THE INDUSTRIAL TRIBUNALS

CASE REF: 24540/19IT

CLAIMANT: **Aminat Abimbola Wahab**

RESPONDENT: **Four Seasons (No.7) Limited**

JUDGMENT

The unanimous judgment of the tribunal is as follows:-

(a) The claimant's complaint of unfair dismissal is dismissed by the tribunal;
(b) The tribunal Orders that the respondent shall pay to the claimant the sum of £1,896.00 in unpaid wages;
(c) The claimant's complaint of unlawful discrimination on grounds of race is dismissed by the tribunal.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Leonard**

Panel Members: **R McKnight**
I Atcheson

APPEARANCES:

The claimant appeared in person under the current arrangements pertaining to in person hearings at the tribunal venue and was unrepresented.

The respondent was represented by Ms Emma McIlveen, Barrister-at-Law, instructed by Murphys, Solicitors, conducted under the current arrangements pertaining to hearings at the tribunal venue.

BACKGROUND AND PRELIMINARY FINDINGS OF FACT

1. The respondent operates a number of residential care homes in Northern Ireland, one of which is located at Tennent Street in Belfast.

2. The claimant was employed by the respondent as a healthcare worker, commencing in that employment on 22 October 2018 and this employment came to an end on 22 September 2019 when the claimant was dismissed from employment. For the reasons which follow, it is not necessary to provide further detail concerning the disciplinary process which preceded the dismissal as this is not immediately relevant to the tribunal's determination. It is sufficient to say that, following a disciplinary hearing which took place on 13 September 2019, the Home Manager of

the Tennent Street residential care home, by letter dated 19 September 2019 informed the claimant that she was to be dismissed, with effect from 22 September 2019, the stated reason for dismissal being as follows: – "*You have failed to adhere to policy and procedures relating to notifying the home of absence. You failed to notify the home of when you would return to work*". Materially, the letter of 19 September 2019 informed the claimant of her entitlement to appeal the dismissal decision. By letter dated 21 September 2019 the claimant notified the respondent's regional manager, Ms Lorraine Kirkpatrick, of her desire to appeal the dismissal.

3. An appeal hearing duly proceeded on 26 November 2019, which hearing was attended by the claimant and by Ms Kirkpatrick. By letter dated the same date, 26 November 2019, Ms Kirkpatrick wrote to the claimant to advise her of the outcome of the appeal hearing. The material part of the outcome letter reads as follows: – "*Having reviewed the detail of your appeal, I am satisfied that the decision to terminate your employment should be overturned. This concludes the company's disciplinary procedures and the above decision is final. Please contact me on* [number provided] *should you wish to discuss your return to work with FSHC*".

4. The tribunal had sight of a copy email dated 5 December 2019 sent by Ms Eimear McCabe, Regional Secretary of the respondent, to Ms Kirkpatrick informing Ms Kirkpatrick as follows: – "*Aminat Wahab rang the regional office to say she had received her appeal letter but does not want to return to work with Four Seasons as she now has a new job*".

5. The claimant was aggrieved at the dismissal and she sought advice from the Equality Commission, as far as the tribunal understands it a relatively short time after the dismissal, but prior to the appeal hearing. The Equality Commission appears to have provided some advice and assistance to the claimant, but the exact nature and extent of this is not fully clear to the tribunal. By claim form dated 17 October 2019 the claimant set forth a claim against the respondent providing some detail and including claims of, firstly, race discrimination, secondly, unfair dismissal, and thirdly, a claim for unpaid holiday pay. The amount specified in regard to the latter was £164.40.

6. By response to the claimant's claim, submitted by the respondent's legal representatives, dated 7 January 2020, and after having given an account of some of the history of the matter as far as the respondent was concerned, it was asserted that the claimant would not have a stand-alone claim for unfair dismissal as she did not have the requisite qualifying period in terms of continuous employment. Further, the claim for race discrimination was denied and this was characterised as being vexatious, malicious and misconceived and for the alleged purpose of affording jurisdiction to the tribunal.

Case Management

7. The case was subject to case management in the usual manner relating to a case including a claim of unlawful discrimination. The case now comes before the tribunal for determination on the basis of the directed witness statement procedure, with an agreed bundle of documents in accordance with the directions previously afforded to the parties. The hearing was listed for three days, from 28-30 September 2021. However, the hearing was readily accommodated over two days, 28 and 29 September 2021. The respondent at hearing was represented by

Solicitor and Counsel and the claimant was self-represented.

8. At the outset of the hearing the tribunal took steps to establish, for the avoidance of doubt, that the claimant had a good understanding of spoken and written English and the tribunal was satisfied that this was the case, notwithstanding that English may not have been her first language. Throughout the course of the hearing, further, the tribunal took considerable care to ascertain and to establish that the claimant was not placed at any disadvantage on account of, firstly, any language or comprehension issue, secondly, on account of the fact that she was a self-represented person, with professional representatives representing the opposing party and, thirdly, on account of the specific arrangements pertaining to hearings conducted using the technology currently installed in the tribunal venue.

9. At a number of points in the course of the hearing steps were taken by the tribunal, without objection from the respondent's representative, carefully to explain matters of procedure and certain principles of law applicable to the jurisdictional heads under which the claimant sought to bring her case. To give but one example of this, the respondent's representative on the first day of hearing cited a legal authority in argument (which is further referred to below). The tribunal directed that, in advance of the following day's hearing, a copy of that legal authority would be provided to the claimant, together with a reasonable opportunity being afforded for the claimant to peruse this. Further, the broad principles emerging from that legal authority were explained to the claimant in order to ensure, insofar as possible, that the claimant had a fair and reasonable opportunity to comprehend any relevant legal principles emerging from that authority.

10. The sole witness for the respondent was Ms Methyl Dagooc, Manager of the Tennent Street residential home. This witness, upon affirmation, adopted and confirmed the content of her witness statement and the witness was then subject to cross-examination by the claimant and to re-examination, as applicable. The claimant, upon affirmation, adopted and confirmed the content of her witness statement and supplemental witness statement and the claimant was then subject to cross-examination by the respondent's representative. The claimant was thereafter afforded by the tribunal an opportunity to clarify any answers which she had provided in response to cross-examination questions. Upon conclusion of the oral evidence, upon the second day of the hearing, the tribunal heard oral submissions from the respondent's representative and from the claimant. The tribunal's judgment in the matter was reserved upon conclusion of the hearing.

RELEVANT LAW

Race Discrimination

11. The Race Relations (Northern Ireland) Order 1997 ("the 1997 Order") provides as follows:-

> *"Article 3(1) –*
>
> *A person discriminates against another in any circumstances 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;

…

Article 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).

Article 4(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 allegations so states) contravened this Order; or

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

Article 4A (1) –

A person ('A') subjects another person ('B') to harassment in any circumstances relevant to 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 of effect of –

(a) violating 'B's' dignity, or

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

Conduct shall be regarded as having the effects specified at 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.

The 1997 Order, further, provides at Article 52A:-

"(1) This Article applies where a complaint is presented under Article 52 and a 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.

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."

Article 32 – (1) –

Anything done by a person in the course of his employment shall be treated for the purposes of this Order as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.

Article 32 – (3) –

In proceedings brought under this Order in respect of an act alleged to have been done by an employee of his, it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from –

(a) doing that act, or

(b) doing, in the course of his employment, acts of that description."

Shifting of the Burden of Proof

12. The correct approach in assessing the occurrence of unlawful discrimination and applying provisions relating to the shifting of the burden of proof are relatively well-settled in case law in a number of leading UK and Northern Ireland authorities.

13. A helpful and quite succinct statement of the contemporary law, binding upon the tribunal, was set forth by the Northern Ireland Court of Appeal in the case of ***McCorry and Ors v McKeith [2016] NICA 47***(a disability discrimination case)***.*** The following is a relevant extract from that case:-

> *"The Shifting Burden of Proof.*
>
> *[35] - [36] ....*
>
> *[37] The Burden of Proof Directive (EEC) 97/80 was extended to the United Kingdom in 1998 and Article 4(1) provided –*
>
> > *"Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them have established, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."*
>
> *[38] Section 17A (1B) of the 1995 Act provides –*
>
> > *`Where, on the hearing of a complaint under sub-section (1), the complainant proves facts from which the Tribunal could, apart from this sub-section, conclude in the absence of adequate explanation that the respondent has acted in a way which is unlawful under this Part, the Tribunal shall uphold the complaint unless the respondent proves that he did not so act.'"*
>
> *[39] The approach to the shifting burden of proof was considered by the Court of Appeal in England and Wales in Wong v Igen Ltd (2005) EWCA Civ 142. It was stated that the statutory amendments required a two-stage process. The first stage required the complainant to prove facts from which the Tribunal could, apart from the section, conclude, in the absence of an adequate explanation, that the employer had committed, or was to be treated as having committed, the unlawful act of discrimination against the employee. The second stage, which only came into effect on proof of those facts, required the employer to prove that he did not commit or was not to be treated as having committed the unlawful act, if the complaint is not to be upheld.*
>
> *[40] The issue was revisited by the Court of Appeal in England and Wales In Madarassy v Nomura International plc [2007] EWCA Civ 33 which set out the position as follows (italics added) –*
>
> > *"56. The Court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent `could have' committed an unlawful act of discrimination. The bare facts of a difference in*

status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal `could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

57. `Could conclude' [in the Act] must mean that `a reasonable Tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the Tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the complaint to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by [the Act]; and available evidence of the reasons for the differential treatment.

58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the Tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."

Unfair Dismissal

14. Article 130 of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") and subsequent provisions, as amended, provide:-

"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 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 –

(b) 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."

15. Concerning the necessary qualifying period of employment to bring a claim of unfair dismissal, if the complaint is to be upheld Article 140 of the 1996 Order provides as follows:-

> ***140.**—(1) Article 126 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than one year ending with the effective date of termination.*

This latter is subject to certain statutory exceptions further set forth in Article 140 of the 1996 Order.

Unauthorised Deduction from Earnings

16. A claim for unauthorised deduction from earnings falls under Article 45 of the 1996 Order, including a claim that the claimant did not receive monies due under the employment contract.

THE EVIDENCE AND RELEVANT FINDINGS OF FACT

17. Dealing, firstly, with the matter of cogency and credibility of the evidence from the two witnesses, in general terms and after having given considerable latitude to the claimant, the tribunal found the claimant's evidence to be lacking in cogency, to be unfocused and, at times, regrettably lacking in credibility. To give but one example of this latter, the claimant made to the tribunal a clear and unambiguous assertion (in response to cross-examination earlier in the day's proceedings on the second day of hearing) that she had without any doubt whatsoever expressly mentioned to the tribunal the first name of the husband of the respondent's sole witness, by way

of identification of that person. She was most adamant that this was the case; she steadfastly maintained that position, when questioned. As the tribunal had no recollection of this name being expressly mentioned by the claimant in evidence, and as the respondent's representative, likewise, had no such recollection of the name being mentioned in the claimant's oral evidence, the tribunal carefully explored with the claimant at what point in proceedings she might have expressly named that person. This exploration conducted with the claimant was in order that the tribunal might be assisted with efficiently checking the record, without otherwise having to expend an undue amount of time in that process. The tribunal thus endeavoured to establish sufficient information from the claimant for the purpose of checking the record. However, the tribunal did not achieve much success and the process engaged in was regrettably rather protracted. Notwithstanding her repeated assertions that she had, without doubt, mentioned the name expressly to the tribunal in evidence, as matters proceeded and as things were further explored, ultimately the claimant changed her stance. In a complete reversal of her previous steadfast assertion, the claimant then stated that she had not mentioned this name in her oral evidence.

18. This latter is but one illustration of a generally unfocused and unsatisfactory presentation of evidence on the claimant's part. Another illustration relates to the fact that the claimant did not seek to have produced potentially corroborative documentation from the respondent nor to call witnesses in order to corroborate her case. The tribunal sought to establish whether the claimant had fully understood the interlocutory process and her entitlement in that regard. The tribunal, having noted the Record of Proceedings concerning the Preliminary Hearing which was held before the Vice President on 4 March 2020, noted the fact that the interlocutory procedure and procedures generally were explained by the Vice President to the claimant and a number of specific directions from the Vice President are recorded, with timetabling. The claimant, when questioned, confirmed that this explanation had been afforded and that it was understood by her.

19. Notwithstanding the foregoing, at a further point in proceedings the claimant endeavoured to assert that she did not understand that she was entitled to call witnesses and to call for the production of documents. This entirely contradictory position characterises some aspects of the claimant's, at times, unfocused case. Whilst making appropriate and reasonable allowances for the claimant's command of spoken English (the claimant's apparent command of the written word being reasonably adequate from the documents before the tribunal), the tribunal nonetheless harboured concerns regarding the consistency and cogency of the claimant's evidence. This issue was indeed taken up in submissions by the respondent's representative, which submissions will be further briefly mentioned below. In contrast, the tribunal found the evidence of the respondent's witness, Ms Dagooc, to be consistent with her evidence-in-chief when subjected to cross-examination by the claimant.

20. In terms of the material content of the claimant's evidence, this primarily concerned two issues: firstly, the dismissal issue and, secondly, the alleged unlawful discrimination issue. For the reasons mentioned below, the tribunal did not need to concern itself much with evidence tendered by the claimant regarding the dismissal issue which preceded in time the claimant's appeal hearing against the dismissal. However, that part of any evidence impacting directly or indirectly upon the claimant's allegations of unlawful discrimination was certainly fully relevant. The

claimant nonetheless sought to adduce a considerable amount of evidence about her dismissal and events preceding that. However, any evidence in that regard does not need to be rehearsed, nor does much in the way of specific findings of fact concerning the discrete issue of the dismissal need to be recorded in this determination, on account of relevancy. It is sufficient perhaps to say that the claimant's evidence bore out the common position with the respondent's evidence that there was a dismissal and that a right of appeal against that dismissal was afforded to the claimant. Significantly, Ms Kirkpatrick issued a letter dated 26 November 2019 which confirmed to the claimant that her appeal had been successful: the decision to terminate her employment had been overturned. The claimant received that communication by letter. She was aware of the success of her appeal. There is no issue of contention in that regard.

21. In respect of that part of claimant's evidence purporting to support her allegations of unlawful discrimination, whilst the majority of the content of the claimant's primary witness statement (and the content of a further statement in reply to the respondent's witness statement) focused upon the detail of the unfair dismissal allegation (and thus is not of direct relevance, for the reasons later stated), nonetheless the claimant set forth certain allegations in her (primary) witness statement in the following terms: – *"They always tell me I am black"; (2) "They always abused me because I am covered my head"; (3) "They said don't like Nigeria people"; (4) "They said I am smelling*"; (5) *They are always told me that they don't understand my English*".

22. Under cross-examination, the claimant was closely questioned by the respondent's representative concerning these specific allegations and about the identity of any individual or individuals who might have been responsible in any manner for this alleged conduct towards her – in other words the identity of the "they" referred to by her in the five numbered allegations. Nowhere in her primary witness statement were any named individuals expressly referred to, whether in regard to the matters relating to the dismissal nor, materially, in regard to the alleged unlawful discrimination.

23. In the claimant's further, replying, witness statement filed in response to the respondent's witness statement, the claimant expressly names "*Alona Briones*" (as "*units nursing in charge*") and "*Samuel sawn*" (believed to be a reference to a person named "Samuel Swain" referenced by the claimant as "*team leader*"). Whilst the initial references to individuals appear to be in regard to issues of annual leave, there is a slightly later reference made in this replying witness statement to "*Alona Briones*", with the allegation expressly made that that person "…..*was planning against me*". The tribunal took that to raise the possibility of some connection to the allegation of race discrimination, although that is not entirely clear and it is certainly not expressly stated. Again, there are further references to "*Alona Briones*" but, yet again, nothing in the witness statement is expressly alleging, in clear and unambiguous terms, any connection with race discrimination. Without referring to her by name, later in this replying witness statement, the claimant does make reference to "*manager*" which the tribunal, on balance, construes as being an intended reference to Ms Dagooc.

24. The tribunal notes that, generally, the claimant has a tendency to refer to people in unspecific terminology such as "they" instead of by reference to named individuals. She also has a tendency to refer to "manager" in a number of places instead of

specifically referring to her manager by name. Any reference to "manager" is presumed by the tribunal to be a reference to Ms Dagooc. For example, in paragraph 5 of her second witness statement the claimant asserts "… *manager always show me the hatred and wicked attitude to me*…". Here, the tribunal presumes that this is intended to be an assertion to Ms Dagooc having "hatred" of, and a "wicked attitude" to, the claimant.

25. In the tribunal's case management directions made by the Vice President, it had been made fully clear to the claimant that the witness statement evidence provided by her was to be her complete evidence to the tribunal. Nowhere in any of this witness statement evidence (and contained within the two witness statements provided by the claimant to the tribunal) is any express reference made to race discrimination. Having said that, the tribunal is entitled to take heed of any answers provided by the claimant in response to cross-examination questions. In her oral evidence tendered under cross-examination (which cross-examination for the reasons indicated below was primarily focused by the respondent's representative upon the issue of the potential for unlawful discrimination) the claimant sought to adduce further evidence regarding matters more pertinent to her claim of alleged unfair dismissal than regarding unlawful discrimination. However, one specific allegation made by the claimant was that she had verbally reported allegations of conduct visited upon her on a number of occasions and also that she had written a letter to her manager, twice, effectively reporting these allegations of treatment amounting to unlawful discrimination. She alleged that this manager (believed to be Ms Dagooc) had basically told her that she (Ms Dagooc) had encountered the same thing when she had started sometime before and, in simple terms, had to "put up with it" and that things then had improved for Ms Dagooc.

26. When questioned as to whether she had kept a copy of any letter or document reporting the matter in writing to management, the claimant stated that she had not done so. However, in some further oral evidence provided by the claimant to the tribunal, the tribunal understood the claimant to be stating that she had indeed sent a copy of a complaint letter that she had directed to management to the Equality Commission, at the time she had approached the Commission to seek assistance with her case. She was questioned further by the respondent's representative as to why she had not sought to obtain a copy of that letter from the Equality Commission, but she was unable to provide a clear explanation. There also appears to be a fundamental contradiction between the claimant stating in evidence that she had not kept a copy of any letter but, nonetheless, she also in a contradictory manner asserted that she had provided a copy of a letter to the Equality Commission. The tribunal was unable to resolve that apparent contradiction.

27. Generally, the claimant was vague and imprecise in her evidence concerning the details of these stated verbal and written reports. The claimant also alleged in evidence that she had made a verbal report of adverse conduct suffered by her to a nurse named "Nurse Roosevelt", but that nothing had been done concerning anything which she had reported. Again, there was no corroboration of this. In one part of her evidence the claimant alluded to a nurse named "Phyllis" and the claimant made allegations that there were adverse references made to the claimant's skin colour, to the claimant covering her head and, further, that three other nurses had started to laugh together and to talk in their native language (which was Filipino) which the claimant did not understand, thereby intentionally

excluding the claimant from any conversation. In respect of an alleged comment, as asserted by the claimant in her oral evidence, that a member of staff had said that they did not like people from Nigeria, the claimant could not recall when this alleged comment had been made. The claimant identified no named individual as being responsible for this, save that the alleged reference was made by a person from Northern Ireland, she stated. In respect of the allegation put forward by the claimant that a reference had been made to the claimant "smelling", the claimant alleged, variously, that this remark had been made by an unnamed and unidentified fellow employee one night when she was working with her, this being a nurse, and also by the husband of her manager (it not being fully clarified definitively whether that latter person was actually an employee of the respondent). In response to further cross-examination questions, the claimant made a general allegation that she was treated "like a slave" and that she was forced to clean up after other members of staff. Again, her allegation was not further particularised, with no dates, times, nor any means of identification being provided of any individuals who might have been responsible for any such treatment as alleged.

28. In respect of the evidence from the respondent's sole witness, in simple terms this witness stated that there had been no complaints nor any allegations raised by the claimant, either verbally or in writing, with Ms Dagooc, nor were there any records of grievances or complaints recorded in any other manner by the respondent, concerning or which could have concerned unlawful discrimination, during the course of the claimant's employment. Ms Dagooc maintained that, in effect, these particular matters had been raised by the claimant, opportunistically, after termination of the employment contract and in the course of the tribunal proceedings, in order to enhance the claimant's case. Ms Dagooc stated that it was only at this stage of tribunal proceedings that the respondent had received any knowledge of these allegations. The claimant, nonetheless maintained her assertion that she had raised these issues verbally with her manager on a number of occasions and had also written to the manager in which the alleged discrimination was mentioned; again, she had not kept a copy.

29. When asked specifically in cross-examination about when any such verbal reports had been made to the manager and when any letter had been written, the claimant's evidence was to a large degree vague and unspecific. The claimant did mention in her oral evidence a letter of "December 2018", which would have been a relatively short time after her start date. The claimant then further mentioned in oral evidence a letter of "April or early May 2019" which she stated was given by her to her manager. Her evidence here was however generally unfocused and it did not assist the tribunal in clearly establishing matters of fact in support of any specified allegations.

30. Generally, the tribunal observes an endeavour made by the claimant in evidence to portray treatment, both by colleagues and also by management, which ultimately culminated in some manner of a conspiracy, having at least some element of racial motivation, that she would face disciplinary charges, with the intended effect or consequence that she would be dismissed from employment. Any such conspiracy and, in particular, any racial motivation was robustly denied by Ms Dagooc, both in her evidence-in-chief and also steadfastly in her responses to any cross-examination questions. As mentioned, Ms Dagooc steadfastly maintained that at no stage had anything, either verbally or in writing, been reported by the claimant to her in regard to any of the claimant's allegations concerning unlawful discrimination,

now voiced to the tribunal. She expressed shock at the allegations; she sought in her evidence to draw to the tribunal's attention the very diverse workforce, with a significant number of foreign nationals working in the Tennant Street home. She sought to provide in her witness statement and oral evidence some detail to the tribunal in terms of numbers and national origins of the workforce and, indeed, this uncontroverted evidence bore out the fact that it was quite a diverse workforce in this regard.

The Submissions

31. In aid of the claimant, in order that she might clearly understand the submissions which were to be made on the part of the respondent, it was agreed that the respondent's submissions would be made first, by the legal representative. These were succinct and encompassed three areas. Firstly, the contention advanced was that legal authority supported the proposition that once a dismissal had been overturned upon an appeal under a disciplinary process, the contract of employment was automatically reinstated. Accordingly, if a dismissed employee who was so reinstated on appeal then, of their own volition, decided not to return to the employment, there was no dismissal by the employer. The cited authority for this proposition was derived from the case of ***Ramesh Patel v Folkstone Nursing Home Limited [2018] EWCA Civ 1689 and [2018] EWCA Civ 1843.*** That English Court of Appeal case makes reference to the Northern Ireland Court of Appeal case (which is binding upon this tribunal) of ***David McMaster v Antrim Borough Council [2010] NICA 45.*** In effect, the respondent did not terminate the contract which subsisted up to the date of the successful appeal. The claimant's conduct after that date effected the termination of the contract and accordingly there was no dismissal. For this reason, there could be no successful unfair dismissal claim. They corollary of this position, as conceded by the respondent's representative, was that no argument could be effectively advanced that the claimant had failed to attain the necessary period of one year, provided for in Article 140 of the 1996 Order. That being the case, the further concession made in submissions was that the respondent was indeed obliged to pay the claimant the equivalent of two months' pay. It was explained to the tribunal, without objection from the claimant, that a figure had been quantified in respect of this latter which amounted to the sum of £1,896.00. The respondent was agreeable to this figure being made the subject of an Order by the tribunal for unpaid wages in the matter. The claimant raised no objection to that.

32. In regard to the claimant's claim for unlawful discrimination, the submission made on behalf of the respondent was that there was absolutely no credible evidence to support this. A number of points were material, so it was submitted. Firstly, there is no written record of anything in the nature of a complaint or grievance made by the claimant whilst in the employment of the respondent which could possibly connect to any allegation of race discrimination. The respondent's sole witness, Ms Dagooc, had steadfastly maintained that nothing had been received from the claimant by way of a complaint or grievance in writing, nor had any such matter being raised by the claimant verbally during the employment, connecting with this issue.

33. The case had been subject to case management and the facility had existed for the claimant to summon witnesses for corroborative purposes and the claimant was entitled to obtain documents. If the claimant was now arguing that a written grievance complaint or letter had been presented by her to the respondent

containing, expressly, allegations of unlawful discrimination, the claimant had taken no steps to gain access to any such evidence and to produce it to the tribunal. The claimant had failed to call any witness in support of her allegations. Indeed, in the representative's submissions the tribunal was requested to note that the claimant had, in effect, "expanded" her case as it progressed. The representative drew the tribunal's attention to certain parts of the case where it was contended that this was so. As there was no evidence adduced by the claimant from which the tribunal could make findings of fact relevant to the allegations of unlawful discrimination, the law provided that the burden of proof did not shift to the respondent. If the tribunal accepted the respondent's representative's submission, that was an end to the matter. As the claimant had herself terminated the employment contract, and as the concession had been made in respect of two months' pay, and as there was absolutely no basis upon which to make a finding of unlawful discrimination, this concluded the issues, in the representative's submission.

34. The tribunal gave some latitude to the claimant in proceeding with her submissions. The tribunal clarified the technical position that the claimant's evidence was concluded (which fact had been carefully checked and confirmed by the tribunal with her at the time of conclusion) and that she had to confine her case to submissions only; the tribunal ensured that she fully understood this point. Nonetheless, on a number of occasions subsequently the tribunal had to steer the claimant away from endeavouring to introduce further evidence and the tribunal had to draw the claimant back to the primary purpose of this part of the proceedings, which was to enable the claimant to argue that her contentions ought to be supported by the tribunal and to articulate any reasons for this.

35. Setting aside those parts of the claimant's case were she endeavoured to continue to argue that she had been unfairly dismissed, the claimant also presented a largely unfocused argument that the tribunal ought to believe her, that she was telling the truth, and that there had been, in effect, a conspiracy to dismiss her which was grounded upon racial motivation and unlawful discrimination. She again alluded to parts of her evidence which she felt were supportive of this claim. In regard to the cited authority regarding the unfair dismissal issue, the claimant stated that this related to another person's case and so it was irrelevant to hers. The tribunal took some time to explain to the claimant, in basic terms, the issue of precedent and the fact that earlier judicial determinations and the principles established therefrom could be persuasive or binding upon the tribunal, for example in the latter the case of ***McMaster v Antrim Borough Council.*** The claimant's submissions concluded with the claimant maintaining that she had been subjected to unlawful discrimination on racial grounds.

The Tribunal's Judgment

Unfair Dismissal

36. Dealing firstly with the unfair dismissal matter, the tribunal notes the case cited in argument by the respondent's representative and, particularly, notes the fact that this English Court of Appeal judgment alludes to the Northern Ireland Court of Appeal case of ***McMaster v Antrim Borough Council.*** A brief extract from the judgment of Coughlan LJ (at para. 14 and after an extensive exploration of the relevant authorities) on behalf of the Court of Appeal might be helpful: –

"[14] *Applying the principles derived from the above authorities to the decision of the Industrial Tribunal in this case we have reached the conclusion that the appeal must be allowed. ……. The appellant exercised that right of appeal and obtained a successful outcome. The legal result is that the plaintiff's contract must be regarded as reinstated at the date of the successful appeal."*

37. A further extract from the case of ***Ramesh Patel v Folkstone Nursing Home Limited*** might, again, be helpful (with the tribunal's emphasis):-

"

27. By including a contractual right of appeal in the employment contract, the employer makes available to the employee a facility to seek to overturn the disciplinary decision made against him and to have the dismissal treated as being of no effect. If the appeal is successful, then subject to any other contractual provisions, ***the employee is entitled to be treated as having never been dismissed, to be paid all back pay and to have the benefit of all other terms of his contract of employment through the relevant period and into the future.*** *…..*

28. Conversely, if the employee exercises his right of appeal under the contract and does not withdraw the appeal before its conclusion, it is obvious on an objective basis that he is seeking to be restored to his employment and is asking and agreeing (if successful) to be treated as continuing to be employed under his contract of employment for the interim period since his previous dismissal and continuing into the future, so that that dismissal is treated as having no effect. ***It is not a reasonable or correct interpretation of the term conferring a right of appeal that a successful appeal results in the employee having an option whether to return to work or not.***

29. ***If an appeal is brought pursuant to such a term and is successful, the employer is contractually bound to treat the previous dismissal as having no effect and the employee is bound in the same way. That is inherent in the very concept of an appeal in respect of a disciplinary dismissal.*** "

The employee thus has no "option", as it is put, whether or not to return to work. Accordingly, such an option was not available to the claimant and if she opted not to do so, that was her choice. However, the net effect was that it was the claimant, not the respondent, who terminated the contract. Thus there can be no question of a dismissal, fair or otherwise in this case. The unfair dismissal case cannot succeed.

Wages

38. Dealing then with the conceded effect of the foregoing, the contract was extended and thus it is fairly conceded that two months' pay is due by the respondent to the claimant. The claimant appears to have accepted that proposition, without demur either in principle or in respect of the amount of £1,896.00 indicated. This figure will accordingly be made the subject of an Order of the tribunal, as below. The claimant did not make any submission that anything further was due in regard to unpaid wages.

Unlawful Discrimination

39. In respect of the claimant's claim for unlawful discrimination made under the 1997 Order, the tribunal notes the pertinent statutory provisions, materially in this instance the burden of proof provisions referenced in the 1997 Order, at Article 52A. As has been made clear in many decisions of this Tribunal in this jurisdiction (and elsewhere in the UK in regard to equivalent statutory provisions) and which principles of law have been confirmed by the Northern Ireland Court of Appeal in such cases as ***McCorry and Ors v McKeith*** referenced above, the initial burden of proof rests with a claimant who wishes to establish unlawful discrimination. As the principles derived from such authorities as ***Wong v Igen Ltd (2005) EWCA Civ 142*** and ***Madarassy v Nomura International plc [2007] EWCA Civ 33*** make clear, there is, in essence, a two-stage process. The first stage requires that the claimant shall prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer had committed, or was to be treated as having committed, the unlawful act or acts of discrimination against the employee. Materially, the second stage only comes into effect upon proof of those facts at the first stage. This second stage then requires (if the complaint is not to be upheld by the tribunal) that the employer shall prove that it did not commit, or was not to be treated as having committed, the unlawful act or acts.

40. Examining any relevant facts derived from the evidence in respect of the application of the first stage of this two-stage process, the tribunal observes in this case the uncorroborated evidence of the claimant concerning allegations of unlawful discrimination. A number of issues thus bear upon the tribunal's further consideration of this. Firstly, the interlocutory process was fully explained by the Vice President to the claimant in the course of case management that took place well in advance of this hearing, including an explanation afforded of the fact that the claimant had an entitlement under the process to secure the evidence of witnesses who might provide corroboration of her case and that she had the entitlement to seek the production of documents supportive of her case. Notwithstanding that, the claimant did not seek to avail of any of these entitlements. Accordingly, her case has been left to rest solely upon her uncorroborated evidence, upon any information and evidence provided by the respondent's witness, and upon any documentation contained in the agreed bundle.

41. To present a credible and convincing case of merit, the claimant's evidence would need to be cogent and consistent and the tribunal would need to have proper reasons to support conclusions of fact derived from her evidence, in opposition to the contrary evidence adduced by the respondent. For example, the claimant sought to persuade the tribunal that she had made to the respondent's management a number of verbal reports or complaints concerning conduct which would bear upon her allegation of unlawful discrimination. Further, she asserted that she had recorded such matters in writing by letters sent to management (seemingly in December 2018 and in April or May 2019). Ms Dagooc denied receipt of any of these stated verbal or written reports or complaints at any time during the currency of the claimant's employment. There was thus a clear conflict between the evidence of the claimant and Ms Dagooc. The tribunal accepted that the evidence of Ms Dagooc was clear and consistent at all times. However, the tribunal had concerns at what might be termed the "shifting position" adopted by the claimant and this undermined her general credibility.

42. Having carefully considered the evidence, the tribunal does not accept, as a matter of fact, that the claimant did make clear and unambiguous reports, whether orally or in writing, to the respondent's management concerning matters which would bear, directly or indirectly, upon unlawful discrimination during the course of her employment with the respondent. Further, the tribunal is not satisfied that there is clear and credible evidence of some manner of a conspiracy effectively to drive the claimant out of employment with the respondent which has a connection with any manner of motivation on racial grounds. In addition, there is no corroboration whatsoever of the claimant's allegations of remarks being made to her by other members of staff which might be connected with her race or colour. There is insufficient weight of evidence, in the absence of any witness corroboration, nor any evidence of any effective complaint made, nor any supporting documentation, that these allegations are substantiated.

43. The suggestion, of course, made in submissions on behalf of the respondent by the representative is that this element of alleged unlawful discrimination was devised after termination of contract in order to enhance the claimant's case. The only finding that the tribunal is required to make is whether or not sufficient facts have been established in order to satisfy the first stage of the two-stage process mentioned in the statutory provision and in relevant case law.

44. The tribunal's unanimous determination is that the claimant has failed to prove such facts and accordingly the legal burden of proof does not shift to the respondent; the second stage in the process is not engaged. That being the tribunal's determination, this is the end of the matter: the claimant's case of unlawful discrimination cannot proceed.

45. In respect of all of the foregoing, the tribunal's unanimous judgment is as follows:

    45.1 The claimant's complaint of unfair dismissal cannot succeed as there was no dismissal by the respondent and that complaint is dismissed by the tribunal;

    45.2 The respondent and the claimant both agree to an Order being made by the tribunal that the respondent shall pay to the claimant the sum of £1,896.00 in unpaid wages and the tribunal Orders accordingly;

    45.3 The claimant's complaint of unlawful discrimination on grounds of race is dismissed by the tribunal.

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

Employment Judge:

Date and place of hearing: 28 & 29 September 2021, Belfast.

This judgment was entered in the register and issued to the parties on: