THE INDUSTRIAL TRIBUNALS

CASE REF: 304/16
1219/16

CLAIMANT: **Donna Nesbitt**

RESPONDENT: **The Pallet Centre Limited**

DECISION

The unanimous decision of the tribunal is that:-

1. The claimant's claim of equal pay, pursuant to the Equal Pay Act (Northern Ireland) 1970, as amended, is dismissed, the respondent having established the genuine material factor defence, for the purposes of Section 1(3) of the said Act.

2. The claimant was unfairly constructively dismissed.

3. The claimant was unlawfully discriminated, by way of victimisation, pursuant to the Sex Discrimination (Northern Ireland) Order 1976.

4. The tribunal makes a total award of compensation to be paid by the respondent to the claimant in the sum of £13,453.83.

5. The claimant's claim of sexual harassment, pursuant to the Sex Discrimination (Northern Ireland) Order 1976 and her claim for unauthorised deduction of wages and/or breach of contract, for non-payment of bonus, are dismissed, upon withdrawal.

Constitution of Tribunal:

Employment Judge: **Employment Judge Drennan QC**

Members: **Mr I. Carroll**
Mrs A. Gribben

Appearances:

The claimant appeared in person and was not represented.

The respondent was initially represented by Mr I. MacLean and subsequently by Ms C. Wall, both of Peninsula Business Services Limited.

Reasons

1.1 The claimant presented a claim to the tribunal on 12 January 2016, in which she made a claim for sex discrimination (equal pay), victimisation and sexual harassment, which was given the case reference number 304/16. The respondent presented a defence to the said claim on 12 February 2016, denying liability for the said claims of the claimant. The claimant presented a further claim of unfair constructive dismissal and a claim for unauthorised deduction of wages and/or breach of contract for non-payment of bonus on 25 April 2016, which was given the case reference number 1219/16. The respondent presented a defence to the said claim on 1 June 2016. The said claims of the claimant were the subject of a "Consolidation Order", so that both claims were considered together and heard by the same tribunal.

1.2 At the commencement of the hearing, the claimant confirmed, if the tribunal found her dismissal was unfair, that she wished to obtain by way of remedy an award of compensation and, in particular, she did not wish to seek, by way of remedy, an order of reinstatement and/or re-engagement, pursuant to the provisions of Articles 147-151 of the Employments Rights (Northern Ireland) Order 1996 (the 1996 Order). The claimant also confirmed that, in relation to her claim for discrimination by way of victimisation, she was seeking to include, by way of remedy, compensation for injury to feelings and/or personal injury. The claimant, at all times, properly accepted that, in relation to her claim of equal pay and/or unfair constructive dismissal, she could not seek by way of remedy, compensation by injury to feelings and/or personal injury.

In her relation to her claim for personal injury, pursuant to her claim of victimisation, as referred to above, the claimant relied upon medical evidence which was introduced by her following the conclusion of the hearing in this matter; which was subsequently admitted in evidence, by consent, without formal proof, subject to the caveat as to the weight, if any, to be given to such evidence, so admitted by the tribunal, in circumstances where such medical evidence was not the subject of any cross-examination by the respondent's representative.

1.3 The tribunal, following a series of Case Management Discussions, in the above matter, made relevant orders in relation to the claimant's claim for equal pay, whereby it was agreed that the tribunal, at the commencement of the substantive hearing, would first determine whether the respondent had established the defence to the claimant's claim of equal pay, of "a genuine material factor" (GMF defence); and that, subsequently, at a further hearing, the tribunal would determine the claimant's remaining claims. The tribunal would then, at the conclusion of both said hearings, reserve its decision and subsequently would give its decision, in writing, in relation to all the claimant's said claims, as referred to above. It was further agreed that if, at the above hearing, the respondent did not establish the GMF defence, then the matter would be relisted for a further hearing to determine all remaining issues in relation to the claimant's claim of equal pay, pursuant to the Equal Pay Act (Northern Ireland) 1970, as amended (the 1970 Act), following any such failure, by the respondent, to establish the GMF defence.

1.4 At the hearing, relating to determine the GMF defence of the respondent, the respondent was represented by Mr I. MacLean, consultant of Peninsula Business

Services Limited. Mr MacLean, due to a period of illness, was unable to represent the respondent at the subsequent hearing to determine the remaining claims of unfair constructive dismissal and/or discrimination by way of victimisation; and it was agreed, by the claimant and the respondent, that at the said subsequent hearing, the respondent would be represented by Ms C. Wall consultant of Peninsula Business Services Limited.

1.5 For the avoidance of doubt, during the course of the hearing of these matters, the claimant withdraw her claim for sexual harassment, pursuant to the Sex Discrimination (Northern Ireland) Order 1976 (the 1976 Order) and also her claim for unauthorised deduction of wages and/or breach of contract for non-payment of bonus, which said claims are dismissed upon withdrawal. Insofar as the claimant was alleging she had been harassed by the respondent, which was denied by the respondent, it was agreed by the representatives that any such allegation remained part of the claimant's claim of unfair constructive dismissal and not of her claim of sexual harassment, now withdrawn, as set out above.

1.6 It was not disputed by the respondent's representatives that the respondent was vicariously liable for the acts of the employees of the respondent, in relation to any acts or omissions of them, or each of them, for the purposes of these proceedings, pursuant to the Sex Discrimination (Northern Ireland) Order 1976 and/or the Employment Rights (Northern Ireland) Order 1996.

Relevant Law

2.1 Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") provides:-

(i) Article 126 the 1996 Order:-

"(1) an employee has the right not to be unfairly dismissed by his employer."

(ii) Article 127 of the 1996 Order:-

"(1) the purposes of this part an employee is dismissed by his employer if …

(c) the employee terminates a contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

2.2 Sex Discrimination Northern Ireland Order 1976 ("the 1976 Order") provides:-

(i) Article 6 of the 1976 Order:-

"A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this order if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason of the person victimised has –

(a) brought proceedings against the discriminator or any other person under this Order or the Equal Pay Act …., or

(b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Order or the Equal Pay Act …., or

(c) otherwise done anything under or by reference to this Order or the Equal Pay Act …. in relation to the discriminator or any other person, or

(d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to contravention of this Order or give rise to a claim under the Equal Pay Act

… or by reason that the discriminator knows the person victimised intends to do any of those things, or suspects the person victimised has done, or intends to do, any of them.

(2) 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 …"

(ii) Article 8 of the 1976 Order provides:-

"… (2) it is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland to discriminate against her –

(a) in the way he affords her access to opportunities for promotion, transfer or training or to any other benefits, facilities or services or by refusing or deliberating omitting to afford her access to them, or

(b) by dismissing her or subjecting her to any other detriment.

(iii) Article 42 of the 1976 Order

(1) anything done by a person in the course of his employment shall be treated for the purpose 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.

(2) anything done by a person who is agent for another person with the authority (whether expressed or implied, and whether precedent or subsequent) of that person shall be treated for the person of this Order as done by that other person as well as by him.

(3) and proceedings brought under this Order against any person in respect of any act alleged to been done by the employee of his should

be a defence for that person to prove that he took such steps as was reasonably practicable to prevent the employee for doing that act, or from doing in the course of his employment acts of that description.

(iv) Article 63A of the 1976 Order

(1) This Article applies to any complaint presented under Article 63 to an Industrial Tribunal.

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

(a) has committed an act of discrimination … against the complainant which is unlawful by virtue of Part III, or

(b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination …. against the complainant, or

….

The tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case maybe, is not to be treated as having committed, that act.

2.3 Equal Pay Act (Northern Ireland) 1970 ("the 1970 Act") provides

1. Requirement of equal treatment for men and women in same employment

(i) if the terms of a contract under which a woman is employed in an establishment in Northern Ireland do not include (directly or by way reference to a collective agreement or otherwise) an equality clause they should be deemed to include one.

2. An equality clause is a provision which relates to terms (whether concerned with pay or not) if a contract under which a woman is employed (the "woman's contract"), and has the effect that –

(a) where the woman is employed on like work with a man in the same employment –

(i) if (apart from the equality clause) any term that a woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefitting that man included in the contract under which he is employed, the woman's contract shall be treated as including

such a term;

(b) where the woman is employed on work rated as equivalent with that of a man in the same employment –

(i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind to the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefitting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term.

(c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) applies, is in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment –

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) If (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefitting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term.

….

3. An equality clause falling within sub-section (2)(a), (b) or (c) shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor –

(a) in the case of an equality clause falling within sub-section (2)(a) or (b), must be a material difference between the woman's case and the man's; and

(b) in the case of an equality clause falling within sub-section (2)(c) may be such a material difference

….

(Tribunal's emphasis).

2.4 As stated in *Harvey on Industrial Relations and Employment Law, Volume 2, Section D1, at Paragraph 403*, it has long been held that:-

> *"In order for an employee to be able to claim constructive dismissal four conditions must be met –*
>
> *(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.*
>
> *(2) That breach must be sufficiently important to justify the employee resigning or else it must be the last in a series of incidents which justify him leaving. Possibly a genuine, albeit erroneous interpretation of the contract by the employer will not be capable of constituting a repudiation in law.*
>
> *(3) He must leave in response to the breach and not for some unconnected reason.*
>
> *(4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract."*

(See further ***Western Excavating v Sharp [1978] QB 761***.)

2.5 It should also be noted, in the above context, that a constructive dismissal is not necessarily unfair and it is normal for a tribunal, in order to make a finding of unfair constructive dismissal, to find the reason for the dismissal and whether the employer has acted reasonably in all the circumstances (***Stevenson & Company (Oxford) Ltd v Austin [1990] ICR 609***).

2.6 Even if an employee cannot establish a breach of an express term of a contract, it has also been recognised that a contract of employment includes an implied obligation that an employer would not, without reasonable and proper cause, act in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence between an employer and employee. This is often referred to as *the Malik term* (see ***Malik v Bank of Credit & Commerce International SA [1997] UKHL 23*** and ***Baldwin v Brighton & Hove CC [2007] IRLR 232***).

Baldwin confirmed that the original formulation of 'calculated and likely', as set out in some cases (including the leading case of ***Malik***) was a slip. The test is objective: an intention to damage the relationship is not required (see further ***Leeds Dental Team v Rose [2014] IRLR 8***).

2.7 However, as seen in ***Amnesty International v Ahmed [2009] ICR 1450*** and ***Ministry of Justice v Sarfraz [UKEAT/0578/10]*** the phrases 'without reasonable and proper cause' and 'destroy or seriously damage' must be given their full weight. As Lord Steyn stated in ***Malik***, the term is there to protect 'the employee's interest in not being unfairly and improperly exploited'; the conduct must, objectively speaking, if not destroy then seriously damage trust and confidence – mere damage is not enough.

In ***Abbey National PLC v Fairbrother [2007] IRLR 320*** the Employment Appeal Tribunal set out the following useful guidance:-

> *"(30) ... conduct calculated to destroy or seriously damage the trust and confidence inherent in the employer/employee relationship may not amount to a breach of the implied term; it will not do so if the employer had reasonable and proper cause for the conduct in question. Accordingly, the questions that require to be asked in a constructive dismissal case appear to us to be:-*
>
> *1. What was the conduct of the employer that is complained of?*
>
> *2. Did the employer have reasonable and proper cause for that conduct?*
>
> *If he did have such cause then that is an end of it. The employee cannot claim that he has been constructively dismissed.*
>
> *3. Was the conduct complained of calculated to destroy or seriously damage the employer/employee relationship of trust and confidence?"*

Failure to adhere to a grievance procedure is capable of amounting to or contributing to a breach of the implied term of trust and confidence.

A failure, for example, to hold a proper appeal, in respect of a grievance may be a significant breach of the implied term of trust and confidence (see ***Blackburn v Aldi Stores [2013] IRLR 846***).

In ***Frankel v Topping [2015] UKEAT/01606/15***, Langstaff P, in the EAT, held:-

> *"The test is a demanding test. It has been held (see, for instance, the case of* ***BG v O'Brien [2001] IRLR 496*** *at Paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying 'damage' is 'seriously'. This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in* ***Malik*** *... as being 'apt to cover the greater diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited.' Those last few words are again strong words. Too often we see in this tribunal a failure to recognise the stringency of this test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the appeal tribunal in* ***Morrow v Safeway Stores [2002] IRLR 9****."*

2.8 The above authorities established it is an implied term, which is descriptive of conduct, viewed objectively, that is repudiatory in nature. In assessing whether or not there has been a breach, what is significant is the impact of the employer's conduct on the employee, objectively tested, rather than what, if anything, the employer intended (see further ***Woods v WM Car Services Peterborough [1981] IRLR 3***) and the ***Malik*** decision. In the more recent decision of ***Buckland v***

Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, the Court of Appeal emphasised that a tribunal should determine the matter by reference to the law of contract and not by reference to the fairness and/or merits of the case:-

> *"the range of reasonable responses test is not appropriate to establish whether an employer has committed a repudiatory breach of contract entitling an employee to claim constructive dismissal";*

and thereby confirming the test for establishing constructive dismissal remains objective (see ***Western Excavating v Sharp [1978] ICR 221***). In the case of ***Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420***, it was confirmed that the test for determining whether there was a repudiatory breach of the implied term of trust and confidence had to be determined objectively, ie from the perspective of the reasonable person in the position of the innocent party. Applying the ***Malik*** test therefore does not import a range of reasonable responses (as applied when determining the fairness of any dismissal) (see further ***Sharfudee v T J Morris Ltd T/a Home Bargains [2017] UKEAT/0272/16***).

2.9 In the decision of the Court of Appeal in the case of ***Nottingham County Council v Meikle [2005] ICR 1***.

Keane LJ held:-

> *"It has long been held by the EAT in* **Jones v Sirl & Son (Furnishers) Ltd [1997] IRLR 493** *that in constructive dismissal cases the repudiatory breach of the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of control and that the employee may leave because of both those breaches and another factor such as the availability of another job. It suggested the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other; see the* **Western Excavating** *case. The proper approach therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract as at an end. It must be in response to the repudiation but the fact that the employee also objected to other actions or inactions of the employer not amounting to a breach of contract would not vitiate the acceptance of the repudiation … Once it is clear the employer was in fundamental breach ... the only question is whether [the employee] resigned in response to the conduct which constituted that breach."*

This dicta was followed by Elias J, as he then was, in the case of ***Abbeycars (West Horndon) Ltd v Ford [UKEAT/0472/07]***, when he stated:-

> *"On that analysis it appears that the crucial question is whether the repudiatory breach played a part in the dismissal … "*

and

"It follows that once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon."

and also was followed in the case of ***Logan v Celyn Home Ltd [UKEAT/0069/12]*** where HHJ Shanks stated:-

" … It should have asked itself whether the breach of contract involved in failing to pay the sick pay [the relevant breach] was a reason for the resignation not whether it was the principal reason."

Elias J emphasised that there must be a causal connection between the breach of contract relied on and the resignation (see further ***Ishaq v Royal Mail Group Limited [2016] UKEAT/0156/16***).

This approach was again recently confirmed and followed by Langstaff P in the case of ***Wright v North Ayrshire Council [EATS/0017/13]*** where he emphasised that it is an error of law for a tribunal, where there is more than one cause, to look for the effective cause in the sense of the predominant, principal, major or main cause and in doing so he raised concerns how the relevant law is expressed in *Paragraph 521* of *Harvey on Industrial Relations and Employment Law, Volume 1, Section D1*.

In the 'summary head note', Langstaff P stated:-

"In order to determine a claim for constructive dismissal, a tribunal had applied to a test, referred to in Harvey, whether the contractual breach by the employer was 'the effective' cause 'of an employee's resignation'. It was now time to scotch any idea that this approach is correct if it implies ranking reasons which have all played a part in the resignation in a hierarchy so as to exclude all but the principal, main, predominant, cause from consideration. The definite article 'the' is capable of being misleading. The search is not for one cause which predominates over others, or which on its own would be sufficient but to ask (as Elias J put it in ***Abbey Cars v Ford****) whether the repudiatory breach 'played a part in the dismissal'. This is required on first principles and by Court of Appeal authority (****Meikle****). The tribunal here appeared to seek for 'the' cause rather than 'a' cause ... ."*

2.10 In ***Buckland v Bournemouth University Higher Education Authority [2010] EWCA Civ 121***, Sedley LJ in the Court of Appeal acknowledged that:-

"No decided case holds, in terms, that a repudiatory breach, once complete (that is not a merely anticipatory breach) is capable of being remedied so as to preclude acceptance ... absent waiver or affirmation, the wronged party has an unfettered choice of whether to treat the breach as terminal, regardless of his reasons or motive for so doing. There is, in other words, no way back.

Albeit, with some reluctance, I accept that if we were to introduce into employment law the doctrine that a fundamental breach, if curable and if cured, takes away the innocent party's option of acceptance, it could only be on grounds that are capable of extension to other contracts and for reasons I have given I do not consider that we would be justified in doing this. This does not mean, however, that tribunals of fact cannot take a reasonably robust approach to affirmation: a wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends ... ."

Further, Jacob LJ, although not sharing Sedley LJ's regret that a repudiatory breach of contract, once happened can be 'cured' by the contract breakdown held:-

"Once he has committed a breach of contract which is so serious that it entitles the innocent party to walk away from it, I see no reason for the law to take away the innocent party's right to go. He should have a clear choice: affirm or go. Of course the wrongdoer can try to make amends – to persuade the wrong party to affirm the contract. But the option ought to be entirely at the wronged party's choice.

As held by Langstaff P, in ***Lochuack v London Borough of Sutton [2014] UKEAT/0197/14*** said there may well be concurrent causes operating on the mind of an employee; that is not fatal to a claim of constructive dismissal (see further ***Carreras v United First Partners Research [2016] UKEAT/02655/15***).

2.11 In relation to the implied term relating to terms and conditions, to which there has been previous reference, Lord Nicholls in ***Eastwood v Magnox Electric plc [2004] UKHL35*** stated the terms and conditions term meant that an employer must act responsibly and in good faith in the conduct of the employer's business and the employer's treatment of his employees.

In the case of ***Cantor Fitzgerald International v Bird [2002] IRLR 867***, it was held by the High Court, over-aggressive promotion of proposed changes to terms and conditions by a particular manager, including threatening and intimidatory behaviour, can amount to conduct calculated or likely to seriously damage or destroy the relation of trust and confidence between employee and employer. The case also held that the fact an employee has lost confidence in management is not the same as conduct by the employer calculated to destroy or seriously damage trust and confidence between employer and employee in the sense of the implied term.

As was seen in ***Crawford v Suffolk Mental Health Trust Partnership NHS Trust [2012] EWCA Civ 138,*** a breach of trust and confidence can arise from a suspension which is not justified (see further paragraph 2.31 of this decision).

In ***Gillan v Richard Daniels and Co Ltd [1979]*** it was held, whether a unilateral reduction in additional pay or fringe benefits by the employer is of sufficient materiality as to entitle an employee to resign and claim constructive dismissal is a matter of degree.

In ***Clark v Nomura International PLC [2000] IRLR 766*** it was held an employer exercising a discretion, which on the fact of it is unfettered, such as the payment of a bonus, will be in breach of contract if the reasonable employer would have exercised the discretion in that way. In matters of remuneration, there would normally be an implied term along the lines that an employer would not treat his employees arbitrarily, capriciously or inequitably (see ***F C Gardner Ltd v Beresford [1978] IRLR 63***).

2.12 As has long been recognised (see further *Paragraphs 480 – 481.01 in Harvey on Industrial Relations and Employment Law, Section D1*), many constructive dismissal cases, which arise from the undermining of trust and confidence, can involve the employee contending that he left in response to a course of conduct carried on over a period of time, but the particular instance which caused the employee to leave may in itself be insufficient to justify his taking that action; but nevertheless, when viewed against a background of such incidents, it may be considered sufficient by the courts to warrant treating the resignation as a constructive dismissal ('the last straw' doctrine).

As was made clear in the case of ***London Borough of Waltham Forest v Omilaju [2005] IRLR 35***, in order to result in a breach of the implied term of trust and confidence, a 'final straw' which is not itself a breach of contract, must be an act in a series of earlier acts which taken together amount to a breach of the implied term.

The Court of Appeal, at *Paragraph 14* of the judgment, set out, in particular, the following in relation to the relevant principles to be adopted in relation to a claim of unfair constructive dismissal, namely:-

"(1) The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221****.*

(2) It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee : see, for example, ***Malik v Bank of Credit & Commerce International SA [1997]ICR 606*** *, ... I shall refer to this as 'the implied term of trust and confidence'. [The Malik term]*

(3) Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, per Browne-Wilkinson J in ***Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666*** *... . The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship [original emphasis].*

(4) The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nichol said in ***Mahmud*** *at Page 610H the conduct relied on as constituting the breach must –*

'Impinge on the relationship in the sense that looked at *<u>objectively</u>* *[emphasis added by Dyson LJ], it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have with his employer'.*

(5) A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put in Harvey on Industrial Relations and j Employment Law, Paragraph D1(or 80):

'Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the Courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship'.

Further, at Paragraph 16 of his judgment, Dyson LJ said this:

'(16) Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim 'de minimise non curate lex') is of general application.'

Further, at Paragraph 19 Dyson LJ said:

'(19) ... the quality of that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts, on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.'."

The Court of Appeal held in particular:-

"The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts upon which the employee relies, it amounts to a breach of the terms of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. *<u>Thus, if an employer has committed a series of acts which amount to a breach of the implied term of trust and</u>*

> *<u>confidence but the employee does not resign and affirms the contract, he cannot rely on those acts to justify a constructive dismissal if the 'final straw' is entirely innocuous and not capable of contributing to that series of earlier acts</u>. The 'final straw', viewed in isolation, need not be unreasonable or blameworthy conduct. … Moreover an entirely innocuous act on the part of the employer cannot be a 'final straw', even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective."*
>
> *(Tribunal emphasis – see later).*

(See further ***Pan v Portigon AG London Branch [2013] UKEAT/0116*** where the tribunal followed the said principles set out in ***Omilaju*** and found a return to work letter sent by the respondent to the claimant as '*innocuous*', insofar as it was relied upon by the claimant, as the last straw entitling him to regard himself as discharged from further performance; and the said principles were again followed in ***Nicholson v Hazel House Nursing Home Ltd [2016] UKEAT/024/15***.)

The passage from the Court of Appeal in ***Omilaju,*** emphasised above, has given rise to some dispute in some recent cases eg ***Addenbrooke v Princess Alexandra Hospital NHS Trust [2014] ICR D9, Pets at Home Ltd v MacKanzie [2017] UKEAT/0146;*** and, in particular where there is subsequently conduct which, taken together with the employer's earlier fundamental breach, causes the employee to resign or plays a part in the decision to resign, can the latter act effectively reactivate the earlier fundamental breach, which had been affirmed and not acted upon at the time.

In the recent decision of the Court of Appeal in ***Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978,*** Underhill LJ, followed ***Omilaju*** and held that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee. He held, following ***Omilaju,*** that, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the ***Malik*** implied term. To hold otherwise would mean that, by failing to object at the first moment that the conduct reached the threshold of breaching the ***Malik*** term of trust and confidence, the employee lost the right ever to rely on all conduct up to that point. This would in his judgment be unfair and unworkable. So, as long as the last straw forms part of the series, per ***Omilaju***, it can *"revive"* earlier breaches.

At paragraph 55, Underhill LJ provided the following guidance, in a normal case where an employee claims to have been constructively dismissed, namely:-

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in ***Omilaju)*** of a course of conduct comprising several acts and omissions which viewed cumulatively, amounted to a (repudiatory) breach of the ***Malik*** term? [Breach of the ***Malik*** term is of its nature repudiatory – see paragraph 14(3) of ***Omilaju***]. (If it was, there is no need for any separate consideration of a possible previous affirmation ….)

(5) Did the employee resign in response (or partly in response) to that breach?"

2.13 In the ***Western Excavating*** case, Lord Denning referred to the necessity for an employee to 'make up his mind' soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged'. Issues have arisen in this context in relation to whether an employee can be said to have 'waived the breach' or affirmed the contract and therefore lost the ability to claim constructive dismissal. Indeed, in many cases/textbooks, the terms are often used interchangeably. Indeed, in many claims, even where there is a breach, the employee may choose to give an employer an opportunity to remedy it (see further ***W E Cox Toner (International) Ltd v Crook [1981] IRLR 443***, which was recently referred to with approval in the case of ***Colomar Mari v Reuters Ltd [2015] UKEAT/0539/13*** and more recently in ***Novakovic v Tesco Stores Ltd [2016] UKEAT/0315/15***.)

In ***(Colomar) Mari***, HH Judge Richardson also referred with approval to the more recent decision of the Employment Appeal Tribunal in ***Hadji v St Luke's Plymouth [2013] UKEAT/0095/02*** – where it stated:-

"The essential principles are that:-

*(i) the employee must make up his/her mind whether or not resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed. (**Western Excavating v Sharp** ... as modified by **W E Cox Toner** ... and **Cantor Fitzgerald International v Bird [2002]**;*

*(ii) mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from long delay – see **Cox Turner**;*

*(iii) if the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the EAT may conclude there has been an affirmation – see **Fereday v South Staffordshire NHS Primary Care Trust [2011] UKEAT/0513**;*

*(iv) there is no fixed time-limit in which the employee must make up his mind; the issue of affirmation is one which subject to these principles the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive – see **Fereday**."*

As seen in the recent decision in the case of ***Adjei-Frempong v Howard Frank Ltd [2015] UKEAT/0044/15***, after again referring with approval to ***Cox Toner***, the Employment Appeal Tribunal made it clear, in determining this issue, 'context is everything'. Further, the EAT referred with approval to the guidance of Langstaff P in the case of ***Chindove v William Morrisons Supermarket PLC [2013] UKEAT/0201/13*** when he stated, inter alia:-

> *"25. ... the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.*
>
> *26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. ... But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of* ***Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121****, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test. ... "*

The cases of ***(Colmar) Mari, Fereday, Hadji*** and ***Chindove***, on their own particular facts, did raise issues whether, if a period of delay arises where an employee is off sick and in receipt of sick pay, can this be a relevant fact in relation to the issue of affirmation. As seen in *Harvey on Industrial Relations and Employment Law, Volume 1 Section D (534 - 538)*:-

> *" ... there may still be cases where there is no affirmation in spite of receipt of sick pay but that will be as a matter of fact (as in* **Chindove***) with no particular rule of thumb as to the length of an acceptable period. On the other hand, a finding of affirmation must be seen as a distinct danger for the employee in this difficult position, with the illness absence being in itself no reliable excuse for an ever-lengthening delay, especially where there are other acts or omissions of the employer relevant to the question, in addition to continuing receipt of sick pay."*

2.14 In the case of ***Morrison v Amalgamated Transport & General Workers Union [1989] IRLR 361***, the Northern Ireland Court of Appeal held in relation to the issue of contributory fault:-

> *"(i) the tribunal must take a broad common sense view of the situation;*
>
> *(ii) that broad approach should not necessary be confined to a particular moment, not even the moment when the employment is terminated;*
>
> *(iii) what has to be looked for in such a broad approach over a period is conduct on the part of the employee which is culpable or blameworthy or otherwise unreasonable; and*
>
> *(iv) the employee's culpability or unreasonable conduct must have contributed to or played a part in the dismissal."*

In ***Allders International Ltd v Parkins [1982] IRLR 68***, it was emphasised that it is the employee's conduct alone, which is relevant to the issue of whether the loss resulting from the dismissal should be reduced on grounds of contributory fault.

In a recent decision of the Employment Appeal Tribunal in the case of ***Steen v ASP Packaging Ltd [2013] UKEAT/0023***, Langstaff P, confirmed it would be a rare case where there would be a 100% deduction for contributory fault. He also confirmed it was necessary for the tribunal to focus on what the employee did or failed to do and not rely the employer's view of what he had done but the employer's assessment of how wrongful that act was; and if any such conduct, as identified by it, which it considers blameworthy, caused or contributed to the dismissal to any extent and, if so, to what extent the award should be reduced and to what extent it is just and equitable to reduce it. If the identified conduct which the tribunal considers blameworthy did not to any extent cause or contribute to the dismissal there can be no reduction, no matter how blameworthy in other respects the tribunal might think the conduct to have been.

2.15 As stated in *Harvey on Industrial Relations and Employment Law, Volume I, Section D1, Paragraph 2663*:-

> *"A finding of constructive dismissal is not inconsistent with a finding that the employee has by his own conduct, contributed to that dismissal … ."*

In ***Morrison***, the NI Court of Appeal confirmed that there was no 'exceptional circumstances', presumption or rule of law. Langstaff P in ***Firth Accountants Ltd v Law [2014] IRLR 510*** acknowledged such a finding would be unusual, particularly in a case concerning a breach of the implied term of trust and confidence, as there must have been no reasonable or proper cause for the employer's conduct for there to be a breach of the implied term.

Following the decision in ***Polkey v AE Dayton Services Ltd [1987] IRLR 50*** ('***Polkey***'), a ***Polkey*** deduction is the term used in unfair dismissal cases to describe the reduction in any award for future loss to reflect the chance that the individual would have been dismissed fairly in any event. It can take the form of a percentage reduction, or it may take the form of a tribunal making a finding the individual would have been dismissed fairly after a further period of employment or

a combination of both (but not in relation to the same period of loss - ***Zebrowski v Concentric Birmingham [2017] UKEAT/0245***).

It is sometimes considered that a '***Polkey***' deduction has no part to play in a finding of unfair constructive dismissal. This view may have arisen due to the fact the factual situation, especially in the context of procedural failings in a claim of unfair dismissal, following dismissal by an employer, may more easily give rise to proper application of the principles/guidance relating to a ***Polkey*** deduction. However, in the judgment of this tribunal, a ***Polkey*** deduction can, in certain factual circumstances, be applied to a claim of unfair constructive dismissal and it is not restricted to only claims of "ordinary" unfair dismissal (ie not constructive); albeit the issue remains not without some uncertainty. In the case of ***Zebrowski v Concentric Birmingham [2017] UKEAT/0245***, Laing J reviewed the authorities on this issue, in some detail (*Paragraphs 35 – 41*) and concludes that a ***Polkey*** deduction can be made in a case of unfair constructive dismissal but also states:-

> *"I respectfully agree with the principle that the courts should not create a complex structure of subsidiary rules from the open language of the statutory provisions."*

In ***Firth Accountants v Law [2016] UKEAT/0108***, Laing J, again in a case of unfair constructive dismissal, accepted a ***Polkey*** deduction was able to be made; albeit on the particular facts. She held that, where there is significant overlap between the factors taken into account in making a ***Polkey*** deduction and when making a deduction for contributory conduct, the tribunal should consider expressly, whether in light of that overlap, it is just and equitable to make a finding of contributory conduct and, if so, what amount it should be – thereby avoiding the risk of penalising the claimant twice for the same conduct. The question for the tribunal relates to what the particular employer would have done (not a hypothetical reasonable employer [see later]).

These dangers of overlap and difference of approach between ***Polkey*** deduction and deductions for contributory fault were also referred to by Langstaff P in ***Steen v ASP Packaging Ltd [2013] UKEAT/0023*** when he stated:-

> *"That is because the focus in a **Polkey** decision is predictive, it is not historical as is the focus when establishing past contributory fault as a matter of fact. Second, **Polkey** focuses upon what the employer would do if acting fairly. Contributory fault is not concerned with the action of the employer but with the past actions of the employee. A finding in respect of **Polkey** thus may be of little assistance in augmenting reasons given by a tribunal in respect of contributory deduction."*

Turning to the issue of a ***Polkey*** deduction and how it may be properly assessed, Elias J in ***Software 2000 Ltd v Andrews [2007] UKEAT/0533/06*** gave some guidance:-

> "(1) *In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.*

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the tribunal. … it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence."

In ***Brinks Ireland Ltd v Hines [2013] NICA 32***, Girvan LJ followed, with approval, the guidance in ***Software 2000 Ltd***.

2.16 In ***Hill v Governing Body of Great Tey Primary School [UKEAT/0237/12/SM***, Langstaff P held:-

*"24. A '**Polkey** deduction' has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer **would** have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. … ."*

In ***Dev v Lloyds Asset Finance Division Ltd [2014] UKEAT/0281*** Langstaff P also stated, when confirming the approach in ***Hill***:-

*"6. A tribunal asked to consider a **Polkey** question must not ask what would have happened but rather what might have happened. To ask what would have happened asks for a decision, effectively on the balance of probability, with a straight yes or no answer. The second looks at the matter as one of assessment of chances within a range of 0% - 100%. It is well established the latter is the correct approach … (see further **Ministry of Justice v Parry [2013] ICR 311** and **Hill v Governing Body of Great Tey Primary School** …)."*

In ***Contract Bottling Ltd v Cave [2014] UKEAT/0100/14/DM***, Langstaff P emphasised that ***Software 2000 Ltd*** decision has to be placed in a broader context than is apparent from the decision itself and a ***Polkey*** decision is part, but part only, of a complex assessment of the losses which arise as a result of a dismissal and a part only of the overall decision on the compensation; but also the assessment of a ***Polkey*** deduction is a prediction exercise about which there can be no absolute and scientific certainty. Evidence is needed to inform the prediction but it is more a matter of art then a matter of science.

In ***V v Hertfordshire CC [2015] UKEAT/0427/14/LA***, Langstaff at *Paragraph 23*, referred to a series of decisions in relation to ***Polkey*** deductions confirming that they are <u>not</u> about probability but all about chance.

2.17 Generally a ***Polkey*** deduction is only applicable to the compensatory award not the basic award (apart from the limited circumstance where such a fair dismissal might have taken place virtually contemporaneously with the actual dismissal) – see ***Granchester Construction (Eastern) Ltd v Attrill [2012] UKEAT/0327/12/LA***.

Following the decision in ***Digital Equipment Co Ltd v Clements [1997] EWCA Civ 2899***, and subsequent case law, the order in which adjustment to any compensatory award should be made has now been clarified, and, in particular, the order, as set out below:-

(1) calculate total losses suffered by the claimant'

(2) deduct any amount received from the employer such as payment in lieu of notice or ex gratia payment made to the employee as compensation for the dismissal;

(3) deduct earnings which have mitigated the claimant's loss or a sum which reflects any failure by the claimant to mitigate his or her loss;

(4) a ***Polkey*** deduction;

(5) percentage increase or reduction to reflect a failure by employer or employee to comply with the LRA Code [and statutory dismissal procedure in NI].

(6) percentage reduction for any contributory conduct on the part of the employee;

(7) grossing up; and

(8) applying the statutory cap (if relevant).

2.18 Article 156(2) of the 1996 Order, provides, in relation to the issues of the amount of a basic award and contribution on the part of the claimant:-

> "Where the tribunal considers any conduct of the complainant before the dismissal .... was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

Article 157(6) of the 1996 Order provides in relation to the issues of the amount of a compensatory award and contribution on the part of the claimant:-

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

In the Northern Ireland Court of Appeal, in the case of ***GM McFall & Company Ltd v Curran (1981) IRLR455***, which would be normally binding on this tribunal, it was held that the general rule is that both the basic and compensatory awards should be reduced by the same amounts. It should be noted, however, that the relevant legislation in Northern Ireland at the time of that decision was differently worded to that now seen in the 1996 Order. In particular, the provisions relating to both a basic award and a compensatory award were in similar terms to that now seen in Article 157(6) of the 1996 Order and <u>both</u> provisions, at that time, therefore had reference to causation/contribution.

Now, Article 156(2) and Article 157(6) of the 1996 Order, as set out above, are in similar terms to those set out in Sections 122(2) and 123(6) of the Employment Rights Act 1996, which applies in Great Britain. As has been made clear in a recent decision of Langstaff P in the case of ***Steen v ASP Packaging Ltd (2013) UKEAT/0023/13***:-

> *"The two sections are subtly different. The latter calls for a finding of causation. Did the action which was mentioned in Section 123(6) cause or contribute to the dismissal to any extent? That question does not have to be addressed in dealing with any reduction in respect of the basic award. The only question posed there is whether it is just and equitable to reduce or further reduce the amount of the basic award to any extent. <u>Both sections involve the consideration of what is just and equitable to do."</u>*
>
> *[Tribunal's emphasis]*

He also points out that, in applying the provisions of Section 123(6) if the conduct which it has identified and which it considers blameworthy did not cause or contribute to the dismissal to any extent, then there can be no reduction, pursuant to Section 123(6), no matter how blameworthy in other respects the tribunal might consider the conduct to have been. If it did cause or contribute to the dismissal, then issues arise to be determined in relation to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

Langstaff P emphasises that:-

> *"A separate questions arises in respect of Section 122(2) (the basic award) where the tribunal has to ask whether it is just and equitable to reduce the amount of the award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award but it does not have to do so."*

So, in light of the foregoing, it would appear that, despite the change in the wording of the legislative provisions in Northern Ireland since the decision of the Court of Appeal in Northern Ireland, in ***GM McFall & Company Ltd***, was decided, in most cases the same result would still be achieved; albeit it must be remembered that, in relation to the compensatory award, issues of causation/contribution have to be considered before any issues of reduction arise. This, for the reasons set out above, is unlike the position in relation to the basic award. However, as seen above, in most cases, the same reduction will continue to be applied to the basic and compensatory awards.

2.19 In a recent decision in the case of ***British Gas Trading Ltd v Price [2016] UKEAT/03267/15***, Mrs Justice Simler (P) has recently reviewed the authorities in relation to the issue of contributory fault and the statutory provisions relating to reduction of the basic and compensatory award in such circumstances, pursuant to Section 122(2) and 123(6) of the Employment Rights (Northern Ireland) Order 1996 (see before re: 156(2) and 157(6) of the 1996 Order).

After emphasising the Sections, focus on the conduct of the employee and not on the conduct of the employer she relied on the guidance provided by HHJ Peter Clark in an old case of ***Optikinetics Ltd v Whooley [1999] ICR 984*** when he stated:-

> *"(1) Before making any finding of contribution the employee must be found guilty of culpable or blameworthy conduct. The inquiry is directed solely to his conduct and not that of the employer or others.*
>
> *(2) For the purposes of Section 123(6) the employee's conduct must be known to the employer at the time of the dismissal (cf : the just and equitable provision under Section 123(1) and have been a cause of the dismissal.*
>
> *(3) Once blameworthy conduct causing, in whole or in part, the dismissal has been found, the tribunal must reduce the compensatory award by such proportion as it considers just and equitable. It must make a reduction ...*
>
> *(4) A finding of contribution under Section 122(2) does not require a finding that the conduct is causatively linked to the dismissal. It may be first discovered after dismissal. The wording of Section 122(2) grants to the tribunal a wide discretion as to whether to make any, and if so what, reduction in the basic award on the ground of the employee's conduct.*
>
> *(5) After some uncertainty ... it is now clear that different proportionate reductions are permissible in relation to the basic and compensatory awards ...*
>
> *(6) The appellate courts will rarely interfere with the employment tribunal's assessment of the percentage reduction for contribution."*

(Paragraph 5 of the guidance requires to be considered further in light of the judgment seen in ***Steen*** above.)

On the facts of the ***Price*** case, the EAT found the tribunal in determining these issues of contributory fault and reduction of basic and/or contributory award, had wrongly focused on the conduct of the employer rather than the employee and had confused causation of the dismissal with causation of the unfairness.

It held:-

> *"The question for a tribunal was the statutory question – did the culpable conduct cause or contribute to any extent to the claimant's dismissal? That question involves a mixed question of law and fact, as the parties agree. In many cases, the answer will be obvious once the facts are found taking a broad common sense approach. There may be cases however, where an evaluative judgment must be made as to whether the conduct was a legal contributing or an effective cause; or to put it another way, whether dismissal was a direct and natural consequence of the conduct. Depending on the circumstances, it is open to a tribunal to determine that it was not."*

In relation to *Paragraph 3* of the guidance in ***Optikinetics***, where it states a tribunal must make a reduction once blameworthy conduct causing, in whole or in part, the dismissal has been found, Simler J concluded that, having found conduct did cause or contribute to the dismissal and that a tribunal is required to consider reducing the amount of the compensatory award by such proportion as it considered 'just and equitable', having regard to that finding, it would be difficult to envisage circumstances, although she did not altogether rule them out, where it would not be just and equitable to reduce the award at all, when there was a finding the claimant's blameworthy conduct caused or contributed to the dismissal.

2.20 The amount of any reduction of the basic and/or compensatory award (see before), by a percentage on just and equitable grounds, can be as much as 100%; but such a sizeable reduction, although legally possible, is rare/unusual/exceptional (see ***Lemonious v The Church Commissions (2013) UKEAT/0253/12***); and, if such a reduction is made by a tribunal, it must be justified by facts and reasons set out in the decision. In any event, the factors which help to establish a particular percentage should be, even if briefly, identified (see further ***Steen v ASP Packaging (2013) UKEAT/0023/13***).

2.21 In relation to the issue of compensation, where a claimant has obtained income from a new job, following an unfair dismissal, the Employment Appeal Tribunal, in the case of ***Whelan v Richardson [1988] IRLR 144,*** summarised the approach to be taken by a tribunal; albeit emphasising the tribunal's had a discretion to do what was appropriate in individual cases:-

> *"(1) the assessment of loss must be judged on the basis of the facts as they appear at the date of assessment hearing (the assessment date).*
>
> *(2) Where the (claimant) has been unemployed between dismissal and the assessment date then, subject to its duty to mitigate and the operation of the recruitment rules, he will recover his net loss of earnings based on the pre dismissal rate. Further the Employment Appeal Tribunal will consider for how long the loss is likely to continue so as to assess future loss.*

(3) *The same principle applies where the (claimant) has secured permanent alternative employment at a lower level of earnings then he received before his unfair dismissal. He will be compensated on the basis of full loss until the date on which he obtained the new employment and thereafter for partial loss, being the difference between the pre-dismissal earnings and those in the new employment. All figures will be based on net earnings.*

(4) *Where the (claimant) takes alternative employment on the basis will be for a limited duration, you will not be precluded from claiming loss to the assessment date, or the date in which he secures further permanent employment, whichever is the sooner, giving credit for earnings received from the temporary employment.*

(5) *As soon as the (claimant) obtains permanent alternative employment paying the same or more than his pre-dismissal earnings, his loss attributable to the action taking by the respondent employer ceases. It cannot be revived if he then loses that employment either through his own action or that of now employer. Neither can the respondent employer rely on the employee's increased earnings to reduce the loss sustained prior to his taking the new employment. The chain of causation has been broken."*

This guidance was described as helpful by the Court of Appeal in ***Dench v Flynn and Partners [1998] IRLR 653,*** although the Court considered that the obtaining of permanent employment at the same or greater salary would not in all cases break the chain of causation. The ***Dench*** decision was applied in ***Cowen v Rentokil Initial Facilities Service (UK) Limited [2008] AER 70.*** Further, in a recent decision of the Employment Appeal Tribunal, in the case of ***Commercial Motors (Wales) Limited v Hawley [2012] UKEAT/0636,*** the Employment Appeal Tribunal cited with approval the case of ***Dench***.

In ***Salvesen Logistics Limited v Tate (UKEAT/689/98)***, the Employment Appeal Tribunal made clear that the chain of causation will not be broken where it is clear from the outset that the employment would be on a temporary basis.

2.22 In relation to the issue of mitigation of loss, there is no dispute that the principle that a claimant is under a duty to take reasonable steps to mitigate his loss is well-established under common law and that the principles of mitigation of loss apply equally to awards of compensation by a tribunal in relation to awards of compensation for unfair dismissal (see ***Fyfe v Scientific Furnishings Ltd [1989] IRLR 331***) and that therefore the employee must take reasonable steps to obtain alternative employment. In the case of ***Wilding v British Telecommunications PLC [2002] IRLR 524***, the Court of Appeal ruled that the following general principles apply in determining whether a dismissed employee, who is refused an offer of employment, has breached the duty to mitigate:-

"(a) *The duty of the employee is to act as a reasonable person unaffected by the prospect of compensation from her employer.*

(b) *The onus is on the former employer as wrongdoer to show that the employee has failed to mitigate by unreasonably refusing the job offer.*

(c) *The test of reasonableness is an objective one based on the totality of the evidence.*

(d) *In applying that test, the circumstances in which the offer is made and refused, the attitude of the former employer, the way in which the employer had been treated, in all the surrounding circumstances, including the employee's state of mind, should be taken into account.*

(e) *The tribunal must not be too stringent in expectations of the injured party (that is, the employee).*

*The guidance in set out in the **Wilding** case has been applied in a number of recent decisions by the Employment Appeal Tribunal; but each relate to their own particular facts (see further **Harris v Tennis Together Ltd [2009] UKEAT/0358/08**, **Hibiscus Housing Association Ltd v Mackintosh [2009] UKEAT/0534/08***, and ***Beijing Ton Ren Tang (UK) Ltd v Wang [2009] UKEAT/0024/09**."*

The state of the labour market can be relevant in deciding whether an employee has made reasonable efforts to find a new job (see *Korn Employment Tribunals Remedies, Paragraphs 13 – 28*). It was held ***HG Bracey v Kes [1973] IRLR 210*** that the duty of mitigation does not require the dismissed employee to take the first job that comes along, irrespective of pay and job prospects.

In the recent decision of ***Look Ahead Housing and Care Ltd v Chetty (2014) UKEAT/0037*** Langstaff emphasised, in relation to the burden of proof by the employer:-

> *"<u>But without there being evidence</u> (whether by direct testimony or by inadequate answers given by a claimant in cross-examination) adduced by the employer on which a tribunal can be satisfied, on the balance of probabilities, that the claimant has acted unreasonably in failing to mitigate, a claim of failure to mitigate will simply not succeed".* *[Tribunal's emphasis]*

2.23 In relation to the burden of proof provisions set out in the 1976 Order, referred to previously, the English Court of Appeal in the case of ***Igen v Wong [2005] IRLR 258***, considered similar provisions, relating to sex discrimination, applicable under the legislation applying in Great Britain and, it approved, with minor amendment, the guidelines set out in the earlier decision of ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332***. In a number of decisions, the Northern Ireland Court of Appeal has approved the decision of ***Igen v Wong [2005] IRLR 258*** and the said two-stage process to be used in relation to the burden of proof (see further ***Brigid McDonagh & Others v Samuel Thom t/a The Royal Hotel Dungannon [2007] NICA 1*** and other decisions referred to below.) The decision in ***Igen v Wong [2005] IRLR 258*** has been the subject of a number of further decisions in Great Britain, including ***Madarassy v Nomura International PLC [2007] IRLR 246***, a decision of the Court of Appeal in England and Wales, and ***Laing v Manchester City Council [2006] IRLR 748***, both of which decisions were expressly approved by the Northern Ireland Court of Appeal in the case of ***Arthur v***

Northern Ireland Housing Executive & Another [2007] NICA 25. (See further the recent Supreme Court decision in the case of ***Hewage v Grampian Health Board [2012] UKSC 37***, in which the Supreme Court approved the guidance in ***Igen*** and followed in subsequent case law, such as ***Madarassy*** [see below].), and where it did not consider any further guidance was necessary. It also emphasised it was not necessary to make too much of the role of the burden of proof provisions; they required careful attention where there was room for debate as to the facts necessary to establish discrimination but they had nothing to offer where the Tribunal was in a position to make positive findings on the evidence one way or the other.

In ***Madarassy v Nomura International PLC [2007] IRLR 246*** the Court of Appeal held, inter alia, that:-

> *"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 [Tribunal's emphasis], sufficient material 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 allegation 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 contesting the complaint. Subject 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 to whether the act complained of occurred at all, evidence as to the actual comparators relied upon by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the claimant were of like with like as required by Section 5(3) and available evidence for the reasons for the differential treatment. The correct legal position was made plain by the guidance in **Igen v Wong**. Although Section 63A(2) involves a two-stage analysis of the evidence, it does not expressly or impliedly prevent the Tribunal at the first stage, from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing or rebutting the claimant's evidence of discrimination … ."*

In ***Igen*** the Court of Appeal cautioned Tribunals, *at Paragraph 51* of the judgment, '*against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground*'.

Even if the Tribunal considers that the conduct of the employer requires some explanation before the burden of proof can shift there must be something to suggest that the treatment was less favourable and by reason of the protected characteristic (eg disability) (see ***B and C v A [2010] IRLR 400*** and ***Curley v Chief Constable of the Police Service of Northern Ireland and Another [2009] NICA 8*** later in this decision).

2.24 In relation to what is to be included by the expression 'something more' – guidance is to be found in the judgment of Elias J in ***The Law Society v Bahl [2003] IRLR 640***, which judgment was approved by the Court of Appeal (see ***[2004] IRLR 799***).

In *Paragraph 94* of his judgment, Elias J emphasised that unreasonable treatment is not of itself a reason for drawing an inference of unlawful discrimination when he stated:-

> *"94. It is however a wholly unacceptable leap to conclude that whenever the victim of such conduct is black or a woman that it is legitimate to infer that our unreasonable treatment was because the person was black or a woman. All unlawful discriminatory treatment is unreasonable, but not all unreasonable discriminatory treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour. In order to establish unlawful discrimination it is necessary to show that the particular employer's reason for acting was one of the proscribed grounds. Simply to say that the conduct was unreasonable tells us nothing about the grounds for acting in that way. The fact that the victim is black or a woman does no more than raise the possibility that the employer could have been influenced by unlawful discriminatory consideration. Absent some independent evidence supporting the conclusion that this was indeed the reason, no finding of discrimination can possibly be made.*
>
> *96. ... Nor in our view can Sedley LJ (in* **Anya v University of Oxford***) be taken to be saying that the employer can only establish a proper explanation if he shows that he in fact behaves equally badly to members of all minority groups. The fact that he does so will be one way of rebutting an inference of unlawful discrimination, even if there are pointers which would otherwise justify that inference. ... No doubt the mere assertion by an employer that he would treat others in the same manifestly unreasonable way, but with no evidence that he had in fact done so, would not carry any weight with a Tribunal which is minded to draw the inference on proper and sufficient grounds that the cause of the treatment has been an act of unlawful discrimination."*

In particular, in *Paragraph 101* of Elias J's judgment explained that unreasonable conduct is not necessarily irrelevant and may provide a basis for rejecting an explanation given by the alleged discriminator but then added these words of caution:-

> *"The significance of the fact that the treatment is unreasonable is that a Tribunal will more readily in practice reject the explanation, given that it would if the treatment were reasonable. In short, it goes to credibility. If the Tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination. But it will depend upon why it has rejected the reason he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not discriminated on the proscribed grounds may nonetheless give a false reason for the behaviour. They may rightly consider, for example, that the*

true reason costs then in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the Tribunal suggest there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support finding of unlawful discrimination itself."

At *Paragraph 113* of his judgment, he also stated:-

"There is an obligation on the Tribunal to ensure that it has taken into consideration all potentially relevant non-discriminatory factors which might realistically explain the conduct of the alleged discriminator ... ."

At *Paragraph 220* he confirmed:-

"An inadequate or unjustified explanation does not <u>of itself</u> [Tribunal's emphasis] amount to a discriminatory one."

In the recent decision in the case of ***The Solicitors Regulation Authority v Mitchell [2014] UKEAT/0497/12***, this guidance was summarised in the following way (*Paragraph 46*):-

"(i) In appropriate circumstances the 'something more' can be an explanation proffered by the respondent for the less favourable treatment that is rejected by the Employment Tribunal.

(ii) If the respondent puts forward a false reason for the treatment but the Employment Tribunal is able on the facts to find another non-discriminatory reason, it cannot make a finding of discrimination."

Determining when the burden of proof is reversed can be difficult and controversial as illustrated in the following decisions. In ***Maksymiuk v Bar Roma Partnership [UKEATS/0017/12]****, when Langstaff P at Paragraph 28 said:-*

"The guidance in ***Igen v Wong*** *has been carefully refined. It is an important template for decision-making. As* ***Laing*** *and* ***Madarassy*** *have pointed out however, a Tribunal is not required to force the facts into a constrained cordon where in the circumstances of the particular case they do not fit it. That would not to be apply the words of the statute appropriately. Intelligent application of the guidance, rather than slavish obedience where it would require contorted logic, is what is required."*

Further, in ***Birmingham City Council v Millwood [2012] UKEAT/0564***, Langstaff P stated:-

"26 What is more problematic is the situation where there is an explanation that is not necessarily found to be a lie but which is rejected as opposed to one that is simply not regarded as sufficiently adequate.

Realistically, it seems to us that, in any case in which an employer justifies treatment that has a detrimental effect as between a person of

one race and a person or persons of another by putting forward a number of inconsistent explanations which are disbelieved (as opposed to not being fully accepted) there is sufficient to justify a shift of the burden of proof. Exactly that evidential position would have arisen in the days in which ***King v Great Britain – China Centre [1992] ICR 516*** *was the leading authority in relation to the approach should take to claims of discrimination. Although a Tribunal must by statute ignore whether there is any adequate explanation in stage one of its logical analysis of the facts, that does not mean, in our view, to say that it can and should ignore an explanation that is frankly inadequate and in particular are that is disbelieved.*

27 ... to prefer one conclusion rather than another is not, as it seems to us, the same as rejecting a reason put as being simply wrong. In essence, the Tribunal in the present case appeared not to believe at least two of the explanations that were being advanced to it, and there were, we accept from what Mr Swanson has said, some three inconsistent explanations put forward for the difference in treatment that constituted the alleged discriminatory conduct."

On the facts of the case, in the ***Solicitors Regulation Authority*** case, it was found that a false explanation for the treatment was given by the respondent's witness, which was found to lack credibility and could therefore constitute the 'something more'; and the Tribunal, having reversed the burden of proof, in the circumstances, was able to properly infer discrimination:-

"The Tribunal asked the reason why the claimant had been treated as she was. It was not simply a question of the respondent putting forward no explanation but having given a false explanation. This was clearly capable of being 'something more' ... ."

This issue again arose in a further recent decision by the Employment Appeal Tribunal in the case of ***Veolia Environmental Services UK v Gumbs [UKEAT/0487/12]*** where the EAT recognised ***Igen***, ***Madarassy*** and ***Hewage***:-

"all exhibit the same tension; how to recognise the difficulty of proving discrimination on the one hand, whilst at the same time not stigmatising as racially discriminatory conduct which is simply irrational or unreasonable, on the other ... ."

In ***Effa v Alexandra Health Care NHS Trust [1999] (Unreported)*** Mummery LJ held:-

"It is common ground that an error of law is made by a Tribunal if it finds less favourable treatment from which it can properly make such an inference ... . In the absence of direct evidence on an issue of less favourable treatment on racial grounds, the Tribunal may make inferences from other facts which are undisputed or are established by evidence. However, in the absence of adequate material from which inferences can be properly made, a Tribunal is not entitled to find a claim proved by making unsupported legal or factual assumptions about disputed questions of less favourable treatment on racial grounds. This is so whether the discrimination is alleged to rise from

> *conscious or subconscious influences operating in the mind of the alleged discriminator."*

Further, as seen in ***R (on the application of E) v Governing Body of JFS and Others [2010] IRLR 136***, Lady Hale (*Paragraphs 62 – 64*) emphasised that, in all but the most obvious cases involving direct discrimination, a Tribunal requires to consider the mental processes, whether conscious or subconscious, of the alleged discriminator.

It held, as set out in the head note of the judgment, it did not accept that ***Madarassy*** and ***Hewage*** supported the submission that an employer should not have the burden of proof reversed and be required to give a non-discriminatory explanation for its conduct in demoting an employee or denying the employee an opportunity to qualify to do different work where inconsistent explanations for the reason for the demotion had been given and an unacceptable account of knowledge of the ambition to qualify had been given. Whilst the substance of the explanation should be excluded from consideration when deciding whether the burden of proof should be reversed the fact that explanations had been given which were inconsistent could be taken into account. When an account of lack of knowledge as to the employee's ambition to qualify for different work had been contradicted by other evidence that was a factor to be considered in deciding whether the burden of proof had shifted.

2.25 In the case of ***Curley v Chief Constable of the Police Service of Northern Ireland and Another [2009] NICA 8***, the Northern Ireland Court of Appeal approved the judgement of Elias LJ in ***Laing***, which was also referred to with approval by Campbell LJ in the Arthur case, that it was not obligatory for a Tribunal to go through the steps set out in ***Igen*** in each case; and also referred to the opinion of Lord Nicholls in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] NI 147***, where he observed at paragraph 8 of his opinion, as follows:-

> *"Sometimes a less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue".*

Lord Nicholl's opinion in the ***Shamoon*** case made clear the normal two step approach of Tribunals in considering, firstly, whether the claimant received less favourable treatment than the appropriate comparator, which can include an actual or hypothetical comparator, and then, secondly whether the less favourable treatment was on the proscribed ground, can often be avoided by concentrating on why the claimant was treated as he/she was; and was it for the proscribed reason or for some other reason. If the latter, the application fails. If the former, there would normally be no difficulty in deciding whether the less favourable treatment, afforded to the claimant on the proscribed ground was less favourable than was or would have been afforded to others (see further *Paragraph 11* of Lord Nicholls' opinion). Indeed, Lord Nicholls' opinion emphasised that the question whether there had been less favourable treatment and whether the treatment was on the grounds of [sex] are in fact two sides of the same coin.

2.26 In ***Nelson v Newry and Mourne District Council [2009] NICA 24***, Girvan LJ referred approvingly to the decisions in ***Madarassy*** and ***Laing*** and also held that the words 'could conclude' are not to be read as equivalent to 'might possibly

conclude'. He said "*the facts must lead to the inference of discrimination*". He also stated:-

> *"24. This approach makes clear that the complainant's allegation of unlawful discrimination cannot be used 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 probably conclude in the absence of an adequate explanation that the respondent has committed an act of discrimination. In **Curley v Chief Constable the Police Service of Northern Ireland and Another [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 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."*

In ***Efobi v Royal Mail Group Limited [UKEAT/0203/167]*** Laing J emphasised that the factual materials available to the tribunal at the first stage of the exercise include all the evidence called up to the end of the hearing (see further Mummery LJ in ***Madarassy**, Paragraphs 47 and 70*).

In ***Ayodele v Citylink and another [2017] EWCA Civ 1913,*** the Court of Appeal confirmed that, in relation to the burden of proof, it remains (albeit the Court was interpreting the burden of proof provisions under the Equality Act 2010, which does not apply in this jurisdiction) – *"a claimant"* is required to bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facia case that the reason for the respondents' act was a discriminatory one) then the claim will succeed unless the respondents can discharge the burden placed on it at the second stage.

2.27 Carswell LCJ, as he then was, in the Sergeant A case, which also emphasised the necessity for the Tribunal to look at the matter, in the light of all the facts as found, stated:-

> *"3. Discrepancies in evidence, weaknesses and procedures, poor record keeping, failure to follow established administrative processes or a satisfactory explanation from an employer may all constitute material from which an influence of religious discrimination may legitimately be drawn. But Tribunals should be on their guard against the tendency to assume that every such matter points towards a conclusion of religious discrimination, especially where other evidence shows such a conclusion is improbable on the facts."*

Although, both the ***Curley*** and ***Sergeant A*** cases were dealing with issues of religious discrimination, the dicta is also relevant, in the judgment of the Tribunal, to determination of claims of discrimination by way of victimisation and the interpretation of the relevant provisions relating to the burden of proof provisions, in the case law, referred to above, from the Employment Appeal Tribunal and the Court of Appeal of England and Wales.

2.28 The now classic test for discrimination was contained in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*** and later summarised by Lord Hoffman in ***Watt (Carter) v Ahman [2008] 1AC*** *at Paragraph 36*, 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."*

In ***Islington BC v Ladele [2009] ICR 387*** Elias J held, in light of ***Ashan*** and Shamoon (see before):-

> *"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."*

This was endorsed in ***Dr Kalu v Brighton & Sussex University Hospital NHS Trust [2014] Eq LR 488***.

In ***Shamoon*** it was further held, in order for a disadvantage to qualify as a 'detriment' it must arise in the employment field; in that the court or tribunal must find that, by reasons of the act or acts complained of, a reasonable worker would or might take the view that he had been thereby disadvantaged in the circumstances in which he thereafter had to work. An unjustified sense of grievance cannot amount to detriment (see further ***Derbyshire and Others v St Helen's Metropolitan BC and Others [2007] ICR 841***). As held in ***Bowler v Chief Constable of Kent Constabulary [2017] UKEAT/0241***, following ***Shamoon*** and ***Derbyshire***, the grievance must be objectively reasonable as well as perceived as such by the claimant. (See further ***NI Fire and Rescue Service and another v McNally (NICA unreported 29 June 2012***)

In ***CLFIS (UK) Ltd v Reynolds [2015] IRLR 562*** the Court of Appeal held a person may be less favourably treated on the grounds of a protected characteristic [ie disability] either if the act complained of is inherently discriminatory or if the characteristic in question influenced the mental processes of the putative discriminator, whether consciously or unconsciously, to any significant extent.

It further held that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must have been motivated by the protected characteristic [ie disability]. There is no basis on which his act can be said to be discriminatory on the basis of someone else's motivation.

In a recent decision of the Employment Appeal Tribunal in the case of ***Commissioner of Police of the Metropolis v Denby [2017] UKEAT/0314/16*** Kerr J emphasised the ratio of ***CLFIS*** is simple:-

> *"52. … where the case is not one of inherently discriminatory treatment or of joint decision-making by more than one person acting with discriminatory motivation is liable; an innocent agent acting without discriminatory motivation is not. Thus where the innocent agent acts on 'tainted information' (per Underhill LJ at Paragraph 34), ie 'information supplied, or views expressed, by another employee whose motivation is or is said to have been discriminatory', the discrimination is the supplying of the tainted information, not the acting upon it by the innocent recipient."*

Kerr J said the ***CLFIS*** principle needs careful handling and, in particular, a tribunal should not allow an employer to hide behind its more junior officers taking responsibility for decisions dictated to them by invisible senior officers, such as where an employer operates a system of deliberately opaque decision-making, intended to mask the involvement of senior employers in decisions. On the facts of the case, it was found the 'innocent' police officer was not innocent as defined in ***CLFIS*** as he was fully aware of the discriminatory context.

2.29 The said reverse burden of proof provisions also apply to cases of discrimination by way of victimisation (see further ***Rice v McEvoy [2011] NICA 9).*** Further, the House of Lords made clear, in the decision in the case of ***Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830***, discrimination by way of victimisation occurs when in any circumstances relevant for the provisions of this Act, a person is treated less favourably than others because he/she has done one of the "protected acts", as defined in Article 69 of the 1976 Order. Thus, in order to make the necessary comparison it is necessary to compare the treatment afforded to the claimant who has done a "protected act" and the treatment which was or would be afforded to other employees who had done the protected act. This may involve comparison with an actual or hypothetical comparator. In the ***Rice*** case Girvan LJ said in order to establish victimisation:-

(a) circumstances relevant for the purposes of the provision of the Order must apply

(b) the alleged discrimination much leave treated the person allegedly victimised less favourably than in those circumstances be treated or would treat other persons in similar circumstances

(c) he must have done so by reason of the fact the person victimised has done are of the protected acts ("the reason why issue").

In the ***Rice*** case, Lord Justice Girvan at paragraph 33 of his judgement, when considering "the reason why issue" further stated:-

> *"In determining the reason why issue, it is necessary for the tribunal to consider the employers mental processes, conscious and unconscious. If on such consideration it appears the protected act had a significant influence on the outcome, victimisation is established (see Lord Nicholls in **Nagarajan v London Regional Transport [1999] IRLR 572 at 575, 576**), the question is 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 (Per* Lord Nicholls in ***Chief Constable of West Yorkshire v Khan [2001] IRLR 830*** *at paragraph 24)".*

Lord Scott in the ***Khan*** referred to establishing the "real reason", the "core reason" and "the motive" for the treatment complained of

Higgins LJ stated in ***Northern Ireland Fire and Rescue Service and Another v McNally [NICA unreported 29 June 2012]*** paragraph 23 of his judgement:-

> *"The primary object of the victimisation provisions is to ensure that employers who had taken steps to exercise their statutory rights (under the 1998 Order) are not penalised for doing so (see Lord Nicholls in **Khan v Chief Constable of West Yorkshire Police [2001] UKHL 48** at paragraph 16)".*

In the case of ***Simpson v Castlereagh Borough Council [2014] NICA 28,*** Girvan LJ, in paragraph 18 of his judgement stated:-

> *"A person discriminates against alleged to have been victimised if he treats the person less favourably "by reason that the person victimised" has (inter alia) done anything under or by reference to the 1976 Order or the Equal Pay Act. "By reason that" simply means "because" (see Lord Neuberger in **Derbyshire v St Helen's Metropolitan Borough Council [2007] ICR 841 at 865 paragraph 76**). As Mr Potter pointed out in argument, in determining whether an act is done because the victimised did one or some of things set out in Article 6(1)(a)-(b), the test to be applied may be expressed in somewhat different ways though it should lead to the same answer. The tribunal can ask the question "why did the respondent act as he did?" See for example **Nagarajan v LRT [1999] IRLR 57 at paragraphs 13-18.** In **Derbyshire** Lord Neuberger put the matter thus:*
>
> > *"The words "by reason that" require one to consider why the employer has done the particular act …. and to that extent one must assess the alleged act of victimisation from the employer's point of view. However, in considering whether the act has caused a detriment, one much view the issue from the point of view of the alleged victim"*
>
> *Alternatively the tribunal may pose the questions "would the respondent have acted as it did but for the fact that the victimised party did what he she did*

acting under Article 6(1)(a)-(d)". (See for example Lady Hale in ***R v Governing Body of JFS [2010] IRLR 136*** *paragraph 58 and Lord Clarke (****IBID****) at paragraphs 131-134). Alternatively, it may pose the question, as Lord Mance did in* ***JFS,*** *whether the impugned act was inherently discriminatory.*

2.30 In relation to whether the "protected act" had a significant influence on the outcome, as referred to by Lord Nicholls in the ***Nagarajan***, that expression was interpreted as an influence more than trivial. In ***Villalba v Merrill Lynch and Company [2006] IRLR 437*** Elias J, as he then was, held that, in finding the victimisation was 'a very small factor, not a significant influence in the decision to remove the claimant, the tribunal, the tribunal properly applied ***Nagarajan*** and, in particular, that discrimination is made out if the prohibited ground had a significant influence on the outcome. Further, although that wording was interpreted in ***Igen*** as meaning an influence more than trivial, if in relation to any particular decision a discriminatory influence is not a material influence or factor, it is trivial.

2.31 The Court of Appeal in England and Wales in the decision of ***Crawford v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138*** has confirmed that, depending on the particular facts, suspension could amount to a detriment for the purposes of the discrimination legislation. In a footnote to the judgement, Elias LJ, obiter (paragraph 71) raised particular concerns about suspending employees for alleged gross misconduct and referring the allegation to the police; and he indicated, in such a case, suspension "<u>should not be a knee jerk reaction and it will be a breach of the duty of trust and confidence towards the employee if it is</u>". He also stated that, even where there is evidence supporting an investigation, it does not mean that suspension is automatically justified. He referred to the feelings of demoralisation and the psychological effect of suspension where there is exclusion from work and enforced removal from colleagues. Of course such matters, in an appropriate case, might be relevant to issues of remedy and injury to feelings."

[Tribunal's emphasis]

2.32 The purpose of the Equal Pay Act (Northern Ireland) 1970, as amended ("the 1970 Act") is to eradicate discrimination between men and women with regard to all aspects and conditions of remuneration. The material provision of the 1970 Act, for the purposes of these proceedings, was Section 1(3), which provided the circumstances in which certain provisions of sub-section 2 do not apply if the GMF defence can be established. If a woman has shown that she is engaged on "like work, work rated as equivalent or work of equal value to that of an appropriate male comparator, then it is presumed that any difference between her salary and that of her comparator is due to the difference of sex. In the absence of a successful GMF defence on the part of the employer, this would lead to the woman obtaining the benefit of a sex equality clause being deemed to be included in her contract of employment, which will then modify her contractual terms so that these are in line with those of her comparator. As stated previously, the initial issue to be determined in these proceedings was whether the employer could establish the said GMF defence. In the IDS Handbook on equal pay, in reference to the said GMF defence, it is described as follows:-

"I know that the work of woman and the work of her comparator are of equal value in terms of demands, skills, etc but the man was paid more for a

particular reason and that reason has nothing to do with the fact that the claimant is a woman or the comparator a man".

In ***Glasgow City Council and Others v Marshall and Others [2000] IRLR 272,*** the House of Lords held that where a woman is doing like work with a man, and is paid less, there is a rebuttable presumption of sex discrimination, and the burden passes to the employer to show the explanation for the variation is not tainted with sex. The employer must satisfy the tribunal on the following matters:-

(1) that the proffered explanation, or reason, is genuine and not a sham or pretence;

(2) that the less favourably treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a "material" factor, that is, a significant and relevant factor. The factor must be "material" in a causative sense, rather than in a justificatory sense;

(3) the reason is not the "difference of sex", which is apt to embrace any form of discrimination, whether direct or indirect;

(4) that the factor relied upon is, or in a case within Section 1(2)(c), may be a "material" difference, that is a significant and relevant difference, between the woman's case and the man's case.

An employer who proves the absence of sex discrimination, direct or indirect, is under no obligation to prove a "good reason" for the pay disparity. If there is any evidence of sex discrimination, such as evidence that the difference in pay has a disparate adverse impact on women, the employer will be called upon to satisfy the tribunal that the difference in pay is objectively justifiable. But if the employer proves the absence of sex discrimination, he is not obliged to justify the pay disparity.

In ***Villalba v Merrill Lynch and Company Inc and Others [2007] ICR 469,*** Elias J set out at paragraphs 114-117 three different circumstances in which pay arrangements may be tainted by sex:-

"First, there may be a difference in treatment which is specifically on sex grounds. A woman is paid less simply because she is a woman. That is the classic form of direct discrimination.

Second, there may be a difference in treatment which, whilst not specifically on grounds of sex, results from the adoption of a criterion or practice which adversely impacts on women because they are women. Typically this may be because the social role which women habitually perform makes it more difficult for them to place themselves in the category of the worker attracting higher pay. Treating part-timers less favourably is the classic example.

Third, where cogent, relevant and sufficiently compelling statistics demonstrate that women suffer a disparate impact when compared with men, there is an irrefutable presumption that sex has indirectly tainted the arrangements, even though it may not be possible to identify how that has

occurred, and the differential needs to be objectively justified".

In the decision of the Northern Ireland Court of Appeal in ***Fearnon and Others v Smurfitt Corrugated Cases Lurgan Limited [2008] NICA 45,*** a "red circling case", Kerr LCJ observed, at paragraph 12-13 of the decision:-

> *"…. To qualify as a contemporaneous genuine material factor accounting for the discrepancy in salary, the reasons for it at the time of the difference in earnings as challenged must be examined. Otherwise, it will be possible for an unscrupulous employer difference in earnings to persist while knowing that the initial reason for it no longer obtained.*
>
> *It is to be remembered that the onus of establishing that there is such a genuine material factor rests on the employer throughout …."*

In Great Britain, Section 1(3) of the 1970 Act has now been replaced by Section 69 of the Equality Act. Despite some differences, the substance of the provision, in essence, remains the same, as Section 69 in effect affirms the case law which was made under Section 1(3) of the 1970 Act and therefore the case law under the previous provision remains relevant for consideration in this jurisdiction and the present proceedings.

In ***Calmac Ferries Limited v Wallis [2014] EQLR 115,*** Mr Justice Langstaff pointed out that the Equality Act 2010 is not a "true" consolidating act as such. Its purpose is to "reform and harmonise equality law and restate the greater part of the enactments relating to discrimination". Accordingly, the extent to which previous case law has to be taken into account in Great Britain must be treated with some caution; although, even in this case, neither advocate argued that any prior case was to be disregarded because of this. He pointed out that Section 69 of the Equality Act is drafted differently to Section 1(3) of the Equal Pay Act. However, he also acknowledged that some of the changes made clear, legislatively, what had already been the subject of judicial decision under the 1970 Act.

In order to be "material" (or "significant and relevant", as referred to in ***Glasgow City Council and Others v Marshall and Others)***, the factor relied upon has to explain the difference between the particular woman's pay and the particular man's pay. It must be of actual significance and relevance to the particular case, it is not sufficient that it is merely potentially capable of constituting the material factor, for the purposes of the said defence.

In ***Calmac Ferries Limited,*** a case under the 2010 Equality Act, it was confirmed that "where a pay disparity arises for examination in a claim of equal pay, it is not sufficient for an employer to show why one party is paid as one party is. Statute requires an explanation for the difference, which inevitably involves consideration why the claimants are paid as they are, on the one hand, and separately, why the comparator is paid as he is.

In ***Bury Metropolitan Council v Hamilton/Council of the City of Sutherland v Brennan [2011] IRLR 358,*** the Employment Appeal Tribunal held that – the explanation, or cause, of a state of affairs is not definitively established simply by showing its historical origin. In the case of direct discrimination, it may be pertinent

to consider not only why the differential in question first arose but why it was maintained, particularly if the relevant circumstances may have changed. In the case of indirect discrimination, gender proportions as between the advantaged and disadvantaged groups may have changed, or there may be reasons why a justification which was once good no longer remains so (see also ***Smurfitt Corrugated Cases Lurgan Limited above).***

In ***Skills Development Scotland v Buchanan [2011] EQLR 955***, the Employment Appeal Tribunal held that the mere passage of time does not cause a gender neutral explanation for a difference of pay to lose its "non sex" character, although passage of time could be one, amongst all the relevant factors relied upon by the claimant in any given case, to challenge the genuine nature of the employer's explanation. In ***Outlooks Supplies Ltd v Parry [1978] IRLR 12*** it was held a relevant factor in determining whether the employer has discharged the onus is for the tribunal to see the length of time that has elapsed, since any such 'protection of wages' was introduced, and whether the employer has acted in accordance with the current notion of good industrial practice in their attitude to the continuation of the practice.

In ***Davies v McCartneys [1989] IRLR 439,*** it was established that an employer may rely on more than one material factor, but where that is done, the employer must be prepared to explain all of the variation in pay by reference to the factor(s) relied upon. This is because it is necessary for the tribunal to be satisfied that the reason(s) relied upon is or are sufficiently significant to provide objective justification for part or all of the differences (see further Discrimination Law paragraph c.10.002). (See further Industrial Relations and Employment Law Section K Chapter 8 paragraphs 502-503).

2.33 In ***Lynch v Ministry of Defence [1983] NI 216***, Hutton J, as he then was, endorsed the principles, stated in ***O'Donnell v Reichard [1975] VR 916 at page 929***

> ***"****Where a party without explanation fails to call as a witness a person whom he might be expected to call if that person's evidence would be favourable to him, then, although the jury may not treat as evidence what they may as a matter of speculation think that person would have said if he had been called as a witness, nevertheless it is open to the jury to infer that that person's evidence would not have helped that person's case; if the jury draw that inference, then they may properly take it into account against the party in question for the purposes, namely (a) in deciding whether it accept any particular evidence, which has in fact been given either for or against that party, and which relates to a matter with respect to which a person not called as a witness could have spoken; and (b) in deciding whether the draw inferences of fact, which are open to them upon evidence which has been given, again in relation to matters with respect to which the person not called as a witness could have spoken".*

(See ***Breslin v McKevitt and Others [2011] NICA 33*** where ***Lynch*** was approved and followed).

In ***Wiszniewski v Central Manchester Health Authority [1998] PIQR 324*** Brooke LJ set out the following principles from this line of authority in ***Reichard.***

"(1) In certain circumstances a Court may be entitled to draw inferences from the absence on silence of a witness who might be expected to have material evidence to give on such an issue or action.

(2) If a Court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the Court is entitled to draw the desired inference: in other words there must be a case to answer on that issue."

In the case of ***Habinteg Housing Association Ltd v Holleron Ltd [2015] UKEAT/0274/14*** Langstaff P held at paragraph 29 of his judgement (albeit in a case on very different facts to the present proceedings and the issues to be determined) gave some guidance on the absence of a witness to give evidence.

"…. First, it shows to me that a tribunal is entitled to take into account the absence of a witness who could give contradictory evidence in assessing whether the assertion made by a party is accurate. This is because it is a sound principle that a party's case is to be determined not just by the evidence produced but by the evidence which it is within the power of either party to support or refute the allegation. In simple terms, if a conversation is critical, then if a party has within its power to call a person who could give evidence of that conversation which is supportive of its case and does not do so, a tribunal is entitled to draw an inference ….".

3.1 In relation to the said issue of the genuine material factor defence (GMF), the tribunal heard oral evidence on behalf of the respondent from Mr Julian Morrow, the general manager of the respondent, and Mrs Jeanette Brown, an administrative assistant with the respondent; and on behalf of the claimant, the claimant herself and Ms Leanne Nesbitt, her sister, who was formerly employed with the respondent as an administrative assistant from in or about October 1997 to in or about June 2006. The tribunal further admitted without formal proof, by consent, as evidence, the witness statement of Ms Leslie Keys, who was formerly an administrative assistant with the respondent, from in or about May 2011 to in or about November 2011; but subject to the caveat as to the weight to be given to any such evidence by the tribunal in such circumstances, where the respondent was not able to cross examine the said witness.

Having considered the evidence given to the tribunal by the parties, the documents contained in the trial bundle, as amended, to which the tribunal was referred during the course of the hearing, together with the submissions of the claimant and the respondent's representative in relation to the said issue of the GMF defence of the respondent, for the purposes of the claimant's claim of equal pay (see before), the tribunal made the following finds of fact, as set out, in the following sub-paragraphs, in so far as necessary and relevant for the determination of the said issue.

3.2 It was agreed, and confirmed, at the outset of the proceedings, the claimant's comparators for the purposes of her said claim were, Mr David McVeigh,

Mr Mark Rodgers, Mr Alan McKeown and Mr Eric Lynas. It was further agreed, and confirmed at the outset of the proceedings, by the respondent's representative, that for the purposes of issues of the GMF defence, that the respondent was relying, in particular, on the following factors, namely:- "seniority", "line management responsibilities", "hands on work" and "responsibility" to demonstrate the difference in pay between the claimant and the respondent. In relation to the Mr McVeigh, the claimant was relying on Mr McVeigh, as a comparator, before his promotion on 7 April 2014, to production manager from maintenance manager.

3.3 It was not disputed, for the purposes of these proceedings, there was a difference in pay between the claimant and her said comparators, with the claimant paid less than her said comparators. In the circumstances, and given the tribunal's decision, it was not necessary for the tribunal to further consider the said differences in pay between the claimant and her comparators.

3.4 During the course of the hearing, the tribunal found considerable uncertainty in relation to the precise job titles of the claimant and her comparators, both in documentation relied upon by the parties and when each was described in the course of evidence at the hearing. However, for the purposes of determining the GMF defence, the tribunal did not find such differences in any job title used, as referred to above, of significance and relevance in comparison to the actual job/work carried out by each of them. Therefore, subject to the foregoing, at the material time, the claimant was office supervisor/manager, Mr McVeigh was the senior fitter/maintenance manager, Mr Rodgers was the maintenance fitter/ supervisor and Mr McKeown and Mr Lynas were production supervisors. As set out previously, Mr Morrow and Ms Brown gave evidence on behalf of the respondent, in relation to the said GMF defence issue. In particular, the said evidence was given principally, by Mr Morrow, in his role as a general manager for some 10 years of the respondent, and based on his knowledge, in that role, of the precise work carried out by the said comparators. The claimant strongly challenged, in the course of her evidence and submissions, the absence of any relevant documentation which might have corroborated his evidence as to their role/work and/or the failure of the respondent to call the said comparators and/or any other person with direct knowledge of their role/work to further corroborate his evidence in relation to such matters. However, significantly, in the tribunal's judgment, the claimant frankly and fairly acknowledged that she was not in a position, save in the general sense referred to above, to challenge his evidence in relation to the specific role/work of the comparators. In such circumstances, the tribunal was not prepared to draw any inferences from any such failures by the respondent (see paragraph 2.35 of the decision) and was satisfied it was able to determine the necessary facts for the GMF issue, on the evidence placed before it, during the course of the hearing, as referred to previously. In light of the claimant's said acknowledgement, the tribunal was able to place considerable reliance on the documentation prepared by Mr Morrow, with the assistance of his representatives, of the examples of the said factors relied upon by the respondent in relation to the claimant and her said comparators.

3.5 The tribunal was satisfied that, although the respondent, for the purposes of the GMF defence, was relying on the said factors of "seniority", "line management responsibilities", "hands on work" and "responsibility", there was considerable overlap in the circumstances between the said factors and which taken together were relevant for the purposes of determining the said issue.

3.6 Insofar as the respondent relied on seniority, this did not relate to an employee's length of service but rather it related to their position within the respondent and the role/work carried out in that position, as reflected more particularly in the tribunal's said findings of fact, as set out below. In that context, insofar as relevant, the tribunal was satisfied the said comparators carried out a more "senior" role to that of the claimant in the respondent's organisation.

3.7 In his role as senior fitter/maintenance manager, prior to his promotion to production manager, Mr McVeigh had direct line management responsibility for one employee, namely Mr Rodgers, the maintenance fitter/supervisor. Both employees were together solely responsible for maintenance matters in the respondent. Even before his promotion, in his said role as maintenance manager, Mr McVeigh was required to attend regular maintenance and production meetings to ensure the smooth running of the respondent's business. Mr Rodgers has line management responsibility for training and supervising of one apprentice, under a Government scheme, but would also assist other supervisors when required. Mr Lynas and Mr McKeown, as supervisors, had joint line management responsibility for approximately 32 employees. The claimant, as office manager/supervisor had no such line manager responsibilities, which were the responsibility of Mr Kirkwood, the commercial manager; albeit, the claimant would have liaised closely with him in relation to any relevant decisions that required to be taken by him, such as, for example, the holidays of staff.

3.8 All the comparators are "on call", and require to come in, if necessary, where relevant work issues arise. The comparators, other than Mr Lynas, have company mobile phones to assist for "on call" purposes. Mr McKeown and Mr McVeigh are key holders and Mr McVeigh is on the relevant "on call" list with the respondent's security company. In addition, the comparators have handheld radios, so can be contacted where/when necessary. The claimant, at the material time, has no similar responsibilities with such matters or required to have use of company mobile phone/radio.

3.9 In relation to the claimant's hands on work/responsibilities, as office supervisor/ manager, which she is able to carry out on a part-time basis, it is undoubtedly important work in which she carries out in exemplary manner; but the tribunal is satisfied that this work is largely of a routine/administrative nature. In particular, her work relates to inputting of wages and initiating the automated wages BACs system and issuing a computerised on line wage report to HMRC, posting invoices and payments to the company's creditors, dealing with telephone enquiries regarding outstanding payments and liaising with suppliers, regarding invoice queries and running the computer systems once a year, for the submission of the year-end tax returns and carrying out various input tasks for the pension system. The claimant would have assisted in the initial general induction of any administrative assistants, who commenced work in the office, such as her sister and Ms Keys; but the tribunal did not consider she had a specific training role and the said administrative assistants in the office, like the claimant, carried out their own specific individual administrative tasks, without any specific supervision. If any specific problems arose it was Mr Kirkwood who would require to resolve them and make relevant decisions; albeit liaising with the claimant if appropriate and necessary.

3.10 In relation to hands-on work/responsibilities, Mr McVeigh is responsible, in particular, for the maintenance of plant and machinery, stock control, overall supervision of the factory production, completion of formal risk assessments, as and where necessary, and negotiations with contractors and suppliers. He has considerable experience of the respondent's plant and equipment, some of which is bespoke and of varying age, and which requires regular input and maintenance where his said experience is of particular value. He often has to work unsocial hours, so as not to interfere with productivity. He is regularly required to attend the respondent's plant in Cork to maintain the machinery at that plant. He has to have daily/weekly meetings and/or tool box meetings to ensure the maintenance of the equipment as the need arises. He has to ensure regular servicing and maintenance of plant and equipment to ensure smooth operation of the respondent's production with minimal plant downtime. He supervises engineers during servicing and liaises with the external companies providing relevant services to the respondent. He is responsible for the purchase and acquisition of maintenance materials. He has to program and implement regular maintenance shutdowns on machinery, dealing with ordering of parts for machinery, and sourcing parts were not readily available. He also has to liaise with contractors and suppliers to ensure best quality in price. He has to ensure compliance with relevant Health and Safety Regulations and to complete appropriate risk assessments. The importance of the ongoing good maintenance of the respondent's plant and equipment cannot be underestimated for which, as referred to above, both Mr McVeigh and Mr Rodgers are responsible.

3.11 In relation to hands on work/responsibilities of Mr Rodgers, his work dovetails/overlaps with Mr McVeigh, given that they are the only employees with specific maintenance responsibilities. His said work/responsibilities include, in particular, the servicing, repair maintenance of plant and machinery, to ensure smooth operations of the respondent's production with minimal downtime and ensuring a safe place of work and compliance with health and safety requirements. He also controls the daily flow of work and stock level of waste timber chippings to avoid fire risk, working closely with and also liaising with production staff about their work loads and their operational needs. He also requires to attend, as appropriate, similar meetings to those of Mr McVeigh.

3.12 In relation to hands on work/responsibilities of Mr Lynas and Mr McKeown, their major role is to ensure that production targets are met on a daily basis and, if not, to work with relevant management to ensure any disruption is kept to a minimum. They require to attend daily management/supervisor production meetings and also tool box meetings with employees, under their supervision, when required and necessary. They have to conduct quality and control checks on goods and conduct internal audits and assist in monthly external audits. They have to ensure all production operatives have appropriate tools to safely perform their duties. They both have specific responsibilities for the training and development of new employees on the production floor and ensuring the ongoing retraining of staff on a biannual basis.

3.13 The tribunal was satisfied, in light of the facts, as set out in the previous subparagraphs, the level of hands on work/responsibilities of the claimant's comparators, in their said roles/work, was at a much higher/greater level to the routine and administrative work/role of the claimant.

4.1 In light of the facts as found by the tribunal and, after applying the relevant legislative provisions and guidance, as set out in the case law, referred to previously, in relation to the issue of the GMF defence, the tribunal reached the following conclusions, as set out in the following subparagraphs.

4.2 Having regard to the factors of "seniority", "line management responsibilities", "hands on work", and "responsibilities", as relied upon by the respondent, the tribunal was satisfied, the respondent has established, that the reason for the difference in pay, is not due in any way to the difference of sex between the claimant and her said comparators; but is due to the said factors, taken as a whole, not individually; and after taking account of the degree of overlap, as set out, in detail, in the findings of fact as found by the tribunal in relation to the work/role of the said comparators, in comparison to that of the claimant. The tribunal found no evidence that the said reason for the difference in pay, was in anyway a sham or pretence but was, in the circumstances genuine.

4.3 The tribunal therefore dismissed the claimant's claim for equal pay, pursuant to the Equal Pay Act (Northern Ireland) 1970, as amended, as the respondent had established the Genuine Material Factor defence, for the purposes of Section1(3) of the said Act.

5.1 In relation to the claimant's claim of unfair constructive dismissal, pursuant to the 1996 Order and/or discrimination by way of victimisation, pursuant to the 1976 Order, the tribunal heard evidence from the claimant and, on behalf of the respondent, from Mr Paul Kirkwood and Mr Terry Elton. Mr Morrow did not give evidence in relation to these claims. Having considered the evidence given to the tribunal by the parties, the documents contained in the trial bundle, as amended, to which the tribunal was referred during the course of the hearing, together with the submissions of the claimant and the respondent's representative in relation to the said claims, the tribunal made the following findings of fact, as set out in the following subparagraphs, insofar as necessary and relevant for the determination of the said claims.

5.2 The claimant, who was born on 13 June 1969, was employed by the respondent as office manager/supervisor (see before) from 19 April 1993 to 28 March 2016. At the date of the termination of employment, she was earning £241.73 gross and £220.64 net per week. She had an exemplary record and was never, prior to the events, the subject matter of this claim, the subject of any disciplinary record by the respondent. At the relevant time, in the said office, the respondent employed two administrative assistants, Mrs Brown (see before) and Ms A.J.

5.3 On 22 October 2015, at or about 10.30 am, Paul Kirkwood, the commercial manager, who had responsibility for the said office (see before) asked the claimant to come to his office. He confirmed he had spoken to Mr Morrow, the general manager (see before) in relation to the claimant's earlier suggestion that Ms A.J should be given a pay rise to compensate her for any extra expenses she would incur following the proposed change to her hours. Mr Kirkwood told the claimant that both Mrs Brown and Ms A.J were each to get a rise of 10%. In the circumstances, and not surprisingly, the claimant asked whether she was also to get a pay rise. She required to know, in particular, as she had responsibility for organising the payment of wages for all employees. Mr Kirkwood said she was not to receive any pay rise, as these were for extra work carried out by Mrs Brown and

Ms A.J. The claimant was naturally very disappointed, as she felt she had done extra work for the respondent in the previous couple of years.

Significantly, in the tribunal's view, during the course of this discussion, the claimant reminded Mr Kirkwood of a previous recent conversation/discussion, she had had with him in relation to her salary and that she had pointed out to him she was the lowest paid supervisor/manager in the respondent and the only female in the respondent carrying out such a role/work. She also reminded him that he had said, during this previous conversation/discussion, that her salary would not be reviewed as there was no money available for such a rise. In light of the proposed rise for the said administrative assistants, she repeated her request for a salary review. He bluntly refused and said it would not be happening and she would not be getting a rise. The tribunal is satisfied Mr Kirkwood knew the claimant was, in essence, making a complaint of equal pay; and was clearly annoyed by her doing so by his reaction and absence of any meaningful response. The claimant left Mr Kirkwood's office somewhat confused and very upset by this reaction.

5.4 The claimant, who remained very upset and somewhat emotional, returned to Mr Kirkwood's office on 22 October 2015 at 10.45 am and asked to have another word with him. Mr Morrow was in the office but left immediately. The claimant explained that she was not happy that she had been overlooked for a salary review again and felt that it was unfair. Significantly, in the tribunal's judgment, she then explained to Mr Kirkwood she was the lowest paid manager/supervisor and the only female in the role and, in particular, she felt she was being discriminated against in this role because she was female. She went on to point out to Mr Kirkwood how Mr McVeigh, Mr McKeown and Mr Lynas (see before) all were paid more than her and in her view she had more responsibilities that these male employees. Mr Kirkwood told her there was nothing he could do about it and she was not going to be considered for a rise. The tribunal is satisfied Mr Kirkwood was fully aware that the claimant was repeating her complaint of equal pay.

Before the discussion concluded, Mr Kirkwood then said to the claimant that Ms A.J had rung him upset that she was not the only person to receive a rise and that Mr Morrow was not happy and there may be consequences. The claimant, at that time, was not sure what he was referring to and repeated her concerns, as referred to above. The claimant left the office of Mr Kirkwood, saying she would not "let it drop this time" and needed to speak to Mr Morrow. It was apparent from Mr Kirkwood's reference to Mr Morrow, he and Mr Kirkwood had discussed the matter and the tribunal has no doubt that this would have included the claimant's complaint of equal pay during the course of the claimant's discussion with Mr Kirkwood.

5.5 At this point, it is necessary to refer to an incident that arose during the course of this second discussion with Mr Kirkwood, as referred to in the previous sub-paragraph, shortly before the said discussion ended. The said office of Mr Kirkwood is small and contains a lot of other equipment. Mr Kirkwood was sitting at his desk and the claimant was standing near the door raising her said concerns with him. At that time, Mr Peter Ervine, the accountant of the respondent, entered the door of the office to get some documents from the printer. As he did so he pushed against the claimant. Regretfully, in the circumstances, he did not apologise when he did so. The tribunal has no doubt he did push against the claimant as he tried to get to the printer but is satisfied, on the evidence before it,

the claimant has exaggerated what has happened and taken it to be an "assault"; whereas the tribunal has no doubt it was an "accidental" push as he went to get documents from a printer in an overcrowded office with the claimant standing in his way. The claimant returned to the main office and told Ms A.J and Mr Elton, the site manager of the respondent, what had happened. At that time, neither Mr Elton or Mr Kirkwood took any further action. The tribunal is satisfied that Mr Kirkwood had concluded that it was an accident and therefore did not consider any further action was necessary at the time. The claimant somewhat later reported to the police that she had been assaulted by Mr Ervine but the police declined to take any further action. The tribunal is of the view that the claimant has read into the incident much more than she is entitled to, and has done so in view of the later events, as set out in this decision. In these circumstances, the tribunal, in light of its decision, in this matter did not consider it necessary to consider this incident, in relation to Mr Ervine, in any further detail.

5.6 At or about 11.45 am on 22 October 2015, the claimant was asked by Mr Kirkwood to come to Mr Elton's office. At the time she thought it was to discuss the Ervine incident and/or her request for an increase in salary, as discussed at their previous meeting. The tribunal does not accept that Mr Kirkwood told the claimant, on the telephone, what the meeting was about. However, it accepts that, when she came into the meeting, she was told by Mr Kirkwood that she was being investigated for a breach of confidentiality as part of a formal investigation, with Mr Dunlop present as a note taker. Mr Elton was not present at this time in his office. Mr Kirkwood then asked the claimant to tell him, how Ms A.J found out about the pay rise for Mrs Brown. The claimant said she did not know but said that, after she had spoken to Mr Kirkwood about the pay rises for Mrs Brown and Ms A.J, she had gone into the front office very upset and Ms A.J had asked her what was wrong and the claimant had said to her "everyone here gets a pay rise except me". She had then left the office for a smoke to "cool down". The claimant categorically denied telling Ms A.J how much the pay of Mrs Brown was to rise and insisted that the extent of her conversation was that as set out above. The claimant was then handed a letter, which had clearly been prepared before the meeting and Mr Kirkwood told the claimant she was suspended on full pay, while further investigations were made into the matter. In shock, the claimant said to Mr Kirkwood – "is that it"? Mr Kirkwood then told her to collect her things and go home and she was not required to work the rest of the day and someone would be in touch with her. The claimant was totally surprised and upset in relation to what had happened and left the office in total shock. She then drove home, feeling devastated by what had happened. She consulted her doctor, who then diagnosed extreme stress and anxiety and gave her a relevant sick line and told her not to return to work until she was feeling better. The claimant did not read the letter Mr Kirkwood had handed to her until she got home.

5.7 In the letter, dated 22 October 2015, Mr Kirkwood:-

> *"Further to our meeting on 22 October 2015, I write to confirm that you have been suspended on contractual pay to allow an investigation to take place following the allegations of breach of confidentiality. As your employer we have the duty to fully and properly investigate this matter.*
>
> *Suspension from duty and contractual pay is not regarded as disciplinary action. It is merely a holding measure pending further investigations where it*

is undesirable for an individual to remain on duty.

The duration of the suspension will only be for as long as it takes to complete the investigation.

…

Should the investigation indicate that there is some substance to the allegation you will be required to attend a disciplinary hearing. You will be provided with all relevant documentation prior to the hearing and you will be notified in writing of the time and date and venue.

Once our investigations have been completed we will contact you again to inform you of what action, if any, we will be taking.

…"

The tribunal notes that, although the letter refers to an allegation of breach of confidentiality, the claimant was given no detail of the said allegation. It also referred to the carrying out of an investigation and should that indicate some substance to the allegation, the claimant would require to attend a disciplinary hearing. Significantly, the crucial witness, Ms A.J, to the said conversation, the subject matter of Mr Kirkwood's questions at the meeting, was not interviewed at that time and no statement was obtained from Ms A.J, prior to the disciplinary hearing, which subsequently took place (see later). The tribunal has no doubt that this letter was prepared by Mr Kirkwood, with the advice of the respondent's employment consultants, Peninsula, following consultation with Mr Morrow and was a standard "suspension" letter used by Peninsula. The tribunal is further satisfied that the allegation of breach of confidence, as set out in the letter, was included by the respondent's employment consultants following instructions from Mr Morrow. However, it was not clear to the tribunal what precise instructions were given to the consultants before the letter was drawn up to enable them to conclude that suspension was appropriate and the matter to be investigated was such a breach of confidentiality. The tribunal was further satisfied Mr Morrow, and subsequently Mr Elton, were both fully aware, following discussion between them of the action that had been taken by Mr Kirkwood, as outlined above, together with the drawing up and sending to the claimant of the said letter. Mr Kirkwood was unable to explain why, as set out in his said letter, it was felt necessary to suspend the claimant and require her to remain off duty in the circumstances during the investigation of the matter, save that this was what was set out in the terms of the standard draft letter provided to him by the employment consultants. The claimant felt totally humiliated and embarrassed by the suspension in these circumstances and indeed initially did not inform her family because of this embarrassment.

5.8 On 28 October 2015, the claimant received a letter, dated 27 October 2015, requesting her attendance at a disciplinary hearing on 29 October 2015 but the letter said it enclosed a copy of the minutes of the meeting on 23 October 2015, prepared by Mr Dunlop and a statement from Mr Kirkwood. Unfortunately Mr Kirkwood's statement was not enclosed. There was some dispute between the claimant and Mr Kirkwood about the contents of the minutes prepared by Mr Dunlop in comparison to notes she had prepared subsequent to her earlier meetings with Mr Kirkwood; although the tribunal concluded the differences were not of any great

significance and in particular, in light of the findings of fact, as referred to above. In the letter, dated 27 October 2015, Mr Elton stated:-

> *"You were suspended on contractual pay from 22 October 2015 following the allegation of breach of confidentiality.*
>
> *Suspension on contractual pay is not regarded as disciplinary action. It is merely a holding measure pending further investigations were it is undesirable for an individual to remain on duty. During suspension you remain our employee and continue to be bound by your terms and conditions of employment. It may be necessary for me to contact you and you are required to make yourself available during your normal working hours.*
>
> *Following the investigation on 22 October 2015 you are required to attend a disciplinary hearing on Thursday 29 October at 10.30 am in our office to discuss the following matter of concerns:*
>
> - *alleged breach of confidentiality*
>
>   *If this allegation is substantiated, we will regard them as gross misconduct. If you are unable to provide a satisfactory explanation, your employment may be terminated without notice*
>
> *…"*

Again, the tribunal notes the continued absence of any detail in relation to the allegation of breach of confidentiality. Although Mr Elton had not been initially involved in this matter, the tribunal is satisfied, before he was asked to conduct the disciplinary hearing, he was made fully aware in discussion with Mr Morrow of the discussions, between the claimant and Mr Kirkwood, and the action taken by Mr Kirkwood following discussion with Mr Morrow, as outlined previously. Mr Elton, prior to the disciplinary hearing also had in his possession a statement from Mr Kirkwood (see later), where it is noted (see later) there is some general reference to the claimant's complaint of equal pay, as referred to previously, in the course of Mr Kirkwood's discussions with the claimant. In the statement, Mr Kirkwood confirms he had informed Mr Morrow of his discussion with the claimant before it was decided by Mr Morrow there had been a breach of confidentiality and the claimant was suspended.

Due to the claimant's ongoing sickness, the disciplinary hearing had to be postponed on a number of occasions and it eventually took place on 12 November 2015, when the claimant received a letter, dated 10 November 2015, 11 November 2015, informing her, inter alia, that the hearing would take place on 12 November 2015 in her absence if she failed to appear. This was despite the claimant informing Mr Elton that she remained unwell. In the circumstances, the claimant felt she had no option but to attend to defend the allegations and to protect her job in the circumstances. She still had not been provided with any further information in relation to the allegation of breach of confidentiality or the statement from Mr Kirkwood and, as referred to in the letter, dated 27 October 2015.

5.9 The disciplinary hearing took place on 12 November 2015. It was only during the course of that hearing, the claimant was given a copy of the statement from

Mr Kirkwood. After some debate, Mr Elton eventually accepted that no statement had been taken from Ms A.J as part of the investigation, since the date of the claimant's suspension, although she was the person with whom the claimant was alleged to have broken confidentiality. The fact that Ms A.J, had been on holiday for part of the period between 22 October 2015 and the disciplinary hearing was not in the tribunal's view a good reason, given her crucial role in the matter. Indeed, the tribunal could not understand why an immediate statement had not been taken from her on 22 October 2015, the date of the various meetings, and when it had been decided to suspend the claimant and; at a stage, when Ms A.J was in the office and available to give a statement and had not gone on any holiday.

5.10 In the statement of Mr Kirkwood, not previously seen by the claimant, he stated, inter alia:-

> *"I asked Ms Nesbitt to come to my office to discuss the matter of changing the hours of Ms A.J, from Monday Thursday to Thursday and Friday.*
>
> *I advised Ms Nesbitt that we had, as previously suggested by her, increase the earnings of Ms A.J to take account of the fact that her husband, who is an employee of the company, would be going home on a Friday at lunchtime, when his shift finished, and then to come back for her at 4.30 pm.*
>
> *I further advised that we would also be increasing the earnings of Mrs Brown by similar percentage, as the duties of both Ms A.J and Mrs Brown would be changing, and they would have additional work given to them.*
>
> *Ms Nesbitt asked if her earnings would be increasing and I answered that would not, as neither her hours or duties would be affected. Ms Nesbitt was not happy with this news, and went on to say that it was unfair that other office personnel were to be given an increase and she was not.*
>
> *I explained that there was nothing I could do about that.*
>
> *Ms Nesbitt then returned to the office and from her expression it was clear to Ms A.J that something was wrong. When she asked Ms Nesbitt, she told "everything here gets a pay rise but me".*
>
> *At that point she went out of the office and Ms A.J rang me, upset that she was not the only one to get an increase. I tried to explain the reasoning behind our decision, but I believe the damage was already done. I am of the opinion that Ms A.J was satisfied with the outcome of our previous discussions surrounding her remuneration until such time that she was informed that another member of staff was also to be given an increase.*
>
> *When I relayed the various conversations I had with Ms Nesbitt and Ms A.J to the general manager, he advised that Ms Nesbitt had broken the rules of confidentiality in discussing the remuneration of another member of staff. At this stage we contacted our employment law provider to ask their opinion on the current situation, and sought their advice in how to proceed.*
>
> *We feel there is a matter of trust at stake here, as Ms Nesbitt is responsible for the weekly wages, and if she was to discuss one person's wage with*

someone else, there was always the chance this could occur again.

Ms Nesbitt and I had a further conversation were she said she thought she was being treated unfairly, that she did a good job, and that no one had any complaints with the work she produced. I did reiterate that the duties of the two employees concerned were changing dramatically and that was the sole reason for the increases. Ms Nesbitt left my office obviously still not satisfied with our reasoning on the whole affair. At this stage, we re-contacted our employment law providers and proceeded in accordance with their advice."

5.11 The claimant provided to Mr Elton, a document prepared by her, prior to the meeting. This document, in essence, confirmed the events, as found by the tribunal in relation to what had happened on 22 October 2015; and, in particular, confirming what she had said to Ms A.J at the time, limited, in particular to her statement "seems that everyone gets a pay rise here except for me". In and that she had not told Ms A.J that Mrs Brown had got a pay rise. Mr Kirkwood had to admit in evidence, it was an assumption on his part that the claimant had told Ms A.J, as all he was aware of was what the claimant told him she had said to Ms A.J following their meeting, as confirmed above. In the tribunal's judgment, this emphasised the failure of Mr Kirkwood at the time and Mr Elton, prior to the disciplinary hearing, to obtain any statement from Ms A.J. Mr Elton decided to adjourn the hearing to consider the document provided by the claimant, as referred to above. He indicated that he would reconvene the meeting later that day. He failed to do so and no further meeting took place between Mr Elton and the claimant before the claimant received two letters from Mr Elton on 14 November 2015, dated 13 November 2015. The tribunal is not satisfied Mr Elton carried out any further investigation or enquiries, following the said hearing.

5.12 In a letter dated 13 November 2015, Mr Elton stated to the claimant:-

"Further to your suspension between duty and the investigating meeting held on 22 October 2015, and the disciplinary hearing held on 12 November 2015, I am now writing to confirm that I have completed my investigation into the alleged breach of confidentiality.

I am pleased to report that having listened to your explanations and made further enquiries, there is not, on this occasion, any case to answer and the matter is now closed. Your suspension is lifted with immediate effect and you are expected to return to work on 17 November 2015.

The suspension allowed us to conduct the investigation impartially and unfairly, was no way a form of disciplinary action against you.

…."

In a further letter dated 13 November 2015, Mr Elton wrote to the claimant:-

"Further to the disciplinary hearing on 12 November 2015, I am pleased to confirm that, having carefully reviewed the evidence in the circumstances, I have decided that no disciplinary action will be taken against you.

However, I still feel it is appropriate to informally outline the issues that have

been identified regarding your conduct. As you are aware the topic of the hearing was your breach of confidentiality whereby you disclosed information about pay increases to a member of staff.

During the hearing you explained that you did not disclose who actually received a pay increase but instead stated that "everyone gets a pay rise in here except me". While formal action is not warranted on this occasion, I still feel that your explanations are unsatisfactory because even though you did not disclose exactly who received the pay increase, the member of staff was still able to draw conclusions as to who else received an increase and this led to some unrest within the company. As an office supervisor you are expected to keep all aspects of your role, confidential and it is not accepted that this breach occurred.

On this particular occasion I have decided not to proceed with formal disciplinary action. However, this letter is to be treated as confirmation that I have discussed my concerns with you and that you are expected to make every effort to address the shortcomings that have been identified.

This letter is not intended to be a formal warning and does not form part of the company's disciplinary procedure, however, it will be kept in your personnel file and thus takes the form of what we consider to be a reasonable written management instruction.

Should there be any repeat of this conduct, or indeed any misconduct in general you may be subject to formal disciplinary action …"

It was not apparent to the tribunal from Mr Elton's evidence what investigation/ further enquiries/review of the evidence; if any, Mr Elton carried out, as referred to in the correspondence. In the circumstances, the tribunal concluded no such enquiries/review took place.

5.13 A letter dated 16 November 2015, the claimant replied to the letters received from Mr Elton regarding her suspension and disciplinary action

"….. It states that I am expected to return to work on 17 November 2015. I wish to let you know that I am still unwell and unfit for work at this present time. You have received a doctor's line which covers me until 23 November 2015, which was given to you on 10 November 2015.

Also I would like to note that the meeting for the disciplinary hearing was adjourned to allow you time to read my statement regarding the recent events leading to my alleged breach of confidentiality. I am aware that my suspension has now been lifted. Despite how I am feeling, I had hope that this meeting would have been rescheduled as I also had concerns, stemming from these events, which I wanted to discuss and which need to be addressed …

Also you stated in one of your letters 13 November 2015 there is no case to answer, yet in your second letter of 13 November 2015 you state that you are unsatisfied with my explanations. One letter appears to be a contradiction of the other and I am finding them very confusing.

My "off the cuff" remark said while upset, as explained during the meeting of the 12 November 2015, was made because I genuinely feel everyone in this company gets a rise except for me and for no other reason as I am, as noted in your second letter, being apportioned blame now for "unrest within the company" and my conduct is still in question. Can you please forward me a copy of Ms A.J's statement, if one has been taken and a copy of the minutes of the meeting …"

On 17 November 2015, Mr Elton replied to the claimant's letter of 16 November 2015, in which he stated:-

"With regard to your return to work <u>we</u> are happy to wait until 23 November for you to return to work however you are welcome back at any earlier stage. <u>We</u> have decided not to reconvene the disciplinary hearing as there was no point when <u>we</u> had already decided that no disciplinary action needed to be taken. If you have any further concerns we suggest expressing them at the grievance hearing arranged for 18 November at 09.45 in our offices … <u>We</u> are not obliged to provide Ms A.J's statement as no formal action has been taken against you. Can you confirm if you are wanting to appeal our decision of issuing no <u>formal</u> action?"

[Tribunal emphasis]

The tribunal, noting the use of "we" in the letter, is satisfied Mr Elton consulted Mr Morrow about the said decisions taken by him.

5.14 In a letter dated 13 November 2015, in reply to the letter dated 11 November 2015 by the claimant about several grievances, Mr Elton indicated that it would be appropriate to address this matter through the formal grievance procedure and confirmed the grievance would be heard on Wednesday 18 November. The issues of concerns identified were as follows:-

"In these various bullet points you are not content of being overlooked for a salary review.

- *You are not content at being overlooked for a salary review.*
- *Your workload is going to increase and has been constantly increasing over the last few years.*
- *You feel that you are the lowest paid manager/supervisor in the company.*
- *You state that Mr Ervine pushed you out of the way in order to retrieve some documents from the printer in Mr Kirkwood's office. You felt intimidated and shocked.*
- *The situation has caused you a great deal of stress. You have not been able to sleep.*
- *You have had a loss of appetite, severe headaches, panic attacks, heart palpations and dizziness. You have also experienced pains in*

your lower limbs because of the stress caused by this.

- *You feel that if Ms A.J had been spoken to at the earliest convenience then the situation could have been resolved before now.*

- *You feel your suspension was uncalled for and will have caused defamation of your character.*

These matters will be discussed and considered at the meeting therefore it is important that you contact me in advance of the hearing if you deem the above information to be incorrect in any way or if you wish to add anything further to the above points …"

In a letter dated 18 November 2015, the claimant set out, in particular, her grievance that she was entitled to equal pay with the said comparators, who are the subject of her claim, as referred to previously in this decision. During the course of the grievance hearing on 18 November 2015, the claimant also raised additional concerns about payment to her of her Christmas bonus.

In a letter dated 25 November 2015, Mr Elton wrote to the claimant rejecting her grievance and stating that, following the meeting and further investigations which have been carried out, which included discussions with Mr Ervine and Mr Kirkwood he rejected her claim for equal pay, her allegation against Mr Ervine and her issues with the suspension and subsequent disciplinary process carried out by the respondent. In relation to the Christmas bonus, he stated that this bonus was discretionary and was not an automatic entitlement and, in the past few years, every employee's bonus had been affected including that of the claimant. It should be noted that, following the termination of the claimant's employment, the Christmas bonus was subsequently paid to the claimant in her final pay statement and no proper explanation was given why it had not been paid at that time. In evidence, Mr Elton tried to suggest it was not paid because the claimant was off sick at Christmas. However, the tribunal found this unconvincing, especially in light of his earlier reasoning. Having concluded that he could not find sufficient grounds to substantiate the grievance, he indicated that the claimant had the right to appeal this decision.

In relation to the rejection of her grievance relating to equal pay, in essence, he repeated the respondent's defence of GMF, which has been addressed elsewhere in this decision. In relation to the issue of the suspension and disciplinary hearing he stated, inter alia:-

"• *… we are genuinely sorry the situation has caused you a great deal of stress, however we felt the process was carried out as per our rules and procedures in place in our company Handbook which expresses how serious we take breaches of confidentiality in the workplace and especially information to which you would be privy to due to the sensitive nature of such information.*

- *We are able to substantiate this point as we feel the situation could have been resolved more quickly had we spoken to Ms A.J at an earlier time however at the time we felt we had enough to suspend you whilst further investigations took place and when the*

investigations were completed your suspension was lifted.

- *Suspension is a precautionary measure and as per your Handbook on some occasions temporary suspension on contractual pay may be necessary in order than an uninterrupted investigation can take place. This must not be regarded as disciplinary action or a penalty of any kind."*

The claimant appealed the decision and the grievance appeal hearing was heard on 16 December 2015 by an independent employment consultant Ms McNamee, who reported on 12 January 2016 to the respondent. Ms McNamee did not give evidence but her full report was produced in evidence. The claimant had informed the respondent on 14 November 2015 that she could not attend this appeal meeting as she was still unwell but she was informed on 14 December 2015 by Mr Morrow that the meeting would go ahead in her absence. No other dates were suggested by the respondent. On 16 November 2015, the claimant raised a formal grievance of victimisation, which included reference to the events of 22 October 2015, the subsequent suspension and disciplinary process.

In a letter dated 12 January 2016, Mr Morrow sent a letter to the claimant enclosing Ms McNamee's report of the grievance appeal hearing and the said letter concluded – "after full and thorough investigation of this matter, the organisation would advise that they have accepted the recommendations of Ms McNamee and wish to communicate that your grievance appeal has not been substantiated and the decision taken by Mr Terry Elton is upheld.

5.15 From 26 October 2015 the claimant remained off sick and was paid sick pay by the respondent and was continued to be paid until the beginning of March 2016, when the claimant received a letter from Mr Elton, dated 9 March 2016, in which he stated:-

> *"We trust things are improving for you.*
>
> *I am writing to remind you that in the event of absence from work due to sickness, you are entitled to receive 28 weeks statutory sick pay.*
>
> *Your current period of sickness absence began on 26 October 2015. You have been receiving discretionary company sick pay from 26 October 2015. This entitlement was entirely discretionary and will be ending on 11 March 2016. From 14 March 2016 you will still continue to receive SSP which is currently £88.45 per week. This will continue for the remainder of your 28 weeks sickness absence. After this date you will need to refer to Department of Work and Pensions for any entitlements.*
>
> *…."*

The claimant replied to this letter dated 14 March 2016 in which she stated:-

> *"I have received your letter dated 9 March 2016 on 12 March 2016, informing me that I will no longer be receiving company sick pay from 11 March 2016. I feel this is yet another form of victimisation related to my grievances of 22 October 2015. For 22 years I have always received full pay whilst on sick*

leave but have rarely had to avail of this until now. I feel the cessation is in breach of my contract with the Pallet Centre and yet another form of bullying by you. I would like to remind the Pallet Centre that this company's sick pay is being paid out before for a longer period of time than I have been receiving it, to former employees. For example, XY, who had been involved in an automobile accident, received full company sick pay for approximately one year. Also, not only am I distraught at this decision to terminate my company sick pay but the fact that you have given me no notice of this is appalling. At no stage, until now, was I informed of when the company's sick pay would end. As you are aware I am single parent and the sole earner in my household and the speed of this decision has left me no time to put something else in place, to cover the substantial drop in my income.

I would like you to reconsider this decision. Mr Elton replied on my letter dated 16 March 2016

> *"Thank you for your letter for your letter 14 March 2016 which you request that we reconsider our decision to cease paying full discretionary sick pay during your sickness absence.*
>
> *You made reference to a former employee that received full payment during their sick leave, however this case was entirely different to yours this employee paid back the difference between SSP and full sick pay in line with the mutual agreement the employee had with the company.*
>
> *…. The circumstances were different to yours and we are not in a position to continue paying full sick pay for an unknown period of time.*
>
> *We have paid full discretionary sick pay for a period of 20 weeks since 26 October 2015 and are under no statutory obligation to continue doing so, anything that has been paid up until now has been entirely for your benefit. Therefore unfortunately we are unable to reconsider this decision to cease full payment and as such from 14 March 2016 you will still continue to receive SSP which is currently £88.45 per week. This will continue for the remainder of your 28 weeks sickness absence. After this date you will need to refer to Department for Works and Pensions for any entitlement."*

In evidence, Mr Elton could give no proper explanation, why there had not been paper warning/notice the payment of the company sick pay was to be [ ]. He was fully aware of the financial impact of so doing.

5.16 By letter dated 21 March 2016, the claimant wrote to Mr Elton stating, inter alia:-

"I am writing to inform you that I am resigning from my post of office supervisor with effect from 28 March 2016. Please accept this as my formal letter of resignation and termination of our contract from this date.

I feel that I am left with no choice but to resign in light of the following:-

A. fundamental breach of contract whereby I have been subjected to the

following:

- *discrimination on the grounds of sex and equal pay*
- *unwarranted suspension for alleged breach of confidentiality*
- *delayed and flawed investigation into this alleged breach*
- *harassment and victimisation because of my grievances …*

The implication by this company that I am not an office supervisor, that I do not supervise neither the employees or the work flow in the office, a duty which I have performed for 22 years, to try to disadvantage my claim for equal pay and sex discrimination.

B. Breach of Trust and Confidence and Implied Duty

I feel all the above has seriously damaged any trust and confidence I had for this company.

The nature of my position requires trust and confidence in both employee and employer and I feel this has been destroyed by the above actions carried out by you. The company's failure to acknowledge and recognise any of my grievances by way of some sort of resolve rather than denial, as is this case has caused me ill health and again has destroyed the relationship of trust and confidence between us …

C and Finally this being "the last straw", the termination of company sick pay despite my request for you to reconsider this decision. Although now I actually written into my contract, there has been a verbal agreement in place for this for 22 Years. I have always received company sick pay during my 20 years of employment with this company. You have also been paying me company sick pay since October 2015, which I feel is your confirmation of this verbal agreement, but which you have now terminated without any prior notification. This has left me in a very difficult financial situation, has caused me further stress and anxiety and the feeling of total mistrust in this company.

I consider these to be fundament/unreasonable breaches of contract on your part. I would also like to note that I am disappointed to find myself in this position, having always been a loyal, dependable and trustworthy employee for this company.

…"

In this letter, the claimant also referred to various other matters; but in light of the tribunal's decision in relation to the issue of the assault, as referred to above but also the tribunal's decision in relation to the claimant's claim of victimisation and/or unfair constructive dismissal, it was not necessary, to set these other matters out in full detail.

5.17 In an email on 16 February 2016, following the receipt of the letter of 12 February 2016 from the Mr Elton informing her that her various grievances had not been upheld, the claimant sent an email, dated 16 February 2016, informing Mr Elton "Unfortunately, I still do not feel able to return to work presently. I spoke with my doctor yesterday and he also does not feel that I am fit to return".

Significantly, in the judgment of the tribunal, in the course of her evidence, the claimant insisted that she always hoped that, as soon as she was fit to return to work, she would be able to do so; but the issue of stopping her sick pay, without notice, was the last straw; and, as a consequence, resulted in her sending the said letter of resignation on 21 March 2016. She also accepted that the respondent could not pay company sick pay to her indefinitely and that it was discretionary; but the custom and practice was that company sick pay was paid to all <u>office</u> employees, such as herself.

5.18 Following her resignation, the claimant properly obtained employment on a temporary basis with her brother as an administrative assistant. This employment continues and, as the claimant acknowledged, in evidence, it was now effectively permanent. He accepted she could have looked for something more suitable, in light of her experience, but she had preferred not to do so as her brother was flexible in allowing her to deal with her claims, as a litigant in person, which she felt another employer might not be willing to do. The claimant, in the circumstances, confirmed she had not obtained statutory benefits relevant to the Employment Protection (Recruitment of Jobseekers Allowance and Income Support Regulations (Northern Ireland) 1996, as amended.

5.19 As stated previously, following the hearing of the evidence, the claimant submitted in evidence a report from her general practitioner (see paragraph 1.2 of this decision). The report confirmed the claimant was diagnosed with acute stress/ anxiety following the events of 22 October 2015 and was advised, as a consequence to take time off from the 26 October 2015 until her resignation on 28 March 2016 and was prescribed support and relevant medication. On the 9 August 2016 she attended her general practitioner, with symptoms of depression and was prescribed anti-depressant medication. The doctor concluded "she took a proactive approach to her low mood and anxiety and although she has been learned how to manage these well, she continues to have episodes of depression.

6.1 In light of the facts as found by the tribunal and, after applying the legislative provisions and guidance set out in the legal authorities referred to in the previous paragraphs of this decision, together with the submissions, oral and written, of the representatives, the tribunal reached the following conclusions, as set out in the following sub-paragraphs.

6.2 In relation to the claimant's claim of discrimination by way of victimisation, the tribunal was satisfied that the claimant, having made a claim of equal pay at both the first and second meeting with Mr Kirkwood on 22 October 2015, had therefore carried out a protected act, as defined in Article 69 of the 1976 Order.

It was therefore necessary for the tribunal to initially determine whether the reasons for the suspension and subsequent disciplinary process and hearing and any other actions were because the claimant had made the said claim of equal pay.

Within a very short period of time of raising the claim of equal pay, the claimant found herself suspended and made the subject of a disciplinary process and hearing on an allegation of breach of confidentiality. In the view of the tribunal this was not merely a matter of coincidence of time, as suggested by the respondent's representative but was a deliberate act on the part of the senior management of the respondent, in particular Mr Morrow, Mr Kirkwood and Mr Elton because the claimant had made the claim of equal pay, which claim was strongly resisted, and in the tribunal's judgment, resented by the respondent. Further the claimant was not given detail of the alleged breach before she was suspended or indeed before the commencement of the disciplinary hearing. The claimant never disputed that she had gone into the front office, following her conversation with Mr Kirkwood and was very upset and had said to Ms A.J "everyone here gets a pay rise except me". That was always the height of the evidence in relation to this allegation, with the claimant always denying telling Ms A.J about the rise of Mrs Brown. There was no evidence to suggest otherwise. Indeed, Mr Kirkwood acknowledge he had made the assumption that she had told Ms A.J. In light of the foregoing, and without further evidence, the fact that Ms A.J had contacted Mr Kirkwood, in an upset state, following the claimant's outburst, could not justify the action subsequently taken by the respondent against the claimant; and, in the tribunal's judgment, could only have been because she had made the claim of equal pay. Indeed, despite her denial, the claimant was handed a pre-prepared letter suspending her on full pay, while it was suggested further investigations would be made into the matter. Significantly, Ms A.J was not interviewed at the time, even though she was the crucial witness, whether the claimant had breached confidentiality, as alleged. The claimant was a long standing employee with a good exemplary work and disciplinary record; but, despite this, without any other relevant evidence, she was not only suspended but made the subject of a disciplinary process on a serious charge, for which no detail was provided. The tribunal considered that suspending the claimant was a classic "knee jerk reaction", by the senior management, namely Mr Morrow, Mr Kirkwood and Mr Elton, after discussions between them, which the tribunal does not consider would have taken place but for the fact that she had made a claim of equal pay. Peninsula certainly gave advice in relation to the terms of the suspension letter and the process to be followed but, in do so, Peninsula acted in accordance with instructions given to them which, for the reasons set out above, did not set out the full picture of what had happened and, in particular, the reason why the respondent wished to pursue the claimant on a charge of breach of confidentiality. Mr Kirkwood could not properly explain why suspension was necessary in the circumstances and frankly admitted that from the outset he had made an assumption, despite the claimant's denial, about what the claimant had said to Ms A.J about Mrs Brown's pay rise. The tribunal was not satisfied any further investigation was carried out, despite the suspension before Mr Elton carried out the disciplinary hearing. At a minimum, as part of any genuine investigation Ms A.J should have been interviewed. The letter, prior to the disciplinary hearing sent by Mr Elton to the claimant, again provided no detail of the allegations made against the claimant for breach of confidentiality. If this was a genuine process, and not a sham in order to penalise the claimant for making a claim of equal pay, the claimant would have been provided with such detail. Mr Kirkwood's statement was not enclosed with the letter and indeed the claimant did not see this statement until the commencement of the hearing. The statement of Mr Kirkwood confirmed the claimant's denial, as referred to previously and in particular what she had actually said to Ms A.J.

In light of the foregoing, in the judgment of the tribunal, this whole process, from the initial suspension was a sham and tainted throughout by the fact that the claimant had made a claim of equal pay. In the tribunal's judgment, what occurred on 22 October 2015 could and should have been resolved without invoking the disciplinary process and concluded that the only reason for not doing so was because the claimant had made her claim of equal pay.

In light of the absence of any evidence against the claimant of breach of confidentiality, Mr Elton, properly in the tribunal's view, concluded, at the conclusion of the disciplinary hearing, that there was "no case to answer" and "the matter was now closed". Indeed, there could have been no other decision by him in the circumstances. However, having said, in his first letter of the 13 November 2015 there was no case to answer the matter was closed, he then proceeded in his second letter of 13 November 2015 to state, in contradiction to what he had set out in his first letter, that he found the claimant's explanations as unsatisfactory and he blamed her for unrest in the company arising out of her actions and that, in essence, her conduct was still in question; albeit there was not to be a formal warning and the said letter of 13 November 2015 would be kept on the claimant's personnel file. Indeed, there was no indication when any such letter would be removed from the claimant's personnel file. The tribunal has no doubt that this second letter was some form of misguided attempt by senior management of the respondent, and, in particular Mr Elton, to try to justify the action that had been taken by them, despite the fact that the first letter had found there was no case to answer and the matter was closed. The tribunal was satisfied this was a further example of how this whole process had become tainted and such a letter would not have been issued against any other employee in the circumstances but for the fact the claimant had made a claim of equal pay. In essence, by issuing the second letter, which was to remain on the claimant's personnel file, without a time limit, the claimant was being penalised for raising her equal pay claim, which she was entitled to do, and was to be left with a "black mark" on her personnel file.

6.3 Not surprisingly, Mr Elton, given his earlier involvement in correspondence, did not uphold the claimant's subsequent grievances. The claimant found the failure to pay the claimant her Christmas bonus was a further act of victimisation. In doing so, the tribunal noted that Mr Elton initially suggested such a payment was discretionary and not an automatic entitlement; but, in evidence, he suggested the failure to pay the claimant was because she was off sick at the time. Again, without any proper explanation, the said bonus was subsequently paid by the respondent following the termination of the claimant's employment in March 2016. In the circumstances, there does not appear to have been any good reason why the Christmas bonus was not paid to the claimant in December 2015.

6.4 In relation to the decision to terminate the claim of the company's sick pay, with little or no effective notice or warning, the tribunal accepts that payment of the company's sick pay was a matter of discretion for the respondent. Even the claimant accepted, in evidence, the payment of company sick pay could not have continued indefinitely. However, as a matter of discretion, the company sick pay had been paid to the claimant previously but, in particular, since October 2015, without any issue or suggestion that it was to be brought to an end. The tribunal is again satisfied that to terminate the claimant's company sick pay, without such proper notice or warning, was a further act of victimisation because the claimant had made her claim of equal pay and that any other employee, not having made

such a claim of equal pay, would have been given appropriate notice and warning of termination of the payment of company sick pay. In evidence, Mr Elton was unable to satisfactorily explain why no proper notice/warning was given in the circumstances in exercising his discretion. Mr Elton was fully aware of the claimant's personal circumstances but in particular the financial consequences for the claimant of terminating her sick pay without appropriate notice and warning.

6.5 In light of the tribunal's conclusion that the claimant was discriminated against by way of victimisation, for the reasons set out above, the tribunal was satisfied that the claimant was very upset and stressed by the said actions of the respondent and is therefore entitled to an award of injury to her feelings. The tribunal also considered the claimant's claim for personal injury; but reminded itself of the circumstances in which the report of the claimant's general practitioner was admitted in evidence. Having considered the said report, the tribunal noted, in particular, that there appeared to be considerable overlap between the claimant's said injury to her feelings and the findings of acute stress/anxiety and depression noted by her doctor in this report, which were not the subject of any detailed evidence. In the circumstances, the tribunal concluded that any element of personal injury suffered by the claimant would be fully reflected in the tribunal's award of compensation for injury to her feelings, as set out below.

6.6 The tribunal decided that the award of compensation to the claimant for injury to her feelings fell within the lower band, as set out in the case of ***Vento v Chief Constable of West Yorkshire Police [2003] IRLR 103*** as amended, in the recent case of ***De Souza v Vinci Construction Limited [2017] EWCA Civ 879*** and makes an award of £4,500.00 for the injury to her feelings. The claimant is also entitled to an award of interest, pursuant to the Industrial Tribunals (Interest on Awards and Sex and Disability Cases) Regulations (Northern Ireland) 11996 from 22 October 2015 (act of discrimination) to 16 August 2018 (calculation day) at 8%. The tribunal was satisfied no serious injustice would be caused to the respondent if interest were to be so calculated.

6.7 The claimant has also made a claim of unfair constructive dismissal. There can be no doubt that the acts of discrimination by way of victimisation, as found by the tribunal, as referred to in the previous paragraphs in relation to the claimant's suspension, the disciplinary process and hearing, including the conclusion of that process, were actions which amount to repudiatory breaches of the claimant's contract of employment in the circumstances. Even if the tribunal is wrong and the said actions were not actions of victimisation, the tribunal would have been satisfied that the use of the suspension and the disciplinary process in the circumstances was not justified and thereby, in itself, would have been a repudiatory breach of the claimant's contract of employment. This was a minor incident, when the claimant, a long standing employee with an excellent work and disciplinary record, made an emotional outburst in the heat of the moment but yet the respondent decided to suspend her, without considering any other course of action in such circumstances. It invoked the disciplinary process, in the tribunal's view as a "knee jerk reaction" without any good reason and any further proper investigation and enquiry (see further judgment of Elias J, in ***Crawford***, referred to previously).

6.8 However, it has to be recognised that the claimant did not resign at any time prior to the end of March 2016. She was on sick leave, although clearly not satisfied with the outcome of the disciplinary process. She further did not resign when the

respondent failed to pay her the Christmas bonus, which the tribunal found, as set out above, was a further act of discrimination by way of victimisation. However the tribunal would not have been satisfied that failure to pay the Christmas bonus, in itself, without any other repudiatory breach, would have been sufficient to amount to repudiatory breach of the claimant's contract of employment entitling the claimant to resign. Given the claimant remained on sick leave, during the period from October 2015 to March 2016, despite the actions of the respondent during this period, and had not resigned, the tribunal had some concerns whether she had, by not resigning in response, thereby affirmed the respondent's said repudiatory breaches of the claimant's contract of employment. In this context, it also has to be recognised that the claimant, in evidence, frankly accepted that she intended to return to work and had so informed the respondent she would do so when she was fit.

However, for the reasons set out below it was not necessary for the tribunal to resolve this issue whether the claimant had affirmed the repudiatory breaches of the claimant's contract of employment by the respondent. The tribunal, for the reasons seen previously, was satisfied the failure to the pay the claimant her sick pay, without proper notice and warning, was a further act of discrimination by way of victimisation and clearly was the "last straw" for the claimant, following the previous series of breaches, and was the reason why the claimant finally decided to resign. Even if the actions of the respondent were not discriminatory in failing to pay her company sick pay, the tribunal was satisfied the respondent, albeit it had a discretion to pay the said company sick pay, by giving no proper warning/notice, acted inequitably/arbitrarily/capriciously and exercised the discretion in an unreasonable manner (see paragraph 2.11 of this decision). Even if the claimant, by not resigning earlier could be said to have affirmed the earlier actions of the respondent in breach of her contract of employment, the recent decision in ***Kaur*** emphasises that the earlier acts can be received and relied upon in relation to a claim of unfair constructive dismissal. There is no doubt the action in relation to the determination of the payment of a company sick pay, as a "last straw" formed part of a serious of actions, per ***Omilaju***) and could therefore "revive" the earlier breaches. This failure to give proper notice/warning terminating the company sick pay was not an innocuous act on the part of the respondent.

6.9 The claimant was therefore unfairly constructively dismissed. The tribunal could find no relevant evidence, in light of the findings of fact made by the tribunal, that any action by the claimant contributed to her said dismissal in the circumstances. Similarly, in the judgment of the tribunal, the tribunal was not satisfied that any ***Polkey*** deduction required to be considered in relation to any compensation to be paid by the respondent to the claimant in the circumstances.

6.10 The claimant obtained alternative employment with her brother immediately following her resignation, albeit with a small shortfall in her earnings. This was initially a temporary appointment but the claimant accepted, in evidence, was now "effectively, a permanent position"; (see paragraph 2.21 of this decision). The claimant also accepted she could have looked earlier for more suitable alternative employment had decided not to do so as she wanted to retain the flexibility her brother gave her to prepare her tribunal claim, as a litigant in person. Taking all these matters into account, the tribunal decided it was just and equitable, in the circumstances, to award the claimant a sum of £2,000.00 based on the undisputed figures of loss produced by the claimant, to reflect any loss of earnings incurred by

her since her resignation during the period of temporary employment which was now effectively at an end. It was clearly the claimant's decision not to seek other employment but to remain in employment with her brother on a permanent basis.

7.1 In light of the foregoing, the tribunal assessed compensation to be awarded to the claimant as follows:-

1. **Injury to Feelings for Discrimination by way of Victimisation**

£4,500.00
£1,014.90 (interest at 8% from 22 October 2015 until 16 August 2016)

£5,514.90

2. **Compensation for Unfair Constructive Dismissal**

A.	Basic Award		£5,438.93
B.	Compensatory Award		
	(i)	Loss of Earnings	£2,000.00
	(ii)	Loss of Statutory Rights	£ 500.00
			£2,500.00
Total monetary award (A and B)			£7,938.93

7.2 **Total compensation to be paid by the respondent to the claimant**

£7,938.93
£5,514.90

Total £13,453.83

7.3 The Employment Protection (Recruitment of Jobseekers Allowance and Income Support) Regulations (Northern Ireland) 1996, as amended, do not apply to this decision (see before).

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

Employment Judge:

Date and place of hearing: **8 May 2017, 9 May 2017, 10 May 2017, 11 October 2017, 12 October 2017, 13 October 2017, Belfast.**

Date decision recorded in register and issued to parties: