THE INDUSTRIAL TRIBUNALS

CASE REF: 1260/08

CLAIMANT: **Mary Adams**

RESPONDENT: **Lisburn City Council**

DECISION

The unanimous decision of the tribunal is that the claimant was not unfairly dismissed and her claim for unfair dismissal is therefore dismissed.

Constitution of Tribunal:

Chairman: **Mrs Órla Murray**

Members: **Mrs Ailish Hamilton**
Mr Pat Archer

Appearances:

The claimant was represented by Mr N Gillam of Donnelly & Kinder Solicitors.

The respondent was represented by Mr B McKee, Barrister-at-Law instructed by Campbell Stafford Solicitors.

1. The Claim

The claimant's claim was for unfair dismissal. The claimant contended that the respondent should have referred her for ill-health retirement rather than dismissing her. The claimant further claimed automatic unfair dismissal on grounds of failure to comply with the statutory dismissal procedures in that the respondent allegedly failed to comply with step one of that procedure. The respondent admitted that it dismissed the claimant and contended that it was a fair dismissal related to the claimant's unacceptable level of sickness absence. At the outset of the hearing the claimant's representative confirmed that no claim for breach of contract was being made.

2. The Issues

The issues for the tribunal were:

(1) Was the claimant automatically unfairly dismissed due to failure by the respondent to comply with Step One of the Statutory Dismissal Procedure?

(2) Was the claimant unfairly dismissed on grounds of one or more of the following potentially fair reasons: capability or some other substantial reason?

(3) As it was agreed between the parties that the reason for the claimant's dismissal related to her sickness absence record, the issue was for the tribunal on "ordinary" unfair dismissal related to the respondent's failure to refer the claimant for consideration for ill-health retirement according to the NILGOSC standard, rather than dismissing her.

(4) Whether dismissal was fair or unfair in the circumstances.

3. Sources of Evidence

For the respondent the tribunal heard evidence from Ms Deborah Martin the claimant's Line Manager; Ms Caroline Magee, the respondent's Human Resources Manager; Mr Mario Scappaticci the claimant's former Line Manager; Mr James Rose the Director of Leisure Services involved in the claimant's appeal against dismissal. The claimant gave evidence on her own behalf. The tribunal also considered the documentation to which it was referred and the bundle of documents which ran to 140 pages.

4. Findings of Fact

The tribunal found the following facts relevant to the issues before it:

(1) The claimant worked for the respondent as a cleaner at the Lagan Valley Leisure Plex from 20 September 1989 until her dismissal on 17 June 2008.

(2) The claimant's representative conceded that the claimant's absence record for the three years prior to her dismissal was poor. The focus of the claimant's case was on the reasonableness of the respondent's decision to dismiss her in light of the fact that all of her sick absence for the previous two years related to two separate operations and her most recent absence related to a back injury which she sustained at work and in light of the fact that no specific referral for consideration of ill-health retirement was made.

(3) In the leave year 2005-2006 the claimant was off work on six occasions amounting to 132 days. On the leave year 2006-2007 the claimant was off on two occasions one of which related to her operation and the total absences was 57 days. In the leave year 2007-2008 the claimant was off on two occasions one of which related to her operation and the second of which related to her back injury. In the leave year 2008 during which the claimant was dismissed, her most recent absence related to her back injury and totalled 79 days.

(4) The claimant's sickness absence rates for the three full absence years prior to the year in which she was dismissed were 61%, 26.68% and 28.24% respectively. These absence rates were well above the average percentage absence rates for employees of the respondent's organisation. The average absence rates across the organisation were 3.32% to 4.25%.

(5) The tribunal therefore finds as a fact that the claimant's sickness absence record for the three years prior to her dismissal was very poor indeed.

(6) The claimant had a First Stage absence interview on 20 June 2005 and a Formal Case Review on 18 November 2005. Both of these interviews related to the respondent's Policy on Managing Attendance related to the claimant's sickness absence.

(7) On 18 April 2007 the claimant had another First Stage absence interview with Mr Scappaticci who was her Line Manager at that stage. In summary the record of that interview notes that the claimant had very poor attendance which was well above average in the previous three years. Mr Scappaticci went through a pro-forma, which had been partly filled in by Mr McCaughen, and Mr Scappaticci outlined to the claimant that any further absences would trigger the policy and a move to disciplinary procedures in the future namely a stage two Formal Case Review. He also warned the claimant that her absence record was very poor and that she needed to improve and that her previous absence record which was poor might be taken into consideration if she triggered the sickness policy again.

(8) The tribunal finds that the implication from the record of the interview with Mr Scappaticci was that the claimant was being monitored.

(9) At paragraph 6.21 on the respondent's Policy on Managing Attendance it states that, for intermittent or short-term absences, an absence interview must be conducted and during that interview several points should be covered including: *"comparison with the general level of absences within the section/department or for similar employees in terms of age, grade, gender and skill/experience"*. Whilst reference was made to this in the course of the claimant's case in the context of general fairness, namely that the respondent should have compared her absence rate with that category of employees rather than with the organisation as a whole, the case was not made for the claimant that cleaners had the same level of absence that she did. The claimant accepted without qualification that her attendance was poor in the previous three years before dismissal.

(10) The claimant had an accident at work when she fell and injured her back and was off from 3 January 2008 to 3 April 2008 namely a total of 79 days. With this absence the claimant breached the trigger point for long-term absence which was defined at paragraph 6.8.3 of the Policy as one period of sickness extending for more than four consecutive weeks, that is, 20 working days.
The claimant's absence due to her back injury was therefore the trigger for starting the respondent's process that ultimately led to her dismissal.

(11) The first stage of the process was that the claimant was referred to Occupational Health on 15 January 2008 by Mr McCaughen the Duty

Manager. This was done by way of a standard Occupational Health Consultant (OHC) referral form which, amongst other things, listed eight standard questions. Mr McCaughen indicated that all eight questions should be responded to by the Occupational Health Consultant and these questions included the following:

> *"(5) Does the employee's condition mean the employee should be considered disabled as per the Disability Discrimination Act?*
>
> *(6) Is the employee suitable for an ill-health retirement under the NILGOSC Pension Scheme?"*

(12) The OH Report of 22 January 2008 in summary stated that the claimant was not fit for work, would be off for 8-12 weeks, would likely be fit for work and was not disabled stating: *"Mrs Adams condition has been short lived and I do not believe that she would be regarded as disabled".*

(13) On 3 March 2008 Mr McCaughen made a further OHC referral on the standard form again asking for the Occupational Health Consultant to address all eight standard questions including the DDA and NILGOSC questions.

(14) The OHC report of 6 March 2008 dealt with the claimant's back injury and made mention of the claimant's knee problems declaring her unfit for work and stating that the prognosis for her fitness for employment was uncertain. The doctor further noted in relation to the question of whether the employee was disabled that the long-term effects were uncertain. Another review was recommended by the doctor.

(15) Ms Martin the claimant's Line Manager was then tasked with organising a Formal Case Review under the respondent's long-term sickness absence policy.

(16) Ms Martin made a referral to OHC under a standard form. The form listed ten standard questions but Ms Martin referred to only seven of those questions leaving out the three questions relating to whether or not the employee was disabled, whether reasonable adjustments could be made under DDA and whether the employee was suitable for ill-health retirement under the NILGOSC Pension Scheme.

(17) On 23 April 2008 the Human Resources Manager, Ms Magee, wrote to the claimant to arrange the Formal Case Review meeting. The letter enclosed the respondent's Managing Attendance Policy and in the letter the claimant's attention was drawn to section 6.9 of that Policy. Nowhere on the face of the letter did the respondent state that the meeting could include the consideration of whether to dismiss the claimant.

(18) Paragraph 6.9 of the Policy runs to approximately two pages and outlines the procedure and details relating to the Formal Case Review. Included in paragraph 6.9 is the following paragraph:

"On the basis of all the relevant information as outlined above, the Line Manager will consider a number of different recommendations including:

> *(1) Disciplinary action*
> *(2) Ill-health retirement (subject to OHC and NILGOSC)*
> *(3) Termination of contract*
> *(4) No further action at this stage"*

(19) The claimant confirmed in evidence that she received the policy document with that letter of 23 April 2008 and she further confirmed that she read it at the time and she understood it. We therefore find as a fact that the claimant received the policy at the time, read it at the time and understood it. Indeed it was clear to us at the hearing that the claimant had no difficulty at all understanding the import of that part of the policy in particular.

(20) Whilst in our view it would have been preferable for the respondent to specify the relevance of paragraph 6.9 referred to in the letter of 23 April 2008, so that the gravity of the claimant's position at that time was crystal clear to her, we do not regard it as outside the band of reasonable responses for the respondent in this case to have simply referred to a paragraph in the attached policy document particularly given our clear finding that the claimant understood the policy and understood that dismissal was an option being considered.

(21) On 16 May 2008 the Formal Case Review meeting took place between the claimant, her Line Manager and the Human Resources Manager. The claimant made the case that she did not know that her job could be in jeopardy at this meeting. We do not accept the claimant's evidence on that, as it is clear from the record of the meeting that one of the possible outcomes from the formal Case Review was dismissal. It was also clear that the respondents were very concerned about the claimant's level of absence and made clear to the claimant the difficulty in terms of costs and the impact on other employees of the claimant's absences. Indeed the record stated that the claimant said at the meeting that she was afraid to lose her job so we find as a fact that the claimant was fully aware that her job was in jeopardy and that she was aware that this related to her poor absence record.

(22) On 2 June 2008 the claimant received the report and notes of the Formal Case Review and reference was made again to paragraph 6.9 of the policy for managing attendance. The letter invited the claimant to a meeting with a more senior member of staff namely Mr Feeny. The tribunal finds this letter of 2 June 2008 to be a Step One letter complaint with the statutory procedures, as it is clear from section 6.9 of the policy and it is clear from the copy of report and notes which were enclosed that the claimant's job was in jeopardy and that the meeting was being arranged to discuss this.

(23) In summary the tribunal does not necessarily regard the contents of the letter of 23 April 2008 as insufficient. On the facts in this case that letter could well amount to a Step One letter. However as the letter of 2 June clearly complies with Step One because the report was attached and there was reference to paragraph 6.9 of the policy (which we have found as a fact that

the claimant received, read and understood), we find the letter of the 2 June to be the Step One letter. On the facts we have found the claimant clearly knew her job was in jeopardy following the letter of 2 June 2009. The claimant had made the comment that she did not wish to lose her job during the Formal Case Review meeting and made the same comment to Ms Martin in the car after the meeting when the claimant became upset at the prospect of losing her job.

(24) The tribunal wishes to make clear that it is not good practice for an employer in all cases simply to refer to attached documents in a letter. It is preferable to have in the Step One letter a clear statement that the employee's job is at risk and why. However in this case we are satisfied that the letter of 2 June 2008 complies with Step One given the facts we have found as to the level of knowledge of the claimant. We have looked at the contents of the letter, its attachments and the surrounding circumstances and are satisfied it complies with Step One requirements.

(25) The OHC report of 6 May 2008 referred to the claimant's back and knee problems and advised that the claimant was fit to return to work. Under the heading "Outlook" the report stated as follows:

> *"Hopefully Mrs Adams should be able to maintain her fitness for work. She does however have confirmed Osteoarthritis in her right knee which could intermittently flare up and cause problems".*

(26) The doctor went on to assess whether work place adjustments were necessary and advised that the claimant would be able to cope with her usual hours and duties at work, the doctor addressed the DDA stating as follows:

> *"Disability: I do not believe that the DDA would currently be applicable to Mrs Adam's situation"*

(27) The doctor therefore addressed DDA and reasonable adjustment issues despite the fact that he had not been requested to do so by the referral form.

(28) The report compiled by Mrs Martin following the Formal Case Review stated in its conclusions and recommendations amongst other things as follows:

> *"Having considered all of the above and having due consideration to section 6.9 of the policy for managing attendance the Occupational Health Consultant's reports and the overall level of absence I have determined that all possible steps have been taken and have failed to secure a regular and sustained attendance at work. I therefore recommend that Mrs Adams contract of employment be terminated."*

(29) On 10 June 2008 a further meeting under the Formal Case Review procedure took place between the claimant, Ms Magee of Human Resources and Mr Feeny the Assistant Director of Leisure Services to consider the Formal Case Review report and its recommendation of dismissal.

(30) On 17 June 2008 the claimant received her letter of dismissal which advised her of her right to appeal. The reason given for the dismissal was that she had

failed to secure regular and sustained attendance. The tribunal therefore finds that the respondent complied with Step Two of the Statutory Dismissal Procedures.

(31) The claimant first triggered the Managing Attendance Policy because of her long-term absence. The respondents switched to dealing with her under the short-term intermittent absence procedure because the claimant was back at work. The claimant's case was that it was a flaw in the respondent's procedures that they did not follow the intermittent short-term absence procedure but rather, in effect, continued with the long-term absence procedure by continuing the Formal Case Review procedure. The tribunal does not accept that. It is clear from paragraph 6.9 of the policy that the Formal Case Review procedure can be triggered by either long-term absence or by intermittent or short-term sickness absence. The Formal Case Review addressed the things that the short-term policy would have addressed. The specific complaint that the claimant makes in relation to the policy followed by the respondent relates to the failure of the respondent to consider the referral of the claimant to NILGOSC for ill-health retirement. This is provided for in section 6.81 of the intermittent short-term absence policy where it states: in relation to the Manager's considerations:

> *"In addition he may consider the following dependent on the circumstances of each case:*
>
> *(1) If medical advice indicates that the employee is unlikely to provide regular and reliable service within a reasonable time-scale the Line Manager should arrange to meet the employee with a representative from Human Resources to discuss the options available and the possibility of a referral to NILGOSC for ill-health retirement; the Line Manager and Human resources representative may decide at this stage to conduct a Formal Case Review (see section 6.9);*
>
> *(2) If the medical report indicates that an improvement is likely within a reasonable time-scale or the employee is disabled in accordance with the Disability Discrimination Act the Line Manager and a representative from Human Resources should meet with the employee to confirm the doctor's prognosis and review absence".*

(32) The claimant appealed the decision to dismiss by letter received by the respondent on 19 June 2008 and the appeal hearing was heard on 18 September 2008 by Mr Rose.

(33) The uncontested record of that meeting records that Mr Feeny stated in the meeting that his reason for dismissing the claimant related to the claimant's poor absence record and the part of the meeting record states as follows in this regard:

> *"He also referred to an OHC report which stated that "Mrs Adams had confirmed osteoarthritis in her right knee which could intermittently flare up and cause further problems. During the interview MA advised a doctor said her knee "was like a junkyard". Taking this into*

consideration M Adams attendance could not be guaranteed and the absence could put pressure on others in the centre and additional cost. Based on all the above it was decided to terminate her employment with the Council".

(34) The respondent's witnesses gave evidence, which we accept, that, even discounting the absence due to the back injury which was due to the industrial injury at work, the claimant had a poor attendance record.

(35) In making the decision to confirm the decision to dismiss Mr Rose took into account and balanced his sympathy with the employee's position against the economic effect and the effect on morale of the claimant's high level of absence. There was disruption and financial cost to the respondent caused by the claimant's absence in that other staff had to cover her duties and agency staff had to be engaged to cover her duties. Mr Rose compiled a report of the disciplinary appeal hearing on 1 October 2008 and confirmed the decision to dismiss.

(36) As regards the issue of whether or not the respondent's should have referred the claimant for a NILGOSC ill-health retirement we do not accept that this was something that was required in this case. The claimant was back at work having been certified fit to do so by the Occupational Health Consultant. Whilst the Consultant had not been specifically asked to consider the NILGOSC referral, it was Ms Magee's evidence, which we accept, that the doctors involved in the OH assessments do NILGOSC assessments too and that they would flag it up to the employer if a case should be referred to NILGOSC even if they have not been asked that question. The last report from the Occupational Health Consultant deals with issues relating to DDA even though the doctor had not been asked to look as those issues and this supports the respondent's contention that, if the doctor had felt that a NILGOSC referral was appropriate in this case he would have stated that in the report despite not being asked that question.

(37) As it was, the respondents were faced with the claimant who was back at work, certified fit to do her duties but with a knee problem that could flare up in the future. The part of paragraph 6.8.1 of the policy referred to in paragraph 31 above does not make it mandatory for a manager to refer anyone who has medical problems for a NILGOSC referral. It is no more than an <u>option</u> that a manager may consider dependent on the circumstances of the case if the medical advice indicates that the employee is unlikely to provide regular and reliable service within a reasonable time-scale. That position did not pertain in this case and we do not find it a fault or a flaw in the procedure in this case that the respondent did not specifically refer the claimant for a NILGOSC referral.

5. The Law

(1) The right not to be unfairly dismissed is enshrined in Article 126 of the Employment Rights (NI) Order 1996 (see ERO). At Article 130 of ERO it is stipulated that it is for the employer to show the reasons for dismissal and that the reason falls within one of the fair reasons outlined at Article 130(2). The two potentially fair reasons for dismissal engaged in this case relate to

the capability of the employer and some other substantial reason. The tribunal then must go on to consider whether the dismissal was fair or unfair in accordance with Article 130(4) and for this purpose the tribunal looks at the equity and substantial merits of the case.

(2) The tribunal needs to be satisfied that the employer acted reasonably in treating the reason for dismissal as sufficient for dismissing the employee in the circumstances known to the respondent at the time. The reasonableness of the employer's decision is looked at at the time of the final decision to dismiss namely at the conclusion of any appeal hearing. The tribunal's task is to assess whether the employer's actions in relation to procedure and penalty in this case fell within the range of reasonable responses which a reasonable employer might have adopted in the circumstances. The appellate courts have made it clear that the tribunal should not seek to substitute its own view for that of the employer.

(3) The statutory disciplinary and dismissal procedures are set out in the Employment (NI) Order 2003 (Dispute Resolution) Regulations and the Employment (NI) Order 2003. Essentially there are three steps in the standard disciplinary and dismissal procedure. Step One involves the employer writing to the employee setting out the grounds which lead him to contemplating dismissing the employee together with an invitation to attend a meeting. Step Two involves holding a meeting and notifying the employee of the decision and the right of appeal. Step Three involves inviting the employee to an appeal meeting if the employee avails of the appeal process and notifying the employee of the appeal decision. All actions under the procedures must be conducted without unreasonable delay, the timing of and place of the meetings must be reasonable and the formal meetings must be carried out in a way which allows both employer and employee to explain their cases. Appeals should be decided by more senior managers than the original decision maker as far as is reasonably practicable and the employee has the right to be accompanied by a colleague or a trade union official at all meetings. The claimant in this case claims automatic unfair dismissal citing failure to comply with Step One.

(4) The tribunal had regard to Harvey on Industrial Relations and Employment Law Division D1 paragraphs 1190-1350 which deal with dismissals relating to incapability arising from ill-health.

(5) Article 130A(1) and (2) of ERO states as follows:

"130A.—(1) An employee who is dismissed shall be regarded for the purpose of this Part as unfairly dismissed if—

(a) one of the procedures set out in Part 1 of Schedule 1 to the Employment (Northern Ireland) Order 2003 (dismissal and disciplinary procedures) applies in relation to the dismissal,

(b) the procedure has not been completed, and

(c) the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements.

(3) Subject to paragraph (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of Article 130(4)(a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure."

(6) Apart from the references to cases in Harvey, the parties referred the tribunal to the following cases:

First West Yorkshire t/a First Leeds v Haigh **[2008] IRLR 182 (EAT)**

Brezan v Zimmer Ltd **[2008] (EAT)**

Alexander v Bridgen Enterprises Ltd **[2006] IRLR 422 (EAT)**

Lynock v Serial Packaging Ltd **[1988] IRLR 510**

(7) The tribunal considered the relevant paragraphs in Harvey and the above cases in reaching its decision.

(8) The principles relevant to this case which emerge from Harvey and from the decisions are as follows.

(9) The ***Zimmer*** case follows the approach of Judge Elias in the ***Alexander*** case where the tribunal had to look at whether an employer has complied with step one. Mr Justice Elias states at paragraph 38 of ***Alexander*** as follows:

"At the first step the employer merely has to set out in writing the grounds which lead him to contemplate dismissing the employee, together with an invitation to attend a meeting. At that stage in our view the statement need do no more than state the issue in broad terms…at step one the employee simply needs to be told that he is at risk of dismissal and why."

(10) In the ***Zimmer*** case it was held that it was open to the tribunal to consider that the step one letter and the information provided with it, could be regarded, in the individual circumstances of the case before the tribunal, as sufficient to communicate the risk to the employee of dismissal albeit that the letter itself did not expressly say that.

(11) In the ***Haigh*** case the EAT upheld the tribunal decision that the employer should have given proper consideration to an ill-health retirement scheme before he dismissed the employee for long-term sickness. The ***Haigh*** case concerns a case of long-term sickness were an employee was essentially blocked by the employer from exercising the option of ill-health retirement. The general rule as stated at paragraph 40 of the decision is as follows:

"As a general rule when an employee is absent through ill-health in the long-term an employer will be expected prior to dismissing the employee to take reasonable steps to consult him to ascertain by means of appropriate medical evidence the nature and prognosis of his condition and to consider alternative employment".

(12) At paragraph 54 of the ***Haigh*** decision the EAT stated:

"The question for the tribunal, on which it rightly concentrated, was whether it was reasonable for the company to dismiss when, and how, it did forcing Mr Haigh to choose between dismissal or foregoing any right to claim an ill-health pension and without waiting for a report on the question whether he was permanently incapacitated."

(13) It is the tribunal's view that the ***Haigh*** case is of no assistance given the facts found in the present case. ***Haigh*** concerned an employee on long-term sick leave where the employer essentially blocked the option of ill-health retirement and did not wait for medical evidence to ascertain whether that might be an option. In contrast Mrs Adams was certified fit for work, the doctors who assessed her fitness did not raise the issue of ill-health retirement and they would have done so if it had been relevant. Mrs Adams was sacked for a poor absence record and uncertainty over her future level of attendance not for inability to return to work following long term sick absence.

(14) The ***Lynock*** case relates to a dismissal for intermittent absence. The EAT stated that there is no principle that the mere fact that the employee is fit at the time of dismissal makes the dismissal unfair. The head note of the case summarises the case as follows:

"A disciplinary approach involving warnings is not appropriate but the employee should be cautioned that the stage has been reached when it has become impossible to continue with the employment. Factors which may prove important include the nature of the illness, the likelihood of it recurring or of some other illness arising, the length of the various absences and the period of good health between them; the need of the employer to have done the work of the employee; the impact of the absences on those who work with him; the adoption and carrying out of the policy; the emphasis on a personal assessment in the ultimate decision; and the extent to which the difficulty of the situation and the position of the employer have been explained to the employee."

6. Conclusions

(1) We had reservation about the claimant's evidence in several important respects and her evidence did not support the case which was open to us by her representative. For example the claimant alleged that she had no idea that her job was in jeopardy until she was handed an unopened envelope by Mr Feeny and told that she was dismissed. In cross-examination however Mrs Adams conceded that not only was an envelope given to her but Mr

Feeny read through the letter of dismissal and explained it to her and that she was accompanied by her trade union official throughout. In addition the claimant's own evidence confirmed that on several occasions it was made clear to her that her job could be in jeopardy and that she, on at least two occasions, stated that she did not wish to lose her job. In summary our decision is that the claimant was fully aware that the procedure she was going through related to her poor sickness absence and that there was a strong possibility that she was facing dismissal.

(2) The respondents were at pains during the hearing to state that there was no question of the respondents disbelieving the claimant's medical problems. At every stage the respondent confirmed that they believed the claimant had genuine medical problems. However the fact that an individual has genuine medical problems does not mean that they cannot be dismissed. Similarly the claimant's age and her long service, whilst they are factors to be taken into account, do not mean that the claimant cannot be dismissed.

(3) At the absence interview with Mr Scappaticci of April 18 2007, the claimant was put on notice that her absence record was a cause for concern and that she would be in a dire position if she had another absence. The tribunal is satisfied that the claimant understood this and knew that her absence could jeopardise her job.

(4) Despite the claimant's assertion that she did not know what trigger points meant we are satisfied, having heard the claimant, that the claimant did know what triggers meant and knew that, if her absence triggered the managing attendance policy, this could lead to investigation by the respondent and potentially serious consequences including possible dismissal.

(5) It is our view that the claimant was well aware following two meetings in 2007 relating to her poor sick record and in the meeting with Mr Scappaticci on 18 April 2007 that her level of absence was of concern to the employer and could lead to serious consequences including dismissal if further absences occurred. It is our view that the employer weighed up the various factors set out in the ***Lynock*** case and also set out in Harvey at paragraph 1264 where the dictum of Philips J in ***Spencer v Paragon Wallpapers Ltd*** is outlined. Factors listed in that paragraph largely mirrored the factors which were weighed up by the respondent in this case in so far as they were relevant to the facts before them.

(6) It is clear from the process that the trigger for the Managing Attendance Procedure was the claimant's long-term absence because of her back injury. Whilst that was the trigger we find that it was not taken into account in the calculation for absence when considering whether to dismiss as the record shows that the respondent specifically stated that, even discounting that absence, the absence was so poor that it merited dismissal. We therefore do not find the respondent to have been at fault for not allowing further latitude for the claimant, as we have found that the fact that the trigger for the Managing Attendance Policy was the long-term absence was ultimately discounted. It would have been unreasonable, in our view, for the respondent to be expected to ignore for all purposes the absence due to the back injury simply because it happened at work. We do not find it

unreasonable for that to have acted as a trigger for the Managing Attendance Policy in the circumstances in this case where the absence was so poor that it merited dismissal even discounting the industrial injury absences.

(7) The tribunal heard argument from the claimant's representative in relation to the terms of the NILGOSC scheme and the standard applied in that scheme in determining whether someone could be considered for ill-health retirement. The tribunal regards the details of the NILGOSC scheme as irrelevant in the circumstances of this case where we have found that the claimant was determined to be fit for work by Doctors who also dealt with assessments under the NILGOSC scheme and would have volunteered their view that NILGOSC was an option that should be explored if they felt it relevant.

(8) The tribunal therefore finds that the claimant was dismissed because of her poor absence record and that this was for one or more of the potentially fair reasons under the legislation namely "capability" and "some other substantial reasons."

(9) We further find that the respondent complied with the statutory dismissal procedure and we dismiss the claim for automatic unfair dismissal.

(10) In our view it was a flaw in the employer's procedure that Ms Martin did not ask all of the questions on the pro-forma and left out the DDA and NILGOSC questions. However we find that the failure of her to highlight those questions did not of itself render the dismissal unfair nor did it make a difference to the outcome given our finding that the doctor addressed the DDA issues and that he would have addressed the NILGOSC issue if he felt it was relevant. Whilst that failure to ask all the questions on the form was a procedural flaw we find that Article 130A of ERO applies in that it does not render the otherwise fair dismissal unfair.

(11) Having regard to the facts found above we find the claimant's dismissal to be fair in all the circumstances. The claimant's level of absence was very poor indeed and we find it to have been well within the band of reasonable responses for this employer to dismiss the claimant even though it did not doubt the genuineness of her illnesses.

(12) The claimant's claims are therefore dismissed in their entirety.

Chairman:

Date and place of hearing: **4-6 November 2009, Belfast.**

Date decision recorded in register and issued to parties: