THE INDUSTRIAL TRIBUNALS

CASE REF: 13608/18

CLAIMANT: **Boryana Chimbuleva**

RESPONDENT: **G & C Pubs Ltd**

DECISION

The unanimous decision of the tribunal is that the claimant was unfairly dismissed. In the absence of a resolution between the parties a separate hearing will be convened to consider the question of remedy for unfair dismissal.

The claimant was subject to an unauthorised deduction of wages, in respect of the calculation of her pay during the period of her suspension and in respect of the calculation of her holiday pay, in an amount of **£1,468.69** gross, which will be subject to statutory deductions.

The claimant did not receive a main statement of her contractual terms and is entitled to an additional award of 4 weeks' wages. The amount of a week's wages was agreed between the parties as being £503.46. The claimant is awarded the sum of **£2,013.84.**

The claimant's claims of unlawful discrimination and harassment contrary to the Race Relations (Northern Ireland) Order 1997 are dismissed in their entirety for the reasons set out in this judgment.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Gamble**

Members: **Mr W Mitchell**
Mr B McCreight

APPEARANCES:

The claimant represented herself.
The respondent was represented by Mr P Moore of Copacetic Business Solutions Ltd.

BACKGROUND

1. The claimant presented a complaint to the tribunal on 14 September 2018, complaining of unfair dismissal. In her lengthy, narrative claim form, the claimant complained that the statutory dismissal procedure was not complied with, as the disciplinary and appeal decisions were taken by someone other than her employer. The claimant complained that the investigation carried out on behalf of the

respondent was inadequate. The claimant complained that the dismissal was substantively unfair. The claimant advanced an allegation that the dismissal was the culmination of *"a plot organised against [her] as a punishment".* The claimant asserted that, as a member of a diverse ethnic community, her body language could be misinterpreted.

2. The claimant's complaint disclosed a claim of unauthorised deduction from wages in respect of her pay during her suspension and the calculation of her holiday pay. She complained that she had not received a written statement of terms.

3. The claimant made a claim of unlawful race discrimination, stating that she had been treated less favourably than colleagues and discriminated against "based on [my] ethnicity".

4. The ET3 Response presented on behalf of the respondent asserted that the claimant had been dismissed because she was guilty of gross misconduct, and stated that the decision to dismiss was predicated on a reasonable belief that the claimant had failed to follow a reasonable management instruction and bullied and harassed a member of staff. The ET3 response also denied the claim of discrimination.

RELEVANT FACTS

5. The following facts are not in dispute:

   a. The claimant was employed from 25 September 2016 until the time of her dismissal at "The Grouse" bar and restaurant in Ballymena. She was at the time of her dismissal the restaurant manager.

   b. The claimant is from Bulgaria.

   c. The respondent company owns a pub and restaurant establishment known as "The Grouse" and also owns another establishment known as "The Countryman".

   d. The claimant was suspended on 21 April 2018. The suspension was imposed by Ciaran Moffatt, the General Manager of the Grouse, on the recommendation (as per Mr Loughlin's evidence)/instruction (as per Mr Moffatt's evidence) of Mr Loughlin. The claimant was merely told that she was being suspended for alleged gross misconduct at the time the suspension was imposed.

   e. On 24 April 2018, the claimant wrote to Mrs McKenna, one of the owners of the respondent company, to complain about her suspension and that she had been given no information regarding the reason for her suspension, other than that she had been accused of serious misconduct. She complained that she had not been provided with any details of the misconduct she had been accused of. The claimant asked for details of the complaints/allegations which had been made against her and what process was being followed. The claimant stated that she had received advice that the employer is obliged to state that any suspension is a neutral act and this is not a punishment, and that suspension should be on full pay.

f. Mr Moffatt appears to have replied to that letter by means of an undated letter which stated:-

> *"Hello Boryana*
>
> *I am now in a position to inform you of the company's view.*
>
> *Our reasons for your suspension on full pay was [sic] the alleged harassment and bullying of a junior member of staff & failure to follow management instruction.*
>
> *Although you have been placed on suspension with full pay, this is not deemed punishment and you should remain available for work if required.*
>
> *I can confirm that our HR company are taking care of the investigation and you will hear from them in due course.*
>
> *Kind regards,*
>
> *Ciaran Moffatt."*

g. An investigation into the alleged misconduct was carried out by Mr Moffatt. He met with the claimant on 2 May 2018. The claimant was accompanied to the investigation meeting by Alastair Donaghy, an accredited trade union representative.

h. The claimant was then invited to a disciplinary hearing by Mr Loughlin of MCL Law "for and on behalf of The Grouse, GNC pubs Ltd" by letter dated 8 May 2018.

This letter stated:

> *"The purpose of the disciplinary meeting is to allow you to respond to the following allegations:*
>
> - ***Failure to follow reasonable management instruction***
>
> - ***Bullying and Harassment in the workplace***
>
> *You are advised that should the allegations be upheld then you will be liable to disciplinary action which may include dismissal under the terms of the company disciplinary policy and procedures"*

i. An invitation letter to the rescheduled disciplinary meeting (at page 109 of the main bundle) issued to Mr Donaghy on 16 May 2018. This letter was shared by means of a "one drive link", attached to Mr Loughlin's email of that date. The letter of 16 May 2018 provided further details of the allegations that the claimant was to answer at the disciplinary meeting, namely:

- *"Failure to follow reasonable management instruction, further particulars being that you were spoken to regarding your behaviour and attitude towards employees and you were told by management to be mindful of how you address employees and show respect to every employee, this issue was discussed at an informal meeting on 13th March of which you will recall and be aware however, for purposes of clarity please find attached an account of what was covered at that meeting.*

- *Bullying and harassment in the workplace, further particulars being that it is reported that on 21 April 2018 you left [HS] & Sinead [Gamble] both very upset and shaken following separate incidents. It is further alleged that this is not the first instance of conduct that has breached the company's anti-bullying & harassment policy, further information regarding this allegation is contained in the witness statement provided to you."*

j. The claimant attended a disciplinary hearing on 21 May 2018, accompanied by Mr Donaghy. The claimant was dismissed by Mr Loughlin, by letter dated 12 June 2018, with effect from 15 June 2018. Mr Loughlin upheld the two disciplinary charges against the claimant. In the dismissal letter he stated that even if these allegations had not been upheld, the claimant would still have had her employment terminated on grounds of some other substantial reason, because the relationship between the claimant and management and the claimant and her colleagues had irreparably broken down.

k. The claimant was offered and exercised a right of appeal. The appeal hearing took place, after rescheduling, on 8 August 2018. Mr Moore of MCL Employment Law heard and determined the appeal. The appeal was not upheld and the outcome was communicated in a letter from him dated 29 August 2018, stated to be for and on behalf of the respondent.

l. At the time of the incident that gave rise to her dismissal, the claimant had a clear disciplinary record, having never been subject to any disciplinary sanction by the respondent.

Issues

6. A main statement of legal and factual issues for determination by the tribunal was agreed between the parties and lodged with the tribunal office. These were as follows:

*"**Legal Issues***

1. Was the claimant unfairly dismissed contrary to Article 126 and Article 130 of the Employment Rights (Northern Ireland) Order 1996, as amended?

2. Did the respondent subject the claimant to direct discrimination by way of less favourable treatment in dismissing her on grounds of her race/nationality/ethnic origins contrary to the Race Relations (Northern Ireland) Order 1997?

3. *Who is the claimant's comparator? Is the comparator an appropriate comparator?*

4. *Did the respondent subject the claimant to direct discrimination by way of less favourable treatment during her employment prior to her dismissal on the grounds of her race contrary to The Race Relations (Northern Ireland) Order 1997?*

5. *Who is the claimant's comparator? Is the comparator an appropriate comparator?*

6. *Did the respondent victimise or harass the claimant on grounds of her race/nationality/ethnic origins contrary to The Race Relations (Northern Ireland) Order 1997?*

7. *If the claimant is entitled to remedy what is the nature of that remedy? Are the relevant tests set out in the relevant case law met for compensation?*

Factual Issues *(as amended, by agreement, at the commencement of the hearing)*

1. A. *What was the reason for the dismissal of the claimant?*

   B. *Was it a reason which justified the dismissal of the claimant?*

2. *Did the respondent follow a fair and reasonable procedure in dismissing the claimant?*

3. *Did the respondent consider alternatives to dismissing the claimant?*

4. *Did the claimant's dismissal fall within the band of reasonable responses open to the respondent?*

5. *Did the claimant suffer less favourable treatment on the grounds of her race in respect of the respondent's decision to dismiss her?*

6. *Did the claimant suffer less favourable treatment on grounds of race in respect of the respondent's treatment of her during her employment?*

7. *If so, what was this less favourable treatment?*

8. *Was the claimant treated differently by Ciaran Moffat, M the Chef and Eugene McKenna compared with other colleagues for example Peter Magill and Sinead Gamble?*

9. *Were their concerns and complaints investigated by him and the respondent but hers were not?*

10. *Why was this?*

11. *Was the claimant paid the same wages as junior staff despite her being senior?*

12. If so, why was this? Was it because of her race/nationality/ethnic origin?

13. Was the claimant forced to work every weekend when no one else was?

14. If so, why was this? Was it because of her race/nationality/ethnic origin?

15. Did Ciaran Moffat tell the claimant "I don't like foreigners working front of house"?

16. Was this comment discriminatory on the grounds of race?

Remedy

1. Did the claimant suffer injury to feelings as a result of the alleged discriminatory acts and omissions of the respondent? If so, what is the appropriate remedy in the circumstances?

2. Did the claimant suffer financial loss as a result of a dismissal and the alleged discriminatory acts and omissions of the respondent? If so, what is the appropriate remedy in the circumstances?

3. Are the relevant tests as set out in the relevant case law met for compensation?"

7. At the commencement of the hearing, the parties agreed that the tribunal would, in light of the content of the claimant's claim form, have to give consideration to Article 27 of the Employment (Northern Ireland) Order 2003 regarding the provision of contractual terms, in the event that the claimant was successful in her claim. It was also agreed that in the event of a finding that the statutory dismissal procedures had not been complied with (as alleged by the claimant), the question of an uplift would also have to be considered.

8. The claimant's claim form and witness statement were both lengthy documents which were general in nature and which did not fully and adequately particularise her claims. The claimant was asked to clarify the nature of the complaints she was pursuing at the outset of the hearing. Consequent upon this clarification, the claimant was informed of her right to make an application to amend the basis of her claim to include additional claims that she had alluded to during discussion, namely a claim of sex discrimination, a claim of age discrimination and a claim of unlawful detriment for having made a disclosure in the public interest. Following consideration, the claimant did not pursue any such amendment application.

9. During the course of the hearing, the tribunal also alerted the respondent's representative to the live claim of unauthorised deduction of wages, which had not been reflected in the issues. During the claimant's cross-examination, the claimant gave oral evidence which supported her claim of having received incorrect holiday pay. This aspect of her claim had been addressed in her claim form, but not her witness statement.

PROCEDURE AT THE HEARING

10. The claimant confirmed at the commencement of the hearing that she did not need an interpreter (having previously confirmed that she did not require an interpreter at the Case Management Discussion on 14 December 2018). Ms Madalina Comescu (a Romanian national) also confirmed at the hearing that she was content to proceed to give oral evidence in cross examination without an interpreter.

11. On the first day of the hearing, the claimant was directed to provide a supplementary witness statement providing further particulars of certain aspects of a small number of the claims referred to in her witness statement. The respondent was also permitted to adduce supplementary witness statements from Mr and Mrs McKenna, who own the respondent company, in relation to an alleged incident on 27 November 2017, as their witness statements had not properly addressed the claimant's allegations in respect of that incident.

12. It became apparent during the course of the hearing that some relevant documents had not been furnished and/or included in the bundle. Accordingly, further documents were adduced and admitted by both parties during the hearing. Following an application made at the hearing by the respondent's representative, the claimant agreed, and the tribunal ordered, that she provide copies of her bank statements to the tribunal in respect of her self-employment earnings following her dismissal, as no tax return was available. By agreement, these bank statements were provided to the respondent's representative subject to redaction. The parties were ordered to provide **all** further relevant discovery on the evening of 14 November 2019, to ensure that the drip feed and piecemeal provision of documents did not impact further upon the progress of the hearing.

Sources of Evidence

13. The tribunal received witness statements and heard oral evidence from the claimant, Ms Madalina Comescu (a co-worker) and Mr Alastair Donaghy (an accredited trade union representative who had accompanied the claimant to the investigation meeting, the disciplinary meeting and the appeal meeting) on behalf of the claimant.

14. The tribunal received witness statements and heard oral evidence from Mr Ciaran Moffatt (the General Manager of the Grouse), Mr Eugene McKenna and Mrs Carole McKenna (the owners of the respondent company), Ms. Sinead Gamble (the floor supervisor, who reported to the claimant and gave a statement to the investigation regarding HS), Mr Florin Pop, Ms. Joy Kinney (who looked after payroll for the respondent), Mr Chris Reynolds (who gave a witness statement regarding an alleged exchange between the claimant and Mr Magill), Mr Peter Magill (the bar manager in the Grouse), Mr Pat Moore (the respondent's representative, who also heard and determined the claimant's appeal against dismissal) and Mr Dylan Loughlin (who made the decision to dismiss) on behalf of the respondent. The tribunal also received supplementary witness statements from the claimant, Mr McKenna and Mrs McKenna during the hearing, and before cross examination of the claimant had been completed.

15. The tribunal recalled the claimant to address the issue of whether she or her representative had received the letter of 16 May 2018, excerpted at paragraph 5i above, (page 109 of the main bundle), as this was of crucial importance in determining whether the statutory dismissal procedure had been followed.

16. The tribunal also read and considered all of the documents which were provided to the panel in advance of the hearing comprised within a main bundle and a supplementary bundle, as well as the additional documents which were produced during the course of the hearing.

17. The claimant requested that the tribunal watch CCTV of the incident on 21 April 2018, which ultimately gave rise to her dismissal. This footage, which had been requested from and discovered by the respondent, was made available to the tribunal on the morning of 12 November 2019 and the tribunal watched five short CCTV clips in the hearing room in the presence of the parties to ensure that the personnel shown in the footage were correctly identified. The tribunal was also provided with a copy of the footage.

18. During the course of the hearing, the tribunal made such enquiries of witnesses as it considered appropriate for the clarification of the issues, and to ensure that the parties were on an equal footing, so far as was practicable, in accordance with the overriding objective.

Structure of this decision

19. Part A of this decision sets out the relevant law, findings of fact and conclusion in respect of the claim of unfair dismissal. Part B of this decision sets out the relevant law, findings of fact and conclusion in respect of the claim of failure to provide a main statement of employment terms. Part C of this decision sets out the relevant law, findings of fact and decision in respect of the claim in respect of unauthorised deduction of wages/holiday pay. Part D of this decision sets out the relevant law, findings of fact and conclusion in respect of the race discrimination claim. Part E deals with the question of Remedies for Unfair Dismissal.

PART A

Relevant Law – Unfair Dismissal

FAIRNESS OF THE DISMISSAL

20. **PART XI UNFAIR DISMISSAL**

CHAPTER I RIGHT NOT TO BE UNFAIRLY DISMISSED

The right

126.—(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Paragraph (1) has effect subject to the following provisions of this Part (in particular Articles 140 to 144).

…

Fairness

General

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

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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

…

(c) relates to the conduct of the employee,

…

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

(6) Paragraph (4) is subject to Articles 130A to 139

…

Procedural fairness

130A.—(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 I of Schedule 1 to the Employment (Northern Ireland) Order 2003 (dismissal and disciplinary procedures) applies in relation to the dismissal,

(b) the procedure has not been completed, and

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

(2) Subject to paragraph (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of Article 130(4)(a) as by itself making the employer's

action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure.

…

…

21. **Employment (Northern Ireland) Order 2003**

SCHEDULE 1

STATUTORY DISPUTE RESOLUTION PROCEDURES

DISMISSAL AND DISCIPLINARY PROCEDURES

STANDARD PROCEDURE

Step 1: statement of grounds for action and invitation to meeting

1.—(1) The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.

(2) The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2: meeting

2.—(1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.

(2) The meeting must not take place unless—

(a) the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and

(b) the employee has had a reasonable opportunity to consider his response to that information.

(3) The employee must take all reasonable steps to attend the meeting.

(4) After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

Step 3: appeal

3.—(1) If the employee does wish to appeal, he must inform the employer.

(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.

(3) The employee must take all reasonable steps to attend the meeting.

(4) The appeal meeting need not take place before the dismissal or disciplinary action takes effect.

(5) After the appeal meeting, the employer must inform the employee of his final decision.

22. In **Lewis v McWhinney's Sausages Ltd [2013] NICA 47**, Morgan LCJ, delivering the judgment of the Court, referred to the requirements of these provisions, as referred to by the Employment Appeal Tribunal in the case of **Alexander v Bridgen Enterprises Ltd [2006] ICR 1277**. A fuller review of the operation of Statutory Dismissal Procedures and Article 130A of the 1996 Order is contained in the decision of Employment Judge Drennan QC in **Doherty v Castle Hotels N.I. Ltd 1093/13.**

23. The Court of Appeal in **Rogan v South Eastern Health & Social Care Trust [2009] NICA 47** approved the earlier decision of Court in **Dobbin v Citybus Ltd [2008] NICA 42** where the Court held:-

> *"(49) The correct approach to [equivalent GB legislation] was settled in two principal cases – **British Home Stores v Burchell [1980] ICR 303** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17** and explained and refined, principally in the judgements of Mummery LJ, in two further cases **Foley v Post Office** and **HSBC Bank PLC (formerly Midland Bank) –v- Madden reported at [2000] ICR 1283** (two appeals heard together) and **J Sainsbury v Hitt [2003] ICR 111**.*
>
> *(50) In **Iceland Frozen Foods**, Browne-Wilkinson J offered the following guidance:-*
>
> *"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by [equivalent GB legislation] is as follows:-*
>
> *(1) the starting point should always be the words of [equivalent GB legislation] themselves;*
>
> *(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;*

(3) *in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*

(4) *in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another;*

(5) *the function of an industrial tribunal, 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. "*

(51) *To that may be added the remarks of Arnold J in* ***British Home Stores*** *where in the context of a misconduct case he stated:-*

> *"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, it must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now said more normally in a criminal context, or, to use the more old fashioned term such as to put the matter beyond reasonable doubt. The test, and the test all the way through is reasonableness; and certainly, as it seems to us, a conclusion*

on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion. "

24. In **Rice v Dignity Funerals [2018] NICA 41** the Northern Ireland Court of Appeal endorsed the summary of the legal principles relating to Article 130 of the 1996 Order set out in the minority judgment of Gillen LJ in **Connolly v Western Health and Social Care Trust [2017] NICA 61**. These are as follows:

"[28] …

(i) The starting point is the words of Article 130(4) of the 1996 Order.

(ii) The Tribunal has to decide whether the employer who discharged the employee on grounds of misconduct entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct.

(iii) Therefore there must in the first place be established a belief on the part of the employer.

(iv) The employer must show that he or she had reasonable grounds for so believing.

(v) The employer, at the stage he/she formed the belief, must have carried out as much investigation into the matter as was reasonable. It is important that an employer takes seriously the responsibility to conduct a fair investigation.

(vi) The Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider that the dismissal to be fair.

(vii) In judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(viii) In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another, quite reasonably, take another.

(ix) The function of the Industrial Tribunal, 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.

(x) A Tribunal however must ensure that it does not require such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within the relevant legislation.

(xi) *Gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee. The disobedience must at least have the quality that it is wilful. It connotes a deliberate flouting of the essential contractual conditions.* (Tribunal's emphasis.)

(xii) *More will be expected of a reasonable employer where the allegations of misconduct and the consequences to the employee if they are proven are particularly serious.*

(xiii) *In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the employer's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses that an employer could reasonably make in the circumstances. The fact that other employers might reasonably have been more lenient is irrelevant (see the decision of the Court of Appeal in* ***British Leyland (UK) Ltd v Swift [1981] IRLR 91****,* ***Gair v Bevan Harris Limited [1983] IRLR 368*** *and Harvey on Industrial Relations and Employment Law at [975].*

(xiv) *The conduct must be capable of amounting to gross misconduct.* (Tribunal's emphasis.)

(xv) *The employer must have a reasonable belief that the employee has committed such misconduct.*

(xvi) *The character of the misconduct should not be determined solely by the employer's own analysis subject only to reasonableness. What is gross misconduct is a mixed question of law and fact. That will be so when the question falls to be considered in the context of the reasonableness of the sanction."* (Tribunal's emphasis.)

25. An employer is not expected to conduct a quasi-judicial investigation into allegations of misconduct. Nonetheless any investigation of the material facts must be carefully conducted and must be conscientious in character. (**Ulsterbus v Henderson [1989] IRLR 251**).

26. In **J Sainsbury v Hitt [2002] EWCA Civ 1588 [2003] ICR 111** the Court of Appeal in England and Wales held: *"The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason…".* Viscount Dilhorne said in **W Devis & Sons Ltd v Atkins [1977] IRLR 314, [1977] ICR 662, HL,** the employer cannot be said to have acted reasonably if he reached his conclusion *'in consequence of ignoring matters which he ought reasonably to have known and which would have shown that the reason was insufficient'.* The same sentiment was expressed slightly differently by Stephenson LJ in **W Weddel & Co Ltd v Tepper [1980] IRLR 96 at 101:**

> *"… [employers] do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the*

[employment] tribunal in this case, "gathered further evidence" or, in the words of Arnold J in the Burchell *case, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case". That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably'.'*

27. There are also a number of English authorities which have helped to interpret the application of the tests. In **Bowater v North West London Hospitals NHS Trust [2011] EWCA Civ 63**, (as endorsed by the Northern Ireland Court of Appeal in **Antrim Borough Council v McCann [2013] NICA 7**) the Court of Appeal (GB) Longmore LJ stated:

> *"But the employer cannot be the final arbiter of its own conduct in dismissing an employee. It is for the ET to make its judgment always bearing in mind that the test is whether dismissal is within the range of reasonable options open to a reasonable employer."*

He further noted that parliament had entrusted the tribunal with *"the responsibility of making what are, no doubt, sometimes, difficult and borderline decisions in relation to the fairness of dismissal."*

28. In **Connolly v Western Health and Social Care Trust [2017]NICA 61**, Deeny LJ, delivering the majority judgment of the Northern Ireland Court of Appeal stated:

> *"[22]… The decision is whether or not a reasonable employer in the circumstances could dismiss bearing in mind 'equity and the substantial merits of the case'. I do not see how one can properly consider the equity and fairness of the decision without considering whether a lesser sanction would have been the one that right thinking employers would have applied to a particular act of misconduct. How does one test the reasonableness or otherwise of the employer's decision to dismiss without comparing that decision with the alternative decisions? In the context of dismissal the alternative is non dismissal i.e. some lesser sanction such as a final written warning.*
>
> *…*
>
> *[36] ….Furthermore, I agree with the statements in Harvey on Industrial Relations and Employment Laws [1550]-[1566] that dismissals for a single first offence must require the offence to be particularly serious. Given the whole list of matters which the employer included under the heading of Gross Misconduct it is impossible, in my view, to regard the nurse's actions as "particularly serious".*
>
> *[37] The Tribunal cannot have been mindful of the statement of Edmund Davies LJ, as he then was, in Wilson v Racher [1974] ICR 428, CA at page 432, citing Harmon LJ in Pepper v Webb [1969] 1 WLR 514 at 517:*

"Now what will justify an instant dismissal? — something done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract."

[38] For this court to approbate the Tribunal's decision upholding as within a reasonable range of responses the summary dismissal of an employee from her chosen profession on these facts without any prior warning as a "repudiation of the fundamental terms of the contract" would be to turn language on its head. Employment law is a particular branch of the law of contract. With statutory interventions it has, of course, developed a character of its own. But any dismissed employee opting to go into a court of law and claim damages for breach of contract at common law against an employer who had summarily dismissed them for using a Ventolin inhaler while suffering from an asthmatic attack and delaying two days in reporting that, particularly when it was their 'first offence,' could be tolerably confident of success before a judge, in my view."

Findings of fact – Unfair Dismissal

29. On 21 April 2018, there was an exchange between the claimant and HS, a member of the floor staff managed by the claimant, following which HS complained about how the claimant had spoken to her. It is common case that HS left the floor to get drying cloths and that upon her return, the claimant challenged HS for leaving the floor without permission. HS provided one handwritten statement dated 21 April 2018 which was relied upon in the Investigation. It stated:

> *"Boryana got into my face. Very raised voice. Felt threatened and uncomfortable. Calmly asked her to not shout in my face, she carried on shouting. Started to feel upset and shakey. Kept saying I should not leave the floor + always should ask her. Voiced that I should never listen to Sinead as she has no authority to tell me what to do. Walked away from her and she followed asking if I was okay. Calmly told her 'no I was not'. Did not discuss further with her. Then approached again where she ask what I was speaking to Peter about. This also felt very intimidatory and slightly threatened. Left feeling upset and overall uncomfortable with the situation."*

30. There is no record of HS formalising a bullying and harassment complaint against the claimant, beyond the narrative account set out above. Mr Loughlin's letter of 16 May 2018, which provided the detail of the disciplinary charges, cited the claimant's behaviour towards both HS and Ms Gamble. However, the tribunal notes that Ms Gamble was treated as a witness by Mr Loughlin, and not as a co-complainant, according to the tenor of his witness statement and oral evidence. In the ET3 response, the respondent relied on the treatment of a junior member of staff as comprising the alleged misconduct at the hearing.

The parties' submissions on unfair dismissal

31. Both the claimant and Mr Moore gave closing oral submissions.

32. Mr Moore contended that the dismissal was both procedurally and substantively fair, as an investigation was carried out, the claimant attended a disciplinary meeting with the trade union representative and she was offered a right to appeal. On appeal, the claimant was accompanied by a trade union representative, and the decision to dismiss was upheld. Mr Moore characterised the claimant's main objections to the dismissal as procedural, and a deflection from the fact that she had bullied a junior member of staff.

33. The claimant in her closing submissions cast her dismissal as part of a plot to get rid of her. She suggested that not all evidence had been taken into consideration in the disciplinary procedure and asserted that her complaints, which were made during the course of the disciplinary proceedings, were not properly considered. She also contended that the failure to furnish the CCTV which was relied on by Mr Loughlin in advance of the disciplinary or appeal hearings was unfair.

DISCUSSION

34. It was not disputed by the claimant that the reason asserted by the respondent for the dismissal, namely the alleged conduct of the claimant, was a potentially fair reason. However, the claimant asserted that this reason was not the real reason for the dismissal. The claimant made the case that that the respondent had made a decision to terminate her employment as part of a plot.

35. The tribunal finds, on the balance of probabilities, that Mr Loughlin's reason for dismissing the claimant was the alleged misconduct by the claimant. The tribunal accepts his evidence in this regard. The tribunal rejects the claimant's allegation that the dismissal was the culmination of a plot to get rid of her as the claimant was unable to adduce evidence to substantiate her assertion in that regard.

36. The tribunal has therefore proceeded to consider the fairness of that dismissal, in particular, whether: (i) the Statutory Dismissal Procedure was followed? (ii) there was an actual belief by the respondent in the alleged misconduct by the claimant?; (iii) there were reasonable grounds to sustain that belief?; (iv) the respondent had carried out as much investigation as was reasonable in the circumstances?; and (v) the dismissal was within the band of reasonable responses?;

Was the dismissal procedurally fair in accordance with the Statutory Dismissal Procedures?

37. The tribunal finds that the requirements of Schedule 1 of the Employment (Northern Ireland) Order 2003 were complied with. These requirements are set out at paragraph 21 above. The invitation letter dated 16 May 2018 from Mr Loughlin to Mr Donaghy, excerpted at paragraph 5i above, which was sent in the context of rescheduling the disciplinary meeting, did fully discharge the requirements of step one of the procedure. The tribunal finds that the disciplinary meeting with Mr Loughlin also discharged the requirements of step two of the procedure. The claimant was afforded an opportunity to put forward her explanation in relation to the

allegations against her. The tribunal finds that the appeal meeting with Mr Moore discharged the requirements of step three of the procedure.

38. The tribunal notes the objection made on behalf of the claimant that the steps should be taken by *the employer* and not an outside consultancy. The tribunal can see that there may be merits in bringing in an outside consultancy to handle one or more stages of the procedure. For example, in the case of a small employer, where there are not enough managers/directors to complete the investigation, conduct the disciplinary meeting and conduct the appeal meeting, it may be necessary for an employer to rely on an external HR service provider. The tribunal recognises that employment law is complex and on some occasions the employer involved may reasonably feel that he or she lacks the expertise to safely navigate what can be very difficult waters. Mrs McKenna clarified in her evidence that the HR function was outsourced to MCL Employment Law because *"they were experts".*

39. The decisions which were taken by Mr Loughlin and by Mr Moore were all stated to have been taken for and on behalf of the respondent. Mr Loughlin's written statement of evidence describes MCL Employment Law as having been engaged to advise and assist the respondent on all HR and employee relations matters. He then describes how it was intended that Mr Moffatt was to carry out the investigation, Mrs McKenna was to carry out the disciplinary hearing and that MCL would attend to any disciplinary appeal. In the event, MCL staff carried out both the disciplinary hearing and the disciplinary appeal for and on behalf of the respondent. An alternative course of action would have been for those disciplinary and appeal outcome reports to have been presented to the employer by way of a recommendation and for the employer to have made the final decision. However, the failure to have done so, and to have proceeded in the manner before the tribunal, does not constitute a breach of the three step statutory procedure. In this regard, the tribunal derived assistance from the observation of the EAT regarding the use of external consultants and the use of their decisions in the case of **Kisoka v Ratnpinyotip (t/a Rydevale Day Nursery) 2013 UKEAT/0311/13/LA** (albeit that this follows the repeal of the statutory procedures and the introduction of the ACAS code):

> *"60. … There is no fixed or inflexible rule which applies. The question is essentially one of fact, as has been emphasised in the authorities which I have already cited. … In particular, as the Code recommends at paragraph 3 Employment Tribunals will take the size and resources of an employer into account and it recognises that it may not always be practicable for all employers to take all of the steps set out in the Code*."

Was there an actual belief by the respondent in the alleged misconduct by the claimant?

40. The tribunal accepts, on the balance of probabilities, Mr Loughlin's evidence that he, on behalf of the respondent, believed that the claimant was guilty of the alleged misconduct, namely bullying and harassment of a junior member of staff, and failure to follow a reasonable management instruction.

Were there reasonable grounds to sustain that belief?

Charge 1 – Bullying and harassment

41. The tribunal finds there were no reasonable grounds for Mr Loughlin to sustain his belief in the guilt of the claimant of the alleged misconduct. This is because:

    a. Mr Loughlin could not have reasonably considered the allegation by HS as harassment. The MCL handbook harassment policy, which was applied by Mr Loughlin, states that *"harassment is unwanted conduct related to a particular characteristic (age, disability, marital or civil partnership status, sex, sexual orientation, race, religious belief or political opinion) which violates the dignity of women and men at work."* Mr Loughlin was asked during his oral evidence to clarify what the protected characteristics of HS were which led him to consider the allegation as "harassment". He stated that it was "sex". He conceded that this allegation of harassment of HS on grounds of her sex had not been raised with the claimant throughout the course of the disciplinary procedure. It is a striking feature of HS's complaint, which is set forth at paragraph 29 above, that it does not make any complaint of bullying or harassment by the claimant on grounds of her sex. This complaint was, at its height, a disagreement about whether the claimant had exercised her managerial oversight appropriately.

    b. Even if the tribunal has erred in making this finding regarding the allegation of harassment, the tribunal finds that in the absence of a reasonable investigation (see below) Mr Loughlin did not have reasonable grounds for his belief that the claimant had bullied and harassed a junior member of staff.

Charge 2 – Failure to follow a reasonable management instruction

42. The tribunal finds that there were no reasonable grounds for Mr Loughlin to maintain a belief in the guilt of the claimant for failure to follow a reasonable management instruction. This is for the following reasons:

    a. Mr Loughlin's letter dated 16 May 2018 set out the details of the allegation of having failed to follow a reasonable management instruction. It stated *"further particulars being that you were spoken to regarding your behaviour and attitude towards employees and you were told by management to be mindful of how you address employees and show respect to every employee, this issue was discussed at an informal meeting on 13th March of which you will recall and be aware however, for purposes of clarity please find attached an account of what was covered at that meeting."* (Tribunal's emphasis.) Mr Loughlin concluded in his dismissal letter dated 12 June 2018 (at pages 142-144 of the main bundle) that instructions were given to the claimant at a meeting on 13 April 2018 and the agreed way forward was not adhered to. The tribunal finds that there were no reasonable grounds for Mr Loughlin to believe that such a meeting took place on 13 April 2018, as alleged or at all, at which a management instruction was given that the claimant was to be *"mindful of how [she] address employees and show respect to every employee".* In this regard, the tribunal notes:

i. The claimant, at the disciplinary meeting with Mr Loughlin, recounted attending an appraisal meeting on 12 April 2018 and her recount differs significantly from the content of the notes of a meeting dated 13 March 2018, prepared by Mr Moffatt, contained at page 62 of the main bundle.

ii. Mr Loughlin did not have reasonable grounds to accept the typed note at page 62 as an accurate contemporaneous record of the meeting in light of the fact that the notes are wrongly dated 13 March 2018;

iii. The tribunal finds that, contrary to Mr Loughlin's statement, he appears not to have relied on the typed notes as in the Disciplinary Summary and Decision document he referred to *handwritten* notes of that meeting;

iv. Even if Mr Loughlin had been minded to accept the typed note at page 62 of the main bundle as an accurate record of the meeting, there is no record of any such management instruction having been given to her contained in those notes. It was not clear to the tribunal as to what Mr Loughlin was referring to when he cites "an agreed action plan" not being adhered to, in his Disciplinary Summary and Decision at page 135.

v. Mr Moffatt's witness statement to the tribunal does not contain any evidence regarding how and when he informed Mr Loughlin of a management instruction having issued to the claimant. His witness statement merely says: *"On 13 April 2018 Boryana was invited to a meeting in the Countryman… to discuss this, help was offered to Boryana in order to learn how to approach and talk with staff when applicable. At this stage she was told she was a valuable member of staff and we would like to find a resolve to this so we could move forward with her continuing to lead the front of house staff."*

vi. Mr Loughlin in his oral evidence, during cross examination, attempted to rely on a document entitled "Heads of Departments" at pages 65-66 of the main bundle as being the basis of his belief that the claimant had failed to follow a reasonable work instruction. However, Mr Moffatt, in his oral evidence stated this document was an internal document and that it had not been discussed with the claimant. Accordingly, this document could not have evidenced that a management instruction had issued to the claimant. Further, even if Mr Loughlin mistakenly believed that this document had been discussed with the claimant, this document does not record any management instruction given to the claimant.

vii. Mr Moffatt, at paragraph 3 of his witness statement, made reference to having told the claimant on several occasions between the months of September and December 2016 to talk with staff in a quiet area if a reprimand was required. No record exists of these conversations. In any event, this was not the basis of the disciplinary action against the claimant, as set out in the letter of 16 May 2018, and could not have been the basis of any belief held by Mr Loughlin at the relevant time.

b. Even if the tribunal has erred in making this finding, the tribunal finds that in the absence of a reasonable investigation (see below) Mr Loughlin did not have reasonable grounds for his belief that the claimant had failed to follow a reasonable management instruction.

43. Accordingly, it has not been demonstrated by or on behalf of the respondents that Mr Loughlin had reasonable grounds for his belief in the guilt of the claimant, as per **British Home Stores**.

Did the respondent carry out as much investigation as was reasonable in the circumstances?

44. The tribunal finds that the investigation carried out by Mr Moffatt on behalf of the respondent was not reasonable in the circumstances. When the meeting took place on 8 May 2018, the claimant had not been provided with any of the witness statement evidence which had been obtained against her, to enable her to respond fully to the allegations.

45. The purpose of an investigation is to establish the facts to establish whether there is an issue which needs to be addressed, whether informally or through a formal process.

46. The tribunal recognises that the defects in Mr Moffat's investigation could potentially have been remedied by the actions of Mr Loughlin at the disciplinary hearing stage, but in the particular circumstances before the tribunal, the tribunal finds that it was not so remedied. The tribunal finds that the respondent did not carry out as much investigation as was reasonable in the circumstances for the following reasons:

a. It is clear from Mr Loughlin's Disciplinary Summary and Decision document that, contrary to his assertion that a thorough and extensive investigation had taken place, Mr Loughlin realised the inadequacy of the investigation as he directed that a further statement be obtained from IL (which he disregarded following his viewing of the CCTV), he accessed and viewed the CCTV footage, and he made follow up enquiries with some members of staff after meeting with the claimant (see second paragraph of page 137, section entitled "follow up enquiries" at page 140 of the main bundle and referenced in the dismissal letter at page 143).

b. The claimant was not advised of the content of all of the information Mr Loughlin was provided with as a result of his follow up enquiries or given any further opportunity to respond or comment.

c. Mr Moffatt makes no reference to having viewed the CCTV footage in his witness statement. In his oral evidence, he stated he reviewed CCTV to identify the witnesses he then approached. The CCTV footage ought to have been carefully considered by him as part of his investigation.

d. The staff who provided statements were not interviewed to establish the veracity of the claimant's account which contextualised the exchange with HS (according to the claimant she had been informed by Mr Moffatt that service the previous night was poor, HS confirmed this, and a complaint of slow

service was received at 1:15pm on the day of the incident) and the claimant's allegations in respect of the behaviour of other staff in the aftermath of the incident.

47. In his oral evidence, Mr Loughlin stated that he did not rely on the CCTV in making his decision. Mr Moore submitted that he did not "rely heavily" upon the CCTV. This claim is contradicted by the Disciplinary Summary and Decision which extensively references the CCTV footage to support his conclusions. The tribunal was asked to review the CCTV footage by the claimant, and having done so, the tribunal finds that the CCTV evidence supports the tribunal's finding that not as much investigation as was reasonable was carried out by or on behalf of the respondent, as the evidence which tended to exonerate the claimant or which did not support the allegations against her does not appear to have been properly considered or given appropriate weight. In particular:

i. Video 1 shows the claimant approach HS and call her away from the bar. It does not appear that any particular consideration was given as to why HS was away from the floor of the restaurant in the first place. This was important in the interests of fairness to the claimant. HS may have felt upset at what was merely an appropriate managerial challenge.

ii. Video 2 (which shows the entirety of the 22 second exchange between the claimant and HS) does not support HS' allegation that the claimant was "in her face". The claimant and HS then walk away from the cupboard together in conversation, and the claimant does not follow HS when she walks away from that exchange. Further, HS does not appear at any time in the footage to display any lack of composure consistent with being "shakey and upset".

iii. Videos 2 and 3 do not support the allegation that the claimant had spoken to HS in a very loud voice or was shouting. There are customers sitting in reasonably close proximity to the claimant and HS whilst this exchange takes place. None of them can be seen to react to what has been presented as the claimant shouting and behaving in a threatening manner.

iv. Ms Gamble is not visible in Videos 1 to 3, which show the exchange with HS, which are timestamped 14:03.

v. Ms Gamble is only visible in Videos 4 and 5 which are timestamped 14:13 to 14:14.

vi. Mr Loughlin accepted that he had not visited the Grouse as part of his handling of the disciplinary proceedings. It is not clear on what basis he concluded that the tables on view in the limited CCTV footage provided represent all of the tables in the restaurant, before making conclusions about how busy or otherwise the restaurant was.

vii. Mr Loughlin states in the Disciplinary Summary and Decision that the claimant addressed the issue with HS in the bar in full view of colleagues and customers. This is not supported by the CCTV footage which is suggestive of the claimant finding HS at the bar, calling her away from the bar and then addressing the issue with her away from the bar under a stairwell beside a cupboard. One female colleague is visible in the footage briefly at some

distance from the claimant and HS at the end of the exchange. Another male colleague looks on at a distance before speaking to the claimant.

viii. Mr Loughlin refers to the CCTV footage supporting Ms Gamble saying that she kept her back to the claimant when matters were addressed with her. Video 5 contradicts this as it shows the claimant and Ms Gamble in a face to face exchange.

ix. Mr Loughlin also relied on his interpretation of the claimant's body language in the Disciplinary Summary and Decision. At the hearing, he was asked whether he had considered the claimant's representation about her body language, namely that she is a foreign national. He confirmed that he did not take it into consideration because he said everyone is treated the same.

48. It was not clear to the tribunal what evidence, garnered from the investigation, Mr Loughlin relied upon to conclude that what he describes as a "fraught exchange" between a manager and a member of staff amounted to bullying and harassment of a junior member of staff (namely HS).

49. Further, the tribunal finds that the counter allegations raised by the claimant during the course of the disciplinary process were not the subject of a careful and conscientious investigation.

Was the dismissal within the band of reasonable responses?

50. Even if the tribunal has erred in finding that there were no reasonable grounds for Mr Loughlin to maintain a belief in the guilt of the claimant and that that the respondent did not carry out as much investigation as was reasonable in the circumstances, the tribunal, acting as an industrial jury, finds that the claimant's dismissal did not lie within the band of reasonable responses. This is because:

a. The allegations of bullying and harassment did not in the circumstances amount to gross misconduct.

i. The tribunal was provided with two handbooks for the respondent. The handbook provided by the claimant was stated to be for the Grouse and Countryman pubs ("the claimant's handbook"). The tribunal was also provided with a handbook marked copyright of MCL Associates Limited, which was used by Mr Loughlin and Mr Moore in disciplinary process ("the MCL handbook").

ii. According to Mr Moffatt's oral evidence, the claimant's handbook superseded the "*pre-existing"* MCL handbook. The tribunal finds that the claimant's handbook was the handbook in force.

iii. Irrespective of which handbook the matters are considered under, the allegations against the claimant did not amount to harassment, as HS did not allege that the treatment she complained of was on any protected grounds.

iv. Irrespective of which handbook the matters are considered under, an allegation of bullying, arising from a single incident, against the claimant

did not amount to gross misconduct. The claimant's handbook does not categorise any particular offence as being gross misconduct. The disciplinary policy, at page 16 of the supplementary bundle, envisages disciplinary proceedings being escalated through warnings, culminating in dismissal, if there is no significant improvement. In relation to dismissal it states: *"If following a final written warning, your performance, conduct or attendance does not improve significantly, or further misconduct occurs, you may be dismissed. Dismissal will be authorised by the General manager or Director."* The MCL handbook states that workplace bullying will be dealt with under the disciplinary procedure. It further states that *"the disciplinary response will depend upon the nature and seriousness of the incident, and in extreme cases will result in summary dismissal."* (Tribunal's emphasis.) No evidence was adduced by the respondent to support any conclusion by Mr Loughlin that this was an "extreme case". Mr Loughlin's Disciplinary Summary and Decision, at page 138 of the main bundle, acknowledges that the claimant had a right to challenge a member of staff for disappearing off the floor, but categorises the manner of the challenge and the location of the challenge as *"not best practice".* This descriptor is not an indicator of an *"extreme case"* amounting to gross misconduct.

b. The claimant's conduct, in challenging a junior member of staff for leaving the floor without permission, could not have been categorised under the general law, either impliedly or expressly, as gross misconduct, amounting to a repudiation of the fundamental terms of the contract, as per **Wilson v Racher** and **Connolly**.

c. The dismissal of the claimant for a first offence without any prior warning in these circumstances lay outside the band of reasonable responses, as in the case of **Connolly.** Summary dismissal would only have been justified if the conduct was *"particularly serious"* as per **Connolly.** The tribunal acting as an industrial jury finds that the incident relied upon lacks the quality of being particularly serious.

d. The tribunal finds that Mr Loughlin did not properly consider alternatives to dismissal. In Mr Loughlin's witness statement at paragraph 30 and during the cross examination of Mr Donaghy, the respondent sought to advance the case that the claimant had been dismissed because she and her trade union representative had rejected the imposition of a lesser penalty at the disciplinary meeting. The tribunal prefers Mr Donaghy's account of this exchange given in his oral evidence, where he recounted that the claimant and he were asked during the hearing whether the claimant would agree to be redeployed to the Countryman. Given that she was maintaining her innocence of any misconduct, this suggestion was declined. This exchange did not absolve the respondent of its obligation to consider disciplinary sanctions short of dismissal in disposing of the disciplinary charges, in the event that of a finding of misconduct was made. Mr Loughlin's Disciplinary Summary and Decision provides no insight into why lesser sanctions were discounted. The decision letter issued by Mr Loughlin on 12 June 2018 stated *"the Company has decided, based on the terms of the Company Disciplinary Policy and Procedures, that due to your misconduct your employment is terminated with immediate effect."* The Company Disciplinary Policy and

Procedures did not require dismissal in every case, but only in an *"extreme case".* In paragraph 31 of his witness statement dated 2 January 2019, Mr Loughlin relied upon the claimant having shown no remorse or sympathy and the overwhelming evidence against the claimant as the reason why *"I had no other choice but to dismiss"*. This reasoning was not reflected in his Disciplinary Summary and Decision nor in the dismissal letter. Further, in those documents he attributes the decision to dismiss as one taken by the company, not one taken by him.

51. The tribunal has also considered the fairness of the dismissal in the context of Article 130(4) of the 1996 Order. The respondent operates two public house establishments. It retains in excess of 50 staff. It has outsourced its HR function to a specialist external company to ensure it is properly advised. These are factors which are relevant to the fairness of the dismissal, and support the tribunal's conclusion that the dismissal was unfair in all of the circumstances.

52. The tribunal notes that Mr Loughlin attempted to introduce a new, alternative, contingent ground for the dismissal in his decision letter. This was never put to the claimant to allow her to respond to and thus would have constituted a breach of the statutory procedures had it been actively relied upon. However, the tribunal, in any event, finds that there was no evidence before Mr Loughlin to support a conclusion of an *irreparable* breakdown in relationships. Such a conclusion is unsustainable in the absence of the introduction and failure of initiatives to support effective relationships within the workplace, for example the issue of a warning to staff whose conduct was challenging to effective relationships (thus allowing them a chance to address the impugned behaviours), mediation and workplace training.

53. The tribunal, in light of its findings at paragraphs 41 to 51 above, finds that the claimant was unfairly dismissed.

PART B

FAILURE TO PROVIDE MAIN STATEMENT OF EMPLOYMENT PARTICULARS

54. **Employment (Northern Ireland) Order 2003**

Failure to give statement of employment particulars, etc.: industrial tribunals

27.—(1) This Article applies to proceedings before an industrial tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 4.

(2) If in the case of proceedings to which this Article applies—

(a) the industrial tribunal finds in favour of the employee, …., and

(b) when the proceedings were begun the employer was in breach of his duty to the employee under Article 33(1) or 36(1) of the Employment Rights Order (duty to give a written statement of initial employment particulars or of particulars of change), the tribunal shall, subject to paragraph (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it

considers it just and equitable in all the circumstances, award the higher amount instead.

…

(4) In paragraphs (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under paragraph (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that paragraph unjust or inequitable.

Employment Rights (Northern Ireland) Order 1996

Statement of initial employment particulars

33.—(1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

(2) The statement may (subject to Article 34(4)) be given in instalments and (whether or not given in instalments) shall be given not later than two months after the beginning of the employment.

(3) The statement shall contain particulars of—

(a) the names of the employer and employee,

(b) the date when the employment began, and

(c) the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).

(4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment containing them) is given, of—

(a) the scale or rate of remuneration or the method of calculating remuneration,

(b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),

(c) any terms and conditions relating to hours of work (including any terms and conditions relating to normal working hours),

(d) any terms and conditions relating to any of the following—

(i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),

(ii) incapacity for work due to sickness or injury, including any provision for sick pay, and

(iii) pensions and pension schemes,

(e) the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment,

(f) the title of the job which the employee is employed to do or a brief description of the work for which he is employed,

(g) where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,

(h) either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer,

(j) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made, and

…

Statement of changes

36.—(1) If, after the material date, there is a change in any of the matters particulars of which are required by Articles 33 to 35 to be included or referred to in a statement under Article 33, the employer shall give to the employee a written statement containing particulars of the change.

…

Findings of fact – Failure to provide main statement of employment particulars

55. The tribunal is satisfied that at the time when the proceedings were begun the respondent was in breach of its obligation to give a written statement of employment particulars. The tribunal was informed by Mr Moore that the respondent had been a client of MCL for some time before the claimant's dismissal. Mr Loughlin's statement confirmed that MCL were retained to *"advise and assist [the respondent] on all HR and Employee Relations issues."* The tribunal is satisfied that it is just and equitable in all of the circumstances to make an award of the higher amount of four weeks' pay. The respondent company is of a size and nature

where it would be expected that statements of terms and conditions would issue to employees as a matter of course. There was an opportunity to remedy the default when Mr Moffatt was appointed as general manager in 2017. Further, the claimant's pay was reviewed and increased and this would have triggered to the obligation to give to the employee a written statement of particulars of change (Art. 36 of the 1996 Order). It is also clear that the respondent company was receiving HR advice and guidance from MCL employment law for a period before and during the disciplinary proceedings. This presented a further opportunity to remedy the default.

56. The tribunal awards the claimant 4 weeks' gross pay in this regard in an amount of **£2,013.84**.

PART C UNAUTHORISED DEDUCTIONS FROM WAGES AND HOLIDAY PAY

Relevant Law

57. Employment Rights (Northern Ireland) Order 1996

Employments with no normal working hours

20.—(1) This Article applies where there are no normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) The amount of a week's pay is the amount of the employee's average weekly remuneration in the period of twelve weeks ending—

(a) where the calculation date is the last day of a week, with that week, and

(b) otherwise, with the last complete week before the calculation date.

(3) In arriving at the average weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken.

(4) This Article is subject to Articles 23 and 24.

Right not to suffer unauthorised deductions

45.—(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

…

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Paragraph (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

…

Complaints to industrial tribunals

55.—(1) A worker may present a complaint to an industrial tribunal—

(a) that his employer has made a deduction from his wages in contravention of Article 45 (including a deduction made in contravention of that Article as it applies by virtue of Article 50(2)),

…

(2) Subject to paragraph (4), an industrial tribunal shall not consider a complaint under this Article unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this Article in respect of —

(a) a series of deductions or payments,

…

the references in paragraph (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(4) Where the industrial tribunal is satisfied that it was not reasonably practicable for a complaint under this Article to be presented before the end of the relevant period of three months, the tribunal may consider

the complaint if it is presented within such further period as the tribunal considers reasonable.

Determination of complaints

56.—(1) Where a tribunal finds a complaint under Article 55 well-founded, it shall make a declaration to that effect and shah order the employer—

(a) in the case of a complaint under Article 55(1)(a), to pay to the worker the amount of any deduction made in contravention of Article 45,

…

Meaning of "wages" etc.

59.—(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise, …

58. The Working Time Regulations (Northern Ireland) 2016 set out the entitlement to 5.6 weeks' annual leave for all workers and the entitlement to be paid unused holiday entitlement upon termination. The relevant provisions are Regulations 15 to 17. The Regulations further provide that:

Payment in respect of periods of leave

***20.**—(1) A worker is entitled to be paid in respect of any period of annual leave to which the worker is entitled under regulation 15 and regulation 16, at the rate of a week's pay in respect of each week of leave.*

(2) Articles 17 to 20 of the 1996 Order shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3). …

59. **Harvey** on Industrial Relations and Employment Law at Division B1 Pay, Part 7, Section D, Subsection 7 at paragraph [341] states: "*The fact that [the English equivalent to Article 59 of the 1996 Order] refers to 'sums payable under [the worker's] contract or otherwise' is relevant to holiday pay. It means that the definition of wages in [Article 59] includes not only contractual holiday pay but also payments in respect of annual leave due under regs 14(2) and 16 of the Working Time Regulations 1998: see* ***Revenue and Customs Comrs v Stringer [2009] UKHL 31*****,** ***[2009] IRLR 677****. As a result, a worker who has not been paid in respect of a period of statutory annual leave may bring a claim either (i) under reg 30(1)(*b) *of the Working Time Regulations 1998 or (ii) under {the 1996 Order], regardless of whether he can show a contractual right to the holiday in question."*

60. The claimant's claims of having been subject to unauthorised deductions from wages were comprised of the following matters: (i) during the period of her suspension (a) she was not paid her normal average weekly hours and (b) she was

paid at £8.50 per hour and not £9.50 per hour; and (ii) that she was not paid for her full accrued holidays upon the termination of her employment.

The respondent's submissions regarding unauthorised deductions from wages

61. The respondent's representative submitted that pursuant to Article 46 (2) of the 1996 Order the payment made during suspension could not amount to an authorised deduction. Article 46 (2) provides:

> *"Article 45 does not apply to a deduction from a worker's wages made by his employer in consequence of any disciplinary proceedings if those proceedings were held by virtue of a statutory provision."*

62. In the event that the tribunal held that there had been a deduction from wages, the respondent's representative provided the tribunal with a calculation which was not agreed by the claimant.

Findings of fact – Unauthorised deduction of wages

63. The tribunal finds that the claimant's claim in respect of having been made subject to unauthorised deduction of wages is well-founded. The tribunal further finds that the claimant was subject to a series of unauthorised deductions in respect of her pay during her period of suspension.

64. The tribunal was not satisfied that the payments made to the claimant during her period of suspension were within Article 46(2). The respondent did not adduce any evidence that the disciplinary proceedings had been held by virtue of a statutory provision.

65. The respondent's representative accepted that the claimant's suspension was on "full pay" and was not a disciplinary sanction. The claimant's suspension on 21 April 2018 was to be "full pay" (see letter at page 79 of the main bundle).

66. The tribunal finds that the claimant was not paid her usual weekly wage during her period of suspension.

67. The tribunal was provided with monthly payslips for the period of 13 weeks prior to the suspension, during which time the claimant's hours were recorded as 579.25. This gives average weekly working hours of 44.56 hours per week. Accordingly, during the period of her suspension she should have been paid for 347.57 hours over a period of 7 weeks and 4 days. The payslips for the period of the claimant's suspension, from 21 April 2018 to 15 June 2018, show that she was only paid for 285 hours. The respondent's representative suggested the claimant was contracted to work for a 37.5 hour week. As no written statement of terms and conditions was before the tribunal, the respondent's representative was asked to clarify the factual basis for this assertion. He initially asserted that this was based on the evidence of Mrs McKenna. Upon checking, it was accepted by him that no such evidence had been adduced.

68. The tribunal finds on the basis of the evidence before it (including payslip at page 215 of the main bundle), that the claimant's rate of pay immediately before her suspension was £9.50 per hour (and not £8.50 per hour as asserted by the

respondent). The reason for this is that the tribunal rejects the evidence of Mrs McKenna that the claimant's payslip showed £9.50 per hour because of an issue with the claimant's pay "which was rectified and changed in accordance with National Minimum Wage increase". The National Minimum Wage increased to £7.83 per hour for the over 25 age group in April 2018. The claimant was already receiving £8.50 per hour before the change, which was well above the threshold of £7.83 per hour. The explanation offered by Mrs McKenna did not provide a satisfactory rationale for the increase from £8.50 per hour to £9.50 per hour, shown on the payslip. The tribunal finds that the reason for £9.50 per hour being shown on the payslip was because this was the claimant's rate of pay, following the award of a pay rise.

69. Accordingly, the tribunal finds that in respect of her period of suspension, the claimant should have been paid for 347.57 hours at a rate of £9.50 per hour, being £3301.92 gross. Instead she received £2,422.50 gross. This amounted to an authorised deduction in the sum of **£879.42** gross. This amount is subject to statutory deductions, as appropriate.

70. The claimant was also shown as having received holiday pay for 15 hours of holidays in the payslip dated 30 April 2018 for the period 19 March 2018 to 22 April 2018. This period included the day she was suspended and the day after she was suspended. The rotas for that period were included in the main bundle (pages 231 to 235) which the tribunal were referred to during the claimant's cross examination and the tribunal finds, on the balance of probabilities, that the claimant did not take annual leave at this time. The tribunal therefore finds that the first two days of her suspension were wrongly treated for payroll purposes as annual leave. This also amounts to an unauthorised deduction from wages.

71. In her final payment, the claimant appears to be have been paid 10.5 days outstanding holiday on the basis of a 37.5 hour week at £8.50 per hour. Accordingly, the claimant has been subject to a further unauthorised deduction in respect of holiday pay and is entitled to be paid for 12.5 days in her final pay (10.5 days plus the 2 days wrongly treated as annual leave during suspension). The figure of £503.46 for a week's pay has been agreed between the parties in the context of the calculation of the Basic Award. The tribunal is satisfied that the use of this reference figure of a week's pay in respect of the calculation of holiday pay is appropriate. The CJEU in **Hein v Albert Holzkamm GmbH (C-385/17), [2018] 12 WLUK 184** held that a worker should receive normal pay as holiday pay. The tribunal finds that the claimant should have received £1258.65 gross in respect of her accrued but untaken holidays, whereas she only received £669.38 in her final pay. The amount of the deduction in respect of holiday pay is **£589.27**. This amount is subject to statutory deductions, as appropriate.

Unauthorised deductions from wages and holiday pay summary

72. The claimant is awarded the sum of **£1468.69** gross (£879.42 and £589.27) in respect of her claims of unauthorised deductions from wages. This payment is subject to statutory deductions, as appropriate.

PART D

RACE DISCRIMINATION CLAIM

73. **Relevant Law**

Race Relations (Northern Ireland) Order 1997

Racial discrimination

3.—(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Order if—

(a) on racial grounds he treats that other less favourably than he treats or would treat other persons

…

(3) A comparison of the case of a person of a particular racial group with that of a person not of that group under paragraph (1) or (1A) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

Discrimination by way of victimisation

4.—(1) A person ("A") discriminates against another person ("B") in any circumstances relevant for the purposes of any provision of this Order if

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

(b) he does so for a reason mentioned in paragraph (2).

(2) The reasons are that—

(a) B has—

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

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

(iii) otherwise done anything under this Order in relation to A or any other person; or

(iv) alleged that A or any other person has (whether or not the allegation so states) contravened this Order; or

(b) A knows that B intends to do any of those things or suspects that B has done, or intends to do, any of those things.

(3) Paragraph (1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.

Harassment

4A.—(1) A person ("A") subjects another person ("B") to harassment in any circumstances relevant for the purposes of any provision referred to in Article 3(1B) where, on grounds of race or ethnic or national origins, A engages in unwanted conduct which has the purpose or effect of—

(a) violating B's dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) Conduct shall be regarded as having the effect specified in sub-paragraphs (a) and (b) of paragraph (1) only if, having regard to all the circumstances, including, in particular, the perception of B, it should reasonably be considered as having that effect.

Meaning of “racial grounds” “racial group” etc.

5.—(1) Subject to paragraphs (2) and (3), in this Order—

“racial grounds” means any of the following grounds, namely colour, race, nationality or ethnic or national origins; “racial group” means a group of persons defined by reference to colour, race, nationality or ethnic or national origins, and references to a person's racial group refer to any racial group into which he falls.

Burden of proof: industrial tribunals

52A.—(1) This Article applies where a complaint is presented under Article 52 and the complaint is that the respondent—

(a) has committed an act of discrimination, on grounds of race or ethnic or national origins, which is unlawful by virtue of any provision referred to in Article 3(1B) (a), (e) or (f), or Part IV in its application to those provisions, or

(b) has committed an act of harassment.

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

(a) has committed such an act of discrimination or harassment against the complainant,

(b) is by virtue of Article 32 or 33 to be treated as having committed such an act of discrimination or harassment against the complainant, the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act.

SHIFTING THE BURDEN OF PROOF

74. The proper approach for a tribunal to take when assessing whether discrimination has occurred and in applying the provisions relating to the shifting of the burden of proof was reviewed and restated by the Northern Ireland Court of Appeal in the case of **Nelson v Newry & Mourne District Council [2009] NICA**:-

> *"22 This provision and its English analogue have been considered in a number of authorities. The difficulties which Tribunals appear to continue to have with applying the provision in individual cases indicates that the guidance provided by the authorities is not as clear as it might have been. The Court of Appeal in **Igen v Wong [2005] 3 ALL ER 812** considered the equivalent English provision and pointed to the need for a Tribunal to go through a two-stage decision-making process. The first stage requires the complainant to prove facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. Once the Tribunal has so concluded, the respondent has to prove that he did not commit the unlawful act of discrimination. In an annex to its judgment, the Court of Appeal modified the guidance in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 333**. It stated that in considering what inferences and conclusions can be drawn from the primary facts the Tribunal must assume that there is no adequate explanation for those facts. Where the claimant proves facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex then the burden of proof moves to the respondent. To discharge that onus, the respondent must prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of sex. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal would normally expect cogent evidence to be adduced to discharge the burden of proof. In **McDonagh v Royal Hotel Dungannon [2007] NICA 3** the Court of Appeal in Northern Ireland commended adherence to the **Igen** guidance.*
>
> *23 In the post-**Igen** decision in **Madarassy v Nomura International PLC [2007] IRLR 247** the Court of Appeal provided further clarification of*

the Tribunal's task in deciding whether the Tribunal could properly conclude from the evidence that in the absence of an adequate explanation that the respondent had committed unlawful discrimination. While the Court of Appeal stated that it was simply applying the ***Igen*** *approach, the* ***Madarassy*** *decision is in fact an important gloss on* ***Igen****. The court stated:-*

> *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient matter from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination; 'could conclude' in Section 63A(2) must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage, the Tribunal needs to consider all the evidence relevant to the discrimination complaint such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the complainant were of like with like as required by Section 5(3) and available evidence of all the reasons for the differential treatment.'*
>
> *That decision makes clear that the words 'could conclude' is not be read as equivalent to 'might possibly conclude'. The facts must lead to an inference of discrimination. This approach bears out the wording of the Directive which refers to facts from which discrimination can be 'presumed'.*

24 This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. In ***Curley v Chief Constable of the Police Service of Northern Ireland [2009] NICA 8****, Coghlin LJ emphasised the need for a Tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the Tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The Tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination."*

75. In **S Deman v Commission for Equality and Human Rights & Others [2010] EWCA Civ 1279**, the Court of Appeal in England and Wales considered the shifting of the burden of proof in a discrimination case. It referred to **Madarassy** and the

statement in that decision that a difference in status and a difference in treatment 'without more' was not sufficient to shift the burden of proof. At Paragraph 19, Lord Justice Sedley stated:-

> *"We agree with both counsel that the 'more' which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be forwarded by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."*

76. The Supreme Court considered the statutory test in **Hewage v Grampian Health Board [2012] IRLR 870**. Lord Hope stated**:**

> *"29. In **Igen v Wong**, para 16, Peter Gibson LJ said that, while it was possible to offer practical help…, there was no substitute for the statutory language. And in **Madarassy v Nomura International plc [2007] ICR 867**, para 9 Mummery LJ emphasised that the Court of Appeal had gone out of its way in **Igen** to say that its guidance was not a substitute for statute. As he put it, "Courts do not supplant statutes. Judicial guidance is only guidance." In para 11 he said that there was really no need for another judgment giving general guidance: "Repetition is superfluous, qualification is unnecessary and contradiction is confusing." And in para 12:*
>
> > *"Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts. It is vital that, as far as possible, the law on the burden of proof applied by the fact-finding body is clear and certain. The guidance in **Igen Ltd v Wong** meets these criteria. It does not need to be amended to make it work better."*
>
> *30. Nevertheless Mummery LJ went on in paras 56 and following of his judgment in **Madarassy** to offer his own comments as to how the guidance in **Igen v Wong** ought to be interpreted, which I would respectfully endorse. In para 70, having re-stated what the tribunal should and should not do at each stage in the two stage process, he pointed out that from a practical point of view, although the statute involved a two-stage analysis, the tribunal does not in practice hear the evidence and the argument in two stages:*
>
> > *"The employment tribunal will have heard all the evidence in the case before it embarks on the two-stage analysis in order to decide, first, whether the burden of proof has moved to the respondent and, if so, secondly, whether the respondent has discharged the burden of proof."*
>
> *31. In para 77, in a passage which is particularly in point in this case in view of the employment tribunal's reference in para 107 to its being required to make an assumption, he said:*
>
> > *"In my judgment, it is unhelpful to introduce words like 'presume' into the first stage of establishing a prima facie case. Section 63A(2) makes no mention of any presumption. In the relevant passage in **Igen Ltd v Wong** … the court explained why the court does not, at the first stage, consider the absence of an adequate explanation. The tribunal is told*

by the section to assume the absence of an adequate explanation. The absence of an adequate explanation only becomes relevant to the burden of proof at the second stage when the respondent has to prove that he did not commit an unlawful act of discrimination."

The assumption at that stage, in other words, is simply that there is no adequate explanation. There is no assumption as to whether or not a prima facie case has been established. The wording of sections 63A(2) and 54A(2) is quite explicit on this point. The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be proved, and it is for the claimant to discharge that burden."

77. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11** the issue of the comparison required in discrimination cases was considered. Lord Nicholls remarked:

"10. In deciding a discrimination claim one of the matters employment tribunals have to consider is whether the statutory definition of discrimination has been satisfied. When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.

No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.

…

11. This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

…

110
In summary, the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. But the comparators that can be of evidential value, sometimes determinative of the case, are not so circumscribed. Their evidential value will, however, be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the victim."

78. Lord Hoffman in **Watt (Carter) v Ahman [2007] UKHL 51; [2008] 1AC 696** at Paragraph 36, summarised the test for discrimination as follows:-

"(1) The test for discrimination involves a comparison between the treatment of the complainant and another person ('the statutory comparator') actual or hypothetical, who is not of the same sex or racial group as the case may be.

(2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in each case should be (or assumed to be) the same as, or not materially different from, those of the complainant.

(3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a Tribunal may infer how a hypothetical comparator would have been treated ... This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question ('the evidential comparator') to those of the complainant and all the other evidence in the case."

VICTIMISATION

79. In **McCann v Extern [2014] NICA 1** the Northern Ireland Court of Appeal summarised the law relating to victimisation.

[14] … The IDS Handbook states at paragraphs 9.41 and 9.42:-

"9.41 To succeed in a claim of victimisation, the claimant must show that he or she was subject to the detriment because he or she did a protected act or because the employer believed he or she had done or might do a protective act …

9.42 …. The essential question in determining the reason for the claimant's treatment is always the same: what consciously or sub-consciously motivated the employer to subject the claimant to the detriment? In the majority of cases, this will require an inquiry into the mental processes of the employer …"

[15] As Harvey said at paragraph [468] in respect of the test for victimisation:

> *"Analysing the elements of any potential victimisation claim requires somewhat different considerations as compared to the other discrimination legislation.*
>
> *…*
>
> *A claim of victimisation requires consideration of:-*
>
> *The protected act being relied upon*
>
> *The correct comparator*
>
> *Less favourable treatment*
>
> *The reason for the treatment*
>
> *Any defence.*
>
> *Burden of proof."*

80. A claim of victimisation requires a comparison with an appropriate comparator. In ***Chief Constable of West Yorkshire Police v Khan, [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065*** Lord Nicholls stated (at para [27]): *'The statute is to be regarded as calling for a simple comparison between the treatment afforded to the complainant who has done a protected act and the treatment which was or would be afforded to other employees who have not done the protected act.'* The case of **Khan** considered the wording of "by reason that":

> ***"29***
>
> ***(3) 'by reason that'***
>
> *Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in* ***Nagarajan v London Regional Transport [1999] IRLR 572, 575–576****, a causation exercise of this type is not required either by s.1(1)(a) or s.2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."*

81. In ***Khan***, the claimant had brought a complaint about racial discrimination at work in failure to promote him. Before it came up for hearing he resigned and asked for a

reference for obtaining another job. The respondent refused because of the pending case. It was held that the respondent had treated Mr Khan less favourably than other comparators, being persons who would be customarily given a reference on resigning. But the refusal of reference was caused by the pendency of the discrimination case and the need to preserve his position in that proceeding, not by the fact that he had brought the case. Therefore there was no victimisation.

HARASSMENT

82. **Harvey** stated at Division L paragraph 410 that *"No justification for harassment is possible and no comparator is needed; that said, conduct shall be regarded as having the required effect only if, having regard to all the circumstances, including in particular the perception of the victim, it should reasonably be considered as having that effect."*

83. The conduct must also be on the ground of the claimant's religious belief or political opinion. In **Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336,** a race relations claim, the EAT found that the necessary elements of a harassment claim are:

(1) The unwanted conduct. Did the respondent engage in unwanted conduct?

(2) The purpose or effect of that conduct. Did the conduct in question either:

(a) have the purpose or

(b) have the effect of either (i) violating the claimant's dignity or (ii) creating an adverse environment for [the claimant]? (We will refer to (i) and (ii) as 'the proscribed consequences'.)

(3) The grounds for the conduct. Was that conduct on the [proscribed grounds]?

Underhill J continued *"[14] it is important to note the formal breakdown of 'element (2)' into two alternative bases of liability – 'purpose' and 'effect'. That means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose; and, conversely, that he may be liable if he acted for the purposes of producing the proscribed consequences but did not in fact do so (or in any event has not been shown to have done so)."* Dealing with the proviso, he held *"A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred.*

…

[15] Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including

the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.

…

[16] 'element (3)' involves an inquiry which will be very familiar to tribunals from other types of discrimination claim. There is ample case law on the nature of the inquiry required by the (interchangeable) statutory phrases 'on the grounds of' or 'by reason that': see, classically, the speeches of Lord Nicholls in ***Nagarajan v London Regional Transport [1999] IRLR 572****, at pp.575–576 and* ***Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830*** *at paragraph 29*

[22] We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

84. In **Warby v Wunda *Group plc* [2012] Eq LR 536** Langstaff J endorsed the observations of Elias J in ***Land Registry v Grant (Equality and Human Rights Commission intervening)*** **[2011] ICR 1390** "*In* ***Grant*** *at para 43, again, the importance of the particular circumstances were emphasised there by Elias LJ: 'for example, it will generally be relevant to know to whom a remark is made, in what terms, and for what purpose.' We therefore accept the respondent's submission that context is everything. It is for a tribunal who hears the witnesses, whose job it is to determine the facts, and who considers the submissions made to it in the light of having heard those witnesses and determined those facts, to decide what the context is and to contextualise what has taken place. We would add that it may be a mistake to focus upon a remark in isolation. A tribunal is entitled to take the view, as we see it, that a remark, however unpleasant and however unacceptable, is a remark made in a particular context; it is not simply a remark standing on its own.*

…
We accept that the cases require a tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a tribunal, in our view, is not obliged to do so. The words are to be seen in context …"

COMPARATORS

85. The claimant relied upon the following comparators in respect of her claim: Peter Magill (the bar manager), Sinead Gamble (floor supervisor and the claimant's predecessor as Restaurant Manager), Ciaran Moffatt (the claimant's Line Manager

and General Manager of the Grouse) and MMcI (the son of Mrs McKenna who is above the claimant in terms of line management). It was also apparent that in some instances she was relying on a hypothetical comparator who was British/Irish.

The parties' submissions in respect of race discrimination

86. The respondent's representative submitted that the claimant had failed to prove facts from which a conclusion of discrimination could be made as per **Igen.** He pointed to the fact that the decision to dismiss was made by Mr Loughlin, and upheld by him, and that race had not been a consideration for either of them in that decision. In relation to the allegation regarding M the chef, it was the respondent's representative's contention that the claimant's claim in this regard had been presented outside the requisite time limit. He described the claimant's claim that she was forced to work weekends as *"nonsense"*, submitting that she was responsible for writing the rotas for staff and that the claimant had been accommodated in allowing her Mondays and Tuesdays off. He denied that there was any conspiracy against the claimant.

87. The claimant submitted that she had been discriminated against on grounds of her ethnicity in the way that she was made to work every Sunday compared to colleagues and when she asked for this matter to be addressed, nothing was done. She relied on the fact that she received the same rate of pay as a colleague who was in a less senior position. She submitted that she would have been treated differently if she had been British/Irish and that things would not have been addressed so quickly or so rashly. In relation to her suspension, she contended that contrary to the evidence of Mr Loughlin, her health and protection were not considered at all. She submitted that she had proved facts from which discrimination could be concluded.

RELEVANT FINDINGS OF FACT

88. The tribunal finds that the claimant has not proved facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent or its employees had committed the unlawful acts of discrimination, and that her claims of unlawful race discrimination, by way of direct discrimination, harassment and victimisation, and the claimant's claim is therefore to be dismissed. The findings in relation to each allegation are set out below.

89. The parties agreed at the outset of the hearing that the claimant's witness statement disclosed 15 allegations of race discrimination. The tribunal has summarised the claimant's allegations of direct discrimination, victimisation and harassment, identified where in the claimant's witness statement the respective allegation is found and set out its relevant findings of fact in respect of each allegation.

89.1 First allegation – see paragraphs 19-21 and paragraph 25 of the claimant's witness statement

(i) The claimant claimed she was not remunerated appropriately for the work that she did both in terms of what was required of her and her experience compared to other non-foreign nationals.

The claimant alleged that she was treated as a second-class person

and was loaded with more duties than her comparators, Peter Magill, (Bar Manager – equivalent to the claimant). Sinead Gamble, (Restaurant Supervisor – below the claimant in the management structure) and Ciaran Moffatt (General Manager – above the claimant in the management structure). At the hearing she also sought to rely on McMI, who was a son of Mrs McKenna and a general manager.

(ii) **Findings of Fact**

In relation to that allegation, the tribunal finds that the claimant has not established on the balance of probabilities that she was subject to less favourable treatment than her comparators in relation to her remuneration for the following reasons:

(a) The claimant was paid the same rate of pay as Mr Magill, her direct equivalent over the bar. The tribunal had no evidence before it as to the lack of equivalence of the duties of Mr Magill to determine whether he was assigned “a lighter load” then the claimant or otherwise.

(b) The claimant was started on a higher rate of pay than her predecessor Ms Gamble had enjoyed when she undertook the duties of restaurant manager. These facts do not support the claimant’s assertion of a discriminatory pay regime.

(c) Ms Gamble, as floor supervisor, reported to the claimant and could not have been expected to carry out equivalent duties to the claimant. The tribunal noted that Ms Gamble had been the restaurant manager prior to the claimant before she went on maternity leave. As such, she had been entitled to return to work following her period of maternity leave on the same terms and conditions. The tribunal accepts the evidence of Mrs McKenna that in light of Ms Gamble’s long service and seniority, she was given increases in pay to keep parity with the claimant. Whilst this may have seemed very unfair to the claimant, in the sense that someone who she managed received the same rate of pay, she has not proved facts from which a tribunal could conclude that this arrangement was on grounds of the claimant’s race. In any event, even if the burden of proof had been shifted to the respondent, the tribunal accepts Mrs McKenna’s explanation for the treatment, namely the desire not to disadvantage Ms Gamble. The treatment was not on the grounds of the claimant’s race or ethnicity.

(d) Mr Moffatt was the claimant’s superior and the tribunal had no comparative evidence before it as to his duties. As the claimant’s line manager, the tribunal does not in any event accept him as an appropriate comparator.

(e) MMcI, who is a son of one of the directors, was also a general manager and was not in a situation which was comparable to

that of the claimant. Accordingly, the tribunal does not accept him as an appropriate comparator.

(f) Further, on the claimant's evidence, when she raised her concerns, she was awarded a further pay rise, as reflected in the last payslip before her suspension.

Accordingly, the tribunal finds that the claimant was not subject to unlawful direct race discrimination in respect of this allegation.

89.2 Second Allegation – see paragraph 22 of the claimant's witness statement

(i) The claimant asserted that she was bullied and harassed by Peter Magill, by M the chef, and by Ciaran Moffatt on numerous occasions on the basis of her race and/or ethnicity.

(ii) **Findings of fact**

In relation to that allegation, the tribunal finds that the claimant has not proved on the balance of probabilities that she was unlawfully harassed by Mr Magill, Mr Moffatt or M the chef.

(a) The claimant alleged that she had raised a complaint with Mr Moffatt regarding Mr Magill's behaviour and relied on an exchange of text messages between them. This was not put to Mr Moffatt in cross examination, and the tribunal was not satisfied that the text message exchange referred to Mr Magill, who maintained his denial of any wrongdoing.

(b) M the chef, like the claimant, is not of British/Irish ethnicity. The tribunal accepts that there is evidence that the claimant and M the chef had had an unpleasant exchange which had given rise to a written complaint by the claimant on 19 March 2018. The claimant's email of complaint describes M the chef having used foul and abusive language towards her. By the time she made her witness statement to the tribunal, she had embellished her initial account so that instead of M the chef calling her a "f*cking bitch' she recounted he called her a 'fucking Bulgarian bitch'.

(c) There is no evidence that the claimant raised any complaint during her employment regarding the behaviour of Mr Moffatt.

Accordingly, the tribunal is not persuaded that the dignity of the claimant was violated or that Mr Moffatt or Mr Magill created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The claimant has not discharged the burden of proof in relation to the incident with M the Chef with regard to his behaviour having been on grounds of her ethnicity.

89.3 Third allegation – see paragraph 22 of the claimant's witness statement

(i) The claimant claimed she was suspended without explanation on the basis of her race and/or ethnicity.

(ii) **Findings of fact**

In relation to that allegation, the tribunal finds that the claimant's suspension was not on grounds of her race or ethnicity. This is because:

(a) The claimant was suspended on the advice of Mr Loughlin. The claimant did not maintain any allegation of racial motivation on the part of Mr Loughlin.

(b) The tribunal considered the claimant's treatment against that of a hypothetical comparator, in her circumstances, who was British/Irish. There was no evidence before the tribunal to suggest that there would have been a difference in treatment afforded to such a comparator.

(c) The tribunal did consider the fact that M the chef had not been suspended when the claimant complained about him. If the claimant's assertions regarding the respondent wishing to rebalance the workforce in favour of local people were correct, it is surprising that M the chef, who was not British/Irish, was not suspended and disciplined. The failure of the respondent to suspend M in these circumstances is inconsistent with the tenor of the claimant's allegations. Further, the tribunal notes that the claimant confirmed that she had not wished for formal disciplinary action to be pursued against M the chef. These factors undermine any inference of discrimination in the treatment afforded to the claimant.

Notwithstanding the findings above, the tribunal rejects the explanation provided for the suspension by Mr Loughlin. Mr Loughlin's witness statement and oral evidence was that it was company policy under the MCL handbook to suspend in the case of allegations of bullying and harassment. However, the extracts of the handbook (subject to the findings that the tribunal has made regarding that handbook having been superseded) contained in the bundle of documents do not support his assertion in this regard. Mr Loughlin was asked to clarify what section of the MCL handbook was relied upon. He referred the tribunal to page 85 of the main bundle which stated as follows:

*"**Precautionary Suspension***

In certain cases, for example in cases involving gross misconduct, where relationships have broken down or there are risks to our property or responsibilities to other parties, consideration will be given to a brief period of suspension with full pay whilst unhindered investigation is conducted. We will also consider alternative actions which would be more acceptable to you yet serve the same purpose as a suspension e.g. agreeing to a temporary transfer to other duties or another work station without loss of pay or the taking of annual holidays to which you are entitled. Any action taken will be reviewed to ensure it is not unnecessarily protracted. It will be made clear that any action taken is not considered a disciplinary action."

This is clearly not a policy of automatic suspension, as suggested by Mr Loughlin. It was also clear from Mr Loughlin's evidence that his consideration of the imposition of the suspension was cursory and passing. Further, it is not clear to the tribunal why HS could not have been assigned a new manager during the investigation.

The finding that the handbook did not require suspension does not mean that the tribunal should infer discrimination, and the tribunal declines to do so. The tribunal finds that the imposition of the suspension arose due to ineffective consideration of the terms of the MCL handbook by Mr Loughlin, rather than due to discrimination. Accordingly, the imposition of the suspension on the instruction of Mr Loughlin was not an act of race discrimination.

89.4 Fourth allegation - See paragraph 23 of the claimant's witness statement

(i) The claimant asserts that she was shouted at and sworn at on many occasions by the owner and blamed for matters which were not her responsibility/fault.

(ii) **Findings of fact**

In relation to that allegation, there was no evidence before the tribunal to substantiate the claimant's bare assertion in this respect. The claimant has not proved on the balance of probabilities that she was shouted at and sworn at by the owner on many occasions and blamed for matters which were not her responsibility/fault. Even if there had been evidence before the tribunal to substantiate the claimant's assertion, this would not have been sufficient in the absence of the "more" referred to in **Madarassy** (see paragraph 74 above) to conclude that the claimant had been subject to unlawful harassment on grounds of her race.

89.5 Fifth Allegation – see paragraph 24 of the claimant's witness statement

(i) The claimant claimed that on 27 November 2017 Eugene McKenna shouted and swore at her and stated *"I don't give a fuck what you think. You have to do what I have told you. NOW!!"*

(ii) **Findings of fact**

In relation to that allegation, the tribunal finds on the balance of probabilities that there was an unpleasant exchange between the claimant and Mr McKenna either late on 26 November 2017 or in the early hours of 27 November 2017. It cannot be certain as to the words used by Mr McKenna. The statements of both the claimant and Mrs McKenna (who the claimant messaged following the incident) confirm that there had been an issue regarding the claimant being unwilling to release floor staff towards the end of their shift. However, the tribunal does not find that this unpleasant exchange was on the grounds of the claimant's race. That is because the claimant herself in the contemporaneous WhatsApp message exchange with Mrs McKenna acknowledges that she knows Mr McKenna and knows he doesn't mean it, that it was just pressure. Mrs McKenna confirmed that she was right in this view and advises the claimant just to ignore him when he is like that. On this basis, the tribunal is unable to conclude that a British/Irish restaurant manager would have been treated any differently in the same situation or that the claimant was subject to unlawful harassment on grounds of her race. Rather, it appears that the treatment was because of the disagreement between the claimant and Mr McKenna regarding how she should have dealt with the staff on that occasion. As per **Grant** and **Warby** (see paragraph 84 above) the tribunal takes the view, that this exchange, however unpleasant and however unacceptable, is a remark made in a particular context; it is not simply a remark standing on its own.

89.6 Sixth Allegation – see paragraphs 30 and 31 of the claimant's witness statement

(i) The claimant complained of an inequitable distribution of weekend work and asserted that this was unlawful race discrimination.

(ii) **Findings of fact**

In respect of that allegation, the tribunal finds that the claimant has not proved facts from which it could conclude in the absence of an adequate explanation that the weekend rota arrangements were discriminatory. The tribunal accepts that the claimant did seem to be in work for most Sundays. The fact that she appeared to work weekends more often than colleagues does not cause the burden of proof to shift because there was insufficient evidence from which a tribunal could conclude that this was against her will or on grounds of her ethnicity. The claimant sought to compare her treatment to that of Ms Gamble who was of a different ethnic background to Ms Gamble

and who generally did not work weekends. However these two matters (i.e. difference in treatment and difference in status) are not sufficient to raise an inference of discrimination as per **Madarassy** (see paragraph 74 above)**.** The tribunal notes the following matters which would indicate the arrangements were not discriminatory:

(a) The claimant, during cross examination, confirmed that she was responsible for the preparation of staffing rotas.

(b) The respondent's representative sought to advance the case that the claimant was on rota by herself to work every weekend to free herself up to pursue other activities, including work with the Inter Ethnic forum, on a Monday and Tuesday. The tribunal has insufficient evidence to enable it to make a finding as to whether this was the reason for the claimant working weekends or not.

(c) It was accepted by Mr Moffatt during his oral evidence that the claimant had expressed discontent with the distribution of weekend working. Mr Moffatt accepted that Ms Gamble was generally off on Sundays. On the claimant's own evidence, Ms Gamble's lack of weekend working was due to arrangements agreed with Mrs McKenna, grounded on Ms Gamble's family circumstances, rather than the claimant's race.

(d) If the claimant had genuinely felt that she was being exploited on grounds of her ethnicity, it is surprising that there is no record of any formal complaint by her in this regard. The claimant was able to submit a detailed written complaint about the behaviour of M the Chef.

Accordingly, the tribunal is not persuaded on the evidence before it that the pattern of weekend working was against the claimant's will or if it did amount to less favourable treatment, that it was on grounds of her ethnicity.

89.7 **Seventh Allegation –** see paragraphs 31 and 32 of the claimant's witness statement

(i) The claimant complains that she was increasingly isolated following raising a complaint. This could have potentially amounted to victimisation, depending on the circumstances. With the agreement of the respondent's representative, the claimant provided clarification to the tribunal as to the detail of what was said when she complained. She confirmed that she had had conversations with Mr Moffatt where she told him she felt isolated and discussed her difficulties regarding her feeling she was always required to provide weekend cover. The claimant relayed the details of the conversation set out at allegation 15 (see paragraph 89.15 below), when he is alleged to have said that *"foreigner staff should not be on the floor",* which is denied by Mr Moffatt. She did not give evidence of having raised any complaint about this comment which she alleged Mr Moffatt made. Likewise, the

claimant recounted her complaints to Mrs McKenna which consisted of the claimant telling Mrs McKenna of her difficulties regarding the weekend rota, how she felt "put down" and that Ms Gamble was always refusing to help. She recounted that Mrs McKenna was to have a word with her, but nothing changed.

(ii) **Findings of fact**

In respect of that allegation, the tribunal finds that the details of the complaint made by the claimant did not amount in law to a protected act and therefore no complaint of victimisation could be sustained under Article 4 of the Race relations (Northern Ireland) Order 1997 (see paragraph 73 above).

89.8 Eighth Allegation – see paragraph 33 of the claimant's witness statement

(i) The claimant complained that she was not invited to taste food when others who were not of her race/ethnicity were. The claimant provided further details of this incident in a short supplementary witness statement. The allegation by the claimant related to Mr Moffatt inviting Mr Magill, Ms Gamble and a kitchen helper to taste food from new suppliers whilst passing over her. This was alleged to have happened around the beginning of February 2018, according to the claimant's supplementary witness statement.

(ii) **Findings of fact**

In respect of that allegation, the tribunal finds that there is no evidence before it from which it could conclude in the absence of an adequate explanation that this difference in treatment was on the grounds of the claimant's race or ethnicity. The claimant has done no more than assert a difference in treatment and a difference in status. This does not amount to the "more" required by **Madarassy** (see paragraph 74 above)**.**

89.9 Ninth Allegation – see paragraphs 39-43 of the claimant's witness statement

(i) The claimant recounted an issue regarding tips going missing. This claim was clarified as relating to a potential complaint of detriment for public interest disclosure which was not pursued by the claimant.

(ii) **Findings of fact**

In light of this claim not being pursued, it is not necessary for the tribunal to make any finding.

89.10 Tenth Allegation – see paragraph 45 of the claimant's witness statement

(i) The claimant asserted that M the chef shouted at her stating *"Fucking bitch I hate you everybody hates you"* and calling her *"A fucking Bulgarian bitch".*

(ii) **Findings of fact**

In respect of that allegation, the tribunal does not accept the claimant's evidence that the adjective 'Bulgarian' was used by M the chef (see paragraph 89.2(ii)(b) above). The claimant did not include this detail in her email of complaint on 19 March 2018. If the adjective "Bulgarian" had been used the tribunal finds it highly likely that this detail would not have been omitted when the claimant formalised a written complaint about his behaviour.

89.11 Eleventh Allegation – see paragraphs 46 and 47 of the claimant's witness statement

(i) The claimant complains of the handling of her complaint about this alleged incident by Mr McKenna, Mr Moffatt and MMcI.

(ii) **Findings of fact**

In respect of that allegation, the tribunal finds that the relevant circumstances of the claimant and M the Chef, regarding the claimant's complaint against M the chef and the incident on 21 April 2018 when compared to HS' complaint against the claimant, are not the same. The tribunal accepts the evidence of Mr Moffatt that the claimant did not wish for the matter to be dealt with in a formal matter. The claimant's witness statement also confirms this to be the case at paragraph 47. It is clear that both Mr Moffatt and MMcI took the claimant's complaint seriously and arranged to meet with her as they wished to take it further. The reason why it was not progressed was because of the claimant's express wishes, rather than any reason related to the claimant's race/ethnicity. Further, if the claimant's views of the respondent are correct, and that it has a different standard for foreign nationals than for those who are British/Irish, the respondent's actions in not pursuing M the Chef make no sense.

89.12 **Twelfth Allegation –** see paragraphs 41-51, 52 of the claimant's witness statement

(i) The claimant complains there was a discussion between M the chef and Ciaran Moffatt in which it was disclosed that it was intended to dismiss the claimant and replace her.

(ii) **Findings of fact**

In respect of that allegation, the tribunal is not persuaded that the alleged incident occurred. The tribunal notes that Mr Moffatt denied this allegation and said it never happened. The tribunal is of the view that if the claimant had been privy to such a conversation, it is simply not credible that she would not have raised an immediate complaint about it to Mr and Mrs McKenna. When the incident happened with M the chef, the claimant demonstrated that she was capable of raising a detailed letter of complaint the next day. A conspiracy of this nature by

her line manager was more serious and would have warranted an immediate complaint to the owners of the business. Further, it appears to be the claimant's case that LP referred to below was appointed to replace her and that this was an act of race discrimination. LP is also a foreign national from Eastern Europe. This factual matrix simply does not support the claimant's belief that there was a plot to get rid of her, because she was a foreign national.

89.13 Thirteenth Allegation – see paragraphs 49-50 of the claimant's witness statement

(i) The claimant claims that she was not consulted about or told of the commencement of a new Assistant Manager, LP and was kept out of the way when he was being interviewed.

(ii) **Findings of fact**

In respect of that allegation, the tribunal is not persuaded that the claimant was not told that LP was commencing work. The weekly rotas were prepared by the claimant. The rota for LP's start date is included at page 233 of the main bundle. This rota commences on Monday 2 April 2018 and it shows LP working Saturday, 7 April and Sunday, 8 April of that week. The claimant, during cross examination, suggested that this rota must have been amended at the end of the week. The tribunal is not persuaded that this rota had been amended. Other rotas included within the bundle have been amended in pen. It is also clear that employees submitted weekly timesheets so it is unclear why it would have been necessary for this rota to have been amended at the end of the rota period. Even if the claimant is correct that she was not consulted about LP being recruited and was kept out of the way when he was being interviewed, this does not of itself amount to race discrimination. There was no evidence before the tribunal that a hypothetical restaurant manager of British/Irish ethnicity would have been consulted and informed of LPs recruitment and employment.

89.14 Fourteenth Allegation – see paragraphs 53 and 54 of the claimant's witness statement

(i) The claimant complains that Peter Magill was rude and unfriendly about her and that no action was taken when she complained to Carol (McKenna), MMcI and others.

Paragraph 54 of the claimant's witness statement appears to be the only specific example of an incident when the claimant alleges that Peter Magill was rude to her and when she raised a complaint.

(ii) **Findings of fact**

In respect of that allegation, the tribunal finds that the claimant has not proved that Mr Magill was rude and unfriendly to her or that she raised a complaint in respect of which nothing was done. The tribunal notes

that Mr Magill denied the claimant's allegations against him. The claimant relied on an exchange of text messages between her and Mr Moffatt to show that she had raised a complaint with Mr Moffatt regarding Mr Magill's behaviour. This text exchange was not put to Mr Moffatt in cross examination, and the tribunal was not satisfied that the "him" referred to in the text message exchange was Mr Magill. Even if there had been objectionable behaviour by Mr Magill, the claimant has not proved facts from which a tribunal could conclude that any difference in treatment was due to the claimant's race/ethnicity.

89.15 Fifteenth Allegation – see paragraph 59 of the claimant's witness statement

(i) The claimant confirmed that between January 2018 and April 2018 on numerous occasions Ciaran Moffatt expressed opinions that he did not wish foreign nationals to be front of house (see paragraph 6, factual issue 15)/serving on the floor (see paragraph 89.7(i))**.**

(ii) **Findings of fact**

In respect of that allegation, the tribunal finds on the balance of probabilities that no such comments were made by Mr Moffatt. The tribunal notes that Mr Moffatt strenuously denied that he had expressed such opinions. The tribunal considered the content of Ms Comescu's statement, insofar as it related to the claimant's claims. The respondent's representative focused his cross examination on Ms Comescu's complaints regarding her own treatment prior to her maternity leave, which are not matters for the tribunal. Ms Comescu's statement alleged that there were issues of race discrimination at the respondent's business. However, Ms Comescu's witness statement did not corroborate any specific allegation put forward by the claimant. The tribunal notes that although Ms Comescu asserted that she left in protest at the treatment afforded to foreign nationals, particularly after Mr Moffatt's appointment, her resignation letter does not reflect this but states that she was sleep deprived, overwhelmed and unable to continue working following the birth of a child. This undermined Ms Comescu's credibility and tainted her evidence generally. Accordingly, the tribunal did not place much weight upon her evidence.

90. For the avoidance of doubt, the tribunal finds that the claimant's dismissal was not on grounds of her race. Whilst the tribunal has found that the dismissal was unfair, it does not find that it was discriminatory.

PART E

REMEDIES

Submissions by the respondent on remedy

91. The tribunal notes that in his closing submission, the respondent's representative submitted that the claimant was not entitled to any compensatory loss in the event

that her dismissal was found to be unfair. He was asked to clarify the basis for this submission, following which he stated the tribunal should make such award as is just and equitable. The respondent's representative accepted that the question of mitigation by the claimant had not been touched upon during his cross examination of the claimant. If compensation is the appropriate remedy, it is for the respondent to show that the claimant has not mitigated her loss.

92. The tribunal has considered whether it would be appropriate to deal with the question of remedy in this decision. It has determined that it would not be appropriate for the following reasons:

(i) The provisions of Article 146 of the 1996 Order

Article 146 provides

> **146.**—(1) This Article applies where, on a complaint under Article 145, an industrial tribunal finds that the grounds of the complaint are well-founded.
>
> (2) The tribunal shall—
>
> (a) explain to the complainant what orders may be made under Article 147 and in what circumstances they may be made, and
>
> (b) ask him whether he wishes the tribunal to make such an order.
>
> (3) If the complainant expresses such a wish, the tribunal may make an order under Article 147.
>
> (4) If no order is made under Article 147, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with Articles 152 to 161**)**. . . to be paid by the employer to the employee.

Whilst the claimant had indicated at paragraph 6.11 of her claim form that she is seeking the remedy of "compensation only", the provisions of Article 146 require the tribunal, on a finding of unfair dismissal, to explain to the claimant what orders may be made, and to ask the claimant whether she seeks an order of re-instatement or re-engagement.

(ii) The provisions of Articles 156 and 157 of the 1996 Order

In the event that the claimant confirms her election to receive compensation only, the tribunal must award what it considers just and equitable in the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the respondent. Despite the parties having been directed to agree a schedule of loss, the tribunal is left with conflicting schedules of loss. The tribunal has been unable to determine the precise level of the claimant's losses. This is because a number of the claimant's invoices in respect of her

self-employment contained in the main bundle are completely illegible (pages 204-210). The tribunal has also been unable to satisfactorily cross reference these amounts with the bank credits shown on the claimant's bank statements. Further, the tribunal is also mindful that the claimant began her self-employment with the Inter Ethnic Forum in January 2018, prior to her dismissal. The letter at page 18 of the supplementary bundle appears to suggest that she received £280 per month prior to her dismissal. If this is the case, then, in so far as she continued to receive this amount, it does not count towards her income in mitigation of her losses.

93. Accordingly, a separate Remedies Hearing will be convened to consider the question of remedy for Unfair Dismissal. A Case Management Discussion will be convened to give directions and orders in respect of that hearing. This does not preclude the parties resolving the issue of remedy for the claim of unfair dismissal between them in advance of such a reconvened hearing.

94. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 11-15 November 2019, 28-29 November 2019 and 6 December 2019 Belfast.

Date decision recorded in register and issued to parties: