FAIR EMPLOYMENT TRIBUNAL

CASE REFS: 82/15 FET
2577/15

CLAIMANT: **Helen Suzanne Scott**

RESPONDENT: **Stevenson & Reid Ltd**

DECISION

The unanimous decision of the Tribunal is that the respondent:-

1. Discriminated against the claimant on the grounds of her religious belief or political opinion, and
2. Harassed the claimant on the grounds of her religious belief or political opinion, and
3. Discriminated against her by way of victimisation, and
4. Constructively unfairly dismissed her.

And it awards her compensation as follows: -

5. £3,240 for unfair dismissal, and
6. £15,000 for injury to feelings, and
7. £2,496.00 of interest on the award for injury to feelings

Constitution of Tribunal:

Employment Judge: **Employment Judge Greene**

Members: **Mrs C Stewart**
Ms L May

Appearances:

The claimant was represented by Ms Suzanne Bradley, of counsel, instructed by the Equality Commission for Northern Ireland.

The respondent was represented by Mr Tim Warnock, of counsel, instructed by Worthington Solicitors.

1. The Tribunal heard evidence from the claimant and on behalf of the respondent from Billy Stevenson, John Stevenson, Donna Carmichael, Joe Donnelly, Robert Bunting, Kevin Kerr, Stephen Gardiner, Walter Weir, Grahame Todd and Sam McCammond. The witness statements from Graeme McCarthy and Billy Thompson were admitted in evidence without cross-examination.

THE CLAIM AND COUNTERCLAIM

2. The claimant claimed that she had been constructively unfairly dismissed and also suffered discrimination on the basis of religion and/or political opinion, harassment on the ground of her religious belief and/or political opinion and discrimination by victimisation. The respondent disputed the claimant's claim in its entirety.

THE ISSUES

3. **Legal Issues**

(1) Whether the claimant was constructively unfairly dismissed contrary to Article 126 of the Employment Rights (Northern Ireland) Order 1996.

(2) Whether the claimant was directly discriminated against on the grounds of her religious belief and/or political opinion contrary to Article 3(1)(a) of The Fair Employment and Treatment (Northern Ireland) Order 1998.

(3) Whether the claimant was harassed on the grounds of her religious belief and/or political opinion contrary to Article 3 of The Fair Employment and Treatment (Northern Ireland) Order 1998.

(4) Was the claimant victimised by the respondent by virtue of the following acts;

(a) subjecting her to an investigation as set out in the respondent's correspondence of 11 August 2015.

(b) sending a recorded delivery letter to her on 18 August 2015 while she was off work on a period of certified stress-related absence, alleging that she was in breach of the respondent's Sickness Absence Policy and advising her that it would be treated as a disciplinary matter;

(c) the creation of a work environment for her wherein she felt that her trust and confidence in the respondent was so irreparably damaged that she had no option but to resign from her post and to consider herself constructively dismissed.

(5) Who is the claimant's comparator(s)?

(6) Whether the claimant is out-of-time in relation to her religious discrimination claim as per Article 46(a) of The Fair Employment and Treatment (Northern Ireland) Order 1998, by reason of the claimant lodging her claim outside the three month time-limit?

(7) If so, whether the Tribunal should extend time to permit jurisdiction to determine the claimant's claim on the basis that it would be just and equitable to do so?

(8) Whether the claimant's claim of religious discrimination was an ongoing act which culminated in her resignation on 21 August 2015?

(9) Whether the respondent can rely on the statutory defence in respect of the alleged discrimination?

Factual Issues

(1) Why did the claimant resign on 21 August 2015?

(2) Whether Mr Sam McCammond directed the phrase "Tiocfaidh ar Lá" towards the claimant in a discriminatory manner?

(3) If so, whether the claimant relies on this comment insofar as to seek remedy from the Tribunal?

(4) Whether the claimant's invite to an investigatory meeting by correspondence, dated 11 August 2015, constituted religious discrimination? If so, was this part of an ongoing act?

(5) Whether the claimant, at the meeting on 5 August 2015, stated that the phrase used by Mr Sam McCammond did not offend her political or religious sensitivities?

(6) Whether there were three customer complaints made against the claimant on 7 August 2015?

(7) If so, whether this justified the respondent calling for an investigation meeting with the claimant by correspondence dated 11 August 2015.

(8) Whether the claimant breached the respondent's Sickness Absence Policy in August 2015?

(9) Whether the claimant lodged a formal grievance in respect of the comment made by Mr Sam McCammond on 31 July 2015?

(10) Did the respondent subject the claimant to the following treatment because she had alleged to the respondent company directors (Mr Stevenson and Mr Weir) that Sam McCammond had made a sectarian comment to her, namely "Tiocfaidh ar Lá"?

(a) subjecting her to an investigation as set out in the respondent's correspondence of 11 August 2015;

(b) sending a recorded delivery letter to her on 18 August 2015 while she was off work on a period of certified stress-related absence, alleging that she was in breach of the respondent's Sickness Absence Policy and advising her that it would be treated as a disciplinary matter;

(c) the creation of a work environment for her wherein she felt that her trust and confidence in the respondent was so irreparably damaged that she had no option but to resign from her post and to consider herself constructively dismissed.

(11) Was the foregoing sufficient so as to undermine the trust and confidence of the claimant in the respondent so as to entitle her to resign and claim constructive dismissal?

(12) What is the claimant's loss?

FINDINGS OF FACT

4. (1) The claimant was born on 20 September 1965 and is Catholic. She worked for the respondent from 1 August 2011 until 21 August 2015 when she resigned.

(2) The claimant had attained the position of sales manager when she resigned. She earned per month £3118.00 gross, £2,287.00 net.

(3) The respondent supplies bathrooms and heating systems and has branches in Belfast, Newtownabbey, Bangor, Ballymena, Ballymoney, Cookstown and Omagh. It has about 54 employees of whom 40 are Protestant, 11 Catholic and 3 non-determined. The respondent does not have a HR department nor a written equal opportunities policy.

(4) The respondent company has seven directors, Billy Stevenson, his sons John and Mike, Walter Weir, Kevin Kerr, Sam McCammond and John McDonnell. Two of the directors, Kevin Kerr and John McDonnell are from Catholic backgrounds with the remainder from a Protestant background. Billy Stevenson is the managing director and controlling shareholder.

(5) The claimant worked at the Belfast branch in Prince Regent Road and her line manager was Sam McCammond. She was the only Catholic working in the showroom. Mr Kevin Kerr, a Catholic director, was also based at the premises. Sam McCammond, who was based there, is married to a Catholic.

(6) In 2013 the showroom became a boutique and the claimant became the boutique manager. Her duties included responsibility for the boutique personnel and its profitability.

(7) In January 2015 the claimant's role was changed to boutique sales' manager. Her duties included responsibility for increasing sales in the boutique with all associated activities including marketing, as the respondent believed that she was superb at sales and had a formidable work ethic. Sam McCammond had overall responsibility for the boutique.

(8) It was the practice, in the respondent company, to hold a credit meeting on Friday afternoon at head office. Billy Stevenson, managing director, chaired the meetings at which every customer's account was reviewed in relation to sales to them. The external sales people were in attendance. Either the claimant or her line manager, Sam McCammond, would attend on behalf of the boutique.

(9) On the morning of 31 July 2015 the claimant emailed Billy Stevenson and asked him if she could be excused from the meeting, scheduled for that afternoon, as she was under extreme pressure.

(10) Billy Stevenson replied, by email, to say that the claimant did not have to attend the meeting if she could persuade Sam McCammond to deputise for her. The claimant says that she missed the second part of the email and therefore did not have any conversation with Sam McCammond about her non-attendance at the meeting or that he should attend in her place.

(11) Billy Thompson, senior area representative, of the respondent company was responsible for confirming, before the Friday afternoon meeting, who would be in attendance.

(12) Between 12 noon and 12.30 pm on 31 July 2015 Billy Thompson rang the claimant to confirm the claimant's attendance at the credit meeting. She told him that she had been excused from the meeting. The claimant was then dealing with customers and returned to that task.

(13) Billy Thompson spoke to Sam McCammond, by telephone, around 1.00 pm. There are different accounts of the conversation, and its background from Sam McCammond and Billy Thompson. However, the result of the conversation was that Sam McCammond became aware that the claimant was not attending and that he was expected to attend the credit meeting.

(14) In his witness statement Sam McCammond stated that Billy Thompson had told him that when he telephoned the claimant to confirm her attendance at the meeting that,

> "... she informed him that she had been excused by Billy Stevenson but had spoken to me and that I had agreed to attend".

He added,

> "Mr Thompson can confirm this was indeed the true version of events".

Later in his witness statement Sam McCammond stated,

> "... At 1300hrs Mr Thompson rang looking for Kevin Kerr. I was surprised when he said he will see me later at the meeting. I obviously was at a loss but he insisted he had been informed by the Claimant that she had been excused but had since spoken to me and gained my agreement to attend in her place".

In cross-examination Sam McCammond stated that he found out he had to

go to the credit meeting by chance. He told the Tribunal;-

> "I made a flippant remark to Billy Thompson, "I hope you enjoy the credit meeting", to which he replied that Helen had informed him that she had arranged with me to attend in her place... "

(15) In his witness statement Billy Thompson said,

> "I first phoned Sam and he said he could not come and to phone Helen. I then phoned Helen and she said she could not come but leave it with her and she would sort it out with Sam".

Billy Thompson's account of the conversation with Sam McCammond is significantly different,

> "Around 1.00 p.m. I spoke to Sam on the phone and he asked why I had not come back about the meeting. I said that there was no reason to come back because Helen told me that she would sort it out with Sam. Sam then became annoyed and went off to speak to Helen".

Arising from the conversation, and with Billy Thompson still on the phone, Sam McCammond went immediately looking for the claimant.

(16) The claimant, at that time, wished to show a shower-fitting to her customers and made her way to the storeroom passing through the internal sales office which was then occupied by a number of persons preparing for lunch.

(17) As the claimant was passing through the sales office Sam McCammond stopped her and shouted into her face, with his index finger raised, "I have just found out that I have to attend a credit meeting this afternoon. I am not one bit fucking happy!" On his own account he accused her of ambushing him and telling lies. He told her that this would not happen again. He does not deny using strong language.

(18) The claimant was shocked by the manner in which Mr McCammond spoke to her. She replied by telling him that she did not make decisions as to who should or should not attend the meetings.

(19) Mr McCammond responded to the claimant by shouting, "tiocfaidh ar lá" into her face in what the claimant regarded was a menacing manner.

(20) Stephen Gardiner saw the incident and stated that Sam McCammond seemed very upset, agitated, annoyed and had described the claimant as having "ambushed him again". He told the Tribunal that Sam McCammond added, "I am fed up covering for you. You think of no one but yourself. This will not happen again. Tiocfaidh ar lá".

(21) Mr McCammond explained that he used the phrase, "tiocfaidh ar lá" in the workplace to express frustration. The claimant had never heard him use the phrase previously. He told the Tribunal that he used the phrase to convey that he felt that he had been "ambushed" again by the claimant. He also asserted that he did not have any sectarian, religious or political affiliations. He accepted, however, that the phrase was inappropriate.

(22) The claimant asserts that the outburst from Mr McCammond was witnessed by a number of persons. Those present, she stated, were Stephen Gardiner, Stephen Pyper, Graeme McCarthy and Donna Carmichael. Graeme McCarthy said that he was not there to witness the incident. Donna Carmichael stated that she did not witness the incident nor hear the comment "tiocfaidh ar lá" being said nor did she asked the claimant for an explanation of its meaning as she was in the adjoining showroom. The Tribunal does not attach any significance to the claimant's error as to who was present or heard the comment as there is not any dispute that the comment was made.

(23) The claimant was stunned and embarrassed by the use of that phrase in front of other members of staff. She states that she was visibly shaken and Donna Carmichael asked her if she was 'ok' and asked her what "tiocfaidh ar lá" meant. Donna Carmichael denies having had any conversation with the claimant as she did not witness the incident. The claimant also stated that Stephen Pyper commented, "that was a bit rough"

(24) The claimant was anxious and upset about the incident throughout the weekend. She believed the phrase, "tiocfaidh ar lá", was directed at her because of her religious background and perceived political opinion with the intention of causing her offence. She found that disturbing as she was the only Catholic working in the respondent's Belfast branch.

(25) On Monday 3 August 2015 the claimant sent an email to Mr McCammond in which she stated;-

> "Sam,
>
> I am deeply shocked and upset over the manner in which you spoke to me last Friday. Not only was it deeply offensive but also highly unprofessional, especially in front of other colleagues.
>
> You not only swore at me you also made the statement 'Tiocfaidh ar Lá'
>
> I request an immediate explanation of this and not least an apology. On this occasion a 'quiet word in the back office' is not an option for me.
>
> The other colleagues who were witness to this outburst proceeded to ask me for the meaning of what you said. This only added to my embarrassment."

(26) Sam McCammond replied the same day to the claimant in the following terms;-

> "Helen,
>
> I will certainly apologise to you if you can speak to Billy Thompson and ascertain which one of you LIED to me, which I also find deeply offensive and to me highly unprofessional among work colleagues. We all make mistakes at work, which I am well used to, but I am particularly upset when I find I am deliberately lied to. Billy Thompson had spoken to me earlier in the morning and explained only one of us was required for the credit meeting, he said that you were going and that I was "stood" down. At 3 minutes to 1, speaking to him about something else

I find out purely by accident that you have been excused and I was to attend in your place. I have no issue with that, as I believe Billy Stevenson authorised, however like you I had a busy workload and needed Friday afternoon to complete, so I pressed Billy Thompson as to why I was only finding this out now to which he stated that you had told him that you had arranged this with ME earlier.

You know that you had not spoken to me or informed me of this change, but Billy Thompson said that you had told him you had spoken and arranged this with me and that is why he did not feel the need to confirm with me.

If you wish perhaps the best way forward is to ask Billy Thompson to come over here and the 3 of us can sit down and it will not be difficult to find out the source of the lie.

I have been on the receiving end of shouting in front of colleagues and have often felt embarrassed, but have quickly put it out of my head as I understand we all can get upset and stressed. I believe I am very patient in regard to many issues that would upset many in my position but I will always draw the line at being deliberately lied to. If however I am guilty of hastily reacting to what Billy Thompson told me, and this proves to be a lie on his part, then I will of course apologise sincerely and will learn not to take everything at face value.

What will not change is my reaction to being lied to and I make no apology in stating clearly this will not happen again.

Sam"

The account given by Sam McCammond about Billy Thompson's involvement in the arranging of the meeting is not supported by Billy Thompson's evidence.

(27) The claimant denies lying to Billy Thompson who did not give oral evidence to the Tribunal, but whose witness statement was put in evidence by agreement between the parties.

(28) The claimant felt that Sam McCammond's reply added insult and hurt to her because it lacked any remorse and suggested that the claimant had done something much worse. It concentrated on Mr McCammond's belief that he had been lied to rather than the offence to the claimant.

(29) Because of her disappointment with Mr McCammond's response the claimant, on 3 August 2015, sent both emails to Billy Stevenson and stated that she was making the matter formal.

(30) Billy Stevenson replied, by email of 4 August 2015, that he assumed that she wished to invoke the Grievance Procedure. To that end he invited her to meet with the Board at 3.00 pm on Thursday 6 August 2015 and informed her that she could be accompanied by a fellow employee of her choice. The claimant replied the same day querying about attending a board meeting.

(31) Billy Stevenson replied referring the claimant to Clause 13 of her contract of employment which provided;-

GRIEVANCE PROCEDURE

> If you have a grievance, you should initially take this up with your Director. If this is not resolved satisfactorily it may be referred to a meeting of the Board. You may be accompanied by a fellow employee of your choice and the decision of this meeting is final. All meetings shall be held as soon as practical.

He also stated that Walter Weir, Commercial Director, and he were always there to listen and give help and support if she did not wish to pursue the formal route.

(32) There was a further exchange of emails in which Billy Stevenson stated that the grievance should go to the Board as Sam McCammond, the claimant's line manager, was a director and it was he about whom she was making a grievance. The claimant replied that she would find it intimidating to have a meeting with six directors but that she was happy to meet with Billy Stevenson and Walter Weir provided she could still invoke the grievance procedure.

(33) Billy Stevenson replied, by email of 4 August 2015, confirming her right to invoke the grievance procedure at any time. He added that she had not yet done so but should she do so that he would follow the procedure in the Grievance Procedure. He reiterated that he and Walter Weir were available for informal discussions at any time.

(34) On the evening of 5 August 2015 the claimant met with Billy Stevenson and Walter Weir for an informal meeting to consider the claimant's grievance. The meeting did not resolve matters.

(35) Arising from the discovery process the respondent produced a document entitled, MINUTE OF MEETING HELD ON WEDNESDAY 5 AUGUST 2015 AT 4.45 pm. This is not an agreed minute and the claimant had never seen it before it was revealed as part of the discovery process for the hearing of this claim. After the meeting a copy of this document was provided to Sam McCammond and the other directors but not to the claimant. It was not explained to them that it was not an agreed minute. The claimant challenges the accuracy of many aspects of the matters contained in the document including comments attributed to her. According to the claimant it does not record some of the comments that were made.

(36) The document is clearly not a minute of the meeting. It records evidence from Billy Stevenson, personal to him, which could only be based on information received from others, not named or declared (viz the first two paragraphs); commentary by Billy Stevenson on the meeting; Billy Stevenson's assessment of the claimant as a person including less than honourable motives attributed to her in bringing the grievance; criticism of her management of the boutique; an allegation about bullying a director; and an attempt to portray the incident in a more benign way and as part of a row between the claimant and Sam McCammond. The document also contained

attempts by Billy Stevenson to defend Sam McCammond and his actions, even though he maintained that he had not spoken to Sam McCammond about the incident at that time and revealed his unwillingness to accept any criticism of Sam McCammond whom he obviously held in high regard; and a statement that the claimant could bring her grievance to the Board but that he did not think it would be upheld.

(37) The document records;-

> "... WDS enquired if the phrase offended Helen's political or religious sensitivities and she replied absolutely no."

In his witness statement about this matter Walter Weir stated;-

> "... In particular, Billy Stevenson asked if the phrase offended her religious or political sensibilities and she replied that she had none...."

The claimant specifically denies that at this meeting she told Billy Stevenson and Walter Weir that the phrase, "tiocfaidh ar lá" did not offend her religious or political sensibilities. She asserts that such a question was not asked of her. She explained to the Tribunal that she did not have any political sensitivities but it did offend her religious sensitivities. She contends that Billy Stevenson said to her that she must have some "twisted religious or political beliefs" after she had explained that the phrase had not only offended her but gravely intimidated her. Billy Stevenson denies making this statement and is supported in that denial by Walter Weir. The claimant alleges that she replied that he (Billy Stevenson) could not be further from the truth.

Billy Stevenson did not consider the use of "tiocfaidh ar lá" unacceptable if no-one was offended and he was aware that Sam McCammond used the phrase "to express extreme frustration and annoyance". He suggested that the phrase was used in the Protestant community when speaking about football. However he stated that in using the phrase he believed Sam McCammond was giving the claimant "a serious dressing down".

(38) Billy Stevenson added that he was aware that people would use the phrase to express frustration. He believed it had similar connotations to the Protestant motto, "no surrender". He believed the use of "tiocfaidh ar lá" and "no surrender" no longer had the same connotation as he thought "both wars were over".

(39) Though he accepted "tiocfaidh ar lá" was a sectarian phrase Billy Stevenson asserted that there was not a sectarian bone in Sam McCammond's body. He told the Tribunal that he has not taken any steps to ask Mr McCammond to desist from the use of that phrase. He further stated that he did "not believe for a moment" that the claimant was offended by the remark despite her statements to the contrary which he believed were untrue, ridiculous and total nonsense as she was in his words, "as tough as nails".

(40) Billy Stevenson also told the claimant that he did not regard the statement as a sacking offence. However in the respondent's disciplinary procedure threatening behaviour, discrimination, victimisation and harassment are

described as gross misconduct for which the penalty is summary dismissal. In addition, in an email, on 31 January 2011, all staff were reminded that harassment was punishable by summary dismissal and that it was the perception of the victim not the perpetrator that mattered. Billy Stevenson did not believe the utterance of the phrase by Sam McCammond fell into the disciplinary code at all and offered the claimant the option of invoking the Grievance Procedure. The respondent's disciplinary code describes a bad attitude to other staff as major misconduct.

(41) The claimant returned to work on 6 August 2015. She received an email from Sam McCammond the same day in which he stated,

> "Helen,
>
> Having considered some of the issues raised at your last meeting with Billy and Walter I am now very aware of the sensitivities of the Gaelic phrase I used, and the distress and discomfort this has obviously caused to you. I wish to apologise unreservedly for using this phrase, and do so without discussing with others, and will certainly not repeat in your presence.
>
> I do wish to assure you that I use this phrase regularly, often in more light-hearted debate, and as such this was not a one of remark aimed directly at you, and certainly with no sinister, political or sectarian connotation. Over the years I have probably distorted the phrase to suit my intention of expressing "**what goes around comes around**" In the context of Friday I was annoyed at having to attend the credit meeting at such short notice, the apparent disregard for the need to discuss and gain my agreement, and used the Gaelic phrase to portray the sentiment highlighted in bold above.
>
> Over some 33 years working for Stevenson and Reid I do not feel there is anyone within the Company that views me as having political, sectarian or bigoted views and having entered into a 25 year mixed marriage at the height of the "troubles" in Belfast, and the extreme difficulties encountered, I would hope that this would demonstrate.
>
> ...
>
> I hope that you will accept my use of the phrase, whilst inappropriate, was out of context, and I can assure you that, like you, I am only interested in moving the Boutique forward, and to that end I have already moved on from Friday.
>
> I do note your comments with regard to passage of information, and I do believe this is a weakness by all parties. In an effort to address this I would like to hold a meeting perhaps weekly/fortnightly attended by you, Stephen and I. This may be an ideal opportunity to discuss sales, debtors, issues, deliveries, stocks etc, I hope you agree.
>
> Regards
>
> Sam"

(42) Sam McCammond describes this apology in his witness statement as "a genuine unreserved apology". He said he made the apology after reading paragraph 2 of the minute of the meeting of 5 August 2015 because he did not want to offend the claimant and for friendship sake, despite his belief that the claimant was not offended. However paragraph 2 does not make any mention of the claimant being offended. Rather it purports to record the claimant's description of Sam McCammond's behaviour as intimidating. Sam McCammond informed the Tribunal that he did not believe the claimant had been offended. The first paragraph of the "genuine unresolved apology" is at best insincere and at worst a lie.

(43) The claimant disputes that "tiocfaidh ar lá" does not have political/religious implications or that anyone in Northern Ireland would be unaware of the political sensitivities of the use of the phrase. She also stated that she had neither heard Sam McCammond nor anyone else use that phrase in the workplace until Sam McCammond used it to her on 31 July 2015.

(44) Sam McCammond did not make his apology in person to the claimant. However, the claimant felt that she would simply accept the apology and move on.

(45) Shortly after Grahame Todd returned from holidays on 27 July 2015 he received a serious complaint from Joe Donnelly. It related to the supply of an incorrect unit in a bathroom for work completed in December 2014. The complaint had been made to Grahame Todd prior to December 2014 but he had not done anything about it. Following the complaint to Grahame Todd, he did not know if the supply of the wrong unit was because the customer had ordered the wrong unit or the claimant had supplied the wrong unit. Apart from trying to pacify Joe Donnelly he did not do anything about the complaint. He had previously received a similar complaint from Sean Brannigan but apart from trying to pacify him he had not done anything else.

(46) On 7 August 2015, Grahame Todd, account manager, advised Billy Stevenson that he had received three complaints from customers who wanted to close their accounts because of the claimant. Billy Stevenson did not inquire as to the identity of the customers or the nature of the complaints about Helen. Subsequently he asked Sam McCammond to find out if there was "a prima facie complaint", to have a meeting with the claimant and to give the claimant a chance to deal with it. On the same day John Stevenson, showroom manager, also advised Billy Stevenson of another complaint. None of the respondent's employees made any notes of these four complaints.

(47) The respondent exhibited an email from John Stevenson to Billy Stevenson and Sam McCammond dated Friday 7 August 2015 at 12.57 pm. The email came about after Billy Stevenson had discussed with his son John that he had received three complaints about the claimant from Grahame Todd earlier that day. John Stevenson told his father that he had received a complaint about the claimant earlier that week. He later sent an email to his father in which he recorded a number of complaints about the claimant. The email stated;-

"I took a call on Monday [3 August] from Kevin Brady who took over

maintenance of ACC Lacefield site from Philip Dickensen about six months ago. He went on at length how Helen and Donna's unacceptable level of service was damaging their reputation as a company. He would no longer deal with Helen or Donna and insisted on dealing directly with Sam. I've had the same complaint from Philip previously and Peter McMullan himself who politely enquired if there was anything that could be done to improve it.

I found this fairly embarrassing, particularly in light of all the invoicing problems we had with this account when I had to sit down with their purchase ledger manager as well as the company accountant in order to correct mistakes from Helen (Alison's invoices and service for tiles was fine at the time). The purchase ledger manager complained at length about her extra workload due to Boutique invoices but the Company Accountant kindly took on the problems herself which really helped getting them resolved. At the time i assured them it would be smooth going forward so i feel i've suffered some damage to my own reputation.

I don't normally esculate complaints about Helen or Donna but given what we have all gone through after the Ally Watkins affair i think we can no longer ignore these issues as its causing us severe reputational damage."

(48) Although the complaints were made about the claimant and Donna without distinction there was not any evidence before the Tribunal of the respondent doing anything in relation to the complaints about Donna. In addition although John Stevenson says, in his email, that he could no longer ignore these issues there was not any evidence in his email that he had done anything about them in advance of the email. He characterises the report to his father, in the email, as escalating the complaint. However in evidence to the Tribunal he says he reported the complaint to Sam McCammond on 3 August 2015 which action is neither in the email or his witness statement to the Tribunal. It appears he only informed his father about the complaint that he had received on 3 August 2015 during his father's telephone call to him on 7 August 2015.

(49) In his witness statement John Stevenson said that the complaint received on 3 August 2015 "related to a post-contract maintenance issue" but in cross-examination he said the complaint related to the claimant's failure to replace a faulty item. He characterised the complaint as being serious but neither made a record of it nor asked the complainant to put it in writing.

(50) On 11 August 2015 Sam McCammond delivered a letter to the claimant, alleging that as a result of a telephone call to Billy Stevenson on 7 August 2015 three "serious customer complaints" had been brought to his attention regarding her performance and in addition issues had been raised about her performance/conduct within the company. He stated that Billy Stevenson had asked him to investigate these matters. He also stated, in the letter, that he had already spoken at length to the three customers and members of staff and requested the claimant to attend an investigatory meeting. In fact precise details were not sought by Sam McCammond from the customers. He saw his function as merely to establish that there were genuine

complaints. He discharged that by ascertaining from the customers, without more, that they had in fact made complaints about the claimant and the boutique.

In Billy Stevenson's witness statement he said that he had, on the morning of 7 August 2015, received complaints from Grahame Todd and John Stevenson. A number of the respondent's witnesses gave evidence to the Tribunal that complaints from customers, in their business, was a frequent occurrence.

(51) In his letter of 11 August 2015 to the claimant, drafted by Billy Stevenson with the assistance of his solicitor, Sam McCammond set out the issues for discussion at the investigatory meeting to be held within five working days at Sandra Road with Michael Stevenson also in attendance, as follows;-

"a) Robert Bunting has confirmed that he will no longer send customers to the Boutique. He believes every job that you have been involved with has been a catalogue of errors and mistakes and has cost him dearly in terms of time, money and reputation. He also indicates that there may well be costs to the Company in that, despite informing you on a number of occasions, product remains to be collected at the house we supplied in Donegal. I would assume this is McGarrity's.

b) Joe Donnelly has repeated a very similar list of complaints and indicated that he no longer wishes to deal with the Boutique if you are directly involved, but may be persuaded to continue trading with us if he can be assured that Stephen alone will look after the sale and subsequent delivery.

c) Sean Brannigan, SGB Construction, has confirmed that after just one transaction with us he would be unwilling to recommend a client to The Boutique and would only reconsider if we could "make sure Helen is not involved".

d) On discussing the above with another Director on Friday Billy was made aware of a complaint received from Kevin Brady at ACC, reference Lacefield, who is no longer prepared to deal with you.

e) Stephen Gardiner has expressed concerns about the time and effort he is expending "to cover for your many mistakes".

The letter of 11 August 2015 provides the only details given to the claimant of these complaints.

The investigation meeting with the claimant did not take place as she was off work from 12 August 2015 with work-related stress certified by her GP.

(52) By way of discovery, the respondent produced another version of the letter of 11 August 2015. This version has significant changes. However the claimant did not receive this version of the letter.

(53) Robert Bunting told the Tribunal that he had raised concerns, about the services provided to him by the claimant, with Grahame Todd over a number

of years. On 7 August 2015 he contacted Grahame Todd to complain but could not remember why he did so on that occasion.

(54) The allegations referred to in Mr McCammond's letter from Robert Bunting relate to work done between six months and one year before the date of the letter. The McGarrity job was in 2013. The claimant had worked with him for three years whilst working for the respondent and prior to that with a different employer and there was never any suggestion that he was unhappy with her work. She believes that, had there been, "a catalogue of errors and mistakes that had cost him dearly in terms of time, money and reputation", it would have been brought to her attention at a much earlier stage. In relation to the work in Donegal the claimant stated that the work was completed in the summer of 2014.

(55) The claimant also drew to the attention of the Tribunal that an undated letter from Robert Bunting to Grahame, relied on by Sam McCammond in support of this contention, does not make any reference to the above complaints and merely states, "... I will no longer be trading with Stevenson & Reid whilst Helen Scott is employed with your Company".

(56) Joseph Donnelly informed the Tribunal that he was dissatisfied with the service provided to him by the claimant in two jobs completed in December 2014 and early 2015. He was asked by Grahame Todd to put his complaints in writing, on the advice of the respondent's solicitor, which Mr Donnelly did in February 2016 even though he had complained to Grahame Todd verbally in November-December 2014 and all the faults had been rectified by December 2014. He said that he could not explain why he waited from late 2014 to August 2015 to complain.

(57) The claimant also queries that if Joe Donnelly was dissatisfied with the job in Easter 2015 why did the June 2015 contract occur at all. In relation to the Easter 2015 job, the claimant asserts, that both Joe Donnelly and the client had confirmed that they were delighted with the service. The claimant also refers to delays in the project which were caused by the supplier not by her.

The letter in the bundle, in support of Joe Donnelly's criticisms, is undated, refers to a conversation in the previous year and does not provide a "list of complaints". The claimant only became aware of the details of the complaint made by Joe Donnelly when she received his witness statement for the hearing, dated 2 June 2016.

Grahame Todd said that Billy Stevenson had told him in February 2016 that the letters of complaint, relied on by the respondent from Robert Bunting and Joe Donnelly came about because the respondent's solicitor had asked for them.

(58) On 7 August 2015 Grahame Todd met with Robert Bunting who declared that because of several bad experiences in the past with the claimant that he was not going to recommend the boutique to any of his customers while the claimant was in charge of it. Robert Bunting's business with the respondent was worth between £100,000 and £150,000 per year. Mr Todd explained to the Tribunal that Robert Bunting only made a complaint, which related to work done in 2013, when he had asked him to settle his monthly account.

He did not provide details of the complaint. However he felt Robert Bunting's complaints serious enough to request a meeting with Billy Stevenson. He had informed Billy Stevenson that there was a number of complaints in a subsequent telephone conversation before the meeting. However Billy Stevenson did not ask for any details of the complaints.

(59) The claimant cannot recall who Sean Brannigan is nor does she have any idea to what the comments attributed to Sean Brannigan relate. She sought further details from the respondent but none were provided to her. Despite being requested by Grahame Todd, Sean Brannigan refused to put any complaints in writing or want to have anything to do with the respondent.

(60) The claimant regards her relationship with Kevin Brady from ACC as impeccable. She understood that the job on which she worked with him had been completed and the snagging list done to the client's satisfaction many months before August 2015. There had not been any maintenance complaint made to her. She suggests that it was Kevin Brady who had frustrations with the respondent's head office in the past.

(61) The comments attributed to Stephen Gardiner, critical of the claimant, were made by him following an inquiry from Sam McCammond of him if he had any complaints about the claimant. They do not relate to any of the customer complaints that were the subject of the investigation and it begs the question why they were included in the letter.

(62) The claimant alleges that when she spoke to Stephen Gardiner about the comments attributed to him that he was furious and denied reporting anything about anyone.

(63) The claimant alleges that the letter from Sam McCammond of 11 August 2015 stemmed from the complaint that she had made against Sam McCammond and was an attempt by the respondent to get rid of her. She further alleges that there had never been any complaints about her from the persons mentioned in the letter of 11 August 2015 prior to that date.

(64) The claimant said that she was devastated by the letter of 11 August 2015 and had to attend her GP the following morning (Wednesday 12 August) at the open surgery. She notified Sam McCammond of her sickness and her inability to attend work by a text message on 12 August 2015 at 8.42 am and not by telephone as, she says, that she was not allowed to use her mobile phone in the surgery. Her GP diagnosed that she was suffering from work-related stress and gave her a sick certificate which she sent by first class post to the respondent on 12 August 2015. The claimant believes that it should have arrived at the respondent's premises by Saturday (15 August) or Monday (17 August). The claimant sent a second text message at 16.47 on 17 August 2015 confirming she had sent a sick certificate to head office in Whiteabbey.

(65) The claimant further alleges that during a telephone call with Stephen Gardiner, on 14 August 2015, she told him that she would not be in work for the rest of the week and he volunteered that he would let Sam McCammond know. Stephen Gardiner admits that he spoke to the claimant when she was off sick but denies having any conversation with her about her sickness or

how long she would be off work and therefore could not inform Sam McCammond about these matters. It seems to the Tribunal surprising that there was not any discussion about the claimant being sick or being off work.

(66) Sam McCammond wrote to the claimant, by letter 18 August 2015, on the instructions of Billy Stevenson. In the letter he stated;-

> "As far as I am aware, and having checked with Billy, it seems you have yet to notify the Company as to the nature and probable duration of your illness. On checking today's post it also seems the doctor's certificate you mention by text had been posted, has not been received.
>
> Could I draw your attention to your contractual obligations under your contract, attached and highlighted herewith, and remind you that under these terms you are in breach of contract and that failure to comply will be treated as a disciplinary offence."

The claimant is not aware of any other employee of the respondent having received a similar letter.

(67) This letter, though in the name of Sam McCammond, was the work of Billy Stevenson after he had discussed it with his daughter-in-law, who is a senior HR professional in the public sector. She had advised sending the claimant a recorded delivery letter which Billy Stevenson caused to be done. The advice obtained from Billy Stevenson's daughter-in-law was based on the erroneous assertion that the claimant had failed to communicate with the respondent. The claimant had indeed communicated with the respondent about her absence on at least two occasions but had not given notification of her illness in the prescribed form.

(68) The claimant's contract of employment sets out the claimant's obligations, if sick as follows;-

> **"11. SICKNESS**
>
> You are entitled to Statutory Sick pay provided the following rules are complied with;
>
> a. You must personally notify your line manager of the nature and probable duration of your illness by telephone call (not text) before 10 a.m. on the first morning and daily thereafter.
>
> b. If the illness extends beyond 3 days you must complete a DHSS self-certification form on the fourth day.
>
> c. If the illness extends beyond 7 calendar days you must present a doctor's certificate and thereafter regularly if the illness persists.
>
> Failure to observe these rules will result in SSP being withheld and will be treated as a disciplinary offence.
>
> ... "

(69) The respondent's disciplinary code describes, failure to comply with Sick Pay procedures as major misconduct for which the normal penalty will be a final written warning.

(70) The claimant considered the letter of 18 August 2015 as extremely high-handed. She believed Sam McCammond could have contacted her to advise that the sick line had not been received. On receiving the letter of 18 August 2015 the claimant hand-delivered a copy of the sick line the same day. She believes the respondent followed this approach to cause her maximum stress.

(71) By this stage the claimant believed that her position with the respondent was no longer tenable. She believed that she had been subjected to religious/political discrimination by her line manager and that when she had raised a complaint, instead of taking appropriate action, that the respondent had victimised her by subjecting her to a disciplinary investigation, as set out in the letter of 11 August 2015, and further threatened her with disciplinary action while she was off work by reason of work-related stress. She believed the respondent was intent on dismissing her by whatever means possible. She stated that she had lost all trust and confidence in the respondent and did not have any other choice but to resign.

(72) The claimant resigned by letter of 21 August 2015. In her resignation letter she stated;-

> "I hereby tender my resignation with my intention to leave following the notice period required in the terms and conditions supplied. I feel that I have no alternative but to leave Stevenson and Reid's employment as I feel that the Company has made my position untenable."

Billy Stevenson instructed Sam McCammond to accept the claimant's resignation and to draft a letter of acceptance of the resignation. The claimant was not required to work her notice.

(73) When the claimant received the investigatory letter of 11 August 2015 she considered looking for other jobs. She subsequently made the decision that she could no longer work for the respondent and started looking for companies that would embrace her experience.

(74) The claimant knew David Scott personally for some 20 years. She contacted him on 18 August 2015 to seek a meeting with him to discuss a business proposal. She met him on 20 August 2015. The claimant was verbally offered and accepted a job with David Scott Tiles and Stone Specialists on 20 August 2015 as a bathroom sales manager. She then tendered her resignation to the respondent. She began working for David Scott on 1 October 2015. The claimant had anticipated working her notice with the respondent but she was not required to do so.

THE LAW

5. **Constructive Dismissal**

(1) A breach of contract arises when the employer breaches any term of the

claimant's contract of employment whether the term is an express term or an implied term or arises by operation of law.

(2) To establish a constructive dismissal that is unfair a claimant must prove that:-

(a) there was a breach of his contract of employment, and

(b) the breach went to the core of the contract, and

(c) the breach was the reason or principal reason for his resignation,

(d) he did not delay in resigning after the breach occurred; and

(e) in all the circumstances the employer acted unreasonably.

(3) The breach of contract can be a breach of an expressed term of the contract or a breach of an implied term, or both.

(4) Implied terms of the contract include:-

(a) a breach of the duty of trust and confidence;

(b) a breach of the duty of co-operation and/or support;

(c) a breach of the duty promptly to address grievances; and

(d) a breach of the duty to provide a suitable working environment.

(Harvey on Industrial Relations and Employment Law D1 [429]-[479]).

(5) A breach of the implied term of trust and confidence can be a single act of the employer or a course of conduct by the employer over a period of time.

(6) Where a course of conduct is relied upon, it is not necessary that any single act itself amount to the breach of the implied term of trust and confidence but the course of conduct, cumulatively, must amount to the breach of the implied term.

(7) Where a constructive dismissal claim arises from an alleged breach of the implied term of trust and confidence where the employee leaves in response to conduct carried out 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 the background of such incidents it may be considered sufficient by the court 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. **(Harvey on Industrial Relations and Employment Law D1[480]).**

Discrimination on Ground of Religion or Political Opinion

(8) A person discriminates against another person on the ground of religious

belief or political opinion, in any circumstances relevant for the purposes of The Fair Employment and Treatment (Northern Ireland) Order 1998, if he treats the other less favourably than he treats or would treat other persons. (Article 3 The Fair Employment and Treatment (Northern Ireland) Order 1998).

(9) As Lord Nicholls states **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL**:-

> *"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 and postponing the less favourable treatment issue until after they have decided why the treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded to the claimant on the prescribed ground was less favourable than it was or would have been afforded to others."*

(10) A person ("A") subjects another person ("B") to harassment in any circumstance relevant for the purposes of any provision referred to in Article 3(2B) where, on the ground of the religious belief or political opinion A engages in unwanted conduct which has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Conduct shall be regarded as having the effects specified only if having regard to all the circumstances, including, in particular the perception of B, it should reasonably be considered as having that effect.

A person also subjects another to unlawful harassment if he engages in conduct in relation to that other which is unlawful by virtue of any provision mentioned in Article 3(2B). (Article 3A The Fair Employment and Treatment (Northern Ireland) Order 1998).

Victimisation

(11) A person ("A") discriminates, by way of victimisation, against another person ("B") if he treats B less favourably than he treats or would treat other persons whose circumstances are the same as B's and he does because B has:-

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

(b) given evidence or information in connection with such proceedings brought by any person or any investigation under this Order; or

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

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

(e) or A knows that B intends to do any of those things or suspects that B

has done or intends to do any of those things. (Article 3(4) and (5) of The Fair Employment and Treatment (Northern Ireland) Order 1998).

(12) Anything done by a person in the course of his employment shall be treated for the purposes of The Fair Employment and Treatment (Northern Ireland) Order 1998 as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval. (Article 36 The Fair Employment and Treatment (Northern Ireland) Order 1998).

(13) In proceedings brought under The Fair Employment and Treatment (Northern Ireland) Order 1998 against any person in respect of an act alleged to have been done by an employee of his, it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act or from doing, in the course of employment, acts of the same description. (Article 36(4) The Fair Employment and Treatment (Northern Ireland) Order 1998).

(14) Where, on the hearing of a complaint under Article 38, the complainant proves facts from which the Tribunal could, apart from this Article, conclude, in the absence of an adequate explanation, that the respondent has committed an act of unlawful discrimination or unlawful harassment against the complainant or is by virtue of Articles 35 or 36 to be treated as having committed such an act of discrimination or harassment against the complainant the Tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed that act. (Article 38A The Fair Employment and Treatment (Northern Ireland) Order 1998).

(15) The Northern Ireland Court of Appeal in **McDonagh & Others v Samuel John Hamilton Thom T/a The Royal Hotel Dungannon [2007] NICA 3** stated that, when considering claims of discrimination, Tribunals must have regard to the burden of proof. The correct approach to the burden of proof in all discrimination claims is that set in the annex to the decision in the Court of Appeal in **Igen v Wong [2005] 3 ALL ER 812**.

In the **McDonagh** case the Northern Ireland Court of Appeal recommended that Tribunals adhere closely to the guidance in **Igen**.

The guidance set out in the annex to the **Igen** case is:-

> *"(1) Pursuant to s63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Pt II or which by virtue of s41 or s42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.*

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but really based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

(5) It is important to note the word 'could' in s63A(2). At this stage the Tribunal does not have to reach a definitive conclusion that there was an act of discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can conclude, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall with s74(2) of the SDA.

(8) Likewise, the Tribunal must decide whether any provision of any relevant Code of Practice is relevant and if so, take it into account in determining, such facts pursuant to s56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant Code of Practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit or as the case may be is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a Tribunal to assess not merely whether the respondent has proved an explanation for the facts from which some inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or Code of Practice."

(16) In the decision of the Fair Employment Tribunal in **David Halliday v Royal Mail Group Ltd & Others [Case Reference: 165/09 FET, 47/10 FET]** the Tribunal held that the phrase, "tiocfaidh ar lá", has a clear sectarian significance and could create a hostile, intimidatory and offensive atmosphere.

(17) The Tribunal shall not consider a complaint of discrimination on the ground of religion or political opinion unless it is brought within a period of three months beginning with the day on which the complainant first had knowledge or might reasonably be expected to have knowledge of the act complained of or at the end of the period of six months beginning with the day on which the act was done.

A Tribunal may nevertheless consider any such complaint which is out of time if, in all the circumstances of the case, it considers it is just and equitable to do so. (Article 46 The Fair Employment and Treatment (Northern Ireland) Order 1998)

(18) In determining whether there was "an act extending over a period", as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period". **(Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA.)**

(19) Where a Tribunal makes an award under The Fair Employment and Treatment (Northern Ireland) Order 1998 it shall, whether an application has been made or not, consider whether to award interest on any sum awarded. Where interest is being considered in relation to an injury to feelings award the date for beginning the calculation of the interest is the date of the first act of discrimination. (Article 3 of The Fair Employment Tribunal (Remedies) Order (Northern Ireland) 1995.)

(20) Interest awarded shall be the same as in force during the period for which it is to be calculated in relation to decrees in the County Court and shall be

calculated as simple interest which accrues from day to day. (Article 4 of The Fair Employment Tribunal (Remedies) Order (Northern Ireland) 1995).

(21) The power to award interest under the Regulations is discretionary, though if a Tribunal decides not to make an award, it must give reasons for its decision not to do so ... but the discretion relates only to the decision whether or not to award interest at all; if it decides to make an award there is no discretion as to the manner on which it is to be calculated, nor (save in exceptional circumstances) the period for which it shall be awarded. The Tribunal must, however, consider whether to make an award even in the absence of a formal application ... (**Harvey on Industrial Relations and Employment Law, P1 [1130].**)

(22) In **Commissioner of Police for the Metropolis v Shaw [2012] IRLR 291 EAT** Underhill P stated that aggravated damages are an aspect of injury to feelings reflecting the making more serious of the injury to feelings by some additional element which would fall into one of three categories:

(a) the manner in which the wrong was committed,

(b) motive (but only if the claimant was aware of the motive), or

(c) subsequent conduct (eg, by the employer not taking the complaint seriously, failure to apologise or conduct at trial). The ultimate question would always be what additional distress was caused to a particular claimant in the particular circumstances of the case and Tribunals should be cautious about focussing on the respondent's conduct. However, a Tribunal should ask itself whether the conduct, objectively viewed, was capable of having that aggravating effect, and should be cautious to avoid awarding aggravated damages and compensation for injury to feelings for the same conduct: **H M Land Registry v McGlue [2013] EQLR 701** ...

A Tribunal awarding aggravated damages should seek to avoid double recovery by having regard to the overlap between the heads of damage (see **Ministry of Defence v Fletcher [2010] IRLR 25, EAT** and also **McGlue** above). The Tribunal should look at whether the overall award is proportionate to the totality of the claimant's suffering and generally the large majority of awards would be in the range of £5,000.00 to £7,500.00 (see **Shaw**, above). In **Shaw**, above, Underhill P confirmed that the only purpose of aggravated damages is compensatory and they should not be awarded in order to punish a respondent. (in the process thereby doubting observations to the contrary in **Fletcher**).

Exceptionally, an award of aggravated damages may be appropriate where the manner in which a respondent has conducted proceedings has aggravated the harm caused by the original act of discrimination (**Zaiwalla and Co and Another v Walia [2002] IRLR 697 EAT**). [Tolleys Employment Handbook 2017 31st Edition 13.18].

APPLICATION OF THE LAW AND FINDINGS OF FACT TO THE ISSUES

6. **Resignation**

(1) There are two competing explanations for the claimant's resignation, that set out in her letter or resignation of 21 August 2015 that the respondent had made her continuing employment with the respondent untenable, and that advocated by the respondent that her new job with David Scott Tiles and Stone Specialists had, in effect, caused her to resign.

(2) The only evidence in support of the respondent's contention is the fact that the claimant was offered more money and accepted a job with David Scott on 20 August 2015.

(3) The claimant states that on receipt of the letter from the respondent, dated 18 August 2015, she realised her position with the respondent was no longer tenable. It appears that the letter crystallised her decision which she had been considering for a number of days.

(4) The claimant does not deny that she considered looking for other jobs from receipt of the investigating letter of 11 August 2015. This, the Tribunal concludes, is consistent with her considering her position with the respondent and over a few days arriving at a conclusion that her position with the respondent was no longer tenable.

(5) In those circumstances the Tribunal accepts the claimant's explanation for her resignation.

Tiocfaidh ar Lá

(6) The phrase "tiocfaidh ar lá" was considered by the Fair Employment Tribunal in the decision of **David Halliday v Royal Mail Group Limited & Others [Case Ref: 165/09 FET, 47/10 FET]**. The Tribunal found that: ""tiocfaidh ar lá" has a clear sectarian significance and could create a hostile, intimidatory and offensive environment."

(7) The starting point for considering of the phrase, "tiocfaidh ar lá", is therefore that it has a sectarian significance and could create a hostile, intimidatory and offensive atmosphere.

(8) The respondent contends that the phrase, as used by Sam McCammond, did not have any sectarian significance. The respondent stated that the phrase is used by Sam McCammond to express frustration or annoyance or as a synonym for "what goes round comes round". The respondent also contends that as Sam McCammond was not a sectarian person it could not be a sectarian remark. However Sam McCammond accepted that the use of the phrase by him was "inappropriate". He did not explain why or in what way it was inappropriate.

Incident of 31 July 2015

(9) Sam McCammond was clearly displeased at having to go to the

credit meeting on 31 July 2015. He regarded the claimant as having ambushed him and not for the first time. Although he was on the phone to Billy Weir, when he heard he had to go to the meeting instead of the claimant, he did not even take time to end the telephone conversation but went looking for the claimant whilst holding his mobile phone. Stephen Gardiner described Sam McCammond as being very upset, agitated and annoyed. Sam McCammond decided to confront the claimant in the public office which is surprising for a manager to do even if misconduct was being alleged or considered.

(10) Sam McCammond's opening remarks included strong language and an accusation of an ambush of him again by the claimant. He did not make any attempt to ascertain whether she had said that she had arranged for him to attend the credit meeting. When the claimant responded that she did not make the decision about who should attend the credit meeting, Stephen Gardiner stated Sam McCammond added a comment like, "I am fed up covering for you"; "You think of no one but yourself"; "This will not happen again", and he concluded by saying "tiocfaidh ar lá".

(11) It is clear that Sam McCammond was not frustrated or annoyed or upset at having to attend a meeting when he had other things to do. His frustration, upset, annoyance was directed at the claimant for making it necessary for him to have attend the meeting. In the circumstances of this claim "what goes round comes round", Sam McCammond's explanation of his use of "tiocfaidh ar lá", can only imply that if in the future roles were reversed he would make the claimant do something she did not want to do or to use a colloquial phrase, "he would get his own back". This can only be a threat and is somewhat menacing given that the claimant was the only Catholic working in the showroom.

(12) The Tribunal is therefore not persuaded that, in the circumstances of this case, that the phrase "tiocfaidh ar lá" has been sanitised of its sectarian significance.

(13) The claimant clearly relies on the comment, "tiocfaidh ar lá" to ground her claims for discrimination on the ground of religion or political opinion, harassment, victimisation and constructive dismissal.

(14) On 5 August 2015 the claimant had an informal meeting with Billy Stevenson and Walter Weir which did not resolve the issue. Billy Stevenson was not prepared to contemplate the possibility that Sam McCammond had committed an act of misconduct or that any sectarian significance attached to his use of the phrase, "tiocfaidh ar lá" even though he had not spoken to Sam McCammond about the matter. Nor did he believe the claimant had been offended. The only avenue open to the claimant was to continue with her formal grievance which went to the Board of which Billy Stevenson was the chairman and he had already declared his view to her that he did not think it would be successful.

Apology

(15) The claimant returned to work on 6 August 2015 and received

Sam McCammond's email of apology which he described in his witness statement as a "genuine, unreserved apology". To so describe it is disingenuous, in the extreme. Sam McCammond did not believe the claimant had been offended. He clearly believed that the claimant did not have "sensitivities" or that it had caused the claimant distress or discomfort. This begs the question, why apologise at all?

Customer Complaints

(16) Shortly after 27 July 2015, Grahame Todd received "a very serious complaint" from Joe Donnelly. He did not make a record of the complaint. The complaint had to do with an incorrect bathroom unit for work completed in December 2014. Grahame Todd did not know if the wrong bathroom unit had been supplied incorrectly by the claimant or the customer had ordered the wrong unit. Mr Donnelly complained about it in December 2015 to Grahame Todd but he did not do anything about it.

The Tribunal was not provided with any explanation why a complaint made in December 2014 was resurrected in July 2015. Indeed, Mr Donnelly could not give an explanation to the Tribunal when asked. Nor was any explanation offered to the Tribunal why "a very serious complaint" was not investigated at the time or at least drawn to the claimant's attention for her comments. The complaint by Joe Donnelly was only committed to writing in February 2016 after a request from the respondent coming from the respondent's solicitor, after these proceedings had commenced. It is also not clear that the claimant did anything wrong as the error might have emanated from the customer.

(17) On 7 August 2015, Grahame Todd met with Robert Bunting to ask him to settle his monthly account. It was only during this meeting that Robert Bunting referred to several bad experiences with the claimant in relation to work done in 2013. In relation to the alleged, "catalogue of errors and mistakes that had cost him dearly in terms of time, money and reputation", the claimant poses question why none of this had been drawn to her attention. Again the Tribunal was not provided with any explanation. As with Joe Donnelly, Robert Bunting's undated letter of complaint does not refer to any specific complaints but merely makes an allegation of incompetence by the claimant which allegedly cost Mr Bunting to suffer financial losses.

(18) The complaint of Sean Brannigan has never been committed to writing, either by the respondent or Sean Brannigan, the latter having refused to do so when asked. The respondent did not provide and indeed does not know any details about Sean Brannigan's complaint. The claimant sought details and was not provided with any. The complaint, as set out in the letter dated 11 August 2015 states no further business will be done by him if the claimant is involved. This is not necessarily negative, it could just as easily be because the claimant drove a hard bargain on behalf of the respondent, on the basis of what has been told to the Tribunal.

(19) The complaint from Kevin Brady was made to John Stevenson on 3 August 2015. He complained about an unacceptable level of service from the

claimant and Donna Carmichael and no longer wanted to deal with either of them. John Stevenson alleges he received similar complaints from Philip Dickinson and Peter McMullan. John Stevenson did not record any of the complaints or do anything about them save an alleged report to Sam McCammond which is not referred to in any of his emails or in either witness statement. He only put them in an email on 7 August 2015 following a discussion about alleged complaints with Billy Stevenson on 7 August 2015. In cross-examination, John Stevenson gave different general comments about the complaint of 3 August 2015.

(20) Though charged with investigating these complaints, Sam McCammond did not seek precise details of the complaints nor did he make any records of the complaints. He viewed his task as merely to confirm that these individuals had made complaints, without more.

(21) The matter of the complaints is very unsatisfactory. Most of them allegedly occurred months and years before August 2015. Incredibly the details of the complaints were never sought or recorded. The supporting letters provide little support. Some of the complaints involve other persons about whom the respondent did nothing. Most disturbing of all is that the respondent has not provided any explanation why historic complaints resurfaced in August 2015. The suspicion before the Tribunal is that the complaints were resurrected by the respondent to use against the claimant.

(22) Normally, whether an investigatory meeting is called or not is a matter for the employer, assuming of course that there are appropriate matters to be investigated relating to conduct or performance. The decision that the complaints were to be investigated in this case has many concerning aspects, as set out above. In addition, the complaints, for the most part, are of some vintage, were made previously, were not even considered to be matters to be investigated previously and resurfaced on 7 August 2015 without any credible explanation. Allied to these concerns are the, proximity of the incident between the claimant and Sam McCammond of 31 July 2015 and the respondent's decision to initiate an investigation into the complaints relating to the claimant. In the context of the concerning aspects of the process itself the Tribunal is not persuaded that, in the particular circumstances of this case, the respondent was justified in calling an investigatory meeting.

(23) The Tribunal is not persuaded that the claimant at the meeting on 5 August 2015 stated that, "tiocfaidh ar lá" did not offend her political and religious sensitivities. There is complete conflict between the claimant and the respondent on this point. The "minute" of the meeting of 5 August 2015 is not reliable as a minute for the reasons set out above.

(24) It is clear that the claimant did lodge a formal grievance by her email of 3 August 2015.

Sickness Absence

(25) Arising from the letter from the respondent of 11 August 2015 the claimant attended her General Practitioner on 12 August 2015 and was certified unfit

for work by reason of work-related stress. The claimant notified her employer by text message on 12 August 2015 that she was not able to attend work through sickness. In so doing she was not following the respondent's sickness policy which required notification by telephone. It is also described as a disciplinary offence.

(26) The claimant said she sent the notice by text message as she is not permitted to use the telephone in the GP's surgery. It was not clear to the Tribunal why this was so and, even if so, why she could not have stepped outside to make the telephone call.

(27) She also stated she sent the sick certificate to her employer by first class post on 12 August 2015 (Wednesday). She anticipated that it would arrive at the respondent's head office by Saturday 15 August or Monday 17 August. The claimant also sent a text message to her employer on 17 August 2015 informing the employer that she had sent a sick certificate to Whiteabbey. Despite the text message saying a sick certificate had been sent, Sam McCammond, on the instruction of Billy Stevenson, sent the claimant, by registered post, a letter dated 18 August 2015 asserting that the claimant was in breach of her contract of employment.

(28) The claimant was in breach of the respondent's sickness policy by notifying it by text message instead of by telephone call on 12 August 2015. According to the contract the claimant was only required to produce a doctor's certificate from day 8 of sickness, ie 20 August 2015. However, the respondent had been told that she had sent a doctor's certificate on Friday 14 August 2015 to the respondent, that is within two days of going on sick leave.

(29) The decision of Billy Stevenson to instruct that the letter of 18 August 2015 be sent was based on the erroneous information that the claimant had failed to communicate to the respondent. It is clear that the claimant had contacted the respondent twice, albeit not by telephone, and made the respondent aware that she had sent in a medical certificate. She claimed she also informed Stephen Gardiner, which is disputed. However, this did not elicit any response from the respondent or any attempt to contact the claimant, nor did it lead to a decision to await until 20 August 2015, the date permitted by the respondent's sickness policy for the submission of a sick certificate. The claimant provided a copy of the sick certificate on 18 August 2015 which apparently explained her absence from work. The claimant further asserts that she was unaware of any other employee having received a letter like that received by her following a period of sickness and this assertion was not challenged.

(30) Although the respondent is correct that the claimant had not notified the respondent of the nature and possible duration of her illness, the respondent was aware on 17 August 2015, the day before the letter was sent, that a doctor's certificate had been sent to the respondent. Such a document should have explained the nature and probable duration of the claimant's illness. Thus, in the circumstances of this claim, it was unreasonable for the respondent to send the letter of 18 August 2015 to a manager whose good attendance and adherence to her contractual obligations had not

hitherto been challenged and not to await the arrival of the medical certificate, at least until 20 August 2015.

(31) The respondent received the medical certificate on 18 August 2015 within the time prescribed by the claimant's contract of employment.

Discrimination on the ground of religion and political opinion

(32) The claimant clearly establishes the first limb of the test of discrimination as she is Catholic and the alleged discriminator is Protestant.

(33) Following the approach suggested by Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary** the Tribunal will address the issue of why the claimant was treated as she was first.

(34) The accounts of the incident on 31 August 2015 and how it came about from the respondent are not totally consistent. However it is clear that because Sam McCammond had to attend the credit meeting, in place of the claimant, he was very upset, agitated and annoyed with the claimant. His level of annoyance was such that he did not even put down the telephone he was on or end the conversation before he went in search of the claimant and confronted her in a public place. In that confrontation he used strong language and accused her of ambushing him again and lying to him. Indeed, Billy Stevenson described it as "a serious dressing-down".

(35) It is clear from Sam McCammond's subsequent email that he was very annoyed at what he perceived was lying by the claimant to him.

(36) As part of the outburst, Sam McCammond used the phrase "tiocfaidh ar lá". There is no doubt that the phrase has a clear sectarian significance. That has been found in a decision of the Vice President of the Fair Employment Tribunal. Indeed, Billy Stevenson stated that historically it had a sectarian aspect and he compares it to the Protestant phrase, "No Surrender".

(37) Sam McCammond invites the Tribunal to conclude that when he used the phrase, "tiocfaidh ar lá", it was bereft of all sectarian significance. He suggested it was to express his annoyance and frustration and meant, "what goes round comes round". Yet he also describes the use of the phrase by himself as inappropriate, without explaining how or why it was inappropriate.

(38) "What goes round comes round" in the context of this case can only be seen as a threat, ie that the claimant would be ambushed and lied to or forced to do something that she did not want to do as some sort of revenge. However, had that been said to the claimant it would have been threatening and unfavourable treatment but is unlikely, without more, to have been unlawfully discriminatory.

(39) Significantly, Sam McCammond did not say to the claimant, "what goes round comes round", or even something expressing the idea that he would get his own back on her. He chose to use a phrase with an obvious and

acknowledged sectarian significance. He said it to someone who was of a different religion to himself and who worked in a workplace in which she, a Catholic, was very much in the minority.

(40) On the basis of the evidence before it, the Tribunal is persuaded that the ground for using the phrase, "tiocfaidh ar lá", was the claimant's religion or political opinion.

(41) Following the decision in **Shamoon** having established the reason for the treatment afforded to the claimant it is clearly less favourable treatment.

(42) However, even if the Tribunal is wrong in that conclusion, by applying Article 38 of The Fair Employment and Treatment (Northern Ireland) Order 1998, there is a prima facie case of discrimination on the ground of religion or political opinion by virtue of the incident of 31 July 2017 and the use by Sam McCammond of language with a sectarian significance which shifts the burden to the respondent. The respondent has not discharged the burden of proving, on the balance of probabilities, that the treatment (saying, "tiocfaidh ar lá",) was in no sense whatsoever on the ground of religion or political opinion since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(43) The Tribunal is therefore satisfied that Sam McCammond committed an act of discrimination on the ground of religion or political opinion against the claimant.

(44) The respondent has not adduced any evidence that would enable it to avail of the statutory defence in this claim and therefore the respondent is vicariously liable for the act of discrimination of one its employees against the claimant.

Harassment

(45) It is clear that the behaviour of Sam McCammond on 31 July 2015, by reason of the sectarian words used towards the claimant and in a public area before colleagues was unwanted and had the effect, if not the purpose, of violating the claimant's dignity as well as creating an intimidating, hostile, degrading, humiliating and offensive environment for the claimant. The claimant has clearly articulated that she found the whole episode offensive. The Tribunal has concluded, as set out above, that the use of the phrase "tiocfaidh ar lá" by Sam McCammond was not bereft of sectarian significance. It was therefore reasonable for the claimant to consider that it was offensive.

(46) However, bad behaviour by an employer in the work situation is not in itself sufficient to establish unlawful discriminatory harassment. The Tribunal must be satisfied that the reason for this treatment of the claimant was her religious belief or political opinion. The claimant clearly believed the purpose of the use of the sectarian language was her religion or political opinion. Sam McCammond denied this and asserts he is not a sectarian person. He

specifically refers to his own domestic situation and relies on the supporting comments of colleagues. However the Tribunal has already found that the language used had a sectarian significance.

(47) Can the Tribunal accept Sam McCammond's denial of religion and political opinion as the ground for his use of language with a sectarian significance. The Tribunal concludes that it cannot. In so concluding the Tribunal had regard to the lack of explanation of why he did not use such phrases like, "what goes around comes around" or "I will get you back" or "I will get my own back" or some other like phrase if that is solely what he intended to convey.

(48) In addition, the denial itself is not reliable as on the basis of his own evidence Sam McCammond is not a reliable witness. In his letter of apology of 6 August 2015, Sam McCammond stated:-

> *"Helen,*
>
> *Having considered some of the issues raised at your meeting with Billy and Walter I am now very aware of the sensitivities of the Gaelic phrase I used, and the distress and discomfort this has obviously caused to you. I wish to apologise unreservedly for using this phrase, and do so without discussing with others, and will certainly not repeat it in your presence."*

(49) He then told the Tribunal that the apology was untrue. He did not believe that the claimant had been offended at all. Further, he did not consider his use of the phrase, "tiocfaidh ar lá", had any sectarian significance. Furthermore despite the first paragraph of his letter of apology being untrue, which he knew it to be, he repeated the untruth in his witness statement when he described his apology as, "a genuine unreserved apology". He therefore repeated the untruth to the Tribunal as part of his evidence under oath.

(50) The Tribunal therefore concludes that the ground for the offensive treatment of the claimant on 31 July 2015 was her religion or political opinion.

(51) The Tribunal is therefore satisfied that Sam McCammond is guilty of harassment pursuant to Article 3A of The Fair Employment and Treatment (Northern Ireland) Order 1998. The respondent is vicariously liable for the harassment of Sam McCammond.

Victimisation

Protected act

(52) The protected act is the claimant's complaint, in her email, of the use of, "tiocfaidh ar lá". Whilst the email does not allege a contravention of Article 3(4) and (5) of The Fair Employment and Treatment (Northern Ireland) Order 1998 it is clear from the subsequent meeting between the claimant, Billy Stevenson and Walter Weir and Sam McCammond's apology of 6 August 2015 that no one was in any doubt

that the claimant was alleging she had been treated less favourably on the ground of her religion or political opinion.

The correct comparator

(53) The correct comparators in the instance case are those who raised a grievance and were not the subject of an investigation or those who did not receive a recorded delivery letter when off sick. There was not any evidence before the Tribunal that the respondent had ever conducted an investigation into any member of staff against whom a customer had made a complaint or that any member of staff who had been off on sick absence and had not complied fully with the sickness notification procedure had received a recorded delivery letter in which it was stated that they were in breach of their contract of employment.

(54) The treatment on which the claimant relies as constituting less favourable treatment is:-

(a) subjecting the claimant to an investigation as set out in the respondent's letter of 11 August 2015; and

(b) sending a recorded delivery letter to the claimant on 18 August 2015 when she was off work on a period of certified stress-related absence; and

(c) by creating a work environment wherein which trust and confidence were irrevocably damaged.

Less favourable treatment

(55) Where an employer raises complaints about conduct or performance about an employee, particularly from outside customers, it is for the employer to decide how to deal with that, including whether to hold an investigation with a potential disciplinary hearing to determine whether there was misconduct or lack of performance.

(56) So is the investigation, set in train by the respondent by its letter of 11 August 2015, just the outworking of a legitimate investigation into complaints made to the respondent?

(57) The Tribunal is satisfied that the claimant was treated less favourably than the hypothetical comparator. In so concluding the Tribunal had regard to the following matters:-

(a) It appears that the complaints made in the letter of 11 August 2015 were made by a number of customers.

(b) Although the complaints have been described by the witness on behalf of the respondent as "serious" and "very serious" the details of the complaints were never sought or recorded.

(c) The letters of support adduced by the respondent in support of the complaints do not actually provide the details outlined in the letter of 11 August 2015.

(d) Some of the complaints involved not only the claimant but another member of staff and there does not seem to have been anything done to the other person in relation to the same complaints for which it was proposed to investigate the claimant.

(e) Although, according to the evidence, complaints are commonplace the unchallenged evidence was that the respondent has never initiated an investigation apart from the one in relation to the claimant.

(f) None of the complaints were contemporaneous. They all related to events occurring 6 – 12 months earlier or longer. The Tribunal was not provided with any explanation as to why they were not investigated when they were made or why they were resurrected in August 2015 for investigation. Indeed some of the complainants who gave evidence to the Tribunal, were unable to answer to the Tribunal why they raised the matters again in August 2015.

(g) No attempt was made to gather the details and evaluate the complaints so that an investigation would be fair for the person to be investigated.

The reason for the treatment

(58) The claimant asserts that the investigation is a direct result of the complaint she made on 3 August 2015 arising from the incident of 31 July 2015. The respondent denies that and relies on the proposition that if there are complaints made it is reasonable for an employer to investigate them.

(59) By reason of the concerns expressed above; the coincidence in time of the investigation of old complaints and the claimant's grievance; the respondent's inability to explain why it did not investigate the old complaints when they were made; the respondent's failure to offer a credible explanation why old complaints were resurrected in August 2015; the failure to gather details of the complaints so that an investigation could be fair by providing details to the person to be investigated, the Tribunal concludes that, on balance, the reason for the initiation of an investigation process was the claimant's doing of the protected act mentioned above.

Any defence

(60) The respondent's only argument in favour of initiating the investigation is that they received complaints and decided to investigate them. However, in view of the concerns expressed above about the decision to investigate the complaints, especially not seeking details of the complaints or recording the complaints; not investigating them when they were made; and resurrecting

them in August 2015 immediately after the claimant had lodged a grievance mean that the respondent's explanation is not credible in the circumstances.

(61) The decision to issue the recorded delivery letter for sick absence without notification in the appropriate fashion is unprecedented within the respondent company. In addition, the advice to follow this course was itself based on an erroneous statement of the facts, ie that the claimant had not contacted the respondent, whereas the correct complaint was that she had not done so in the appropriate manner.

(62) The respondent was aware that the claimant had sent a doctor's certificate which should have answered the respondent's concerns and yet the respondent did not await its arrival to see if its queries and concerns had been answered at least until 20 August 2015 the limit for compliance with the sickness procedure. It was unreasonable, in the circumstances, to issue the letter to a manager whose sickness or attendance record was never challenged and who had indicated a sickness certificate from her general practitioner had been sent, or without letting her know that the sick certificate had not arrived.

(63) In the letter of 18 August 2015, which deals with alleged misconduct of the claimant, the respondent had already arrived at a conclusion. Where there is suspicion of misconduct, proper procedure requires notification to the employee of the alleged misconduct with supporting details and arranging a disciplinary hearing with an opportunity to state any defence they may have before a conclusion is made by the employer. That clearly was not done in this claim.

(64) The Tribunal is persuaded, on the balance of probabilities, that the issuing of the recorded delivery letter asserting that the claimant was in breach of her contract of employment relates to the grievance raised by the claimant concerning the behaviour of Sam McCammond on 31 July 2015.

Burden of proof

(65) In light of the Tribunal's findings above it is unnecessary to rely on the burden of proof provisions under Article 38 of The Fair Employment and Treatment (Northern Ireland) Order 1998. However, if it were necessary it is clear, for the reasons set out above, that the claimant has established a prima facie case of victimisation. The burden would then shift to the respondent which, arising from the deficiencies set out above, could not prove that, on the balance of probabilities, the treatment meted out to the claimant was in no sense whatever on the basis of the claimant's religion or political opinion.

(66) Accordingly, the Tribunal is satisfied that the respondent has discriminated against the claimant by way of victimisation.

Constructive dismissal

(67) The Tribunal is satisfied that the claimant was constructively unlawfully dismissed contrary to Part XI of The Employment Rights (Northern Ireland)

Order 1996. In so concluding the Tribunal had regard to the following matters:-

(a) The findings of discrimination made above.

(b) The Tribunal is further satisfied that the respondent breached the implied term of trust and confidence. That breach arose from the treatment by the claimant's line manager, Sam McCammond, on 31 July 2015; the unwillingness of the respondent, in particular Billy Stevenson, to contemplate any criticism of Sam McCammond whatsoever before any investigation was carried out, as manifested at the meeting of 5 August 2015; the failure to address the claimant's grievance properly; the decision to initiate an investigation into complaints which were at least between 6 and 12 months old against the claimant without even having obtained a proper and precise account of the complaints; and the issuing of a recorded delivery letter accusing the claimant of breaking her contract in relation to her sick leave on an erroneous basis, while knowing a medical certificate was en route; and not giving the claimant any chance to explain her action. This created an atmosphere in which the trust and confidence between the employer and employee was irreparably damaged with the letter of 18 August 2015 amounting to the "last straw".

(68) The breach of the implied term of trust and confidence went to the core of the claimant's contract of employment

(69) The Tribunal is satisfied that the principal reason for the claimant's resignation was the breach of the implied term of trust and confidence. The Tribunal rejects, in the light of the findings above, the respondent's contention that the principle reason for the claimant's resignation was that she had found a job with David Scott on 20 August 2015.

(70) The Tribunal is satisfied that the claimant did not delay too long before resigning. The events leading to her resignation occurred between 31 July 2015 and 18 August 2015 and she resigned on 21 August 2015.

(71) The Tribunal is also satisfied, on the basis of the findings, that from 31 July 2015 until 18 August 2015 the respondent acted unreasonably.

(72) The Tribunal is also satisfied that the claimant suffered an unfair constructive dismissal.

(73) The Tribunal is satisfied that an atmosphere of discrimination existed within the respondent company from 31 July 2015 until the claimant's resignation on 21 August 2015.

Time-issue

(74) The claimant's claim was lodged on 6 November 2015. Therefore all matters of which she complains from 6 August 2015 are within the statutory time-limits.

(75) As the Tribunal has found that there was an atmosphere of discrimination from 31 July 2015 at least until the letter of 18 August 2015 all the claimant's complaints fall within the statutory time period permitted.

Remedy

(76) The claimant did not suffer a financial loss and is not entitled to a compensatory award for her unfair dismissal claim or her discrimination claim. She is entitled to a basic award and for her loss of statutory rights. Her gross weekly wage was £719.54 per week. The maximum permitted per week is £490.00. Her basic award is therefore £2,940.00 (£490.00 x 6). Her loss of statutory rights is valued at £300.00.

(77) The claimant also claimed for injury to feelings for the discrimination she suffered which included shock, embarrassment, anxiety, upset of the incident on 31 July 2015. She suffered further by the reaction of Sam McCammond to her complaint by inflicting insult and disrespect on her. She was devastated by the victimisation she suffered, initially by the letter of 11 August 2015 and later by the letter of 18 August 2015.

(78) Doing the best it can and following the approach of the Courts in **Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102 Court of Appeal** and **Da'Bell v NPCC [2010] IRLR 19 EAT**, the Tribunal assesses the appropriate band is the middle band and the appropriate level of compensation is £15,000.00.

(79) Where a Tribunal makes an award for injury to feelings it is obliged to consider making an award of interest from the date of the first act of discrimination, 31 July 2015, to the calculation dated 25 August 2017.

(80) There was no argument made to the Tribunal as to why interest should not be awarded or the period for the interest varied. Nor did anything emerge in the course of the evidence which amounted to exceptional circumstances that would enable the Tribunal to conclude that serious injustice would be caused if an award of interest were made. Accordingly, the Tribunal makes an award of interest on the £15,000.00 award which it calculates at £2,496.00.

Aggravated damages

(81) The Tribunal is not persuaded that it would be appropriate to award aggravated damages in this claim. In so concluding the Tribunal had regard to the following matters:-

(a) The respondent's defence to these claims was simply to reject them in their entirety. Further it did not accept that the phraseology used by

Sam McCammond or the investigation or the letter in relation to the sickness absence could be challenged in any way as being discriminatory or giving rise to an unfair constructive dismissal claim. The respondent maintained this approach from the outset and conducted its defence in a manner that is consistent with that attitude. The claimant should not have had any illusion as to the approach being taken by the respondent in the conduct of their claim as it was manifested from the outset.

(b) The Tribunal is not persuaded that the conduct of the defence and the lines of defence adopted by the respondent at the hearing and in their witness statements added any further distress to the claimant to what she had already suffered by the particular actions which the Tribunal has impugned above.

7. This is a relevant decision for the purposes of the Fair Employment Tribunal (Interest) Order (Northern Ireland) 1995.

Employment Judge: Brian Greene

Date and place of hearing: **21, 22 and 23 June 2016; and 1, 2, 8, 9 and 29 September 2016, Belfast.**

Date decision recorded in register and issued to parties: 20 OCT 2017

CASE REF: 82/15FET
2577/15

INTEREST NOTICE
INDUSTRIAL TRIBUNALS
INTEREST ON AWARDS IN DISCRIMINATION CASES

The Industrial Tribunals (Interest) Order (Northern Ireland) 1990 provides that interest shall accrue on a sum of money payable as a result of an award of an industrial tribunal where that sum remains unpaid in whole or part 42 days after the decision containing the award was issued to the parties.

In relation to awards made under the Equal Pay Act (Northern Ireland) 1970, the Sex Discrimination (Northern Ireland) Order 1976, the Disability Discrimination Act 1995, or the Race Relations (Northern Ireland) Order 1997, the Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination Cases) Regulations (Northern Ireland) 1996, the Race Relations (Interest on Awards) Order (Northern Ireland) 1997 and the Industrial Tribunals (Interest on Awards in Age Discrimination Cases) Regulations (Northern Ireland) 2006 determined that interest shall accrue from the day immediately following the day the decision containing the award is issued to the parties. However no interest is payable on the award if the full amount of the award is paid within 14 days after the day of issue of the decision to the parties. Interest does not accrue on costs or expenses awarded by the tribunal.

In this application, please note that -

1. The decision day is 20 October 2017 being the day the decision was sent to the parties;

2. The calculation day is 21 October 2017 being the day immediately following the decision day; and

3. The stipulated rate of interest is 8% being the rate of interest in force on amounts awarded by decree in the county court on the decision day.

Patricia Macdonald

For the Secretary of the Tribunals