THE INDUSTRIAL TRIBUNALS

CASE REF: 359/16

CLAIMANT: **Jonathan Moore**

RESPONDENTS: **1. ICTS (UK) Ltd**
2. Winnie McCarroll

DECISION

The unanimous decision of the tribunal is that the claimant's claim of unlawful discrimination under the Disability Discrimination Act 1995 (as amended) together with his claim of unfair dismissal are dismissed.

Constitution of Tribunal:

Employment Judge: **Employment Judge Crothers**

Members: **Mrs V Walker**
Mr A Crawford

Appearances:

The claimant appeared in person and represented himself.

The respondents were represented by Mr T Muirhead of Moorepay Compliance Limited.

THE CLAIM

1. The claimant claimed that he was the subject of unlawful discrimination under the provisions of the Disability Discrimination Act 1995 (as amended) ("the DDA"). He also claimed unfair dismissal. The respondents denied all his claims.

ISSUES BEFORE THE TRIBUNAL

2. The issues before the tribunal were as follows:-

   a. What are the alleged acts of discrimination?
   b. If direct discrimination, who does the Claimant compare himself to?
   c. If a hypothetical comparator, why does the Claimant say that the reason for his treatment was related to his disability?
   d. What adjustments does the Claimant say it would have been reasonable for the Respondent to make and why?
   e. What was the Claimant's effective date of termination (this appears to be in dispute)?
   f. What was the reason for dismissal?
   g. Was this a permissible reason within the terms of Article 130 of the Employment Rights Northern Ireland Order 1996?
   h. Did the Respondent act fairly in terms of Article 130A of the 1996 Order?
   i. Does the Claimant still seek reinstatement?
   j. Does the Claimant still seek re-engagement?
   k. Is it practicable for the Respondent to comply with a reinstatement order, if not, why?
   l. Is it practicable for the Respondent to comply with a reengagement order, if not, why?
   m. What is the value of the claim?
   n. If the Claimant is successful, what compensation should be awarded?
   o. Has the Claimant taken reasonable steps to mitigate his loss?

SOURCES OF EVIDENCE

3. The tribunal heard evidence from the claimant and from Colin Black, Training Manager with ICTS (UK) Ltd ("ICTS") and Winnie McCarroll, a Station Manager. The tribunal also received an agreed bundle of documents.

FINDINGS OF FACT

4. Having considered the evidence insofar as same related to the issues before it, the tribunal made the following findings of fact, on the balance of probabilities:-

   (i) The claimant commenced employment with ICTS as a Security Agent at Belfast International Airport. He was employed in this capacity from 25 May 2004 until the effective date of termination of his employment on 18 November 2015. His gross weekly wage was £334.23 (£287.87 net). The tribunal was referred to the written procedure relied on by ICTS in the period up to the claimant's dismissal. Colin Black was responsible for his dismissal. Winnie McCarroll heard his appeal against dismissal on 4 December 2015. The claimant has been receiving Employment Support Allowance at the rate of £437.00 per month and Disability Living Allowance at the rate of £317.00 per month from the effective date of termination of his employment.

   (ii) The respondents did not dispute the fact that the claimant was disabled within the meaning of the DDA. The claimant wrote to the first respondent on 1 February 2013 stating:-

   > "As you may be aware I was diagnosed with Osteoporosis in June 2008

and I have been on medication for this ever since. I recently had an appointment with my Consultant who was dealing with my Osteoporosis at Musgrave Park Hospital this is where I have my routine bone density scan done every 18 months".

(iii) It appears that reasonable adjustments were made for the claimant in 2013 pursuant to this correspondence which ended with the following:-

> "I was not aware that I had Osteoporosis when I took up my employment with ICTS nearly nine years ago. Please be assured that I am not requesting or refusing to work in Central Search or even on these lanes. I am able to load, use the x-ray and do liquid NSM testing. All I ask is that I would be grateful if you could work with me in my request to look into my circumstances on these two lanes, and assure my safety within the company".

In the same letter the claimant had brought to ICTS's attention that as regards lanes 1 and 6 there was not enough room between the x-ray and the walls. In lane 1 there was only three feet clearance. He had explained to his consultant that when a bag is placed on the floor waiting to be searched, this becomes a hazard to him as he has to pass the space made narrower by the bags. He had found himself having to step over bags or cases whilst carrying a bag and possibly trays containing electric items. The claimant also explained in his correspondence that part of his condition was that it left him very vulnerable to breaks or bone fractures if he were to fall. He explained that this could obviously put him out of work for a long time if his bones were "even to heal properly at all". This would of course leave him unable to work. Clearly, at this stage, considerable concerns had been raised not only in relation to the claimant's medical condition but in relation to health and safety issues in his working environment.

(iv) Colin Black, his duty manager at ICTS, spoke to the claimant on 17 June 2014 proposing a welfare meeting on 23 June 2014. However such a meeting does not appear to have taken place until 19 January 2015. In that meeting the claimant referred to his Osteoporosis and his MRI scan. He explained that the bones were crushing down in the middle, that he had disc problems in his lower back, and that he was really struggling. He was currently taking 8 tramodol painkillers and 8 paracetamol per day. Evidently, this medication was not really easing his pain and he explained that after about 8 minutes he was really "crippled". Discussion ensued regarding the functions of his job and Colin Black agreed to write to his General Practitioner, Dr Beirne, for a full report. This was also requested on 19 January 2015. Colin Black was obviously anxious to establish whether the claimant would be able to return to his duties. The letter includes the following:-

> "The following details have been provided in order to assist you establish Jonathan's fitness to carry out his duties: Jonathan works a shift pattern of four days on shift and two days' rest. His duties include body and bags searching, lifting, standing and moving".

(v) It appears, following correspondence of 13 April 2015 and 17 April 2015 to the claimant, explaining the sickness procedure and the provisions regarding

access to reports under the Medical Reports Act 1998, that further correspondence requesting a report was sent to Dr Beirne on 21 April 2015. He responded on 15 May 2015 confirming that:-

> "Jonathan suffers from significant osteoporosis. Osteoporosis is generally asymptomatic until it causes a fracture. A fracture may be caused by a minor fall or a sudden impact, or even by a cough or sneeze.
>
> Jonathan has a history of rib fractures and presently has a fracture for thoracic vertebra. He has resulting backpain from this fracture.
>
> In addition to the fracture in his spine, Jonathan has a disc lesion at L5/S1. This lesion is probably causing most of his symptoms. Jonathan is awaiting orthopaedic assessment of this lesion. He may be suitable for surgery.
>
> Jonathan also has some osteoarthritis of his spine exacerbating his symptoms.
>
> I am unsure when Jonathan will be fit to return to work. At present his back pain is severe, requiring opiate analgesia".

(vi) The tribunal further considered the minutes of a welfare meeting held on 17 June 2016 during which the claimant described the severity of his condition and its impact on him being able to carry out the main functions of his job upon returning to work. The position was to be reviewed in 4-5 weeks' time.

(vii) ICTS was clearly concerned about the claimant's ongoing state of health and invited him to a further welfare meeting on 20 August 2015 during which he confirmed that his morphine dosage had been increased to 80 mg per day. According to the minutes he informed Colin Black that:-

> "The doctor gave me an examination but she thinks that the osteoporosis has taken over now.
>
> Remember at the last meeting I said I would be able to come back the following week, I wouldn't have been able to cope. She is now sending me on to the pain clinic".

(viii) The claimant also explained during the welfare meeting that he was having spasms, that he was scared of not coming back, but that "right now" it was impossible. Colin Black was clearly concerned about the morphine intake and this is reflected in the questions and answers in the minutes of the meeting. The claimant was asked if he could work having taken morphine. He explained:

> "All of a sudden it can hit me, with dryness of the mouth, tiredness, it is so unpredictable". ... sitting too long may start the spasms, and focusing on the screen, the morphine doesn't help my concentration".

The claimant was also taking 2 x 400 mg of lyrica per day. The question of

alternative employment was raised by Colin Black at this meeting. The claimant referred to the possibility of an office job but indicated that he could be putting something into the computer which shouldn't be there due to the fact that he didn't know how he would be affected by the morphine. At the same time if the medication were to be taken away, the claimant explained that he would be in "agony". When asked about his long-term prognosis of getting back to work, the claimant explained:-

> "At the moment not very good. I really don't know how to answer that. If I turn round and say I can't ever see me coming back, what do the company do? The illness will only get progressively worse".

Colin Black explained:-

> "We send the paperwork to HR and then it is in their hands. It's dependent on the illness for instance if I break a leg, I can get back to work within a certain timeframe, with you there is no end to it, we haven't got a timeline that's virtually impossible".

The claimant could not indicate when he would be in a position to return to work. Again the position was to be assessed within 4-6 weeks.

(ix) The tribunal is satisfied that the claimant made a specific reference for the first time at the appeal hearing before Winnie McCarroll that the morphine only "kicked in" between 4.00 pm and 5.00 pm.

(x) The minutes of the meeting held on 20 August 2015 also record that the claimant read through the completed reasonable adjustments assessment form and signed it. In his evidence, the claimant denied having read the notes in the form but conceded that he had signed the form. The tribunal does not accept that the claimant would not have had some regard to the notes before signing the reasonable adjustments assessment form. He did however query what the expression "morphine booster" contained in the notes meant during his evidence before the tribunal.

(xi) In the tribunal's view the reasonable adjustments assessment form is important in relation to the state of affairs pertaining in August 2015. The following entries are made:-

> "Based primarily on the fact that Jonathan medicates twice daily with 40 mg of an opiate analgesic (morphine) plus lyrica (morphine booster) any role, even with an adjustment would be futile.
>
> Although Jonathan wishes to return to work at some point, this is currently not viable due to the severity of his illness coupled with medication. Jonathan feels his long term prognosis in relation to returning to work isn't good however he is reluctant to say never".

(xii) The claimant had been absent from work from 31 March 2015 due to osteoporosis. Colin Black wrote again to Dr Beirne on 28 September 2015. This correspondence includes the following:-

> "Jonathan is an employee of the Company and has been absent from

work since 31 March 2015 due to osteoporosis. His current medical certificate expired on 23 September 2015.

His duties as a Security Agent involve working a shift pattern of four days on shift and two days' rest. His duties include body and bag searching, lifting, stand and moving, driving and x-ray screening.

Jonathan has given us permission to contact you for a medical report, please see attached.

In order for the Company to fully understand Jonathan's medical condition I would appreciate you giving information on the following points:-

1. What is the exact nature of their medical condition?

2. How long has Jonathan had this condition for?

3. Is this condition deemed to be a disability in accordance with the Equality Act 2010 (previously Disability Discrimination Act 1995)?

4. What treatment is Jonathan receiving and how long will it last?

5. From their duties described above how long do you anticipate the illness will affect their work?

6. Are there any duties that should be avoided upon returning to work?

7. If so, would this be on a short term or long term basis?

8. When do you anticipate a return to work?

9. Is Jonathan taking any medication for their condition? If so, could this have an effect of their ability to return to full or reduced duties?

Please kindly furnish us with any additional information which you feel will be of relevance to us in this matter".

Dr Beirne's reply, dated 15 October 2015 confirmed that there had been no change in the claimant's condition since his last report dated 15 May 2015. He did not address the other specific questions raised in Colin Black's correspondence. Nevertheless, in seeking to establish the true medical condition, ICTS was left in no doubt that his previous report should be referred to as reflecting his current medical condition. It was also not disputed that the claimant suffered from a progressive condition. The medical evidence did not therefore indicate when the claimant would be fit to return to work.

(xiii) At this stage the tribunal considers it appropriate to refer to paragraphs 8.15 and 8.16 in the Disability Code of Practice which state:-

"Retention of disabled employees

8.15 An employer must not discriminate against an employee who becomes disabled, or who has a disability which worsens. Employers will often find that it is of benefit to their organisation to retain a disabled employee as this will prevent their knowledge and skills from being lost to the enterprise. In addition, the cost of retaining such an employee will frequently be less than the cost of recruiting and training a new member of staff.

8.16 If as a result of the disability an employer's arrangements or a physical feature of an employer's premises place the employee at a substantial disadvantage in doing his or her existing job, the employer must consider any reasonable adjustment that would resolve this difficulty. The nature of the adjustments which an employer may have to consider will depend on the circumstances of the case, but the following considerations will always be relevant:

- The first consideration in making reasonable adjustments should be to enable the disabled employee to continue in his or her present job if at all possible.

- The employer should consult the disabled person at appropriate stages about what his or her requirements are and, where the employee has a progressive condition, what effect the disability might have on future employment, so that reasonable adjustments may be planned.

- In appropriate cases, the employer should also consider seeking expert advice (for example, from an occupational health adviser) on the extent of a disabled person's capabilities and on what might be done to change premises or working arrangements (for example, from an access auditor). Where an employee has been off work, particularly for a long period of time, a phased return might be appropriate.

- If there are no reasonable adjustments which would enable the disabled employee to continue in his or her present job, the employer must consider whether there are suitable alternative positions to which s/he could be redeployed".

(xiv) The question arose during the hearing as to whether ICTS should have retained an Occupational Health doctor for expert advice. It is clear that ICTS can access such expertise. Dr Thakore, described as a company doctor in email correspondence dated 4 January 2016, was involved during the appeal hearing process. Kate Mailer, HR Manager, emailed

Winifred McCarroll on 4 January 2016 stating:-

> "Dr Thakore came back and said lyrica and morphine are both known to be sedative. Morphine can cause nausea. Some patients are able to take them and still function but others are too lethargic (albeit pain free!)."

(xv) It was clear to the tribunal that management relied on advice from Moorepay and their own HR department as to whether ICTS should retain the services of an Occupational Health doctor. No advice was forthcoming from either source in this direction. On balance, the tribunal is satisfied that ICTS and Winnie McCarroll were able to establish the claimant's true medical condition and, through the various welfare meetings, establish his ability to carry out the main functions of his job, and to consider any suitable alternatives. Both Colin Black and Winnie McCarroll were clear that as far as they were concerned, no positions in an office capacity were available for the claimant as suitable alternative positions to which he could be deployed and there was no satisfactory evidence to the contrary. A phased return was not contemplated due to the severity of his medical condition at the time of his dismissal and subsequent appeal hearing. The claimant indicated during his evidence that he had weaned himself off morphine but no medical evidence was provided to establish his current medical condition, even if considered relevant in the context of his claims. The respondents appeared to be more concerned about the effects of medication on his job role than his physical condition which, in itself, revealed considerable cause for concern. Winnie McCarroll understood the claimant's reference to the side effects of the morphine not "kicking in" until between 4.00 pm and 5.00 pm as being a reference to his situation when not at work.

(xvi) The claimant described how he had been pursuing job applications in Tesco, Asda and B&M Bargains, so far without success. The tribunal accepts that there is no real basis for contending that he failed to mitigate his loss after his dismissal. Indeed, the tribunal has considerable sympathy for the claimant in light of his current medical condition and his evident enthusiasm and willingness to work for a living, as reflected in his letter of appeal set out in paragraph (xxi) below.

(xvii) Following the second short report from Dr Beirne, the claimant was invited to a medical capability meeting on 12 November 2015. Colin Black made it clear at the outset of this meeting that its purpose was to ascertain what ICTS could do to make reasonable adjustments to the claimant's working environment. ICTS again sought to establish his present medical condition and referred to the updated report from the GP, which was read out. The claimant in confirming that the morphine dosage had gone up from 60 mg to 80 mg and the lyrica up from 150 mg to 200 mg stated that he felt "it could go up more, but I don't want more". The question of adjustments was again addressed. The claimant enquired as to what sort of adjustments Colin Black had in mind. According to the minutes Colin Black replied that:-

> "Make sure you only body search 20 minutes, bag search 30 minutes, they are easily done. However, based on the fact you are taking 80 mg of morphine, if you take into consideration the morphine in you, the lyrica in you, could you do the job even with our adjustments?"

The claimant replied:-

> "Probably not. I would like to think if I felt like that I would speak to the supervisor".

The tribunal notes Colin Black's remark in the minutes that he was hoping for a more comprehensive doctor's report. He referred to the fact that the doctor had not mentioned that the claimant was on a bigger dosage of medication. The claimant also conceded that he probably could not lift the shopping out of the car. Colin Black's concern is encapsulated in the minutes when he said:-

> "Even with the reasonable adjustments in place, and with what you are taking, it's not going away. Even a sneeze can break a bone, you have a broken vertebrae, all this, impact, cough, sneeze, minor fall can cause you fractures".

(xviii) At the meeting held on 12 November 2015 an office job was discussed. The claimant made clear that he could not do rotas but he could help "Jacqui". Colin Black also pointed out that an office job was dependent on the days and asked the claimant what adjustment he would need to do body searches. A discussion then ensued on this particular topic during which the claimant stated that from 2007 to 2015, nothing had happened to him but in the same period he had broken his ribs four times. He also referred to tripping or falling. The claimant also described taking his first dose of medication about 9.00 am and that he didn't start feeling the effect until the afternoon. The claimant stated that the morphine can make a person "dopey" and went on to explain that it "lets my brain think there is nothing wrong with my back; the lyrica is for the pain". The claimant made this remark following Colin Black's enquiry as to whether (apart from having osteoporosis and given the fact that he was taking 3 x 80 mg of morphine), he could do the job efficiently.

(xix) The tribunal was satisfied that ICTS did all that was reasonably required in relation to establishing the claimant's true medical condition and consulting with him accordingly. ICTS also afforded him the opportunity of being accompanied at the welfare/capability meetings by a work colleague of his choice or a trade union representative. It was also clear to the tribunal that ICTS were extremely concerned about the impact the claimant's medical condition could have in relation to performing any job role. It accepts, on the evidence before it, that a suitable alternative office role was not available for him or indeed any other suitable role with ICTS. Again, the claimant signed the reasonable adjustments assessment form at the meeting held with Colin Black on 12 November 2015. That form records:-

> "Osteoporosis and meds is 80 mg x 3. Morphine coupled with doctor's report. Plus broken vertebra.
>
> Went through doctor's report and previous minutes".

(xx) The tribunal considers it appropriate to reproduce the dismissal letter dated 18 November 2015 as follows:-

"Following our meeting on 12 November, which was organised in order that your current state of health and absence from work could be discussed in relation to your job, I now wish to confirm the content of that meeting in writing.

The meeting took place in ICTS Offices on 12 November 2015 at 1200 and was conducted by Colin Black. It was put to you that the Company was finding it increasingly difficult to cover your position with temporary arrangements, and was concerned as to when, realistically, you would be returning to work.

With your co-operation, a medical report was obtained by the Company on 15 October 2015. The contents of the medical report were discussed and considered to establish your own thoughts and opinions about the future.

After these points were put to you, you responded by saying you felt that you were able to carry out all tasks, bag searching, body searching, loading and x-ray providing time constraints were applied. However, you then went on to say if it was today you would not be able to body search because of the pain. In addition, you added that when bag searching people could bump into you. Your Morphine and Lyrica doses had been upped and when asked if you could do the job, even with adjustments, with the amount of meds in your system you replied probably not.

Taking into account you have to be able to get into work safely, and there is no guarantee that you can attend when roster'd, you work in a fast paced environment with a lot of physical interaction with both fellow employees and customers. There is no guarantee that you are not going to injure yourself or be injured by others during the course of the working day. Moreover, it is an airport security environment, where lapses of concentration whilst x-raying, bag or body searching, worst case scenario could lead to prohibited items getting airside.

Consequently, after full consideration of the facts and circumstances involving your health and possible alternative solutions to the situation, we regrettably advise you that it is the Company's decision to terminate your employment with the Company with effect from 18 November 2015. The Company will pay 2 weeks in lieu of notice; therefore, your termination date will be 18 November 2015. All monies due to you, including any outstanding holiday pay, will be paid to you on 15 December 2015. Your P45 will be sent to your home address.

Should you not feel dismissal is appropriate action for the matters concerned, you may appeal against this decision, in writing, within 7 working days from receipt of this letter, using the appeals procedure by applying to Ms Winnie McCarroll, Station Manager, ICTS(UK) Limited, Belfast International Airport stating why you feel that dismissal is either too severe or inappropriate.

On behalf of the Company may I take this opportunity to thank you for your services and contributions made throughout the course of your

employment, and wish you a complete and speedy recovery and the best of luck in your future endeavours.

Yours sincerely"

(xxi) The claimant appealed his dismissal in correspondence of 21 November 2015 in the following terms:-

"Following the letter that I received from ICTS dated 18 November 2015, I am writing to notify you of my decision to exercise my right to appeal as per the company's appeal procedure.

I feel that the company's decision to determinate my employment is inappropriate on the grounds of unfair dismissal under the Disability Discrimination Act (NI). As I am sure you are aware from the minutes from all my previous welfare meetings, I was and am always willing to return to my work place. I believe that you and the company have not done enough to make my return to work possible. I feel that there has not been enough done with reasonable adjustments needed for me to return to work. For example, when I suggested a working role in the office, this was laughed off by Colin Black at my last welfare meeting.

I feel personally let [down] by you and the company after 11 and a half years service with ICTS. This situation is absolutely no fault of my own, and due to ill health I now find myself being punished by ICTS for not being fit for work at the moment.

I will without ... doubt be taking legal advice on this matter, and will obviously take this as far as I have to. In the interim I request that you forward to me all of the minutes from all of my welfare meetings.

Just to clarify, I wish to appeal the decision made in terminating my employment.

Yours sincerely"

(xxii) The tribunal carefully considered the relevant correspondence in relation to the appeal process and the factors taken into account by Winnie McCarroll. She issued a very detailed appeal outcome letter in which she recorded the case made by the claimant at the appeal, which includes several references to the medication and its effects. At the end of the correspondence Winnie McCarroll states:-

"• I am sorry that you do not feel that you have been treated as any other staff in the past and that you in the 11 years you been with ICTS have never known any other staff member to be dismissed due to time off with a disability or illness – I can assure you have been treated fairly in line with our company procedures. I cannot comment on any other staff member with you.

• I am not aware of any passenger who got on an aircraft without being security screened.

- ICTS did not dismiss you because of your disability but because of the medication you are on and which our company doctor has now informed us that

  - Lyrica and morphine is both known to be sedative. Morphine can cause nausea. Some patients are able to take them and still function but others are too lethargic (albeit pain free!).

- Unfortunately the company cannot make adjustments for the medication that you are on as these are sedatives.

- I agree you have done nothing wrong however the medication you are on leaves us that we cannot accommodate you.

- I cannot investigate who told [your] father that you had been sacked by the company as you did not give the names of those who [allegedly] spoke to your father.

Additionally, I would like to add a few things regarding the meeting and the outcome.

I just wanted to say that during your time with ICTS there was no issues with your work or disability.

As this is your appeal I can conclude that you have no further right to appeal and the case is closed.

Yours sincerely"

(xxiii) It is not disputed that the claimant's role involved important security issues. It also appears that any alternative duties whether relating to office work, lost property, profiling or check-in would not have obviated the risks presented to the claimant physically or by the claimant in light of his increased dosage of medication, and especially morphine, which affects concentration. It is therefore extremely doubtful whether the claimant (despite his willingness to do so) could have returned to work in ICTS in any capacity given his severe and progressive medical condition as it presented itself to ICTS at the time of his dismissal and the subsequent appeal hearing. There was no suggestion or evidence that at these stages in the process the claimant may be weaned off his medication. It is difficult to see how expert evidence from an Occupational Health doctor could have advanced the matter in any meaningful way. There is however an entry in 22 April 2016 in the claimant's GP notes which states:-

> "Has tribunal meeting re unfair dismissal, pain well controlled and comfortable past three months approximately, advised reduce MST slowly with a view to stopping".

It is important to observe that this entry was made after the dismissal and appeal process and during a time at which the claimant was not working.

(xxiv) In relation to his direct disability claim, the claimant made the case that during the 11 years he worked for ICTS many staff had taken a lot longer off work than he had without having their employment terminated. The tribunal carefully considered the evidence in relation to five named non-disabled comparators. The respondents' evidence pointed to the claimant's progressive medical condition and contrasted this with the named comparators who they maintained had "light at the end of the tunnel" in terms of the possibility of being able to return to work whereas, as Winnie McCarroll explained, the claimant was assessed as having no hope of coming back to work.

(xxv) In relation to the unfair dismissal claim, the claimant sought re-instatement or failing re-instatement, re-engagement or failing re-engagement, compensation. The tribunal explained these remedies, in simple terms, in the course of the hearing.

(xxvi) The tribunal considered the claimant's evidence in relation to claiming benefits, together with a Schedule of Loss.

(xxvii) The respondents contended that the claimant had no case under Article 130A of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") and maintained, through Winnie McCarroll's evidence, that at the time the claimant was dismissed, there was no prospect of him making an imminent return. There was no medical evidence provided that he might have been able to wean himself off the morphine and lyrica. She also contended that it would remain impracticable for ICTS to offer him re-instatement for the same reasons he had been dismissed, namely the significant risk of injury and the side effects of his medication. The respondents also relied on these reasons in asserting that was also impracticable for ICTS to offer the claimant re-engagement in the event of him establishing unfair dismissal.

THE LAW

5. **Disability Discrimination**

(1) Article 3A of the DDA provides as follows:-

"Meaning of "discrimination"

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 reason does not or would not apply, and

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

(2) For the purposes of this Part, a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable

adjustments imposed on him in relation to the disabled person.

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

(4) But treatment of a disabled person cannot be justified under subsection (3) if it amounts to direct discrimination falling within subsection (5).

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

(6) If, in a case falling within subsection (1), a person is under a duty to make reasonable adjustment in relation to a disabled person but fails to comply with that duty, his treatment of that person cannot be justified under subsection (3) unless it would have been justified even if he had complied with that duty."

(2) The tribunal found the summary on disability discrimination given by Lord Justice Hooper in the case of **O'Hanlon v Commissioners for HM Revenue and Customs [2007] EWCA Civ 283 [2007] IRLR 404**, to be of assistance. In paragraphs 20-22 of his judgment he states as follows:-

> "Section 3A identifies three kinds of disability discrimination. First, there is direct discrimination. This is the situation where someone is discriminated against because they are disabled. This particular form of discrimination mirrors that which has long been found in the area of race and sex discrimination. As with other forms of direct discrimination, such discrimination cannot be justified …
>
> Second, there is disability-related discrimination …
>
> Third, there is the failure to make reasonable adjustments form of discrimination in subsection (2). Here, the employer can be liable for failing to take positive steps to help to overcome the disadvantages resulting from the disability. However, this is once he has a duty to make such adjustments. That duty arises where the employee is placed at a substantial disadvantage when compared with those who are not disabled".

(3) In the case of **Tarbuck v Sainsburys Supermarkets Ltd [2006] IRLR 664, EAT**, it was held that while it will always be good practice for the employer to consult, and it will potentially jeopardise the employer's legal position if it does not do so, there is no separate and distinct duty on an employer to consult with a disabled worker. The only question is, objectively, whether or not the employer has complied with his obligations to make reasonable adjustments.

(4) The tribunal also took into account relevant sections in the Disability Code of Practice Employment and Occupation ("the Code"), being careful not to use the Code to interpret the legislative provisions. It also considered Harvey on Industrial Relations and Employment Law ("Harvey") at L368.01ff, in so far as relevant.

(5) **Reasonable Adjustments**

(i) The tribunal considered carefully the provisions of Sections 4A and 18B of the Act. Paragraph 5.3 of the Code states:-

> "The duty to make reasonable adjustments arises where a provision, criterion or practice applied by or on behalf of the employer, or any physical feature of premises occupied by the employer, places a disabled person at a substantial disadvantage compared with people who are not disabled. An employer has to take such steps as it is reasonable for it to have to take in all the circumstances to prevent that disadvantage – in other words the employer has to make a "reasonable adjustment". Where the duty arises, an employer cannot justify a failure to make a reasonable adjustment ……
>
> …5.4 It does not matter if a disabled person cannot point to an actual non disabled person compared with whom she/he is at a substantial disadvantage. The fact that a non disabled person, or even another disabled person, would not be substantially disadvantaged by the provision, criterion or practice or by the physical feature in question is irrelevant. The duty is owed specifically to the individual disabled person.
>
> …. 5.11 The Act states that only substantial disadvantages give rise to the duty. Substantial disadvantages are those of which are not minor or trivial. Whether or not such a disadvantage exists in a particular case is a question of fact.
>
> … 5.24 Whether it is reasonable for an employer to make any particular adjustment will depend on a number of things, such as its costs and effectiveness. However, if an adjustment is one which it is reasonable to make, then the employer must do so. Where a disabled person is placed at a substantial disadvantage by a provision, criterion or practice of the employer, or by a physical feature of the premises it occupies, the employer must consider whether any reasonable adjustments can be made to overcome that disadvantage. There is no onus on the disabled person to suggest what adjustments should be made (although it is good practice for employers to ask) but, where the disabled person does so the employer must consider whether such adjustments would help overcome the disadvantage, and whether they are reasonable."

(ii) The tribunal also considered the types of adjustments which an employer might have to make and the factors which may have a bearing on whether it would be reasonable for an employer to make a particular adjustment. These are set out in Section 18B of the Act as follows; (in so far as may be material and relevant)

“Reasonable adjustments: supplementary

18B.—(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to -

(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

(b) the extent to which it is practicable for him to take the step;

(c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;

(d) the extent of his financial and other resources;

(e) the availability to him of financial or other assistance with respect to taking the step;

(f) the nature of his activities and the size of his undertaking;

(g) ….

(2) The following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments –

(a) making adjustments to premises;

(b) allocating some of the disabled person’s duties to another person;

(c) transferring him to fill an existing vacancy;

(d) altering his hours of working or training;

(e) assigning him to a different place of work or training;

(f) allowing him to be absent during working or training hours for rehabilitation, assessment or treatment;

(g) giving, or arranging for, training or mentoring (whether for the disabled person or any other person);

(h) acquiring or modifying equipment;

(i) modifying instructions or reference manuals;

(j) modifying procedures for testing or assessment;

(k) ….

(l) providing supervision or other support.

(3) ….

(4) ….

(5) ….

(6) A provision of this Part imposing a duty to make reasonable adjustments applies only for the purpose of determining whether a person has discriminated against a disabled person; and accordingly a breach of any such duty is not actionable as such."

(iii) The tribunal considered the guidance given to Tribunals in the Employment Appeal Tribunal case of **Environment Agency v Rowan (2008) IRLR 20** where Judge Serota states at paragraph 27 of his judgment:-

"In our opinion an employment tribunal considering a claim that his employer has discriminated against an employee pursuant to Section 3A(2) of the Act by failing to comply with the Section 4A duty must identify:-

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

(b) the physical feature of premises occupied by the employer, or

(c) the identity of non-disabled comparators (where appropriate) and

(d) the nature and extent of the substantial disadvantage suffered by the claimant. It should be borne in mind that identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the "provision, criterion or practice applied by or on behalf of the employer" and the "physical feature of premises", so it would be necessary to look at the overall picture.

In our opinion, an employment tribunal cannot properly make findings of a failure to make reasonable adjustments without going through that process. Unless the employment tribunal has identified the four matters we have set out above, it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage".

The tribunal also had regard to the code at Section 8.15 relating to managing disability or ill-health and retention of disabled employees. Paragraph 8.16 states, inter alia:-

> "If there are no reasonable adjustments which would enable the disabled employee to continue in his or her present job, the employer must consider whether there are suitable alternative positions to which he could be deployed".

BURDEN OF PROOF

6. (i) Section 17A of the DDA and Regulation 42 of the Regulations deal with the burden of proof.

(ii) In **Igen Ltd (formerly Leeds Carers Guidance) and Others v Wong, Chamberlains Solicitors and Another v Emokpae**; and **Brunel University v Webster [2006] IRLR 258**, the Court of Appeal in England and Wales set out guidance on the interpretation of the statutory provisions shifting the burden of proof in cases of sex, race and disability discrimination. This guidance is now set out at Annex to the judgment in the **Igen** case. The guidance is not reproduced but has been taken fully into account. It also applies to cases of discrimination on the ground of age.

(iii) The tribunal also considered the following authorities, **McDonagh and Others v Hamilton Thom Trading As The Royal Hotel, Dungannon [2007] NICA, Madarassy v Nomur International Plc [2007] IRLR 246 ("Madarassy"), Laing v Manchester City Council [2006] IRLR 748** and **Mohmed v West Coast trains Ltd [2006] UK EAT 0682053008**. It is clear from these authorities that in deciding whether a claimant has proved facts from which the tribunal could conclude in the absence of an adequate explanation that discrimination had occurred, the tribunal must consider evidence adduced by both the claimant and the respondent, putting to the one side the employer's explanation for the treatment.

(iv) The Court of Appeal in **Ladele v London Borough of Islington (2010) IRLR 211 CA**, upheld the following reasoning of the EAT that:

> "Explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence, quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy Stage 1".

(v) The tribunal also received considerable assistance from the judgment of Lord Justice Girvan in the Northern Ireland Court of Appeal decision in ***Stephen William Nelson v Newry and Mourne District Council [2009] NICA 24***. Referring to the ***Madarassy*** decision (supra) he states at paragraph 24 of his judgment:-

> "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 adequate explanation that the respondent has committed an act of discrimination. In Curley v Chief Constable [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".

Again, at paragraph 28 he states in the context of the facts of that particular case, as follows:-

> "The question in the present case however is not one to be determined by reference to the principles of Wednesbury unreasonableness but by reference to the question of whether one could properly infer that the Council was motivated by a sexually discriminatory intention. Even if an employer could rationally reach the decision which it did in this case, it would nevertheless be liable for unlawful sex discrimination if it was truly motivated by a discriminatory intention. However, having regard to the Council's margin of appreciation of the circumstances the fact that the decision-making could not be found to be irrational or perverse must be very relevant in deciding whether there was evidence from which it could properly be inferred that the decision making in this instance was motivated by an improper sexually discriminatory intent. The differences between the cases of Mr Nelson and Ms O'Donnell were such that the employer Council could rationally and sensibly have concluded that they were not in a comparable position demanding equality of disciplinary measures. That is a strong factor tending to point away from a sexually discriminatory intent. Once one recognises that there were sufficient differences between the two cases that could sensibly lead to a difference of treatment it is not possible to conclude in the absence of other evidence pointing to gender based decision-making that an inference or presumption of sexual discrimination should be drawn because of the disparate treatment of Ms O'Donnell and Mr Nelson".

(vi) In the case of **J P Morgan Europe Ltd v Chweidan [2011] EWCA Civ 648**, Lord Justice Elias states as follows:-

> "5. Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focussing on the reason for the

treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: See the observations of Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 paragraphs 8-12. This is how the tribunal approached the issue of direct discrimination in this case.

6. In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie, if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason: See Peter Gibson LJ in *Igen v Wong* [2005] IRLR 258, paragraph 37".

(vii) Regarding the duty to make reasonable adjustments the tribunal considered the case of **Latif v Project Management Institute [2007] IRLR 579**. In that case the EAT held that a claimant must prove both that the duty has arisen, and that there are facts from which it could reasonably be inferred, absent explanation, that it has been breached before the burden will shift and require the respondent to prove it complied with the duty. There is no requirement for claimants to suggest any specific reasonable adjustments at the time of the alleged failure to comply with the duty. It is permissible (subject to the tribunal exercising appropriate control to avoid injustice) for claimants to propose reasonable adjustments on which they wished to rely at any time up to and including the tribunal hearing itself.

(5) (i) The Tribunal also considered Section 4(2) of the Act which states that:-

> "It is unlawful for an employer to discriminate against a disabled person - …(d) by dismissing him or subjecting him to any other detriment."

(ii) In this case the claimant was also relying on the provisions of Articles 126, (his right not to be unfairly dismissed), 127, (circumstances in which an employee is dismissed) and 130, (fairness) of the Employment Rights (Northern Ireland) Order 1996 to establish unfair dismissal. "Capability", in Article 130(3), "In relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality."

(iii) The tribunal also considered Article 130A of the 1996 Order insofar as relevant.

Unfair Dismissal Remedies

7. Article 150 of the 1996 Order provides:-

(i) *"(1) In exercising its discretion under Article 147, the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account –*

(a) whether the complainant wishes to be reinstated,

(b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) whether the claimant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for reinstatement, it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing, the tribunal shall take into account –

(a) any wish expressed by the complainant as to the nature of the order to be made,

(b) whether it is practicable for the employer (of his successor or an associated employer) to comply with an order for re-engagement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

(4) Except in a case where the tribunal takes into account contributory fault under Paragraph (3)(c) it shall, if it orders re-engagement, do so in terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.

(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of Paragraph (1)(b) or (3)(b) whether it is practicable to comply with an order for reinstatement or re-engagement.

(6) Paragraph (5) does not apply where the employer shows –

(a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or

(b) that –

(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and

(ii) when the employee engaged the replacement it was not longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement."

(ii) The tribunal having ascertained the wishes of the claimant, then has to consider whether or not to make a reinstatement order as requested having also considered whether it is practicable for the respondent to comply with an order for reinstatement, and whether the claimant caused or contributed to some extent to the dismissal, as, if so, whether it would be just to order his reinstatement. The tribunal is aware that reinstatement or re-engagement has to be considered first in terms of remedy.

(iii) Article 147 of the 1996 Order provides as follows:-

"An order under this Article may be –

(a) An order for reinstatement (in accordance with Article 148),

(b) An order for re-engagement (in accordance with Article 149),

as the tribunal may decide".

(iv) Article 146 of the 1996 order provides:-

"(2) The tribunal shall –

(a) explain to the complainant what orders may be made under Article 147 and in what circumstances they may be made, and

(b) ask him whether he wishes the tribunal to make such an order.

(3) If the complainant expresses such a wish the tribunal may make an order under Article 147.

(4) If no order is made under Article 147, the tribunal may make an award of compensation for unfair dismissal ... ."

(v) Article 148 of the 1996 Order provides as follows:-

"**Order for reinstatement**

148 – (1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.

(2) An order for reinstatement the tribunal shall specify –

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,

(b) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and

(c) the date by which the order must be complied with.

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so by for being dismissed.

(4) In calculating for the purposes of paragraph (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received and the date of reinstatement by way of –

(a) wages in lieu of notice or ex gratia payments paid by the employer, or

(b) remuneration paid in respect of employment with another employer, and such other benefits as the tribunal thinks appropriate in the circumstances."

(vi) The tribunal considered the useful analysis of reinstatement as a remedy in the Industrial Tribunal case of **Anthony McErlean v Northern Health and Social Care Trust (Ref 1268/13)**.

SUBMISSIONS

8. The tribunal carefully considered the helpful written submissions provided by both parties which are appended to this decision.

CONCLUSIONS

9. The tribunal, having carefully considered the evidence together with the submissions and having applied the principles of law to the findings of fact, concludes as follows:-

(1) In order to be successful in a claim for direct disability discrimination, the tribunal must be satisfied that the claimant was treated less favourably on the ground of his disability. The relevant comparator is someone who does not have the particular disability of a disabled person and whose relevant

circumstances are the same as, or not materially different, from those of the disabled person. The tribunal is not satisfied that the claimant has identified a proper comparator or comparators. Sometimes it will not be possible to decide whether there is less favourable treatment without deciding "the reason why" **(Shamoon v Chief Constable of the RUC (2003) UKHL 11)**. In the case before this tribunal, there is no evidence that the relevant Policy was not applied equally to all employees whether disabled or not or that the claimant was unlawfully discriminated against on the ground of his disability as he was dismissed on capability grounds relating to his health. The claimant has not therefore proved facts from which the tribunal could conclude in the absence of an adequate explanation that he had been treated less favourably on the ground of disability and therefore the burden of proof does not shift to the respondents to prove on the balance of probabilities that the alleged detriment was not on the prohibited ground of disability.

Reasonable Adjustments

(2) The case of ***Tarbuck v Sainsbury's Supermarkets Limited*** **(2006) IRLR 664**, EAT, establishes that the duty to consult is not of itself imposed by the duty to make reasonable adjustments. The only question is, objectively, whether or not the employer has complied with his obligations.

(3) Following the principles set out in *Rowan*, it appears that the provision, criterion or practice was the sickness and absence policy itself which applied to disabled and non-disabled employees. Furthermore, as Langstaff J stated in the case of *Royal Bank of Scotland v Ashton* (2010) UKEAT/0542/09, at paragraph 14:-

> "An Employment Tribunal – in order to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus, discrimination – must be satisfied that there is provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled".

(4) There is no satisfactory evidence before the tribunal that the claimant was placed at a substantial disadvantage by comparison to a fellow employee who was not disabled. The Employment Appeal Tribunal in the case of **Project Management Institute v Latif (227) IRLR 579**, (already referred to in terms of the burden of proof), held that there must at least be facts before the tribunal from which, absent any innocent explanation, it could be inferred that a particular adjustment could have been made, otherwise the respondents would be placed in the impossible position of having to prove the negative proposition that there was no reasonable adjustment that could have been made. While the tribunal is satisfied that the claimant has proved that a duty to make reasonable adjustments had arisen, he has not proved facts from which it could be reasonably inferred, absent explanation, that the duty has been breached, and, therefore, the burden of proof does not shift to either respondent to prove that the duty has been complied with. In any event ICTS was entitled to apply the policy to the claimant in the manner in which it did.

(5) In the context of the 1996 Order, the reason for dismissal related to the capability of the employee for performing work of the kind which he was employed by the employer to do and the dismissal was fair in all the circumstances of the case as being within the range of reasonable responses. There was no satisfactory evidence placed before the tribunal to establish a claim under Article 130A of the 1996 Order.

The tribunal has considerable sympathy for the claimant in his personal circumstances. Nevertheless, it finds itself unable to uphold his claims and accordingly, all claims are dismissed.

Employment Judge:

Date and place of hearing: **24-25 August 2016, Belfast.**

Date decision recorded in register and issued to parties:

IN THE BELFAST INDUSTRIAL AND FAIR EMPLOYMENT TRIBUNAL
CASE NO: 259/16

BETWEEN:

Mr Jonathan Moore	Claimant
-v-	
ICTS Ireland (UK) Ltd	Respondent

Claimants Submissions

Submissions

What was the Reason for Dismissal

1. I the claimant was dismissed for alleged capability, in terms of Article 130 of the Employment Rights Northern Ireland Order 1996.

2. Invite the Tribunal to reject the Respondent's evidence that this was the reason for my dismissal, and in fact it was because I am disabled.

3. Considering the Respondent at the time did not do enough to learn about my condition, or how my medication worked on me in the long term, they decided to dismiss me at the very first opportunity. The Respondent said I was not capable of performing my key job functions, but ruled out other job roles within the company from the start.

a. I do have 'significant osteoporosis' (GP report dated 15/5/15 (J76)

b. Respondent choose not to send me to undergo an independent medical examination by a practitioner of their choosing, as they were very well within their rights as set out in the ICTS company handbook. (page 51 in the bundle).

c. The Respondent made no effort to obtain an Occupational Health Advisers opinion to try and learn more of my condition or taking my medication long term. As set out in the ICTS company handbook, (page 51 in the bundle).

d. The Respondent took out of context the meaning of how morphine make you feel dopey (J104). This was stated at the Tribunal on 24/8/16.

Did the Respondent act fairly in the terms of Article 130A of the 1996 Order

1. I disagree with the process adopted by the Respondent and was not fair in the circumstances and included:

a. I would invite the Tribunal to accept that the Respondent did not follow its statutory procedure in my dismissal.

b. I believe the ICTS did not comply with the disciplinary rules in terminating my employment. I did not attend or have a disciplinary hearing at anytime before my employment was terminated.

c. I disagree with the Respondents claim that I had a final meeting where I was informed that my employment with the company as at risk. Although in a letter dated 12/11/15 (page 101 in the bundle) inviting me to a meeting, the letter makes reference in considering terminating my employment. I also had a letter dated 19/10/15 saying the same thing. Colin Black did nt say one word of this at this meeting on 12/11/15, he never mentioned at all that this was to be my final meeting. I asked Colin Black on cross examination at this Tribunal on 24/8/16, did he know that the meeting held on the 12/11/15 was to be my last meeting. Colin Black's reply straight away was NO!

d. I ask the Tribunal to accept that there was no formal final meeting.

e. My right to appeal. I disagree with the Respondent's argument that I had only raised at my appeal hearing that the side effects of my medication only presented at 4pm-5pm in the day. I infact pointed out to Clin Black twice in previous meetings. Once in 25/9/15 (page 90 in the bundle), where I stated I feel effects about 3-4 o'clock. Again at a meeting n 12/11/15 (page 103 in the bundle). I said that I don't start to feel the effects until the afternoon. I advise the Tribunal to accept the the afternoon begins at 12.01 and ends at 6pm. I could have been axcate with the time, however I was never asked.

f. Although the Respondent suggests that there is no medical evidence that I was being weaned of the morphine (which I have done). I believe that the medical report that I supplied from my GP (page 137 in the bundle) is enough evidence for the Respondent and the Tribunal to accept. *Advised reduce MST slowly with view to stopping.* I believe if ICTS had me examined by their OHU this may have Been something that might have been discussed.

Alleged Acts of Discrimination

1. Direct discrimination - Respondents decision to dismiss.

2. Under Article 130 paragraph 3(a) of the Employment Rights Northern Ireland Order 1996. I disagree with the Respondent's dismissal of me for capability, as I could have been assessed for other different skills within the company.

3. Invite the Tribunal to accept that the reason for dismissal was due to my disability and not capability. Colin Black stated in his statement (page 25), *that after a week to consider matters and to terminate my employment, because of (a). He had significant Osteoporosis.* In seven other points in his consideration, he make not mention to my medication.

4. I see no reasonable evidence to support that the Respondent would have dismissed a non-disabled employee whose circumstances were similar to mine.

Comparators

1. The Respondent gave evidence to say that no other named comparators had the same condition and that they were different from my circumstances. There is no evidence to support this statement from the Respondent. When asked by Judge Crothers on 25/8/16, why there was no reports to support their evidence, Winnie McCarroll stated that she didn't have any. Given that she had at least 6 months to gather such evidence.

2. Invite the Tribunal that there is no evidence to show that the Respondent would have dismissed a non-disabled employee, whose circumstances were similar to that of mine. The Respondent was challenged with the fact that other roles could have been sought for me to take up.

Reasonable Adjustments

1. It would have been a reasonable adjustment for the Respondent to have re-trained me in various other positions throughout the airport as suggested by myself at my appeal hearing held on 4/12/15.

2. The Respondent took it upon themselves not to believe me, or understand how my medications side effects got less and less unpredictable as time went on. The Respondents took advice on how my medication affected some patients, but failed to seek advice on how the medication patients in the long term.

3. I dismiss the argument that if the Respondent had of made reasonable adjustments then I would have still been at risk of a minor impact causing fractures. Seven years working with ICTS and having Osteoporosis and not having any incidents. Obviously no one can predict the future, not me nor the Respondent.

4. There is no evidence to suggest that the Respondent sought any medical advice about my condition in the short term or the long term. This might have helped them to understand what I was capable of achieving.

5. There is no evidence to show that the Respondent has met its full duty in the terms of the DDA 1995 (as amended) to consider reasonable adjustments to accommodate me. Chapter 5 paragraph 5.18 under the heading: *altering the disabled person's hours of working or training.* Paragraph 5.20, *allowing a disabled employee to take a period of disability leave.*

6. At my appeal hearing held on 4/12/15, I even suggested to Winnie McCarroll that I had been in touch with Access to Work NI and they could have been helpful with getting people with disabilities to and from work. This was rejected by the Respondent in her decision letter dated wrongly 12/1/15

7. Not once did Winnie McCarroll say to me, either at my appeal hearing nor in her decision letter or in her statement, that there were no office jobs available. However at the Tribunal on 25/8/16 while being cross examined by myself she clearly stated that she told me there were no office positions available.

Reinstatement/Re-engagement

1. It would be possible for the Respondent to comply with a reinstatement or re-engagement order.

2. Osteoporosis is a degenerative condition affecting 3 million people in the UK. (Age Concern UK, Osteoporosis advice website). This condition is controllable with weekly medication and daily calcium and vitamin D tablets. This helps to slow the process of Osteoporosis down. It is degenerative over many many years and as so I will have to work.

3. Although the respondent has said that I did hit of 'weaning off the medication', but states there is no evidence to support this. As referred to earlier from my doctors report (J137) stating, *pain well controlled and comfortable past 3 months approximately, advised reduce MST slowly with view to stopping.* The Respondent has suggested that taking any dosage of opiate, would mean that I could not undertake my role as security agent, but the Respondent make no suggestions that if I were on an opiate if I could undertake a different role, for example in the office.

Value of Claim, Compensation and Mitigation

1. I have submitted a schedule, which consists of a claim for:

a. Loss of earnings from 18/11/15 to 24/8/16.
Gross £13,369.2
Net £11,514.8

b. I would invite the Tribunal to accept my claim for Injury to Feelings in the medium to high band of Vento. Taking into consideration that I have been in full-time employment from the age of 16 with no unemployment gaps in 23 years. Having Osteoporosis is no fault of mine and if having such a conduction wasn't challenging enough, I thought that I would have had support from my employer of over 11 years but instead they terminated my employment because of my condition. My employment being taken away from me has destroyed my confidence, self esteem and feeling of no self worth. I could have very well broke down many times over the past months because of how this has effected me, but for the sake of my children and family I've had to keep it to myself. It has taken a

lot for me to pursue this and it has also taken a lot out of me. It has effected my mental health and will probably take a long time to get over it.

2. A medical examination, supported by a medical report from my doctor, or any independent doctor from the Respondents choice, would I'm sure support my ability and fitness to return to work.

3. I strongly disagree with the Respondent when it is suggested that I have failed to take reasonable steps to mitigate my losses. Considering that I only started to look for employment from the end of April when I started to feel better and reducing my medication. That is 4 jobs that I have applied for in 4 months and with being away on holiday on two separate occasions, totaling 3 weeks I feel that 4 jobs so far is reasonable. My searching for employment is also an ongoing process to seek employment again. I therefore ask the Tribunal that if I am successful with my case, to dismiss the Respondent's plea to reduce any award accordingly.

Jonathan Moore

1/9/16

IN THE BELFAST INDUSTRIAL AND FAIR EMPLOYMENT TRIBUNAL CASE NO: 259/16

BETWEEN:

Mr Jonathan Moore — Claimant

-v-

ICTS Ireland (UK) Ltd — Respondent

Comments on Claimant's Submissions

The Respondent comments on the Claimant's submissions in the order that he has presented them as follows:

Under the Heading - What was the Reason for Dismissal

Comments on paragraph 3:

It is disputed that the Respondent dismissed the Claimant at the first opportunity. The Respondent took a considerable amount of time to consult with the Claimant and consider his condition and its impact on his ability to carry out his job functions. This included seeking and obtaining medical opinion from his GP in the form of 2 reports. The Respondent therefore did what was reasonable in the circumstances to ensure that it was properly informed prior to dismissing the Claimant. The Claimant does not specify what 'other job roles' he says were ruled out and the burden on doing so rests with the Claimant.

Comments on paragraph 3 (b) & (c):

In circumstances where the Respondent had consulted with the Claimant extensively and sought medical opinion in the form of two reports, it is submitted that there was no requirement nor obligation on the Respondent to have the Claimant undergo an independent medical examination or occupational health assessment. It was reasonable for the Respondent to rely upon the word of the Claimant and the expert opinion of his GP. Nothing further was reasonably required.

Comments on paragraph 3 (d):

The Respondent was entitled to take the words used by the Claimant referring to the medication making him '*feel dopey*' at face value. The Respondent was entitled to give the words used by the Claimant their ordinary meaning and consider that these

meant that the Claimant was adversely affected by the medication. That was the Respondent's evidence and this was not challenged.

Under the Heading – Did the Respondent act fairly in terms of Article 130A of the 1996 Order

Comments on paragraph 1 (b):

The Respondent followed its own capability procedure when dealing with the Claimant's dismissal, which is set out at page 63 of the bundle. The Respondent *'took account of medical evidence'* and *'dismissed where medical opinion indicates no, or insufficient, improvement is likely within a reasonable timescale'.*

Comments on paragraph 1 (c):

The letter in the bundle inviting the Claimant to the meeting at which his employment was terminated (page 101 of the bundle) makes it clear that *'if we are unable to do anything to assist in your return to work, we may consider terminating your employment'.* This represented sufficient indication to the Claimant of the seriousness of the subject matter to be discussed at the meeting and the possibility that his employment could be terminated.

Comments on paragraph 1 (e):

The Tribunal is invited to hold on the facts presented that the Claimant did not say at any time prior to the appeal hearing that his side effects manifested themselves at around 4 or 5pm. The facts speak for themselves. The Respondent was entitled to form a view regarding these inconsistencies. Winnie McCarroll's evidence was that she was concerned about these inconsistencies and the Tribunal is invited to accept that evidence. The Respondent was entitled to have regard to these inconsistencies. The reference in the Claimant's medical notes (page 137 of the bundle) to him *'reducing MST slowly with a view to stopping'* was not before the Respondent at the time of dismissal or time of the appeal and the Respondent could not reasonably have foreseen that this may have been something which might have happened in the immediate future. Nothing to that effect was ever put before the Respondent until the matter reached the late stages of litigation.

Under the Heading – Alleged Acts of Discrimination

Comments on paragraph 2:

The Claimant does not specify here what other *'different skills'* he refers to. In any event, the Tribunal is invited to accept the Respondent's evidence and their submissions that no other alternative roles were available for the Claimant and that adjustments to the Claimant's role would not have been reasonable for the reasons already stated in the Respondent's evidence and in its submissions.

Comments on paragraph 3:

Colin Black did not give evidence that he dismissed the Claimant only because of his osteoporosis. His clear evidence was that set out at paragraph 23 (a) to (g) of his witness statement.

Under the Heading - Comparators

Comments on paragraph 1:

The Respondent does not recollect Winnie McCarroll being asked for evidence of reports regarding the circumstances of the Comparators. In any event, it is submitted that such reports were unnecessary. The Claimant accepted in his evidence before the Tribunal that the circumstances of the comparators were not the same as the Claimant's circumstances, namely, none suffered from a progressive condition and none were required to take opiate type medications. In Colin Black's words, in respect of the others, there was 'light at the end of the tunnel'.

Under the Heading – Reasonable Adjustments

Comments on paragraph 2:

The Respondent cannot be faulted for not knowing that the 'effect of the Claimant's medication may, over time, have become more predictable'. This was never made clear by the Claimant prior to his dismissal or at the stage of his appeal. Further, there was no hint of that being a possibility in any of the medical evidence obtained prior to his dismissal.

Comments on paragraph 3:

Although it is accepted that the Claimant appears to have had Osteoporosis for some time, the clear evidence before the Respondent and before the Tribunal was that in the last year or so of his employment, his condition had become worse.

Comments on paragraph 5:

The Claimant's reference to paragraph 5.20 of the Guide gives an example of a reasonable adjustment to be a period of disability leave. It is not clear from the guide what is being referred to here. It is most likely to refer to circumstances in which there is some known prospect of a return from long term sick leave. However in the Claimant's circumstances there was no indication at the time of his dismissal or the time of his appeal, of a possibility of return to work in the immediate future and therefore the purported example is not relevant, particularly when there was no such request or suggestion made by either the Claimant or his GP prior to his dismissal that such a period of leave may be appropriate.

Comments on paragraph 6:

Reference in the appeal minute, properly read would appear to relate to a suggestion by the Claimant about him being in touch with 'Access to Work NI with a view to assisting him getting to and from work' (page 114 of the bundle, 4th paragraph). The Respondent did not dismiss the Claimant because of his inability to commute to work, but because of his incapability in being able to perform his key job functions.

IN THE BELFAST INDUSTRIAL AND FAIR EMPLOYMENT TRIBUNAL CASE NO: 259/16

Under the Heading – Value of Claim, Compensation and Mitigation

Comments on paragraph 1 (b):

No evidence was given by the Claimant (or in the form of a medical report) that he had suffered hurt feelings as a result of the alleged discrimination and it is submitted that this is a powerful factor that the Tribunal must take into account when determining the extent of any injury to feelings award. An award in anything other than the lower band would not be appropriate and that at the lower end of the lower band.

Comments on paragraph 2:

If the Claimant wishes to persuade the Tribunal as to his fitness to return to work either by way of reinstatement or by way of reengagement, then the burden of showing this was on the Claimant. The Claimant could have, but did not, lodge any medical evidence whatsoever to show that he was fit to return in April 2016 or is now fit to return to employment.

Tom Muirhead
9 September 2016

IN THE BELFAST INDUSTRIAL AND FAIR EMPLOYMENT TRIBUNAL CASE NO: 259/16

BETWEEN:

Mr Jonathan Moore	Claimant
-v-	
ICTS Ireland (UK) Ltd	Respondent

Respondent's Submissions

Issues:

Agreed as:

a. What are the alleged acts of discrimination?

b. If direct discrimination, who does the Claimant compare himself to?

c. If a hypothetical comparator, why does the Claimant say that the reason for his treatment was related to his disability?

d. What adjustments does the Claimant say it would have been reasonable for the Respondent to make and why?

e. What was the Claimant's effective date of termination (this appears to be in dispute)?

f. What was the reason for dismissal?

g. Was this a permissible reason within the terms of Article 130 of the Employment Rights Northern Ireland Order 1996.

h. Did the Respondent act fairly in terms of Article 130A of the 1996 Order.

i. Does the Claimant still seek reinstatement?

j. Does the Claimant still seek reengagement.

k. Is it practicable for the Respondent to comply with a reinstatement order, if not, why.

l. Is it practicable for the Respondent to comply with a reengagement order, if not, why.

m. What is the value of the claim.

n. If the Claimant is successful, what compensation should be awarded.

o. Has the Claimant taken reasonable steps to mitigate his loss.

Submissions

What was the Reason for Dismissal

1. Claimant was not capable of performing his key job functions because of: (1) The risk of injury stemming from his increasingly worse osteoporosis (2) the side effects presented with his medication (Morphine and Lyrica). Capability is a permissible reason in terms of Article 130 of the Employment Rights Northern Ireland Order 1996.

2. Invite the Tribunal to accept the Respondent's evidence that this was the reason for the Claimant's dismissal and not because he was disabled as the Claimant has alleged.

3. Considering the facts which were known to the Respondent at the time the Claimant was dismissed, the Respondent was entitled to

form the view that the Claimant was not capable of performing his key job functions, then and for the foreseeable future, namely:

a. Claimant had 'significant osteoporosis' (GP report dated 15/5/15 (J76).

b. Fracture can be caused by a minor fall or sudden impact or even by a cough or a sneeze (J76). Thoracic Vertebra is the section of the spine between the bottom of the neck and the bottom of the ribs. The Tribunal must consider the nature of the Claimant's role. Claimant's rib fracture caused by bending down to pick up a slipper in April 2015 is evidence which would place him at an unacceptable risk of injury by continuing in his role as Security Agent. What would happen to the Claimant if he had to bend down to lift up a bag, or inadvertently bump into an item of equipment, or was bumped by a passenger? The very nature of his role placed him at too great a risk of injury.

c. Had a history of rib fractures and presently a fracture of the thoracic vertebra (J76).

d. GP was unsure when Claimant would be fit to return (J76).

e. Further GP report taken 5 months later on 15/101/15 confirms no change to his condition from May 2015 (J98).

f. Claimant described his vertebra as 'broken down and would not heal' at 17/6/15 meeting (J78-79).

g. Claimant described his condition as having 'become a lot worse' at the 20/8/15 meeting (J81-82).

h. At the same meeting Claimant confirmed that his GP said the 'osteoporosis had taken over' (J81-82).

i. Describing the side effects of his medication he said at the same meeting '*All of a sudden it can hit me, with dryness of the mouth, tiredness, it is so unpredictable'* (J82). There were inconsistencies in the Claimant's explanations concerning the side effects of his medications. The Claimant did not make it clear to the Respondent that he was

becoming 'accustomed' to his medication (as he suggested in his evidence at Tribunal) and therefore the Respondent was entitled on the available evidence to discount his suggestion at the appeal stage that the side effects only presented between 4pm and 5pm in the day. Further, that suggestion was not supported by any medical evidence, nor is there any evidence of it in the Claimant's medical notes. If as the Claimant suggests, he discussed this with his GP, then one would expect that to have been recorded somewhere in his medical notes. Further, applying common sense, the effects of sedative type medication must be capable of presenting themselves at any time and influenced by a number of factors, such as how rested the Claimant was, how busy he had been on a particular day, how much food he had consumed, whether he had missed sleep the night before etc.

j. At the meeting Claimant also confirmed that the morphine did not help his concentration and that he may input something on to a computer that should not be there (J82).

k. Claimant confirmed that his illness would only get progressively worse, confirming the 'degenerative' nature of osteoporosis (J82).

l. He could not give an indication when he might be able to return (J82).

m. At the following meeting held 25/9/15 Claimant confirmed his GP's view that 'he was not going to get any better and that he should stop fooling himself (J89).

n. At the same meeting Claimant confirmed that long term his condition would not get any better and that he could not see a way out of it (J90).

o. At the next and final meeting 12/11/15, Claimant confirmed that his dosage had increased from morphine 60mg to 80mg and Lyrica from 150mg to 200mg (J101).

p. Claimant confirmed that he probably would not be able to undertake amended duties whilst taking morphine (J102).

q. Claimant also confirmed that he had broken his ribs 4 times (J103).

r. Claimant confirmed that he had been waiting for a Consultant appointment for 18 months, but that his GP did not think that it would make any difference (J104).

s. Claimant said that the morphine makes him dopey and think that there is nothing wrong with his back (J104).

t. At the 22/4/15 welfare meeting Claimant described an incident where he broke a rib reaching down for a slipper next to his bed (J165-166).

u. There was no prospect of an imminent return to work (confirmed by both the Claimant and the Claimant's GP).

4. Respondent acted on the facts known to it at the time that it dismissed the Claimant and could not reasonably have foreseen that the Claimant might have been able to wean himself of the sedative type medication in the near future. There was no suggestion made by the Claimant or by his GP that this might have been a possibility.

Did the Respondent act fairly in terms of Article 130A of the 1996 Order

5. Article 130A requires the Respondent to follow a minimum statutory procedure in respect of certain types of dismissal. It is questionable whether the statutory minimum procedures apply to the Claimant's capability dismissal. The language of the minimum procedures relates to disciplinary action (for example misconduct/ poor performance) and is not specifically structured to apply to dismissals for capability. Recent case law suggests that the ACAS Code of Practice on disciplinary and grievance procedures does not apply to ill-health dismissals *(Homes v Qinetiq Ltd, UKEAT/0206/15/BA).* The Tribunal is invited to follow this principle in respect of the question of the Claimant's capability dismissal and hold that the statutory minimum procedures do not apply.

6. In the alternative, it is for the Claimant to show in what respect the Respondent has failed to apply the minimum procedures.

7. Nothing in the Claimant's ET1, in any additional information provided by him, in his witness statement or in his evidence at Tribunal, makes any suggestion of the manner in which the minimum procedures may have been circumvented.

8. The Claimant made no challenge of the Respondent's witnesses under cross examination as to any purported failings to follow the statutory procedures.

9. The Claimant cannot now advance any such argument in submissions which did not feature in the evidence before the Tribunal, otherwise this would be unjust to the Respondent in that they have not been put on notice, or been able to give any evidence to rebut a suggestion that statutory procedures were not followed.

10. In any event, invite the Tribunal to hold that statutory minimum procedures have been followed. Further, the Respondent has adopted a procedure which was fair in the circumstances and included:

    a. Extensive consultation (no fewer than 6 meetings in the 10 month period prior to his dismissal).

    b. Proper opportunity to explain himself and put forward his points.

    c. Medical opinion from his GP in the form of 2 reports, one in May 2015 the final in October 2015.

    d. A final meeting at which the Claimant was informed that his employment with the Company was at risk.

    e. The right to be accompanied at each of the meetings.

    f. The right to appeal against his dismissal. The Respondent was entitled to reject the point raised at appeal that the side effects of his medication only presented at 4pm or 5pm in the day. This was not the information presented by the Claimant

at the welfare meetings held by Coin Black. The information presented at those earlier meetings was inconsistent (as referred to above) and at best there was a suggestion very late in the Claimant's final meeting that the effects presented between 3 and 4pm. Winnie McCarroll confirmed in her evidence that she did not accept the Claimant's 4/5pm suggestion particularly in view of the absence of any supporting medical evidence.

11. The decision to dismiss the Claimant was within the range of responses and reasonable in the circumstances bearing in mind the following:

    a. The nature of the Respondent's business and the risk of prohibited items passing through security.

    b. The risk to the Claimant's health because of his osteoporosis.

    c. No imminent prospect of a return.

    d. Progressive nature of his illness all indications being that he would only get worse not better. The evidence before the Respondent at the time of the Claimant's dismissal, clearly showed that the Claimant's condition had become progressively worse in the run up to his dismissal (see points at paragraphs 3 (a) to (q) at the beginning of these submissions.

    e. Even although the Claimant now may suggest (with no supporting medical evidence) that he is now being slowly weaned off the morphine, there was no indication at the time of dismissal or the time that he appealed that this was in prospect. The Respondent could not reasonably have foreseen that this might be a possibility. Nothing to that effect was ever before them or even hinted at the time that they dismissed.

Alleged Acts of Discrimination

12. Direct discrimination – The case as pleaded and as presented indicates that the alleged act of direct discrimination was the Respondent's decision to dismiss the Claimant. The Claimant did not give any clear evidence as to any other alleged acts of direct discrimination.

Comparators

13. The Claimant relies on actual comparators, as set out in his undated document at page 152 of the bundle.

14. A proper comparator must be one in which there are no material differences between the Claimant and his chosen comparators (*Disability Discrimination Act 1995 s 3A (5)*).

15. If there are material differences then the purported comparator is not a proper comparator for the purposes of the Act.

16. The Respondent's evidence, which was not challenged by the Claimant, was that the circumstances of all named comparators were different from the Claimant's circumstances. None of the comparators had a progressive condition like the Claimant's, none were required to take morphine or other sedative type medications and it was considered that there was a reasonable prospect in respect of each of them of a return to better health and work. In the Respondent's witnesses words, there was 'light at the end of the tunnel' in respect of each of them.

17. The Claimant accepted in his evidence that none of his chosen comparators had progressive conditions, nor took morphine or other sedative type medications.

18. Accordingly, those named are not appropriate comparators for the purposes of the Claimant's disability discrimination claim.

19. The Claimant did not rely on a hypothetical comparator, nor identify what that hypothetical comparator was and how his circumstances might relate to them. Accordingly, no question arises in that respect.

20. Even if the comparators could be considered to be proper comparators, it is submitted that the Respondent has discharged the burden of proof (in the event that the Tribunal considers that the burden may have switched) by explaining the reason for the disparity of treatment between those comparators and the Claimant.

21. Invite the Tribunal to hold that the Respondent dismissed the Claimant for capability, a permissible reason in terms of Article 130 of the Employment Rights Northern Ireland Order 1996

22. Invite the Tribunal to accept that the reason for dismissal was capability and not because the Claimant was disabled.

23. Submit that the evidence shows that the Respondent would have dismissed a non-disabled employee whose circumstances were similar to the Claimant (lengthy absence with no prospect of a return and taking medication which had an adverse effect on ability to undertake his key job functions). This was Colin Black's evidence as to the reason for the Claimant's dismissal and it was not challenged.

Reasonable Adjustments

24. Claimant had 'significant osteoporosis' (Medical evidence from GP dated 15/5/15 - J76) and his condition had become worse over time (see submissions above).

25. Claimant was being prescribed opiates with side effects which impaired his ability to undertake his key security duties, the dosage for which had steadily increased over the 7 month period prior to his termination.

26. Submit that none of the suggested adjustments to his duties (office work, lost property, profiling or check in) would have taken away the issues which the Claimant's condition presented: the risk of injury, the inability to concentrate on the security aspects of his job.

27. The *Equality Commission for Northern Ireland Disability Code of Practice* gives some helpful examples of adjustments which it might be reasonable for an employer to make. Although the Guide is not a statement of the law, a Tribunal may take it into account in deciding whether an employer has met its duties in respect of reasonable adjustments. Page 84 of the Guide gives an example of a reasonable adjustment being *'Allocating some of the disabled person's duties to another person'*. The example given is where an employer *'reallocates minor or subsidiary duties to another employee.* This would not have been practicable in the Claimant's case as to accommodate his condition and the side effects of his medication would have required major alterations to his role. It is questionable whether it was in fact possible to alter his role at all to remove the risk of injury and to remove the risk of the sedative effect of his medications, bearing in mind the nature of his role and the nature of the Respondent's business. The nature of the Claimant's role involved:

    a. Moving bags.
    b. Moving around his working area and the potential for inadvertent impact.
    c. Lifting.
    d. Being alert at all times due to the security nature of his role.

28. The guide also gives an example of a reasonable adjustment being *transferring the employee to another vacancy.* The Respondent's evidence was that there was no other vacancy available in the office and this was not challenged. Further, no suggestion has ever been made as to any other potential vacancy for which the Claimant could have been considered.

29. Considering all of the facts presented to the Respondent at the time of Claimant's dismissal, submit that the Respondent met its duty to consider whether reasonable adjustments could be made to accommodate the Claimant and was entitled to conclude that none were feasible.

30. If an adjustment would not enable a return to work it will not be reasonable (*Conway v Community Options Ltd UKEAT/0034/12, [2012], referred to in extract from Harvey 399.01).* Here, adjustments to the Claimant's role would not have taken away the risk of a minor impact causing fractures. Even if that risk could have been taken away, it would not remove the risk associated with the impact on his concentration levels associated with his medication. Security is the very bedrock of the Respondent's business and of the Claimant's role.

31. It would not have been a reasonable adjustment for the Respondent to retain the Claimant (this point though has never been suggested) to see how his condition might have progressed. The facts were as presented that the condition was progressive, that there was no prospect of an imminent return and there was no suggestion whatsoever that there might be a plan to wean the Claimant off his medication.

32. There was some suggestion by the Tribunal that perhaps an occupational health referral could have been undertaken. This was never suggested by the Claimant and it is submitted that there was no absolute obligation on the Respondent to do so. Clearly in circumstances where medical evidence is sought and it is not provided, or where a Respondent has sought no medical evidence at all, then a referral to occupational health would be an appropriate step to take and may represent a reasonable adjustment. However in the Claimant's case, medical opinion was properly sought, obtained and taken into consideration. In that respect, there was no requirement on the Respondent to seek an occupational health referral.

33. Submit that the Respondent has met its duty in terms of the DDA 1995 (as amended) to consider reasonable adjustments to accommodate the Claimant and there was no discrimination.

Reinstatement/Reengagement

34. It would not be practicable for the Respondent to comply with a reinstatement or reengagement order.

35. The Claimant's degenerative condition of osteoporosis remains. The nature of it means that it will only get worse and hence the risk of injury increase rather than decrease.

36. Although there is a hint in the Claimant's medical record of April 2016 of 'weaning off the medication', there is no medical evidence to support that he has. Taking any dosage of opiate, would mean that the Claimant could not undertake his role as security agent.

37. Claimant's Employment and Support Allowance in 'Support Group' Category suggests that he may not in fact be fit to return. Had the Claimant been fit to work as he suggests, then he would have been appropriately placed in the 'Work Related Activity Group' *(See terms of Employment Support Allowance).*

Date of Termination

38. Effective date of termination is when the termination takes effect. This is now agreed as 18/11/15.

Value of Claim, Compensation and Mitigation

39. The value of the Claimant's claim, should he succeed will be at the discretion of the Tribunal, taking account of his financial losses and any injury to feelings which the Claimant has sustained.

40. The figures for Gross and net weekly pay are agreed as follows:

    a. £334.23 Gross.

b. £287.87 Net.

41. The value of any claim will depend to the greatest extent on the Tribunal's specific findings. For example, if the Tribunal considers that it would have been reasonable to retain the Claimant in order to see how his prognosis developed, then any claim for compensatory losses will be very limited, the Claimant's sick pay having expired before his EDT.

    a. With respect to any claim for injury to feelings, the Claimant gave no evidence whatsoever that his feelings were hurt as a result of the alleged discrimination. Any award should therefore be restricted to the lower band of Vento and at the lower end of that band, reflecting a nominal award only.

    b. It is questionable whether the Claimant is in fact fit for work. No medical evidence provided to support this. Employment and Support Allowance in Support Group category suggests that the Claimant is not fit to return to work.

    c. The Claimant has failed to take reasonable steps to mitigate his losses. His evidence was that he had applied for 4 jobs since his dismissal and this does not represent reasonable steps to mitigate. The Tribunal should therefore reduce any award accordingly.

Tom Muirhead
30 August 2016