

# FAIR EMPLOYMENT TRIBUNAL

CASE REFS: 127/08 FET  
975/08

**CLAIMANT:** Marian McCullough

**RESPONDENTS:**

1. South Eastern Education & Library Board
2. John Mason
3. Dorothy Morrow
4. Lynette Bailie

## DECISION

The unanimous decision of the Tribunal is that:-

- (1) Following oral withdrawal at the hearing of this matter, the claimant's claims of unlawful discrimination on the ground of sex and unlawful discrimination on the ground of religious belief and/or political opinion are dismissed.
- (2) The claimant was unfairly dismissed by the first respondent.
- (3) The claimant was not directly discriminated against on the grounds of her disability and was not discriminated against for a reason which related to her disability, pursuant to the Disability Discrimination Act 1995, as amended; but was discriminated against by reason of the failure of the first respondent to comply with its duties to make reasonable adjustments imposed on it in relation to the claimant, contrary to the Disability Discrimination Act 1995, as amended.
- (4) The claimant was not discriminated against by way of victimisation, pursuant to the Sex Discrimination (Northern Ireland) Order 1976 and/or the Fair Employment and Treatment (Northern Ireland) Order 1998.
- (5) The Tribunal orders the first respondent to pay to the claimant the sum of £14,702.74.

### Constitution of Tribunal:

**Chairman:** Mr N Drennan QC

**Members:** Ms E McFarlane  
Mr J McClean

## **Appearances:**

**The claimant was represented by Mr B Mulqueen, Barrister-at-Law, instructed by Campbell Stafford, Solicitors.**

**The respondents were represented by Ms A Finnegan, Barrister-at-Law, instructed by Education & Library Board's Solicitors.**

## **Reasons**

1.1 The claimant presented a claim form to the Tribunal on 3 July 2008 in which she made a claim of unfair dismissal and breach of contract in relation to the termination of her employment with the first respondent ('the Board'), together with claims against the respondents of disability discrimination, discrimination on the grounds of sex and/or religious belief and/or political opinion, discrimination by way of victimisation on the grounds of sex and/or on the grounds of religious belief and/or political opinion.

The respondents presented a response to the Tribunal on 18 August 2008, in which they denied liability for the claimant's claims.

1.2 By a decision registered and issued to the parties on 20 October 2008, the claimant's claim for breach of contract in respect of holiday pay and notice pay were dismissed, following their withdrawal.

1.3 Following Case Management Discussions in relation to these proceedings, the representatives of the parties identified, as set out below, legal and main factual issues, together with the comparators relevant to the said claims:-

### **"The factual issues :**

- (1) In February and May 2008 what consideration was given to the claimant's medical condition?
- (2) Between February and May 2008 what efforts were made to identify suitable and alternative employment for the claimant?
- (3) Between February and May 2008 what efforts were made to consult with the claimant?
- (4) Between February and May 2008 what efforts were made to accommodate the claimant's medical condition with regard to her working environment?
- (5) Did the first-named respondent terminate the claimant's contract of employment by way of correspondence dated 1 April 2008 and/or 28 May 2008?
- (6) If the first-named respondent did terminate the claimant's contract of employment, was such termination a result of human error?

- (7) Was the claimant afforded a right of appeal with regard to her dismissal?
- (8) Did the first-named respondent take all reasonable steps to retract the dismissal and to reinstate the claimant with continuity of employment once the Head of Human Resources was made aware of the matter?
- (9) Was the first-named respondent prepared to consider the issue of reasonable adjustments once the Head of Human Resources became aware of the matter?
- (10) Was the first-named respondent prevented from investigating what reasonable adjustments might be made for the claimant by virtue of her refusal to agree to reinstatement?
- (11) Did the claimant act reasonably in refusing to allow her reinstatement to proceed?
- (12) Did the claimant act reasonably in refusing to meet Mr Mason?
- (13) Did the first-named respondent take any steps to implement policies and procedures as defined by the terms of settlement as previously reached between the claimant and the first-named respondent?

**Legal issues :**

- (1) Was the claimant unfairly dismissed?
- (2) Was the claimant subjected to less favourable treatment on the grounds of her disability?
- (3) Was the claimant dismissed due to a disability-related reason?
- (4) With regard to the claim that the respondents discriminated against the claimant contrary to Section 3A(2) of the Disability Discrimination Act 1995 by failing to comply with the Section 4 duty to make reasonable adjustments, the following have to be identified by the Tribunal:-
  - (a) the provision, practice or criterion applied by or on behalf of the respondents;
  - (b) physical feature of the premises occupied by the respondents;
  - (c) the identity of non-disabled comparators (where appropriate); and
  - (d) the nature and extent of the substantial disadvantage suffered by the claimant.

- (5) Did Section 4A(1) of the Disability Discrimination Act 1995 impose a duty on the respondent employer in the particular circumstances of this case.
- (6) If there was such a duty, did the respondent employer at any time take such steps as were reasonable to take in order to prevent the Section 4A(1)(a) provision, practice or criterion having the effect of placing the claimant at a substantial disadvantage.
- (7) Does the Tribunal consider that the respondent employer would have taken such steps as are referred to at (6) above had the claimant agreed to meet Mr Mason and to a reinstatement?
- (8) Could the respondents have taken any of the steps set out in Section 18B(2) of the Disability Discrimination Act 1995 having regard to the factors set out in Section 18B(1) of the Disability Discrimination Act 1995?
- (9) Did the respondents discriminate against the claimant contrary to Section 4(2)(d) of the Disability Discrimination Act 1995 by dismissing her?
- (10) Was the claimant subjected to less favourable treatment for a reason relating to her disability in being dismissed and, if so, can the respondents show that the treatment in question was justified?
- (11) Was the claimant discriminated against on the grounds of sex?
- (12) Was the claimant discriminated against on the grounds of religion and/or political opinion?
- (13) Did the claimant suffer victimisation on foot of previous Tribunal proceedings relating to discrimination on grounds of sex and/or religion and/or political belief?
- (14) Is the first-named respondent entitled to rely on the statutory defence?
- (15) Did the respondents comply with the statutory procedures as required by the Employment (Northern Ireland) Order 2003?
- (16) Was the claimant's response to the first-named respondent's offer to retract the dismissal and reinstate her reasonable?
- (17) What is the effect of the claimant's refusal to accept the respondents' offer to retract the dismissal and reinstate her with full continuity of employment?

## **Comparators :**

(1) Direct discrimination/disability-related discrimination

A person with the same material circumstances but absent the disability.

***[London Borough of Lewisham v Malcolm [2008] UKHL 43]***

(2) Reasonable adjustments (S4A)

A person who is not disabled and who is able to carry out the essential functions of their job and therefore not liable to be dismissed.

***[Archibald v Fyfe Council [2004] 4 AER 303]***

(3) Sex discrimination

A hypothetical male, in the same circumstances as the claimant, who is not subjected to the same treatment.

(4) Discrimination on the grounds of religion

A hypothetical non-Roman Catholic employee, in the same circumstances as the claimant, who would not be subjected to the same treatment.

There was no dispute between the parties that the claimant was a disabled person for the purposes of the Disability Discrimination Act 1995, as amended ('DDA').

- 1.4 The respondents' representative, during the course of the opening of the claimant's case to the Tribunal by the claimant's representative, conceded that the claimant had been dismissed by the Board, by virtue of a letter sent to her by the Board, dated 28 May 2008, and that the claimant was automatically unfairly dismissed by the Board by reason of the failure of the Board to comply with the relevant dismissal and disciplinary procedures contained in the Employment (Northern Ireland) Order 2003 (the '2003 Order') and the Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004 ('the 2004 Regulations'). However, she also confirmed that all issues in relation to quantum, arising out of the said admitted dismissal, remained in issue between the parties. Subsequently, during the course of the claimant's evidence-in-chief, at the commencement of the third day of hearing, the respondents' representative formally made certain further admissions/concessions to the Tribunal, in relation to the remaining claims of the claimant. In particular, the respondents' representative accepted that the Board had failed in its duty to make reasonable adjustments pursuant to the DDA. She also confirmed that all issues relating to quantum, arising out of the said failure to make reasonable adjustments remained in issue between the parties. At the same time, the claimant's representative, on behalf of the claimant, orally withdrew the claimant's claim of unlawful discrimination on the grounds of sex and/or unlawful discrimination on the

grounds of religious belief and/or political opinion. The Tribunal confirmed that, following such withdrawal by the claimant, the said claims were dismissed and a formal decision, dismissing the said claims, would be included in this decision.

In light of the foregoing, the representatives of the parties confirmed that the Tribunal would still be required to determine the claimant's remaining claims of direct disability discrimination, disability-related discrimination and victimisation, both in respect of liability and remedy; together with the issues of remedy, relating to the claims of unfair dismissal and failure to make reasonable adjustments referred to above.

- 1.5 There was no dispute between the parties that, in relation to the claimant's claims of discrimination against the respondents, any acts of the second, third and fourth respondents, relevant to these proceedings, were carried out in the course of their employment with the Board, the first respondent, and for which acts the Board was, at all times material to these proceedings, vicariously liable.
- 2.1 The Tribunal made the following findings of fact, insofar as relevant and material, as set out in the following sub-paragraphs, after hearing evidence from the claimant; the second, third and fourth respondents; Mr P O'Rawe, Mr S Sloan, Dr W Jenkinson and Ms N Niblock; together with the documents produced in evidence to the Tribunal and the oral and written submissions of the representatives of both parties.
- 2.2 The claimant, who was born on 13 February 1954, was employed by the South Eastern Education & Library Board (the Board) from in or about November 1991 as a Senior Unit Catering Supervisor. In or about August 2006, the claimant was appointed, on a temporary basis, to the position of Senior Unit Catering Supervisor at Saintfield High School and she subsequently applied for the permanent post, to which she was ultimately formally appointed in or about March 2007, with effect from on or about 13 November 2006. The third respondent, Mrs Dorothy Morrow, as the Area Catering Manager, was the claimant's line manager in the said post.
- 2.3 The claimant brought Tribunal proceedings in 2006/2007 relating to claims of unlawful discrimination on the grounds of sex and religious belief and/or political opinion against the Board and other employees of the Board, including Mrs Morrow, the third respondent. The subject-matter of the Tribunal proceedings related, in part, to the initial failure, following interview, of the Board to appoint the claimant to the said permanent position of Senior Unit Catering Supervisor at Saintfield High School. Dorothy Morrow was the Chairman of that interview panel for that position. The claimant was not initially appointed to that post following the interview; but, subsequently, she was appointed to the post, as set out above, after the successful male candidate had not taken up the post. The Tribunal, at all times, during the course of these proceedings, emphasised to the parties, which was not disputed by them, that it was not its role, in these proceedings, to determine the issues, the subject-matter of the previous Tribunal proceedings brought in 2006/2007 – which were settled, as a result of conciliation action in a written agreement entered between the parties to those proceedings. However, the fact of those proceedings, which were brought pursuant to the Sex Discrimination (Northern Ireland) Order 1976 and/or the Fair Employment and Treatment (Northern Ireland) Order 1998, settled as aforesaid, was relevant to the claimant's claim of discrimination by way of

victimisation, in these proceedings, being the relevant 'protected acts' for the purposes of her said victimisation claims.

2.4 In light of the foregoing, it is therefore necessary to set out the material terms of that written agreement:-

“ ...

- (1) *The first respondent [South Eastern Education & Library Board] will pay to the claimant, without admission of liability on the part of any of the respondents, the sum of £15,000 in full and final settlement of all the above-numbered claims ...*
- (2) *The first respondent acknowledged that there have been defects in the implementation of procedures and undertakes to ensure that all relevant procedures are followed in the future.*
- (3) *The respondents and each of them wish to express regret in relation to any injury to feelings, victimisation or harassment which may have been perceived by the claimant.*
- (4) *The respondents and each of them assure the claimant she will not suffer any victimisation, harassment or detriment as a consequence of bringing the above numbered proceedings.*

...”

The agreement was signed, on behalf of the Board, by John Mason, the second respondent to these proceedings, together with the other respondents including Mrs Dorothy Morrow (the third respondent in these proceedings). Mrs Morrow had been appointed as Area Catering Manager in or about August 2006 and in that position she was responsible for some 230 staff, including the claimant. She worked partly from the Board's Headquarters in Dundonald but also from an office at the central kitchen in Ballynahinch. The Tribunal is satisfied that Mrs Morrow and the claimant had a good professional working relationship, albeit not close. However, the Tribunal is satisfied that Mrs Morrow was unhappy when she was asked by the Board to sign the settlement terms, as set out above, in relation to those previous proceedings, because she did not believe she had done anything wrong in relation to the recruitment process, which was, in part, the subject-matter of those proceedings. She signed the agreement on or about 25 September 2007. Subsequently, during the course of an informal conversation amongst staff at the Board in the immediate weeks or month following settlement, she found out about the actual amount of the settlement. She had not known and had not been told the settlement figure at the time she signed the settlement agreement. When asked to sign the agreement, the relevant page of the agreement, setting out the precise sum of settlement, was not shown to her. She had no involvement in the negotiations, which led up to the settlement and/or the amount of the settlement. Mrs Morrow, when she did find out the amount of the settlement, clearly considered it was a lot of money for the claimant to be paid on foot of a settlement of proceedings, to which she had been made a party, in circumstances where she did not believe that she had done anything wrong. The Tribunal, in its judgment, concluded that following the settlement, despite her

unhappiness, Mrs Morrow maintained her professional working relationship with the claimant. There was no evidence of any unpleasantness or resentment by Mrs Morrow towards the claimant, following the settlement; and the claimant continued to work in her post, under the management of Mrs Morrow, without any difficulty or problem.

- 2.5 During the Summer of 2007, the claimant had keyhole surgery on her left knee, due to degenerative arthritic changes, which had increasingly, over the previous years, given her problems. However, although these problems would have been known to her immediate working colleagues, they, or at least their serious nature, would not have been known by Mrs Morrow or Personnel/Human Resources of the Board, as she had always been able to continue to work, without the necessity to take any leave of absence. There was no criticism of the claimant in relation to her work at any time and indeed the fact that she had continued working, despite her knee problems, reflected not only the attitude of the claimant to her work but also the enjoyment and satisfaction that she gained from her work and her position as Senior Unit Catering Supervisor at Saintfield High School. Following the surgery, which took place during the school holidays of the Summer of 2007, and which therefore did not involve her in having to take any time off work, she increasingly found it difficult to continue working, due to ongoing problems with her left knee. In or about November 2007, this situation had got sufficiently serious that the claimant accepted she had no alternative but to take time off work. The Tribunal was satisfied that this was a matter of extreme regret to the claimant, who had tried, for a number of years, to avoid such a situation arising. On 28 November 2007, the claimant wrote to Mrs Morrow, her line manager, enclosing sick lines for an initial period of six weeks. In the letter, she explained the serious nature of her left knee condition stating, inter alia:-

*“I will use the time to build up the muscle around my knee by swimming and exercise as prescribed. ... I had hoped that when I returned last September the operation would have allowed me to return to normal duties. However, it would appear the damage caused by wear and tear cannot be rectified. ... [My surgeon] has said he cannot operate further and the only option is a replacement knee. This is not possible for at least 10 years as it has a limited lifespan. While I have tried to work through the pain I now realise this is preventing any healing process. I have attempted to bring my paperwork up-to-date before leaving. I realise the Board has absence procedures in place and I confirm I am willing to have the surgeon’s notes and x-rays made available if required. I have arranged physiotherapy through my GP and I will continue to visit him to assess if it will be possible to return to my duties at some time in the future, without causing further damage to my knee. I would confirm, due to the existing damage to my knee, I am unable to carry out normal living activities. ... .”*

The Tribunal does not believe that the reference to normal living activities at the conclusion of the letter was a matter of chance; but was included by the claimant to indicate to Mrs Morrow that she considered that she was a disabled person, as defined by the Disability Discrimination Act 1995 (‘the 1995 Act’). That Act sets out a definition of disability – long-term physical or mental impairment which has a substantial adverse effect on ability to carry out normal day-to-day activities. The claimant, in sending any correspondence relevant to these proceedings, to the Board and/or its relevant employees normally did so after discussing and/or seeking

assistance from her husband, who, as shall be set out later, had considerable experience and knowledge of employment matters. Mrs Morrow informed the Tribunal that, although she recognised the seriousness of the claimant's knee condition, she did not recognise that this made her a disabled person within the terms of the 1995 Act. Given that the respondents have properly, in the judgment of the Tribunal, accepted, for the purposes of these proceedings, that the claimant at all material times was a disabled person, it is not necessary to consider this aspect further – save to note the fact that Mrs Morrow, an experienced line manager, with responsibility for a large number of staff, seemed to have little or no proper knowledge of the disability discrimination legislation and the responsibility it imposes upon an employer and/or the Board's Equal Opportunities Policy in relation to disability and/or of the Code of Practice under the 1995 Act.

- 2.6 Although there was a dispute between the parties about the precise percentage of the claimant's duties which involved written/paperwork, the Tribunal took the view that it was sizeable and involved well over 50% of her time. This was, in the Tribunal's view, a factor in helping the claimant to avoid for so long having to take time off work, despite her ongoing knee problems.
- 2.7 Following the Christmas/New Year period, the claimant remained off sick due to the condition of her knee. She was contacted by Mrs Morrow, by telephone on 9 January 2008; though, initially, during the course of her evidence to the Tribunal she seemed to have forgotten that this contact was made with her by Mrs Morrow. In the course of that conversation, the claimant's ongoing difficulties with her knee were discussed and Mrs Morrow explained to the claimant that, under the Board's sick absence/attendance procedures, which the claimant acknowledged, Mrs Morrow was required to send the claimant to see an Occupational Health Doctor, on behalf of the Board. However, Mrs Morrow indicated, during the course of this conversation, that she was willing to wait before referring the claimant for a further six week period to see if the claimant would be able to return or a further sick line would be sent in by the claimant. The claimant made no objection to this course of action, as suggested by Mrs Morrow.

On 12 February 2008, Mrs Morrow again telephoned the claimant and told her that, in light of her continuing sick absence due to her knee, she was going to have an appointment arranged for the claimant to see an Occupational Health Doctor on behalf of the Board. The Tribunal is satisfied that the primary purpose of this telephone call was to inform the claimant of the steps that she was making to arrange the said appointment. However, the Tribunal also accepts that, during the course of this conversation, there was discussion between Mrs Morrow and the claimant about the claimant's attendance at a training course which was to be held on 13 February 2008 about completion of 'E timesheets'. The claimant had attended the initial course in November 2007; and this was a further session, arranged by the Board, as it had been felt by some of the supervisors that the Board session was not sufficient. In anticipation of the claimant returning to work, Mrs Morrow had already put the claimant on the list to attend the training course. Mrs Morrow believed that, if the claimant was to return to work, following her sick absence, to have attended this further course would be helpful and of benefit to her. However, the Tribunal does not believe that there was any compulsion put upon the claimant by Mrs Morrow to attend the training course held on 13 February 2008 or, to attend the alternative dates of 14 or 15 February 2008 when the course was also running; and that she left it to the claimant to decide whether she wished to attend

the training the next day, if she felt up to it. The claimant did attend the training course and again the Tribunal considers that this illustrates her desire to get back to work, whenever she was able to do so. There were no other contacts during this period by Mrs Morrow.

- 2.8 Following this second telephone conversation, on 12 February 2008, in light of the continuing sick absence of the claimant, Mrs Morrow, on 12 February 2008, requested an appointment for the claimant to see the Board's Occupational Health Doctor. This request was sent by Mrs Morrow, in the normal way, to the Staff Welfare Officer of the Board, the fourth respondent, Ms Lynette Bailie, who then arranged the necessary appointment. As part of her duties as Staff Welfare Officer, Ms Bailie was required to deal with sick absence/attendance issues involving employees and to arrange such relevant and necessary medical appointments with the Board's Occupational Health Doctor. Despite the duties of Ms Bailie, she appeared, like Mrs Morrow, to have little or no knowledge of the disability discrimination legislation. It was unclear to the Tribunal the amount of training, if any, she had had in such matters. On 19 February 2008, Ms Bailie wrote to the claimant:-

*“Out of concern for your state of health and your welfare, an appointment has been arranged for you to attend for examination by the Board's medical officer, Dr A Glasgow, on 27<sup>th</sup> February 2008.”*

Dr Glasgow is a Consultant Occupational Health Physician, who provides occupational health reports on behalf of a number of employers, including the Board. He is in partnership with another Consultant Occupational Health Physician, Dr W Jenkinson; and they both operate from consulting rooms in the centre of Belfast.

- 2.9 A medical referral document was sent by Ms Bailie to Dr Glasgow. It was a standard referral document, as used by the Board, which referred, inter alia, to the claimant's reason for absence from 27 November 2007 as 'left knee pain'. In relation to the reasons for referral the following boxes were ticked:-

- “(1) Employee is on sick leave – advise on progress required.*  
*(2) Advice on rehabilitation required.”*

The box relating to 'advice on consideration of ill-health retirement' was not ticked. In addition, Dr Glasgow was asked to advise on the following specific questions – namely:-

- “(a) Is Mrs McCullough fit to resume her duties? If not, when can a return to work be expected?*  
*(b) Is Mrs McCullough's condition likely to lead to permanent incapacity or is it likely to last for at least 12 months?*  
*(c) Is Mrs McCullough's condition significantly debilitating that she is unlikely to provide regular reliable and sustained service whilst carrying out the full range of her catering duties?”*

The claimant in a letter dated 21 February 2008, which her husband helped her to write, confirmed her willingness to attend the appointment with Dr Glasgow, subject to confirmation of the following – firstly, that Dr Glasgow had access to all her GP notes and records/Consultant's notes relating to her knee operation, for which she had previously given her consent and, secondly, her right under the Medical Rights legislation to see and agree the report before it was furnished to the Board. By letter dated 25 February 2008, the claimant was given confirmation by the fourth respondent that Dr Glasgow would talk to the claimant at the assessment about the need to contact her GP and seek her approval and that she could talk to Dr Glasgow about his report and her having sight of it, at the time of the appointment.

The claimant agreed to attend as notified. Ms Bailie had never received previously, when dealing with such referrals, a letter in the terms such as sent by the claimant on 21 February 2008. Without seeking any advice, she had replied to the claimant, as set out above.

2.10 The claimant attended the appointment with Dr Glasgow on 27 February 2008.

In a report, dated 27 February 2008, sent by Dr Glasgow to Ms Bailie, Dr Glasgow referred to the claimant's medical history relating to the claimant's left knee and her ongoing symptoms of 'chronic ongoing painful symptoms, whether standing or seated'; and noted, on examination he had found the keyhole surgical scars and signs of ongoing degenerative arthritis.

Dr Glasgow concluded:-

*"In her role as Senior Unit Catering Supervisor with the repeated physical activity required in standing and lifting, carrying, bending and stooping, I see little prospect of sufficient improvement in the chronic knee condition to allow an early return to work. It is likely to be some, if not many, years before she undergoes further treatment to her knee and even then, in my opinion, this would not restore sufficient knee function to allow her to undertake this form of work. On that basis, ill-health retirement, if applied for, could be supported on medical grounds. ..."*

If it had not been known previously, arising from the claimant's letter to Mrs Morrow on 28 November 2007, there can be no doubt that upon receipt of Dr Glasgow's report it was known by the Board and its employees, that the claimant was a disabled person, for the purposes of the 1995 Act.

There seems to have been some administrative delay in the forwarding of this report from Dr Glasgow to Ms Bailie. Certainly she had not received it, by 18 March 2008, when Mrs Morrow, who had instigated the initial referral, in line with the Board's procedures, contacted Ms Bailie to ascertain the result of the examination of Dr Glasgow. Ms Bailie, in the absence of the receipt of the report, then contacted Dr Glasgow's office and a faxed copy of the report was forwarded to her on that date. Ms Bailie was not able to speak to Mrs Morrow but left her a message that the report had been received and she also indicated that ill-health retirement was being supported by Dr Glasgow. In Ms Bailie's experience of dealing with such matters, ill-health retirement seems to have been the desire of most of the Board's employees when faced with such medical conditions. Indeed, she indicated that

ill-health retirement was not considered by the Board's employees to be a negative and/or undesirable result and it was her general assumption, from her experience of dealing with such ill-health retirements that most employees, in circumstances where it was supported by the Occupational Health Physician, would want to take it; and if this was not the case, that would have been made known to her. Ms Bailie informed the Tribunal that, in her role as Staff Welfare Officer, dealing with such matters, she would not consider any issue of reasonable adjustment unless the Occupational Health Doctor had specifically alerted her to it or the employee had raised it with her. She accepted that the referral made by her had not asked Dr Glasgow to consider any issue of reasonable adjustment or alternative employment, for which the claimant might be suited, given her medical condition.

Due to pressure of other work and the Easter holiday period, Ms Bailie took no immediate action on foot of the report.

- 2.11 Before Ms Bailie had taken any action on foot of the report, on 1 April 2008, in the judgment of the Tribunal, there was a significant telephone conversation by Mrs Morrow to Ms Bailie on 1 April 2008. Ms Bailie, whom the Tribunal found a very impressive witness, made a written note of this conversation. It was not intended to be a verbatim note; but the Tribunal considers that it accurately reflected what was said during the course of that conversation.

The note stated:-

*"I phoned to check retirement date for Mrs McCullough. Details not processed yet asked Dorothy re contact re IHR [ill-health retirement]. Dorothy stated she would be happy enough as she wanted this. She had spoken to her before. Knee bad 'wanted out'. Therefore I advised – issue letter memo confirming date of retirement for end April."*

The Tribunal is satisfied that Mrs Morrow, despite her consistent denials, both during these proceedings but also the internal grievance hearings did in fact say to Ms Bailie, the fourth respondent what is stated in the note of the conversation, as recorded by Ms Bailie and, in particular, the words 'wanted out'. The Tribunal also did not accept that Ms Bailie, in some way, misunderstood, as Mrs Morrow tried to suggest, what had been said by her during the conversation. Given the culture amongst the Board employees, as referred to above, it would have been natural for Ms Bailie, as she has recorded, to ask Mrs Morrow, as the claimant's line manager, had she spoken to the claimant about ill-health retirement. Ms Bailie made it clear, during the course of her evidence, that she would not have recorded what is stated, unless it had been said – and, in particular, the words 'wanted out' – which the Tribunal is satisfied is consistent with what is set out elsewhere in the note taken by Ms Bailie.

However, there was no evidence that Mrs Morrow had ever discussed ill-health retirement with the claimant or that the claimant had ever given Mrs Morrow any indication she wished to leave on the basis of ill-health retirement or even told Mrs Morrow 'she wanted out'. The Tribunal is satisfied that Ms Bailie, in view of what she had been told by Mrs Morrow from that time on worked on the assumption that the claimant wanted ill-health retirement. She therefore set in train the process to terminate the claimant's contract of employment on that basis. In the circumstances, she did so, without taking any steps to herself contact the claimant.

The Tribunal is satisfied that Mrs Morrow would have been fully aware that, by stating what she had said to Ms Bailie that Ms Bailie would proceed to terminate the claimant's contract of employment on that basis. Mrs Morrow, as an experienced line manager, was fully aware of the Board's procedures for the retirement of employees on grounds of ill-health.

- 2.12 In light of the foregoing, Ms Bailie, assuming that there would be no difficulty, and it was what the claimant wanted filled in the standard termination form, giving the reason for the claimant's leaving as ill-health retirement and the date of leaving as 29 April 2008. She then sent it to the relevant administrative offices of the Board to process. Due to the failure to give clear instructions it was then wrongly processed, in error, without having regard to the fact the claimant, as set out below, did not wish to accept the proposal of ill-health retirement and wanted to appeal Dr Glasgow's report; and without waiting for such matters to be concluded.

On the same date, 1 April 2008, Ms Bailie sent to the claimant a standard form letter enclosing a copy of Dr Glasgow's report. She repeated the main parts of Dr Glasgow's report and then stated, inter alia:-

*"In view of this report, it is with regret that I have to advise you that the Board proposes to terminate your employment on health grounds with effect from 29 April 2008. Subsequent to your acceptance of this proposal, you shall be entitled to the following payments ... ."*

Although, in fact there had been no application for ill-health retirement, Ms Bailie clearly proceeded on the basis that there had been, based on what she had been told by the third respondent, Mrs Morrow; and had taken the necessary steps to process the termination of the claimant's employment on those grounds.

The letter does go on to say that the claimant had the right of appeal against the medical opinion contained within Dr Glasgow's report; but the letter, in the Tribunal's view, is very badly worded and makes the assumption that the termination, previously referred to, will not proceed in the event of a successful appeal. After referring, inter alia, to the forms which are required to be signed by the claimant in order to obtain the relevant ill-health pension, the letter concluded in the standard form:-

*"Subsequent to your acceptance of the above, the Board would wish to place on record its appreciation of your services over the past 17 years and wish you well in the future. May I also add my own personal good wishes and I hope that your health will soon show signs of improvement."*

Again, this phraseology in the above paragraph pre-supposes, in the opinion of the Tribunal, an assumption that the proposal will be accepted and the termination will in fact proceed; rather than a two-stage process with a decision firstly by the claimant whether or not to appeal and only, if not, to proceed to ill-health retirement. The standard routine use of the concluding paragraph was emphasised by the absence of any contact by the respondents, and in particular Ms Bailie as the Staff Welfare Officer with responsibility for such matters, prior to the sending of the said letters. The letter did give the claimant the opportunity, if she wanted, to arrange to discuss the letter with an officer from Human Resources – but there were no arrangements suggested for either Ms Bailie or anyone else in Human Resources

to meet and discuss the contents of the letter with the claimant. Indeed, no such contact was ever made with her by any of the respondents. In accordance with the normal practice of the Board, such contacts/home visits, which form part of the relevant absence procedures of the respondent, were never arranged, unless sought by an employee. In the opinion of the Tribunal this appears to have arisen, despite the provision in the relevant procedures, for purely financial reasons on the part of the Board.

The Tribunal was surprised that, having regard to Ms Bailie's job description as Staff Welfare Officer, she had not only the authority but was also able to take all relevant decisions relating to termination of staff without reference to more senior employees of the Board. Indeed this role would seem to be very different to the role that had been envisaged for her, as seen in the job description. This included, inter alia, providing confidential advice to staff who had personal, family or work-related problems, with a view to assisting them identify solutions. That aspect of her role does not appear to have featured in any way in relation to the claimant. Indeed, there was no express provision in her job description for the role that she in fact carried out terminating an employee's employment, such as the claimant, in the event of ill-health retirement. Indeed the Tribunal concluded that, at all material times, since Ms Bailie had commenced work as the Staff Welfare Officer in July 2003, her real role was this termination role on behalf of Board; rather than the welfare role, which might have been expected, giving support/advice to an employee and/or acting as a go-between between the management and the employee. In any event, in view of what she had been told by Mrs Morrow, Ms Bailie, in accordance with the normal practice of the Board did not consider any intervention/contact was required by her. The Tribunal is satisfied that Ms Bailie, in this case, followed the normal processes and would have done exactly the same with any other employee, whether disabled within the terms of the Disability Discrimination Act 1995 or not whom she believed, as she did here, wished to have her contract of employment terminated on grounds of ill-health retirement. Indeed, in giving this evidence, she was not seriously challenged nor was there any evidence given of any person, who was not disabled, being treated in any different way.

However, the Tribunal can fully understand and accept that the claimant, who at all times, in the judgment of the Tribunal, had hoped to be able to return to work was devastated to receive such a letter. The letter, was written by some person she had never met or knew, expressing appreciation of her services, in a standard format and with no personal input. The Tribunal could well understand and accept that this heightened the hurt that the claimant felt on receipt of the letter. In addition, the Tribunal could well understand and accept how a person receiving the letter of 1 April 2008, by its inadequate wording, could believe and understand, when first read, it was a letter of termination of employment. Indeed, it is only, with careful reading, that it is seen any termination is subject, inter alia, to an appeal brought by the employee. Indeed, the claimant fairly acknowledged that, with the benefit of hindsight, although not at the time, it was not in fact a straightforward letter of termination. The fact the letter was sent by Ms Bailie on 1 April 2008 was no coincidence, in the opinion of the Tribunal. It followed the telephone conversation between Ms Bailie and Mrs Morrow, referred to above.

2.13 On 15 April 2008, Ms Bailie sent to Mrs Morrow formal notice in the following terms:-

*“ ... I can now confirm that it is Dr Glasgow’s opinion that Mrs McCullough is unfit to return to work and that ill-health retirement could be supported on medical grounds. Therefore a proposal of ill-health retirement has been sent to her with the right of appeal. In line with procedures, Mrs McCullough’s employment will terminate on 29<sup>th</sup> April 2008.”*

This date was the relevant date under the procedures, some four weeks from the date of the notification.

It has to be noted that what is stated above is not in fact what Dr Glasgow had actually stated in his report. He did not in fact state she was unfit to work but rather had stated that he saw ‘little prospect of improvement ... to allow an early return to work’; and he had also stated ill-health retirement, if applied for [Tribunal’s emphasis] could be supported on medical grounds. This memorandum to Mrs Morrow once again illustrated, in the opinion of the Tribunal, the assumption on the part of Ms Bailie, following her conversation with Mrs Morrow, despite the reference in the letter to the right to appeal, that the claimant’s employment would terminate on 29 April 2008 on the basis of ill-health retirement; although there had been no contact by her with the claimant or from the claimant. In that conversation, Ms Bailie had been informed by Mrs Morrow that ill-health retirement was in fact what the claimant wanted, Ms Bailie clearly had acted on foot of what she was told and this set in motion the correspondence referred to above.

Given what she had been told previously by Mrs Morrow, the Tribunal accepts that Ms Bailie was genuinely surprised when the claimant wrote to her on 25 April 2008 exercising her right of appeal within the four week stated time period for appeal, as she was entitled to do. Despite her surprise, Ms Bailie does not appear to have taken any steps to contact the claimant. She did not speak to Mrs Morrow about what she had earlier told her. As stated before, her normal practice was not to make any contact; it was up to the employee to do so if he/she wanted. The Tribunal found such a practice very surprising, given Ms Bailie’s job as Staff Welfare Officer; but is satisfied no more senior employee of the Board queried this practice.

The Tribunal is satisfied that, in the absence of any contact by either Ms Bailie, or indeed Mrs Morrow, during this period, the claimant’s exercise of a right of appeal, by letter dated 28 April 2008, was the clearest indication to Ms Bailie there could have been that the claimant was hoping to obtain a different result from the doctor, on appeal; and it certainly gave no support to the statement by Mrs Morrow to Ms Bailie that the claimant ‘wanted out’/‘wanted ill-health retirement. If the claimant had wanted ill-health retirement’/‘wanted out’ as suggested by Mrs Morrow, the Tribunal does not believe the claimant would then have sought to bring the appeal; and she would therefore have allowed the proposed termination of 29 April 2008, as set out in the letter of 1 April 2008 to proceed without any appeal. Despite this indication, there appears to have been no action taken by Ms Bailie, consistent with her normal practice, to ascertain the claimant’s views. Ms Bailie, following receipt of the claimant’s letter of appeal, properly set in motion the appeal procedure.

- 2.14 A medical appointment was then arranged by Ms Bailie, the fourth respondent, with Dr W Jenkinson, Consultation Occupational Health Physician, and a partner of Dr Glasgow, for 22 May 2008. The claimant was so informed by letter dated 7 May

2008. Though Dr Jenkinson and Dr Glasgow are in partnership, the Tribunal is satisfied that this did not prevent Dr Jenkinson providing, on appeal, to the respondents an independent report. Again, it is of interest to note, the terms of the letter of referral sent by Ms Bailie to Dr Jenkinson on 19 May 2008. It stated, once again, inaccurately, in the Tribunal's judgment, that Dr Glasgow in his report had declared that her condition had deteriorated to such a degree as to render her unfit to return to this form of work. It also told him the Board had issued an ill-health retirement proposal which the claimant had appealed. It asked him, in particular:-

*"I would seek your professional medical opinion on Mrs McCullough's medical opinion and as a (sic) consequence, her ability to return to work, timeframe for same and her ability to fulfil the full range of her duties, whilst providing regular, reliable and sustained service in the foreseeable future."*

As with Dr Glasgow's referral letter, no express reference was made to the issue of reasonable adjustments and/or alternative employment and his opinion in relation thereto.

- 2.15 On 27 May 2008 Ms Bailie received Dr Jenkinson's report. In his report, Dr Jenkinson concluded, in his summary:-

*"I therefore believe Mrs McCullough is unfit for her usual work indefinitely."*

- 2.16 On 28 May 2008 Ms Bailie informed Mrs Morrow, again inaccurately in the Tribunal's opinion, that Dr Jenkinson's opinion was:-

*"The claimant should leave work on the grounds of permanent ill-health. Therefore a letter terminating her employment with immediate effect has been sent to her. In line with procedures, the claimant's employment will terminate on 28<sup>th</sup> May 2008."*

There was no attempt by Ms Bailie, at this time, to clarify with Dr Jenkinson, the contents of his conclusions and whether, as seemed to be assumed by her, that he supported the views expressed in her memo to Mrs Morrow. However, it has to be recognised that, whatever the specific terms of his report, Dr Jenkinson did orally tell the claimant, in the course of his examination, he would be confirming Dr Glasgow's opinion. Dr Jenkinson acknowledged, in evidence to the Tribunal, that he understood the claimant, who had appealed Dr Glasgow's report, had a desire to continue in work. He also accepted that, by the use of the terminology – 'unfit for usual work', in the conclusion of his report, he was 'leaving open the door' for another job to be found by the Board, within its organisation, for the claimant.

- 2.17 By letter dated Wednesday 28 May 2008 Ms Bailie wrote to the claimant. Again consistent with her normal practice, before she did so, she did not send her a copy of Dr Jenkinson's report, speak to her about its contents or arrange a meeting with her.

Although the letter was properly addressed to the claimant, it commenced 'Dear Mrs Irwin'.

Whilst the Tribunal can accept this arose from the misuse of a standard template letter, given the importance of the letter, it was an administrative/typographical error

that was inexcusable and should not have occurred; and undoubtedly increased the claimant's hurt. The Tribunal could fully understand the claimant's annoyance and hurt at what she understandably believed was a lack of care for her position as an employee of some 17 years and who was being told, elsewhere in the letter, her employment was terminating with immediate effect. She was not even provided with a copy of the report from Dr Jenkinson.

The letter sets out, in essence, the principle points made by Dr Jenkinson in the conclusion of his report – which can be contrasted with the inaccurate statement in the memorandum by Ms Bailie to Mrs Morrow of 28 May 2008. At the time of the receipt of the memorandum dated 28 May 2008, Mrs Morrow was in fact on holiday in Spain, having gone on holiday on 24 May 2008 and was not due to return to work until 4 June 2008. Mrs Morrow never in fact saw Dr Jenkinson's report, only the contents of the said memorandum upon her return to work from holiday. Even if Mrs Morrow had been at work on receipt of the memorandum, the Tribunal does not consider, in light of the lack of contact by the Board's officers, as part of their normal practice, as referred to above, Mrs Morrow would have tried to make any contact with the claimant or offered to meet her to discuss the contents of Ms Bailie's memorandum. The memorandum, in any event, had been sent at or at the same time as the letter to the claimant herself.

The letter from Ms Bailie of 28 May 2008 concluded:-

*“In view of this report it is with regret that I have to advise you that the Board will terminate your employment on health grounds from your post with immediate effect ... .”*

It again repeated, in the standard format, seen in the previous letter of 1 April 2008 Ms Bailie's appreciation of her services. Once again, the Tribunal could understand and accept the claimant's feelings of devastation and worthlessness, at this time, that her work, which she had earnestly hoped at all times she would be able to continue, had ended without any further discussion from either the Staff Welfare Officer or her line manager, the third respondent, or indeed any one from the Board. There was no reference in the letter or opportunity given to discuss any reasonable adjustments or alternative employment with the Board. Further, the letter did not give any indication of any right of appeal of the decision by the Board to terminate her employment. In light of her conversations with Dr Jenkinson, during the course of her examination, the claimant acknowledged, in evidence, she was not surprised that Dr Jenkinson had reached his conclusion, as set out in the letter; albeit she had always hoped he would have concluded otherwise. However, she was very much aware that there had been no discussion with her at any time about such matters, namely reasonable adjustments and/or alternative employment with the Board. These failures increased her hurt.

- 2.18 The claimant received the letter of Wednesday 28 May 2008 on Thursday 29 May 2009. The claimant then entered into a series of correspondence on 29 May 2009 to various persons/bodies, relating to the termination of her employment, as set out in the letter of 28 May 2009. In writing these letters, the Tribunal has no doubt, as she readily accepted in evidence to the Tribunal, that these letters were drafted and/or written with the assistance and guidance of her husband, who had returned home to discuss them with her upon receipt of the said letter.

The claimant's husband is not legally qualified but he lectures in employment law at Queen's University of Belfast and is head of legal advice within the Human Resources Department at the University of Ulster. He was therefore very experienced and knowledgeable about employment matters and the relevant procedures and requirements under the legislative provisions in relation to such matters. Indeed, the Tribunal is satisfied that it was, because of this knowledge and experience, all this detailed correspondence, which had all the hallmarks of legal involvement in its terms and language, was able to be sent so quickly on 29 May 2008, following receipt of the letter of 28 May 2008. There was no evidence to show that this correspondence had been drafted by the claimant and/or her husband prior to 29 May 2008, in anticipation of the receipt of the letter of 28 May 2008 from Ms Bailie. However, the Tribunal is satisfied that, in the discussion with her husband, following receipt of the letter of 28 May 2008, the claimant was made fully aware by her husband that she would be able to make a successful claim and obtain considerable compensation from the Board for automatic unfair dismissal, as she had been dismissed, as her husband recognised, without regard to the statutory disciplinary and dismissal procedures but also for a claim, pursuant to the Disability Discrimination Act 1995, as the Board had not sought to make any reasonable adjustments – both of which failures were, as set out above, conceded by the respondents. The Tribunal is also satisfied that, in the course of those discussions, it was inevitable that, in addition to being made aware that she would be able to make such claims and obtain such compensation from a Tribunal, that she also would have been made aware she would be able to obtain, following termination in such circumstances, monies due on ill-health retirement, which were of considerable financial benefit to the claimant, as she would be retired early from her employment, with early payment of her NILGOSC pension.

2.19 The claimant wrote to the second respondent, John Mason, on 29 May 2008, invoking the respondents' grievance procedure. At the relevant time, Mr Mason was Head of Human Resources of the Board, having been appointed in or about August 2007. He had not been involved in the recruitment exercise, the subject-matter of the previous Tribunal proceedings; but was, in the above capacity, involved in the settlement agreement concluding those proceedings and in signing the agreement on behalf of the Board and obtaining the signatures of the other respondents, including the third respondent.

2.20 In her grievance letter to Mr Mason, the claimant stated, inter alia:-

- “(1) By stating in its letter of 28<sup>th</sup> May 2008 that the Board is terminating my employment, with immediate effect, you are dismissing me unfairly.*
- (2) As someone who would be considered a disabled person under the current legislation, the Board has failed in its duty to consider any reasonable adjustment that would have allowed me to continue in employment.*
- (3) That in dismissing me, the Board has failed to comply with existing legislation, codes of practice and its own policies and procedures.*
- (4) That in dismissing me I am being victimised contrary to fair employment and sex discrimination.*

- (5) *Following my previous complaints relating to a less qualified male being appointed rather than myself, also when an unqualified person was redeployed in preference to me when my post was no longer required, now that the Board has dismissed me when I am aware of circumstances that would allow my employment to continue, the Board is guilty of a fundamental breach of trust that would make any future employment relationship impossible.*

....”

She also enclosed with the letter three statutory questionnaires to be completed.

Despite her assertions in Paragraph 5 of the letter, the previous proceedings had not made such findings. Also, at this time, the claimant was unaware of what Mrs Morrow had said to Ms Bailie in the telephone conversation of 1 April 2008.

- 2.21 The claimant also wrote to Ms Bailie on 29 May 2008, pointing out the administrative/typographical error in the letter in relation to her name and returning the relevant NILGOSC form to be sent to enable her ill-health retirement, as set out in the letter of 28 May 2008, to be processed. The claimant also wrote on 29 May 2008 to the Minister of Education in which she stated, inter alia:-

*“The Board has now dismissed me on ill-health grounds. I consider I am a disabled person. No attempt has been made to accommodate my disability. I am aware of duties that I am qualified and experienced to carry out, however, I fear the Board has victimised me over my previous claim.*

*While I will seek to follow the internal procedures and again go to Tribunal if required, I suspect that the Board will again buy me off. Given the past history of treatment by Board officers, I would wish them held accountable for their actions and would ask you to ensure that this happens this time.”*

She wrote on similar terms on 29 May 2008 to the Commissioners for the Board, who had been appointed by the Government to oversee the day-to-day working of the Board’s officers:-

*“ ... The Board has now dismissed me, despite the fact that I am disabled and they have not, to my knowledge, considered any reasonable adjustment. I have raised a grievance but given my previous experience, when from the Chief Executive down the Board failed to follow its procedures, I have no confidence in the process. Can you please oversee the process this time?”*

- 2.22 Ms Bailie, by letter dated 2 June 2008, apologised for the error in relation to the claimant’s name, acknowledging her receipt of the NILGOSC form and telling the claimant that this would be forwarded to NILGOSC; but also pointing out NILGOSC operate independently of the Board, so she was not in a position to say when this would be processed by NILGOSC.

- 2.23 The claimant, on 29 May 2008, went to her place of work at Saintfield High School to tell her colleagues, whom she stated had been asking her when she was likely to return, that her employment, that she had in fact been terminated by the Board.

The claimant, in evidence to the Tribunal, made it clear that, in having to make this visit, when she also returned her uniform, she found it emotional, and she felt that she had been 'cheated out of her work by the Board', This was work she liked and she could not believe that her medical condition had resulted in the termination of her employment.

2.24 Mr Mason received the claimant's letter of 29 May 2008 on Friday 30 May 2008. Prior to that date, he had no involvement in the previous correspondence sent to the claimant by Ms Bailie or indeed any personal knowledge of the steps that had been taken by Ms Bailie, which had led to her sending the said correspondence to the claimant. The Tribunal can fully accept that, before he could reply properly to the claimant's grievance, in view of his non-involvement prior to that date, it was necessary for him to speak to relevant personnel; but in particular Ms Bailie, who was the author of the relevant letters and who, as Staff Welfare Officer, was authorised to deal with such terminations of employment and also Mrs Morrow, the claimant's line manager, who had instigated, under the relevant procedure, the initial referral to Dr Glasgow. He was unable to speak to Ms Bailie on that date, as she does not work on a Friday. Mr Mason spoke to Ms Bailie on Monday 2 June 2008, when he obtained from her the relevant documentation relating to her actions in terminating the claimant's employment referred to previously; although he was not shown, at that time, Ms Bailie's memorandum of her telephone conversation with Mrs Morrow of 1 April 2008. Mr Mason spoke to Mrs Morrow on the afternoon of 4 June 2008, on her return from holiday, at an urgent meeting, which was arranged by him to discuss the claimant's letter of 28 May 2008. This meeting was also attended by the Board's legal adviser. By involving the Board's legal officer at that meeting, the Tribunal has no doubt that, subject to obtaining legal advice and/or approval, Mr Mason, from what he had heard from Ms Bailie and had seen in the correspondence, had already in mind to send the letter, which he subsequently sent on 5 June 2008, following that meeting. Mr Mason did not contact the claimant to tell her about enquiries he was carrying out, as set out above, before replying to her nor did he formally acknowledge receipt of her letter. Whilst accepting such enquiries were appropriate in the circumstances and could not have concluded before Mrs Morrow's return from holiday on 4 June 2008, to have acknowledged the claimant's letter and informed her he was making such enquiries would have reduced the claimant's upset during this period.

It is necessary, in view of the Tribunal's decision in this matter, to set out the contents of this letter of 5 June 2008 in some detail.

In the letter he stated:-

*" ... It was with the utmost regret that I learned that a letter had been sent to you indicating you will be dismissed on health grounds. I apologise, on behalf of the Board, for the issue of this letter. I was not aware of this until I received your letter of 29 May 2008.*

*I want to assure you that this letter should not have been sent. I have immediately asked for the letter to be retracted and activated your reinstatement to your post of Senior Unit Catering Supervisor, Saintfield Central Meals Kitchen. Your continuity of employment is confirmed and all reference to dismissal will be removed immediately from your personnel file.*

*The medical reports from Dr Glasgow and Dr Jenkinson indicate that you are unfit for your usual work in catering.*

*I would therefore welcome the opportunity of meeting with you, at your convenience to ascertain what adjustments the Board can put in place to enable you to continue in your employment in the school's meal section or elsewhere in the Board.*

*Please let me know of a convenient time when we can meet to discuss options.*

*Once again please accept my apologies for the letter being issued to you.*

*... .”*

- 2.25 The claimant replied to the letter received by her from Mr Mason by return on 6 June 2008. She acknowledged, in evidence, that the letter was also written with the assistance of and after discussion with her husband.

In it she stated, inter alia:-

*“ ... further to your letter of [5<sup>th</sup>] June, I can assume it has been written on legal advice. If my dismissal was indeed a mistake I would have expected immediate contact, not a week later; stable door and bolted horses come to mind*

*Mrs McCullough's correspondence is quite clear, on 30<sup>th</sup> May money was lodged into my bank account and I received a payment slip which referred to pay in lieu of notice. I was told by someone called Phillip in Salaries and Wages that I was terminated with effect from the 29<sup>th</sup> of April 2008.*

*Legally my contract is broken. While I would contend the dismissal was unfair and a breach of contract, I have accepted my employment with the Board is at an end. As such I have taken steps to deal with the financial consequences.*

*Ms Bailie has confirmed to me verbally, and via voicemail, which I have retained, that she will process my ill-health retirement. Therefore I have informed NILGOSC accordingly.*

*I would draw your attention to Point 5 of my letter of 29<sup>th</sup> May. Breach of contract is fundamental following the previous acts of discrimination. Therefore I cannot consider any future employment with the Board.*

*I have now obtained copies of Board policies on absence, disability and dealing with the disabled. Once again I am shocked at the blatant disregard for the Board's own policies ... Once again the Board has ignored legislation and Codes of Practice. I am firmly of the view that I am now subject to victimisation. I would refer you to the terms of the settlement of my previous claim. It was extremely difficult to return to work knowing my line manager preferred a less experienced male. Mrs Morrow is well aware of the opportunities that exist to accommodate my disability.*

*I wish my ill-health retirement to be processed as promised by Ms Bailie. I have outlined the grievance I wish addressed; please confirm the arrangements for the hearing.*

... .”

In evidence, the claimant acknowledged, despite the terms of her letter, no previous acts of discrimination had been established in the previous proceedings. The previous claim had been settled without admission of liability, albeit with an acknowledgement of defects in the implementation of procedures.

Significantly, in the judgment of the Tribunal, she also made it clear in evidence, to the Tribunal, that, despite the terms of Mr Mason’s letter, dated 5 June 2008, received by her on 6 June 2008, she had decided, regardless of what he had stated, she was not prepared to accept any of the terms offered by him in his letter and to proceed, if necessary to obtain any compensation she was entitled to in Tribunal proceedings.

2.26 The claimant wrote again to Mr Mason on 11 June 2008, in not dissimilar terms to her previous letter, confirming that she would not be returning to work with the Board, despite what had been stated by Mr Mason. She again sought assurances her ill-health retirement would be processed by the Board. The claimant confirmed, in evidence, that her husband had also assisted her, following discussions, in the drafting of the terms of this letter.

2.27 By letter dated 16 June 2008, Mr Mason again wrote to the claimant in which he stated, inter alia:-

*“As previously stated in my letter of 5<sup>th</sup> June 2008 I apologise that a letter was sent to you indicating you would be dismissed on health grounds. I would reiterate that the Board would be more than happy for you to continue in its employment.*

*Accordingly I would be happy to meet with you, at your convenience, to ascertain what adjustments the Board could put in place to enable you to continue in your employment in the school meals section or elsewhere in the Board.*

*If however you do not wish to continue in employment with the Board with suitable adjustments, I will process your ill-health retirement and notify NILGOSC accordingly.*

*Please let me know by Friday 20<sup>th</sup> June 2008 if you wish me to process ill-health retirement on your behalf.*

... .”

2.28 The claimant again acknowledged, in evidence that, regardless of what Mr Mason said in this further letter, where he had reiterated his apology but, in particular, his offer to meet with her to consider the issue of adjustment to enable her to continue

her employment, she was not prepared to take him up on any such offer, even to meet him on a 'without prejudice' basis.

- 2.29 Despite having written to the Minister of Education, for her support, upon her receipt of the letter of dismissal, the Minister's reply, dated 17 June 2008, also did not cause the claimant to re-consider taking up Mr Mason's suggestion for a meeting. In the letter, the Minister indicated she was unable to become directly involved in issues between employer/employee but she confirmed she was aware the Board's Head of Human Resources, namely Mr Mason, had written withdrawing the letter of dismissal and inviting the claimant to a meeting to review the position.
- 2.30 By letter of 18 June 2008, the claimant confirmed to Mr Mason she wanted the ill-health retirement to proceed. In doing so, in the Tribunal's view, the claimant was consistent with what she told the Tribunal, in the course of her evidence to the Tribunal. This was, she had made her mind up, from the receipt of the letter of dismissal, to allow the dismissal to proceed and to go through the relevant procedures for ill-health retirement and she was not prepared to re-consider the decision, despite the terms of Mr Mason's letters and, if necessary, to also take Tribunal proceedings.
- 2.31 By letter dated 24 June 2008, Mr Mason acknowledged that the claimant had asked him to process ill-health retirement and she had refused his offer to meet to ascertain what adjustments the Board could put in place to enable her to continue in her employment in the schools meals section or elsewhere in the Board.
- 2.32 As requested by the claimant, the Board arranged a grievance hearing to take place under the statutory grievance procedures set out in the Employment (Northern Ireland) Order 2003 and the Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004 ('2003 Order' and '2004 Regulations').

The grievance hearing was subsequently heard by Mr Neil Craig, the Chief Financial Officer of the Board, pursuant to the grievance procedures under the 2003 Order and 2004 Regulations, on 27 June 2008. He had all relevant correspondence and documentation before him including Ms Bailie's note of her conversation with Mrs Morrow. Mr Craig gave his decision in a letter dated 16 September 2008. In the meantime, as set out previously, the claimant, on 3 July 2008, commenced these proceedings. Having set out the history of the matter, he concluded by stating, inter alia:-

*"As a result of an administrative error a letter was sent to you on 1<sup>st</sup> April 2008 from Ms L Bailie, Staff Welfare Officer, and as a result of this error, no reasonable adjustments were considered at this time. Prior to this letter being sent to you on 1<sup>st</sup> April 2008 you should have been invited to attend a meeting to discuss the contents of Dr A Glasgow's medical report and your future employment with the Board.*

*A letter was sent to you on 28<sup>th</sup> May from Ms Lynette Bailie, Staff Welfare Officer, to advise with immediate effect the Board will terminate your employment on health grounds. This letter should not have been sent.*

*On 5<sup>th</sup> June 2008 Mr John Mason wrote to apologise unreservedly on behalf of the Board for the issue of the letter. Mr John Mason confirmed that this letter should not have been sent. He confirmed that he had immediately asked for the letter to be retracted and activated your reinstatement to your post to Senior Unit Catering Supervisor at Saintfield Central Meals Kitchen. He confirmed your continuity of employment. He offered the opportunity to meet with you at your convenience to ascertain what adjustments the Board could put in place to enable you to continue in your employment in the schools meals section or elsewhere in the Board.*

*In your letter dated 11<sup>th</sup> June 2008, you confirm that you considered that you had been dismissed and were not returning to Board employment. In your letter of 18<sup>th</sup> June 2008 you requested the Board to process your ill-health retirement, as originally offered in Ms L Bailie's letter of 1<sup>st</sup> April 2008.*

*I cannot find any evidence that the issue of reasonable adjustments were considered prior to 28<sup>th</sup> May 2008. I do note that Mr J Mason indicated the desire to meet with you at your convenience to ascertain what adjustments the Board put in place to allow you to continue in the schools meals section or elsewhere in the Board.*

*Given the apology in Mr J Mason's letter, I do not consider it reasonable for you not to have met with Mr J Mason to discuss reinstatement and reasonable adjustments.*

*... .”*

For the reasons set out previously, the Tribunal does not accept Mr Craig's conclusion. The letter of 1 April 2008 was sent as a result of an administrative error by Ms Bailie; but arose from what she had been told by Mrs Morrow and recorded in her memo.

- 2.33 The claimant appealed this decision by Mr Craig to Mr Stanton Sloan, the Chief Executive of the first-named respondent, which was heard on 8 January 2009. Mr Sloan, during the course of the hearing of the appeal, again asked the claimant if she wished to be reinstated; but she declined. He again repeated his offer in his letter of 26 January 2009 turning down her appeal and apologised to the claimant for what had occurred. In his letter of 26 January 2009, following the hearing of the appeal, Mr Sloan accepted, inter alia, the statutory dismissal procedures had not been followed and the failures to consider reasonable adjustments and to follow legislation and the Board's policies and procedures. He did not concede the claimant had been victimised nor that she had not received an explanation for her treatment, and referred to the findings of Mr Craig. In his letter, he placed great emphasis on the failure of the claimant, despite the Board's admitted failures, to take up the offers of Mr Mason. The Tribunal was satisfied that, both during the course of the hearing of the appeal and in the said correspondence, Mr Sloan made it clear to the claimant that he was anxious to explore every possibility to enable her to be reinstated to a suitable position. In his letter, he pointed out that in June 2008 there was the post of Executive Officer with the Financial Strategic Unit within Board Headquarters which was available, together with other posts at the same level within the Board. In a reply dated 30 January 2009, the claimant asked:-

*“Can you confirm that the Board is now saying a suitable redeployment option was and still is available?”*

The claimant, giving all the appearance she was genuinely anxious to explore the possibilities of such redeployment, then sought further details of any such post. By letter dated 20 February 2009, Mr Sloan confirmed the offer of re-engagement “was entirely genuine and he was prepared to consider all options available to achieve [the claimant’s] re-employment”.

He also stated:-

- “(1) I can confirm that a suitable redeployment option will be made available within the Financial Strategic Unit or elsewhere in the Board at Executive Officer Grade and my meeting with you will be initially to discuss your qualifications, experience, knowledge and skills. This analysis will provide us with an outlined specification to best achieve a post that will meet both your needs and the needs of the Board.*
- (2) It is obviously essential however that the Board meets with you at an early stage to discuss how such redeployment can best be implemented in light of the adjustments which the Board is required to make in view of your disability.*
- (3) I can also confirm that you will not be subject to a further probationary period.*
- (4) The Board appreciates that you may require training with regard to certain aspects of any post that will be offered and this will be facilitated.*
- (5) The Board will be happy to discuss flexible working arrangements with you at an early date.*
- (6) The proposed new post will not involve you reporting to your former line manager or any of the Area Managers within the catering service.*
- (7) I note your comments with regard to being on your feet and physical activity. I would not envisage that the post would involve being on your feet for any lengthy period of time.*
- (8) In relation to your pension I would advise you that you contact NILGOSC directly ...*
- (9) Your earnings will obviously depend on the number of hours that you work per week. The Board is not in position to advise as to the impact your earnings would have on your entitlement to Incapacity Benefit.*
- (10) The arrangements pertaining to the payment of a retainer fee during the Summer months do not apply to Headquarters staff. However, the Board is content for you to work on a term-time basis and will, if you wish, take steps to smooth your earnings for 10 months over a 12 month period. You will be able to avail of the Board’s flexible*

*working scheme and your annual leave entitlement can now be taken throughout the entirety of the calendar year subject to the agreement of your line manager as was not the case with your previous post.*

...

- (12) *I note you have raised wider issues with regard to alleged harassment and victimisation. I do not wish to enter into correspondence on these wider issues in the light of the impending Tribunal proceedings. I can however state that the Board will use its best endeavours to ensure that you, like every Board employee, can work in a safe working environment with access to agreed harassment procedures should the need arise.*
- (13) *I can however confirm that you will not be required to have contact with those individuals whom you believe have victimised you (although that I should point out that this particular allegation is denied by the Board).*
- (14) *I appreciate that you may not be entirely happy with all the conclusions reached within the Board's response to your grievance but wish to assure you that my offer of redeployment is entirely genuine as was my apology for your dismissal ... ."*

2.34 By letter dated 23 February 2009, the claimant said, inter alia:-

*"At our meeting I had told you I had moved on from my time with the Board. However, when I received your letter offering reinstatement in a suitable post, I had agreed to approach any proposal with an open mind."*  
*[Tribunal's emphasis)*

In fact, as admitted in the course of cross-examination, the claimant admitted this was not true. She never had any intention of taking up any post and had been playing at all times, as she admitted to the Tribunal, 'ducks and drakes' with Mr Sloan. Her enquiries with Mr Sloan about the details of other posts were in fact, in the judgment of the Tribunal, a 'sham'. Despite what she said of approaching any proposal with an open mind, this was never true.

Without knowing this and in accordance with his previous correspondence, however, by letter dated 10 March 2009, Mr Sloan enclosed details of posts that were currently available. He confirmed the claimant would be reinstated at Executive Officer Grade. He also gave details of a proposed post within the Finance Strategic Unit, providing details of what was proposed and how he considered it would be suitable to the claimant in light of her disability and would match her skills and experience. The Tribunal had no reason to believe that these proposals made by Mr Sloan were not genuine and that he intended to follow them through, if the claimant had agreed to consider them, as she had suggested in earlier correspondence she was willing to do.

Given the claimant's admission to the Tribunal, the claimant, not surprisingly in those circumstances, did not pursue any of these proposals further with Mr Sloan and proceeded with the termination of her employment on grounds of ill-health; and

she proceeded with her Tribunal proceedings, which she had commenced on 3 July 2008.

3.1 Insofar as relevant and material, having regard to the admissions of liability of the respondents, the following statutory provisions applied, as set out below.

3.2 The claimant in this matter has brought her claim pursuant to the 1995 Act, which provides in relation to each said claim, as set out below:-

(i) Disability-related discrimination

Section 3A

(1) For the purposes of this Part, a person discriminates against a disabled person if –

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

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

...

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

(ii) Direct disability discrimination

Section 3A:-

...

(4) The treatment of a disabled person cannot be justified under Sub-section (3) if it amounts to direct discrimination falling within Sub-section (5).

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

Section 4:-

...

- (2) It is unlawful for an employer to discriminate against a disabled person whom he employs –
- (a) in the terms of employment which he affords him;
  - ...
  - (d) by dismissing him or subjecting him to any other detriment.

(iii) Failure to make reasonable adjustments

Section 3A:-

...

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

Section 4A:-

- (1) Where –

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

...

places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice ... having that effect.

- (2) Nothing in this Section poses any duty on an employer in relation to a disabled person if the employer does not know and could not reasonably be expected to know –

...

- (b) in any case that that person had a disability and is likely to be affected in the way mentioned in Sub-section (1).

3.3 In relation to direct discrimination under the 1995 Act, it has to be noted that there is no justification defence to this category of discrimination. The less favourable treatment requires to be 'on the ground of' a disabled person's disability – ie was the alleged discrimination on the prohibited ground? As the *Disability Code of Practice*, issued under the Act, makes clear less favourable treatment, which is disabled-specific or which arises out of prejudice about either disability generally or about a particular disability can amount to direct discrimination. The comparator may be actual or hypothetical – namely a person who does not have a disability at

all or a person who has another kind of disability. The circumstances of the comparator need not be the same in every respect; but the relevant circumstances (including his/her abilities) must be the same or not materially different from those of the disabled person (see further the *Disability Code of Practice* and the cases of ***High Quality Lifestyles Ltd v Watts [2006] IRLR 850*** and also ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** and, in particular, the opinion of Lord Nicholls).

Knowledge that a person has a disability where a disabled person does not appear to be required, since treatment may not be conscious (see *Brian Doyle Disability Discrimination Law and Practice, 6<sup>th</sup> Edition, Page 58* and the *Disability Code of Practice*).

3.4 The law relating to disability-related discrimination under the 1995 Act has been significantly altered, insofar as it was previously understood, following the decision of the House of Lords in the case of ***London Borough of Lewisham v Malcolm [2008] IRLR 700***. This decision was not an employment case but is now being followed in a series of employment decisions by the Employment Appeal Tribunal, including the cases of ***The Child Support Agency (Dudley) v Truman [2009] IRLR 277*** and the ***City of Edinburgh Council v Dickson [2009] UKEATS/038/09***. The House of Lords held (by a majority) that the relevant comparison in a claim of disability-related discrimination is between a claimant and the comparator, namely an individual without the relevant disability, thereby overruling the previous decision of the Court of Appeal in ***Clarke v TDG T/A Novocold [1999] IRLR 318***. It further held that the expression (relates to) denotes some connection between the reason and the disability, that is not too remote; and further that it is necessary to show that the alleged discriminator either knew or ought to have known of the disability. In the ***City of Edinburgh Council*** case, Underhill P expressed the view that, if a claimant failed to establish direct disability discrimination, it would be practically impossible, since ***Malcolm***, for a claimant to also succeed in case of disability-related discrimination.

3.5 Section 17A of the 1995 Act provides:-

- (1) a claim by any person that another person - has discriminated against him ... in a way which is unlawful under this Part;

may be presented to a Tribunal –

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

3.6 The English Court of Appeal, in the case of ***Igen v Wong [2005] IRLR 258*** considered a similar provision in relation to the burden of proof under the sex discrimination legislation and approved with minor amendment, the guidelines set out in the earlier decision of ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332***. In a number of recent decisions, the

Northern Ireland Court of Appeal has approved *Igen v Wong* and the said two-stage process set out therein.

As Lord Nicholls, in his judgment in the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*, made clear the normal two-step approach of Tribunals in considering, firstly, whether the claimant received less favourable treatment and the appropriate comparator, which can include an actual or hypothetical comparator and then, secondly, whether the less favourable treatment was the proscribed ground, can often be avoided by concentrating on why the claimant was treated as he/she was; and was it for the proscribed reason or for some other reason. If the latter, the application fails. If the former, there would normally be no difficulty in deciding whether the less favourable treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others (see further Paragraph 11 of Lord Nicholls' opinion). Indeed, Lord Nicholls in his opinion emphasised that the question whether there had been less favourable treatment and whether that treatment was on the grounds of sex are in fact two sides of the same coin. As he observed (see Paragraph 8 of his opinion) sometimes a less favourable treatment issue cannot be resolved without, at the same time, deciding the reason 'why' issue.

- 3.7 In the case of *Stephen William Nelson v Newry & Mourne District Council [2009] NICA 24*, Girvan LJ, reviewed the authorities in relation to Article 63A of the Sex Discrimination (Northern Ireland) Order 1976, which is in similar terms to Section 17A of the 1995 Act and Article 38A of the Fair Employment and Treatment (Northern Ireland) Order 1998 (see later):-

" ...

- 22 This provision and its English analogue have been considered in a number of authorities. The difficulties which tribunals appear to continue to have with applying the provision in individual cases indicates that the guidance provided by the authorities is not as clear as it might have been. The Court of Appeal in *Igen v Wong [2005] 3 AER 812* considered the equivalent provision and pointed to the need for a Tribunal to go through a two-stage decision-making process. The first stage requires the complainant to prove facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. Once the Tribunal has so concluded the respondent has to prove that he did not commit the unlawful act of discrimination. In an annex to its judgment, the Court of Appeal modified the guidance in *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 333*. It stated that in considering what inferences and conclusions can be drawn from the primary facts the Tribunal must assume that there is no adequate explanation for those facts. Where the claimant prove 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. To discharge that onus the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of sex. 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 be adduced to discharge the burden of proof. In **McDonagh v Royal Hotel Dungannon [2007] NICA 3** the Court of Appeal in Northern Ireland commended adherence to the *Igen* guidance.

- 23 In the past *Igen* decision in **Madarassy v Nomura International PLC [2007] IRLR 246** the Court of Appeal provided further clarification of the Tribunal's task in deciding whether the Tribunal could properly conclude from the evidence that in the absence of an inadequate explanation that the respondent had committed unlawful discrimination. While the Court of Appeal stated that it was simply applying the *Igen* approach, the **Madarassy** decision is in fact an important gloss on *Igen*. The court stated:-

*“The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination : could conclude in Section 63A(2) must mean that ‘a reasonable Tribunal could properly conclude’ from all the evidence before it. This would include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in contesting the complaint. Subject only to the statutory ‘absence of an adequate explanation’ at this stage the Tribunal needs to consider all the evidence relevant to the discrimination complaint such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparison being made by the complainant were of like with like as required by Section 5(3) and available evidence of all the reasons for the differential treatment ... .”*

That decision makes clear that the words ‘could conclude’ is not to be read as equivalent to ‘might possibly conclude’. The facts must lead to the inference of discrimination. This approach bears out the wording of the directive which refers to facts from which discrimination can be presumed.

- 24 This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude in the absence of an adequate explanation that the respondent has committed an act of discrimination. In **Curley v Chief Constable of the Police Service of Northern Ireland [2009]**

**NICA 8**, Coghlin LJ emphasised the need for a Tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the Tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The Tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination."

In **Curley**, the Court of Appeal also approved the judgment of Elias J in **Laing v Manchester City Council [2006] IRLR 748**, which was also quoted with approval by Campbell LJ in the decision of the Court of Appeal in Northern Ireland in the case of **Arthur v Northern Ireland Housing Executive & Another [2007] NICA 25**, when Elias J stated that it was not obligatory for a Tribunal to go through the formal steps set out in **Igen** in each case (see Paragraph 73).

3.8 In the Fair Employment and Treatment (Northern Ireland) Order 1998 ('FETO') it is provided:-

Article 3

(1) In this Order 'discrimination' means –

...

(b) discrimination by way of victimisation and 'discriminate' shall be construed accordingly.

...

(4) A person ('A') discriminates by way of victimisation against another person ('B') in any circumstances relevant for the purposes of this Order if –

(a) he treats 'B' less favourably than he treats or would treat other persons in those circumstances; and

(b) he does so for a reason mentioned in Paragraph (5).

(5) The reasons are that –

(a) 'B' has –

(i) brought proceedings against 'A' or any other person under this Order; or

(ii) given evidence or information in connection with such proceedings brought by any person or any investigation under this Order; or

(iii) alleged that 'A' or any other person has (whether or not the allegations so states) contravened this Order; or

- (iv) otherwise done anything under or by reference to his Order to 'A' or any other person; or

...

A similar provision relating to discrimination by way of victimisation is to be found under the Sex Discrimination (Northern Ireland) Order 1976 ('the 1976 Order') and is contained in Article 6 of the 1976 Order. Under FETO (Article 38A) and under the 1976 Order (Article 63A), there are similar provisions to those set out above in relation not Article 17A of the 1995 Act, relating to the burden of proof.

- 3.9 As the House of Lords made clear in the decision of the **Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830**, victimisation occurs when, in any circumstances relevant for the purposes of the provisions of this Act, a person is treated less favourably than others because he/she has done one of the 'protected acts'. The burden of proof provisions, to which reference has been made above, are also applicable to a victimisation claim. Further, in order to make the necessary comparison, it is necessary to compare the treatment afforded to the claimant, who has done a 'protected act' and the treated which was or would be afforded to other employees, who have not done the 'protected act'. As before, the Tribunal was required to consider the position of the hypothetical comparator, as there was no actual comparator relied upon by the claimant.

Lord Nicholls said in the **Khan** case the situation should be looked at subjectively and the question asked why did the alleged discriminator act as he/she did – 'what consciously or unconsciously was his/her reason; or as Lord Scott said:-

*"The real reason, the core reason, the motive for the treatment complained of."*

Lord Nicholls in **Nagarajan v London Regional Transport [1999] IRLR 572** made it clear that conscious motivation on the part of the discriminator is not a necessary ingredient of unlawful victimisation.

Lord Nicholls in **Nagarajan** said that the victimisation could be made out if the 'protected ground' had a significant influence on the outcome. In **Igen v Wong** that word was interpreted as an influence more than trivial. In **Villalba v Merrill Lynch & Company [2006] IRLR 437**, Elias J held that, if in relation to any particular decision where a discriminatory influence was not a material influence or factor then it was trivial and therefore according to the dicta in **Igen v Wong** insufficient to break the principle of equal treatment.

- 3.10 In the claimant's claim, the claimant claimed she was unfairly dismissed, pursuant to the provisions of the Employment Rights (Northern Ireland) Order 1996 ('the 1996 Order').

Under Article 130 of the 1996 Order, it is provided:-

- "(1) In determining for the purposes of this Part whether the dismissal is fair or unfair, it is for the employer to show –

- (a) the reason (if more than one, the principle reason) for the dismissal; and
  - (b) that it is 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) The reason falls within this paragraph if it –
- (a) relates to the capability or qualification of the employee for performing work of a kind which he was employed by the employer to do ...
- (3) In Paragraph 2(a) –
- (a) ‘a capability’, in relation to an employee, means his capability is assessed by reference to skill, aptitude, health or any other physical or mental quality ...
- (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 reasons shown by the employer) –
- (a) depends on whether in the circumstances, including the size and the 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.”

3.11 Substantial changes to the law of unfair dismissal were introduced the commencement in April 2005 of the Employment (Northern Ireland) Order 2003 (‘the 2003 Order’) and the Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004 (‘the 2004 Regulations’). The 2003 Order and the 2004 Regulations introduced, inter alia, the statutory dismissal and disciplinary procedures (DDP). It was not disputed that the DDP was applicable to this matter. As set out previously, the Board accepted, properly in the Tribunal’s judgment, it had not followed the said procedure in any way, which involved a three-step process, namely:-

- (1) providing a statement of grounds for action and invitation to a meeting;
- (2) meeting; and
- (3) appeal.

3.12 Arising from the introduction of the said statutory procedures, there also required to be further amendments made to the 1996 Order, including, in particular, the introduction of Article 130A of the 1996 Order, which provided that if an employer failed to comply with the statutory DDP, when dismissing a claimant, as occurred here, the dismissal is automatically unfair. As indicated previously in this decision (see Paragraph 1.40 the Board recognised this and accepted (albeit only at the commencement of the hearing) that the dismissal was automatically unfair.

In light of the foregoing, it was not necessary to consider these provisions in any greater detail for the purposes of the decision.

3.13 However, a failure to comply with the relevant statutory provisions in relation to the applicable DDP has an impact on compensation in relation to any claim of unfair dismissal, resulting in an adjustment upwards, in the case of default by the employer. Under Article 17(2) and 17(3) of the 2003 Order, the adjustment must be at least 10% and, if the Tribunal considers it just and equitable, up to 50%. Under Article 17(4) of the 2003 Order, a Tribunal can apply no adjustment (or an adjustment of less than 10%) if there are exceptional circumstances making a 10% adjustment unjust or inequitable. Any potential uplift or reduction is limited to the compensatory award only; and there is no provision in an unfair dismissal to uplift the compensatory award beyond the statutory maximum (Article 158A of the 1996 Order).

3.14 The Employment Appeal Tribunal has been reluctant to set down principles that fetter the discretion of a Tribunal in relation to this issue of the uplift of the compensatory award in a claim of unfair dismissal (see **Cex Ltd v Lewis [UKEAT/0031/07]**). In the case of **Davies v Farnborough College of Technology [2008] IRLR 4**, Burton J suggested a maximum uplift would apply where there had been a ‘complete and deliberate breach of any procedures’. In the case of **Aptuit (Edinburgh) v Kennedy [UKEATS/0057/06]**, the Employment Appeal Tribunal (in Scotland) held that in exercising its discretion to uplift, the only relevant matters to take into consideration were those surrounding the failure to complete the statutory procedures. In this matter, there was a complete failure to follow the statutory procedures by the Board, for which the Tribunal could find no justification, excuse or reason. In view of the Tribunal’s decision in relation to the issue of compensation, as set out later in this decision, it was not necessary to consider further the above authorities and the different approaches to be found in the case law in relation to this issue of uplift. However, if the Tribunal had been required to do so, it would have uplifted any compensatory award by 50% due to the complete failure to follow the procedures, without any justification, excuse or reason.

3.15 Where a Tribunal finds that a claimant has suffered unlawful discrimination, it is entitled to make an award of compensation in relation to injury to feelings. In the case of **Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102**, the Court of Appeal set out three relevant bands for such compensation:-

- (1) The top band should normally be between £15,000 – £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most

exceptional case should an award for injury to feelings exceed £25,000.

- (2) A middle band of between £5,000 and £15,000 should be used for serious cases which do not merit an award in the highest band.
- (3) Awards of between £500 and £5,000 are appropriate in less serious cases, such as where an act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

In the case of ***Da’Bell v National Society for Prevention of Cruelty to Children [2009] UKEAT/0227/09***, the Employment Appeal Tribunal determined it was appropriate to update the ***Vento*** bands in line with inflation by replacing £5,000, £15,000 and £25,000, with £6,000, £18,000 and £30,000 respectively. In the case of ***Alexander v Home Office [1988] IRLR 1900***, the Court of Appeal held that compensatory damages may include an element of aggravated damages, where, for example, a respondent has behaved in a highhanded, malicious, insulting or oppressive manner in committing the act of discrimination. In the case of ***McConnell v Police Authority for Northern Ireland [1997] IRLR 625***, which is binding on this Tribunal, the Northern Ireland Court of Appeal held that any award of aggravated damages should not be an extra sum over and above the sum which the Tribunal considered to be appropriate compensation to injury to a claimant’s feelings.

- 3.16 In view of the Tribunal’s conclusions, as set out later in this decision, in relation to the compensation to be awarded to the claimant, it is necessary to set out, in some detail, the relevant authorities in relation to the issue of mitigation of loss.

The principle that a claimant is under a duty to take reasonable steps to mitigate her loss is well established under common law. It was not disputed by the representatives in this action that the principles of mitigation of loss apply equally to awards of compensation by a Tribunal, whether in relation to awards of compensation for unfair dismissal and/or unlawful discrimination.

- 3.17 In the leading case of ***Wilding v British Telecommunications PLC [2002] ICR 1079***, Potter LJ, as he then was, gave a leading judgment and stated at Paragraph 37 of his judgment:-

- “(1) The duty of Mr Wilding (the former employee) to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from BT as his former employer.*
- (2) The onus was on BT as the wrongdoer to show that Mr Wilding had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment.*
- (3) The test of unreasonableness is an objective one based on the totality of the evidence.*

- (4) *In applying that test, the circumstances in which the offer was made and refused, the attitude of BT, the way in which Mr Wilding had been treated in all surrounding circumstances should be taken into account.,*
- (5) *The Court or Tribunal deciding the issue must not be too stringent in its expectation of the injured party. I would add under (4) that the circumstances to be taken into account included the state of mind of Mr Wilding.”*

In Paragraph 38 of his judgment, Porter LJ also stated:-

*“ ... in seeking to recover damages for loss resulting of the actions of a wrongdoer, the claimant must take reasonable steps to mitigate his loss. Put another way (see *Fyfe v Scientific Furnishings*) a claimant cannot recover damages for any loss which he could have avoided by taking reasonable steps to do so. Reference to objectivity does no more than emphasis that the duty is to act reasonably. But at the same time the Tribunal must also consider ‘all the circumstances’ these inevitably must be related to the individual conduct and circumstances of the particular claimant when faced with a choice as to whether or not to accept an offer of re-employment. If an offer is made which is, on the face of it, suitable to a claimant who has expressed himself anxious to return to work as a means of mitigating his loss, and the offer is then rejected for reasons peculiar to the particular claimant, that is bound to involve investigation by the Tribunal of whether in the context of the claimant’s circumstances and abilities his refusal of the offer was reasonable or unreasonable.”*

At Paragraph 55, Sedley LJ also stated:-

*“55 Simon LJ’s formulation in *Emblem v Ingram Cactus Ltd* (unreported) [5 November 1997], although it cites an authority and is addressed to the facts of that case it is a re-statement of the principles set out by Lord MacMillan in *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452, 506 –*

*‘The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the costs of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken’.*”

3.18 The guidance set out in the **Wilding** case has been applied in a number of recent decisions by the Employment Appeal Tribunal in Great Britain; but which relate to their own particular facts (see further ***Beijing Ton Ren Tang (UK) Ltd v Wang* [2009] UKEAT/0024/09**; ***Hibiscus Housing Association Ltd v McIntosh* [2009] UKEAT/0534/08** and ***Harris v Tennis Together Ltd* [2009] UKEAT/0358/08**).

4.1 The Tribunal then considered, in light of the facts found by it, and the relevant legal authorities referred to elsewhere in this decision, which of the claimant’s claims had been established; and, in respect of those claims established, the amount of any

compensation to be awarded by the Tribunal to the claimant. As stated previously, it was accepted the Board had automatically unfairly dismissed the claimant and also the claimant had been discriminated against by reason of the failure of the Board to comply with its duties to make reasonable adjustments imposed on it in relation to the claimant, contrary to the Disability Discrimination Act 1995, as amended.

- 4.2 In relation to the claimant's claim of direct discrimination, contrary to the Disability Discrimination Act 1995, in view of the Tribunal's finding that Ms Bailie would have treated a hypothetical non-disabled person in exactly the same way as the claimant was treated, the Tribunal was not satisfied the first stage of the *Igen v Wong* test had been established; and therefore could not properly conclude, in the circumstances, the claimant had been directly discriminated against contrary to the 1995 Act.

In light of this decision, the Tribunal did not consider the claimant could establish, for similar reasons, a claim of disability-related discrimination (see further *London Borough of Lewisham v Malcolm [2008] IRLR 700* and the decision set out in Paragraph 3.4 of this decision).

- 4.3 In relation to the claimant's claim of victimisation, this claim focused on the actions of Mrs Morrow, the third respondent, and, in particular, what she said to Ms Bailie during the course of the telephone call, as recorded by Ms Bailie on 1 April 2008 in her memorandum of that call. The Tribunal did not accept Mrs Morrow's denials and accepted what had been recorded in the memorandum by Ms Bailie was accurate. The Tribunal, in particular, found that the claimant at no time ever expressed any wish to Mrs Morrow she 'wanted out'/was happy enough (to obtain ill-health retirement) or that Mrs Morrow had ever discussed ill-health retirement with the claimant. Other than her denial that she had said the words recorded by Ms Bailie and/or Ms Bailie had misunderstood what she had said in some way, neither of which potential explanations the Tribunal accepted, Mrs Morrow had not sought in any other way to explain what Ms Bailie had recorded. The claimant, by bringing the previous proceedings, had established the necessary 'protected acts' for the purposes of a claim that she had been discriminated by way of victimisation, pursuant to the Sex Discrimination (Northern Ireland) Order 1976 and/or the Fair Employment and Treatment (Northern Ireland) Order 1998. But, for the Tribunal's finding, about the accuracy of the telephone call, as recorded by Ms Bailie in her memorandum, the Tribunal does not consider that any such claim of victimisation could have been brought by the claimant.

In accordance with the two-stage test and the guidance set out in *Igen v Wong*, it was firstly necessary for the Tribunal to determine whether the claimant had established facts from which the Tribunal could conclude, in the absence of an explanation, that the discrimination by way of victimisation had taken place.

Certainly, the findings, as set out above, in relation to the accuracy of what had been recorded by Ms Bailie in her memorandum, in circumstances where there had been no such discussion, were relevant to such consideration. However, there were other relevant facts which the Tribunal considered required to be taken into consideration before any conclusion could be reached. Firstly, following the settlement of the previous proceedings, Mrs Morrow and the claimant had had a professional working relationship, albeit not close. Certainly, Mrs Morrow was

unhappy she was asked to sign the settlement terms, as she did not believe she had done anything wrong. In signing the agreement, however, she was fully aware the settlement was made without any admission of liability. In addition, Mrs Morrow also considered, when she found out shortly after the settlement, that the claimant had received a lot of money as part of the settlement. There was, however, no evidence of any unpleasantness or resentment by Mrs Morrow towards the claimant, following the said settlement and her discovery of the amount that had been paid by way of settlement; and the claimant continued to work in her post, under the management of Mrs Morrow, without any difficulty or problem. Mrs Morrow's unhappiness was not expressed to the claimant in any way by either words or actions.

After the claimant went off sick in or about November 2007, Mrs Morrow did contact the claimant on 9 January 2008 by telephone. Indeed the claimant, who sought to portray a picture to the Tribunal of little or no contact by her line manager, had in fact forgotten this contact. This contact was at the end of the initial period of absence, whenever Mrs Morrow, as the line manager, was properly required to consider sending the claimant to the Occupational Health Doctor on behalf of the Board. Indeed, rather than doing so at that time, she decided to wait a further period of six weeks to see if the claimant would be able to return or a further sick line would be sent in by the claimant. This was not the actions of someone who was seeking to immediately remove the claimant from her employment. Mrs Morrow, in her second telephone call to the claimant in February 2008, informed the claimant, as she was entitled to do, of her decision to refer the claimant to the Occupational Health Doctor as she had not been able to return to work, as hoped for at the time of the first telephone call. In anticipation of the claimant returning to work, Mrs Morrow had already put the claimant's name down for the training course; and the Tribunal was satisfied Mrs Morrow left it up to the claimant whether she wished to attend the training course, if she felt up to it. There was no compulsion on the claimant to attend. However, Mrs Morrow's naming of the claimant on the course and her suggested attendance, if she was able to do so, again would not suggest a person who was trying to remove the claimant from her employment.

As Coghlin LJ emphasised in the case of ***Curley v Chief Constable of the Police Service of Northern Ireland [2009] NICA 8***, there is a need for a Tribunal to keep in mind the fact that the claimant's claim is an allegation of unlawful discrimination; and to stand back and focus on the issue of discrimination.

The Tribunal did not ignore that conscious motivation on the part of the discriminator was not a necessary ingredient of unlawful victimisation (see ***Nagarajan v London Regional Transport [1999] IRLR 572***). However, in light of the above findings of fact, the Tribunal was not satisfied the claimant had established facts from the claimant could conclude, in the absence of an explanation, that the real reason, the core reason, the motive for what Mrs Morrow said to Ms Bailie was because of the previous proceedings and the settlement thereon. The fact of Mrs Morrow's unhappiness that she had to sign the settlement agreement, considered the claimant had received a lot of money, without more, was not sufficient in the circumstances for the claimant to establish the first stage of the ***Igen*** test. It also has to be remembered that, although Ms Bailie had acted upon what she had been told by Mrs Morrow and then proceeded to process the ill-health retirement in accordance with her normal practice, Mrs Morrow was not thereafter

directly involved with this process. The claimant was able to challenge the report of Dr Glasgow, which could have resulted in a different outcome.

So, not without some hesitation, the Tribunal concluded the claimant had not been discriminated by way of victimisation, pursuant to the 1976 Order and/or the 1998 Order.

- 4.4 In light of the foregoing and the Board's admitted failure to comply with its duties to make reasonable adjustments for the claimant, pursuant to the Disability Discrimination Act 1995, the claimant was entitled therefore to an award for injury to her feelings.

The Tribunal was satisfied that the claimant suffered considerable injury to her feelings, by the absolute failure of the Board to comply with its duties to provide reasonable adjustments – with the result that the claimant's employment was terminated on ill-health grounds, without any consideration of such matters. This injury was heightened by addressing the letter of termination, in error, to Mrs Irwin and not to the claimant. To terminate anyone's employment can be traumatic; but to do so without regard to the duties under the 1995 Act, in relation to the claimant who had been a good worker for the Board for 17 years and who had carried on working for the Board for a considerable period of time, despite her increasing medical problems with her knee. She was a person who enjoyed her work and who, at all times, prior to the termination letter, had wanted to continue in her employment with the Board. The Tribunal could therefore well understand how she felt devastated upon receipt of the letter of termination in such circumstances and felt she had been, as she described, cheated out of her work by the Board when it failed to comply with its duties under the 1995 Act.

The Tribunal could understand and accept that, before sending the letter of 5 June 2008, Mr Mason had to make the necessary enquiries and investigations and that this would inevitably have taken some time, not least given the fact that Mrs Morrow was absent on holiday at the relevant time. However, the Tribunal is of the opinion that the claimant's injury to her feelings in the period between receipt of the letter of 28 May 2008 and the letter of 5 June 2008 could have been reduced, if Mr Mason had acknowledged during that period that the claimant's letter of 29 May 2008 was being attended to and that he would reply after he had made the necessary enquiries/investigations.

Terminating the claimant's employment, without any attempt to have any regard to the provisions of the 1995 Act, the Code of Practice and the relevant internal procedures of the Board was, in the judgment of the Tribunal, particularly high-handed and insulting and involved an element of aggravation, which undoubtedly increased, by a small amount, the injury to her feelings.

However, for the reasons set out later in this decision, the Tribunal, whilst recognising the claimant is entitled to an award for injury to her feelings up to and including the period when she received Mr Mason's letter of 5 June 2008, it does not consider she is entitled to any award for any ongoing injury to her feelings from that date on.

- 4.5 In light of the Tribunal's decision that the claimant had been automatically unfairly dismissed and had been discriminated against by the Board, pursuant to the

1995 Act, the claimant would normally have been entitled, in addition to any award for injury to feelings, as appropriate, to an award of financial loss, as appropriate, she had suffered as a consequence of the said unfair dismissal and/or unlawful discrimination. However, for the reasons set out later in this decision, the Tribunal concluded that the claimant had failed to mitigate her loss and that she was therefore not entitled to any award of compensation for financial loss and any award for injury to feelings was limited to the period set out in the previous paragraph. In the circumstances, it was not therefore necessary for the Tribunal to further consider the schedule of financial loss, produced by the claimant and which was largely agreed by the respondents, subject to issues of liability, but also the precise periods of loss to be allowed by the Tribunal.

- 4.6 In particular, in the judgment of the Tribunal, having regard to the dicta and guidance set out in the legal authorities referred to in Paragraph 3.17 of the decision, the Tribunal was satisfied the respondents had shown the claimant had failed to mitigate her loss by reason of her actions, following receipt of Mr Mason's letter dated 5 June 2008.

The claimant, up until the receipt of the letter of 28 May 2008, wanted to remain in employment. Indeed, if she had wanted to take ill-health retirement at an earlier date, she would have had no reason to challenge the opinion of Dr Glasgow and could have accepted the proposal in the letter of 1 April 2008, rather than seeking a further opinion from Dr Jenkinson. In such circumstances, she was undoubtedly most upset to receive the letter of 28 May 2008, terminating her employment.

In her letter of 29 May 2008, she pointed out, inter alia, she had been unfairly dismissed and there had been a failure by the Board to comply with its duties to make reasonable adjustments. She had, in fact, no evidence at that time to suggest any issue of victimisation had arisen. However, she also made it clear that she believed that she had been dismissed in circumstances that would not allow her employment to continue and the Board was guilty of a fundamental of trust that would make her future employment impossible. Her response, assisted by her husband was very swift and the nature and tone of that response the Tribunal could understand in view of the actions of the Board, up to that time, in sending the termination letter in the circumstances previously described.

The claimant, in her evidence, made it clear that she made up her mind at that stage, upon receipt of the letter of 28 May 2008, to accept the termination of her employment and to proceed with Tribunal proceedings, if necessary, to obtain compensation to which she was entitled, regardless to what response the Board made to her letter. By doing so, she would also be entitled to early payment of her NILGOSC pension. In this context, it also has to be remembered that she had also written to the Minister for Education and the Commissioners, who had responsibility for the actions of the Board. As she readily accepted, whenever the response from Mr Mason was received, she not did give the offer contained therein any consideration, as she had already made up her mind not to accept any such offer, regardless of its content. She may well have been surprised to have received Mr Mason's offer; but that did not, in the Tribunal's view, give her any reason not to give it the necessary and full consideration. The response from Mr Mason was not as speedy as that of the claimant; but given the necessity for him to carry out enquiries/investigations before replying, it was not so unduly delayed that the claimant could not have considered it. It has to be remembered that the letter of

termination had only been sent on 28 May 2008 and Mr Mason's letter was sent by 5 June 2008.

In the Tribunal's view the contents of the letter from Mr Mason were very significant in relation to the claimant's claim for compensation arising out of the unfair dismissal and/or unlawful discrimination. Firstly, Mr Mason had apologised. He also assured the claimant the letter of termination should not have been sent. He had asked for her dismissal to be retracted and had activated her reinstatement to her old post, confirmed her continuity of employment and had agreed to remove all reference to dismissal from her personnel file. In particular, he also sought a meeting with the claimant to ascertain what adjustments the Board could put in place to enable the claimant to continue 'in the Schools Meals Section or elsewhere in the Board'. [Tribunal's emphasis]

The claimant wrongfully, in the Tribunal's view, refused to consider what had been offered in any way. In the judgment of the Tribunal that was not the actions of a reasonable person, unaffected by the hope of compensation, in circumstances where the claimant had suffered loss. In essence, Mr Mason was offering to put the claimant back in the situation, which she had been seeking prior to the letter of termination. That letter had only been sent some days before; and had further agreed to meet to see what reasonable adjustments could be put in place to allow her to continue in employment with the Board either in Schools Meals Section or elsewhere in the Board's employment. However, the claimant was not even prepared to meet Mr Mason, even on a 'without prejudice' basis. The Tribunal has no doubt that the claimant's husband, with his experience in employment matters, would have been well aware of the ability to conduct such discussions on a 'without prejudice' basis. No such suggestion was ever made.

Consistent with the claimant's refusal to consider any offer, she sought that the NILGOSC pension forms be assessed. The claimant was clearly very well aware that, if she was to be reinstated, and her employment continued, she would be unable to make any claim for compensation arising out of her dismissal and the early payment of her pension would not occur.

Mr Mason repeated his apology by letter of 16 June 2008 and confirmed that the Board would be more than happy for the claimant to continue employment with the Board and he again sought to meet with her to consider appropriate reasonable adjustments. Given the importance the claimant had attached, prior to the letter of 28 May 2008, to wanting to stay in her job, which she so enjoyed, she now had been given the opportunity to see if that was achievable. However, she was not even prepared to meet Mr Mason to discuss the matter further. If she had made any attempt to do so, even if that had not been ultimately successful, depending on the circumstances, the Tribunal might well have been able to take a different view.

- 4.7 In the opinion of the Tribunal, the actions of the claimant became ever more unreasonable, when she again rejected the offers made by Mr Stanton Sloan, the Chief Executive of the Board, in the course of the appeal from the claimant's grievance. Indeed, it has to be wondered what the claimant hoped to achieve from any such grievance, if she had already made up her mind not to consider any offer that might be made by the Board. Mr Sloan again apologised for what had occurred and, in essence, repeated Mr Mason's offer and stressed his anxiety to explore every possibility to enable the claimant to be reinstated to a suitable position. The

claimant pretended to be interested and Mr Sloan confirmed the offer of re-engagement 'was entirely genuine and he was prepared to consider all options available to achieve the claimant's redeployment'. Indeed, in his letter of 20 February 2009, it set out detailed proposals, which he followed up in the later letter of 10 March 2009, with identification of potential posts. This correspondence followed an indication from the claimant that she would approach any proposal with 'an open mind'. In fact, as the claimant admitted to the Tribunal, she had no such intention of doing so. These were not the actions of a reasonable person. She again never followed up on the proposals or the invitations to the meetings to discuss them.

Again, by her actions, the claimant had, in the Tribunal's judgment, failed to mitigate her loss. She had failed, as with her failure to consider the offer of Mr Mason, to act in her duty as a reasonable person, to mitigate her loss, unaffected by the hope of any compensation (see further **Wilding v British Telecommunications PLC [2002] ICR 1079**, Paragraph 3.17 of this decision).

- 5.1 In light of the foregoing, the Tribunal decided to award the claimant a sum in respect of the injury to her feelings up to the date of receipt of Mr Mason's letter of 5 June 2008 (see further Paragraph 4.4. of this decision). If the Tribunal had not found the claimant had failed to mitigate her loss, this award would have been greater. Taking into account the **Vento** bands, as amended, the Tribunal concluded that the injury to the claimant's feelings, as set out previously, fell within the middle band; and, in the circumstances, awarded the claimant the sum of £12,500, which included a small sum for aggravated damages.
- 5.2 The Tribunal considered whether to award interest under the provisions of the Fair Employment Tribunal (Remedies) Order 1995 ('the 1995 Order') and concluded it should include interest in the sum so awarded, in relation to the injury to the claimant's feelings.

For the purposes of the 1995 Order:-

Date of the first act of discrimination : 1 April 2008

Calculation Date : 14 June 2010

The Tribunal therefore awards compensation as follows:-

(a)	Injury to the claimant's feelings	£12,500.00
(b)	Interest at 8% per annum – from 1 April 2008 – 1 June 2010-06-01	<u>£ 2,202.74</u>
(c)	Total award of compensation (a) and (b)	£14,702.74

6. This is a relevant decision for the purposes of the Fair Employment Tribunal (Interest) Order (Northern Ireland) 1995.

**Chairman:**

**Date and place of hearing:** 5 -7 May 2009;  
11 May 2009;  
14 - 15 May 2009;  
26 – 29 May 2009;  
1 – 3 July 2009; and  
2 September 2009, Belfast

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