the nature and extent of the claims in these proceedings, it was necessary for the claimant to provide us with lengthy oral testimony. Throughout her testimony, the claimant never suggested, or accepted, that, in her management role, she had any shortcomings. Having considered that aspect of her testimony carefully, we are convinced that, in that connection, her evidence was what she genuinely believed.
- (7) In reality, she did have shortcomings. She was a somewhat autocratic manager. She was self-absorbed. She had little insight into the impact of her own behaviour on others. Her management style was rather inflexible. It is likely that, from time to time, some members of the claimant's team will have found her management style uncomfortable (because of the shortcomings which we have mentioned above). However, none of this mattered much to her superiors within XY, who were mainly concerned about sales results. The relevant shortcomings were of limited significance in the context of an SMA post.
- (8) The claimant was never the subject of any disciplinary action, in relation to any aspect of her behaviour, at any time during her period of employment with XY and its predecessor company. Until the end of January 2007, no direct or indirect line manager of the claimant ever wrote to the claimant to express concern regarding any aspect of her people-management or leadership roles.
- (9) SMAs and SMBs report to an L2SM. There was a vacancy for the Northern Ireland L2SM at the end of 2003. The claimant and Mr B were both candidates for that post. Mr B was the successful candidate. So Mr B became the claimant's boss. At all material times, the claimant has believed that she had been by far the better candidate for the vacancy. She has never become reconciled to the outcome of the relevant recruitment process.
- (10) Mr B became the claimant's line manager in January 2004. In March 2004, the claimant protested vigorously about feedback which Mr B had provided, regarding the claimant's management performance, for

the purposes of a management development course on which the claimant was engaged. (Mr B had provided that feedback when he was still the claimant's peer, as distinct from being her direct or indirect line manager.)

- (11) Also in March, the claimant made it clear that she was unhappy with the outcome of her 2003 salary review (which had graded her performance as 'good', and had not graded her performance as 'excellent' or 'distinguished'). In May 2004, she wrote to Mr DD, to complain about that grading. Mr DD was a very senior official of XY. He was the overall boss of more than 1,500 employees. Ultimately, the 2003 grading was left unchanged. The claimant was very bitter about that outcome.
- (12) Mr P was Mr B's immediate line manager. On 6 July 2004, the claimant met Mr P to discuss various work-related concerns which she had. First, she continued to complain in respect of the 2003 salary review grading. Secondly, she complained about aspects of the management style of Mr B. Thirdly, she complained about Mr B's contribution to the management development feedback which has already been mentioned above.
- (13) At a meeting with Mr B on 7 July 2004, the claimant wept in his presence. She told him he was causing her stress; he was sending her too many e-mails; he was talking about her behind her back with the Northern Ireland SMB and he was getting himself too involved in the management of the claimant's SMA team.
- (14) By 7 July 2004, XY was obviously already concerned about the possibility of the claimant instigating litigation arising out of her working relationship with Mr B. On 7 July 2004, 'at 11.25 am', Mr B compiled a detailed manuscript note, extending to three pages, regarding the detail of his meeting with the claimant earlier that morning. On that note, he took the trouble to note the date and time of compilation .
- (15) From 8 July 2004, the claimant was certified by her GP to be unfit for work. Her medical certificate showed that she was suffering from work-related stress.
- (16) On 2 August 2004, she complained to Mr P's immediate line manager, Mr Q, about the behaviour of Mr B. She complained by e-mail. The e-mail was as follows:-

"I wish to make a formal complaint under the XY Harassment policy as a consequence of the conduct of my line manager, [B] ...

This has left me under considerable stress and seeking medical attention, as his behaviour in front of my team, other work colleagues and external customers has left me feeling bullied, harassed, sexually harassed and discriminated in a

demeaning, insulting and degrading manner. I have also been prejudiced as a result of the delay to answer my concerns regarding my salary review for 2003.

Given these concerns I would like to initiate these proceedings to investigate these matters, and await your response to this complaint.”

- (17) XY treated the claimant’s complaint against Mr B (referred to in this Decision as ‘the Complaint’) as a grievance and dealt with it under the respondent company’s employee grievance procedure. However, in processing the Complaint under that procedure, XY paid careful regard to the terms of its Harassment policy (which the respondent refers to as its ‘Dignity at Work’ policy).
- (18) Ms R was appointed by XY to adjudicate in respect of the claimant’s grievance. At the relevant time, Ms R held the post of L3SM.
- (19) Ms CC and Ms R constituted the investigatory team. Ms CC was an ‘Employee Relations Consultant’ within XY. (In other words, she was a senior, directly employed, personnel officer of XY.)
- (20) The initial statement of the Complaint (as set out in the e-mail of 2 August 2004) was amplified by a 14 page statement which set out the grounds of Complaint in detail. That document made it clear that the Complaint was being made under ‘the [XY] Harassment policy’ and that, in essence, the gist of the grievance concerned alleged misbehaviour on the part of Mr B which had left the claimant:-

“ ... feeling bullied, harassed, [sexually] harassed and discriminated [against] ...”
- (21) The claimant confirmed to us that the document had been produced with the assistance of a solicitor. We are sure that when they first read it, both Ms CC and Ms R already strongly suspected that the relevant document had been prepared with the assistance of a solicitor. The format, structure and language of the document is strongly indicative of the involvement of a lawyer, especially to individuals who (like Ms R) have considerable experience in management and to individuals who (like Ms CC) have considerable experience in personnel matters.
- (22) The document sets out a considerable number of accusations. In essence, these can be classified into two categories:-
  - (1) a complaint of sexual misconduct at Galway in 2002;
  - (2) and various accusations of insensitive or bullying behaviour.

- (23) The investigatory team sought information from XY employees who were identified by the claimant as having seen the Galway incident, or as having been present along with Mr B and the claimant at breakfast the morning after the incident. The team did not approach any external individual who was identified by the claimant as having witnessed the incident. On balance, we were satisfied that this omission on the part of the team was reasonable in all the circumstances. (The claimant had identified several XY employees as witnesses in connection with the Galway incident. Involvement of external individuals, in relation to an internal sexual harassment investigation, was likely to be commercially difficult for a sales organisation.)
- (24) In the context of the second category of allegations, the investigatory team made appropriate enquiries of an appropriate range of those XY employees who had been identified by the claimant as being significant witnesses.
- (25) Therefore, overall, we consider that the scope of the investigation was appropriate and reasonable.
- (26) Ms R decided not to uphold any aspect of the claimant's Complaint.
- (27) In relation to the Galway incident, the claimant had first officially notified the company in 2004, in respect of an incident which allegedly occurred in 2002. (There may often be good reason why a woman delays in notifying an employer of a sexual harassment complaint. However, any delay may, as a practical matter, make it more difficult for the woman to prove the truth of the relevant allegation, regardless of the extent of its intrinsic merits.) A variety of XY employees were interviewed in the course of the investigation. None of them confirmed seeing anything untoward. Some of them provided information to the investigatory team which was not consistent with aspects of the claimant's version of events. Against that background, Ms R's decision not to uphold the allegation in relation to the Galway incident was a reasonable decision.
- (28) In relation to the other category of complaints, it has to be borne in mind that these were not simple complaints of mistreatment. Instead, they were complaints of bullying, harassment, sexual harassment and sex discrimination. The matters complained of in this category, even if true, were not necessarily related to the claimant's gender, nor were they unambiguously associated with a bullying approach. Against that background, Ms R made a reasonable decision in deciding not to uphold the second category aspects of the Complaint.
- (29) Ms R's decision was notified to the claimant in a letter dated 16 November 2004. That letter was supplemented by a document which set out a detailed response to the claimant's various allegations.

- (30) Ms R's decision notified the claimant of the fact that she had the right, under the employer's grievance procedure, to appeal that decision. She decided to avail of that entitlement. At this second stage of the grievance procedure, the appeal was heard by Mr Q. Ms CC was appointed to assist Mr Q in connection with the grievance appeal.
- (31) In practice, at both the first and second stages of the grievance, Ms CC carried out much of the detailed spade-work and drafted most of the correspondence.
- (32) Mr Q held a grievance appeal hearing on 6 December 2004. He met again with the claimant on 17 December 2004.
- (33) By the latter date, he had arrived at a provisional decision. However he met with the claimant on 17 December 2004 so that he could explain his provisional conclusions to her and give her the chance to comment on them. The meeting was in two parts. During the first part, Mr Q summarised the claimant's grounds for her appeal and explained the evidence which he had in relation to each ground. The claimant commented on this as the discussion progressed. There was a break of some minutes during which Mr Q and Ms CC considered whether any of the claimant's comments should make any difference to Mr Q's decision. They decided that the claimant had not put forward anything at the 17 December meeting which should materially affect Mr Q's decision. So he went back into the meeting and read from a detailed response document, which rejected all the claimant's grounds of appeal.
- (34) The claimant had been off work from July 2004 until 24 September 2004 pursuant to GP certificates which advised her to refrain from work because of workplace stress. On 24 September 2004 she returned to work on a phased basis. From 24 September 2004 onwards, Ms F, a Scottish-based L2SM, began to act as the claimant's line manager (in place of Mr B) on an interim basis. Those interim arrangements persisted until the end of the claimant's employment with XY.
- (35) From 24 September until late November, the claimant's range of management responsibilities were curtailed, with her full agreement, as an XY response to the fact that the claimant had been off work because of stress.
- (36) The claimant complained within XY, and she has complained to us, of unwarranted work demands which Ms F allegedly imposed upon the claimant during the phasing-in period. We reject that allegation. The demands which Ms F made of the claimant during the phasing-in period were reasonable, proportionate and entirely in line with the available medical advice.
- (37) The claimant has also complained that XY pursued the claimant in a petty and vindictive manner, about telephone bill expenses. In her

witness statement, the claimant dealt with this matter (at paragraph 70) in the following terms:-

“[F] spoke to me in October 2004 and asked me to highlight all calls over the previous three months on my mobile phone with names and reason for call. I felt that this undermined me as a manager in terms of trust.”

For much of the previous three months, the claimant had been on sick leave. Nevertheless, while on sick leave, she apparently had incurred significant expenses on her company mobile phone bill. Against that background, it was entirely appropriate for Ms F to make enquiries about the mobile phone bill. We are satisfied that those enquiries were pursued in a proportionate and polite manner.

- (38) The claimant asserts that those enquiries constituted retaliatory action which was taken because the claimant had made the Complaint. However, prior to the making of the Complaint, the claimant was already expressing vociferous opposition to what she then considered to be inappropriate and vindictive queries by Mr B in relation to various aspects of her expenses.
- (39) The claimant was entitled to pursue her internal grievance appeal to a third stage. However, she decided not to do so.
- (40) In the course of their investigations, both Ms R and Ms CC came to the conclusion that the various accusations were not well-founded. Ms R came to the conclusion that the claimant was being deliberately untruthful. Ms CC was left uncertain on the question of whether the claimant did or did not, subjectively, believe her own allegations. They sought internal legal advice on the question of whether or not disciplinary proceedings could or should be brought against the claimant in respect of the allegedly false allegations. They were advised that it would be difficult to prove that the claimant had made false allegations in bad faith. For that reason, Ms R did not recommend the commencement of relevant disciplinary proceedings against the claimant.
- (41) Ms R in particular was angry about the fact that the claimant had (as Ms R thought) made false allegations in bad faith. She told us that, nevertheless, she never discussed the matter, at any relevant time, with any officers of the company other than the human resources professionals and the legal professionals. This aspect of Ms R's testimony is extremely hard to believe. It is inherently improbable. We do not believe it.
- (42) On the balance of probabilities, we are satisfied that, by the end of 2004, XY had explored the possibility of disciplining the claimant on the ground that (as senior managers within XY saw the situation) she had made false allegations in bad faith. However, they did not proceed to launch disciplinary proceedings because they came to the

conclusion, in the light of the available legal advice, that the legal risks flowing from that course of action were too great.

- (43) XY make independent counselling services available to employees who are off work with stress. While the claimant was off sick in 2004, she availed of that facility. She saw a Dr Michael Paterson, a consultant clinical psychologist. By September 2004, the claimant was keen to get a transfer, so that she would not longer have Mr B as her line manager and so that she would be able to move to Scotland where her partner (who has since become her husband) then lived. That was the background to Dr Paterson's report of 24 November 2004, which was provided to the claimant, at her request, for the purpose of assisting her in pursuing her grievance.
- (44) Although aspects of the report are written in somewhat lurid language, the ultimate conclusion of the report is merely a 'recommendation' that the claimant not be placed in a position of having to work under the management of the man who she alleged bullied her. According to the report:-

"[The claimant] is keen to return to work but is fearful of being placed in a position where she feels she may be bullied. In terms of the brain's information processing this could lead to the same fear experienced by a rape victim having to work under the management of her rapist.

It is my recommendation that [the claimant] should not be placed in a position of having to work under the management of the man who she alleges bullied her. During her therapy sessions, she felt that she could work alongside him but, given her recent experience with management, this may require some more therapeutic work. [Emphasis added]."

- (45) The claimant's grievance process came to an end just prior to Christmas 2004. Early in the new year, on 11 January 2005, Ms CC wrote to Dr C, the respondent's internal occupational health adviser, drawing attention to Dr Paterson's recommendation, and posing the following question in that context:-

"I would be grateful for your assessment as to whether you believe she could ever work for [B] again."

- (46) On 13 January 2005, Dr C had a consultation with the claimant. Subsequently, on 19 January 2005, he produced a draft medical report arising from that consultation. According to the draft:-

"In my opinion there has been an irretrievable breakdown of the management relationship with her former line manager with significant elements of post traumatic stress disorder attached to this such that she is not considered fit to report in a line management relationship with this individual as a permanent medical recommendation.

I would also have some concern over future co working relationship which will prove a psychological challenge to [the claimant] and ideally this should be avoided but if essential it should be able to be treated and supported through further psychotherapeutic support.

Should relocation to another territory within the UK be possible for the business this would be a significant help in allowing [the claimant] to achieve closure on this past circumstance and move forward and I would give my strong support to this on medical grounds.”

(47) The draft e-mail was sent to the claimant, for the purpose of seeking her consent to release the report to Ms CC.

(48) However, the claimant took the opportunity to suggest changes to it. Her suggested changes were intended to bolster her case for obtaining a transfer. She proposed the amendment of the last paragraph of the report so as to reads as follows:-

“Should relocation to another [ ] similar position within the UK such as in Scotland so [the claimant] can start afresh with her partner be possible for the business this would be a significant help in allowing [the claimant] to achieve closure on this past circumstance and move forward and I would give my strong support to this on medical grounds.”

(49) Dr C readily accepted the claimant’s suggested amendment to his medical report.

(50) The report was drafted by Dr C, and it was edited by the claimant, in the mutual expectation that, as a result of the report, the most that would happen is that the claimant would be facilitated in obtaining a transfer which she would find acceptable.

(51) As Dr C pointed out in his witness statement (at paragraph 8):-

“My expectation is that dismissal is the last resort, when the business has explored and exhausted all other options, and would not be based solely on my medical report ... .”

(52) Mr P seized upon Dr C’s report as a pretext for dismissing the claimant. Dr C’s report was provided on 25 January 2005. On 27 January 2005, there was a meeting between Ms CC and Mr P for the purpose of discussing the way forward in light of the C report. In the course of that meeting, Mr P made clear to Ms CC his view as to the way forward. That was the background to the e-mail of 1 February 2005, (often referred to as the ‘options memo’) which Ms CC sent to Mr P. It is a lengthy memo. However, because of its significance, it will have to be quoted in full:-

“As discussed on Thursday please find below the options with regard to the resolution of the Complaint raised by [the claimant] under the Dignity at Work policy. As you were aware we now have the report from [C] which clearly states that “there has been an irretrievable breakdown of the management relationship with her former line manager with significant elements of post traumatic stress disorder attached to this, such that she is not considered fit to report in a line management relationship with this individual as a permanent medical recommendation”. The next step is to meet with [the claimant] and outline the preferred option at a 1:1 meeting:-

1. Give her one month to find an alternative role within [XY], take her out of the business so she has ample opportunity to look for other roles, work on her CV etc.

If she does not find an alternative role then dismiss her with notice under ‘some other substantial reason’ – irretrievable breakdown with Line Manager (NOTICE IS 6 MONTHS DUE TO SALARY).

#### Risks

She takes us to an ET for Unfair Dismissal, potential cost £56,800 plus basic award. The fact that we have not provided her with the opportunity to take her 6 months notice as garden leave could render the dismissal unfair if jobs that meet her skills set appear within 6 months window.

For us to win the claim we would have to prove that she would not have been a suitable candidate for these roles and that she would have had to go through the recruitment process as anyone else, so there would have been no guarantees. Very difficult to say now what roles if any are likely to come up in the next 6 months, although I am aware of the potential roles in [ ]’s and [ ]’s teams come 1 April 2005.

2. Let her take her notice period as 6 months garden leave which should give her ample opportunity to look for alternative roles in the company, then dismiss for Some Other Substantial Reason (as above).

### Risks

She could still take us to an ET for Unfair Dismissal but the fact that we provided her with 6 months to look for alternative roles would be looked at favourably by the ET Panel.

The Business risk is that she could apply and be successful in obtaining a very similar role in Scotland.

3. Let her take 3 months garden leave to look for other roles, and then dismiss with 3 months notice.

### Risks

Very similar to those in option 2, however whether the ET Panel would render the dismissal unfair because we did not have give her 6 months is still the question. Again we would probably have to prove that the roles that appeared after the 3 months would not have been suitable and she would not have been successful.

Hope the above sets out the options quite clearly, should you have any questions please come back to me. I have also attached a draft of the letter to be sent to [the claimant] once you have advised me after talking with [Q] and [T] on the preferred option.”

- (53) A number of aspects of the options memo are highly significant.
- (54) First, the options are being formulated in connection with ‘the resolution of the Complaint raised by [the claimant]’. The focus is on the fact that she made the Complaint. The medical unfitness (in connection with her Northern Ireland post) is not regarded as being of primary importance.
- (55) According to the memo (which was obviously intended to reflect the understanding that had been arrived at between Ms CC and Mr P because of the earlier meeting), the ‘Business risk’ of option 2 is that the claimant could actually be successful in obtaining suitable alternative internal employment. The implication is that such an outcome is a situation which XY wants to avoid. In testimony presented to us on behalf of the respondent, it was suggested to us that the risk being referred to, in the context of option 2, was that the claimant would end up in a job which would involve regular interaction with Mr B (and which would thus be harmful to the claimant’s psychological health). We do not accept that strained interpretation of that part of the memo.

- (56) As a result of the memo, it is clear that, before they had committed themselves to option 1, both Ms CC and Mr P were well aware of the fact that, by following option 1, they were treating the claimant unfairly, at least in the dictionary sense of the word 'unfairly'. (See the heading 'Risks' under option1.)
- (57) The final paragraph of the options memo shows that it was contemplated that, before deciding on the appropriate option, Mr P would consult with Mr Q (Mr P's immediate line manager) and with Mr T (Mr Q's immediate line manager). According to the testimony made available to us on behalf of the respondent, no such prior consultation with Mr T took place. Why no such prior consultation took place has never been satisfactorily explained to us. It is inherently improbable that Mr P would make such an important decision without consulting more senior management. We are satisfied that prior consultation with Mr T did indeed take place before Mr P committed himself irrevocably to 'option1'.
- (58) Mr P chose option 1 because that option was more likely than option 2 or option 3 to achieve an outcome in which the claimant would fail to obtain alternative internal employment within XY.
- (59) First there had to be a meeting with the claimant. That meeting was arranged by letter dated 2 February 2005. Ostensibly, the purpose of the meeting was to discuss a situation of grave misfortune (consisting of the medical inability of the claimant, a successful and hardworking employee of many years standing, to continue in her present position). Against that background, the letter is notable for its cold tone. The second paragraph of the letter is the key paragraph:-
- "I understand that you are currently seeking alternative roles within [XY] and this is one area that I will discuss with you in more detail at the meeting. You should be aware however, that if another role is not forthcoming that we will have no option but to terminate your employment. The reason for this, as stated in [C's] report, is that there has been an irretrievable breakdown of the relationship with [B]. He also states that in his medical opinion you are not consider fit to report in a line management relationship with [B] or indeed to co-work with him."
- (60) The dismissal meeting occurred on 7 February 2005. Ms CC was present along with P, At the meeting, the claimant was accompanied by Mr O, a Professional Relations Manager within XY who had reluctantly agreed to accompany the claimant to the meeting as her representative. After some introductory comments, Mr P made it clear that the claimant would be dismissed if she had not found herself suitable alternative internal employment within a period of one month; upon dismissal she would be paid six months pay in lieu of notice.

(61) He also made it clear that she would have to compete for any roles for which she applied. Given the context of the claimant's inability to continue to carry out the duties of her Northern Ireland post, the cold tone of Mr P's comments at the meeting is remarkable.

(62) In the course of these proceedings, it has been suggested to us that XY were open to discussion about any of the points which were raised by Mr P. However, that is not how we read the official note of the meeting. In particular, we note that, when Mr P adjourned the meeting for 20 minutes, the avowed purpose of that adjournment was to:-

“ ... provide [the claimant] and [Mr O] time to consider what has been outlined and to come back with any questions [Emphasis added].”

So the purpose of the adjournment was to allow the claimant to ask questions relating to the implications of what had been decided (as distinct from making representations as to what should be decided).

(63) The outcome of the dismissal meeting with Mr P was that the claimant had been given notice that she would be dismissed, with effect from 11 March 2005, if she could not obtain suitable alternative employment in the meantime.

(64) The day after the P dismissal meeting, the claimant was certified by her GP to be unfit for work for a period of eight weeks. She immediately told Ms CC about this.

(65) The claimant appealed against Mr P's dismissal decision. She appealed, under XY internal procedures, to Mr T. The appeal meeting took place on 25 February 2005. Apart from the claimant and Mr T, Ms CC was present.

(66) At the meeting, Mr T's attitude was one of detachment. He showed no empathy for the situation in which the claimant found herself. He exhibited no concern regarding her psychological well-being. He sought, with some success, to deflect the claimant from pursuing the central issue of principle, so that she focused instead upon implementation issues. (The issue of principle was whether or not the claimant should be required to obtain alternative internal employment through competition, or whether such employment would be made available through a transfer. The issues of implementation related to the timing and manner in which the P decision, regarding the requirement to enter into selection competitions, would be implemented). In essence, Mr T rejected the claimant's appeal, but marginally extended the dismissal deadline (until 31 March 2005).

(67) Mr T (like Mr P before him) showed an amazing lack of curiosity about the nature of the medical incapacity which prevented the claimant from continuing to carry out the duties of a Northern Ireland SMA, and about the potential (if any) for XY to take measures which

might prevent the claimant having to leave her current post. In his evidence, Mr T told us that he had never seen Dr C's report. However, according to Ms CC he did see it. We accept that he did.

- (68) According to Mr P, he did not enquire, at any time prior to the claimant's dismissal, as to the particular nature of the Complaint or whether anybody in authority thought that the Complaint was honestly or dishonestly made. We consider such a lack of curiosity to be unbelievable. We are satisfied that, when he decided upon dismissal, Mr P knew very well that Ms CC and Ms R thought that many of the accusations made in the course of the Complaint were false and that Ms R thought that those allegations had not been made in good faith.
- (69) According to Mr T, he never enquired as to the nature of the Complaint, or whether anybody in authority thought the Complaint was honestly made or dishonestly made. We find such a lack of curiosity to be unbelievable. We are satisfied that, when he decided upon the appeal, Mr T knew very well that Ms CC and Ms R thought that many of the accusations made in the course of the Complaint were false and that Ms R thought that those allegations had not been made in good faith.
- (70) Throughout the dismissal process, there was an emphasis upon the 'failed' grievance, even though the respondent's avowed reason for dismissal was the claimant's medical unfitness (regarding the carrying out of her duties as Northern Ireland SMA).
- (71) The official record of the dismissal meeting of 7 February 2005 (which we have no doubt was prepared with future tribunal proceedings in mind) identified two purposes of the meeting, one of which was the 'follow-on' from the outcome of the grievance. In his very brief handwritten notes of that meeting, Mr O twice records a reference by Mr P to the fact that the claimant's grievance had not been upheld. When Mr T wrote to the claimant (on 9 March 2005) to inform her that the P dismissal decision was, in essence, being confirmed, he made the following comment:-
- "The situation is not of our making, your Grievance was not upheld ... ."
- (72) After the dismissal appeal hearing, as the claimant was leaving the building, Ms CC asked her if a performance review meeting, in respect of her grading for 2004, could be arranged. The claimant had in the past made much of any perceived procedural deficiencies in respect of the grading assessment process. Furthermore, a dismissal process in respect of the claimant was already under way. Against that background, it was not unreasonable of Ms CC to make the relevant enquiry, although the timing was, of course, most unfortunate.
- (73) By 19 February, XY had informed the claimant's SMA team that:-

“ ... as from Monday 14 January, [the claimant] will no longer continue in her role as [SMA] for Northern Ireland.

[The claimant] is currently seeking alternative roles within [the marketing division of XY] and we wish her well, as she pursues other opportunities”.

- (74) XY is a very big employer. It employs several thousand staff in the United Kingdom; more than 1,500 of those staff are employed in the marketing division of XY (to which the claimant belonged). Approximately 100 SMAs and SMBs are employed in the company.
- (75) The respondent company paid the claimant half a year's salary, to compensate for its failure to provide her with her due notice. There was no business advantage to the employer in failing to provide due notice, apart from the significant factor that, by paying the claimant the sum in lieu, the company was able to make the termination of her employment irrevocable immediately. If the case put forward on behalf of XY were to be believed, it made no economic sense for the company to terminate the claimant's employment, as distinct from requiring her to work out her notice, while seeking alternative employment internally. If XY had taken the latter approach, they would have received some productivity, on the part of the claimant, in return for the six months pay. Accordingly, if the respondent's version of events were to be believed, the respondent (by terminating the claimant's employment without giving due notice) has acted in a manner which, from an economic self-interest point of view, is perverse.
- (76) The company's policies and practices on recruitment did not present any obstacle for the employer if it had been willing to transfer the claimant to an equivalent post (as an SMA or an SMB).
- (77) According to Mr White, his instructions are that the respondent company has no document which sets out rules for the appointment and promotion of employees. The claimant was appointed to her post as an SMB in Wales in the year 2000, even though she had not been an applicant for that post. The claimant was moved to become the Northern Ireland SMA in 2002 without any competition in respect of the SMA vacancy. (We are aware that the claimant's Northern Ireland appointment was given to her against a background of organisational restructuring. However the fact remains that the post was given to her without competition). In March 2005, when Ms AA was impressed by an XY employee, one Ms EE, Ms AA considered 'offering' Ms EE a particular permanent SMA post, even though Ms EE had not put in an application form, in time for the closing date, in respect of that post. Although Ms EE had very little management experience in March 2005, she was at that time offered a temporary role as a SMA in Scotland, covering for someone who was off sick. Less than three months later, when her temporary Scottish assignment was coming to an end, Ms EE was offered, and accepted, the relevant permanent SMA post (which had remained vacant in the meantime). According

to Ms AA, during the intervening months, Ms EE had obtained management experience which was adequate for the duties of the permanent post.

- (78) On the other hand, the claimant (who had been a very successful SMA and SMB for many years), was unsuccessful in her applications for the three alternative internal posts (as an SMA) for which she applied. In each instance, the selection panel decided that the claimant's answers to interview questions showed that she was incapable of meeting the minimum standards for each relevant post (and that she would therefore have been unappointable even in the absence of any competition).
- (79) Those conclusions, on the part of the relevant selection committees, are remarkable because of the fact that they are so out of line with XY's actual experience of the way the claimant had performed, over lengthy periods, in equivalent posts.
- (80) We appreciate that the claimant was sick at the time of the interviews. However, even allowing for the effects of sickness, it seems to us to be very unlikely that the claimant could have performed so badly that any fair and sensible selection panel would conclude that this particular candidate, a successful practitioner as an SMA over many years, was unappointable to the relevant SMA roles.
- (81) According to XY, the outcome of the claimant's applications for the alternative internal employment (the three SMA vacancies) was a shock to Mr P and Mr T, who had both expected her to be successful in one of the relevant applications. However, we do not accept the truthfulness of that testimony. In arriving at that conclusion, we have taken account of the fact that there was no review of the original decision to dismiss, despite the outcome of the interviews for the alternative posts.
- (82) We do not regard the claimant's medical incapability as putting her into a situation which was practically the same as the situation in which a redundant individual would find himself. However, the situations are analogous in some respects. According to XY's policy, a redundant candidate would be transferred to a vacant post, if there were no other redundant candidates who were interested in that post, without competition, provided he or she was assessed as meeting the basis competences necessary for appointment to the relevant alternative post. On any fair assessment, the claimant would have been assessed as being appointable to any SMA post.
- (83) The respondent company has a policy document which deals with the problems which arise when there is a close personal relationship or a family relationship between a line manager and one of that manager's immediate subordinates. We regard that situation as being more closely analogous to a situation in which an individual cannot work with her line manager because of her medical condition.

(84) The relevant policy, issued on 2 December 2002, entitled 'Direct Line Reporting Relationships', clearly envisages that, in those circumstances, if the line-management connection cannot continue, the jobs of the affected individuals will not be in jeopardy; and that options such as redeployment, transfer, or changes in the reporting relationship, will be considered.

27. In the interests of readability, we have set out some additional findings of fact below, particularly in the context of our discussion on our ultimate conclusions.

28. We consider the claimant to be an unreliable witness, in relation to some significant aspects of her evidence, especially in relation to matters of subjective impression. In arriving at that conclusion, we have taken full account of her demeanour and manner of giving evidence, and of the following matters:-

(1) Throughout her evidence to us, the claimant was unwilling to agree that she had any imperfections whatsoever in her role as a sales manager.

(2) She asserted that she had not provided adequate consent to the disclosure of Dr C's report, when it was obvious that she had provided perfectly adequate consent for that process.

(3) She told the tribunal that she had not received any written feedback from Ms U, but neglected to point out that she had however received extensive oral feedback from Ms U.

(4) The Northern Ireland SMA team was very small. In Christmas 2004, one of the members of that team was the subject of serious disciplinary action, which had been instigated by the claimant. Nevertheless, she was affronted when there was a reluctance on the part of the members of the team to have a Christmas function for the team, and she asserted that this constituted victimisation discrimination on their part, and she wanted to be awarded compensation in respect of that alleged discrimination.

(5) On many occasions, she knowingly breached the obligation to provide timely disclosure (to the respondent) of all relevant documents and, in particular, of all relevant documents upon which she intended to rely.

29. We are satisfied that XY used the claimant's medical incapacity (in relation to the carrying out of the duties of her existing post) as a convenient opportunity to dismiss her. We are satisfied that she was dismissed, in the relevant circumstances, because she had made the Complaint. We have arrived at those conclusions having carefully considered the demeanour and manner of giving evidence of Mr P, Mr T and Ms CC. The implication of those conclusions is that each of those three individuals has provided testimony which failed to meet the standard of telling the truth, the whole truth and nothing but the truth; we have not arrived at those conclusions lightly. In arriving at those conclusions, we have also taken account, in particular, of the following matters.

(1) We have noted the contents of the CC 'options' memorandum.

- (2) Ms R inaccurately told the tribunal that, apart from human resources professionals and legal advisers, she had never, up to the time of the drafting of her witness statement, told any officer of XY of the fact that she thought that the claimant had invented the allegations which were the subject-matter of the Complaint.
- (3) According to their evidence, Mr P and Mr T had an incredible lack of curiosity as to the precise nature and extent of the claimant's illness and as to the availability, or non-availability, of potential for making work modifications which might avoid the need for her to permanently leave her existing post.
- (4) In their pre-termination interactions with the claimant, Mr T and Ms CC adopted a cold tone. Furthermore, in their various interactions with the claimant in the pre-termination contexts, the approaches taken by Ms CC, by Mr P and by Mr T were notable for the lack of any signs of sympathy, understanding or compassion.
- (5) In his dismissal interview with her, Mr P emphasised the fact that the claimant had made a grievance which had not been upheld. In his own interaction with the claimant, Mr T also drew attention to that matter.
- (6) The respondent company imposed a very tight timescale within which the claimant was (allegedly) expected to successfully compete for alternative internal employment. However, XY knew very well that there would have been no additional cost to the company if it had allowed her a six month period for the relevant job searches.
- (7) XY tolerated a situation in which the claimant was applying for alternative posts (against a background which prominently included the threat of imminent dismissal) even though she had been certified by her doctor as being medically unfit, because of stress, to be at work.
- (8) Ms CC was assigned to be the chief personnel adviser both in connection with the Complaint and in respect of the dismissal process.
- (9) According to the evidence of XY witnesses, Mr P and Mr T never enquired, and were never informed, prior to the claimant's dismissal, as to the particular nature of the Complaint, or in relation to the question of whether or not the investigators regarded the Complaint as genuine. Such a lack of curiosity is inherently improbable and we do not believe that Mr P and Mr T never enquired, and were never informed, as to those matters. (See paragraph 26 above.)
- (10) Potentially there was a large number of suitable alternative posts within XY, even if due allowance is made for any relatively restricted turnover among the relevant posts and even if due allowance is made for the fact that the claimant would obviously only be willing to accept

a transfer to posts in some parts of Great Britain.  
(See paragraph 26 above.)

- (11) An organisation the size of XY would necessarily, at any given time, have a variety of needs for temporary replacements for people who are on temporary absence, on maternity leave and on sick leave.
- (12) The recruitment policies and practices of XY were very flexible and non-prescriptive. As a result, there was no policy impediment if XY had wanted to transfer the claimant to a post without any prior competition.
- (13) The respondent company failed to keep comprehensive records of the assessments made in the course of the March 2005 selection processes (for which the claimant was forced to compete) even though it was by then perfectly obvious that the relevant processes would probably ultimately become the subject of intensive scrutiny in employment tribunal proceedings.
- (14) In their testimony to this tribunal, Mr P and Mr T both told us that they had expected the claimant to be the successful candidate in respect of one of the three alternative posts for which she applied. But she was not the successful candidate in respect of any of those posts. In that supposedly unexpected situation, XY never reviewed the decision to dismiss.

30. In arriving at our ultimate conclusions on the dismissal aspects of this case, we took full account of our conclusions on those XY assertions which are highlighted at paragraph 37 of the respondent's Submission. Our conclusions on those assertions are as follows:-

- (1) Dr C's opinion stated that the claimant could not work with Mr B as her line manager. It did not definitively state that she could never safely have work-related interactions with him.
- (2) We accept that the temporary arrangements, whereby the claimant was being managed by Mr F, could not sensibly be continued indefinitely. However, there was no pressing economic or business need to discontinue them within the space of less than two months.
- (3) After the initial pre-dismissal meeting with Mr P, there was no doubt that the claimant would no longer be carrying out the duties of the Northern Ireland SMA. Accordingly, in reality the claimant's job search was not engendering any important uncertainty for Mr B or for the Northern Ireland SMA team.
- (4) The reality is that, in the limited time allowed to her by XY, there were, for practical purposes, only three posts for which the claimant could apply. One of the posts mentioned in Mr White's Submission was situated far from where the claimant's partner was living. Two of the posts cited by Mr White were promotional grades.

- (5) Once the claimant knew that her grievance had not been upheld, she was on the look-out for other work. However, there is a considerable difference between being 'on the look-out' for other work, and needing to get other work. Until the 7 February meeting with Mr P, the claimant did not know that she was going to have to obtain other work.
- (6) If 'closure' for the claimant really was necessary (in the context of the interactions between the claimant and Mr B), such closure had already been achieved once Mr P told her that she would no longer be staying in the Northern Ireland SMA post. Against that background, there was no need to truncate the timescale available for an alternative job search, for the purpose of obtaining 'closure'.

### **The law (the discrimination claims)**

31. The discrimination claims are brought under the Sex Discrimination (Northern Ireland) Order 1976 ('the 1976 Order').
32. The 1976 Order has to be construed in light of the requirements of the Equal Treatment Directive 1976 ('the Directive'), as interpreted by the European Court of Justice.
33. In the context of victimisation, those requirements were considered in *Coote v Granada Hospitality Ltd* [1999] ICR 100. At the time of Ms Coote's complaint, the version of the Directive which was then in force included the following provisions:-
  - (1) According to article 1(1) of the Directive, its purpose is:-

“ ... to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions ... ”
  - (2) Article 5(1) of the Directive stated:-

“Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.”
  - (6) Article 6 of the Directive requires member states to:-

“ ... introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment ... to pursue their claims by judicial process after possible recourse to other competent authorities.”
  - (7) Pursuant to Article 7 of the Directive, Member States are to:-

“ ... take the necessary measures to protect employees against dismissal by the employer as a reaction to a complaint within

the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.”

34. In *Coote*, the ECJ noted that the version of the Directive which was then in force was a version which made explicit provision about measures to protect employees against dismissal, but which made no explicit provision in relation to any other retaliatory action on the part of the employer. However, the Court went on to make clear that it was not to be inferred that the intention of the legislator was to limit the protection of workers (against retaliatory measures decided on by the employer) solely to cases of dismissal. As the Court pointed out, although dismissal is an exceptionally serious measure, it is not the only measure which may effectively deter a worker from making use of the right to judicial protection in the context of an issue as to equal treatment.

35. Article 8(2) of the 1976 Order is in the following terms:-

“(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland, to discriminate against her –

...

(b) by dismissing her, or subjecting her to any other detriment.”

36. *Shamoon v Chief Constable of the RUC* [2003] ICR 337 shows that a ‘detriment’ within the meaning of Article 8(2)(b) exists if, by reason of the act or acts complained of, a reasonable worker would or might take the view that she had thereby been disadvantaged in the circumstances in which she had thereafter to work. (See *Shamoon*, at paragraphs 34, 91 and 104.) We accept that, in applying those criteria, it is appropriate to consider the issue from the point of view of the complainant. (See *Shamoon*, at paragraph 105.)

37. We have reminded ourselves that, in considering whether a claimant has been subjected to a detriment because of a particular act, it is necessary to consider all the facts which we have found in the case, and to put that particular act within the context of those other facts.

38. Victimisation discrimination is one of the types of discrimination which are proscribed by Article 8 of the 1976 Order. That type of discrimination is defined in Article 6 of the Order.

39. Article 6 of the 1976 Order provides as follows:-

“6.(1) A person ( “the discriminator”) discriminates against another person ( “the person victimised”) in any circumstances relevant for the purposes of any provision of this Order if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has —

(a) brought proceedings against the discriminator or any other person under this Order or the Equal

Pay Act [or Articles 62 to 65 of the Pensions (Northern Ireland) Order 1995], or

- (b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Order or the Equal Pay Act [or Articles 62 to 65 of the Pensions (Northern Ireland) Order 1995], or
- (c) otherwise done anything under or by reference to this Order or the Equal Pay Act [or Articles 62 to 65 of the Pensions (Northern Ireland) Order 1995] in relation to the discriminator or any other person, or
- (d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Order or give rise to a claim under the Equal Pay Act [or under Articles 62 to 65 of the Pensions (Northern Ireland) Order 1995],”

or by reason that the discriminator knows the person victimised intends to do any of those things, or suspects the person victimised has done, or intends to do, any of them.

- (2) Paragraph (1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.
- (3) For the purposes of paragraph (1), a provision of Part III or IV framed with reference to discrimination against women shall be treated as applying equally to the treatment of men and for that purpose shall have effect with such modifications as are requisite.”

40. Accordingly, victimisation discrimination occurs only if all of the following requirements are met:-

- (1) There must have been a protected act (in the sense in which that concept is used in the context of Article 6(1) of the Order).
- (2) The claimant must have been treated less favourably than the alleged perpetrator treated, or would have treated, an appropriate comparator (who may be an actual comparator or a hypothetical comparator).
- (3) The less favourable treatment must have been accorded 'by reason that' the claimant had carried out the relevant protected act.

41. In cases of direct discrimination, Article 7 of the Order requires that the relevant circumstances of the complainant and of the comparator:-

“ ... are the same, or not materially different ...”.

However, Article 7 does not apply to victimisation discrimination.

42. In *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065 the claimant was a police officer who had made an industrial tribunal claim of racial discrimination. That claim had been brought against the Chief Constable. While those proceedings were pending, he applied for a job with another police force. The Chief Constable refused to provide him with a reference. The claimant brought proceedings for victimisation discrimination in respect of that refusal.
43. In *Khan*, the respondent argued that the correct comparison was with the treatment accorded to other persons who had issued proceedings against the Chief Constable under other statutes, rather than with the treatment accorded to those who had issued no proceedings at all. That view was rejected by the House of Lords. Accordingly, *Khan* is clear authority for the proposition that the comparison to be made is simply between the treatment afforded to the claimant (who had done the protected act) and the treatment that had or would have been afforded to other employees (who had not done a protected act); and that no other features need to be factored into the comparison.
44. In the present case, it is argued on behalf of the claimant that the appropriate hypothetical comparators are any XY employee who was not dismissed and any XY employee who did not receive the alleged ill-treatments (as specified in the various complaints of ‘other detriments’). For the respondent, Mr White argues for a different basis of comparison. According to Mr White’s Submission (at paragraph 31) the correct comparator, in the context of dismissal:-

“ ... is a person who had not performed a protected act but was likewise unable to work in their existing job for a reason related to themselves, not the employer. Furthermore, the hypothetical comparator must be taken to have the skills and abilities of [the claimant]. In the circumstances of this case it would not be enough to postulate as a hypothetical comparator ... merely a person who had not performed the protected act. By the time of the detriment relied on a further factor had intervened – [the claimant’s] medical inability to work with her line manager.”
45. The question of the appropriate comparator arises most acutely in the context of the dismissal. In our view, in that context, anybody who was not dismissed is an appropriate comparator. (See paragraphs 25 and 27 of *Khan*).
46. However, the matters referred to by Mr White (as quoted above) are matters which must be taken into account in deciding whether the relevant treatment was accorded ‘by reason that’ the claimant had carried out the protected act.
47. The ‘by reason that’ requirement will be satisfied even if the fact that the claimant had carried out a protected act was not the main reason for the treatment complained of, if it was an important, or significant, reason for the treatment. (See *Igen Ltd v Wong* [2005] IRLR 258, at paragraphs 35 and 37 of the judgment.)

48. As Mr White has pointed out in his Submission, the phrase 'by reason that' (in the context of Article 6) means, in effect, 'because'. (See paragraph 76 of the House of Lords decision in *St Helen MBC v Derbyshire and Others* [2007] IRLR 540.)
49. Mr White has also drawn our attention to the fact that the third element of the definition of victimisation is significantly different from a causation question. As Lord Nicholls pointed out in *Khan*, at paragraph 29 of the decision:-

"Contrary to views sometimes stated, the third ingredient ("by reason that") does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. ... The phrase "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

50. Accordingly, it has to be borne in mind that, in considering whether victimisation discrimination has occurred, it is necessary to focus on the reason why, as distinct from focusing on questions of pure causation. Nevertheless, against the factual background of this case, comments of Langstaff J in *Blundell v Governing Body of St Andrew's Roman Catholic Primary School* [2007] IRLR 652 (at paragraph 33 of the judgment) are relevant. They are relevant not just in the context of victimisation discrimination, but also in the context of the unfair dismissal claim. (See below.) At paragraph 33 of *Blundell*, Langstaff J pointed out:-

" ... [This case] stands or falls by reference to well established law in relation to direct discrimination. That recognises that treatment complained of is not on the ground of sex if it is on some other ground, which is not gender specific. Although the 'but for' test is often helpful in identifying whether treatment is on the ground of sex, and in circumstances such as those in *James v Eastleigh Borough Council* ... may be determinative, it is worth remembering that the focus of the enquiry is as to the reason for the treatment – the 'reason why?' as it has been described in *Shamoon* (see paragraph 7 in the speech of Lord Nicholls of Birkenhead). The 'but for' test has limitations in resolving disputes as to causation upon which rights to compensation depend. For example, the claim that 'but for' my leaving home in the country to travel to London I would not have been knocked down by a car in Fleet Street may entitle the philosopher to muse that my doing so was the cause of my injuries, but such musing is completely unhelpful in determining the cause of the accident for the purposes of deciding whether I or the driver of the car should be financially responsible for the damage to man and to car involved in the accident. Thus for these purposes a court adopts what has been termed a robust, or pragmatic, approach to causation. Such an approach often leaves a broad margin within which a decision may fall. Courts and tribunals alike are entitled to the respect of the appellate courts when they give an answer as to the reason why treatment has happened, unless the approach is obviously wrong or the answer clearly perverse".

51. Prior to the enactment of Article 63A of the 1976 Order, courts in the United Kingdom had established what amounted to a special rule of proof in discrimination cases. That rule was best expressed in the judgment of Neill LJ in *King v Great Britain-China Centre* [1992] ICR 516, 528–529, in the following terms:-

"From these several authorities it is possible, I think, to extract the following principles and guidance. (1) It is for the applicant who complains of racial discrimination to make out his or her case. Thus if the applicant does not prove the case on the balance of probabilities he or she will fail. (2) It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers would be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that 'he or she would not have fitted in.' (3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 65(2)(b) of the Act of 1976 from an evasive or equivocal reply to a questionnaire. (4) Though there will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on racial grounds, a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but ... 'almost common sense.' (5) It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the Tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case."

52. Although *King*, and other associated cases, developed what amounted to a special rule of proof, there is nothing in *King* itself, or in any of the associated case law, which indicates that this special rule of proof was intended to abrogate (as distinct from operating alongside) the general rule of proof which applies to most civil litigation.
53. That general rule of proof can be simply described in the following terms. If, at the conclusion of the evidence, the party bearing the legal burden proves, on the balance of probabilities, all matters which he is required to prove, he is entitled to succeed in his claim.
54. The special rule of proof, as set out in *King*, entitled a tribunal to decide in favour of a claimant in a discrimination case if that claimant had established a prima facie case which was not the subject of a satisfactory (in the sense of non-discriminatory) explanation from the employer. That was the background to the enactment of Article 63A.

55. Article 63A was enacted for the purpose of complying with the requirements of the EU Burden of Proof Directive of 15 December 1997. According to article 4.1 of the 1997 Directive:-

"1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

56. Article 63A of the 1976 Order is in the following terms:-

"63A. (1) This Article applies to any complaint presented under Article 63 to an industrial tribunal.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent —

(a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part III, or

(b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination or harassment against the complainant,

the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act."

The employment provisions of the 1976 Order are contained within Part III.

57. There is nothing in the content or context of Article 63A to suggest that, through the enactment of that provision, the general rule of proof (as described at paragraph 53 above) was abrogated.

58. One effect of Article 63A is that, if a prima facie case of unlawful discrimination is established, a tribunal is now under an obligation (as distinct from having the power) to find in favour of the claimant unless the employer proves that the relevant treatment was not accorded on a relevant prohibited ground.

59. The English Court of Appeal decision in *Igen* has already been mentioned above. At the end of *Igen*, that court set out what is known as 'the revised *Barton* guidance'. That guidance envisaged a two-stage process for addressing the burden of proof, under Section 63A of the Sex Discrimination Act (which corresponds to Article 63A). That guidance was as follows:-

- (1) Pursuant to section 63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as "such facts".
- (2) If the claimant does not prove such facts he or she will fail.
- (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
- (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
- (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
- (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
- (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.
- (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to section 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
- (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

- (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
- (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since “no discrimination whatsoever” is compatible with the Burden of Proof Directive.
- (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
- (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

60. At paragraph (1) of the guidance, the phrase “ ... the tribunal could conclude ...” means ‘a reasonable tribunal could properly conclude’. (See *Madarassy v Normura International plc* [2007] IRLR 246, at paragraph 57 of the judgment.)
61. Article 56A of the 1976 Order empowers the Equality Commission to issue codes of practice containing such practical guidance as the Commission thinks fit for the purpose of eliminating discrimination in the field of employment and for the purpose of promoting equality of opportunity in that field between men and women. Paragraph (9) of that Article provides that a failure on the part of any person to observe any provision of a code of practice is not, of itself, to render them liable to any proceedings, but in any proceedings under the 1976 Order before an industrial tribunal, any provision of an Article 56A code, which appears to the tribunal to be relevant to any question arising in the proceedings, is to be taken into account in determining that question.
62. The Equality Commission issued an Article 56A code of practice in March 1995. It contains some very detailed and prescriptive guidance. In particular:-
  - (1) The code recommends that every stage of the recruitment process should be documented. (See paragraph 9.8 of the code.)
  - (2) The code points out that all relevant documentation should be retained for 12 months in order to be in a position to deal with any subsequent complaints about the implementation of selection procedures. (See paragraph 9.8 of the code.)
63. Provisions corresponding to Article 56A are to be found in section 56A of the Sex Discrimination Act 1975 (which is of course operative in Great Britain). A code of practice was issued in 1985 pursuant to section 56A of the 1975 Act. The latter code is much briefer than its Northern Ireland counterpart. It is much less

prescriptive. For example, paragraph 23 of the 1985 code merely mentions that records of interviews, showing why applicants were or were not appointed, should be kept 'where practicable'.

64. In cases (like the present case) in which a hypothetical comparator is cited, it is appropriate for a tribunal to construct a picture of how a hypothetical comparator would have been treated in comparable surrounding circumstances. One permissible way of judging a question such as that is to see how unidentical but not wholly dissimilar cases had been treated in relation to other individual cases. (See *Shamoon*, at paragraph 81 of the decision.)

65. The judgments in the House of Lords in *Shamoon* highlight the fact that, when a hypothetical comparator is cited, it will often be helpful to focus attention on the reason for the relevant treatment. As Lord Nicholls commented, at paragraph 11 of *Shamoon*:-

“This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will 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.”

66. In *Zafar v Glasgow City Council* [1998] IRLR 36, the House of Lords endorsed the reasoning of Lord Morison, who had explained (when *Zafar* was in the Court of Session):-

“The requirement necessary to establish less favourable treatment ... is not one of less favourable treatment than that which would have been accorded by a reasonable employer in the same circumstances, but of less favourable treatment than that which had been or would have been accorded by the same employer in the same circumstances. It cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances.”

In *Zafar*, the courts were dealing with a claim of direct racial discrimination. However, it seems clear to us that the general thrust of Lord Morison's comments is equally applicable to victimisation discrimination.

67. The unreasonableness of the treatment complained of is a factor which can be taken into account in deciding what inferences should be drawn, in the context of the question of whether or not particular treatment was accorded on a proscribed ground, or for a proscribed reason. See *Bahl v Law Society* [2004] IRLR 799, especially at paragraph 101 of the judgment. See also paragraph 51 of the judgment in *Igen* (where the Court of Appeal accepted that a tribunal could decide that there was a prima facie case of unlawful discrimination mainly on the basis of

the tribunal's finding that there was unexplained unreasonable conduct on the part of the employer).

### **The law (unfair dismissal)**

68. Article 130 of the Employment Rights (Northern Ireland) Order 1996 ('the 1996 Order') is in the following terms:-

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

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

- (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,
- (b) relates to the conduct of the employee,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under a statutory provision.

(3) In paragraph (2)(a) —

- (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
- (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

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

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case."

69. In determining whether or not a dismissal is fair, there are two stages. First, the employer must establish the principal reason for the dismissal and show that it falls within the category of potentially fair reasons which are specified at paragraphs (1) and (2) of Article 130. (In this case, the respondent has pleaded that the reason for dismissal was either 'some other substantial reason' or medical incapacity.)
70. If the employer fails to show that the reason or (if more than one) the principal reason for the dismissal is a potentially fair reason, the claim of unfair dismissal must be upheld.
71. Dismissal of an employee mainly or solely because she has done a protected act is not a dismissal for a potentially fair reason.
72. In considering, pursuant to Article 130(4), whether a particular dismissal is fair or unfair, it is necessary to have regard to any procedural shortcomings in the process leading up to the decision to dismiss. In considering those procedural matters, this tribunal is not entitled to substitute its own view as to what would be a reasonable and adequate process. Instead, we have to apply the objective standard of the reasonable employer as to what was a reasonable process; the range of reasonable responses test applies as much as to the question of whether the process leading to the dismissal was reasonable in all the circumstances as it does to the reasonableness of the dismissal decision itself.
73. When considering whether the choice of dismissal (as a decision option) was fair, within the meaning of Article 130(4), it is also appropriate to apply the range of reasonable responses approach. The essence of that approach can be summarised as follows:-
- (1) In deciding on the reasonableness of the employer's conduct, we are not entitled to substitute our own views for those of the employer and decide whether we ourselves would have dismissed in the circumstances of this case.
  - (2) Instead we have to make a wider enquiry.
  - (3) This approach (the 'range of reasonable responses' approach) is based on the premise that in many cases there is a band of reasonable responses to the factual context, within which one employer might reasonably take one view and another quite reasonably take another.

- (4) Against that background, the function of this tribunal is to act as an industrial jury and, in that capacity, to determine whether, in the particular circumstances of this particular case, the decision to dismiss the employee, in the relevant context, fell inside, or fell outside, the band of reasonable responses which a reasonable employer might have adopted.

74. A dismissal will not be rendered unfair, for the purposes of the unfair dismissal legislation, merely because the dismissal is effected without giving the employee the notice which she is due under the contract of employment. The law on wrongful dismissal and the law on unfair dismissal are dealing with different issues (although there is some common ground between the two branches of the law). A wrongful dismissal can be a 'fair' dismissal.

### **The law (jurisdiction)**

75. The parties are agreed that the tribunal has jurisdiction to entertain the claims of unlawful discriminatory dismissal and of unfair dismissal. Accordingly, the question of whether the tribunal has jurisdiction (in respect of acts carried out within England and Wales or within Scotland) is a question which only potentially arises in the context of the claimant's complaints that XY discriminated against her by subjecting her to 'other' detriments within the meaning of Article 8 of the 1976 Order.

76. The law on this topic is now mainly to be found in *Clydesdale v Driver and Vehicle Testing Agency* [2002] NI 421 and in *Sheerin v Gallagher* [2007] NI 1.

77. *Clydesdale* was an appeal, to the Northern Ireland Court of Appeal, from the decision of an industrial tribunal. The Court's judgment in that case appears to be authority for the following propositions:-

- (1) The provisions of the 1976 Order have to be construed as applying only to acts carried out within Northern Ireland, unless it is necessary, for the purpose of complying with any applicable requirements of EU law, to construe any relevant provision as applying to acts carried out elsewhere in the United Kingdom.

- (2) In *Clydesdale*, the relevant acts had occurred in Great Britain. In that case, the Court of Appeal concluded that the claimant had the right to make a complaint (in respect of the relevant acts) under Section 4 and Section 13 of the Sex Discrimination 1975 (which applies in Great Britain). Therefore, in the circumstances of that case, the court concluded that, there would be no breach of Article 6 of the Equal Treatment Directive if the provisions of the 1976 Order were construed as being inapplicable to the acts complained of in that case.

78. In *Saggar v Ministry of Defence* [2005] IRLR 618, in 2005, the English Court of Appeal took a notably more expansive view on the general question of a tribunal's jurisdiction to entertain complaints in respect of acts of race discrimination which were alleged to have been committed by an employer against an employee outside Great Britain. According to Mummery LJ in that case (at paragraph 11 of the *Saggar* judgment):-

“In some respects territory is irrelevant to the question whether an employee is protected by Part II of the 1976 Act. The fact that, for example, an act of race discrimination is alleged to have been committed by an employer against an employee outside Great Britain does not of itself deprive the employment tribunal of jurisdiction to determine the complaint. If the employment of the employee is regarded as being at an establishment in Great Britain, Part II of the 1976 Act applies. It does not cease to apply simply because the employee was outside Great Britain, either at work or even away from work, at the time when the alleged racial discrimination occurred or because the alleged acts of discrimination took place outside Great Britain.”

79. In *Sheerin*, the Northern Ireland Court of Appeal decided that a tribunal had been wrong to conclude that it did not have jurisdiction in respect of an act of victimisation discrimination which had occurred in the Republic of Ireland.

80. In that case, the Court was satisfied that the claimant would not be able to invoke the protection of the Republic of Ireland’s sex discrimination legislation because she was not habitually resident in the Republic. The Court concluded (at paragraph 26 of the judgment):-

“Because the appellant could not maintain a claim in the Republic of Ireland, her case is obviously distinguishable from the decision in *Clydesdale*. As we have said above ... if this court had concluded in that case that no remedy was available to the applicant in England, it would have felt it necessary to construe the legislation in a way that would allow the applicant to rely on acts of discrimination that had occurred outside this jurisdiction. Given that the appellant in the present case will not have a remedy in the Republic of Ireland, we consider it necessary in her case to so construe articles 6, 8 and 43 of the 1976 Order.”

81. In this case, the claimant’s claim in respect of discriminatory ‘other’ detriments is based on the premise that there has been a breach of Article 8 of the 1976 Order. As already noted above, Article 8 provides that it is unlawful for a person, “ ... in relation to employment by him at an establishment in Northern Ireland ...” to discriminate against a woman in various, specified, respects. We are unaware of any equivalent legislation in Great Britain, apart from section 6 of the Sex Discrimination Act 1975. However, section 6, which makes it unlawful for a person to discriminate against a woman in various specified respects, applies only:-

“ ... in relation to employment by [the relevant employer] at an establishment in Great Britain ...”.

### **Conclusions (general)**

82. In arriving at each of the conclusions which we have set out below, we have taken account of all of our findings of fact (as distinct from focusing exclusively upon those particular findings of fact which we have highlighted within the context of any particular conclusion).

## **Conclusions (discriminatory dismissal)**

83. In the context of the claim of unlawful discriminatory dismissal, the main issues are as follows:-
- (1) Was the fact that the claimant had made the Complaint a significant factor in the decision to dismiss the claimant?
  - (2) If so, did XY, by dismissing the claimant in those circumstances, treat the claimant less favourably than XY would have treated an appropriate statutory comparator?
  - (3) Has the claimant proven facts from which this tribunal could properly conclude (in the absence of an adequate explanation) that XY has committed a relevant act of unlawful victimisation discrimination against the claimant, or is to be treated as having done so?
  - (4) If so, has the respondent proven that it did not commit, or is not to be treated as having committed, that act?
84. Identifying the precise nature of the hypothetical comparator was potentially an issue. However, because of the conclusions which we have arrived at in relation to issues (1) and (2) above, it became unnecessary for us to explore the latter issue in any depth. (See paragraph 65 above.)
85. The claimant would not have been at risk of dismissal if she had not been medically incapable of continuing to carry out the duties of the Northern Ireland SMA post. That medical incapacity provided the context within which the question of her dismissal became a live issue.
86. When the claimant was found to be medically incapable of carrying out the duties of her existing post, it became inevitable that she would, in due course, be dismissed if alternative internal employment (within XY) did not become available to her.
87. Mr P seized upon that circumstance as a pretext for dismissing her and Mr T later confirmed that dismissal decision.
88. In each instance, the decision-maker wanted to dismiss the claimant because of the fact that she had made the Complaint.
89. If the claimant had not made the Complaint, she would have been transferred to another post without competition. As a result, alternative employment, within XY, would have become available to her. As a result of that availability, the risk of dismissal would have disappeared.
90. We have not found it necessary to arrive at definitive conclusions on the question of whether or not the claimant was the best candidate for any one or more of the three posts for which she applied in early 2005.
91. However, we are satisfied that the claimant was treated unfairly, in connection with each of the relevant selection processes, because her application was not fairly

assessed. Each job application was not fairly assessed because, in each instance, the assessment was affected by bias. In each instance, the source of the bias was the circumstance that there was an awareness, within the relevant interviewing team, of the fact that the claimant was not in good standing with senior management within XY; and she was 'not in good standing' with that element of the staff of the respondent company because of the fact that she had made the Complaint. (See paragraph 26 above.)

92. We consider that the matters listed in paragraph 29 above, taken together, constitute facts from which this tribunal could properly conclude, in the absence of an adequate explanation, that XY had committed an act of unlawful victimisation discrimination against the claimant by dismissing her.
93. The respondent has not proven that it did not commit, or is not to be treated as having committed, the relevant act of unlawful discrimination. Through the evidence of Mr P, Mr T and Ms CC, the respondent have given their explanations for the dismissal. We do not regard those explanations as being 'adequate' (in the sense in which that adjective is used in the context of the *Igen* principles) because we do not regard the evidence of those three individuals as being reliable and accurate in the context of the explanation.
94. Indeed, having considered all the evidence, we are satisfied, on the balance of probabilities, as to the following matters:-
- (1) First, we are satisfied that the claimant was dismissed because she had made the Complaint.
  - (2) Secondly, we are satisfied that if the claimant had not made the Complaint, but her circumstances had otherwise been the same, she would not have been dismissed.
95. For the avoidance of any doubt, we confirm that we accept that it would not have been reasonable to have expected XY to have complied with the terms of any Northern Ireland equality of opportunity code of practice in the context of the March 2005 selection processes (which all took place in Great Britain).
96. Accordingly, all of the elements of the definition of victimisation discrimination are met in respect of this dismissal:-
- (1) There was a protected act.
  - (2) The claimant was dismissed because of the fact that she had made the Complaint.
  - (3) Therefore it follows that an appropriate hypothetical comparator would have been transferred to an alternative post without competition (and as a result) would not have been dismissed. Accordingly, by dismissing the claimant, XY treated her less favourably than XY would have treated an appropriate hypothetical comparator.
97. For those reasons, the claimant's claim of unlawful discriminatory dismissal is well-founded.

## Conclusions (unfair dismissal)

98. In the context of the unfair dismissal claim, the main issues are as follows:-
- (1) Has XY established the principal reason for the dismissal and shown that this principal reason falls within the category of potentially fair reasons?
  - (2) If so, was the choice of dismissal (as the decision option), in the circumstances of this case, within the range of reasonable responses?
99. This was an unfair dismissal, in the sense in which that term is used in the unfair dismissal legislation, for the following reasons and against the following background.
100. As already noted above (at paragraph 85), this claimant would not have been at risk of dismissal if she had not been medically incapable of continuing to carry out the duties of the Northern Ireland SMA post. That medical incapacity provided the context within which the question of her dismissal became a live issue. Without that medical incapacity in relation to her existing post, the respondent would probably not have dared to dismiss the claimant. However, the immediate cause ('the causa causans') of her dismissal was the unavailability of an alternative post. That unavailability was the result of the respondent company's refusal to transfer the claimant (as distinct from requiring her to compete for any internal vacancies) and of its failure to carry out fair selection processes in respect of the alternative posts which the claimant had to compete for. That refusal and that failure occurred because the claimant had made the complaint.
101. Accordingly, the principal reason for the claimant's dismissal was victimisation discrimination. Such discrimination is not a potentially fair reason for dismissal (in the sense in which the latter concept is used within the context of the 1996 Order).
102. In any event, this dismissal was not within the range of reasonable responses because a decision to dismiss a person for a reason which amounts to unlawful discrimination is a decision which is outside the range of reasonable responses.
103. Furthermore, this employer also stepped outside the range of reasonable responses by terminating the claimant's employment after allowing her less than two months to carry out her internal job search for alternative employment, against the following background:-
- (1) The claimant was sick at the time.
  - (2) It would have cost the employer nothing extra to have allowed her six months to carry out any internal job search for alternative employment (because of the claimant's contractual notice entitlement).
104. We now deal with some miscellaneous related issues.

- (1) There was no unwarranted delay in the notification of the outcome of the claimant's internal appeal against her dismissal.
- (2) No pressure was put on the claimant to refrain from appealing against her dismissal.
- (3) This was a wrongful dismissal because the claimant was not given due notice (in the form of her contractual entitlement to six months notice) of termination. However, that lack of due notice is not a factor which makes the dismissal unfair.

### **Conclusions on alleged lack of support in managing stress**

105. The claimant says that she was not properly supported in managing work-related stress, in various (specified) respects and that the failure to provide her with proper support constituted victimisation discrimination. (The details of this category of allegations have already been set out, at paragraph 11 above.) All those allegations of unlawful victimisation discrimination are dismissed, for the following reasons and in the following circumstances.

106. We are satisfied that the allegations within this category are not well-founded:-

- (1) Contrary to the claimant's assertion, she was not subjected to any unreasonable level of enquiry or work-related demands while she was recovering from stress. (See paragraph 26 above.)
- (2) For reasons which have already been given above, it was appropriate, in all the circumstances, for XY to approach the claimant, at the end of the dismissal appeal, with a view to scheduling a performance review meeting,. (See paragraph 26 above.)
- (3) The main function of Dr C, as an Occupational Health Adviser, was to advise the employer. He himself underwent surgery during the course of February 2005. Against that background, we are satisfied that the fact that the claimant had done a protected act was a matter which had no bearing on the extent of any relevant direction, support or advice which Dr C gave, or failed to give, to the claimant.

Accordingly, the claimant has not established a prima facie case on the question of whether any relevant treatment constituted less favourable treatment on the relevant prohibited ground.

### **Conclusions on the 'sidelined, isolated and ignored' allegations**

107. A list of this category of allegations is to be found at paragraph 12 above. Sixteen allegations fall within this category; unfortunately, in the interests of clarity, it is necessary to repeat each allegation separately.

108. Allegation (1) is in the following terms:-

“(1) The claimant found that after her complaint became known, her team arrived for meetings and field visits without preparation and in an unco-operative manner. For example, D and E both attended an appraisal meeting without any preparation. Their attitude was dismissive and failed to show a professional approach and the respect a line manager would have been entitled to expect in terms of meeting preparation.”

109. The claimant has not established facts from which the tribunal could conclude, in the absence of a satisfactory explanation, that any relevant conduct was affected by victimisation discrimination. It is a fact of life that many employees, in many companies, in many industries, attend appraisal meetings without any preparation, (or without adequate preparation), arrive for meetings without adequate preparation, and behave in an unco-operative manner towards their line manager. Furthermore, we regard the claimant as an unreliable witness on matters relating to subjective impressions.

110. Allegation (2) under this category was as follows:-

“(2) Contrary to established practice, some of the claimant’s team sidelined the claimant by going above her head to the next line manager without consulting her. For example, Mr E went to Ms F about matters he should and could have raised with the claimant.

111. It is true that some of the claimant’s team did raise management issues with Ms F, or with Mr B, rather than raising them with the claimant. However, we are satisfied that this was solely because of the fact that the claimant’s management responsibilities were, at the relevant time, curtailed (with her agreement) while she was recovering from workplace stress.

112. Allegation (3) under this category was in the following terms:-

“(3) The claimant’s team did not turn up on time for field visits after her complaint against Mr B became known. They attended meetings late and without explanation. On a number of occasions meetings were commenced as much as one and a half hours late because of the late arrival of the claimant’s staff. Even on such occasions proper explanations were not proffered. Little attempt was made to make contact with the claimant as line manager as a matter of courtesy or good practice to explain such delays. In addition, telephone calls asking about their whereabouts went unanswered or were not responded to. Some telephone calls about other matters the claimant wanted to raise as part of their duties were ignored completely.”

113. The claimant has not established a prima facie case that the conduct complained of in this particular allegation was affected in any way by the fact that she had made the Complaint. In many walks of life, people attend meetings late and without explanation, and they fail to respond to telephone calls asking about their whereabouts. (See also the points made at paragraph 109 above.)

114. Allegation (4) was as follows:-

“(4) There was no initiation of phone calls to the claimant herself from the team itself. This became a significant change in the way the relationship between the claimant and her team developed after it became known that she had made a claim against her line manager.”

115. As noted above, the claimant’s management responsibilities were curtailed during the period when she was recovering from stress. As a result, the initiation of phone calls to her from the team was bound to substantially reduce. For the same reason, there was bound to be a significant change in the way the relationship between the claimant and her team developed. We are satisfied that the relevant matters were unaffected by victimisation discrimination.

116. Allegation (5) was as follows:-

“(5) A leaving card was sent to the claimant to her home address from a customer in September 2004 expressing sorrow that she was “leaving”. This was not true but the claimant believes that it may have been based on company rumour. Nothing was ever done about it.”

117. The claimant asserts that nothing was ever done about the card which was sent to her home address. However, that is factually incorrect. XY made it clear that she was returning to work, in a communication which was sent to some relevant staff. That was all that could reasonably be expected of XY in the circumstances.

118. Allegation (6) was as follows:-

“(6) Another significant change in the way the relationship between the claimant and her team developed after it became known that she had made a formal complaint was in the coldness displayed towards her. Post-complaint, the claimant’s team members did not want to be in social or work context with her.”

119. The claimant was stressed as a result of the pressure of putting in the Complaint. She was resentful of any person who she thought might be less than fully and wholeheartedly supportive of the position which she had taken in the course of making that complaint. As a result, her working relationships, and her social relationships within the workplace, suffered. We have found the claimant to be an unreliable witness, in some significant respects. (See paragraph 28 above.) In the circumstances, we consider that the claimant has not established a prima facie case that she has been the subject of detrimental treatment by others, in the manner indicated in allegation (6), because of the fact that she had carried out a relevant protected act.

120. Allegation (7) was as follows:-

“(7) In particular, the team did not want to go out with the claimant for traditional work night out in Christmas 2004.”

121. By Christmas 2004, Mr E, a member of the claimant’s own small team of staff, was currently the subject of disciplinary proceedings in respect of alleged fraud. The claimant at that time was personally heavily involved in the pursuit of Mr E in relation to those matters. Those circumstances provide very likely reasons for any

reluctance on the part of members of the team to participate in a team party. Against that background, and for those reasons, we are satisfied that the claimant has failed to establish a prima facie case that the relevant treatment was accorded to her because she had carried out a protected act.

122. Allegation (8) was as follows:-

“(8) The claimant believes that the strained and hostile atmosphere was partly based on the fear she felt was rife in the company over her complaint. During the course of the investigation into her internal complaint, and afterwards, colleagues were keeping “their heads down”. This was particularly evident in the case of the employee who had represented her at her internal disciplinary hearing.”

123. Most of allegation (8) is a commentary on the claimant’s perception of the situation generally within the company (as distinct from constituting a complaint about the treatment which the claimant herself received). However, allegation (8) does also contain criticisms of the standard of representation which the claimant receives during the course of one of the internal dismissal hearings. That aspect of allegation (8) is, in essence, the same as aspects of allegation (15), which is addressed at paragraphs 136 and 137 below.

124. Allegation (9) is as follows:-

“(9) The claimant was not copied into e-mails regarding the outcome of the disciplinary case for fraud for one of her own team members, a Mr E.”

125. The outcome of the disciplinary case in respect of Mr E only became known at a time when it was already obvious that the claimant would, in future, not be carrying out the duties of the Northern Ireland SMA. In the circumstances, it was entirely reasonable and appropriate for the respondent to refrain from notifying the claimant of the outcome of the case.

126. Allegation (10) was as follows:-

“(10) The claimant was ignored at local meetings by the Northern Ireland team in Cookstown in January 2005. (In this regard, reference is made to G, H and I). There were around 40 employees at this event and those present made deliberate efforts to avoid interaction with the claimant. Some avoided her by moving off sharply as she approach a group. Others made excuses that they had to go to the toilet or make a telephone call. Particularly in a social context, she was not welcome to join individual groups and those colleagues present were even avoiding eye contact.”

127. As already noted above, the tribunal has concluded that the claimant is an unreliable witness in some significant respects, especially in relation to matters of subjective impression. Furthermore, by January 2005, the claimant was very upset, because of the fact that XY had told her that her grievance had not been upheld. As a result, the quality of her interactions with other staff suffered. She was resentful of any person who she considered to have failed to adequately support her in the course of her grievance. We accept the accuracy of the testimony of Mr G,

Mr H and Mr I in relation to this allegation. For those reasons, and against that background, we are satisfied that this allegation is not factually well-founded.

128. Allegation (11) was as follows:-

“(11) The claimant was separated from other managers and representatives within the Northern Ireland team at a meeting held in St Andrews, Scotland, in February 2005. She tried to speak to other managers such as Mr G, Mr J and Ms K. She was ignored and given a cold response. Her team and herself were put in a different hotel, well away from the main party, which had the effect of isolating her team from the other Northern Ireland team members.”

129. We consider that allegation (11), in its various aspects, is not in substance true. In particular:-

- (1) Mr G, Mr J and Ms K did not ignore the claimant or give a cold response.
- (2) The claimant was not put in a different hotel well away from the main party. (Instead, she was put in a different building, within the same hotel as the main party, and within easy walking distance of the main building within that hotel.
- (3) The accommodation arrangements did not have the effect of isolating her team.

130. Allegation (12) was as follows:-

“(12) She had to walk on her own to and from the conference centre. Socially, a similar situation to the Cookstown meeting was prevalent. (In this context, the claimant’s makes reference to Mr D, Mr L and Ms M). There was a hostile atmosphere.”

131. Allegation (12) is not factually well-founded. First, the claimant did not have to walk on her own to and from the conference centre, and the claimant did not, in practice, always walk on her own to and from the conference centre. Secondly, we do not accept the accuracy of the claimant’s testimony in relation to the interaction, or non-interaction, between herself and Mr D, Mr L and Ms M at the St Andrew’s meeting. (Again we have had regard to our conclusion that the claimant has been an unreliable witness, in a number of significant respects, especially in relation to matters of subjective impression.)

132. Allegation (13) was as follows:-

“(13) The claimant was ignored at management meetings. In this connection, the claimant refers to N at a meeting at the Elstree Moat House, England, in November 2004. As she approached him, Mr N left to make a phone call and at the table she was not included in conversations and eye contact was avoided. In particular, when she tried to contribute to a conversation, this was ignored and no effort was made to include her.”

133. We do not regard the claimant's evidence in relation to allegation (13) as being reliable. In particular, the claimant has not provided the tribunal with reliable evidence on the question of whether she was ignored at management meetings. We are satisfied that Mr N did not avoid contact with the claimant for any reason relating to the Complaint. The only evidence in favour of the relevant proposition (that, at that meeting, the claimant was ignored, was not included in conversations, and that eye contact was avoided) consists of the testimony of the claimant herself. We regard that testimony as being unreliable.

134. Allegation (14) is as follows:-

“(14) The claimant's appointment with Occupational Health, on a date in January 2005, was deliberately timed to coincide with a managerial meeting at the Celtic Manor Hotel, Wales.”

135. We are satisfied that this allegation is not factually well-founded. We are so satisfied mainly because of three considerations. First, Dr C and Ms CC denied this allegation and (having closely observed the demeanour and manner of giving evidence of each of them) we regarded that aspect of their testimony as being credible and accurate. Secondly, it is a fact of business life that people have to juggle competing demands on their time. Thirdly, in the circumstances of this case, it was obviously a matter of urgency, in January 2005, to obtain definitive medical advice on the workplace implications of the claimant's state of health.

136. Allegation (15) was as follows:-

“(15) When the claimant asked a fellow employee, O, to provide support for her at the internal “dismissal” meeting with Mr P, he asked that she not get him any further involved as he feared “repercussions” from Mr P. Furthermore, she had difficulty in getting Mr O to produce agreed notes of that meeting. Mr O failed to provide her with the support she might have been entitled to expect from a colleague in such circumstances. He was more concerned about how his participation in the hearing would affect his career in the company.”

137. We accept that Mr O was an unenthusiastic representative of the claimant and that, in that role, he lacked dynamism. However, having carefully considered his testimony, we are satisfied that this lack of enthusiasm, and that lack of dynamism, were a reflection of Mr O's general reluctance to get involved in industrial relations matters which did not directly affect his own individual interests, or those of the team for which he was managerially responsible. Accordingly, any shortcomings in Mr O's performance were not affected by the fact that the claimant had made the Complaint.

138. Allegation (16) was as follows:-

“(16) Prior to the investigation into internal complaints, she had received regular telephone calls, conversations and meetings with members of her team and other managers in the course of her work. These largely ceased after the claimant returned to work in September 2004, and after interviews (held in connection with the internal complaints) with

the staff concerned had been concluded. In particular, prior to the investigation she had spoken to Mr G daily by telephone. After she returned to work in September 2004, she had no more than a dozen telephone calls with Mr G. Furthermore, from that time onwards, whatever conversations did take place were characterised by their functional nature. There was no interaction at meetings and no humour in the telephone calls.”

139. Against the following background, and for the following reasons, we have concluded that the claimant has not established a prima facie case that she was subjected to any unlawful victimisation discrimination, in any of the respects specified in allegation (16) :-

- (1) In general, as indicated above, we consider that the claimant has been an unreliable witness in relation to several aspects of her testimony. In particular, we consider the claimant to be unreliable on a number of matters of subjective impression. We bore these matters in mind while considering this allegation.
- (2) We consider that there was a change in the intensity of the claimant’s interactions with colleagues and with peers after her return to work in September 2004. However, this was because of two factors. First, the claimant was less inclined to interact constructively with the relevant people, because of the inner turmoil which she felt as a result of having made the Complaint. Secondly, for a lengthy period from September 2004 onwards, the claimant’s managerial responsibilities were curtailed. (See paragraph 26 above.)

140. For the reasons given above, we have concluded that none of the allegations of victimisation discrimination, within the ‘sidelined, isolated and ignored’ category, is well-founded.

### **Conclusions on the ‘undermined’ allegations**

141. As noted above, the claimant claims that the respondent has subjected her to unlawful victimisation discrimination by trying to undermine her in the various respects which are specified at paragraph 13 above. In that paragraph, three separate allegations are listed.

142. All those allegations of unlawful victimisation discrimination are dismissed, for the following reasons and in the following circumstances.

143. Within this category, allegation (1) is in the following terms:-

- “(1) The respondent failed to take her Complaint seriously. It failed to protect her against the action of other employees. It tolerated a culture of distrust and fear. It failed to allow a fair and transparent grievance system to operate. The decision of Mr Q, at the second stage of the internal grievance procedure, was notified to the claimant with indecent and inappropriate haste; indeed, that decision had been pre-determined before the meeting on 17 December. The

claimant was inappropriately advised, by Ms R, by Mr Q and by Mr S, not to pursue the internal grievance appeal processes.”

144. In reality, allegation (1) consists of a number of separate sub-allegations. We will consider each such sub-allegation separately below.
145. According to the claimant, the respondent failed to take her Complaint seriously. We reject that proposition. Indeed, the respondent took the Complaint very seriously indeed. It investigated it exhaustively. Much money was spent on that investigation. Much staff time was spent on that investigation. The investigation was pursued in a very formal manner. (All of this occurred because the respondent anticipated that it was likely that, one day, relevant matters would be pursued against them in an employment tribunal; see paragraph 26 above). Accordingly, this allegation is not well-founded.
146. According to the claimant, XY “ ... failed to protect [the claimant] against the action of other employees. It tolerated a culture of distrust and fear”. We regard those particular statements as constituting an expression of a general point of view (as distinct from constituting an allegation that a particular act, or a particular omission, constituted, or formed part of, an act or omission which was unlawfully discriminatory). Accordingly, that particular sub-allegation does not constitute an actionable allegation of unlawful victimisation discrimination.
147. The claimant asserts that XY failed to allow a fair and transparent grievance system to operate. We construe this sub-allegation as an assertion that XY did not fairly adjudicate upon the claimant’s Complaint. Our conclusions on that particular sub-allegation are to be found in paragraphs 148 to 152 below.
148. As already noted above, the Complaint was investigated exhaustively. In our view, the scope of the evidence considered by Ms R was broadly appropriate.
149. In essence, the Complaint was one of bullying, harassment, sexual harassment and sex discrimination. On the basis of the evidence which had been assembled by the investigating team, and acting within the context of the relevant XY policies, Ms R was not acting unreasonably in concluding that the claimant had not been bullied, sexually harassed, or discriminated against. So the ultimate conclusions of Ms R were reasonable.
150. For the purpose of determining the issues which we have to decide in this case, we have not found it necessary to arrive at any definitive conclusions on the question of whether or not the claimant was in fact the subject of bullying, harassment, sexual harassment or discrimination. Instead, we have merely found that, on the basis of the evidence available to the investigators, and in the light of the policy context within which the investigation was carried out, Ms R acted reasonably in coming to the ultimate conclusions, which she did come to, about the Complaint.
151. In notifying the claimant of the outcome of the Complaint, the investigatory team should have given due recognition to the fact that, in some significant instances, factual allegations have been vindicated by the outcome of the Complaint. (For example, the investigators accepted that there had been a relevant breach of confidence by Mr B and that the ‘Mac the Knife’ incidents had in fact occurred.)

Furthermore, it was perverse of the investigators to conclude that there was no real harm in Mr B describing the claimant as 'Mac the Knife'.

152. However, these are criticisms of aspects of the detail of the investigation. As already noted above, we are convinced that the scope of the investigation was appropriate and that the ultimate conclusions of Ms R were reasonable. Therefore, we must find the claimant's basic accusation (lack of fairness in connection with the Complaint) to be factually unsubstantiated. Against that background, the claimant has failed to make out a prima facie case that there has been relevant 'less favourable' treatment 'by reason that' the claimant had carried out a protected act. Therefore, the tribunal dismisses the claimant's sub-allegation as to the fairness of the investigation of her Complaint.
153. The purpose of the meeting on 17 December 2004 was to inform the claimant of the decision which Mr Q had by that time already provisionally decided upon (at the second stage of the internal grievance procedure) and to consider, in light of that 'provisional' decision, any comments which the claimant might make at that meeting. In those circumstances, it was not unreasonable, in itself, for Mr Q's decision to have been arrived at before the meeting began. Furthermore, his decision was therefore not notified to the claimant with any indecent or inappropriate haste. (See paragraph 26 above.) Accordingly, this particular sub-allegation is not well-founded and it must be dismissed.
154. The claimant asserts that she was inappropriately advised, by Ms R, by Mr Q and by Mr S, not to pursue certain internal grievance appeal processes. Having carefully considered the claimant's testimony in this connection, and having considered the testimony of Ms R and Mr S in that connection, we prefer the evidence of Ms R and Mr S on this matter. We are satisfied that the claimant was not advised by Ms R, or by Mr Q, or by Mr S, not to pursue the internal grievance appeal processes, or not to pursue any particular stage of those processes. In arriving at that set of factual conclusions, we have also taken account of the inherent improbability of Ms R or Mr Q advising the claimant not to pursue internal remedies, against a background in which Ms R and Ms CC strongly suspected that XY would in due course have to face employment tribunal litigation in respect of connected matters.
155. Allegation (2) under this category consists of the following:-
  - (2) The claimant complains in respect of aspects of her interview for an SMA post which was held on 11 March 2005. The interview was delayed and the claimant was treated rudely in that connection. The interview was not nearly long enough. The demeanour of the interviewers was very dismissive."
156. Allegation (2), in reality, consists of three separate sub-allegations. We will deal with each sub-allegation separately in its turn.
157. The claimant asserts that her interview for the relevant post was scheduled for 12 o'clock but did not in fact take place until 2.30 pm, and there was no apology for the delay. According to Mr BB and Ms U, the interview had never been scheduled for the morning, so the question of an apology never arose.

158. Although we regarded Ms U's evidence on this issue to be surprisingly vague, we were satisfied as to the accuracy and truthfulness of Mr BB's evidence on this matter. In particular, we note that he told us that he had previously arranged to attend another meeting in Manchester at 11.00 - 11.30 am (around the time when, according to the claimant, her interview ought to have started). With some hesitation, we have decided that this sub-allegation is not factually well-founded.
159. The claimant asserts that the interview was not nearly long enough. However, we are satisfied that the interview duration was appropriate.
160. The claimant asserts that the demeanour of the interviewers was very dismissive. That is a subjective view. We have found the claimant to be an unreliable witness in relation to various aspects of her testimony, including, in particular, matters relating to subjective impressions. (See paragraph 28 above.) We consider that the claimant has failed to make out a prima facie case that the interviewers were dismissive.
161. Allegation (3) is as follows:-
- “(3) The respondent pursued the claimant, in a petty and vindictive manner, about telephone bill expenses.”
162. As already indicated above, that allegation is not factually well-founded. (See paragraph 26 above.) In our view, the respondent's enquiries, in relation to the relevant expenses, were pursued proportionately and politely. It was entirely appropriate that such enquiries should be pursued.

### **Conclusions on the 2003 salary review allegation**

163. As noted at paragraph 14 above, the claimant says she was subjected to unlawful victimisation discrimination in that she received no support from senior management in relation to a grievance regarding her salary review for 2003. We reject that allegation, because we are satisfied that the amount of support from 'senior management' did not discernibly diminish after the claimant had initiated the Complaint. Accordingly, the claimant has failed to establish a prima facie case that she received no support from senior management, in relation to the salary review grievance, by reason that she had carried out a protected act.

### **Conclusions on the 2004 pay review allegations**

164. These allegations have already been detailed at paragraph 15 above. In the context of the claimant's 2004 pay award, she makes two complaints:-
- (1) She asserts that her performance was not fairly assessed.
- (2) She asserts that the pay review for 2004 was not conducted in a timely fashion.
165. The claimant says that those two shortcomings constitute detrimental discrimination against her, by way of victimisation discrimination.
166. In considering allegation (1), we have taken account of the following:-

- (1) Mr P (who unlawfully discriminated by way of victimisation against the claimant, by dismissing her) had a crucial role in determining the claimant's grading in the context of the 2004 salary review.
- (2) In his testimony during this hearing, he explained the basis upon which the claimant had been graded in that context. However, he is a witness whose evidence we have found to be unreliable in another context. (See paragraph 29 above.)
- (3) The grading system lacks transparency and XY has fostered a culture of secrecy in relation to individual officers' gradings.
- (4) Mr P in particular, and XY in general, had a powerful incentive to grade the claimant's 2004 performance as 'good', as distinct from grading it as 'excellent' or 'distinguished'. A merely 'good' grading fitted more comfortably with the XY argument that the claimant had failed to obtain an alternative post because she had exhibited serious management deficiencies in the course of her interviews for such posts.

167. However, in the end we have come to the conclusion that the claimant has failed to establish a prima facie case that, in deciding on the relevant grading, XY, by reason that she had carried out the relevant protected act, treated the claimant less favourably than XY would treat an appropriate hypothetical comparator. In arriving at that conclusion, we have mainly been influenced by the following factors:-

- (1) The grading which the claimant received in respect of the 2004 pay review was the same as the grading which she had received in respect of the 2003 pay review; the 2003 pay review was undertaken at a time when the claimant had not yet carried out any protected act.
- (2) Mr P's evidence on this topic was internally consistent.
- (3) The claimant was away from work, or carrying out a curtailed range of management duties, for much of the year 2004.

168. We can deal with the second allegation shortly. The actual outcome of the salary review was only delayed by a short number of weeks. There were difficulties in making the necessary arrangements, as a result of the medical unfitness of the claimant and because of the fact that a dismissal process was under way at the relevant time; those difficulties were the sole reason for the delay. Therefore, this allegation fails because the claimant has not established a prima facie case that the relevant treatment was accorded to her because of the fact that she made the Complaint.

### **Conclusions (jurisdiction)**

169. In light of the submissions which have been made on each side of the case in relation to this matter, we are satisfied that it is appropriate for us to accept that we have jurisdiction in relation to the allegations of discriminatory dismissal and unfair dismissal.

170. There was a potential issue as to whether we had jurisdiction in relation some of the alleged acts of pre-dismissal discriminatory detrimental treatment which had occurred in Great Britain, (as distinct from occurring in Northern Ireland or in the Republic of Ireland). However, we have not found it necessary to arrive at definitive conclusions on the jurisdiction issue, in the context of those allegations, because we have concluded that each such allegation is either factually not well-founded or it relates to treatment which is not discriminatory.

### **The Response amendment application**

171. In the course of a hearing, a tribunal has power to give leave to amend a response. That power is referred to in Rule 10(1)(q) of the Industrial Tribunal Rules of Procedure 2005.
172. On 20 April 2007, Mr White made application, on behalf of the respondent, for leave to amend each of the relevant Responses so as to include the following contention:-
- “There was no ‘protected act’ in that the claim of discrimination/sexual harassment made in the Claimant’s e-mail of 2.8.04 and amplified in her written document of 25 pages was false and not made in good faith and so by virtue of Section 6(2) does not qualify for the protection offered by Section 6(1) of the Sex Discrimination (Northern Ireland) Order 1976.”
173. That application was made on the fifth day of a liability hearing which was estimated to last for at least 20 days. The claimant’s witness statement in these proceedings had consisted of 168 paragraphs. The respondent’s witness statements amounted to 160 pages. The case had been extensively case-managed. This was the first time that it had been contended, by or on behalf of the respondent, that the relevant allegations were false and that they had been made in bad faith.
174. On behalf of the respondent, the following arguments were advanced:-
- (1) The proposed amendment was required in the interests of justice, for the purpose of permitting the respondent to advance the full defence available to it on the evidence before the tribunal, and so to allow the tribunal to deal fairly with the proceedings.
  - (2) The tribunal would in any event “ ... be asked to determine whether the [relevant] allegation ... in fact occurred in determining whether the respondent’s alleged witnesses to that act have told the truth ... and whether [Ms R] ... was justified in believing that the Claimant had fabricated the claim.”
175. The application to amend was strongly opposed on behalf of the claimant. On her behalf, the point was made that this defence of falsity and bad faith was being put forward very late in the day. Furthermore, it was argued, the case had been prepared on behalf of the claimant against a background in which there was a common understanding between the parties that issues of falsity and bad faith would not be issues.

176. Both parties were agreed that relevant legal principles were accurately stated at paragraphs 356 to 370 of Division T of 'Harvey on Employment and Industrial Relations Law' ('Harvey').
177. As is made clear at paragraph 356 of Harvey, when determining whether an application to amend a Response should be allowed, the guiding principle is that it is desirable that tribunal proceedings should be as flexible as possible, having regard to the interests of both parties and the justice of the case; accordingly, a respondent will not normally be prevented from amending his Response.
178. The point is also made in Harvey (at paragraph 357) that:-

“If the application for leave to amend is made at the hearing, it should be made at the outset. A tribunal has power to allow an amendment at any stage of the hearing, but it is less likely to permit a substantial amendment once the hearing has begun.”
179. At paragraph 358, Harvey makes the point that, in *Ready Case Ltd v Jackson* [1981] IRLR 312, leave to amend was refused when, on the second day of a constructive dismissal hearing, an application was made to allege a reason for the dismissal when the employers had previously been arguing that there had simply been no dismissal at all. The EAT said in that case that if the amendment had been capable of being made without the necessity of further evidence and an adjournment, then leave ought to have been given. But as it was not, the tribunal was justified in refusing leave.
180. We decided to refuse this application for leave to amend. We told the parties that we would give reasons for that refusal in this decision. In fulfilment of that promise, we now give those reasons, which are as follows.
181. The claimant's original witness statement had been prepared at a time when the common understanding was that the respondent would not be asserting that the relevant allegations were not truthful or were not made in good faith. If the tribunal were to accede to the request for leave to amend, it would be necessary for the claimant to file an extensive additional supplementary witness statement. It would be necessary to provide the opportunity for several of the respondent's witnesses to respond to that second supplementary statement. It would be necessary to adjourn the hearing.
182. It was common case that the claimant had suffered psychological ill-health in the past. It was clear to us that the continuance of these proceedings was already placing a significant burden upon the claimant, in terms of stress. We had been informed that she was pregnant.
183. We were satisfied that, if the amendment was not allowed, it probably would be unnecessary for us to arrive at any conclusive view as to the accuracy or otherwise of most of the allegations which were the subject-matter of the relevant Complaint.
184. Against that background, and having taken account of those considerations, we refused the application, mainly because of the following matters. First, the application had been made on the fifth day of hearing, in very lengthy and complex legal proceedings. Secondly, if the application were to be granted, it would be

necessary to adjourn the hearing for a lengthy period and this delay would probably have had significant negative effects upon the well-being of the claimant, at a time when she was pregnant. Thirdly, it is relatively difficult to organise a four week hearing; there would have been significant disruption, in terms of tribunal administration, if we had granted the amendment application.

### **The restricted reporting order**

185. Restricted reporting orders are provided for in Rule 50 of the Industrial Tribunals Rules of Procedure 2005.
186. On 16 April 2007, the first day of the hearing, the respondent applied for a temporary restricted reporting order in respect of this case. That application was not opposed on behalf of the claimant, although it was made clear that there would be opposition on behalf of the claimant to any application for the making of a full restricted reporting order.
187. On the same date, we made a temporary restricted reporting order, in the following terms:-
  - “(1) Prohibiting the publication in Northern Ireland of identifying matter in a written publication available to the public or its inclusion in a relevant programme for reception in Northern Ireland.
  - (2) In this Order, ‘identifying matter’ is any matter likely to lead members of the public to identify [Mr B] as a person affected by a relevant allegation which is under consideration in Case Reference Nos: 557/05, 612/05 or 621/05.”
188. On 16 April, it was made clear that the respondent wished to apply for a full restricted reporting order. We listed that application for determination on 17 April, having been informed that, by scheduling the hearing for 17 April, we would be providing the media with sufficient notice, in the event that anybody from the media wanted to make representations against the making of a full order.
189. The hearing of the application in respect of the full order did take place on 17 April. Although a journalist was present at the hearings on both 16 April and 17 April, no representations were made on behalf of any element of the media in connection with the application.
190. We decided to make a full order. The full order made by us has the same scope as the interim order. (See paragraph 187 above.) Our reasons for making the full order were as set out below.
191. Rule 50(1) provides that a restricted reporting order may be made in any case which involves allegations of sexual misconduct.
192. Article 13 of the Industrial Tribunals (Northern Ireland) Order 1996 contains the relevant definition of sexual misconduct. According to that Article, ‘sexual misconduct’ means the commission of a sexual offence, sexual harassment or other adverse conduct (of whatever nature) related to sex.

193. The parties were agreed that these proceedings do 'involve' (in the sense in which the concept of involvement is used in Rule 50) allegations of sexual misconduct on the part of Mr B.
194. On both sides of the case, it was recognised that Rule 50 provided the tribunal with a discretionary power (as distinct from imposing a mandatory duty) to make a restricted reporting order. Secondly, the parties were agreed that, in considering whether to make an order, the tribunal was obliged to have regard to the importance of the principle of the freedom of the press to report court and tribunal hearings fully and contemporaneously. Thirdly, the parties agreed that *Associated Newspapers Ltd v London (North) Industrial Tribunal* [1998] IRLR 569 and *Leicester University v A* [1999] IRLR 352 were relevant judgments and that both of those cases were correctly decided.
195. In deciding to make the full order, we were much influenced by the following matters:-
- (1) On behalf of the claimant, Mr Denvir was unable to point to any personal disadvantage, or to any personal detriment, which the claimant would suffer if we were to make the full order.
  - (2) We were aware that, because of the considerable number of complaints being made by the claimant, it was unlikely that it would be possible to arrive at a final decision in the proceedings within a short number of weeks.
  - (3) No representations (against the making of the order) were made by or on behalf of any media organisation.

#### **Rule 49**

196. Rule 49 of the 2005 Rules provides as follows:-

“49 In any proceedings involving allegations of the commission of a sexual offence the tribunal, the chairman or the Secretary shall omit from the Register, or delete from the Register or any decision, document or record of the proceedings, which is available to the public, any identifying matter which is likely to lead members of the public to identify any person affected by or making such an allegation.”

197. From this decision, we have omitted any identifying matter which is likely to lead members of the public to identify any person affected by or making the allegation in respect of the alleged misconduct of Mr B in Galway in the year 2002.

#### **Some general comments**

198. A woman (or a man) who raises an equal treatment allegation with her employer may be at risk of retaliation by the employer in all of the following situations:-
- (1) She proves the allegation to the satisfaction of the ultimate decision-maker (which may be the employer or an employment tribunal).

- (2) The ultimate decision-maker refuses to accept that the allegation is well-founded even though the evidence is perfectly adequate and even though, in reality, the allegation is well-founded.
- (3) She fails to prove the allegation to the satisfaction of the ultimate decision-maker because, although the allegation is, in reality, well-founded. the evidence is inadequate.
- (4) She fails to prove the allegation to the satisfaction of the ultimate decision-maker, because the allegation is not well-founded, although she genuinely believes that it is well-founded.
- (5) She fails to prove the allegation to the satisfaction of the ultimate decision-maker because the allegation is untrue and she knows it.

199. In all of the situations outlined above, apart from situation (5), employment discrimination law protects a complainant.

200. The Equal Treatment Directive was framed with a view to protecting claimants in situations (1) – (4), because article 6 of the Directive imposed a requirement on Member States to:-

“ ... introduce into their national legal system such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment ... to pursue their claims by judicial process ... [Emphasis added].”

201. The 1976 Order effectively implements that requirement of the Directive. Article 6 of the 1976 Order only excludes a complaint of sex discrimination, from the protection of the Order, if the relevant allegation is both false and not made in good faith.

202. An employer who is faced with a situation (5) allegation is not left without an effective and fair means of addressing the issue. He can confront the complainant with the suspicions as to falsity and lack of good faith; he can allow the employee the benefit of internal due process; and he can subsequently arrive at a fair adjudication on the matter, in the course of a subsequent internal investigation or in the course of disciplinary proceedings.

**Chairman:**

**Date and place of hearing: 16 – 27 April 2007;  
4 – 14 June 2007; and  
31 August 2007, Belfast**

**Date decision recorded in register and issued to parties:**