THE INDUSTRIAL TRIBUNALS

CASE REF: 434/13IT

CLAIMANT **Martin Sheil**

RESPONDENT **Stena Line Irish Sea Ferries Ltd**

DECISION

The decision of the tribunal is as follows:

1. The claimant was unfairly dismissed.

2. The tribunal will convene a further hearing on remedies in order to consider whether to make orders of re-instatement or re-engagement.

3. The claimant was subjected to unlawful harassment on the grounds of sexual orientation. The tribunal considers that the appropriate award in respect of this aspect of the claim is £7,500.00.

Constitution of Tribunal:

Chairman: **Mr I Wimpress**

Members: **Mrs C Stewart**
Mr D Atcheson

Appearances:

The claimant was represented by Mr Mark McEvoy, Barrister-at-Law, instructed by the Equality Commission

The respondent was represented by Mr Patrick Moore LLB.

The claim and the response

1. The claimant brought claims of unfair dismissal, discrimination and victimisation on the grounds of sexual orientation and that he was subjected to a detriment and/or dismissed due to his Trade Union activities. The respondent disputed all of these claims and contended that the claimant had been fairly dismissed for gross misconduct.

Sources of Evidence

2. The tribunal received an agreed bundle of documents which was supplemented by a number of documents which included the respondent's company handbook and a research paper written by Mr Matthew McDermott of the Rainbow Alliance. The tribunal also received witness statements and heard evidence from the following witnesses:

   Martin Sheil ('the claimant') - Port Operative (Stena Line Irish Sea Ferries)

   William Gilmour - Port Operative (Stena Line Irish Sea Ferries)

   Brian English - Port Operative (Stena Line Irish Sea Ferries)

   Jim Fenton - Port Operative (Stena Line Irish Sea Ferries)

   Robert Spruth - Duty Manager (Stena Line Irish Sea Ferries)

   Karen Burgess - Human Resources (Stena Line Irish Sea Ferries)

   Nicola Barlow - Human Resources Manager (Stena Line Irish Sea Ferries)

   David Adlington - (Stena Line Irish Sea Ferries)

   Howard Hillis - (Port Operations Manager Belfast, Stena Line Irish Sea Ferries)

   Diane Poole OBE - (Stena Line Irish Sea Ferries)

   The witness statements were received as the evidence in chief of the respective witnesses who were then cross-examined by the respondent's representative. The tribunal also received and read a witness statement by Maurice Cunningham Industrial Organiser of UNITE. In the event although Mr Cunningham attended the first two days of the hearing he was unable to remain any longer due to a family bereavement. The claimant's representative did not seek to have the tribunal reconvene in order to receive his oral evidence.

   In addition, the evidence received by the tribunal made reference to the following individuals:

David Brown - Port Operative (Stena Line Irish Sea Ferries)

William Stitt - Port Operative (Stena Line Irish Sea Ferries)

Ian Gourley - Foreman (Stena Line Irish Sea Ferries)

Wayne Halliday - Foreman (Stena Line Irish Sea Ferries)

The Issues

3. At the Case Management Discussion on 8 May 2013 the issues to be determined by the tribunal were agreed as follows:-

1. Unfair Dismissal

(1) Given that the respondent concedes that the claimant was dismissed, was the claimant unfairly dismissed contrary to Articles 126 and 130 of the Employment Rights (Northern Ireland) Order 1996 as amended?

(2) Was the claimant fairly dismissed and if so, for what reason?

(3) If the claimant was unfairly dismissed, was there any contributory fault on the part of the claimant?

(4) Has the respondent shown consistency in dismissing the claimant in comparison with the disciplinary action taken against William Gilmore?

(5) Did the respondent carry out a full and reasonable investigation into the events of 2 November 2012?

(6) Did the respondent have a reasonable belief in the conduct of the claimant as alleged?

(7) Did the decision to dismiss the claimant fall within the band of reasonable responses open to the respondent?

(8) What was the reason for the claimant's dismissal?

2. Discrimination on grounds of sexual orientation

(1) Was the claimant subjected to harassment on grounds of sexual orientation by the respondent, as defined by Regulation 5 and contrary to Regulation 6(3) of the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003?

(2) a. Did the claimant raise a grievance with the respondent in respect of being subjected to harassment on grounds of sexual orientation by the respondent, as defined by Regulation 5 and contrary to Regulation 6(3) of the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003?

b. And if so, when did the claimant raise the grievance?

(3) Did the respondent subject the claimant to less favourable treatment on grounds of sexual orientation as defined by Regulation 3(1)(a) and contrary to Regulation 6(2) of the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 in comparison with William Gilmore and/or a hypothetical comparator in respect of the following:-

a. The decision to suspend the claimant?

b. The subsequent decision to dismiss the claimant?

c. And if so, when did the claimant raise a grievance in respect of this head of claim?

(4) Was the claimant victimised when he was dismissed by the respondent contrary to Regulation 4 and Regulation 6(2) of the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003?

(5) In respect of legal issue number (4) above, was the claimant's complaint dated 29 November 2012, the "protected act" as defined by Regulation 4 of the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003?

(6) a. Did the claimant raise a grievance with the respondent in respect of victimisation?

b. And if so, when?

3. Trade Union Activities

(1) Was the claimant subjected to a detriment and/or dismissed due to his Trade Union activities and/or membership contrary to Article 73 and/or Article 136 of the Employment Rights (Northern Ireland) Order 1996 by:-

a. The decision to suspend the claimant?

b. The subsequent decision to dismiss the claimant?

(2) Did the claimant raise a grievance with the respondent in respect of being subjected to a detriment and/or dismissed due to his Trade Union activities and/or membership contrary to Article 73 and/or Article 136 of the Employment Rights (Northern Ireland) Order 1996 by:-

a. The decision to suspend the claimant?

b. The subsequent decision to dismiss the claimant?

c. And if so, when did he raise a grievance in respect of this head of claim?

(3) Did the respondent comply with Labour Relations Agency guidelines in respect of disciplining Union Representatives?

4. <u>Loss</u>

(1) What loss has the claimant suffered as a result of his dismissal?

(2) If the tribunal is satisfied that the claimant has suffered unlawful discrimination on grounds of his sexual orientation, is it appropriate to make an award for injury to feelings? If so, how much should be awarded?

5. <u>Factual Issues</u>

(1) Did William Gilmore make derogatory comments on 1 and 2 November 2012 (or on dates prior to this) directly or indirectly to/or about the claimant in respect of the claimant's sexual orientation?

(2) When did the claimant complain to management about these alleged comments?

(3) What happened during the incident on 2 November 2012?

(4) When was the incident referred to in paragraph 2. above reported to management?

(5) What investigation was done prior to suspending the claimant on 6 November 2012?

(6) Was the incident fully investigated?

(7) Was the incident reported to the PSNI by Mr Gilmore?

(8) Did the respondent fully investigate the allegations of harassment (on grounds of sexual orientation) made by the claimant?

(9) Was it necessary to suspend the claimant?

(10) Why was William Gilmore not suspended?

(11) Did the respondent comply with Labour Relations Agency guidelines in respect of disciplining Union Representatives?

(12) What exactly were the claimant's Trade Union activities?

(13) Has the respondent initiated any disciplinary action against Mr Gilmore and if so, what action has been taken?

(14) Was the claimant involved in industrial matters to include the raising of issues in regard to changes to terms and conditions in regard to sick entitlements?

(15) Is there a recognition agreement in place between Unite the Union and the respondent?

(16) Was the claimant's dismissal pre-determined?

(17) Did Mr Gilmore say to the claimant on or about 1 or 2 November 2012:-

a. "There's some people in here who would suck cock."

b. The comment allegedly made by Mr Gilmore on or about 1 November 2012 that "Some people should come out of the closet".

c. "Sure you're a fucking fruit."

(18) Did Mr Gilmore refer to the claimant on or about 1 or 2 November 2012 as a “shirt-lifter”?

The Facts

4. In addition to the list of issues identified at the Case Management Discussion, the parties helpfully agreed certain facts and a chronology at the outset of the hearing. We have used all of this as a framework for our decision.

5. The claimant was employed as a Port Operative by the respondent. The respondent is a large employer with between 250 and 300 employees in its Belfast operation. Mr Hillis, the general manager, had 70 employees working under him.

6. On 1 November 2012 a comment was made on a work minibus at approximately 7.00 am. According to the claimant during the journey Mr Gilmore said that “some people in here should come out of the closet”. The claimant believed that this remark was aimed at him. The claimant also gave evidence to the tribunal that over the previous year Mr Gilmore had made various indirect remarks about the claimant’s personal life and sexual orientation including – “there’s some shirt-lifters in here” and “some people in here would suck cock”.

7. On Friday 2 November 2012 during the morning shift an incident occurred between Mr Gilmore and the claimant in Mr Gilmore’s tug. A tug in this context is best described as a lorry cab without a trailer or load. According to Mr English he heard shouting and then saw the claimant punching Mr Gilmore around the head and face. Mr English intervened and moved the claimant away from Mr Gilmore. The claimant then shouted at Mr Gilmore – “this isn’t the end of this” before climbing into his tug and leaving. Mr English told Mr Gilmore to report the incident immediately but Mr Gilmore did not want the matter reported and asked Mr English not to say anything. According to Mr English Mr Gilmore’s face was bleeding on both sides and his glasses were broken. In his evidence to the tribunal Mr English also stated that the claimant approached him later in the morning shift and said, “I know you don’t want to know but he was laughing at me and that’s why I done it”. Mr English replied that the claimant was in the wrong. Mr English continued to think about the incident and when he went in for his evening shift he reported it to Mr Gourley. As we will come to later the claimant did not report the incident because he claimed he would have been uncomfortable raising issues in regard to his sexual orientation.

8. On Monday 5 November 2012 Mr Hillis received a telephone call from Mr Gourley informing him that there had been an assault by one employee on a fellow employee and that the victim had concerns about reporting the matter namely that he did not want to get anyone into trouble or possibly lose their job and that he was worried about possible interference outside the workplace. The victim was not named. Mr Hillis told Mr Gourley to advise the alleged victim to report the matter officially as Mr Hillis now had responsibility to investigate the matter, it being of a serious nature and as a duty of care to the alleged victim and to other employees. Mr Hillis was later informed of the identity of the alleged victim namely Mr Gilmore. Mr Hillis asked Mr Gilmore to attend his office where he advised Mr Gilmore that he should report the matter immediately in writing to the HR Department and also consider reporting it to the police given his concerns about interference outside work. Mr Gilmore indicated that he would think the matter over before taking any further action. Mr Hillis responded that no matter what he decided the matter would be investigated by the company because of the seriousness of the allegations.

9. On the evening of 5 November 2012 Mr Gilmore handed Mr Hillis a letter and stated that he was now reporting the matter officially. The letter was addressed to Ms Burgess and read as follows:-

> "I am writing to inform you about an incident that occurred last week.
>
> On Friday November 2nd at approximately 7.00 am Mr Martin Shiel assaulted me. The assault took place in VT1 during the load up of the a.m. Heysham vessel. I have no clue as to why he would do this and have decided to ask for your assistance investigating this matter.
>
> If you have any questions regarding this matter please do not hesitate to contact me at the above address (ie his home address) or in VT2.
>
> Thank you for your assistance in this matter."

Mr Gilmore also reported the incident to the police but gave few details to them.

10. On the morning of 6 November 2012 the claimant approached Mr English and asked him if he was going to be a witness for Mr Gilmore. Mr English replied that if he was asked what happened he would tell the truth. Later that same morning the claimant was told by Mr Gourley that Mr Spruth wanted to see him in his office. The claimant did as instructed. Mr Spruth was accompanied by Ms Farrell and he informed the claimant that a complaint of assault had been made against him and that he was suspending him on full pay. This was

followed up in writing by Ms Barlow by letter of the same date informing the claimant that she was suspending him on full pay "pending an investigation in to the allegation of assault on a fellow employee."

11. No allegation or complaint was made in respect of Mr Gilmore by the claimant or anyone else and he was not suspended.

12. Mr Spruth was directed to investigate the allegation of assault. On 8 November 2013, Mr Gilmore attended an investigatory meeting held by Mr Spruth and Ms Farrell. Mr Gilmore's account was that he had been asked to assist the claimant with loading the top deck of the Heysham vessel because it would appear the claimant was doing this slowly. Mr Gilmore also indicated that the drops were not being made accurately. Mr Gilmore admitted that he laughed at a remark made by a crew member about the claimant namely, "Who gave him his licence? He must have been blind". In cross-examination Mr Gilmore recalled a comment being made that "the wee man with the red face did the damage" (an unkind reference to the claimant). Later Mr Gilmore had to swerve out of the way of the claimant's tug and he smirked at the claimant as they passed. Subsequently the claimant pulled up in front of Mr Gilmore causing him to break suddenly. The claimant said," I'm going to knock that fucking smirk off your face". The claimant pointed his finger at Mr Gilmore and told him to get out of the tug but within seconds the claimant was coming at him. Mr Gilmore was half in and half out of his chair and the next thing was that the claimant was on top of him. Mr Gilmore stated that he had a "dickey" shoulder and that he was pushed to the floor. The next questions and answers were as follows:-

> "Mr Spruth – Did he punch you?
> Mr Gilmore – Not that I can remember.
> Mr Spruth – Did he strike you in any way?
> Mr Gilmore – Couldn't possibly say. I was shocked, but if Brian [English] wasn't there, I was at his mercy. He pushed me very forcefully. I didn't know about the blood until after. Brian [English] pulled him off and he went and got into his tug and said 'this is not finished'. And I said 'your right'."

Mr Gilmore was asked what injuries he sustained and he told Mr Spruth that he had scuffs to his face and a cut and that afterwards when he picked up his wife he told her that he had fallen. The interview continued.

"Mr Spruth – Ok. Did you in your opinion do or say anything to [the claimant] to provoke an attack?

Mr Gilmore – No, have not spoken with him for over 2 years. Just smiled at him and shook my head".

The next portion of the interview was not recorded as Mr Gilmore wanted to speak off record. When asked about this in cross-examination Mr Gilmore said that he could not remember this part of the interview. Nor could Mr Spruth recall Mr Gilmore wanting to speak off record. Ms Farrell, the note taker, was able to recall the off record conversation and according to her Mr Gilmore became very emotional at this stage and said that he hadn't told his wife about what had happened because he felt ashamed of what had happened. During the remainder of the interview Mr Gilmore expressed concerns about a reoccurrence of the attack possibly outside of work.

13. Mr English also attended an investigatory meeting on 8 November 2013. Mr English said that he heard the claimant shouting and saw the claimant's tug blocking Mr Gilmore's tug. The interview continued.

"Mr Spruth – After you heard [the claimant] shouting did you see anything else?

Mr English – I slowed down and saw [the claimant] run out of his tug up into the other tug. I thought this is serious and I jumped out and ran to the tug, [the claimant] was in there (the cab) on top of [Mr Gilmore] and going like that (made punching actions with both arms).

Mr Spruth – So did you see an assault?

Mr English – Yes, he was punching him while he was on top. I had to get in between them and wrestle [the claimant] out and then told him that was enough".

Mr English also thought that the claimant said "this isn't over". According to Mr English, Mr Gilmore told him not to report it. Mr English also stated that later on the claimant came over to him and said, "This had to come to a head as he was laughing at me." Mr Spruth asked Mr English if there were any issues between the claimant and Mr Gilmore before the incident and Mr English replied that he didn't think so but that there were a handful of people who didn't speak to the claimant or others but you don't lift your fists. Mr English went on to say that the claimant 'put his head away' so he makes sure to work on the opposite deck because the claimant was a terrible driver. Mr Spruth then returned to the alleged assault and Mr English again stated that the claimant was punching Mr Gilmore.

14. The claimant was invited to an investigatory meeting on 15 November 2012 the purpose of which was described in the invite letter as an opportunity to provide an explanation for an allegation of assault which took place on Friday 2 November 2012. It is clear that the claimant was aware that an allegation of assault had been made against him.

15. On 15 November 2012 the claimant attended the investigatory meeting which was held by Mr Spruth and Ms Burgess. The claimant was accompanied by Mr Cunningham. At the outset of the meeting Mr Cunningham indicated that they were not prepared to continue with the meeting without seeing all the allegations and documents. Mr Cunningham also raised issues about the claimant's rights as a shop steward and the failure to notify the claimant's trade union of his suspension. Mr Cunningham further complained about it being a predetermination and having to answer questions blindly. Mr Cunningham also indicated that he wished to raise grievances against Ms Barlow and Mr Spruth. The meeting was adjourned by Ms Burgess who stated that the company would be in contact with them. The meeting was not reconvened and thus the claimant did not provide an account of the incident from his perspective at this stage of the process. The respondent's witnesses were critical of Mr Cunningham's behaviour at the meeting which they described as rude, aggressive and intimidating. As Mr Cunningham did not give oral evidence and did not address these allegations in his witness statement we will proceed on the basis that there is some substance in the complaints about his behaviour. While Mr Cunningham's behaviour is not of central importance to the issues that we have to decide it does give some indication as to why the investigatory meeting was not reconvened. Mr Spruth subsequently recommended that the allegation against the claimant should be considered at a disciplinary hearing.

16. On 16 November 2012 the claimant raised a formal grievance in respect of the investigation process. His first complaint was against Ms Barlow and was twofold. Firstly, he complained that the decision to suspend him constituted a predetermination that he was the guilty party. The second complaint against Ms Barlow was that as a Shop Steward he should not have been suspended without his Regional Industrial Officer and Branch Office being informed contrary to the Labour Relations Agency's Code of Conduct. The second complaint was made against Mr Spruth that he had also been guilty of predetermination and that he had refused to let the claimant see the allegation against him or discuss its nature.

17. In cross-examination, Mr Spruth was asked why he had decided to escalate the matter to a disciplinary hearing in view of the pending grievance. Mr Spruth answered that he was not aware of the rules in relation to grievances when he took the decision to proceed and he accepted that he could have sought advice from the respondent's lawyers or Human Resources but did not do so. Mr Spruth also indicated that had he been aware that the grievance should have stopped the clock he would have done so.

18. On 20 November 2012, Ms Barlow wrote to the claimant inviting him to attend a disciplinary meeting on 22 November 2012. The letter was delivered by taxi and stated that the purpose of the meeting was to discuss the allegation of assault in order to determine whether the claimant's actions amounted to

gross misconduct and if it was determined that gross misconduct had taken place then action including summary dismissal may be taken against him as detailed in the respondent's disciplinary rules and procedures a copy of which were attached. Enclosed with the letter were copies of the letter of complaint, the statement from the complainant (Mr Gilmore), a witness statement (Mr English) and the minutes of the claimant's investigatory meeting on 15 November 2012. The claimant was advised that the meeting would be conducted by Mr Adlington and that he was entitled to be accompanied by a work colleague or a trade union representative.

19. On 21 November 2012 Mr Cunningham wrote to the respondent about the investigatory meeting with the claimant. Ms Barlow replied on 26 November 2012. Ms Barlow stood over the conduct of the meeting and pointed out that there was no requirement to notify Mr Cunningham of the claimant's suspension as there was no union agreement in place with his union and that shop stewards have no more rights than other employees except where they are acting on behalf of other employees. Ms Barlow disputed the contention that the respondent had failed to comply with the LRA Code of Practice and invited Mr Cunningham to identify the relevant provision. Ms Barlow also denied that the respondent had ignored the claimant's grievance, pointed out that it wasn't received until 20 November 2012 and advised that the grievance procedure had started. Finally, Ms Barlow stressed that the respondent was very concerned about Mr Cunningham's aggressive stance and rudeness to staff and would be complaining to his Regional Secretary about his conduct. In the event Ms Barlow did not follow this through due to advice she received from Mr Moore to the effect that it would detract from the process. Mr Cunningham subsequently replied to this letter on 28 November 2012.

20. On 26 November 2012 Ms Barlow also notified the claimant that the disciplinary hearing had been rescheduled on 29 November 2012. The claimant had been unable to attend the earlier date.

21. On 29 November 2012 the claimant attended a disciplinary hearing in respect of the incident on 2 November 2012. It was heard by Mr Adlington. Ms Burgess attended as the note taker. The claimant was accompanied by Mr Cunningham. At the outset of the hearing Mr Cunningham raised an issue about the claimant's grievance and suggested that if it was upheld the matter would have to revert to the investigatory stage and queried how the disciplinary hearing could proceed in these circumstances. The claimant stated that he wanted to get this over as soon as possible and get back to some normality. The claimant then went on to complain about how he was questioned at the disciplinary interview. There was then a heated exchange between Mr Cunningham and Mr Adlington at the end of which the claimant requested a short recess.

22. When the hearing reconvened Mr Cunningham stated that against his advice the claimant wished to continue with the hearing. Mr Adlington re-started the hearing and asked the claimant to explain or provide him with an insight as to what led to the incident on 2 November 2012 and the claimant replied that Mr Gilmore made derogatory comments about him on the previous day. Mr Adlington asked what kind of remarks these were and the claimant responded that they were about his sexuality and had taken place over several weeks in addition to occurring on the minibus on 1 November 2012. Mr Cunningham asked who was in the minibus and the claimant provided their names – David Brown, Clarke Watson, Jim Fenton and William Gilmore. The claimant then gave his account of the incident on 2 November 2012. As this was the first occasion on which the claimant gave his account it is important to look closely at what he said which was as follows:-

> "MS – On the morning of 2nd the Heysham ship was being emptied and loaded I was doing the top deck. WG appeared with his tug to help load. He was driving past me in the tug laughing and smirking at me and I didn't know why.
>
> DA – Was anyone else around, anyone?
>
> MS – No, just the two of us. His laughing and smirking must have gone on for 15-20 minutes on passing. At VT1 I had emptied and WG loaded, I pulled alongside him to ask what he was laughing and smirking about, he looked surprised. I told him to stop the nonsense about the stuff in the minibus from the previous night and to clear the air and have it over and done with. I was upset. Sorry KB, he called me a "Fucking fruit".
>
> DA – What was the tone of your voice?
>
> MS – I was nervous. I pointed at him, he grabbed the top of my coat (indicated collar area) and I fell forward with WG holding my collar area falling on top of WG.
>
> DA – Did you get out of your tug and go up onto BG tug?
>
> MS – Yes, he had swung around; he said "sure you are a fucking fruit". He pulled me back on top of him; he had his hand around my shoulder and neck area. Brian [English] had to pull me off him. That was it. I got pulled off him and went back to my tug and drove on."

Mr Adlington then asked about the comments in the minibus and whether the claimant said anything that night about the comments. The claimant replied that he did not and that it was his intention to speak to Mr Gilmore on Friday morning. Mr Adlington asked whether the claimant thought that he should have raised a grievance with management. The claimant responded that he

felt that he could deal with it as a mature man and just wanted to sort it out or to agree to disagree. Mr Adlington asked again if there was anyone around who could have heard anything and the claimant replied that those in the minibus would have heard the remarks over the past weeks. Mr Adlington also asked if anything was said on the morning following the minibus incident and the claimant replied "No". Mr Adlington also asked if anyone else could have made a joke or comment on 2 November 2012 and that a reaction to that could have been misunderstood by the claimant who again replied "No". Mr Adlington asked what language was used and the claimant replied that he probably swore and Mr Gilmore swore back at him. Mr Adlington asked further questions about the incident in the course of which the claimant denied hitting Mr Gilmore or using any force against him. Mr Adlington then asked the claimant if it was correct that he approached Mr English on Tuesday 3 November and asked if he was going to be a witness for Mr Gilmore. The claimant's response was – "The jungle drums were rolling on Monday and I had heard that there was a complaint had gone in against me and that Brian English was going as a witness for William Gilmore. I wondered what the complaint was about and what it had to do with William Gilmore. Brian English told me 'I'm going to tell what I seen.' " Mr Adlington then asked if anyone else had spoken to the claimant or behaved in the way that Mr Gilmore did and the claimant responded that only Mr Gilmore spoke to him about his sexuality. Mr Adlington concluded his questioning of the claimant by asking him if he had anything else to say and the claimant responded that his intent was to clear the matter, to agree or disagree and in a matter of seconds that was a clash by Mr Gilmore grabbing him.

Mr Cunningham then made a number of points about the investigatory statements and in particular the inconsistencies and flaws in Mr Gilmore's evidence which included saying nothing about punches being thrown, not giving the police a name and telling his wife and fellow worker that he fell. The claimant asked Mr Adlington what would happen now and he replied that he would need to get answers to the issues raised by Mr Cunningham and then let him know. The meeting then finished.

23. On 3 December 2012, Mr Adlington conducted two further investigatory meetings with Mr Gilmore and Mr English but did not speak with Mr Brown, Mr Watson or Mr Fenton. Mr Adlington asked Mr Gilmore if he had made any remarks to the claimant on 1 December 2012. Mr Gilmore responded," I haven't spoken to that one in two years. I once asked him about overtime and he ignored me and I swore I wouldn't talk to him again". Mr Adlington also asked him about the events on 2 November 2012. There were three loads in and the Checker asked Mr Gilmore to bring the next one and line it up. The Checker then said that "the person that gave him [meaning the claimant] the licence was blind" and Mr Gilmore laughed at this remark. Mr Adlington then asked Mr Gilmore about the tug incident. Mr Gilmore said that he was still laughing at the previous remark when he passed the claimant. According to

Mr Gilmore's account the claimant said, "I will knock that 'effing' tug out my 'effing' face". Mr Gilmore said nothing in reply and the claimant then came at him. Mr Gilmore put his good arm around. Mr Gilmore denied getting hold of the claimant's jacket or saying anything else. Mr Gilmore also went on to say that he was caught between his seat and the tug and that the claimant was raining blows on him. Mr Adlington asked Mr Gilmore to explain why he didn't report the matter straight away. Mr Gilmore responded that he did not want anyone losing their job. He was then asked why he went to the police and gave an off the record answer in which he expressed concerns about his family and the area in which he lived. Mr Adlington asked Mr Gilmore what prompted him to tell everyone that he fell and Mr Gilmore relied that he didn't want it to go further and he didn't report it. Mr Adlington suggested to Mr Gilmore that he was prepared to let it blow over and Mr Gilmore responded that the claimant would deny it and that he was concerned about someone that Mr English had told about the incident and that he panicked. Mr Gilmore said that he was dreading coming in to work on Monday morning and that he didn't expect to come into work and come out scarred. Mr Gilmore stated that the claimant was raining blows on him and that he had been scarred by the protective goggles that he was wearing.

24. Mr English largely repeated what he had already said. Although Mr Adlington was criticised by Mr McEvoy for putting words into Mr English's mouth, we are of the view that Mr Adlington did no more than summarise Mr English's earlier account and that there was nothing improper in Mr Adlington's conduct of the interview. Neither of these further interviews was disclosed to the claimant.

25. On 6 December 2012 the claimant attended a grievance investigation with Diane Poole and was accompanied by Mr Cunningham. Both the claimant and his representative were given a full opportunity to discuss the grievance. Mrs Poole concluded the meeting by advising that she would investigate the matter and get back to them. Mrs Poole obtained a report from Ms Burgess about the investigatory meeting with Mr Spruth.

26. On 11 December 2012 the claimant was informed by letter of the same date that his grievances had not been upheld. In relation to the complaints against Ms Barlow, Mrs Poole stated that the claimant was suspended by Mr Spruth not Ms Barlow and that the decision to suspend was not a pre-determination of guilt but was necessary in order to conduct a fair investigation into an allegation of a serious assault. Mrs Poole also considered that the complaint about not informing the trade union had absolutely no substance or merit as she could find no breach of the LRA Code of Conduct and there were no agreements in place about informing a Trade Union of a suspension of a shop steward even more so where there were allegations of serious assault and that even if such an agreement was in place an allegation of assault by a shop steward would not constitute trade union activities. In relation to the

complaints about Mr Spruth, Mrs Poole indicated that the first complaint boiled down to Mr Spruth's failure to describing the matter as "an incident" rather than "an alleged incident" which Mrs Poole regarded as utter nonsense. With regard to the complaint about the invite letter Mrs Poole was satisfied that the allegation was clearly identified in the letter and that when Mr Spruth attempted to discuss the nature of the complaint at the meeting both the claimant and his representative refused to participate. Mrs Poole also pointed out that Mr Cunningham was both aggressive and rude to Mr Spruth and the note-taker. Mrs Poole concluded the letter by advising the claimant of his right of appeal against her decision. The claimant did not avail of his right of appeal.

27. On 12 December 2012 the claimant was dismissed for gross misconduct for the offence of assault. The material portion of Mr Adlington's letter of dismissal reads as follows:

> "You were given every opportunity to explain and account for your actions in relation to this incident and having listened to your explanations I consider them to be unsatisfactory for the following reasons:
>
> After consideration of the evidence presented by all parties : including follow up with the complainant and an eye witness following the disciplinary hearing with you and the information provided by yourself during the disciplinary meeting I have reason to believe that the above alleged offence was committed by you. The reasonable belief is based on the evidence available to me and is strengthened by the independent witness who has been interviewed twice and has confirmed the situation that he witnessed on 2nd November 2012.
>
> Regardless of whether there had been prior verbal communication between you and the complainant the company has a grievance procedure in place which is there for both the benefit of the company and the employee should it be required by either party. The use of the said procedure may have prevented such an incident occurring in the first instance should you had deemed the treatment of yourself severe enough to initiate it."

Mr Adlington went on to say that he had been mindful of the claimant's length of service but that he had failed to identify any mitigating factors or an adequate explanation for the incident and that as a consequence he could not be satisfied that there would not be a future repeat of such unacceptable and inappropriate conduct. Mr Adlington also stated that having considered all alternatives he had decided to take the severest sanction and summarily dismiss the claimant without notice. Finally, Mr Adlington advised the claimant of his right of appeal.

28. On 20 December 2012 the claimant submitted a lengthy and detailed appeal letter. The claimant denied assaulting Mr Gilmore; drew attention to Mr Gilmore's evidence in relation to the assault namely that he " can't remember" and "couldn't possibly say" that he was punched in contrast to the claimant's clear and precise evidence; that Mr English bore personal animosity towards the claimant; that Mr Gilmore was the aggressor rather than the claimant; that the incident was a result of Mr Gilmore's harassment of the claimant about his sexuality which prompted the claimant to approach him to try to clear the air; bias against the claimant by taking action against him and not Mr Gilmore and ignoring the LRA Code of Practice in relation to Trade Union representatives. The claimant then set out a number of points in support of his grounds of appeal which included refuting the suggestion that Mr English was an independent witness, Mr Adlington's failure to follow up with other witnesses identified by the claimant and the manner in which the claimant as a gay man was dealt with by the respondent.

29. On 2 January 2013 Mr Hillis wrote to the claimant and invited him to an appeal meeting on 9 January 2013. The meeting was subsequently rescheduled for 17 January 2013 and confirmed by letter of 7 January 2013. In both letters the claimant was advised of his right to be accompanied by a work colleague or an accredited trade union official.

30. On 17 January 2013 the claimant attended the appeal hearing which was heard by Mr Hillis. The claimant was accompanied by Mr Cunningham. Both raised a number of issues with Mr Hillis. The claimant gave his account of the incident and the background to it. The claimant asked why there was a delay of four days before he was suspended on 6 November 2012 if he was viewed as the aggressor and queried why Mr Gilmore was not also suspended despite Mr Gourley and Mr Halliday being aware of the incident. The claimant also complained about the initial investigatory meeting and the treatment of his grievance. The claimant went on to say that Mr Gilmore had been making snide remarks aimed at him over the last eighteen months and that this contributed to the claimant confronting him in order to clear the air. The claimant also questioned whether the three witnesses that he named were followed up by Mr Adlington. The claimant also pointed out that the statements of Mr English and Mr Gilmore contradicted each other. Mr Cunningham then made some further points and there was some discussion about how new allegations and new evidence should be treated in an appeal hearing. After a short adjournment Mr Hillis asked for further details about other occasions on which remarks were made. The claimant responded that he didn't log the times and dates of all the remarks made but did give the names of those on the minibus and they were never asked about it. Mr Hillis then closed the meeting and said that there were other parties whom he would need to speak to.

31. Between 23 and 25 January 2013 Mr Hillis conducted interviews with Clark Watson, David Brown, Jim Fenton, Noel McKeown and William Stitt in relation to allegations of harassment on grounds of sexual orientation made by the claimant. Neither the fact that these interviews were being conducted nor the contents of the interviews were communicated to the claimant or his representative. Mr Watson was unable to recall the night in question and Mr McKeown was off sick on that date. Mr Stitt said that he was in the minibus but did not hear any comments specific to the claimant but that there was lots of general banter and comments which he suggested was the norm. Mr Brown gave the following account:-

> "There's always comments in the bus - everyone's always having a go at each other.
>
> WG mumbled something about somebody should come out of the closet - it was a general comment but we all knew he was referring to MS because we all know they don't get on. Just carried on working after that - no response from MS.
>
> Think Jim Fenton, Clark Watson and Noel McKeown were in the van but not 100% sure.
>
> Comments made in general, previous by all the gang in relation to MS and his sexuality.
>
> That's the way it is in that type of environment - its seen as banter. Didn't recall it ever been done will MS was present.
>
> DB has never witnessed WG commenting directly to MS about his sexuality.
>
> They just don't like each other."

32. Mr Fenton had more to say and the interview went as follows:

> "JF (Mr Fenton) – Comments made by WG [Mr Gilmore].
>
> WG got into bus and commented his ears were burning that someone might have been talking about him.
>
> JF asked was it his left or right because left is for love and right is for spite. (Trying to make light of situation!!).
>
> Everyone aware that they don't get on.

WG responded that both ears and commented that ‘It would suit them better if they came out of the closets. MS [the claimant] was in the bus but there was no response/reaction. When we got out of the bus JF commented that ‘He took that bad, you’d think he’d know by now how everyone makes comments about everyone else’. (did not comment to anyone in particular but suggests that Billy Stitt was also in the bus).

JF – General comments over the past 12-18 months among the workforce – he knew people were talking about him. On most occasions comments made when he was not about. Suggests comments were made as far back as when Bill Marchant was employed.

JF- Not aware of any suggestion that MS ever reacted or reported to company – thinks he just ignored it all the time.”

33. On 11 February 2013 the claimant was informed in writing by Mr Hillis that he had decided to uphold Mr Adlington’s decision to dismiss him for gross misconduct. Mr Hillis also set out his conclusions in the letter which were as follows:

- “The incident was officially reported by Mr Gilmore on Monday 5 November and management initiated formal procedures as per company policy.

- I am satisfied the procedures in relation to suspension, investigation and discipline were all as per company policy and at no time was there any bias towards yourself as you claim.

- The grievances forwarded were subject to separate investigation and were dealt with accordingly.

- Interviews with those personnel you claim were present when Mr Gilmore made comment to you and who were not interviewed during the initial investigation do not provide any further clarity on the alleged incident.”

34. Mr Fenton gave evidence to the tribunal in support of the claimant and stated that he was aware of continuous talk and banter about the claimant’s sexuality and remarks of a similar nature being directed towards the claimant on the minibus although he could not say who made the comments. In his witness statement Mr Fenton gave more detail in relation to comments made to or about the claimant. He stated that it started a couple of years ago when Bill Marchant came up with a story that the claimant had been discharged from the army for sucking off a soldier who fell asleep in their billet. Mr Fenton

stated that at first not too many people believed this as Bill Marchant was a 'Walter Mitty' type but as time went on the stories grew and that various stories were circulating of the claimant on weekends away with his boyfriend and being seen with young men in Belfast city bars. Mr Fenton also referred to the workers accommodation which consisted of two buildings and that one weekend when the claimant was off the workers who shared one of the buildings with him moved into the other building leaving the claimant on his own. According to Mr Fenton the claimant's building got the name of 'The Blue Oyster Club' which was a reference to a gay club. Mr Fenton also referred to comments made in the minibus over a period of a few years when the claimant was present. If something was in the paper or in the news about a gay person or gay sex, comments were made that 'someone here would love that'. He also heard the comment that 'some people loved to suck cock'. No names were mentioned but the claimant was on the bus and Mr Fenton felt that this comment was directed towards the claimant. Mr Fenton did not attribute the latter comment to anyone in particular in his statement. According to Mr Fenton everyone was involved in banter. Mr Fenton conceded in cross-examination that he himself made comments about the claimant's sexuality from time to time. This may explain why Mr Fenton did not report any of this behaviour to management until he was asked directly about the matter by Mr Hillis in the context of the incident in the minibus on 1 November 2012. Mr Fenton's account of the minibus incident was that when Mr Gilmore got into the minibus he said that his ears were burning, meaning that someone was talking about him. Mr Fenton responded, "Which one left or right" to which Mr Gilmore replied "Both" and continued "It would suit them better if they came out of the closet". In cross-examination Mr Fenton adhered to his account of the matter. Mr Fenton also commented that he didn't know if the claimant was gay and that it must be difficult for him to go management and say that he is 'a fruit'. Mr Fenton also commented that a lot of people didn't like the claimant and that he wasn't the best driver. According to Mr Fenton when the claimant had an accident he was made an example of whereas other workers' accidents were hushed up. He added that Mr Gilmore and the claimant hated each other and attributed the 'sucking off' comment to Mr Gilmore. Mr Fenton stated that there was talk about everyone but the stuff about the claimant wasn't nice. Mr Moore challenged Mr Fenton by asking him how the respondent was meant to protect the claimant if it was not made aware of this treatment to which Mr Fenton responded that they can't and that the claimant didn't want to "come out "and didn't want to say about being "a fruit". Mr Fenton went on to say that he didn't know that the claimant was gay and that he was probably trying to keep it quiet.

35. In his evidence to the tribunal, Mr Gilmore sought to explain his change of stance on the basis that at first he didn't want the claimant to lose his job and didn't want to be portrayed as a squealer or a tout but that by the time of the

second interview he was aware that the claimant had told lies about him. Thus at the second interview he referred to blows raining down on him in contrast to making no comment of this nature in the first interview.

36. The claimant was in receipt of Jobseekers Allowance from 22 December 2012 to the date of hearing.

The law

Unfair Dismissal

Substantive Unfairness

37. Article 130 of the Employment Rights (Northern Ireland) Order 1996 insofar as relevant provides as follows:-

> "130. -(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this paragraph if it –
>
> (b) relates to the conduct of the employee,
>
> (3) Where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

38. In the application of this statutory guidance the tribunal is mindful of the considerable body of case law and in particular the guidance stemming from the case of **Iceland Frozen Foods Limited v Jones [1982] IRLR 439** (reaffirmed by the Court of Appeal in England in the cases of **Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827**) which includes (inter alia) that in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another and that the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. In this regard the tribunal is also assisted by the guidance given by the Court of Appeal in **Dobbin v Citybus Ltd [2008] NICA 42** as to how an industrial tribunal should approach the task of determining the fairness of a dismissal and in the case of **Rogan v South Eastern Health and Social Care Trust [2009] NICA 47**.

39. In **Dobbin v Citybus Ltd [2008] NICA 42** the Court of Appeal provided guidance as to how an industrial tribunal should approach the task of determining the fairness of a dismissal. The judgment of Higgins LJ reads as follows:-

> "[48]… The equivalent provision in England and Wales to Article 130 is section 98 of the Employment Rights Act 1996 which followed equivalent provisions in section 57 of the Employment Protection (Consolidation) Act 1978.
>
> [49] The correct approach to section 57 (and the later provisions) was settled in two principal cases - British Homes Stores v Burchell [1980] ICR 303 and Iceland Frozen Foods Ltd v Jones [1983] ICR 17 – and explained and refined principally in the judgments of Mummery LJ in two further cases – Foley v Post Office and HSBC Bank Plc (formerly Midland Bank Plc) v Madden reported at [2000] ICR 1283 (two appeals heard together) and J Sainsbury v Hitt [2003] ICR 111.
>
> [50] In Iceland Frozen Foods Browne-Wilkinson J offered the following guidance –
>
> 'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to

adopt in answering the question posed by section 57(3) of the [Employment Protection (Consolidation) Act 1978] is as follows:

(1) the starting point should always be the words of section 57(3) themselves;

(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;

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

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

(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'

[51] To that may be added the remarks of Arnold J in British Homes Stores where in the context of a misconduct case he stated -

'What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to

discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being “sure,” as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter “beyond reasonable doubt.” The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion’.

40. This passage was cited with approval by the Court of Appeal in its recent decision in the case of **Rogan v South Eastern Health and Social Care Trust [2009] NICA 47**.

Procedural Fairness

41. When an employer is considering dismissing an employee it must follow the statutory dismissal procedure. This is the minimum procedure which must be followed in every case to which it applies. In the present case the standard procedure applies which is as follows:-

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

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

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

Step 2: meeting

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

(2) The meeting must not take place unless –

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

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

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

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

Step 3: appeal

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

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

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

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

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

42. The case of ***Polkey v Dayton Services LTD 1987 3 All ER 974 HL*** is of relevance in the event of procedural errors in the disciplinary process. The effect of **Polkey** may be summarised as follows:-

(a) Where an employee is dismissed in breach of the statutory dismissal procedures the dismissal is automatically unfair under Article 130(A) of the 1996 Order, but the case of **Polkey** applies in full so as to enable the tribunal to apply a reduction in the compensatory award of up to 100% to reflect the percentage chance of dismissal.

(b) Where the statutory disciplinary procedures have been complied with, but there is a breach of procedures other than the statutory procedures and the employer can show more than the 50% chance that he would have dismissed the employee anyway, the dismissal is fair (Article 130(A)(2)). **Polkey** is inapplicable as there is no question of compensation at all.

(c) In the event of the statutory disciplinary procedures being complied with by the employer, and the employer showing less than a 50% chance that the employee would have been dismissed anyway, and should the breach of procedures other than the statutory procedures be sufficiently serious, the dismissal will be unfair on ordinary principles, but the compensatory award will be subject to a **Polkey** reduction to reflect the chance of dismissal (0% - 50%).

Discrimination on grounds of sexual orientation

43. (1) It is unlawful for an employer to discriminate against another on the grounds of sexual orientation (Regulation 6(2) Employment Equality (Sexual Orientation) Regulations (Northern Ireland) Order 2003).

(2) It is unlawful for an employer to harass another on the grounds of sexual orientation (Regulation 6(3) Employment Equality (Sexual Orientation) Regulations (Northern Ireland) Order 2003).

(3) Discrimination on the grounds of sexual orientation is to treat someone less favourably than another on the ground of sexual orientation (Regulation 3 Employment Equality (Sexual Orientation) Regulations (Northern Ireland) Order 2003).

(4) Harassment is to subject another to unwanted conduct which has the purpose or effect of violating the other's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the other on the ground of sexual orientation (Regulation 5 of the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) Order 2003).

(5) It is for the claimant who complains of discrimination on the grounds of sexual orientation 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 to which regulation 34 applies or which by virtue of Regulation 24 or 25 of Employment Equality (Sexual Orientation) Regulations (Northern Ireland) Order 2003 is to be treated as having committed such an act against the claimant (Regulation 35 of the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) Order 2003).

(6) 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 out in the Annex to the decision of the English Court of Appeal in ***Igen v Wong [2005] 3 All ER 812***.

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

"(1) Pursuant to section 63 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 Part (II) or which by virtue of section 41 or section 42 of the SDA is to be treated as having been committed against the claimant. These are referred to 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 merely 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 section 63A (2). At this stage the tribunal does not have to reach a definitive conclusion that there was an act of unlawful 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 include, 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 within 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 section 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 grounds 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 such 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 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."

(7) In the ***McDonagh*** case Kerr LCJ, as he then was, stated that the first question to be addressed is has the claimant proved, on the balance of probabilities, facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed the act of discrimination. He went on to say:-

"In addressing this question, it would be necessary for the judge to bear a number of ancillary matters in mind. First, that it is unusual to find evidence of discrimination. Secondly, that the conclusion on the preliminary issue will usually be a matter of inference to be drawn from the primary facts. Thirdly, it must be clearly understood that the plaintiffs do not have to discharge a final burden, merely whether on the facts as found, it is possible to draw the inference of discrimination and finally it must be assumed at this stage that no adequate explanation for the discrimination exists."

(8) The application of the burden of proof was also considered in ***Madarassy v Nomura International PLC [2007] EWCA CIV 33***. In that case Mummery LJ, who gave the decision of the English Court of Appeal, stated in paragraph 52:-

"She [Madarassy] only has to prove facts from which the tribunal 'could' conclude that there has been unlawful discrimination by Nomura, in other words she has set up a 'prima facie' case."

At paragraph 56 he stated:-

*"The court in **Igen v Wong** expressly rejected the argument that it was sufficient for the complainants simply to prove facts for which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination."*

The learned Lord Justice elaborated on "could conclude" at paragraphs 57 and 58:-

"'could conclude' in section 63 A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This will include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage …., the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the

act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the claimant were of like with like as required by section 5(3) of the 1975 Act; and the available evidence of the reasons for the differential treatment.

The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent."

Further clarification was given by Mummery LJ at paragraph 71:-

"Section 63A(2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the claimant or the situations with which the comparisons are made are not
truly like the complainant or the situation of the complainant; or that even if there has been less favourable treatment of the complainant, it is not on the grounds of her sex or pregnancy."

(9) The Northern Ireland Court of Appeal in ***Nelson v Newry & Mourne District Council [2009] NICA 24*** cited with approval the comments of Elias J in ***Laing v Manchester City [2006 IRLR 748*** when he stated:-

"74The focus of the tribunal analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination that is the end of the matter. It is not improper for a tribunal to say in effect "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race."

(10) To succeed in a claim for discrimination on the ground of sexual orientation a claimant must show that the respondent treated him less favourably than he treated or would treat other persons on the ground of

sexual orientation. In making such a comparison the relevant circumstances in the one must be the same or not materially different from the other. The less favourable treatment element may be established by reliance on an actual comparator or a hypothetical comparator.

(11) In ***Shamoon v Chief Constable of the RUC (HL) [2003] ICR 337*** the House of Lords gave helpful guidance to tribunals faced with the task of assessing whether a claimant has established the evidentiary ingredients to prove discrimination. Lord Nicholls stated at page 342, paragraph 12:-

> *"The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases were it is convenient to decide the less favourable issue first."*

(12) In ***Nagarajan v London Regional Transport [1999] ICR 877, 884*** Lord Nicholls said:-

> *"…Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances."*

(13) The decided cases indicate that it is usual, in assessing whether discrimination has been proved on prescribed grounds, for tribunals to rely on inferences and deductions from facts found because it is unusual for direct evidence of discrimination to be available.

Victimisation

44. Regulations 4 and 6(2) of Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 are of particular relevance to the claimant's claim that he was victimised. These provide as follows:-

4 (1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if he treats B less favourably than he treats or would treat other persons in the same circumstances, and does so by reason that B has -

(a) brought proceedings against A or any other person under these Regulations,

(b) given evidence or information in connection with proceedings brought by any person against A or any other person under these Regulations,

(c) otherwise done anything under or by reference to these Regulations in relation to A or any other person, or

(d) alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of these Regulations or by reason that A knows that B intends to do any of those things, or suspects that B has done or intends to do any of them.

(2) Paragraph (1) does not apply to treatment of B by reason of any allegation made by him, or evidence or information given by him, if the allegation, evidence or information was false and not made (or, as the case may be, given) in good faith.

6 (2) It is unlawful for an employer, in relation to a person whom he employs at an establishment in Northern Ireland, to discriminate against that person -

(a) in the terms of employment which he affords him;

(b) in the opportunities which he affords him for promotion, a transfer, training, or receiving any other benefit;

(c) by refusing to afford him, or deliberately not affording him, any such opportunity; or

(d) by dismissing him, or subjecting him to any other detriment.

(3) It is unlawful for an employer, in relation to employment by him at an establishment in Northern Ireland, to subject to harassment a person whom he employs or who has applied to him for employment.

45. The approach to be taken in such cases in order to determine whether victimisation has taken place was set out in the case of **McNally v Limavady Borough Council [2005] NICA 46** by Kerr LCJ. The person who alleges they have been victimised is required to show that they have done the protected act, they must have been treated less favourably, and the treatment must have occurred because the person has done the protected act.

Trade Union Activities

46. Articles 73 of the Employment Rights (Northern Ireland) Order 1996 make provision in relation to the right of a worker not to be subjected to any detriment by his employer if the act or failure takes place for the sole or main purpose of preventing or deterring him from being or seeking to become a member of an independent trade union, preventing or deterring him from taking part in trade union activities, preventing or deterring him from making use of trade union services or compelling him to be or become a member of any trade union. Article 136 makes specific provision in relation to dismissal for engagement in Trade Union membership or activities. Paragraph 45 of the Labour Relations Agency Code of Practice on Disciplinary and Grievance Procedures reads as follows:-

> "Disciplinary action against a trade union representative can lead to a serious dispute if it is seen as an attack on the union's functions. Normal standards should apply to their conduct as employees but, if disciplinary action is considered, the case should be discussed, after obtaining the employee's agreement, with an appropriate senior lay trade union representative in the company or an appropriate full-time union official."

Submissions

47. Both parties helpfully provided detailed written submissions which are attached to this decision. Both parties also took the opportunity afforded to them to make oral submissions on the final day of the hearing. The main points relied upon are set out below.

Claimant's Written Submissions

(1) On behalf of the claimant, Mr McEvoy submitted that neither Mr Adlington nor Mr Hillis had a genuine or reasonable belief in the claimant's misconduct. According to Mr McEvoy, Mr Adlington effected a belief in the alleged misconduct but that this was perverse and unreasonable as it was based on unreliable statements. Mr McEvoy submitted that the respondent did not carry out a reasonable

investigation. Mr McEvoy also contended that Mr Spruth wrongly chose to proceed rather than allow the grievance to run its course. Mr McEvoy drew attention to the failure by Mr Adlington to disclose the additional interviews of Mr Gilmore and Mr English to the claimant and the failure to produce these notes until the tribunal hearing. Furthermore he submitted that Mr Hillis did not operate the appeal so as to rectify this substantive and procedural unfairness but that coupled with his earlier involvement in the process compounded it.

(2) In relation to contributory fault Mr McEvoy contended that there was no conclusive proof of any assault by the claimant on Mr Gilmore. Mr McEvoy submitted that Mr Gilmore's evidence was inconsistent and that Mr English's evidence was neither clear nor credible.

(3) Mr McEvoy submitted that Mr Gilmore was guilty of harassment and that the respondent was liable in respect of same because having been put on notice of same on 29 November 2012 it failed to take reasonable steps save for the follow up undertaken by Mr Hillis which despite proving that homophobic conduct took place did not result in any action being taken. In addition, Mr Adlington took no action when told about it on 29 November 2012. Mr McEvoy placed strong reliance on Mr Fenton's evidence.

(4) Mr McEvoy submitted that Mr Gilmore was an appropriate comparator and that the claimant's treatment in respect of the investigation and his ultimate dismissal constituted less favourable treatment as compared with Mr Gilmore. In particular Mr McEvoy submitted there was sufficient evidence to warrant a disciplinary investigation of Mr Gilmore's actions. In contrast there was no investigation of the claimant's complaint. Mr McEvoy submitted that this was evidence of inconsistency of treatment as between the claimant and Mr Gilmore.

(5) As to the correct manner in which the tribunal should address the fairness or otherwise of the claimant's dismissal Mr McEvoy submitted that the tribunal should only examine this issue in terms of whether the dismissal fell within the band of reasonable responses if it was satisfied that the respondent could have established a genuine belief in the claimant's guilt after a reasonable investigation and Mr McEvoy submitted that the tribunal should not be so persuaded.

(6) Mr McEvoy also drew attention to a 2011 research paper by Mr Matthew McDermott of the Rainbow Alliance which was commissioned by the Minister for Social Development entitled "Through our Eyes – Experiences of Lesbian, Gay and Bisexual People in the

Workplace". Mr McEvoy placed reliance on this paper in the context of his submission that the claimant's concealment of his sexual orientation was typical of a man of his age and the difficulties faced by gay people coming out in the workplace in Northern Ireland.

(7) In relation to discrimination Mr McEvoy submitted that both limbs of Regulation 5(1) were satisfied. Mr McEvoy submitted that the claimant was less favourably treated in comparison with Mr Gilmore or a hypothetical comparator in respect of both suspension and dismissal. No action was taken against Mr Gilmore when the respondent became aware of his alleged remarks. Mr Hillis gave no explanation of this. Mr McEvoy submitted that there was sufficient evidence to at least warrant a disciplinary investigation against Mr Gilmore.

(8) In relation to harassment Mr McEvoy submitted that the claimant had been subjected to a campaign of homophobic treatment by Mr Gilmore but that even a one off incident would suffice to constitute harassment and drew attention to the case of **Reed and Bull Information Systems Ltd v. Stedman [1999] I.R.L.R. 299**. Mr McEvoy accepted that the claimant had raised no formal grievance about harassment but the respondent was on notice of this from 29 November 2012. In response Mr Adlington did nothing. Mr Hillis spoke to witnesses but did nothing further and was unable to offer an explanation for his inaction.

(9) In terms of victimisation, Mr McEvoy submitted that Mr Gilmore's behaviour towards the claimant constituted a protected act and the dismissal was the relating conduct and that there was no obligation on the claimant to raise it again. Mr McEvoy contended that the dismissal of the claimant constituted retaliatory conduct and a punitive mindset that was consistent with a disposition to victimise the claimant.

(10) Mr McEvoy did not press the case in relation to trade union activities and was content to leave it to the tribunal to determine this issue.

(11) In relation to compensation Mr McEvoy submitted that the claimant's case fell into the mid-range in Vento on the basis of harassment, discriminatory dismissal and the failure to investigate the claimant's complaint.

(12) In relation to the factual issues, Mr McEvoy submitted that the failure to suspend Mr Gilmore was due to Mr Hillis' partial, prejudicial and inappropriate conduct on 5 November 2012 in meddling in the investigation. Mr McEvoy submitted that Mr Gilmore did use the phrases

"suck cock" and "shirt lifters" on unknown dates and referred to "come out of the closet" on 1 November 2012 and "fucking fruit" on 2 November 2012.

Respondent's Written Submissions

(1) On behalf of the respondent, Mr Moore submitted that the claimant was fairly dismissed for gross misconduct in that he committed an assault when he punched a fellow employee. Mr Moore submitted that the employer only had to prove that it acted reasonably at the time that it made its final decision to dismiss the employee. In the present case that was when it determined the appeal. Mr Moore reminded the tribunal that its role is not to conduct its own investigation but to assess whether the employer's action fell within the range of reasonable responses.

(2) Mr Moore submitted that the respondent did not treat the claimant less favourably because he was not made aware of the alleged treatment until 23 days after the claimant was suspended for assault. Mr Moore also drew attention to the claimant's description of the matter in his witness statement in which he said that Mr Gilmore had made various indirect remarks about the claimant's personal life.

(3) The claimant was not subjected to a detriment or dismissed because of his trade union activities.

(4) Mr Moore invited the tribunal to prefer the respondent's evidence to the claimant's which he submitted was inconsistent and drew attention to what he described as a deliberate ploy by the claimant to associate his allegations with the 18 month period during which he and Mr Gilmore were not on speaking terms. Mr Moore also pointed out that the alleged provocation by Mr Gilmore
was not raised until 27 days after the incident. Mr Moore also drew attention to paragraph 26 of the claimant's witness statement where he said, "This is why I never complained or made a grievance against William Gilmore". Mr Moore submitted that Mr Gilmore explained why he changed his story and pointed out that the claimant failed to give an account of the incident at the investigatory meeting despite being accompanied by a senior trade union official.

(5) Mr Moore submitted that the claimant was not dismissed because of his sexual orientation or his trade union activities and that an employer cannot protect an employee who does not tell him about allegations of harassment.

(6) Mr Moore submitted that the respondent did take reasonable steps in that the claimant was aware that there were proper facilities and procedures in place to complain about bullying and harassment but that the claimant did not avail of these.

(7) Mr Moore also relied on the case of **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** and submitted that there were no ongoing acts or campaign of harassment as the claimant was only able to supply two dates on which such treatment occurred.

(8) Mr Moore also referred the tribunal to **Nelson** and **Laing** (see above) in relation to the burden of proof and submitted that there was no evidence of discrimination in the present case.

(9) In relation to discrimination Mr Moore submitted that the tribunal should follow the approach of the House of Lords in **Shamoon** and concentrate on the reason why the claimant was dismissed. Mr Moore submitted that in the present case the claimant was not dismissed because of his sexual orientation or his trade union activities but because he assaulted a fellow employee and that therefore his claim should fail.

(10) Mr Moore also challenged the factual basis of the discrimination claim and in particular that the claimant was isolated in a hut whereas the true position was that Mr Brown was in the same hut.

<u>Oral Submissions</u>

48. Mr McEvoy submitted that no reasonable decision maker could have concluded on the civil standard the offence had been committed.

Mr McEvoy submitted that in relation to discrimination the burden shifted to the respondent on the basis of the failure by Mr Adlington and Mr Hillis to take any action in respect of Mr Gilmore and that neither had offered any explanation for their failure to act. Mr McEvoy further submitted that it was of more concern that Mr Hillis had found something out but did nothing about it. Mr McEvoy submitted that in this connection the tribunal should take note of the research paper by Mr McDermott and not let the respondent off the hook in relation to its obligation to investigate.

In relation to harassment Mr Hillis took no steps to follow this up and the respondent was vicariously liable for the harassment having been put on notice of it and taken no action.

In relation to whether a grievance was raised Mr McEvoy pointed out that there was no requirement to raise a formal grievance under the respondent's internal procedures.

Mr McEvoy further submitted that Regulation 4(1) (a) gives a broad definition of 'protected act' and here the trigger was provided by Mr Gilmore committing an act which contravened the Regulations. The dismissal of the claimant is relevant conduct. Mr Adlington's punitive mindset was demonstrated by his decision to dismiss and was consistent with wanting to victimise the claimant.

In relation to trade union activities Mr McEvoy submitted that the respondent's evidence reeked of antipathy towards the trade union and drew attention to the palpable lack of a relationship with Mr Cunningham.

In his oral submissions Mr Moore drew attention to three aspects of Mr Fenton's evidence which he submitted were particularly important – (i) Everyone was involved in banter, (ii) Mr Fenton didn't know if the claimant was 'gay', (iii) Mr Fenton also fell into homophobic comment when he said in relation to the claimant that it must be difficult for him to go management and say that he is a fruit.

49. Mr Moore submitted that there could be no question of substantive unfair dismissal as the dismissal was based on an assault in which the victim was badly hurt.

In relation to procedural unfairness Mr Moore submitted that Mr Adlington did what anyone would do namely he went back over the matter with the witnesses in order to confirm in his mind what he felt was the truth. Mr Adlington did nothing wrong but wanted to make 100% sure that the alleged assault had taken place. Mr Moore also rejected the condemnation of Mr English who Mr Moore submitted was an independent witness with no axe to grind with anyone. Mr Hillis did not bully Mr Gilmore but simply told Mr Gilmore that no matter what he decided the respondent would carry out an investigation and if Mr Gilmore wished he could report the matter to the police which he did.

Mr Moore submitted that there had been no cross-examination in relation to the Polkey aspect and if the tribunal did find weaknesses in the respondent's procedure it should nevertheless conclude that the claimant would have been dismissed in any event. If the tribunal found that the dismissal was unfair it should make a 100% deduction as to do otherwise would be to condone violence in the workplace.

Mr Moore submitted that the contents of the research paper were irrelevant as the claimant did not inform management about his treatment. In addition, the claimant had failed to avail of the grievance, bullying and harassment procedures.

50. In response Mr McEvoy commented that he was not sure how Mr Fenton's evidence assisted the respondent's case as it pointed to a culture of unacceptable banter and homophobic banter. Mr McEvoy also pointed out that whether or not Mr Fenton knew that the claimant was gay was immaterial.

Mr McEvoy also submitted that there was nothing to permit the respondent to rely on a reasonable steps defence and that if appropriate procedures were in place these were simply not applied.

Additional Written Submissions

51. Both parties furnished additional written submissions in relation to the respondent's handbook which was provided at the tribunal's direction after the conclusion of the hearing. These submissions are also appended to this decision and have been taken into account by the tribunal in deciding the case.

Conclusions

Unfair Dismissal

52. We remind ourselves that it is not for the tribunal to determine what actually occurred on 2 November 2012. The tribunal's role is to determine whether the respondent carried out a reasonable investigation and having done so whether the respondent had a genuine and reasonable belief in the claimant's alleged misconduct. For this reason in the context of the unfair dismissal claim we do not consider that it is appropriate for us to make findings in relation to all of the factual issues identified in paragraph 3 above. It is also important to note that issues in relation to the investigation of alleged misconduct feature in both the question of whether a dismissal is substantively unfair and whether it is procedurally unfair.

53. The events that gave rise to the invocation of the respondent's investigatory and disciplinary procedures were somewhat unusual in that neither of the protagonists reported the 2 November 2012 incident to management. Instead management's knowledge of the incident was gleaned initially from a third party, Mr English, who gave an account of the incident which portrayed the claimant as the aggressor. The alleged assault by the claimant on Mr Gilmore was subsequently brought to the attention of the General Manager, Mr Hillis, who spoke with Mr Gilmore and encouraged him to make an official complaint

which he did. On this basis Mr Spruth conducted an investigatory interview with the apparent victim, Mr Gilmore, who, whilst admitting that he was assaulted, downplayed the nature of the assault and in particular did not allege that he was struck or punched by the claimant. Mr Spruth interviewed Mr English on the same day. Mr English maintained that the claimant had punched Mr Gilmore. Mr Spruth also conducted an investigatory interview with the claimant. This was an unsatisfactory interview but this was mainly due to the stance adopted by the claimant and Mr Cunningham. The net result was that the meeting was adjourned, and not reconvened, with the claimant not giving his account of the incident. Mr Spruth proceeded to recommend that disciplinary proceedings should be taken against the claimant.

54. We consider that Mr Spruth ought to have done more to ensure that the claimant had an opportunity to give his side of the case and should at least have attempted to reconvene the investigatory meeting. Whilst this was not a fatal flaw in itself it meant that the disciplinary proceedings commenced with only one half of the picture on the record. In addition, Mr Spruth failed to grasp the mettle in relation to the grievance and thus bears some responsibility for the respondent's failure to appropriately address the impact of the grievance on the disciplinary process.

55. It is not in dispute that the claimant was given a full opportunity to state his case at the disciplinary hearing before Mr Adlington. In summary the claimant's account was that he had been the subject of homophobic abuse prior to the date of the
incident by Mr Gilmore and others prior to 2 November 2012 and seeing Mr Gilmore smiling and smirking at him he decided to have it out with him. Mr Gilmore did not dispute that he smiled or smirked at the claimant but said that this was due to his amusement about a comment made about the claimant's driving. It is not necessary to form a view about this but as Mr Fenton indicated rightly or wrongly there were issues about the claimant's driving ability amongst the claimant's co-workers and we consider that this may well have been the cause of Mr Gilmore's amusement. Against the background of homophobic abuse the claimant did not see it this way and admitted approaching Mr Gilmore in order to confront him about his treatment. The claimant denied assaulting Mr Gilmore and alleged that Mr Gilmore was the aggressor and had again subjected him to homophobic abuse. The claimant also provided Mr Adlington with the names of those who had either witnessed or been involved in the previous homophobic behaviour that is Mr Brown, Mr Watson, Mr Fenton and Mr Gilmore. Mr Adlington re-interviewed Mr Gilmore and Mr English but did not speak to the other three witnesses. Mr Adlington did not consider that the derogatory remarks about the claimant's sexuality warranted further investigation. In addition, neither of the further

interviews that Mr Adlington did conduct was disclosed to the claimant before Mr Adlington made his decision. Nor did Mr Adlington raise the alleged behaviour in the minibus on 1 November with Mr Gilmore. The reason for this failure would appear to be that his focus was on the events that occurred on 2 November 2012 and not what preceded it. Whilst it is important to keep one's feet on the ground as to the level of investigation necessary in respect of a disciplinary offence it is clear that the claimant was at risk of being dismissed and such further information as these witnesses could provide would potentially have supported the claimant's allegations of homophobic abuse and thereby at the very least have offered a degree of mitigation in the event of him being found guilty of assault. It is clear that Mr Adlington did not consider whether the allegations made by the claimant constituted mitigating circumstances. We consider this to be a serious defect in the disciplinary process which goes to whether the allegation against the claimant was properly investigated. For these reasons we consider that the disciplinary hearing was flawed.

56. It is necessary of course to consider the process as a whole and it is quite possible for defects in a disciplinary hearing to be cured on appeal. To his credit Mr Hillis was prepared to go further than Mr Adlington in relation to other potentially relevant witnesses and interviewed four employees in relation to the minibus incident. However, all of this ostensibly good work was undermined by one serious flaw which was that Mr Hillis should not on any reckoning have taken on the task of conducting the appeal due to his involvement at an earlier stage in the process. In our view it was conspicuously unfair to the claimant for Mr Hillis to have been involved at both the beginning and end of the disciplinary process. Given that Mr Hillis strongly encouraged a reluctant Mr Gilmore to make a complaint of assault he should not have heard the appeal. It is difficult to fault Mr Hillis' conduct of the appeal which on paper and as described in his evidence appears to have been scrupulously fair and as we have said Mr Hillis did take the trouble to interview additional witnesses identified by the claimant. However, we consider that all of this was undermined by Mr Hillis' important role at the outset of the process. There was no need for Mr Hillis to hear the appeal in an organisation of the respondent's size and with the resources at its disposal. Mr Hillis offered no explanation as to why someone else in management could not have dealt with the appeal.

57. The claimant did not seek to suggest that the respondent failed to comply with the minimum requirements of the 3 step statutory procedure and we are satisfied that the minimum requirements of the statutory procedure was adhered to.

58. In our view the flaws in the investigatory and disciplinary procedure render the dismissal substantively unfair. As we have indicated in the context of whether or not the dismissal was fair it is not the job of the tribunal to determine what happened on 2 November 2012. That is for the employer to determine having carried out a reasonable investigation. Mr McEvoy has invited us to conclude that no reasonable employer could have found the claimant guilty of assault. We think that this is going too far. In our view it would have been possible for the respondent to have arrived at a finding that the claimant had been guilty of assault if the process had been properly handled.

59. It is therefore necessary for us to consider in percentage terms the chance that the claimant would have been dismissed anyway. We are not satisfied that the respondent has shown that there was more than a 50% chance that it would have dismissed the claimant anyway. The dismissal was therefore unfair. We regard the procedural failings in this case as being of a serious nature. However, as we have indicated above, it would have been possible for the respondent to have dismissed the claimant fairly and we therefore consider that when we come to consider remedies any compensatory award will be subject to a **Polkey** reduction to reflect the chance of dismissal which we measure at 20%.

60. With regard to the issue of contributory behaviour we consider that the claimant was partly to blame as on his own case because he decided to confront Mr Gilmore whereas he could and should have reported Mr Gilmore's behaviour to management. We take into account the difficulties faced by the claimant who would effectively have had to "out" himself and we consider that it would be just and equitable to reduce any compensatory award by 10% on the basis of the claimant's contributory behaviour.

61. Although the respondent sought to suggest that the claimant had not done enough to mitigate his loss we are satisfied on the evidence that he took all reasonable steps to find new employment which included applying for suitable jobs and registering with recruitment agencies.

Discrimination

62. As the caselaw makes clear in order to succeed in a claim for discrimination on the ground of sexual orientation a claimant must show that the respondent treated him less favourably than he treated or would treat other persons on the ground of sexual orientation. We did not receive detailed submissions on the **Igen** guidelines and in particular there was no reliance upon evasive or inadequate responses to a statutory questionnaire and there was no suggestion that a relevant Code of Practice had been breached. We have sought to apply the guidelines as best we can to the facts of this case. There

were some criticisms made of the accuracy of the note taking and the late disclosure of records but in the context of this case none of these failings could in our view properly serve either to shift the burden to the respondent or form the basis for a finding of discrimination. Furthermore we do not consider that the claimant has shown a difference of treatment on the facts to shift the burden unto the respondent. We are in any event satisfied that the respondent has proved that it did not discriminate against the claimant on the basis of sexual orientation.

63. At the heart of our consideration of the discrimination claim is the question of whether Mr Gilmore is an appropriate comparator. We do not consider that he is. As the respondent has pointed out there was no complaint or grievance made in respect of him. In these circumstances there was no basis on which to investigate his behaviour, suspend him or take any disciplinary action against him prior to 29 November 2012 and the failure to take disciplinary action in relation to the alleged assault at that remove was entirely understandable in view of both the delay and the fact that this was being raised for the first time in the context of disciplinary proceedings against the claimant. Had the respondent brought disciplinary proceedings against one of two persons involved in a fight in similar circumstances we would have been more likely to have been prepared to infer discrimination but that was not the case here and each case must be decided on its own facts. What action should have been taken once the allegations of homophobic behaviour and harassment is another matter but we are not satisfied that the failure to take any action against Mr Gilmore constitutes unlawful discrimination on the basis of sexual orientation. Nor do we consider that the unsatisfactory aspects of the investigatory and disciplinary process were in any way influenced by or due to conscious or unconscious discrimination by the respondent. The respondent clearly took a hard line in respect of allegations of assault and this may have served to dissuade the disciplinary decision makers from giving as much weight to mitigating features as they might it is not evidence of discrimination. The respondent can be legitimately criticised for not taking any further action against Mr Gilmore in view of the serious allegations made against him but we do not consider that this failure sounds on the claimant's discrimination claim.

<u>Harassment</u>

64. As set out in the agreed factual issues the complaint of harassment was based on allegations that Mr Gilmore made a number of comments either directly to the claimant or indirectly about him. These can be divided into comments allegedly made on the minibus on or about 1 November 2012:- (a) "There's some people in here who would suck cock", (b) Some people should come out of the closet", and (c) a reference to the claimant as a "shirt-lifter" and the allegation that on 2 November 2012 Mr Gilmore said to the claimant "Sure you're a fucking fruit". Mr Gilmore denied making any of these remarks.

Mr Fenton's evidence was that there was continuous talk and banter about the claimant's sexuality and that remarks of a similar nature were directed towards the claimant on the minibus although he could not say who made the comments. Mr Fenton heard the comment that 'some people loved to suck cock' but could not say who made this comment although he felt that it was directed towards the claimant. Mr Fenton attributed the comment -"It would suit them better if they came out of the closet" to Mr Gilmore. We prefer the evidence on this issue given by the claimant and Mr Fenton to the evidence of Mr Gilmore whom we found an unconvincing witness. Mr Fenton's evidence was largely unchallenged. In particular, there was no suggestion that his evidence was unworthy of belief or was given because he was a good friend of the claimant or a disgruntled or disaffected worker. On the contrary Mr Moore sought to place reliance on it in defence to the discrimination and harassment aspect of the case. Mr Fenton also owned up to participating in the ill treatment of the claimant and gave evidence about the claimant's driving skills that indirectly supported the respondent's case. We are satisfied on the balance of probabilities that the Mr Gilmore made the comments attributed to him by the claimant and corroborated by Mr Fenton's evidence. Although Mr Brown was not called to give evidence, we also take account of what he said during his interview with Mr Hillis which supports the claimant's case. This behaviour clearly constituted harassment on the grounds of sexual orientation and the respondent is liable in respect of same. However, we are not persuaded that there was anything akin to a campaign of harassment. At its height this treatment went on for weeks or months. This is how the claimant described the timescale when he first raised it with the respondent. The claimant did not report it to anyone in authority and it would appear that it took place amongst workers of the same grade. There is no evidence that it was witnessed or tolerated by anyone in authority such as a foreman or a manager. The respondent had policies in place that were designed and intended to discourage such behaviour but we received no evidence that the respondent took active steps to prevent such behaviour. It seems to us that the respondent adopted a far too passive approach to unpleasant banter notwithstanding its prohibition as set out in its Handbook.

Victimisation

65. We are not satisfied that in dismissing the claimant the respondent was guilty of victimisation. The protected act was said to be the complaint made by the claimant at the disciplinary hearing before Mr Adlington on 29 November 2012 about remarks having been made about his sexuality by work colleagues. It was submitted that Mr Adlington had a punitive mindset but this is far removed from establishing that he was guilty of victimisation. As Kerr LCJ held it is necessary for a person who alleges that he has been victimised to show that he has done the protected act; that he was treated less favourably and the treatment occurred because he had done the protected act. Whilst we are satisfied that the complaint made by the claimant on 29 November

2012 constitutes a protected act we are not persuaded that the other two elements have been established.

Trade Union Activities

66. This aspect of the claim did not feature as prominently as it might have in the hearing. No doubt this was partly due to the fact that Mr Cunningham was not called to give oral evidence. Although reference was made at various points in the statements and evidence to the Labour Relations Agency Code of Practice and paragraph 45 in particular, Mr McEvoy did not press the trade union activities case in his written submissions although he did suggest in his oral submissions that the respondent had evinced an antipathy towards the trade union. The agreed bundle also included a document which stated that the claimant had been elected as a shop steward. Be that as it may we would have required a great deal more evidence and submissions to persuade us that the respondent subjected the claimant to any detriment on the basis of his trade union activities and we do not consider that there is any basis for the complaint.

Remedy

Unfair Dismissal

67. The claimant seeks reinstatement. Reinstatement and re-engagement are governed by Articles 147 to 151 of the 1995 Order. Where a complaint of unfair dismissal is found to be well founded the tribunal must first decide whether to make an Order for reinstatement or re-engagement. Article 150 of the 1996 Order provides that in exercising its discretion under Article 147 to make an order for reinstatement or re-engagement, the tribunal should first consider whether to make an Order for reinstatement and in doing so shall take into account:-

(a) whether the claimant wishes to be reinstated;

(b) whether it is practicable for the employer to comply with an Order for reinstatement and;

(c) where the claimant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

In the present case the claimant has expressed the wish to be re-instated. We received no specific evidence in relation to this issue. Mr Moore informed the tribunal that this issue was raised at a Case Management Discussion on 8 May 2013 and that the respondent was to be notified if it was going to be pursued. Mr Moore did not receive any such notification and therefore the matter was not addressed by him. It is not clear why this did not occur but the fact that there was a change in the claimant's representation may well have been a factor. In the event the tribunal must address this issue in view of the claimant's clearly expressed wishes. We do not know whether it would be practicable for the respondent to comply with an Order for reinstatement. Nor have we received any evidence about re-engagement or as to the contents of any order that the tribunal might be disposed to make under Article 147 or 148. We have found that the claimant did cause or contribute to some extent to the dismissal. In these circumstances the tribunal will reconvene in order to consider whether to make orders of reinstatement or re-engagement.

Harassment on the ground of sexual orientation

68. The claimant is entitled to an award in respect of the harassment that he suffered which we consider was reprehensible. In our view this cases falls within the middle range in ***Vento*** as updated in line with inflation by the Employment Appeal Tribunal in ***Da'Bell v NSPCC [2010] IRLR 19***. The middle band begins at £6,000 and in the circumstances of this case we consider that an award of £7,500 is appropriate in respect of injury to feelings. The claimant will also be entitled to interest at 8% on this award.

69. Having regard to our decision to reconvene the hearing in order to receive evidence and submissions as whether to make orders of re-instatement or re-engagement, no final order in respect of compensation will be made at this juncture.

Chairman:

Date and place of hearing: 7-11 October 2013, Belfast.

Date decision recorded in register and issued to parties