Case Numbers: 3202077/2007
3202319/2007

RM/er

RESERVED JUDGMENT

THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Mr M Driscoll	News Group Newspapers Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT STRATFORD

ON: 19 – 23 May 2008 and 4 – 5 September 2008 and (in chambers) 8, 10, 11 &18 September 2008

Employment Judge Goodrich

Members: Mr D Downing
Mr G Tomey

APPEARANCES:
For the Claimant: Mr M Sheridan (Counsel)

For the Respondent: Mrs H Beech (Solicitor)

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The Claimant was unfairly dismissed.

2 The complaint of disability discrimination succeeds, as further set out below.

Accordingly, the case is to be listed for a remedy hearing, at a date to be arranged.

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REASONS

The Claim and the Issues

1 The background to this hearing is as follows.

2 The Claimant issued a claim against the Respondent on 26 July 2007. He complained that he had been unfairly dismissed and discriminated against by virtue of the Disability Discrimination Act 1995.

3 Only the unfair dismissal element of this claim was accepted by the Employment Tribunal. The Claimant's disability discrimination claim was rejected on the basis of non compliance with Section 32 of the Employment Act 2002.

4 The Claimant issued a second claim on 23 August 2007, having by then waited more than one month from the date of sending a grievance his former employers before issuing his second claim. The Claimant's disability discrimination claim was, on this second occasion, accepted by the Tribunal.

5 There were two case management discussions and the case was set down for this hearing. The case was originally listed for a seven day hearing in May 2008. Unfortunately, a Tribunal was only available to sit for five of those seven days, so that the case had to be adjourned, part-heard, until September 2008.

6 At the outset of the hearing the issues were discussed with the parties.

7 Mr Sheridan, on behalf of the Claimant, made two applications to amend the Claimant's case, both of which were resisted by Mrs Beech, on the Respondent's behalf. The first application was made on the first morning of the hearing. The second application was made during the resumed hearing in September. The background to the second application was that, in between the two hearings, the House of Lords had given judgment in the case of *London Borough of Lewisham v Malcolm [2008] IRLR 700* , overturning the case of *Clark v Novacold [1999] IRLR 318.*

8 The Tribunal heard submissions on the application. We also had in mind the guidance given in the case of *Selkent Bus Co. Ltd v Moore [1996] IRLR 661* and the Tribunal's overriding objective contained in Regulation 3 Employment Tribunals Rules of Procedure 2004. The Tribunal decided to give leave to amend in both instances because:-

8.1 In both instances the applications involve the substitution of new labels for facts already pleaded to

8.2 The statutory time limits were not in issue, because the Claimant had already issued proceedings under the Disability Discrimination Act, as described above.

8.3 The timing of the application was late, particularly as there had already been

case management discussions to clarify the issues. In the case of the second application to amend the application was made even later, but there was a good explanation for this. The House of Lords judgment in the *London Borough of Lewisham* case (above) has caused a major change to the interpretation of the law on disability related discrimination.

8.4 If leave to amend was to be refused, the Claimant would suffer potential prejudice. He would be deprived of making what might be a successful claim. So far as prejudice to the Respondent was concerned Mrs Beech, very fairly and correctly, accepted that there would be no prejudice to the Respondent if leave to amend were granted. The Respondent had come to defend the Claimant's case on the basis of the facts pleaded to. If the Respondents response were to be held to be well-founded, ultimately the Respondent would be successful in defending the amendments to the claim.

9 The background to the Respondent's application to amend their Response was as follows.

10 In box 2.5 of the ET3 Response Form a Respondent is asked to state whether or not the substance of the claim had been raised by the Claimant in writing under a grievance procedure. In both the Respondent's responses box 2.5 was left unanswered. Nor was there any reference in the grounds of resistance setting out the Claimant's response to show that the Respondent disputed that the Claimant had failed to comply with the statutory grievance procedures in relation to any part of his Claim Form.

11 The first notification provided to the Claimant that the Respondent disputed that the Claimant had complied with the statutory grievance procedures came in a proposed list of issues dated 21 January 2008. Even then the Respondent asked a general question as to whether the Claimant had raised a grievance, rather than making any specific assertion that the Claimant had not raised a grievance in respect of a specific element of his claim. Until 21 January 2008, the Claimant did not know that the Respondent had any objection to the Claimant's compliance with the statutory grievance procedures; and until the Respondent's closing submissions, had no information as to which elements of the Claimant's claims were asserted not to be the subject matter of a grievance.

12 Having heard submissions from both representatives and, once more, considered the guidance in the *Selkent* case (above) and Rule 3 of the Employment Tribunals Rules of Procedure the Tribunal decided to refuse leave to amend because:

12.1 Section 32(6) Employment Act 2002 provides that an Employment Tribunal shall be prevented from considering a complaint presented in breach of subsections (2) to (4) only if one of two events occur. In other words, if neither of those events occur, the Tribunal will consider the complaint even if it has been presented in breach of Section 32 Employment Act 2002.

12.2 The first ground for not considering a complaint is where the breach is apparent to the Tribunal from the information supplied to it by the employee in connection with the bringing of the proceeding. The Tribunal here did refuse the

Claimant's disability discrimination claim on the presentation of the first complaint because it was clear that the Claimant was in breach of the statutory grievance procedures in respect of this element of the claim, by not waiting 28 days from the date of his grievance before issuing his disability discrimination claim. The Claimant was then able to issue a second claim shortly afterwards, having waited a little longer to allow 28 days to elapse before issuing his second claim.

12.3 The second ground for refusing a claim under Section 32 Employment Act 2002 is when the Tribunal is satisfied of the breach as a result of the employer raising the issue in compliance with provisions in accordance with Regulations made under Section 7 of the Employment Tribunals Act 1996 (The 2004 Employment Tribunals Rules of Procedure). This requires the Respondent to issue a response to a claim, if they wish to defend it. As the Respondent had not raised the issue in either response, leave was needed in order to seek to amend the Response.

12.4 The issue of raising the issue of non compliance with statutory grievance procedures is very time sensitive, from a Claimant's point of view. If the Respondent had raised the issue in either response and specified the nature of their assertion, the Claimant could have issued another grievance quickly, followed by a third claim. The Claimant would have been (probably) within time for doing so, whereas by the time of this hearing he was well out of time.

13 The Claimant would have suffered, potentially, substantial prejudice if leave to amend were to be granted. By virtue of a technical objection he would be deprived of what might otherwise be a successful claim.

14 In contrast, if the substance of the Respondent's Response on the matters in question were to be held to be well founded, ultimately the Respondent would succeed in defeating the parts of the claim in question.

15 Accordingly, leave for the Respondent to amend its Response was refused.

16 The issues for the Tribunal to decide were, therefore, agreed by the parties to be as follows.

Unfair Dismissal

Liability

17 Was the statutory dismissal procedure (SDP) completed and, if not, was this non-completion wholly or mainly attributable to a failure of the Respondent to comply with the procedure's requirements (s.98A)(1) Employment Rights Act 1996)?

18 What was the reason or principal reason for the Claimant's dismissal?

The Respondent contends:

18.1 The principal reason for the Claimant's dismissal related to the capability or qualifications of the Claimant for performing work of the kind which he was employed by the Respondent to do (s.98)(2)(a) Employment Rights Act 1996).

The Claimant contends:

18.2 The Claimant contends that the reason, or the principal reason, was simply that the Respondent wanted to remove him.

18.3 The Claimant's dismissal was because of his disability and/or for a reason related to his disability (s.3A(5) Disability Discrimination Act 1995) in that the Claimant's dismissal amounted to less favourable treatment on the grounds of his disability.

19 Did the Respondent act fairly and reasonably in dismissing the Claimant for the above reasons (s.98(4) Employment Rights Act 1996)?

The Respondent contends:

19.1 The Claimant's dismissal was both procedurally and substantively fair and that the decision to dismiss was within the band of reasonable responses open to the Respondent in the circumstances.

The Claimant contends:

19.2 The Respondent did not act fairly in treating capability (no admission) as a sufficient reason for dismissing the Claimant in all the circumstances including:

19.2.1 The Claimant's length of service,

19.2.2 The nature of the Claimant's ill health,

19.2.3 The cause of the Claimant's ill health, which the Claimant asserts was caused by the Respondent's treatment of him,

19.2.4 The reports of the Claimant's GP, Dr Reeves, dated 13 September 2006, and Dr Shanahan dated 6 October 2006, which both recommended that a meeting between the Respondent and the Claimant's representative would be beneficial in hastening the Claimant's return to work,

19.2.5 The report of Dr Shanahan dated 16 February 2007, which concluded that there had been some improvement of the Claimant's condition,

19.2.6 The confusion as to the funding of the CBT counselling sessions, which led to the delay in these sessions being scheduled,

19.2.7 The information from Mr Turner that the Claimant had contacted Capio

Nightingale Hospital to arrange the CBT counselling sessions that had been recommended to him, which he was expected to commence in the following weeks, and that the Claimant's GP was confident that the Claimant would be well enough to contemplate a return to work at the conclusion of the therapy sessions,

19.2.8 The size and administrative resources of the Respondent.

Remedy – to be determined at any future hearing if necessary

20 If the Claimant was unfairly dismissed, would the Claimant have been fairly dismissed by the Respondent for capability in any event and, if so, when would such a dismissal have occurred had the proper procedures been followed?

21 If the Claimant was unfairly dismissed, was the SDP procedure completed and, if not, to which party was this non-competition wholly or mainly attributable (s.31 Employment Act 2002)?

22 If the Claimant was unfairly dismissed, did the Claimant, by his own conduct contribute to his dismissal (s.123(6) Employment Rights Act 1996) and therefore should any compensation to which the Claimant is entitled be reduced to reflect contributory conduct?

Disability Discrimination

Disability

23 Was the Claimant a disabled person 'between July 2006 and April 2007 ("the relevant time"). **The Respondent admits that the Claimant was a "disabled person" during the relevant time.**

Direct Discrimination

24 Did the Respondent, on the grounds of the Claimant's disability, treat the Claimant less favourably than it treated or would have treated a person not having the Claimant's particular disability but whose relevant circumstances, including his abilities are the same as, or not materially different from, those of the Claimant (Sections 3A(5) and 4(2) Disability Discrimination Act 1995) ("Direct discrimination"), by:

24.1 Stopping the Claimant's sick pay on 4 August 2006 because the Claimant failed to attend a home visit by the Respondent's occupational health manager (Ann Carville), in circumstances where the Claimant's union representative had informed the Respondent that the Claimant would rather not meet with occupational health and had requested that the appointment be cancelled, or to respond to Ms Carville's requests to contact her,

24.2 Stopping the Claimant's sick pay on 25 January 2007 as the Respondent alleged that they had not received a medical certificate covering the Claimant's continued absence. The Claimant alleges that such certificates had been sent to

the Respondent.

24.3 Refusing to exercise its discretion in accordance with its company policy to extend the period the Claimant was entitled to sick pay beyond its expiry on 10 February 2007,

24.4 Refusing to review the decision not to exercise their discretion in accordance with its company policy to extend the period the Claimant was entitled to sick pay.

24.5 Commencing disciplinary proceedings against the Claimant on 16 March 2007 on the grounds of the Claimant's attendance record and capability to attend for work in the future, and inviting the Claimant to a meeting to discuss the potential termination of his employment.

24.6 Holding a disciplinary meeting on 24 April 2007 in the Claimant's absence.

24.7 Terminating the Claimant's employment owing to capability on 28 April 2007.

25 For the purposes of the Claimant's Direct Discrimination claim, the Claimant seeks to rely on a hypothetical comparator.

26 What are the attributes of the hypothetical comparator referred to in paragraph 25?

Harassment

27 Did the Respondent engage in unwanted conduct which had the purpose or effect of (a) violating the Claimant's dignity, or (b) create an intimidating, hostile, degrading, humiliating or offensive environment for him by:

27.1 Fiona Spink and Stuart Kuttner of the Respondent making several calls to the Claimant's home and mobile telephones between 18 July 2006 and 20 July 2006, immediately after the Claimant had been signed off work due to ill health.

27.2 The Respondent's occupational health manager (Ann Carville) visiting the Claimant at home on 3 August in circumstances where the Claimant's union representative had told the Respondent that the Claimant would rather not meet with the occupational health and had requested that the appointment be cancelled.

27.3 Stopping the Claimant's sick pay on 4 August 2006 because the Claimant failed to attend a home visit by Ann Carville in circumstances where the Claimant's union representative had told the Respondent that the Claimant would rather meet with occupational health and had requested that the appointment be cancelled and informing the Claimant that failure to contact Ms Carville to organise a medical examination could be treated as a breach of contract which may lead to serious consequences.

27.4 Writing to the Claimant on 29 November 2006 in relation to his alleged disregard for company procedure, his alleged unwillingness to meet with the Respondent to any realistic degree or make any effort to comply with reasonable instructions,

27.5 Writing to the Claimant on 11 January 2007 informing him that he was required to visit the Company doctor or alternatively that a home visit from the Occupational Health manager, Ann Carville, could be arranged.

27.6 Writing to the Claimant on 25 January 2007 informing the Claimant that a further meeting with the Company doctor had been arranged at the Respondent's Occupational Health Centre or, alternatively, that a home visit from the Occupational Health Manager, Ann Carville, could be arranged, in circumstances where the Claimant had previously informed the Respondent that he would prefer to visit an independent doctor away from Wapping.

27.7 Refusing to exercise its discretion in accordance with its company policy to extend the period the Claimant was entitled to sick pay beyond its expiry on 10 February 2007.

27.8 The human resources department being provided with a copy of a private medical report prepared by Dr Shanahan regarding the Claimant by the Respondent's company doctor,

27.9 Writing to the Claimant on 22 February 2007 and requesting he attend a meeting with Lesley Kerry (HR Business Partner) and Paul Nicholas (Deputy Managing Editor) in all of the circumstances.

28 In considering the effect referred to in paragraph 4, the Tribunal is to have regard to all of the circumstances, including the perception of the Claimant, in determining whether it should be reasonably be considered as having that effect. (Sections 3B and 4(3) Disability Discrimination Act 1995 ("Harassment").

Disability-related Discrimination

29 Did the Respondent treat the Claimant less favourably on the grounds of his absence from work and/or his capability, which the Claimant alleges were reasons which related to the Claimant's disability compared to how the Respondent treated or would have treated others to whom that reason does not or would not apply, by:

29.1 Stopping the Claimant's sick pay on 4 August 2006 because the Claimant failed to attend a home visit by the Respondent's occupational health manager (Ann Carville), in circumstances where the Claimant's union representative had told the Respondent that the Claimant would rather not meet with occupational health and had requested that the appointment be cancelled, or to respond to Ms Carville's request to contact her and informing the Claimant that failure to contact Ms Carville to organise a medical examination could be treated as a breach of contract which may lead to serious consequences.

29.2 Stopping the Claimant's sick pay on 25 January 2007 as the Respondent alleged that they had not received a medical certificate covering the Claimant's continued absence. The Claimant alleges that such certificates had been sent to the Respondent.

29.3 Refusing to exercise its discretion in accordance with its company policy to extend the period the Claimant was entitled to sick pay beyond its expiry on 10 February 2007.

29.4 Terminating the Claimant's employment on 28 April 2007 owing to capability on the alleged basis that the Claimant was either unable or unfit for work for the forseeable future.

30 The Claimant relies on a hypothetical comparator in respect of the alleged acts or disability-related discrimination.

31 What are the attributes of a hypothetical comparator referred to in paragraph 14?

32 If the Tribunal finds that the Claimant was treated less favourably by the Respondent for a reason-related to his disability, is such treatment justified?

Failure to make Reasonable Adjustments

33 The Claimant contends that the Respondent was under a duty to undertake reasonable adjustments, and that the Respondent failed in that duty by:

33.1 Adhering to its practice of refusing to exercise its discretion in accordance with its company policy to extend the period the Claimant was entitled to sick pay beyond its expiry on 10 February 2007.

The Claimant alleges that he was at a substantial disadvantage by comparison with a hypothetical non-disabled comparator in that he received no company sick after 10 February 2007 which resulted in financial hardship and delayed his recovery/return to work.

33.2 Adhering to its practice of holding the disciplinary meeting, at which the Claimant's employment was terminated, in the Claimant's absence in circumstances where the disciplinary meeting had already been rescheduled five times due to the Claimant's and/or his representatives unavailability and where the Claimant was unable to attend such a meeting allegedly due to his health situation.

The Claimant alleges that he was at a substantial disadvantage by comparison with a hypothetical non-disabled comparator in that he was denied the opportunity of putting his case in person in relation to his potential return to work/dismissal.

33.3 Adhering to its practice of allegedly refusing to meet with the Claimant's representative in circumstances when the Claimant was allegedly not well enough

to meet with the Respondent himself.

The Claimant alleges that he was put at a substantial disadvantage by comparison with a hypothetical non-disabled comparator in that he was denied the opportunity, through his representative, to put his case in relation to his dismissal and/or steps which might assist his return to work and/or the state of his health.

33.4 Adhering to its practice of advising the Claimant that he was required to meet with the Respondent's company doctor or occupational health service without advising the Claimant of the option to meet with an independent doctor.

The Claimant alleges that he was out at a substantial disadvantage by comparison with a hypothetical non-disabled comparator in that requiring him to meet with the company doctor or occupational health (which the Respondent knew he was unwilling to do) rather than an independent doctor, the Respondent created a situation where it could later appear to justify the exercise of discretion against the Claimant in respect of extending sick pay.

33.5 Not to dismiss the Claimant.

34 If there was duty to make reasonable adjustments and it is found by the Tribunal that the Respondent failed to comply with that duty, would the less favourable treatment have been justified even if the Respondent had complied with that duty?

35 Which of the acts and/or omissions complained of by the Claimant as constituting direct discrimination, harassment and/or disability-related discrimination, as the case may be, are in time? (Paragraphs 3(1) and 3(3), schedule 3 Disability Discrimination Act 1995).

36 To the extent that any of the matters complained of are out of time, it is just and equitable to extend time pursuant to paragraph 3(2), schedule 3 of the Disability Discrimination Act 1995?

The Relevant Law

Unfair dismissal

37 S.98A Employment Rights Act 1996 provides:

"(1) An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if –

(a) one of the procedures set out in part 1 of schedule 2 of the Employment Act 2002 (Dismissal and Disciplinary Procedures) applies in relation to the dismissal;

(b) the procedure has not been completed, and

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

(2) Subject to (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of s.98(4)(a) as by itself making the employers' action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure."

38 In most instances the statutory dismissal procedures apply to the dismissal of the Claimant.

39 Schedule 2, Part 1 Employment Act 2002 sets out a 3 step procedure that is required if an employee is to be dismissed. In addition, Part 3 of schedule 2 Employment Act 2002 sets out general requirements which apply both to the statutory dismissal procedures and statutory grievance procedures.

40 There have been a large volume of cases dealing with the interpretation of the statutory dismissal procedures. A recent case, *Selvarajan v Wilmot [2008] EWCA 862* gives guidance on the issue of whether or not statutory dismissal procedures have been completed.

41 Section 98A Employment Rights Act 1996 provides, therefore, that if the non completion of the statutory dismissal procedures is wholly or mainly attributable to failure by the employer to comply with its requirements, the dismissal is automatically unfair.

42 If the dismissal is not automatically unfair by virtue of s.98A(1) Employment Rights Act 1996, it is necessary to consider what was the reason, or principal reason, for the dismissal of the employee.

43 Section 98(1) Employment Rights Act 1996 provides that it is for the employer to show the reason or principal reason for the dismissal. Section 98(2) provides reasons for dismissal that are potentially fair. A dismissal will also potentially be fair if it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

44 The Respondents' stated reason for the dismissal of the Claimant was on the grounds of capability. Capability is defined in s. 98(3) as meaning "*capability assessed by reference to skill, aptitude, health or other physical or mental quality*".

45 Guidance was given in the case of *ASLEF v Brady [2006] IRLR 576* that:

> "*Dismissal may be for an unfair reason even where a fair reason, such as misconduct, exists. If the employer treats the fair reason as an excuse to dismiss an employee in circumstances in which he would not have treated others in a similar way, then the principal reason for dismissal will not be the fair reason at all. The question is whether the employer has proved that the fair reason was the principal reason for the dismissal*".

46 In the case of *Stein v Associated Dairies Ltd [1982] IRLR 447* it was stated that:

> *"If there is anything to suggest that the warning had been issued for an oblique motive or if it was manifestly inappropriate, that is a matter which a Tribunal could take into account".*

47 If the employer is able to satisfy a Tribunal that the dismissal was for a reason falling within s.98(1) or (2) Employment Rights Act 1996, it is necessary for a Tribunal to consider s.98(4). This provides that whether the dismissal is fair or unfair depends on whether, in the circumstances, (including the size and administrative resources of the employers' undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. This is an issue to be determined in accordance with equity and the substantial merits of the case.

48 Consideration of s. 98(4) above may require considering both the fairness of the procedures adopted by the employer and the fairness of the sanction of dismissal. The burden of proof is neutral in this respect. Guidance has been given as to the test to apply, both in respect of the procedures adopted and the sanction of dismissal. An Employment Tribunal's function, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.

49 In addition, a Tribunal will consider, where relevant, the guidance given in the ACAS Code of Practice on disciplinary and grievance procedures. The ACAS Code gives guidance on dealing with absences from work on the grounds of ill health. Paragraph 38 of the guidance provides that, if the absence is due to genuine (including medically certificated) illness, the issue becomes one of capability, and the employer should take a sympathetic and considerate approach. It is helpful to consider how soon the employees health and attendance will improve; whether alternative work is available; the effect of the absence on the organisation; how similar situations have been handled in the past; and whether the illness is a result of a disability in which case the provisions of the Disability Discrimination Act 1995 will apply.

50 Guidance was given in the case of *McAdie v Royal Bank of Scotland [2007] EWCA 896* that the fact that an employer has caused the incapacity of an employee, however culpably, cannot preclude him forever from effecting a fair dismissal. The guidance of the Employment Appeal Tribunal was approved, including that where an employer is responsible for an employee's incapacity, that may be *"relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity"*. It may, for example, be necessary in such a case to 'go the extra mile' in finding alternative employment for such an employee, or to put up with a longer period of sickness absence that would otherwise be reasonable.

Disability Discrimination Act – Time Limits

51 The primary time limit for bringing a complaint under the Disability Discrimination Act 1995 is for the complaint to be presented to the Employment Tribunal before the end of the period of 3 months beginning when the act complained of was done. This provision is, however, subject to various qualifications.

52 Firstly, schedule 3 paragraph 3(3)(b) provides that any act extending over a period shall be treated as done at the end of that period. Guidance was given in the case of *Hendricks v Commissioner of Police for the Metropolis* that:-

> "*In determining whether there was* "an act extending over a period", *as distinct from a succession of unconnected or isolated specific acts, from which time would begin to run from the date when each specific acts was committed, the focus should be on the substance of the complaints that the employer was responsible for an on-going situation or a continuing state of affairs*".

53 Secondly, where the statutory grievance procedures apply and the employee has complied with step 1 of those procedures, Regulation 15 Employment Act (Dispute Resolution) Regulations 2004 may have the effect of extending the normal time limit by a further period of 3 months.

54 Thirdly, a Tribunal has power to consider a complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

Disability Discrimination Act –Burden of Proof

55 Section 17A(1)(C) DDA provides that where the complainant proves facts from which the Tribunal could, apart from this sub section, conclude in the absence of an adequate explanation that the Respondent has acted in a way which is unlawful under this part, the Tribunal shall uphold the complaint unless the Respondent proves that he did not so act.

56 Guidance was given in the case of *Igen Ltd v Wong [2005] IRLR 258* as to the interpretation of the burden of proof in discrimination cases. This set out a staged process, involving 13 steps, as to the approach for the Tribunal to take. We adopt this guidance although we do not set it out.

57 Various cases, subsequently, have given further guidance as to when the burden of proof shifts to the Respondent, such as the case of *Madarassy v Nomura International Plc [2007] IRLR 246*. It is also important to bear in mind the guidance given in various cases, including in *Shamoon v Chief Constable of the Royal Ulster Constabulary (2002) IRLR 285* of the need to focus on why the Claimant was treated in the ways he or she have been found to have been treated- was it on the proscribed ground or was it for some other reason?

Disability Discrimination Act 1995 – Direct Discrimination

58 Section 3A(5) provides:-

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

59 Guidance on the identification of a comparator with which to compare the experiences of the Claimant is given in the case of *High Quality Life Styles Ltd v Watts [2006] IRLR 850.*

Disability Discrimination Act 1995 – Harassment

60 Harassment is defined in s. 3B Disability Discrimination Act 1995 which provides:-

> *"(1) ....a person subjects a disabled person to harassment where, for a reason which relates to the disabled person's disability, he engages in unwanted conduct which has the purpose or effect of –*
>
> *(a) violating the disabled person's dignity or*
>
> *(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.*
>
> *(2) Conduct shall be regarded as having the effect referred to in paragraph (a) or (b) of (i) only if, having regard to all the circumstances, including in particular the perception of the disabled person, it should reasonably be considered as having that effect".*

61 Section 18D Disability Discrimination Act 1995 provides that a matter that is defined as a "*detriment*" for the purposes of direct disability discrimination, disability related discrimination, failure to make reasonable adjustments or disability discrimination victimisation, cannot also amount to disability discrimination harassment. In other words disability discrimination harassment amounts to a separate "tort" from other forms of disability discrimination.

Disability Related Discrimination

62 Section 3A Disability Discrimination Act 1995 provides that 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.

63 Section 3A(3),(4) and (6) deal with what amounts to justification.

64 Guidance was given on the issue of comparators for disability related discrimination in the case of *London Borough of Lewisham v Malcolm [2008] IRLR 700.* It was decided that the case of *Clark v Novacold Ltd [1999] IRLR 318* was wrongly decided. It was stated that if a person has been dismissed because he is incapable of doing his job, there is no point making the lawfulness of his dismissal dependent on whether those who are capable of doing their job would have been dismissed.

65 Guidance was also given as to the alleged discriminators state of knowledge required in order for the reason to *"relate to"* the disability. It was stated that it is necessary that he discriminator knows of, or ought to know of, the disability, at the time of the alleged discriminator's act. Unless the discriminator has knowledge or imputed knowledge of the disability, he cannot be guilty of unlawful discrimination.

66 Guidance as to the state of knowledge require of an employer was also given in the case of *Taylor v OCS Group Ltd [2006] IRLR 613.* There it was stated that, in order for an employer to be said to have acted for a reason which related to the disabled person's disability, the disability-related reason must be present in the employer's mind. Where there is more than one reason for treating the disabled employee differently, if the disability-related reason had a significant influence on the employers' decision, that would be enough to conclude that the decision was for a reason related to the employee's disability. It is also open to a Tribunal to find that the decision had been affected by the disability-related reason even though the employer had not consciously allowed that reason to affect his thinking. The disability-related reason must affect the employers' mind, whether consciously or subconsciously. Unless that reason has affected his mind, he cannot discriminate.

67 So far as justification is concerned, it has been held that the range of reasonable responses test applied in unfair dismissal cases (described above) applies also the issue of justification in disability-related discrimination.

Disability Discrimination - Reasonable Adjustments

DDA – Reasonable Adjustments

68 Section 4A Disability Discrimination Act 1995 provides that when a provision, criterion or practice ("PCP") applied by or on behalf of the employer places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case in order to prevent the PCP having that effect.

69 Section 4A(3) Disability Discrimination Act 1995 provides that nothing in that section imposes any duty on an employer in relation to a disabled person if the person

does not know, and could not reasonably be expected to know, that the person has a disability and is likely to be affected in the way mentioned above.

70 Section 18B(1) sets out provisions on whether it is reasonable for a person to have to take a particular step in order to comply with the duty to make reasonable adjustments.

71 Section 18B(2) Disability Discrimination Act 1995 gives examples of the types of steps to be taken. The steps concerned are examples, not an exhaustive list.

72 Guidance was given in the case of *Environment Agency v Rowan [2008] IRLR 20* as to the approach to be taken in considering a reasonable adjustments claim. It is necessary to identify the provision, criterion or practice applied by or on behalf of the employer; the identity of non-disabled comparators (where appropriate); and the nature and extent of the substantial disadvantage suffered by the Claimant.

73 Guidance on the issue of the payment of sick pay and reasonable adjustments was given in the cases of *Nottinghamshire County Council v Meikle [2004] IRLR 703* and *O'Hanlon v Commissioners for HM Revenue and Customs IRLR 404*. The Court of Appeal approved the judgment of the Employment Appeal Tribunal in that case. The Employment Appeal Tribunal gave guidance that it will be a very rare case where giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability-related absence would be considered necessary as a reasonable adjustment.

74 The Employment Tribunal has a duty to take into account the Disability Rights Commission's Code of Practice on Employment and Occupation, where the guidance is relevant.

The Evidence

75 On behalf of the Respondent the Tribunal heard evidence from the following witnesses:

75.1 Ann Paul, Director of Human Resources for the Respondent

75.2 Ann Carville, Occupational Health Manager for the Respondent

75.3 Dr Andrew Deuchar, Occupational Health Doctor for the Respondent.

75.4 Fiona Spink, Human Resources Business Partner at the relevant time for the Respondent.

75.5 Stuart Kuttner, Managing Editor for the News of the World.

75.6 Rosemary Ryde, Senior Legal Counsel for the Respondent.

75.7 Mike Dunn, Sports Editor of the New of the World at the relevant times.

75.8 Paul Nicholas, Deputy Managing Editor for the News of the World.

76 On behalf of the Claimant the Tribunal heard evidence from:

76.1 Steve Turner of the British Association of Journalist and union representative for the Claimant.

76.2 The Claimant himself

76.3 Robert Driscoll, the Claimant's father.

77 In addition the Tribunal considered the documentation to which we were referred from two lever arch files of documents.

Findings of Fact

78 We set out below the findings of fact we consider relevant and necessary to determine the issues we are required to decide. We do not seek to set out each detail of what occurred or adjudicate on every dispute as to the facts. If we did our judgment would be even longer than in already is. We have, however, considered all the evidence provided to us and we have borne it all in mind.

79 The Claimant was employed by the Respondent from 24 June 1997 until he was dismissed by a letter dated 26 April 2007.

80 Throughout the period of the Claimant's employment with the Respondent he worked for the News of the World. The News of the World is published by News Group Newspapers Limited, the Respondent, which is part of the News International Group of Companies. The News of the World Newspaper has about 250 employees and, additionally, individuals that work on a free lance or casual basis. News International has about 4,000 employees. The Respondent is, therefore, a large employer, although News of the World is a relatively small one.

81 From 1997 to 2001 the Claimant was based in North Eastern England. Between 2001 and his dismissal he was based at the company's head office in London.

82 Whilst the Claimant was based in London, from 2005 until his dismissal the management hierarchy was described by Mr Nicholas as being as follows:

82.1 Mr Allan, Deputy Sports Editor

82.2 Mr Dunn, Sports Editor

82.3 The Management Team consisting of Mr Nicholas (Deputy Managing Editor, Mr Kuttner, Managing Editor, Mr Wallis, Deputy Editor and Mr Coulson, Editor. In January 2007 Mr Coulson left and was replaced by Mr Myler.

83 Between 1997 and 2001 the Claimant was promoted twice. We were provided with copies of his annual staff assessment appraisals for 1998, 1999 and 2001. In these three years he was classified as "very good", "good" and "good". The comments given in each of these appraisals by Mr Dunn were very positive. There was one slight reservation in the 2001 assessment "he does not pull as many stories as we would ideally like". Above that he wrote, however, "he has made excellent contacts in the North, can be a gifted writer".

84 The Claimant's promotions and positive assessments are significant in the context of what was to occur later. The promotions and favourable comments show the Claimant to have been, at least up to that point, a successful, well regarded tabloid sports journalist. It is significant because, ordinarily, it is slightly surprising for someone to go from being a successful sports journalist to an unsuccessful one. Of course, employees' performance or conduct at work can deteriorate for a number of reasons. Ordinarily, however, one would expect an employee who has been successful for several years to continue to be successful unless there are good reasons for a deterioration in performance.

85 The Claimant wanted to relocate to London. Mr Dunn sent an email to Mr Coulson, dated 18 January 2001 outlining various changes that he regarded as being absolutely essential to the success of the papers sports section. Amongst the changes was a request that Mr Driscoll be promoted to Chief Footballer Writer and asked to move from Manchester to London. His pay would rise by £6,000 from the £44,000 he was on at the time. Two other sports writer were recommended for pay increases of £6,000. Amongst his comments about Mr Driscoll he stated "I really feel we had the opportunity to publish a weekly interview that has the space to be beautifully written and I believe Matt has the ability to do this".

86 Mr Dunn's proposals for the Claimant were approved and Mr Dunn wrote a letter, dated 20 March 2001, confirming his move and new terms. He was told that he would be given a title of "something like chief sports features writer" and inform that his pay rise was not conditional on his move to London. There was a dispute between the parties as to whether or not the Claimant's initial intended job offered to him was taken over by a newly appointed journalist, Mr Samuel. This dispute does not seem particularly important as the appointment of Mr Samuel occurred several years before there was any evidence of any significant problems in the Claimant's relationship with his managers.

87 The first significant dispute of fact between the Claimant and the Respondent is whether, before the Claimant was relocated to London, Mr Dunn was increasingly concerned about the Claimant productivity, quality of stories and the source of those stories; and that he was not in reality promoted to his position in London, but moved there so that Mr Dunn could keep a closer eye on him (as was Mr Dunn's evidence to the Tribunal); or whether his move to London was a promotion and Mr Dunn had no such misgivings at the time about the Claimant. We find that Mr Dunn has, with the benefit of hindsight and in order to attempt to bolster the Respondent's case, exaggerated any shortcomings the Claimant may have had. We so find because:

87.1 The contemporaneous documentation is more convincing to us than a witness statement produced for the purpose of defending these proceedings. The documentation is consistently positive and enthusiastic about the Claimant's

abilities, albeit with the reservation we referred to above.

87.2 Mr Dunn described the Claimant's move, in his email to Mr Dunn, as being a promotion and also obtained a substantial pay rise, not dependant on his move to London. It is highly unconvincing that Mr Dunn would have taken such steps if he had any significant genuine concerns about the Claimant.

87.3 We also have in mind other problems we have with Mr Dunn's evidence to the Tribunal, some of which we will describe below.

88 The Tribunal was provided with one further staff assessment, for 2002, for the Claimant. His assessment was downgraded to "satisfactory", with the reservation that although he occasionally excelled, he did not produce a steady enough flow of stories. No appraisals were produced for 2003, 2004 or 2005. When cross examined on this Mr Dunn stated that they might have stopped and that he communicated by talking to the staff he managed. The absence of any written documentation by Mr Dunn to back up what he now describes to have been long standing concern of his about the Claimant is surprising. At best there appears to be some double standards in this, given his later criticisms of the Claimant for failing to have sufficient documentary evidence to back up his articles. We infer from the absence of any documented criticisms of the Claimant between 2002 and the events to which we will refer in 2005, that Mr Dunn had no significant concerns about the Claimant's work between those dates.

89 We now turn to a disputed matter, namely whether Mr Coulson turned against the Claimant as a result of an incident late in 2004. The dispute between the Claimant's evidence and that of Mr Dunn is as follows. The Claimant's version is that he was given a tip by Mr Coulson that Arsenal football club were planning to play in purple coloured shirts and was asked to investigate the tip; he telephoned the press officer at Arsenal, Amanda Doherty, who denied it; he, therefore, did not print the story but, about three months later the Sun newspaper did; and the Mr Dunn said to the Claimant that "Coulson will be on the warpath over this. We are dead". Mr Dunn denies any such conversation with the Claimant. We find that such a conversation did take place because:

89.1 The conversation is consistent with documentary evidence (to which we will refer below) of Mr Coulson being hostile to the Claimant in 2005, although there is no documentary evidence of Mr Coulson being hostile towards the Claimant prior to this, either when he was editor or deputy editor of the News of the World.

89.2 For reasons to which we will refer in greater detail below, we found the Claimant's evidence to be more convincing than that of Mr Dunn, or any of the Respondent's witnesses.

1st disciplinary warning against Claimant

90 Shortly after the July 2005 London bombings the Claimant wrote an article about Kolo Toure, the Arsenal footballer, in which he wrote about Mr Toure's religious faith, including providing quotations from him. In view of the recent London bombings the article was published at a sensitive time.

91 Arsenal football club were upset about the article. Their press officer, Ms Doherty, sent a complaint to Mr Dunn by email dated 2 August 2005. Amongst her complaints was that, although they had been upset in the past when players' quotations had been spun and taken out of context he was putting words into Mr Toure's mouth that he had not said.

92 It is not unusual for clubs to make complaints about News of the World journalists. Indeed, the Claimant's evidence, accepted by Mr Dunn in cross-examination, was that in 2005, five of their journalists had been banned by football clubs for writing stories that the clubs did not like.

93 Mr Dunn contacted the Claimant and asked him to provide him with the taped interview with Mr Toure, together with a copy of his notes of the other interview. At that time he was on holiday, but returned from Manchester to Kent to find a copy of the recording. He emailed Mr Dunn a copy of the recording on 3 August 2005.

94 Mr Dunn could not open the Claimant's email attachment, so he asked the Claimant for a transcript. The Claimant returned from holiday on 9 August and, on 10 August, provided a transcript for Mr Dunn.

95 Meanwhile, Mr Dunn wrote by email dated 5 August 2005 to Ms Doherty apologising for the delay. Mr Dunn went on holiday between 13 August and 1 September, during which time no steps were taken to progress the matter. Mr Dunn did not ask anyone to act on the complaint whilst he was on holiday. Ms Doherty made a complaint to the Press Commission, dated 31 August 2005. She complained about inaccuracies, failure to respect privacy and Mr Dunn's delay from 5 August in not providing any further communication to resolve the matter.

96 In summary, Mr Dunn was at least as much to blame for any delays as the Claimant. He accepted as much on 21 September 2005 in an email to Mr Wallis when he stated that Mr Kuttner had told him to keep on top of the case and to keep Arsenal informed; and he accepted that he failed to keep the club fully up to date. In cross-examination he also accepted that he was at fault. Yet in his statement to the Tribunal he described the Claimant as having been purposely delaying matters and made no suggestion that he was himself at fault. This is another example of Mr Dunn exaggerating his evidence to the Tribunal with the benefit of hindsight. He did not suggest at the time that the Claimant was purposely delaying matters.

97 Although Arsenal football club informed the Press Complains Commission that they would be satisfied with an apology from the News of the World, no apology was provided. Nor was the issue subject to any litigation.

98 The senior management of the News of the World became involved in the issue of the Arsenal football club complaint. Mr Dunn wrote to Mr Wallis the Deputy Editor by email dated 21 September 2005, setting out his account of events. The bulk of his message concerned the delays in dealing with the matter, rather than inaccuracies in the article. Included in his explanation of the delays was an acceptance of fault on his own part, as referred to in paragraph 59 above. He stated that Stuart Kuttner "told me to keep on top of the case and to keep Arsenal informed. I accept I failed to keep the club fully up to date during this period".

99 Mr Kuttner decided that Mr Thompson would carry out a disciplinary investigation. Mr Thompson wrote to the Claimant stating that he had been appointed as an investigating officer and that he would compile a report for the editor and managing editor to decide whether or not there was an unacceptable delay in dealing with the complaint from Arsenal football club and whether or not they were unacceptable inaccuracies in his article.

100 Mrs Spink wrote to the Claimant, by a letter dated 6 October 2005, notifying him that a disciplinary hearing would take place to consider allegations of inaccuracies in his interview with Toure and an unacceptable delay in dealing with the complaint. The decision to appoint Mr Dunn to hold the disciplinary hearing was taken by Mr Kuttner.

101 A disciplinary hearing took place on 19 October 2005, at which the Claimant represented himself. Mrs Spink acted as the Human Resources Adviser to Mr Dunn. The first part of the disciplinary hearing focused on the allegations of delays and the second part on the allegations of inaccuracies.

102 Mr Dunn's decision was to issue the Claimant with a first written warning in respect of the allegations. He concluded that his standards of professional behaviour had fallen below an acceptable standard because his quotations were not backed up by a taped verbatim note. So far as the allegation of unacceptable delay is concerned, he noted that there were some mitigating points. He did not, however state that he (Mr Dunn himself) had also been guilty of delay.

103 In cross-examination Mr Dunn was asked about the unfairness of him holding a disciplinary hearing on the issue of delay, when he had already admitted that he (Mr Dunn) was also guilty of delaying. When so pressed Mr Dunn stated that the inaccuracies were 99 percent of what bothered him. This reply was plainly exaggerated because:

103.1 His reply is contradicted by the contemporaneous documentary evidence, referred to above, showing that the issue of the Claimant's delay in responding to the complaint was very much part of the disciplinary action taken. If it had only been 1 percent of what bothered him it is difficult to understand why such coverage should have been devoted to it.

103.2 In Mr Dunn's witness statement he stated that he considered the Claimant's delay to have been unacceptable. Further than this he stated the he felt that Mr Driscoll was purposefully delaying matters. This was never something alleged against him at the time, which suggests that Mr Dunn has exaggerated events with the benefit of hindsight in order to seek to justify his actions.

103.3 The Claimant gave his evidence before Mr Dunn, who was unavailable at the first hearing. The tenor of Mrs Beech's cross-examination of the Claimant was that Mr Dunn was justified in issuing him with a disciplinary warning both in respect of inaccuracies and delays. If Mr Dunn opinion and instructions had truly been at the time that 99 percent of the problem was the inaccuracies, Mrs Beech would have been likely to have cross-examined the Claimant in a manner that was more consistent with Mr Dunn's evidence.

104 Mr Kuttner wrote to Mr Coulson by email dated 9 November 2005. The contents of what he wrote are telling. He stated that the situation was not black and white enough to dismiss Matt Driscoll. He went on to state "of course we could still fire him: and pay the going rate for that. Mike Dunn tells me Driscoll can't be got shot off?" The decision to give the Claimant a first warning, although the outcome of a disciplinary hearing chaired by Mr Dunn, was made by Mr Kuttner, with the agreement of the editor, Mr Coulson.

105 The Claimant felt that it was highly unfair for Mr Dunn to have issued him with a warning. He wrote a letter, dated 10 November 2005, to that effect and copied it to Mr Coulson. He informed him that although he could not accept the criticisms made of them because he believed them to be unfounded, in the interests of harmony he had decided not to appeal against the decision.

106 Mr Coulson responded to Mr Driscoll's letter. The contents of his response are also very telling. He stated "I also disagree with the adjudication. In my view your actions on this matter merited dismissal". He went on to state that his performance would be monitored closely and that if it did not improve, or if there was a repeat of any the failings, further disciplinary action may be invoked against him. He offered no words of encouragement. In the context of Mr Coulson being the Editor of the paper this was a bullying remark. A less bullying response might have been to encourage him to take the criticisms on board and work with Mr Dunn to improve his performance and reputation to its former high standards.

Reason or principal reason for disciplinary actions against the Claimant

107 We turn now to another dispute of fact. One of the Claimant's contentions in this case is that the reason or principal reason for his dismissal was simply that the Respondent wanted to remove him; and that the disciplinary action over the Toure article was a pretext and formed part of a continuous chain that was subsequently to lead to his dismissal. In contrast, the Respondent maintains that the dismissal, and disciplinary processes prior to it were justified and reasonable. Did the Respondent commence disciplinary action against the Claimant in September 2005 and subsequently because of genuine misconduct on his part, or out of a desire to remove him? We find that the disciplinary action over the Toure article, subsequent disciplinary action over an article he wrote about the then Charlton manager, Alan Curbishley and proposed disciplinary action about failure to comply with an instruction to attend the office at 10.00am each morning (the latter two we will refer to in more detail later) was a pretext. It was a pretext for Mr Coulson's desire to "get shot of" the Claimant which was accepted by other members of the Respondent's senior management team. We so find because:

> 107.1 On the face of it the Claimant's article involved inaccuracies, which might suggest it may have been within the range of reasonable responses of a reasonable employer to have embarked on disciplinary action in response to it. It was clearly not reasonable to discipline him for a delay for which Mr Dunn was at least equally responsible, without also taking action, or at least giving some active consideration to doing so, against Mr Dunn. The Arsenal football club made their complaint to Mr Dunn, not the Claimant, and it was his responsibility as a manager to ensure that he dealt with it. Going on holiday without leaving any instructions on to his deputy to follow the matter up was, at the least negligent. When cross-

examined Mr Dunn stated that he was "subliminally" hoping the matter would go away. Yet, so far as we are aware, Mr Dunn was not even reprimanded for this delay and he was asked to conduct the disciplinary hearing.

107.2 Mr Turner, the Claimant's union representative, was an impressive witness. He gave unchallenged evidence that he was involved in three similar cases to that of the Claimant at the News of the World which had each taken the same path. In each case the journalist was unreasonably subjected to disciplinary proceedings, realised that the newspaper felt his face did not fit any more and that they were trying to drive him out; and asked him if a severance package was available to resolve the matter. In each case the suggestion of a severance package was raised by the journalist concerned and taken up by management. The Respondent's actions in this case are entirely consistent with what Mr Turner has described in the other cases.

107.3 Mr Coulson's letter to the Claimant, telling him that he thought he should have been dismissed, is also consistent with Mr Turner's evidence about this and the three other cases with the News of the World. Mr Coulson's comments made the Claimant well aware that the editor no longer wanted him. It is hardly surprising that he should subsequently initiate discussions for a severance package.

107.4 In the course of subsequent disciplinary hearings Mr Turner made a number of requests for evidence that other journalist had been disciplined on similar grounds. His requests were ignored. This evasiveness on the Respondent's part suggests strongly that there have been no such disciplinary processes undertaken.

107.5 Mr Turner also raised the comparison of the journalist in the libel action involving Wayne Rooney. A successful libel action was taken against the News of the World for allegations made against Wayne Rooney. His request was brushed aside by Mrs Spink (as referred to at paragraph 120 below).

107.6 Both Ms Paul and Mrs Spink accepted, when cross-examined, that they had never been involved in disciplinary action involving inaccuracies in articles by journalists. They were both long standing, senior human resources employees who would have almost certainly have known if any such actions had been taken.

107.7 When Mr Kuttner was cross examined along similar lines about evidence of other disciplinary action against journalists for inaccuracies his responses were evasive.

107.8 At the start of the resumption of this hearing, Mr Sheridan (the Claimant's counsel) arrived at the Tribunal with a copy of the judgment in the case of *Mosley v News Group Newspapers Limited [2008] EWHC 1777.* We have read the judgment. It makes instructive reading. It is instructive partly because it is evident that the misconduct committed by Mr Thurlbeck, the journalist concerned, was of a totally different magnitude to that of the Claimant. He was found to have blackmailed one of the prostitutes involved in the case to give an interview; he

took no written notes to confirm his quotations; and included an allegation that was plainly false and he must have been known to be false.

107.9 Mr Sheridan cross-examined Mr Nicholas on the issue of whether Mr Thurlbeck has been subject to any disciplinary action in respect of his article. Asked whether Mr Thurlbeck had been disciplined by the News of the World Mr Nicholas replied that he did not know, although he reluctantly accepted that he is still employed by them. Mr Nicholas's evidence that he did not know whether Mr Thurlbeck had been disciplined in relation to the issue was, at the very least, disingenuous. He described the senior management team at the News of the World as being "close knit". This is plausible as the workforce is comparatively small. It is also confirmed by the very active involvement of the senior management team of the News of the World in the disciplinary actions against the Claimant. We do not believe Mr Nicholas's professed ignorance. Furthermore, Mr Sheridan made it abundantly clear that he would be cross examining Mr Nicholas on the issue. Mr Sheridan arrived at the Tribunal with copies of the judgment in the Mosley case. He stated that he would be cross examining Mr Nicholas on the comparison of the treatment of the Claimant with that of the journalist in the Mosley case. The timetable for the day was that Mr Nicholas would not be giving evidence until the afternoon and he did not do so. Even if, therefore, (which we do not believe) Mr Nicholas did not already know the true position regarding Mr Thurlbeck it is very likely indeed that either Mr Nicholas, or someone within the Respondent's team, would have checked what the position was with Mr Thurlbeck. It would have been a point in their favour if they had been able to say that he had been disciplined for his conduct in the matter. We consider, and find, that Mr Nicholas's response was more than disingenuous. He was, to put it plainly, lying to us in this part of his evidence, as contended by Mr Sheridan on the Claimant's behalf.

Final Disciplinary Warning against the Claimant

108 After the Claimant's disciplinary warning some efforts were made, at least initially, by Mr Dunn to improve working relationships. He wrote an email, dated 6 December 2005, stating "I meant it when I said lets start afresh and get on with the job and I have noted that is exactly what you have done". This is also consistent with the Claimant telling Dr Shanahan (for the purpose of a medical report to which we will refer later) that Mr Dunn had tried to smooth things over.

109 Not for the first time, the contemporaneous evidence of Mr Dunn is inconsistent, therefore, with his witness statement to this Tribunal, where he complained that, following the first disciplinary, Mr Driscoll seemed to be distancing himself and failing to report in. In his witness statement he gives the Claimant no credit for having made even, in his eyes at the time, a temporary improvement.

110 On 22 March 2006, Mr Dunn received a complaint from the press officer at Charlton Athletic Football Club in relation to an article he had prepared concerning the club's manager, Alan Curbishley.

111 The details of the Claimant's article subsequently (after the Claimant was disciplined in relation to the matter), turned out to be true. A fair description of what took place would

be that the Claimant took a short cut in relying on another journalist as his source and not carrying out checks himself.

112 Mr Dunn referred the issue to Mr Kuttner. Mr Kuttner decided to appoint Mr Nicholas to hold a disciplinary hearing in respect of the issue.

113 By this stage the Claimant was feeling very stressed. He discussed the issue with Mr Turner, his union representative. Mr Turner advised him to consider approaching the News of the World about a severance package. He wrote a letter to Mr Dunn, dated 12 April 2006, expressing bewilderment over the recent events. He asked whether it would be better to reach an amicable settlement as to severance terms. The Claimant's evidence, which we find convincing in view of the tentative manner in which he made the suggestion, was that he hoped that Mr Dunn would seek to dissuade him. Instead, Mr Dunn agreed to find out. Negotiations were started, although they were unsuccessful.

114 Meanwhile, the disciplinary action was progressed. Mr Nicholas asked for advice as to whether the Claimant could be dismissed. His mindset at the time, although denied at this Tribunal, was reasonably clear to us. A disciplinary hearing was convened, unlike for the first disciplinary warning, without having a disciplinary investigation. Instead, Mr Nicholas asked for advice on whether the Claimant could be dismissed over the issue. He stated, in advance of the disciplinary hearing that the Claimant had "blatantly lied" about the quotations he had obtained. He wanted to see whether the Claimant would admit at the disciplinary hearing that he had lied. He advised Mr Wallis that the Legal and HR advice was that they probably could not successfully dismissed him, because this issue was not sufficiently worse than the first to merit skipping a final warning and dismissing him.

115 Unfortunately for Mr Nicholas, in view of his expressed inclination to dismiss the Claimant, the Claimant did not admit to lying. Instead, Mr Turner represented him at the disciplinary hearing with, from what we can see of the notes the disciplinary hearing, some determination. Amongst the points made by him was a request for comparisons with other complaints made in similar situations.

116 After the disciplinary hearing Mr Nicholas wrote to Mr Coulson and Mr Kuttner. He reported Mr Turner's request for comparisons and information about the Rooney story. He stated that, in the light of the disciplinary hearing he felt that he had enough to give the Claimant a written warning rather than "safely dismissing". Mr Coulson replied authorising him to "go ahead with final warning". Mr Nicholas did not provide Mr Turner with the comparisons that had been requested.

117 Mr Nicholas was cross examined about the contents of his emails with the senior management team. His explanation for some of the contents was that they were a form of "robust shorthand".

118 We have given some examples of the exchanges among the senior management team. The impression give to us, from reading the documentation and considering the evidence as a whole, was that the senior management team were going through a cynical process of giving an appearance of fairness towards him. By giving him a first warning, final warning and then dismissal they hoped to avoid a successful unfair dismissal claim.

Pursuing a twin approach of both taking disciplinary action and discussing a settlement that would lead to a possible compromise agreement would also be a way of being able to settle a possible claim at a modest level. It is interesting to note that the negotiating continued in a sporadic fashion until the time of the Claimant's dismissal; but failed because of a difference of 3 months pay between what the Respondent was prepared to offer (9 months salary) and what the Claimant was prepared at that time to accept (12 months pay). These very lengthy proceedings would not have taken place had they been able to reach a compromise agreement to settle their differences, with the difference between what the Respondent was prepared to offer, and the Claimant prepared to accept being, at least at that time, relatively small.

119 The Claimant was issued with a final warning. He appealed against it, through Mr Turner, on the basis that the allegations were unfounded; and that they were unreasonable because no similar action had been taken against other sports writers in similar circumstances. Mr Turner asked for information on the number of complaints received from clubs in the past nine years; and whether other sport writers had been the subject of complaints. These requests for information were, once again, ignored.

120 The appeal took place on 18 May 2006, held by Mr Wallis, the Deputy Editor. When Mr Turner raised the issue of comparisons with the journalist writing about Mr Rooney, Mrs Spink brushed off his request. The appeal was unsuccessful.

121 The Claimant continued to feel very stressed. This is entirely understandable. He had been subject to two unjustified disciplinary hearings, as set out above, that had taken place as a pretext to justify the editors desire to get rid of him.

122 Moreover, the Claimant was being put in a position where his working life was being made very difficult indeed. He knew that the editor wanted him out. He knew that his sports editor was happy to see him go, having agreed to his suggestion of a settlement. We also accept Mr Turner's evidence that an investigative sports journalist, such as the Claimant, needed the support of his managers in order to do his job. Clearly he did not have it. This would damage the confidence of most employees. Further, if the Claimant wrote an article that a club complained about he knew that he would be very likely to face dismissal. In contrast no other journalist against whom a complaint had been made from a football club would be subjected to any disciplinary process.

Proposed Third Disciplinary proceedings

123 We turn next to events leading up to what were intended to be a third set of disciplinary proceedings.

124 There is a conflict of evidence as to whether the Claimant distanced himself by not taking sufficient steps to keep in touch with the sports desk or not. This dispute is relatively unimportant as, whether he did or not, the senior management team were intent on seeking a reason to dismiss him. There is no evidence of any genuine desire, apart from the email we have referred to from Mr Dunn above, for him to improve his performance and conduct. We find that the Claimant was making less contact with the sport desk and producing less stories (understandably in view of the grounds for the final warning issue to him) but that Mr Dunn has exaggerated the extent to which he did so.

We so find because Dr Shanaghan stated (in a medical report to which we will refer below) that, in an attempt to cope with the treatment he was receiving at work, he started drinking heavily. It is likely, therefore, that there was some deterioration in the Claimant's work. We so find because there is no contemporaneous documentation from Mr Dunn to the Claimant to ask him to report in to the desk more frequently and consistently. It would have been easy for him to have have communicated in writing to the Claimant, for example by email. Indeed, as referred to above, there is something of a double standard between Mr Dunn's indignation at the Claimant's absence of documentation to back up his stories, with his own absence of documentation towards the Claimant to back up this complaint.

125 Matters came to a head in July 2006. Mr Dunn asked the Claimant to report into work every day at 10.00am. This must have been a humiliating requirement for the Claimant, as no other sports journalist on the team was required to do so.

126 Shortly after that instruction the Claimant did not attend the office, as required. There is a dispute about the Claimant's explanation, which was that he was awaiting delivery at home of a book from Alan Curbishley that he was to serialised. Mr Dunn, in his statement to the Tribunal stated that they received no communication from him on the day in question. This is at variance with his contemporaneous documentation, namely that the Claimant telephoned at about 10.15a.m. It is another example of Mr Dunn seeking, with hindsight, to portray the Claimant in as bad a light as possible.

127 The Claimant was invited, by a letter dated 15 July 2006, to a disciplinary hearing. The hearing was scheduled for 25 July 2006.

128 We have considered the evidence provided to us as a whole for the period from August 2005, following Arsenal Football Club's complaint about the Toure article, to 15 July 2006, when he was invited to another disciplinary hearing. We find the behaviour to have been a consistent pattern of bullying behaviour, as outlined above, with the intention of removing him from their employment, whether through a negotiated settlement package, or through a staged process of warnings leading to dismissal. There was a pattern of behaviour, set out above, entered into with the effect and intention of making his working life difficult for him.

The Start of the Claimant's sickness absence

129 On 18 July 2006 the Claimant sent an email to Mr Kuttner and Mr Dunn. He informed them that he had taken ill with chest pains, attended hospital and his GP, who had diagnosed him as suffering an acute stress reaction. He stated that Dr Reeves (his GP) had advised him to refrain from work for three weeks and placed him on medication. He informed them that the medical certificate issued by Dr Reeves was available if required. The Claimant's mother also telephoned to say that the Claimant had been in hospital over the weekend.

130 Mr Wallis reported to Mr Coulson. Mr Coulson response is instructive. He stated, by email to Mr Wallis dated 19 July 2006, "want him out as quickly and cheaply as possible". We find that Mr Coulson's desire to get rid of the Claimant as quickly and cheaply as possible was his desire not only in on 19 July 2006, but as early as August 2005. The

events we have described above, and findings we have made, are consistent with such a desire.

131 Mr Coulson's attitude towards the Claimant is also reflected in the Respondent's attitude towards the Claimant's illness, as set out below. The Claimant's mental illness is admitted by the Respondent in these proceedings to be a disability at the relevant times for the purposes of the Disability Discrimination Act 1995.

Allegation *– Mrs Spink and Mr Carville making several calls immediately after the Claimant had been signed off work.*

132 The day after the Claimant had telephoned in sick Mrs Spink wrote to him. She informed him that she had made an appointment for him to see the company doctor on 26 July. During the first few days of the Claimant's sickness absence numerous telephone calls were made to him by Mr Kuttner and Mrs Spink, although they did not succeed in speaking with him. In addition Ms Carville and Ms Paul made telephone calls.

133 It is surprising, in our employment experience, for an employer to contact an employee the day after they become sick in order to arrange an occupational health appointment. It is generally best to allow matters to settle for a short period of time to see whether they come back to work reasonably quickly, or whether a longer period of sickness appears likely. Dr Deuchar, when cross examined, also accepted that a short break of one to two weeks might be appropriate.

134 Mr Turner telephoned Mrs Spink. He told her that Mr Driscoll was too ill to come to work to attend his appointment with Dr Deuchar.

Allegation *– As to Ms Carville visiting the Claimant at home on 3 August 2006.*

135 Mrs Spink wrote to the Claimant, by letter dated 28 July 2006, to inform him that Ann Carville, the Group Occupational Health Manager would visit him at home on 3 August.

136 Mr Turner sent an email to Mrs Spink, dated 1 August 2006. He said that Mr Driscoll was very poorly, but satisfied with the treatment and care he was receiving from his GP and that he would be seeing the GP the next day. He stated that the Claimant would rather not see the Group Occupational Health Manager and asked her to cancel the appointment.

137 Mrs Spink's response to Mr Turner's request is indicative of the Respondent's attitude both towards Mr Turner and the Claimant. Ms Spink wrote to Ms Paul, the director of Human Resources stating "surely he can't shut us out?" She wrote back directly to Mr Driscoll, rather than replying to Mr Turner, putting "cc Mr Turner" at the bottom of the letter to the Claimant. She refused to cancel the appointment but confirmed it. Her response is consistent with an attitude towards Mr Turner that, at best, showed an unwillingness to allow him to do his job of representing and supporting the Claimant; and at worst appears outright dismissive or hostile. At best her insistence on Ms Carville visiting the Claimant in these circumstances was heavy handed. The insistence on her visit is also consistent with the pressure being put on the Claimant from August 2005 onwards. It is bullying

behaviour.

138 Ms Carville visited the Claimant on 3 August 2006. The Claimant was out and she spoke to his father. In the course of the conversation he informed her that his son's GP had advised him to distance himself from what he regarded as the source of his illness.

Allegation *as to stopping Claimant's sick pay on 4 August 2006*

139 Ms Carville wrote by email to Mrs Spink on 4 August 2006. She explained that she had visited the Claimant but that he had been out for the day with a friend. She omitted, however, to make any reference to what the Claimant's father had said about his son having been advised to distance himself from what he regarded as the source of his illness. This is a surprising omission from an Occupational Health Advisor as it was important information for the Claimant's managers to know in order to manage his sickness absence.

140 Mr Kuttner was informed of Ms Carville's visit. He decided to stop the Claimant's sick pay. He wrote to the Claimant by letter dated 4 August 2006. He informed him that he was disappointed at Mr Driscoll's failure to respond to Ms Carville's request to contact her. He asked him to contact Ms Carville again to organise a medical examination. He finished his letter by stating that if he failed to do this it would be treated as a serious breach of contract of employment and that it might lead to serious consequences.

141 Mr Kuttner's explanation for his decision to refuse sickness pay at that early stage was that it was a *"shot across the bows"*. We find it to be an extension of the bullying behaviour towards the Claimant that he and other managers had been carrying out towards the Claimant before his sickness absence. In the context of Mr Coulson's message to Mr Wallis to get the Claimant out as quickly and cheaply as possible, it was a way of putting further pressure on the Claimant.

142 The Claimant's father wrote to Ms Spink by letter dated 6 August 2006. He stated that the Claimant's GP considered the Claimant's illness to be due to the *"immense stress"* he had been put under by his employers and was concerned to hear of the *"unremitting bombardment of letters, phone calls, emails from the News of the World since the illness was diagnosed – plus a call in person at his home"*. He stated that his son's GP (Dr Reeves) asked her to contact him directly for information regarding the nature of his condition and progress of treatment.

143 Mrs Spink replied, refusing the request of the Claimant's father that she contact his GP, but insisted that he made the contact with Occupational Health.

144 The Claimant's father replied, by letter dated 15 August 2006. Included in his letter was a statement that his son had been following medical advice to distance himself from the source of his stress until such time as his GP deems him able to again confront the issues.

145 Although the Claimant's father supplied, on 6 August 2006, medical certificates to cover his son's sickness absences from 18 July 2006, sickness pay continued to be

withheld until 20 September 2006.

146 The Respondent's initial approach to the Claimant's sickness absence fails to comply with the guidance given in paragraph 38 of the ACAS Code on Disciplinary and Grievance Procedures to treat genuine illness with a sympathetic and considerate approach. The approach taken by Mr Kuttner and Mrs Spink was confrontational and, at times, bullying, as set out above.

Medical information as to the Claimant's illness

147 Various communications took place with a view to the obtaining of a medical report on the Claimant's condition. Dr Deuchar, the Respondent's Occupational Health Physician, wrote to Dr Reeves to request a medical report. He asked for advice about his diagnosis and treatment, causative factors of the illness causing his absence, any past history of similar or related illness, prognosis and actions for his employers to take to enable a return to duties.

148 Dr Reeves replied to Dr Deuchar, by letter dated 13 September 2006. Amongst the advice given in his letter was:-

148.1 That he had advised Mr Driscoll to take a holiday and attempt to distance himself from the source of his stress, i.e. his work.

148.2 He described the causative factors of the illness as the facing of two disciplinary procedures causing him difficulties in his working practice which led to his present illness. He had become increasingly anxious about his long-term career as a result of these disciplinary proceedings.

148.3 He left blank the question as to whether there was any past history of similar or related illness.

148.4 He advised that he would be unfit for work for a further 4 to 6 months although, if the present difficulties were settled, his prognosis and return to work might well be within the next 2 to 3 months.

148.5 He advised that there should be a meeting between the Claimant's advisors and his employer to try to reach an agreed and appropriate settlement to enable him to return to his duties. He stated that he could not comment as to whether that involved staying with the News of the World or moving on.

149 Dr Deuchar referred the Claimant to a Consultant Psychiatrist, Dr Shanahan, the Claimant agreeing to this.

150 Dr Shanahan provided a report to Dr Deuchar, dated 6 October 2006. Amongst the points made by Dr Shanahan in his report were the following:-

150.1 That his problems started with the lead up to the first disciplinary hearing taken against him. This caused a great sense of injustice.

150.2 He bottled up his sense of injustice as best he could and his boss tried to smooth things over but about 8 months later there was another complaint leading to further disciplinary action, making him wonder if this was indicative of an agenda whereby his Editor was targeting him.

150.3 He started drinking heavily.

150.4 There was no family psychiatric history or previous history of depressive illness on his part.

150.5 He came across as a pleasant man whose mood was depressed and feeling betrayed by the events at work.

150.6 He would only be fit for work when his mood improved and that depended on the resolution of his current disagreement.

150.7 He recommended seeing a one-to-one therapist for cognitive behavioural therapy.

151 One of the issues between the parties is whether the Claimant's illness was caused by the Respondent's treatment of him. We find that it was. We so find because:

151.1 This was the Claimant's evidence

151.2 The Claimant's evidence is supported by Dr Reeves in his medical report

151.3 The Claimant and Dr Reeves' opinions are supported by Dr Shanahan in his report

151.4 Prior to the sequence of events leading up to the Claimant's sickness absence he had, so far as we are aware, no previous history of depressive illness and

151.5 As a matter of common sense, in view of the ways in which we have found that the Respondent treated the Claimant, it would follow that his illness would have been caused by it unless there were any other factors in his life so as to cause such an illness. We were not made aware of any such factors and Dr Shanahan advised that the Claimant did not have a previous history of depressive illness.

152 It is striking that at no stage did the Respondent appear to give consideration, whilst the Claimant was employed by them, as to whether or not he might be disabled. The Claimant's sickness absence was considered by their Director of Human Resources, together with other Human Resources advisors; their Occupational Health Manager; their Occupational Health doctor; and a number of senior managers, including the Editor. Yet none of them sought to ensure that medical advice was obtained for an assessment to be made as to whether or not the Claimant's mental illness amounted to a disability. We find this failing on the Respondent's part most surprising. It is a failing that runs contrary to the advice given in paragraph 38 of the ACAS Code of Practice on Disciplinary and Grievance

Procedures. They advise that it is helpful to consider whether the illness is the result of a disability, in which case the provisions of the Disability Discrimination Act 1995 will apply. The Respondent did not consider this issue.

153 An even more striking omission on the part of the Respondent is that we were informed they do not have any policy on disability. For a large employer such as the Respondent, this is a significant failure to comply with guidance given in the Disability Right's Commission Code of Practice at paragraph 2.12.

Knowledge by the Respondent of the Claimant being disabled

154 One issue for us to determine is when the Respondent ought reasonably to have known that the Claimant was a disabled person. Our findings are as follows:-

154.1 In the first few weeks of the Claimant's sickness absence they could not reasonably have been expected to have known that he was disabled. Although they knew that he had visited hospital and was suffering an acute stress reaction, it would have been too early to have reasonably expected to know that the Claimant was disabled.

154.2 As indicated above, Dr Deuchar could, and should, have asked Dr Reeves the relevant questions (with, if necessary, directing his mind to the relevant parts of the statutory guidance on the definition of disability), to be able to assess whether the Claimant's illness amounted to a disability.

154.3 Even if he had not done so by then, it is almost inexplicable that he did not advise on the issue on receipt of Dr Shanahan's report.

155 The Respondent possibly ought, therefore, to have known that the Claimant was disabled by the time of receiving Dr Reeves' report dated 13 September 2006. They should have known, at the latest, by the time of receipt of Dr Shanahan's report dated 6 October 2006. There is no good reason for Dr Deuchar not asking Dr Shanahan to provide the necessary information in order for an assessment to be made as to whether the Claimant was disabled.

Allegations as to writing to the Claimant on 29 November 2006

156 The Claimant had a company car and mobile telephone. He was entitled to use both of these for personal use, as well as business use.

157 The Claimant, whilst on sickness absence, incurred large sums for parking fines and the use of his mobile telephone whilst on holiday abroad. His telephone bill amounted to £488.61.

158 Ms Paul wrote to the Claimant by letter dated 29 November 2006. She asserted that he was, apparently, disregarding company procedure and unwilling to meet with the Respondent or make any effort to comply with reasonable instructions. In support of this assertion she referred to a number of issues including his unwillingness to attend an

appointment with Dr Deuchar or Ms Carville; not responding to requests to contact his managers; incurring car parking fines; and a large telephone bill. She asked for the return of the car and mobile telephone and stated that the mobile telephone account had been cancelled.

159 So far as we are aware there was no power in the Claimant's contract to require the return of the company car and telephone.

160 In all the circumstances, in particular the Claimant's perception, should the writing of and contents of Ms Paul's letter reasonably be considered as having the effect of violating the Claimant's dignity or creating an intimidating, hostile, etc., environment for him? We find that the conduct stops short of being reasonably so considered, at least in respect of her actions in relation to the Claimant's mobile telephone bill and parking fines, because:-

160.1 Some of Ms Paul's assertions were unfair, in view of our findings of fact above. The Claimant had been given advice to distance himself from his work place and he had well founded reasons for feeling suspicious of the Respondent's managers in view of the treatment he had experienced.

160.2 Nor, as highlighted above, had the Respondent given any consideration as to whether the Claimant was disabled and what sort of adjustments needed to be made in response to any disability he might have.

160.3 The Claimant's mobile telephone bill was, however, very high. He incurred £324.47 for calls made whilst on holiday in Cambodia. He was continuing to incur large numbers of parking fines whilst off work on sickness absence.

160.4 A reasonable employer would have been concerned about such a high volume of personal expenditure. The Claimant was not helping himself by such actions.

Allegations- *as to writing to Claimant on 11 and 25 January 2007*

161 On 8 January 2008 there was a meeting between Mr Kuttner, Ms Stokes, Ms Paul and Ms Kerry (who had taken over the HR involvement in the Claimant's case from Mrs Spink, who had left on maternity leave). They discussed three options for managing the Claimant. These were - to press ahead with the outstanding disciplinary hearing that had been due to take place around the time of the start of the Claimant's sickness absence in July 2006; or to wait for his sick pay to expire and either continue with the disciplinary hearing, or dismiss him for capability due to continued sickness; or to dismiss him in writing now, which was described as a high risk option. They decided to follow the second of these two options (i.e. to dismiss him on the grounds of capability).

162 The contents of the meeting are instructive. What it shows was that none of those involved in the meeting had any interest in helping the Claimant to return to work. It illustrates the mindset of the Respondent's management, namely to dismiss the Claimant.

163 Ms Kerry wrote to the Claimant, by letter dated 11 January 2007, making an appointment for him to see Dr Deuchar or for a home visit to be arranged with Ms Carville. The Claimant did not attend the appointment. Mr Turner wrote to Ms Kerry, by email dated 17 January 2007. Amongst the points he raised were that he asked that the Claimant's sick pay be extended for at least one month after its expiry in early February and for the Respondent to arrange for the Claimant to have counselling, as recommended by Dr Shanahan.

164 We heard a considerable amount of evidence as to delays in the Claimant attending cognitive behavioural therapy ("CBT") as had been recommended by Dr Shanahan. We find that the delays were caused by a misunderstanding between the Claimant and the Respondent as to payment for the sessions. The outcome of the misunderstandings was that the Claimant did not understand until very shortly before he was dismissed that the Respondent would be paying for the sessions. As with many misunderstandings, there were failings on both sides for this misunderstanding.

165 Ms Kerry wrote again to the Claimant, by letter dated 25 January 2007. She reiterated the Respondent's requirement to obtain a report as to the Claimant's current health. Ms Kerry wrote directly to the Claimant without, it would appear from her letter, sending a copy of the letter to Mr Turner. The Respondent was continuing to ignore the Claimant's desire for them to deal with him through Mr Turner.

166 Mr Turner responded to Ms Kerry to inform her that the Claimant had been advised to sever connections with the Respondent until he was better; and that he was willing to see Dr Shanahan, the independent specialist he had previously been referred to.

167 Did Ms Kerry's conduct in sending the letters dated 11 and 25 January 2007 have the purpose or effect of creating a hostile etc environment for the Claimant? We find that it did because:

167.1 Usually, a request for an employee on long term sickness to see the Respondent's doctor, or Occupational health advisor, would be a reasonable request. It is important for an employer to obtain an up to date understanding of an employee's illness, prognosis, and ways of helping him or her to recover and return to work.

167.2 In this instance the letters from Ms Kerry were in response to the meeting, referred to above, on 8 December 2006. They were part of a strategy, agreed at that meeting, to dismiss the Claimant on ill health grounds. None of the individuals at that meeting were motivated to help the Claimant get well, or return to work.

167.3 It is probably the case that the letters were designed to put further pressure on the Claimant and thus had the purpose of creating a hostile environment for him. They certainly had the effect of creating such an environment.

Allegations- as to stopping the Claimant's sick pay on 25 January 2007

168 Another issue covered in Ms Kerry's letter dated 25 January 2007 to the Claimant was to notify him that they had stopped paying sick pay as they had not received medical certificates from him. Mr Turner had previously informed Ms Kerry that he had sent the certificates but would ask his doctors to re-submit a new one and forward it to her.

169 Why was the Claimant's sick pay being stopped by the Respondent? It is true that the Claimant was not helping himself by failing to ensure that sick certificates he had sent had been received and being slow in ensuring any that had not been received were re-submitted quickly. On the other hand the Respondent's approach to the issue was less than sympathetic. The minutes of the meeting, referred to above, on 8 December 2006 show that they were not interested in the Claimant returning to his job, but wanted to progress towards dismissing him. Had there been any desire to facilitate the Claimant returning to work, a more sympathetic approach would have been likely. They would have been willing to work with Mr Turner, rather than being reluctant to do so or even hostile towards him. Ms Kerry might, for example, have sent an email to Mr Turner to remind him that the certificates had not been received and asked him to *"chase"* the Claimant before stopping sick pay.

170 Mr Kuttner continued to be actively involved in the Claimant's case, as illustrated by an instruction from him, in an email dated 30 January 2007, not to pay the Claimant any further salary unless and until receiving further instructions.

171 When the Respondent did receive the Claimant's sick certificates, he was paid sick pay up to the date on which sick pay would expire, unless the Respondent exercised a discretion to extend it.

***Allegation** – refusing to extend discretion to extend Claimant's entitlement to sick pay and refusing to review the decision*

172 The Claimant's sick pay was due to expire on 10 February 2007. The decision not to extend sick pay was made by Mr Kuttner. In his witness statement he gives a variety of reasons for his decision. We do not accept them. We find that the main reason for Mr Kuttner's decision was that he wanted to get the Claimant out of the Respondent's employment. We so find because:-

172.1 We did not find Mr Kuttner to be a convincing witness in a number of respects, such as (for example) his evasiveness as to how the treatment of the Claimant compared with that of other journalists that had written inaccurate articles.

172.2 His witness statement contained contradictions on the issue. He stated that he did give consideration to extending sick pay under the long term sickness and disability scheme, but later stated that he believed the scheme was in disuse.

172.3 The minutes of the meeting dated 8 December 2006, referred to above, show

that Mr Kuttner wanted to dismiss the Claimant. The option they had chosen was to dismiss him once his sick pay ran out. Extending the Claimant's sick pay would have interfered with that objective as it could have prolonged the time before dismissing him.

172.4 Although there is contemporaneous documentary evidence of Mr Kuttner's desire to dismiss the Claimant, there is no such contemporaneous evidence of his giving written consideration to extending sickness pay.

Allegation- *as to Dr Shanahan's medical report dated 16 February 2007*

173 The Claimant attended an appointment with Dr Shanahan, who prepared a medical report for Dr Deuchar, dated 16 February 2007. Among the points made by Dr Shanahan were:-

173.1 Referring to there being confusion as to payment of the costs of attending a CBT therapist.

173.2 Stating that Mr Driscoll was awaiting contact from him employers to arrange a meeting, that this had not happened but he wanted it.

173.3 His mental state had improved but he remained depressed, with the strain of being out of work and financial pressures and anxieties had not helped matters.

173.4 His fitness to return to work depended on a resolution of his current disagreement with his employer.

173.5 CBT would be useful.

173.6 The Claimant is a decent man who is keen to do a good job.

174 We find that there was a misunderstanding between Dr Shanahan and the Claimant in one respect. It is clear from the evidence we heard and documentation we read that the Claimant did not want to meet his employers himself, but wanted a meeting to take place with Mr Turner. It is likely, therefore, and we find that Dr Shanahan misunderstood the Claimant to mean that he wanted a face to face meeting with his employers himself.

175 Dr Deuchar sent a copy of Dr Shanahan's report to Ms Kerry and Ms Carville, having redacted the passages he considered medically confidential.

176 Acting on Dr Shanahan's misunderstanding of the Claimant's wish to have a one to one meeting with his employers, Ms Kerry wrote to him to seek to arrange this, by letter dated 22 February 2007. Mr Turner replied, by letter dated 28 February 2007, stating that he was not well enough to meet with anyone from the News of the World but would like HR or Editorial Management to meet Mr Turner.

Allegations as to refusing to meet with Mr Turner

177 We have set out below the steps that led up to the Claimant's illness, following what we have found to be bullying behaviour designed to make his working life difficult.

178 We have also found the Respondent's bullying behaviour towards the Claimant to have continued after he became absent through illness, particularly in their initial interactions between them.

179 As a result of the Respondent's behaviour towards him, the Claimant had well founded desire, coupled with medical advice from his GP to distance himself from his employers. He was on long term sickness and, therefore, at a disadvantage in comparison with someone who was not mentally ill in being able to explain to his employer what he needed in order to return to work. An individual that was not mentally ill would be better able to argue their case with their employer. We have also found that the Respondent refused on many occasions to engage with Mr Turner, or meet with him, preferring to deal with the Claimant himself; despite the advice of the Claimant's GP for the employer's to meet with the Claimant's advisors (as set out at paragraph 111 above); and the Claimant's desire to deal with his employers through Mr Turner. The Respondent had a practice, therefore, as indicated by one of their witnesses, of regarding Mr Turner as part of the problem and declining to meet with him.

180 The Claimant's relationships with the Respondent's management had broken down. In order to heal the breakdown, which we have found to be caused by the Respondent's actions, the Respondent needed to instigate a healing process. One of the ways of doing so would have been to have taken up Mr Turner's proposal to have a meeting. If progress had been made at such a meeting; and if Mr Turner had been able to re-assure the Claimant of an improved change of attitude on his employer's part, it might have been possible to encourage the Claimant to attend a meeting aimed at helping him return to work. Mr Turner's evidence in cross examination was that the Respondent showed a lack of understanding of depression and that he (Mr Turner) had experienced depression himself. The Respondent's behaviour towards the Claimant after he became ill is consistent with a lack of understanding of or sympathy with mental illness. It would have been a reasonable adjustment, therefore, for the Respondent to have met Mr Turner before setting up a meeting for the purpose of dismissing the Claimant.

181 Ms Kerry ignored Mr Turner's proposal to meet, as they had done many of his requests over a number of issues. Instead, Ms Kerry wrote to the Claimant directly.

***Allegations**- leading up to and concerning the Claimant's dismissal*

182 Ms Kerry's letter, dated 5 March 2007, to the Claimant contained a number of points. Amongst them were the following. She stated that it would unacceptable for them to meet with Mr Turner, rather than with Mr Driscoll directly; she then enclosed a number of questions she wanted him to answer, by not later than 13 March 2007; and warned him that the outcome of the process might be dismissal on the grounds of medical incapacity.

183 Mr Driscoll did not reply to the letter by the date requested. Ms Kerry wrote a further letter, dated 16 March 2007, inviting him to a disciplinary meeting on 21 March 2007. The Claimant responded to say that his representative, Mr Turner, would be unavailable and asking for the hearing to be postponed and gave dates during the following week.

184 The disciplinary meeting was adjourned to 28 March 2007. Mr Turner replied to the letter, reiterating his request for him (Mr Turner) to discuss a resolution to the issue; for the Claimant to have counselling; and to obtain legal advice.

185 Further communication took place between Mr Turner and Ms Kerry, including as to confirmation that the Respondent would pay the full cost for the Claimant having CBT. The hearing was postponed to 30 March 2007 and then 5 April 2007.

186 Mr Nicholas, who had given the Claimant a final written warning the previous year, was appointed by Mr Kuttner to conduct the disciplinary hearing. He wrote to Mr Driscoll, by letter dated 6 April 2007, arranging the meeting for 24 April 2007. He informed him that there would be no further postponements of the meeting and that a decision might be made in his absence, if he failed to attend. Mr Turner, replied by an email on the morning of the scheduled disciplinary hearing, asking for the disciplinary meeting to be postponed until the Claimant had completed counselling and seen the lawyer. He asked once again for sick pay to be re-instated.

187 The disciplinary meeting took place in the Claimant's absence. Mr Nicholas' decision was to dismiss the Claimant and was confirmed by letter dated 26 April 2007.

188 The Claimant appealed against his dismissal. Ms Ryde was appointed to hear the appeal, which took place on 12 July 2008. By the time of the appeal the Claimant had started receiving CBT and it was having some benefit, although he had not completed the treatment. The appeal was a review, rather than a re-hearing of the Claimant's case. The outcome of the appeal was that it was dismissed.

189 We have considered our overall view of the evidence of the witnesses, having taken into account all the evidence provided to us, including documentary evidence. We have given some examples above of ways in which we were not impressed with the evidence of witnesses of the Respondent. These are examples only; and there were many other occasions when we felt that witnesses of the Respondent were giving evidence that was evasive or unsatisfactory in other respects. We were, overall, far more impressed with the evidence of the Claimant and his witnesses. Even although the Claimant remains, we understand, unwell, his evidence appeared far more straightforward and plausible than that of the Respondent's witnesses.

190 Earlier in our findings of fact we made findings that the disciplinary processes carried out against the Claimant prior to his illness were a pretext for a desire to get rid of him as an employee. We have considered whether the Respondent's motivation changed, at least by the time of the Claimant's dismissal. We find that the Respondent's long-standing desire to remove the Claimant continued and we are not persuaded that capability was the reason, or principal reason, for the Claimant's dismissal. We so find because:-

190.1 It is correct that the Claimant was not dismissed swiftly after becoming ill. The Respondent did not, therefore, get the Claimant out "*as quickly and cheaply as possible*" as instructed by Mr Coulson to Mr Wallis in an email message dated 19 July 2006.

190.2 By the time of the Claimant's dismissal Mr Coulson had left the Respondent's employment.

190.3 From our findings of fact above, we found that the Respondent's senior management team shared Mr Coulson's goal of removing the Claimant.

190.4 We made findings above as to the meeting that took place on 8 December 2007 between Mr Kuttner, Ms Paul and Ms Kerry as to the Claimant's sickness absence. They were key players in the process leading up to the Claimant's dismissal. As found above, none of the options discussed involved the Claimant's return to work and they were not interested in facilitating his return to work.

190.5 The medical advice provided for the Respondent indicated that, in order to facilitate the Claimant's return to work, it was necessary to resolve the difficulties that had given rise to the Claimant's sickness absence and that CBT would be beneficial for the Claimant.

190.6 So far as resolving the Claimant's work difficulties were concerned, one method of doing so was to negotiate an agreed severance package. Some attempts were made to do this, with Mr Turner initiating the discussions, but were unsuccessful.

190.7 No attempt was made by the Respondent to undo the wrongs they had done to him. Mr Turner's request for his final warning to be overturned was not granted. Repairing the damage done would have required some recognition that the Respondent had been in the wrong and demonstrating to the Claimant a genuine desire to make a fresh start and repair his working relationships. The Respondent was not willing to resolve the workplace agreement in a way that would have enabled him to continue working for them because there was a long-standing desire to remove him from their employment.

190.8 So far as CBT is concerned, we have found that were some faults on both sides for the delay in the Claimant's CBT starting. It had not started by the time of the disciplinary hearing at which the Claimant was dismissed. It had started but was not completed by the time of the hearing of his appeal against dismissal. It was more important for the Respondent to dismiss the Claimant than to ascertain whether the treatment would lead to his recovery. This is consistent with the Respondent's long-standing desire to dismiss the Claimant; but to do so in such a way as would not render them vulnerable to Employment Tribunal proceedings. It is consistent with the Respondent's feeling by then, that the Claimant could be dismissed safely.

190.9 The person that made the decision to dismiss the Claimant was Mr Nicholas, who had given the Claimant his final warning in order to pave the way for him to be dismissed subsequently.

Closing Submissions

191 Both representatives gave typed closing submissions and supplemented them with verbal submissions. We do not set them out, although they were helpful and we have borne them all in mind.

CONCLUSIONS

Unfair Dismissal Claim

192 The Tribunal has considered, firstly what was the reason or principal reason for the dismissal of the Claimant by the Respondent.

193 The burden of proof is on the employer to satisfy the Tribunal that they have dismissed the employee for a reason that falls within s. 98(2) Employment Rights Act 1996, or for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

194 The Respondent's stated reason for dismissal was on the grounds of capability. It is true that the Claimant was on long term sickness at the time that he was dismissed. In our findings of fact above, however, we found that capability was not in fact the reason that the Claimant was dismissed. It was the pretext for dismissing him, but it was not the reason or principal reason. There is a similarity between this case and the case of *Aslef v Brady* (above) in that in both cases the reason adopted for dismissal was a pretext for a long-standing desire among certain key people to dismiss the person concerned. In the circumstances of this case, the Respondent would probably have dismissed the Claimant much earlier on the pretext of their manufactured allegations of misconduct, leading to a third disciplinary hearing on conduct grounds, had the Claimant not become seriously ill shortly before the scheduled disciplinary hearing.

195 if capability was not the reason or principal reason for the Claimant's dismissal, what was it? The original source of the hostility towards the Claimant was Mr Coulson, the then Editor of the News of the World; although other senior managers either took their lead from Mr Coulson and continued with his motivation after Mr Coulson's departure; or shared his views themselves. Mr Coulson did not attend the Tribunal to explain why he wanted the Claimant dismissed. The witnesses from the Respondent that were responsible for the disciplinary processes against the Claimant leading up to and including the Claimant's dismissal denied that they had any ulterior motives for embarking on these processes. They were not giving the Tribunal accurate evidence. We are not satisfied, therefore, that the Respondent has shown that the reason or principal reason for dismissal was for a reason falling within s.98(2) Employment Rights Act 1996, or was for some other substantial reason of a kind so as to justify the Claimant's dismissal. In the absence of being so satisfied, we prefer the Claimant's contention that the reason or principal reason was simply that the Respondent wanted to remove him.

196 The dismissal of the Claimant by the Respondent was, therefore, unfair as the Respondent has failed to show that it dismissed the Claimant for a reason that falls within section 98(2) Employment Rights Act 1996.

197 It is unnecessary, in view of our conclusions that the Claimant was unfairly dismissed because he was not dismissed for a fair reason, to consider s.98(4) Employment Rights Act 1996. It may be helpful for us to do so, in view of the Respondent's contention that the Claimant would have been fairly dismissed by the Respondent for capability in any event if they had followed fair procedures.

198 If it had been necessary to do so, we would have concluded that the dismissal was unfair by virtue of s.98(4) Employment Rights Act 1996. We would have found both that the procedures adopted to dismiss the Claimant and the sanction, or penalty of dismissal, lay outside the range of reasonable responses that a reasonable employer might have adopted. We would so have concluded because:-

198.1 The Claimant was subject to a serious mental illness. In order to help the Claimant to return to work the employer needed to make reasonable adjustments, as required under the Disability Discrimination Act. They failed to do so at any point up to the Claimant's dismissal. Additionally, there were other ways in which they committed acts of unlawful disability discrimination towards him (as set out below).

198.2 Our findings of fact show that the Claimant's ill health was caused by the Respondent's bullying treatment of him. Some recognition of the fault on their part and expression of a genuine desire to make amends were a necessary part of any healing process for the wrongs they had done to the Claimant. The Respondent refused to do this. For example, they refused Mr Turner's request to overturn the Claimant's second disciplinary warning after Alan Curbishley's book showed that the article he had written about him had been true.

198.3 The Respondents did not follow the recommendations of the medical advice they received from Dr Reeves or Dr Shanahan. Rather than respecting Dr Reeves' initial advice for a period of distance for the Claimant from his work, when he first became sick various individuals continued their bullying behaviour of the Claimant by making unwanted contact with him. The medical advice to resolve the source of the Claimant's stress, namely, his difficulties at work, was not followed. The request by Mr Turner to meet with his employers on the Claimant's behalf were ignored or refused. Nor had the Claimant completed the behavioural therapy that Dr Shanahan had recommended that he receive, even by the date of appeal against dismissal.

198.4 In view of the Respondent's treatment of the Claimant this is a case where, as indicated in the case of *McAdie v Royal Bank of Scotland Plc* (above) it was necessary for the Respondent to *"go the extra mile"*. One such example of going the extra mile would have been to pay for CBT for the Claimant both for initial sessions recommended and any additional sessions for so long as they would have been helpful in allowing him to recover and return to work.

199 We have also considered the issue of whether or not the statutory dismissal procedures were completed; and if, they were not, who it was that was wholly or mainly responsible for the failure.

200 The first issue is whether or not the statutory procedures were completed. This issue is not entirely straightforward. Step 1 was completed – the employer wrote to the employee to arrange a disciplinary hearing at which the Claimant's dismissal was contemplated. Step 3, the appeal, was completed. Step 2, the dismissal meeting, took place without the attendance of the payment or his Union representative to accompany him. Although it is not explicit that the attendance of the employee is a necessary part of the statutory procedures in order for them to be completed, it is implicitly the case. Step 2 requires that the employee takes all reasonable steps to attend the meeting. Under paragraph 13(2) of schedule 2 Employment Act 2002 (one of the general requirements) it is required that meetings be conducted in a manner that enables both employer and employee to explain their cases. In this case the Claimant was unable to explain his case, because he did not attend the meeting at which he was dismissed. Nor do we consider that the statutory procedures can be said to have been completed if one of the 3 steps required has not been completed- otherwise there would be little point in requiring 3 steps to take place. We conclude, therefore, that the statutory dismissal and disciplinary procedures were not completed.

201 The issue of whether the Respondent or Claimant was wholly or mainly responsible for the failure to complete the procedures is, also, a difficult one. Both the employer and the employee bear some responsibility for the non-completion because:-

201.1 The Claimant, through Mr Turner, made numerous requests for adjournments. This does not appear consistent with the requirement under paragraph 2(3) of schedule 2 Employment Act 2002 for the employee to take all reasonable steps to attend the meeting.

201.2 There are also statutory provisions as to the effect of a failure to attend a meeting, as set out in Regulation 13 Employment Act 2002 (Dispute Resolution) Regulations 2004. These provisions suggest that, if the Claimant or his representative declined two offers to attend meetings, the Respondent would be treated as having complied with the applicable statutory procedure.

201.3 The context for the disciplinary hearing was, however, that the Respondent believed that it had by now got good grounds for dismissing the Claimant fairly (although, as can be seen above, their beliefs were incorrect). The context was also that the Claimant was mentally ill.

202 The Tribunal's provisional view is that, pursuant to Regulation 13 of the Dispute Resolution Regulations 2004, we are to treat the Respondent as having complied with the statutory dismissal procedures. The Tribunal's inclination is to neither reduce nor increase the Claimant's award for failure to follow the statutory dismissal procedures. As, however, there is to be a remedy hearing, the Tribunal will permit further arguments as to the statutory dismissal procedures and reserve its final decision on the issue to the remedy hearing.

Disability Discrimination – Time Limits

203 Some of the events that the Claimant has complained of concerned issues that took place more than three months (or six months, with the three months extension of time limit provided for under regulation 15 of the Dispute Resolution Regulations 2004) before the date of the issuing of his Tribunal claims.

204 Were the acts that the Claimant complains of acts extending over a period? Has he shown, as indicated in the guidance in the *Hendricks* case (above) that the alleged acts of discrimination were linked to one another and evidence of a continuing discriminatory state of affairs? Our findings of fact show that they were. There was a continuing and orchestrated, plan on the Respondents behalf to remove him from their employment, both before and after he became ill. Our findings of fact showed that this continuing state of affairs occurred at least up to the date of the Claimant's dismissal and probably up to the rejection of his appeal against dismissal. The allegations forming the subject matter of his complaints amount, therefore, to an act extending over a period and are within time.

Disability Discrimination Claims – Knowledge of Disability

205 The House of Lords in the *London Borough of Lewisham v Malcolm* case (above) stated *"in order for the alleged discriminators reason to 'relate to' the disability for the purposes of s. 24(1)(a), it is necessary that the discriminator knows of, or ought to know of, the disability, at the time of the alleged discriminatory acts. Unless the discriminator has knowledge or imputed knowledge of the disability, he cannot be guilty of unlawful discrimination under the act".*

206 Although the *Lewisham* case concerns disability related discrimination, the relevant wording of the section as the same as for various of the types of disability discrimination with which we are dealing.

207 In our findings of fact, we found that the Respondent could not reasonably have been expected to have known of the Claimant's disability until, at the very least, they received his GP's letter dated 13 September 2006; or, in any event, they should have known after receiving Dr Shanahan's report dated 6 October 2006. For all the disability discrimination complaints that arise after that date, therefore, the Respondent should have had the necessary knowledge of the Claimant's disability.

208 All the Claimant's disability discrimination claims until that date, therefore fail, because the Respondent did not have the necessary knowledge, or imputed knowledge of the Claimant's disability. Although, therefore, the Respondent's initial contacts with the Claimant in July and August 2006; and stopping his sick pay on 4 August 2006 amounted to bullying treatment they did not amount discrimination on the grounds of disability. The allegations described above at paragraphs 24.1, 27.1, 27.2, 27.3 and 29.1 fail, therefore, for this reason.

Whether the Burden of Proof Shifts

209 We have given consideration as to whether, the Claimant has proved on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation that the Respondent has committed an unlawful act of disability discrimination. We conclude that he has because:-

209.1 We appreciate that the Respondent's poor treatment of the Claimant preceded his illness. Indeed, we have found that the Respondent's treatment of him prior to his illness was a cause of the illness. This suggests that the Claimant's disability was not a major reason for the treatment set out in the allegations. It is not necessary, however, for an employee's disability to be the only or main cause of adverse treatment. It is necessary for an employer to show, if the burden of proof shifts, that there has been no discrimination whatsoever.

209.2 It is also the case that employers can regard some forms of disability less positively than others. An employer may be, for example, more sympathetic to an employee who has suffered a physical injury than one who has become mentally ill. We found above, that the Respondent had a lack of awareness of, or sympathy towards, the illness of depression.

209.3 Once the Claimant became ill, the Respondent failed to show a sympathetic attitude towards him, as advised in the ACAS Code of Practice on Disciplinary and Grievance Procedures. This could show a discriminatory motive for such a lack of sympathy.

209.4 The Respondent failed to comply with guidance in the Disability Rights Commission's Code of Practice on Employment and Occupation, not least by having no policy on dealing with disability.

209.5 Our findings of fact show the various ways in which the Respondent treated the Claimant badly after he had become ill. He was bullied in the immediate aftermath of his sickness absence, there was a disinclination to engage with the representative that was trying to assist him, the existing desire to dismiss the Claimant continued without any genuine desire to help the Claimant regain his health and return to work and so on. All these matters could, in the absence of an adequate explanation, point to the existence of unlawful discrimination.

Tribunal's General Approach to Determining Disability Discrimination Claims

210 When adding together the different allegations of disability discrimination they amount to some 25 allegations. Many of the allegations contended to be more than one type of disability discrimination. If we were to make separate conclusions on each of the 25 claims, the length of our judgment would be extended considerably.

211 Our approach is, therefore, as follows. In view of the House of Lords judgment in the *Lewisham* case (above) there can be few cases of disability related discrimination that would succeed where a claim for direct disability discrimination would not. We give no separate consideration, therefore, to the disability related claims. Where a claim of disability discrimination succeeds as one type of disability discrimination, we do not separately consider whether it is also another type of disability discrimination. As the

treatment of the Claimant by the Respondent had a feature of bullying behaviour, we consider the disability discrimination harassment claims first.

Disability Discrimination Harassment Claims

212 We have given details of the Claimant's claims, and made some findings as to the Respondent's motivation as regards the harassment claims in our findings of fact. So far as the matters referred to in the allegations of disability discrimination are concerned, they all represented unwanted treatment from the Claimant's point of view. This element of s.4A Disability Discrimination Act 1995 is therefore satisfied.

213 Section 4A Disability Discrimination Act 1995 requires that the conduct complained of is for a reason relating to the Claimant's disability. Again, in most, if not all the instances complained of, the treatment related to the Claimant's disability. They concern how the Respondent was managing the Claimant's sickness absence. His sickness absence was caused by his disability. Guidance was given, in the *Lewisham* and *Malcolm* case, that conduct that is *"related to a person's disability is a looser test than conduct "on the grounds of" disability (the test for direct disability discrimination)*. One of the allegations of harassment concerns the Respondent's letter dated 29 October 2006 to the Claimant. Some of the contents complained of are not related to the Claimant's disability except in a very indirect way, probably too remotely in order to qualify. The extent of the Claimant's use of his mobile phone for personal calls and parking tickets was not related to his disability; whereas the Respondent's complaints about the Claimant not contacting the Respondents Occupational Health Department and his managers was related to his disability for example because of his GP's advice that he needed to distance himself from the source of his stress, namely his employers.

214 In part, the Respondent's letter dated 29 November 2006 was not related to the Claimant's disability as set out in our findings of fact. To this extent, therefore, the allegation that the letter constituted discrimination/harassment fails.

215 As noted above, the first three of the allegations of disability discrimination harassment fail on the basis of absence of knowledge by the Respondent of the Claimant's disability.

216 Five allegations, and part of one allegation (letter dated 29 November 2006) remain. They all relate to the Claimant's disability in that the concern how the Respondent managed his sickness absence, which was caused by the Claimant's disability. Of those remaining allegations, did the conduct have the purpose, or alternatively, the effect, of violating the Claimant's dignity, or of creating an intimidating, hostile etc. environment for the Claimant? We find that they did have the effect and in some instances the purpose of creating such an environment. We so find because of the reasons given in our findings of fact, such as:

> 216.1 Our findings of fact show that various key managers of the Respondent wanted the Claimant's employment to end and put him under pressure, including bullying treatment, to do so.
>
> 216.2 After the Claimant's sickness absence started, the Respondent's desire

remained for the Claimant's employment to end, not for him to succeed in his job. Some of the allegations would, in ordinary circumstances, be considered good management practice for dealing with an employee's long-term sickness absence, but in this case there was an ulterior motive on the Respondent's part, namely "to get rid of the Claimant as quickly and cheaply as possible".

216.3 There was an ulterior motive in moving towards dismissing the Claimant, in various of the contacts forming the subject matter of the allegations. For example, the letters dated 11 January and 25 January 2007 to visit the company doctor or Occupational Health were produced, following a meeting between Mr Kuttner, Ms Paul and Ms Kerry, where they decided that the best way of removing the Claimant from the Respondent's employment was to dismiss him on ill health grounds.

217 We exclude from these conclusions that the Human Resources Department being provided with a copy of Dr Shanahan's medical report. Dr Shanahan was someone that the Claimant had agreed to see. Dr Deuchar had taken out some elements of the report and wanted the Human Resources department to see Dr Shanahan's advice. We do not consider it could reasonably be considered as having the purpose or effect of creating a hostile or intimating environment.

218 So far as the remaining allegations of disability discrimination harassment are concerned, for the reasons given above in our findings of fact and above we conclude that in all the circumstances, particularly the Claimant's perception, the conduct could reasonably be considered as having the effect of creating an intimidating or hostile atmosphere.

219 The disability discrimination harassment claims succeed, therefore, to the extent set out above.

Disability Discrimination Reasonable Adjustments

220 The first allegation is that the Respondent refused to exercise its discretion to extend the Claimant's sick pay period beyond its expiry on 10 February 2007. Guidance was given in the *O'Hanlon* case that it would be a very rare case indeed where giving higher sick pay than would be payable to a non-disabled person who does not suffer the same disability-related absences would be considered necessary as a reasonable adjustment. Is this a very rare case indeed? As was the case in the *O'Hanlon* case, the Respondent's sick pay scheme was the provision, criterion or practice applied by the employer; he was at a substantial disadvantage in comparison to non-disabled people, whose sick pay would not have run out, because he was receiving no pay.

221 We conclude, in the Claimant's particular circumstances, that it is such a very rare case. The Claimant's sickness absence was caused by work related stress due to the Respondent's ill treatment of him, as set out in the findings of fact above. The Respondent, after the Claimant became ill, continued to treat the Claimant badly rather than redress the wrongs he had experienced. It would, therefore, have been a reasonable adjustment to have exercised their discretion in favour of the Claimant, at least until the Respondent stopped committing acts of disability discrimination against him (for example disability discrimination harassment) as set out above, and started treating him better.

222 This claim of disability discrimination adjustment, therefore, succeeds.

223 The second reasonable adjustment claim concerns the disciplinary meeting at which the Claimant was dismissed. For the disciplinary meeting on 24 April 2007, at which the Claimant was dismissed, the main stated reason for adjourning the hearing by that stage was to enable Mr Turner to obtain legal advice, although the Claimant did also remain in ill health. It is doubtful whether the Respondent's refusal to adjourn the hearing put the Claimant at a disadvantage in comparison to non disabled people- many non disabled employees facing disciplinary hearings might wish to have the hearings adjourned in order for their union representatives to obtain legal advice. It is unlikely, also, that a further adjournment would have made a difference to the outcome of the disciplinary hearing, as Mr Nicholas (and other key managers of the Respondent) had wanted to dismiss the Claimant for a long time. It was this wish, the reasons for which have been explored above, which was the heart of the problem, rather than whether the disciplinary hearing had taken place at a later date. This element of the Claimant's claims, therefore, fails.

224 The third allegation of disability discrimination reasonable adjustments was of refusing to meeting the Claimant's representative, Mr Turner, in circumstances when the Claimant was allegedly not well enough to meet with the Respondent himself.

225 For the reasons given in our findings of fact above, it would have been a reasonable adjustment for the Respondent to have met with Mr Turner, before arranging a meeting in order to dismiss him. We found that there was a practice applied by the Respondent of not meeting Mr Turner; and that this placed him at a disadvantage with non disabled employees. We found that the Claimant had well-founded concerns as to meeting his managers himself. He was in a fragile condition, due to his mental illness, and knew that his managers wanted to remove him from the organisation. Mr Turner suggested meeting with the Respondent and his request was not accepted. Such a meeting might, if well handled, and without the Respondent's ulterior motive of dismissing the Claimant, have led to an improvement in the breakdown of communication that had taken place. Meeting with Mr Turner was not only something that the Claimant wanted, but also had been recommended by the Claimant's, Dr Reeves; and both Dr Reeves and Dr Shanahan had advised that it was essential to resolve the disputes that had arisen between the Claimant and his employers.

226 The fourth allegation was of advising the Claimant that he was required to meet with the Respondent's company doctor or Occupation Health service without advising the Claimant of the option to meet with an independent doctor. Our findings of fact show that the Claimant did meet Dr Shanahan and that the Claimant was willing to see him, although not willing to meet the Respondent's Occupational Health Manager, or Occupational Health Doctor. Dr Shanahan was not connected with the Respondent, except that the Respondent was paying his fees for his reports. It was, we conclude, a reasonable adjustment for the Respondent to arrange for the Claimant to see him. This aspect of the Claimant's claims, therefore, fails.

227 The next allegation is that it would have been a reasonable adjustment not to have dismissed the Claimant. We deal with this under direct disability discrimination. In the *Novacold* case Mummery LJ stated that he agreed with the Tribunal to the extent that it held that the act of dismissing Mr Clark was not in itself a breach of the reasonable adjustment duties. Although, the House of Lords in the *Lewisham* case over-ruled *Novacold*, they did not do so on this point. As the list of reasonable adjustments given in section 18B Disability Discrimination Act 1995 is a list of examples only, there seems no reason, therefore, why it should not include an adjustment of not dismissing an employee. As it is questionable, therefore, whether the duty of reasonable adjustments extends to dismissal, it appears more appropriate to deal with this issue by considering the Claimant's contention that the dismissal was an act of direct disability discrimination.

Direct Disability Discrimination Claims

228 Most of these claims have either already been considered under different headings of disability discrimination, or relate to the Claimant's dismissal.

229 We consider whether the act of dismissing the Claimant, in addition to being an unfair dismissal, was an act of direct disability discrimination.

230 For the reasons we have set out above, the burden of proof shifts to the Respondent to prove that they did not discrimination against the Claimant on the grounds of his disability in dismissing him.

231 So far as the Tribunal is aware, we have been provided with no evidence as to how the Respondent treated long-term sick (non-disabled) employees. We do not know whether, and what employees, and in what circumstances, have been dismissed for long-term sickness absence. We found that the Respondent had a lack of understanding of the effects of a depressive illness. It might be, for example that someone on long-term sickness with a physical illness, such as a form of cancer would not have been dismissed, whereas someone with a long-term mental illness would have been. Accordingly, the Respondent has failed to discharge its burden of proof of satisfying the Tribunal that the treatment was "in no sense whatsoever" on the grounds of disability, as indicated in the guidance in the *Igen v Wong case (above)*. This element of the Claimant's claims, therefore, succeeds.

Remedy Hearing

232 A remedy hearing will be required, unless the parties are able to settle the remedy themselves. We hope that both parties will make all reasonable efforts to do so and put the past behind them.

233 It may be that a Case Management Discussion would be helpful in order to ensure that, if a remedy hearing is required, all the necessary preparation is done and the issues in dispute are clear. The parties are requested, therefore, to write to the Tribunal within 14 days of the date of this judgment with the following information:

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233.1 Whether a Case Management Discussion is required.

233.2 How long is required for the remedy hearing, if the parties are unable to settle remedy.

233.3 Dates to avoid during January and February 2009 (for any Case Management Discussion that might be required); and in March and April 2009 (for the remedy hearing).

RESERVED JUDGMENT

J Im Goodrich STRATFORD

DATE AND PLACE OF SIGNING

17th December 2008 Stratford

EMPLOYMENT JUDGE

JUDGMENT SENT TO THE PARTIES ON

17th December 2008

AND ENTERED IN THE REGISTER

FOR SECRETARY OF THE TRIBUNALS

Case Numbers: 3202077/2007
3202319/2007