

FAIR EMPLOYMENT TRIBUNAL

CASE REFS: 72/13 FET
1126/13

CLAIMANT: Elaine Marks

RESPONDENT: Select Service Partner UK Ltd

DECISION

The unanimous decision of the Tribunal is that the claimant was unfairly dismissed and that she is awarded compensation of £24,269.38, calculated as set out in this decision. The attention of the parties is drawn to the recoupment notice which is attached to this decision.

The claims of unlawful discrimination on the grounds of religious belief and age are dismissed. The breach of contract claims are also dismissed.

Constitution of Tribunal:

Vice President: Mr N Kelly

Members: Mrs E Torrans
Mr A White

Appearances:

The claimant was represented by Mr N Phillips, Barrister-at-Law, instructed by Worthingtons, Solicitors.

The respondent was represented by Mr C Hamill, Barrister-at-Law, instructed by O'Reilly Stewart, Solicitors.

Background facts

1. The respondent is a large company operating food and drink outlets in transport locations, such as train stations and airports, in the United Kingdom and in the Republic of Ireland. At the relevant times, it operated four such outlets in

Central Station. It also operated outlets in Great Victoria Street Station and in Belfast International Airport.

2. The claimant was the senior manager responsible for the four outlets in Central Station from 2002 until she was dismissed on 13 March 2013. Until approximately October/November 2012, the claimant had reported to an Operations Manager who had been based in either Scotland or England and who had visited Northern Ireland once every month or once every two months. Towards the end of 2012, the respondent organisation was restructured and a new Operations Manager, Mr Paul McMichael, was appointed to take over responsibility for all the operations in Northern Ireland. He was based in Northern Ireland.
3. The claimant had taken part in a Government sponsored scheme since approximately 2008 under which employees of the respondent in Central Station were trained by outside training providers, such as Springvale, in relation to various relevant NVQ courses. On the successful completion by any such employee of such a course, the training provider gave that individual employee a payment of £100.00 by a cheque made out to that employee. At the same time the training provider provided a 'bonus' of between £500.00 and £750.00 by a cheque payable to the respondent. Both cheques were given by the training provider to the respondent's manager, in this case the claimant. The first cheque was then passed to the employee. The second cheque, ie the bonus to the respondent, was intended to be used for training incentives for employees. The claimant lodged those bonus cheques, totalling some £7,000.00 over approximately five years, in the respondent's bank account once they were received by her. The claimant, on each such occasion, then withheld an equivalent amount of cash from the cash receipts in the tills and retained that cash in the company safe in an envelope. That money was then used in relation to staff incentives, days out for employees, team-building, presents, etc. In this decision, this will be referred to as 'the NVQ procedure'.
4. Shortly after the appointment of Mr McMichael as the new Operations Manager, the respondent organisation realised that the NVQ scheme was operated differently in Northern Ireland and commenced an investigation. Following that investigation the claimant was charged with gross misconduct and was dismissed.
5. The claimant alleges that she was unfairly dismissed and that she was unlawfully discriminated against by the respondent and by Mr McMichael on the grounds of religious belief and age.

Relevant law

Tribunal procedure

6. Tribunals must approach with particular care any claim that includes not just a claim of unfair dismissal but, in addition a claim of unlawful discrimination. Further problems can occur where there may be an issue of contributory conduct.

In ***London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220*** the Court of Appeal stated at Paragraph 46:-

“Mr Marsh spoke of his experience that employment tribunals often structure their reasons by setting out all their findings of fact in one place and then drawing on the findings at the later stage of applying the law to the relevant facts. It is not the function of appeal courts to tell trial tribunals and courts how to write their judgments. As a general rule, however, it might be better practice in an unfair dismissal case for an employment tribunal to keep its findings on that particular issue separate from its findings of disputed facts that are only relevant to other issues, such as contributory fault, constructive dismissal and increasingly, discrimination and victimisation claims. Of course some facts would be relevant to more than one issue, but the legal elements of the different issues, the role of the employment tribunal and the relevant facts are not necessarily all the same. Separate and sequential findings of fact on discrete issues may help to avoid errors of law, such as substitution, even if it may lead to some duplication.”

Unfair dismissal

7. The proper approach for an Employment Tribunal to take when considering the fairness of a misconduct dismissal is well settled and was recently considered by the Court of Appeal in **Rogan v South Eastern Health & Social Care Trust [2009] NICA 47**.
8. Article 130 of the Employment Rights (Northern Ireland) Order 1996 provides:-

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

- (a) the reason (or if more than one, the principal reason) for the dismissal and*
- (b) that is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) a reason falls within this paragraph if it –

- (b) relates to the conduct of the employee,*

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

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

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

9. The Court of Appeal in **Rogan** approved the earlier decision of Court in **Dobbin v Citybus Ltd [2008] NICA 42** where the Court held:-

“(49) The correct approach to [equivalent GB legislation] was settled in two principal cases – **British Home Stores v Burchell [1980] ICR 303** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17** and explained and refined, principally in the judgements of Mummery LJ, in two further cases **Foley v Post Office** and **HSBC Bank PLC (formerly Midland Bank) –v- Madden reported at [2000] ICR 1283** (two appeals heard together) and **J Sainsbury v Hitt [2003] ICR 111**.

(50) In **Iceland Frozen Foods**, Browne-Wilkinson J offered the following guidance:-

“Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by [equivalent GB legislation] is as follows:-

- (1) the starting point should always be the words of [equivalent GB legislation] themselves;
- (2) in applying the section an industrial tribunal must consider the reasonableness of the employer’s conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;
- (3) in judging the reasonableness of the employer’s conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
- (4) in many, though not all, cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view, and another quite reasonably take another;
- (5) the function of an industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.”

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

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

10. In **Bowater v North West London Hospitals NHS Trust [2011] EWCA Civ 63**, the Court of Appeal considered a decision of the Employment Appeal Tribunal which had set aside a decision of an employment tribunal. The employment tribunal had determined that a remark made by a nurse in an Accident & Emergency Department was not a sufficient basis for a fair dismissal. Lord Justice Longmore stated at Paragraph 18 of the decision that:-

“I agree with Stanley Burnton LJ that dismissal of the appellant for her lewd comment was outside the range of reasonable responses open to a reasonable employer in the circumstances of the case. The EAT decided that the ET had substituted its own judgment for that of the judgment to which the employer had come. But the employer cannot be the final arbiter of its own conduct in dismissing an employee. It is for the ET to make its judgment always bearing in mind that the test is whether dismissal is within the range of reasonable options open to a reasonable employer.”

He continued at Paragraph 19:-

“It is important that, in cases of this kind, the EAT pays proper respect to the decision of the ET. It is the ET to whom Parliament has entrusted the responsibility of making what are, no doubt, sometimes, difficult and borderline decisions in relation to the fairness of dismissal.”

11. In **Fuller v London Borough at Brent [2011] EWCA Civ 267**, the Court of Appeal again considered a decision of the Employment Appeal Tribunal which had set aside the decision of an employment tribunal on the basis that the employment tribunal had substituted its view for the decision of an objective reasonable employer. Lord Justice Mummery stated at Paragraph 7 of the decision that:-

“In brief the counsel’s case on appeal is that the ET erred in law. It did not apply to the circumstances existing at the time of Mrs Fuller’s dismissal the objective standard encapsulated in the concept of the ‘range or band of reasonable responses’. That favourite form of words is not statutory or mandatory. Its appearance in most ET judgments in unfair dismissal is a reassurance of objectivity.”

At Paragraph 38 of the decision, he continued:-

“On a proper self-direction of law I accept that a reasonable ET could properly conclude that the council’s dismissal was outside the band or range of reasonable responses and that it was unfair. If, as I hold, the ET applied the objective test, it did not err in law and there was no ground on which the EAT was entitled to set it aside or to dismiss Mrs Fuller’s claim.”

12. In **Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721**, the Court of Appeal again considered a decision of an Employment Appeal Tribunal which set aside the decision of an employment tribunal on the ground that that Tribunal had substituted their judgment of what was a fair dismissal for that of a reasonable employer. At Paragraph 13 of the judgment, Lord Justice Elias stated:-

*“Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In **A v B [2003] IRLR 405**, the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee’s reputation or ability to work in his or her chosen field of employment is potentially apposite”*

*“In **A v B** the EAT said this:- Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course even in the most serious cases it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the enquiry should focus no less on any potential evidence that may exculpate or least point*

towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.”

13. In **Spence v Department of Agriculture and Rural Development [2011] IRLR 809**, the Northern Ireland Court of Appeal considered a case where a lengthy report had been compiled by the employer into alleged misconduct by the employee. That report had not been disclosed to the employee in the course of internal disciplinary procedures which led to his dismissal. It was disclosed at the industrial tribunal. Mr Justice Hart stated at Paragraph 21:-

“We recognise that the employer may be justified in withholding a report such as this, particularly where it may disclose sensitive information such as the identify of an informer, or as in the Civil Service, sensitive material being developed for submission to Ministers and which is not yet in the public domain. These are merely some examples of circumstances where an employer may withhold information from an employee during disciplinary proceedings, and there may be other situations where some or all of a report may be legitimately withheld from an employee. Nevertheless, subject to constraints such as these, we feel that a fair procedure requires that normally an employer should consider disclosing anything in its possession which may be of assistance to an employee who is contesting the disciplinary charge, or wishes to make submissions in relation to penalty.”

Unlawful discrimination

14. The proper approach for a Tribunal to take when assessing whether discrimination has occurred and in applying the provisions relating to the shifting of the burden of proof in relation to discrimination has been discussed several times in case law. The Court of Appeal re-visited the issue in the case of **Nelson v Newry & Mourne District Council [2009] NICA -3 April 2009**. The court held:-

*“22 This provision and its English analogue have been considered in a number of authorities. The difficulties which tribunals appear to continue to have with applying the provision in individual cases indicates that the guidance provided by the authorities is not as clear as it might have been. The Court of Appeal in **Igen v Wong [2005] 3 ALL ER 812** considered the equivalent English provision and pointed to the need for a tribunal to go through a two-stage decision-making process. The first stage requires the complainant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. Once the tribunal has so concluded, the respondent has to prove that he did not commit the unlawful act of discrimination. In an annex to its judgment, the Court of Appeal modified the guidance in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 333**. It stated that in considering what inferences and conclusions can be drawn from the primary facts the tribunal must assume that there is no adequate explanation for those facts. Where the claimant proves facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex then the burden of proof moves to the respondent. To discharge that onus, the respondent*

must prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of sex. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to be adduced to discharge the burden of proof. In **McDonagh v Royal Hotel Dungannon [2007] NICA 3** the Court of Appeal in Northern Ireland commended adherence to the **Igen** guidance.

- 23 In the post-**Igen** decision in **Madarassy v Nomura International PLC [2007] IRLR 247** the Court of Appeal provided further clarification of the Tribunal's task in deciding whether the tribunal could properly conclude from the evidence that in the absence of an adequate explanation that the respondent had committed unlawful discrimination. While the Court of Appeal stated that it was simply applying the **Igen** approach, the **Madarassy** decision is in fact an important gloss on **Igen**. The court stated:-

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

That decision makes clear that the words 'could conclude' is not be read as equivalent to 'might possibly conclude'. The facts must lead to an inference of discrimination. This approach bears out the wording of the Directive which refers to facts from which discrimination can be 'presumed'.

- 24 This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the tribunal could properly

conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. In **Curley v Chief Constable of the Police Service of Northern Ireland [2009] NICA 8**, Coghlin LJ emphasised the need for a tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination."

15. In **S Deman v Commission for Equality and Human Rights & Others [2010] EWCA Civ 1279**, the Court of Appeal considered the shifting burden of proof in a discrimination case. It referred to **Madarassy** and the statement in that decision that a difference in status and a difference in treatment 'without more' was not sufficient to shift the burden of proof. At Paragraph 19, Lord Justice Sedley stated:-

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

16. In **Laing v Manchester City Council [2006] IRLR 748**, the EAT stated at Paragraphs 71 - 76:-

*"(71) There still seems to be much confusion created by the decision in **Igen v Wong**. What must be borne in mind by a Tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the Tribunal on the balance of probabilities that certain treatment had been by reason of race.*

...

*(73) No doubt in most cases it would be sensible for a Tribunal to formally analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in **Network Road Infrastructure v Griffiths-Henry**, it may be legitimate to infer he may have been discriminated against on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single answer and Tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.*

...

(75) *The focus of the Tribunal's analysis must at all times be the question whether they can properly and fairly infer race discrimination. If they are satisfied that the reason given by an employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is an end of the matter. It is not improper for a Tribunal to say, in effect, 'there is a real 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 believed or he did and it has nothing to do with race'.*

(76) *Whilst, as we have emphasised, it will usually be desirable for a tribunal to go through the two stages suggested in Igen, it is not necessarily an error of law to fail to do so. There is no purpose in compelling tribunals in every case to go through each stage."*

17. Article 19 of the Fair Employment and Treatment (Northern Ireland) Order 1998 ('the 1998 Order') provides:-

"(1) It is unlawful for an employer to discriminate against a person in relation to employment in Northern Ireland –

(b) where that person is employed by him –

(iii) by dismissing him or subjecting him to any other detriment."

Under Article 3 of the 1998 Order, discrimination is defined as discrimination on the ground of religious belief or political opinion. It occurs where, on either ground, a person treats another person less favourably than he treats or would treat other persons.

18. Article 38A of the 1998 Order provides:-

"Where on the hearing of a complaint under Article 38 the complainant proves facts from which the Tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent –

(a) has committed an act of unlawful discrimination or unlawful harassment against the complainant –

The Tribunal shall uphold the complaint unless the respondent proves that he did not commit that act."

19. Under Regulation 3 of the Employment Equality (Age) Regulations (Northern Ireland) 2006 ('the 2006 Regulations'), a person discriminates directly for the purposes of those Regulations if, on the grounds of that other person's age, he treats him less favourably than he treats or would treat other persons.

Regulation 7(2) provides that:-

“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 –

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

20. In relation to complaints to the Tribunal, Regulation 42 provides:-

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

(a) has committed against the complainant an act to which Regulation 41 (jurisdiction of industrial tribunals) applies –

the Tribunal shall uphold the complaint unless the respondent proves that he did not commit ... that act.”

The hearing

21. This claim had been case-managed before the substantive hearing and detailed directions had been given. Witnesses, including the claimant, gave their evidence-in-chief in the form of written statements which were exchanged in advance of the hearing. Each witness, including the claimant, once they had sworn or affirmed, adopted their witness statement as their evidence and moved immediately to cross-examination and then to re-examination.

22. The Tribunal heard evidence from the claimant and, on her behalf, Mrs Hazel Campbell, her former deputy manager at Central Station. The respondent's witnesses were:-

(a) Mr Paul Farrugia, the respondent's HR Advisor;

(b) Mr McMichael who was the new Operations Manager appointed in October/November 2012;

(c) Mr Gerard Golden, the respondent's Head of Fraud Analysis and Investigations who conducted the initial investigations into the claimant and into Mrs Mulholland. Mrs Mulholland was the manager of the outlets at Great Victoria Street Station who was named by the claimant as her comparator;

(d) Mr Clyde Jamison, the Operations Manager for outlets at Dublin Airport. He heard the disciplinary stage and decided to dismiss the claimant;

(e) Ms Niamh Horan, the HR Manager who heard the claimant's grievance; and

(f) Mr Alistair Caldwell, a manager who worked under Mr Paul McMichael.

23. The hearing ran from 10 – 14 March 2014 with a panel meeting on the afternoon of the last day.
24. The disciplinary and grievance appeals were heard and determined by Ms Rebecca Ecob of the respondent's HR Department. She was absent on maternity leave and was not called to give evidence to the Tribunal. She had given a written decision dismissing the disciplinary and grievance appeals as part of the respondent's internal procedure. However, she did not submit a statement of evidence to this Tribunal and was not available for cross-examination. There was no application for a postponement on this ground.

Format of decision

25. The claimant alleges, firstly, unlawful discrimination on the grounds of religious belief and/or age. She, secondly, alleges unfair dismissal. As the GB Court of Appeal stressed in **SMALL** (see above) the Tribunal must approach these two separate claims in distinct ways. In relation to the claims of unlawful discrimination, the Tribunal must look at the shifting burden of proof, applying the relevant case law including **Madarassy** (see above), **Laing** (see above) and **Deman** (see above). It must make relevant findings of fact and must decide whether a prima facie case of discrimination has been established. In relation to the claim of unfair dismissal, the Tribunal must approach the matter differently. The respondent has to show, on the balance of probabilities, that the reason for the dismissal was one of the potentially fair reasons for the purposes of the Employment Rights (Northern Ireland) Order 1996 ('the 1996 Order') (in this case, conduct). After that, the burden of proof is neutral and the Tribunal must be careful to apply an objective test of reasonableness, double-checked as necessary against the '*band of reasonable responses test*'. The Tribunal must be careful, insofar as the reasonableness of the dismissal is concerned, to avoid the danger of '*substitution*' by applying a subjective test and by deciding what it would have done had it been the employer.

The position is again different in relation to the determination of contributory fault, if any, by the claimant. As the Court of Appeal indicated in **SMALL** and indeed in **Roldan**, that involves a different approach to that which is taken in relation to the reasonableness of the dismissal.

26. The Tribunal therefore has to determine two entirely different types of claim; one of unlawful discrimination and one of unfair dismissal. The latter involves two issues; the assessment of the reasonableness of the dismissal against an objective standard and separately the determination of any contributory fault which will involve different findings of fact. Given the difficulties outlined above and specifically discussed in **SMALL**, it would be better if the Tribunal deliberately and carefully deals separately with each type of issue. The decision will therefore deal first with the claim of unlawful discrimination, making relevant findings of fact and, applying the shifting burden of proof provisions, and will reach a separate determination in relation to alleged discrimination. The written decision will then deal separately with the claim of unfair dismissal, making findings of fact proper to

that claim and reaching a determination on that claim. That will involve determining procedural and substantive fairness against an objective standard and separately whether there was contributory fault on the part of the claimant.

Relevant findings of fact - discrimination

27. Mr McMichael was appointed to the new role of Operations Manager based in Northern Ireland towards the end of September 2012. However, because of absences on leave, he did not properly or fully take over this role until some point in October/November 2012. The relevant dates have not been clarified with any precision. In any event, shortly after being appointed to this new role, Mr McMichael held two meetings, which were supposed to be with the manager of the outlets at Central Station (the claimant) and with the manager of the outlets at Great Victoria Street Station (Mrs Mulholland). The claimant did not attend either of those two meetings because she felt that they had been arranged with insufficient notice. The Tribunal is not in any position to judge whether that was a valid objection on the part of the claimant or to judge whether the meetings had been improperly arranged.
28. A further meeting was held on 13 November 2012 [*Bundle No 2, Page 312*]. This involved a sales discussion in Great Victoria Street Station which was attended by the claimant, Mrs Mulholland and other managers, including managers from the respondent's headquarters. In the course of that meeting, Mr McMichael took the view that the claimant had been aggressive and disengaged. He took the trouble to set out a full file note setting out the alleged incidents and his view of the claimant's conduct. In that file note he stated:-

"Eventually she calmed down and said okay that she was wrong but is just not used to having a manager in Northern Ireland."

He further stated:-

"I accepted her apology only due to the short timescale of managing her. This was a very serious case of GROSS MISCONDUCT – INSUBORDINATION."

Mr McMichael, in cross-examination before the Tribunal, suggested that he had done his best to achieve a proper meeting of minds between the claimant and himself and that he accepted the claimant was, at the time of the meeting, having certain difficulties in accepting the structural change within the respondent organisation. The Tribunal does not fully accept the version of events put forward to it by Mr McMichael. It seems absolutely clear from the contents of the detailed file note that Mr McMichael took a very strong view of the claimant's conduct. He was highly critical of the claimant's manner and was apparently reluctant to accept the apology offered by the claimant. In any event, whether or not Mr McMichael's view was justified, he regarded the claimant as aggressive, disengaged and insubordinate. There is no evidence upon which a Tribunal could reasonably infer that this view taken by Mr McMichael was in any way based on the claimant's religious beliefs or upon her age.

29. Having looked at the documentary evidence and having listened to both the claimant and Mr McMichael, the Tribunal concludes that the claimant, for her part,

clearly resented the loss of independence, and perhaps the loss of perceived status, which inevitably flowed from the structural changes in the respondent's organisation. She had become used to operating essentially on her own without constant or intrusive oversight into her activities. The introduction of a locally based Operations Manager, who would then operate as her direct line manager, was a change which she found difficult to accept. Again, there is no evidence before the Tribunal that this bubbling conflict between the claimant and Mr McMichael was in any way influenced by religious beliefs or by age.

30. The substance of the discrimination claim in this case is that the claimant alleged that she had been discriminated against on grounds of her age and her religious belief by the respondent company and by Mr McMichael. She named as her comparator Mrs Mulholland. Mrs Mulholland who, as indicated above, was the manager for the outlets in Great Victoria Street Station, was, at the relevant time, at the same management grade as the claimant although she had at some time in the past worked for the claimant. The claimant was in no sense the line manager of Mrs Mulholland. Like the claimant, she reported to the Operations Manager responsible for Northern Ireland. The claimant alleged throughout the case and throughout her hearing at the Tribunal that she was a Protestant and that Mrs Mulholland was a Roman Catholic. She further alleged that Mrs Mulholland was in a younger age group than the claimant. The respondent has produced no evidence to the contrary and the Tribunal accepts that these distinctions are accurate.
31. On 12 January 2013, Mrs Mulholland set out a written and detailed formal complaint about the attitude which she alleged the claimant had shown towards her. [*Bundle No 1, Page 107*]. That complaint was sent to her new line manager, ie Mr McMichael. In a handwritten note which Mr McMichael wrote on the bottom of his copy of that e-mail, he stated:-

“Theresa visited Monday the 14th. She wants NFA [Tribunal’s note: No Further Action] at this time. She wants to try and resolve firstly with Elaine. OM [Operations Manager, ie Mr McMichael] briefed OD [Operations Director – Mr McMichael’s line manager]. OM agreed this would be the last occurrence he would not intervene in between Elaine and Theresa.”
32. It is clear that Mr McMichael was on friendly terms with Mrs Mulholland. She addressed him by his first name even though this occurred in the context of a formal complaint made by one employee to a line manager about another employee. Again, in that context, Mr McMichael addressed her as ‘T’. However there does not seem to have been any excessive formality generally in internal correspondence and there does not appear to the Tribunal to be any evidence on which it could reasonably infer that anything further could be drawn from any of this.
33. The handwritten note written by Mr McMichael confirms the Tribunal's clear view that there was a high degree of personal friction between the claimant and Mr McMichael which was, at this stage in January 2013 coming to a head. Thankfully, however, it does not fall to this Tribunal to intervene where individuals in the workplace do not like each other and do not get on. The Tribunal does not seek to resolve the normal interpersonal difficulties that can arise in the course of employment relationships. It is not some form of ‘Agony Aunt’. It can only intervene where there has been unlawful discrimination or where there has been an

unfair dismissal or other matter which is expressly within the Tribunal's jurisdiction. The Tribunal can see nothing in relation to this latter incident on which it could reasonably infer unlawful discrimination on the grounds of religious belief or age. It seems to the Tribunal that the only reasonable inference that can be drawn from all of this is that there was inevitably a degree of resentment on the part of the claimant at the introduction of a local line manager. This led to personal conflict between the claimant and Mr McMichael. It is not the Tribunal's task to determine whether either the claimant or Mr McMichael was exclusively to blame for this conflict or whether both had contributed to it. However, it had nothing to do with either prohibited ground of discrimination.

34. As this level of personal conflict was building between November 2012 and January 2013, an issue had arisen in relation to the differences between the NVQ Scheme in Northern Ireland and any equivalent scheme in Great Britain. The respondent's head office had become aware that the scheme was in operation in Northern Ireland and that potentially funds were available for training purposes. On 1 November 2012, a Ms Christine Holland in the respondent's head office, e-mailed the claimant to ask about the manner in which the Northern Ireland scheme operated and to see whether this could be extended to other sites in Northern Ireland. She wrote:-

"I understand you are delivering NVQ/apprenticeships on site and I would be interested to hear more about how this works."

The Tribunal has again looked at the documentary evidence and has considered the evidence from the claimant and the respondent. It concludes that this was a straightforward and innocent enquiry from the respondent's head office which was not prompted by anything other than a desire to identify whether funds were available and, if so, on what basis. Again it had nothing whatsoever to do with age or religious belief. There is not evidence on which any such inference could reasonably be drawn by the Tribunal.

35. The claimant wrote back to Mrs Holland on 3 November 2012 setting out the current position:-

"The staff gets £100.00 on completion and SSP get an amount depending on the qualification. That money is then used to either reward the individual, training awards etc.

I am on annual leave for the next week but if you want to contact either Vicki (telephone number) or Hazel (telephone number)."

The claimant's reply seems perfectly clear and open. The claimant did not in any sense try to conceal the fact that, apart from the individual payment of £100.00 to the employee who has completed the NVQ qualification, there was a separate and additional amount made payable to the respondent which varied depending on the nature of the relevant qualification. The reply also made it clear that the money was then used either to go directly to the individual concerned to compensate him or her for time spent in training or to deal with training awards etc. It directed Mrs Holland to two junior employees who could provide further details. The Tribunal concludes that this openness on the part of the claimant is entirely consistent with her stated position throughout, ie that she had had clear and explicit authority for this

procedure from her first Operations Manager, her second Operations Manager and that it had continued on to her third Operations Manager and indeed her fourth, ie Mr McMichael.

36. Mrs Holland then notified Mr McMichael, in his new role as Operations Manager, of the content of this reply on or about 12 November 2012. The Tribunal notes that this notification would have been received by Mr McMichael the day before the meeting on 13 November 2012 at which he concluded that the claimant had been disengaged, aggressive and insubordinate. It was several weeks before the complaint from Mrs Mulholland on 12 January 2013 about the claimant which prompted Mr McMichael's handwritten note and his discussion with the Operations Director.

Mrs Holland's notification on 12 November 2012 did not prompt any immediately action.

37. On or about 21 January 2013, ie shortly after the complaint from Mrs Mulholland to Mr McMichael, Mr Golden, the Head of Fraud Analysis and Investigation, was tasked by the Operations Director and by Mr McMichael to undertake an investigation into the operation of the NVQ scheme in Central Station. Again the Tribunal does not see anything in Mr Golden's appointment or his decision to pursue the investigation of these matters not immediately or shortly after the notification by Mrs Holland on 12 November 2012 but immediately after Mrs Mulholland's complaint as indicative of anything other than escalating personal conflict between the claimant and Mr McMichael, her line manager. There is no indication of age or religious belief playing any part at all in any of this, ie nothing upon which any such inference could reasonably be drawn by the Tribunal.

38. Mr Golden's role within the respondent organisation was specifically to detect fraud and to deal with fraud. This fraud would have included, as Mr Golden indicated in his witness statement, '*till abuse*' and Mr Golden and his part of the respondent organisation had a range of methods for detecting such '*till abuse*'. The procedure adopted by the claimant for dealing with NVQ scheme, ie, in particular, the removal from the tills of a sum of cash equivalent to the amount of money lodged shortly beforehand in the respondent's bank account had never, up to that point, been the subject of any investigation by Mr Golden. It had never, up to that point, been raised by any audit control in the respondent organisation. It had never, up to that point, been raised by any Operations Manager in the respondent organisation. This lack of any prior action was raised in the hearing. The respondent's counsel sought to argue that there would have been constant variations in the till receipts in the respondent's outlets in Central Station which could be caused by rugby weekends taking place, interruptions in railway traffic, etc. It occurs to this Tribunal all these matters would have been predictable or at least explicable. If the line were closed or if a rugby weekend were cancelled, a sudden drop in takings would have been expected and would not have advised any particular concern. However, the periodic removal of £500.00 to £750.00 in cash from the tills is precisely the sort of occurrence that the respondent's fraud analysis methods would have been intended to detect and prevent. Indeed, such methods are designed to deal with much smaller amounts of cash. That would be common in a cash business. The Tribunal therefore concludes that it is consistent with the claimant's stated position throughout this case that she always had the permission of her Operations Manager for the NVQ procedure, that no one at any stage up to the appointment of

Mr Golden had raised a red flag on this issue or had sought to query the removal of cash from tills, any consequent shortfall in cash, the retention of cash in the office safe or indeed the receipt of cash amounts or cash benefits by members of the staff.

39. On or about 24 January 2013 a decision was made to suspend the claimant.
40. On 24 or 25 January 2013 (the evidence varies on the date) Mrs Mulholland came forward to Mr McMichael and stated that she had operated the same procedure in Great Victoria Street Station. The procedure had operated over a shorter period of time in Great Victoria Street Station than in Central Station. She stated that she had discussed the procedure beforehand with the claimant, who was not her line manager. Mrs Mulholland was not suspended. Mr McMichael in his witness statement stated that the reason why she was not suspended while the claimant was suspended was that:-

“At this point Theresa’s involvement in the case was not clear and therefore it was not necessary for her to be suspended also.”

The Tribunal does not accept that this statement is correct. It concludes that Mrs Mulholland’s decision to come forward was motivated by the claimant’s suspension from duty. It also concludes that the substance of Mrs Mulholland’s involvement in the operation of the scheme was perfectly clear at that point to Mr McMichael and to Mr Golden. If it was fair for the claimant to have been suspended at that point pending disciplinary investigations, it was equally fair for Mrs Mulholland to have been similarly suspended at that point. In any event, further discussions took place with Mrs Mulholland and it was clear at that point, even if it was not clear on or about 24 or 25 January 2013, that her involvement in the scheme was to the extent that it was material, identical to that of the claimant. The Tribunal concludes that it would have been fair for the employer to have suspended both the claimant and Mrs Mulholland at this stage while matters were investigated. It concludes that it was unfair, applying the objective standard of a reasonable employer, to suspend only the claimant and not to suspend Mrs Mulholland. However, looking at the evidence as a whole and considering the injunction in ***Laing*** that the focus of the Tribunal’s attention must be on whether or not unlawful discrimination has occurred, the only reasonable inference the Tribunal can draw is that there was a degree of personal animosity between Mr McMichael and the claimant which resulted in the differential treatment. There was a difference in status and a difference in treatment but nothing further which would justify a reasonable inference of unlawful discrimination on the grounds of age or religious belief.

41. Mr Golden decided to interview Mrs Mulholland first and, having interviewed Mrs Mulholland, still did not decide to suspend her or to recommend her suspension. In his interview with Mrs Mulholland, Mr Golden was informed by Mrs Mulholland that Mr Graeme Scott, the respondent’s audit controller, had asked about the envelope in which cash was retained in Great Victoria Street Station and had been told that the envelope had contained money for staff incentives. Mrs Mulholland was also quite clear with Mr Golden that she had asked the claimant about this process before adopting it and had trusted the claimant’s advice. Crucially, she stated further that she had said to her ‘Ops Manager’ what she had kept in the envelope and further stated that he, her ‘Ops Manager’, had not

questioned this practice. She repeated that she had had ‘*open conversations with my Ops Manager*’. It would have been clear to Mr Golden in the course of this interview that the ‘*Ops Manager*’ referred to by Mrs Mulholland was not the claimant. The claimant was the same management grade as Mrs Mulholland. The reference was either a reference to Mr McMichael or to Mr Simon Harrison or indeed to one of the two earlier relevant Operations Managers. The clear question that should have been put by Mr Golden to Mrs Mulholland at this point was a request for her to identify specifically the ‘*Ops Manager*’ to whom she was referring. He should further have sought clear details of what she was obviously stating was authorisation which had been received, either implicitly or explicitly, from an Operations Manager for the operation of the NVQ procedure. It is entirely unclear why Mr Golden placed so much emphasis on the fact that Mrs Mulholland had sought some sort of approval from the claimant in this respect. The claimant was not her line manager and was simply an employee of an equivalent grade. Again this, although puzzling and clearly indicative of a significant degree of unfairness and indeed a degree of pre-judgment, could only, in the circumstances of this case, give rise to a reasonable inference of personal friction between Mr McMichael and the claimant, ie a decision that she was a troublesome employee. There is no basis for a reasonable inference of discrimination on the grounds of age or religious belief.

42. The manner in which the decision was reached to suspend the claimant also gives rise to some concern. [*Bundle No 2, Pages 115 – 117*]. In that e-mail exchange, Mr Golden, first of all, indicated that he had discussed the issue of suspension with Mr Farrugia of the respondent’s HR Department. He confirms that Mr Farrugia was happy to go to suspension on specific grounds. Mr Golden then proposes matters including the suspension of the claimant. He does not purport to decide the suspension of the claimant. The correspondence is not consistent with a decision of Mr Golden’s part to decide to suspend; simply consistent with a proposal on his part that that is a decision to be made by others. The next step in the correspondence is that the claimant’s suspension letter is then drafted by Mr McMichael for issue by Mr McMichael. The letter is then amended slightly by Mr Golden but Mr Golden does not take the opportunity at that point to alter the substance of the suspension letter to make it plain that the decision to suspend was his decision. The letter, as drafted by Mr McMichael and as approved by Mr Golden, was consistent with the suspension decision being a decision of Mr McMichael. At that point in the correspondence, Mr Farrugia intervened to make it plain that the letter of suspension should issue from Mr Golden and should give the impression Mr Golden made the decision, although he states the letter could be handed to the claimant by Mr McMichael. He states:-

“The wording is fine but I think we need to send the letter from you rather than from Paul and have Paul just issue it to her. As you leading the investigation and have all of the evidence we don’t really want Paul too involved at the moment but if we can say that the suspension was issued by you but delivered by Paul due to geography then I think we should be covered. Does this make sense? Paul can still deliver the message and ensure she leaves etc but we want to make it clear that the decision to suspend is yours and not Paul’s.”

43. The Tribunal’s conclusion, having listened to Mr Golden, Mr Farrugia and Mr McMichael is that the correspondence makes it plain that the decision, rather

than the proposal, to suspend the claimant was a decision of Mr McMichael. The final e-mail from Mr Farrugia was to ensure that the choreography of events gave the impression, and no more than the impression, that the decision to suspend the claimant had been made by Mr Golden rather than by Mr McMichael.

44. Mr Golden's investigation, following the claimant's suspension, appears to have been somewhat perfunctory. He was provided with details of up to 12 employees who had proceeded through the NVQ system at Central Station and of incidents where bonus cheques of between £500.00 and £750.00 had been paid to the respondent by training providers. He looked at a few e-mails, which are referred to in this decision, but did not apparently look further at any other e-mails which might have originated from earlier Operations Managers and did not follow-up any possible further e-mail correspondence which had been identified by the claimant. Mr Golden's failure to follow-up this obvious point, ie to clarify whether the claimant had, as she indicated, received the prior approval from her initial and subsequent Operations Managers is particularly serious. Mr Golden did not make any attempt to interview the previous Operations Managers or indeed to interview Mr Scott, the audit controller. He did not speak to Mrs Campbell, the claimant's assistant manager at Central Station who would have been an obvious and vital witness for any reasonable investigator to contact. Mr Golden spoke to the claimant and he spoke to only five employees who were members of the Central Station team. He conducted five minute interviews with each of those five employees. He did not take the equally obvious step of interviewing all the NVQ trainees. Given his earlier conversation with Mrs Mulholland, it would have been particularly vital for Mr Golden to have followed up this issue with Mr Scott, the audit controller, to find out whether he had indeed been aware of the existence of an envelope containing cash in Great Victoria Street Station and perhaps even in Central Station. Again, given his earlier discussion with Mrs Mulholland, who was hardly going to unnecessarily or inaccurately support the claimant's version of events, and who had already complained about the claimant, it was vital for Mr Golden if he were going to conduct a reasonable investigation to have investigated whether it was indeed correct that at least one Operations Manager knew about the NVQ procedure and had not queried it. It seems clear that Mr Golden was not interested in the claimant's defence or in any point which might have assisted the claimant.
45. In Mr Golden's interview with the claimant on 28 January 2013 [*Bundle No 2, Page 205*] the claimant stated that she had received prior approval for the NVQ procedure. No enquiries were made by Mr Golden into this statement. He does not appear to have been open to the possibility of the claimant in fact having acted with the approval of the respondent. Mr Golden also raised the issue of the tips policy which he stated had been on the internal communications hub in the respondent organisation for a few weeks. That new policy stated that managers were not allowed to retain tips in the office safe. The claimant made it plain to Mr Golden that she had not seen this new policy. It does not appear that this matter was investigated any further by Mr Golden. However, it now appears clear from the evidence shown to this Tribunal that relatively few people had viewed this policy on the communications hub even by the time of the Tribunal, which was itself some considerable time after January 2013. Even at the time of the Tribunal hearing, only some 50% of the relevant managers had read the new policy. It is also of some note that it was not entirely clear from the terms of the tips policy whether it applied to Central Station. It was dependent on a particular type of till being in operation. Even at the time of the Tribunal hearing, the respondent could not say

whether that included Central Station. In any event, at the investigation stage, Mr Golden did not consider or investigate the matter. He should have done so.

46. Mr Golden's written statement to the Tribunal was no doubt carefully prepared as, in effect, the claimant's evidence-in-chief in written form. In that statement, Mr Golden stated specifically that he did not recall any request from the claimant during the course of this interview to access e-mails. However, it is perfectly clear from a cursory reading of Mr Golden's own notes of the interview [*Bundle No 2, Page 211*], that there had been a clear request on behalf of the claimant for access to the e-mails to establish her defence and an equally clear acknowledgement by Mr Golden of that request. It is also clear that the request was repeated by the claimant [*Bundle No 2, Page 216*]. No proper reason has been advanced for Mr Golden's failure to read his own notes and to consider his own evidence properly before preparing his witness statement and before adopting it as his evidence. The Tribunal can only conclude that Mr Golden and the respondent did not regard the claim and this Tribunal hearing as a serious matter.
47. In the earlier interview with Mrs Mulholland, Mr Golden had informed Mrs Mulholland that he was going to recommend to Mr McMichael that disciplinary action was taken against her. Leaving aside the obvious issue of why he did not immediately suspend Mrs Mulholland, the recommendation of disciplinary action, although it was passed on, was not acted upon by the respondent until some two days after the claimant had raised the issue of a comparison between the treatment afforded to her and the treatment afforded to Mrs Mulholland. That is a matter to which this decision will return later.
48. The approach taken by Mr Golden to this matter falls far short of the reasonable and objective standard which can be expected of an investigator in these matters. This is particularly the case where that investigator is employed by the respondent primarily as an investigator and can be expected to know how to approach these matters fairly. The disciplinary charges were not properly or fairly investigated. That, however, seems to the Tribunal to be primarily a matter which is relevant to the fairness of the dismissal. There are no grounds on the facts proven to the Tribunal upon which it would be reasonable for the Tribunal to infer unlawful discrimination on the part of Mr Golden on his own behalf or as directed by Mr McMichael in relation to age or religious belief.
49. The initial suspension on 28 January 2013 of the claimant indicated that four allegations were, at that stage, under investigation. These were:-
 - "(1) alleged breach of cash handling procedures - relating to NVQ cheque payments between January 2008 and January 2013;*
 - (2) alleged falsification of company documentation - relating to incentive payments between January 2008 and January 2013;*
 - (3) alleged breach of cash handling procedures - relating to receipt of monies received for the Wi-Fi offer not being banked; and*
 - (4) alleged breach of cash handling procedures - relating to tips money being retained in the unit safe."*

50. Following the investigation process, outlined above, undertaken by Mr Golden, the claimant was notified on 11 February 2013 of a disciplinary hearing on the following charges:-

- “(1) *alleged breach of cash handling procedures - relating to NVQ cheque payments;*
- (2) *alleged falsification of company documentation - relating to incentive payments between January 2008 and January 2013;*
- (3) *alleged breach of cash handling procedures - relating to tips money being retained in company safe;*
- (4) *suspicion of theft.”*

51. It is clear that the initial concerns about Wi-Fi money had been allayed in the course of the investigation and that that matter was no longer proceeding as a disciplinary charge. The first disciplinary charge relates to the NVQ procedure discussed above. However it does not relate to any identified procedure. The second charge is more worrying. It does not appear from the evidence of any of the respondent's witnesses or indeed from the documentation that an issue of the alleged falsification of documentation was ever put forward to the claimant or that it was ever seriously considered. Equally worryingly, the third charge which relates to the retention of cash tip monies in the safe was not properly investigated. The policy which had allegedly been breached by the claimant had been in operation for only a few weeks and no one had investigated how many people, if at that stage anyone, had read the policy or indeed whether the policy actually applied to Central Station. Most worryingly of all, the fourth charge was '*suspicion of theft*'. In the ordinary course of events it would be obvious that '*theft*' could be a disciplinary charge where there is a difficulty in relation to cash-handling. However, mere '*suspicion*' of theft is more problematic. Mr McMichael accepted that he was responsible for adding this fourth charge, as worded, to the disciplinary charges which the claimant had to face. However, he stated that he did so under '*advisement*'. There is no indication on the documentation and the Tribunal was not told in evidence from whom that '*advisement*' originated or on what basis it was given.

Again all of this is consistent with a significant degree of personal friction and animosity between the claimant and Mr McMichael. There is nothing on the evidence before us which indicates that it was based in any way on age or religious belief.

52. At this stage, ie in February 2013, Mr McMichael was scheduled to hear the disciplinary hearing and to reach a decision on the disciplinary charges which he had himself partly compiled. While there were clear deficiencies in Mr Golden's investigation, and it was perhaps understandable that someone would have decided that further enquiries should be undertaken, it is concerning that Mr McMichael undertook further investigation at that point when he was still expected to hear the disciplinary charges and to reach a determination on guilt. In circumstances as these, it would obviously have been far better for the individual tasked with reaching a determination on the disciplinary charges, firstly, not to be involved in compiling those disciplinary charges if it was not necessary for him to do so and, secondly, not to be involved in conducting an investigation to support those charges where it

was not necessary for him to do so. All of this draws into question the manner in which the respondent approached this disciplinary matter. As part of these investigations, Mr McMichael interviewed approximately eight employees and on certain occasions interviewed those employees several times.

53. Mr Farrugia of the respondent's HR Department had a direct role in these early stages of the disciplinary process. He gave evidence to the Tribunal. Firstly, he confirmed that the new policy in relation to tips, ie the policy which stated that managers should not keep tips in the office safe, was relatively recent, ie had only been in existence for some two to three months before the claimant was interviewed and suspended. He also confirmed that even at the date of the Tribunal it had been viewed by a relatively small number of people. No one had apparently considered these issues at the time the disciplinary charge was investigated, laid or considered. Mr Farrugia also accepted that Mrs Campbell, the deputy manager at Central Station, had not been aware of the change of policy and had stated that it had not been drawn positively to their attention. He could produce no evidence to the effect that the change in policy had been brought positively to the attention of the claimant, her deputy manager or indeed the attention of any other manager. It had been up to the managers concerned to proactively read the contents of the communications hub. He accepted in evidence that, on a reading of the policy, it was not clear that this new policy actually even referred to Central Station. Again the Tribunal concludes that this issue, which was raised as a separate disciplinary charge, had never been properly investigated or properly considered by the respondent.
54. The Tribunal has already dealt with the manner in which the claimant was suspended. Without going through the matter again, without examining again the exchange of correspondence, the Tribunal is satisfied that the decision to suspend the claimant was a decision reached essentially by Mr McMichael with input, at some level, from Mr Golden by way of a proposal and with some input from Mr Farrugia. However, essentially, the decision to suspend the claimant was a decision of Mr McMichael. Mr McMichael repeatedly said under cross-examination that the respondent organisation had decided to complete the claimant's disciplinary process before moving to disciplinary action against Mrs Mulholland. He accepted that Mr Golden had recommended disciplinary action against Mrs Mulholland when he interviewed her in late January 2013. He also accepted that that recommendation had been passed on. He was unable to satisfactorily explain the basis for the alleged decision not to implement disciplinary action against Mrs Mulholland until any disciplinary action had been completed against the claimant. Equally, he was entirely unable to explain why this alleged decision had been suddenly reversed some two days after the claimant, in an internal grievance, had alleged that there was an unfair and discriminatory comparison to be drawn between her treatment and the treatment afforded to Mrs Mulholland. In the absence of any evidence to the contrary, the only reasonable conclusion that the Tribunal can draw is that the decision to suddenly implement disciplinary action against Mrs Mulholland was linked to the internal grievance lodged by the claimant and that it had never been the respondent's intention to lodge such proceedings against Mrs Mulholland. It is notable that Mrs Mulholland had been interviewed first; had never been suspended and, up until the internal grievance had been lodged by the claimant had never been the subject of disciplinary proceedings.

55. As part of his evidence, Mr Farrugia dealt with his interview with Mrs Mulholland on 28 March 2013. He accepted that Mrs Mulholland had stated specifically that the procedure adopted by the claimant for dealing with NVQ cheques was '*common practice*'. Crucially, Mr Farrugia also accepted in evidence that Mrs Mulholland had told him that she had discussed this procedure with Mr McMichael when he first started. That can only mean that Mrs Mulholland had told Mr Farrugia that she had discussed the specific practice of dealing with NVQ cheques with Mr McMichael on or about October/November 2012 when he first started in his role as the local Operations Manager. This is a piece of evidence which went to the root of the disciplinary charges against the claimant. Mr Farrugia did not investigate it further. At that stage, the claimant had been dismissed following a disciplinary hearing and her appeal was pending. Mr Farrugia stated that he could not remember passing this information onto anyone else in the respondent organisation and he agreed that it was likely that he had not passed it on to Ms Ecob who was due to hear the claimant's appeal. Since the claimant's defence to the main disciplinary charge, ie the charge relating to the operation of the NVQ procedure was simply that she had received the permission of her original Operations Manager and subsequent Operations Managers and that the procedure was well-known, it is simply inexplicable that Mr Farrugia did not investigate what he had been told and that he did not pass it to Ms Ecob. If Mrs Mulholland had been telling the truth, this brought into question the entire basis for this disciplinary charge. If Mrs Mulholland had not been telling the truth, it brought into question her particular position in relation to the disciplinary charges she faced.
56. Mr Farrugia also stated in evidence that Mrs Mulholland had accepted that she had not kept receipts for her expenditure under the procedure in Great Victoria Street Station and that she did not feel that she had been required by the respondent to keep receipts or indeed required by the respondent to follow any particular process in relation to the expenditure of monies received under the NVQ procedure. Again, Mr Farrugia accepted that this had not been passed onto anyone in the respondent organisation or indeed to Ms Ecob who was due to hear the claimant's appeal. Mr Farrugia fairly accepted that this was relevant to a substantial issue in the claimant's disciplinary process and he accepted that he should have passed it on. Again it is simply inexplicable that he did not do so at the time.
57. Again Mr Farrugia accepted that Mrs Mulholland stated that she had discussed the envelope in the office safe with Mr Scott, the respondent's audit controller. This was also a matter which again Mr Farrugia had not passed onto anyone in the respondent organisation.
58. As with Mr Golden, Mr Farrugia appears to have approached the issue of the claimant's disciplinary process with a closed mind and to have pre-determined the claimant's guilt. He failed to properly investigate her clear and consistent defence, ie the defence that she had received prior authorisation for the NVQ procedure and that Mr Scott, as audit controller, had been aware of the existence of the envelope containing cash within the office safe.
59. On 1 February 2013 the claimant submitted a detailed internal grievance making allegations of harassment and bullying against Mr McMichael. Many of these complaints raised issues relating to Mr McMichael's management style and his interaction with the claimant and with other members of staff. The most substantial complaint appears to have been that Mr McMichael had been overheard by a

member of the public in the Lagan Bar at Central Station discussing the claimant's disciplinary case with two members of his staff. From other documentation, those other members of staff appear to have been Mr Caldwell and Ms Michelle McKay. The member of the public who had overheard this conversation reported the matter to the claimant's husband and stated that Mr McMichael had said in the course of this conversation that he would be operating a '*tag team format*' and that he would not be asking too many questions in the course of the disciplinary procedure.

60. Following that internal grievance the respondent decided that it would be better for Mr McMichael not to hear the disciplinary interview and not to determine the disciplinary charges. Given Mr McMichael's clear involvement in the process leading up to all of this, it is surprising that they took so long to reach that conclusion.
61. Mr Jamison, who was the manager of the outlets in Dublin Airport, was appointed to hear the disciplinary interview and not to determine the disciplinary charges. The interview was fixed for 22 February 2013. On his arrival in Belfast, Mr Jamison was given a disciplinary pack which he had not received beforehand. That in itself is an indication of a casual attitude being shown by the respondent to this disciplinary process. It is consistent with the attitude of the respondent throughout in failing to properly investigate the matter and in initially arranging for the disciplinary charges to be determined by an individual who had himself put in place at least one of the disciplinary charges and who had suspended the claimant. In any event, on looking at that pack and on meeting the claimant, Mr Jamison realised, belatedly, that this was a complex matter and a second day of hearing was arranged on 2 March 2013.
62. There appear to have been several defects in the course of the disciplinary hearing. In the first instance, Mr Jamison did not have access to the notes of the meeting between Mr Golden and Mrs Mulholland [*Bundle No 1, Pages 189 – 190*] which contained evidence which clearly supports the claimant's position; that she had prior authority for the NVQ procedure. This is not a matter which should have been easily overlooked by Mr Jamison if he had been approaching the matter fairly and with an open mind. Mr Jamison accepted in evidence that the claimant had referred, during the course of the disciplinary interview, to the NVQ procedure in Great Victoria Street Station under the management of Mrs Mulholland. Mr Jamison accepted, under cross-examination, that this was relevant information and that it should have been checked by him in the course of the disciplinary process. The failure on his part to conduct those checks and to weigh these matters in the balance goes right to the core of this matter. Mr Jamison did not bother to investigate the defence put forward by the claimant and it is notable that this was a defence which had consistently been put forward on repeated occasions by the claimant. Mr Jamison did not speak to Mr Graham Frazer who had been the claimant's first relevant Operations Manager. He did not speak to Mr Alan Fraser who had been the claimant's second Operations Manager. These were crucial witnesses and Mr Jamison again, under cross-examination, accepted that he should have spoken to them as part of the disciplinary process. While Mr Jamison indicated at the Tribunal hearing that he had had some form of exchange with Mr Harrison, the third Operations Manager, details of that exchange had not been produced to the claimant during the disciplinary process for comment and indeed had not been produced beforehand to this Tribunal hearing. He accepted that he had not formally interviewed Mr Harrison. In any event, it seems on the evidence that it may not have been the case that there had been any NVQ payments during

Mr Harrison's period as an Operations Manager and it is therefore doubtful on the evidence before us whether Mr Harrison was a particularly crucial witness.

63. Importantly, Mr Jamison accepted that the claimant had requested access to her e-mails during the course of the disciplinary interview. It had been clear to Mr Jamison that her request was on the basis that she expected those e-mails to support her position, ie to support her position that she had prior authority for the NVQ procedure. Mr Jamison had at least made a cursory check to see where these e-mails were. He stated in cross-examination that he had been simply told that they were not available. He did not query this position or take it any further. No evidence was produced to the Tribunal as to why these e-mails were, at this early stage in the process, '*not available*'. Since the claimant still was, in February 2013, an employee of the respondent, it is not credible, in the absence of any convincing evidence, that the e-mails were simply '*not available*'.
64. Mr Jamison also accepted in cross-examination that the attitude shown by the claimant in her initial response to Mrs Holland and in the investigatory process had been open and that the claimant had not in any sense attempted to conceal the NVQ procedure. Her actions were consistent with that procedure being open, known and approved of by more senior management.
65. Crucially, Mr Jamison accepted in cross-examination that if he had considered the matter properly before reaching a disciplinary determination and if he had then accepted that the claimant had had prior authorisation for the NVQ procedure, the only remaining substantive issue was one of poor record-keeping, in that the claimant had not properly kept a detailed record of payments to staff from the NVQ cash and receipts relating to the relevant expenditure. If that had been the only matter remaining, his view was that an appropriate penalty would not have been dismissal but would have been a Final Written Warning.
66. Mr Jamison decided to dismiss the claimant and did so by letter dated 13 March 2013 citing four grounds, ie the four grounds set out in the original disciplinary letter. In relation to the first ground, ie the alleged breach of cash handling procedures relating to NVQ cheque payments, Mr Jamison accepted that no specific breach of the policy had been put to the claimant in the course of the disciplinary process. That in itself does not appear to be significant since the claimant had been aware of the nature of the change. In relation to the second ground, Mr Jamison, again under cross-examination, accepted that no issue of falsifying or forging documentation had been put to the claimant in the course of the disciplinary process which could have been in any sense supported a finding of '*alleged falsification of company documentation*'. Again, under cross-examination, Mr Jamison accepted that the third ground which related to the new policy requiring managers not to keep tips in the office safe, was at its height a minor matter which involved simply a charge of not keeping up-to-date with the requirements of a changing policy for a brief period of time. Again under cross-examination, Mr Jamison accepted that in relation to the fourth ground, ie the peculiarly worded charge of '*suspicion of theft*', that the claimant had not taken money for personal use.
67. Finally, Mr Jamison accepted that he did not look at the disciplinary procedures before reaching a conclusion and that he did not consider the range of penalties open to him under those procedures.

68. As with the entire investigation process, the disciplinary process undertaken by Mr Jamison was gravely deficient. There was a complete failure to properly consider and investigate the defence put forward by the claimant. There was a complete failure to provide e-mails as requested by the claimant without any proper excuse or reason. There was a failure to follow-up and investigate the obvious links with the case of Mrs Mulholland and a failure therefore to consider what Mrs Mulholland had to say about the NVQ procedure. There was a complete failure on the part of Mr Jamison to stand back and to ask himself, as a reasonable employer, whether it was at all likely that two senior managers and a deputy manager would have acted in this way if they had not had prior and clear authorisation from Operations Managers. There was a rush to judgment and a complete unwillingness on the part of Mr Jamison to consider the matter properly. However there is no indication that any of this was related to religious belief or to age.
69. Ms Horan was tasked by the respondent to investigate the claimant's grievance against Mr McMichael and to reach a conclusion. She met the claimant on 11 March 2013. It is notable that according to the notes of that interview there appears to have been no particular discussion of the alleged incident in the Lagan Bar during which Mrs Mulholland was alleged to have discussed the claimant's disciplinary process. There is a note in that interview of the claimant handing in a statement relating to that incident. That statement is not identified. However, from other documentation disclosed to the Tribunal it appears to be the case that this was a statement prepared by the member of the public who had heard a conversation and who had notified the claimant's husband. The claimant also complained that individual members of staff had been interviewed in public area during the investigation process relating to her. She also complained that she felt she was being unfairly treated in comparison with the treatment afforded to Mrs Mulholland. The claimant pointed out the same NVQ process had been followed in Great Victoria Street Station but that no disciplinary action had been taken at that point in relation to her. In relation to that latter point, the Tribunal notes again that it was some two days after the date of the grievance that disciplinary action was taken against Mrs Mulholland.
70. Ms Horan interviewed various members of staff. Her notes of the interview with Mr Caldwell do not refer to the statement from the member of the public having been shown to him. However, the notes of that interview appear to show that '*the tag team*' terminology was used in the context of the investigation process to describe the approach taken by investigators. Ms Horan appears to have taken no particular issue with the fact that in her interview with Mr McMichael on 21 March 2013. Mr McMichael stated that:-

““At no point would I tell anyone about Elaine’s disciplinary. I cannot recall using the term tag team.”

Most importantly, the specific allegation that he said he would not be asking a lot of questions in the disciplinary process was not put to him. That appears surprising. In her grievance decision, which dismissed the grievance, and in her statement to the Tribunal, Ms Horan refers to the alleged meeting in the Lagan Bar in the following way:-

“Regarding the conversation on the 15th of February which was overheard, I spoke to all parties involved in the conversation. I was informed that understood that it was a discussion regarding note taking, ie one manager would take notes for the first meeting and the next manager would take notes for the second meeting, however in order to ensure consistency the same manager took notes for the whole process. At no time was Ms Marks’ name or the nature of what was being discussed mentioned, therefore I concluded that there was no breach of confidentiality or potential damage to Ms Marks’ reputation.”

71. The Tribunal concludes that the notes recorded by Ms Horan do not reflect any detailed questioning of the people who took part in the discussion on 13 February 2013 in the Lagan Bar. It does not appear to have been in dispute that such a discussion actually did take place in a public bar and that it did relate to the claimant’s disciplinary process. It was equally not in dispute that a member of the public had been able to overhear this discussion, that that member of the public had been able to identify the claimant as the subject of that discussion and that member of the public had been able to report the matter to the claimant’s husband. It is surprising to this Tribunal that such a matter did not provoke some form of further action by the respondent against Mr McMichael, Mr Caldwell and Ms McKay. It cannot be satisfactory that confidential disciplinary matters are discussed in a public bar in a manner which enables members of the public to overhear that conversation and to identify the subject of that conversation. It does not seem, to this Tribunal, to be particularly important, even if it were true, that the discussion of the claimant’s disciplinary process related to the procedure to be followed in relation to note taking. Finally, it is clear that the allegation to the effect that Mr McMichael had clearly stated he would not be asking many questions was not properly investigated or determined. This appears to the Tribunal to be a serious matter, in that if indeed Mr McMichael had made such a statement it could have indicated that Mr McMichael had made his mind up and had pre-determined the issue.

Appeals

72. The grievance was not upheld and an appeal was lodged. The appeals against the disciplinary decision and the grievance decision were to be held together by Ms Ecob who worked for the Human Resources Department in the respondent headquarters.
73. A joint appeal was originally to take place on 11 April 2013. On 9 April 2013, the respondent e-mailed the claimant to advise her that Ms Ecob was unwell and was therefore unlikely to be able to travel to Belfast to hear the appeal on 11 April 2013. As an alternative, the respondent offered an appeal hearing conducted by telephone. There is no evidence before the Tribunal to explain why Ms Ecob was unable to come to Belfast but was apparently able to conduct a complicated appeal in relation to both a disciplinary decision and a grievance decision by telephone call. In any event, this was a situation which involved a long-serving employee facing dismissal on serious charges, including a charge of ‘*suspicion of theft*’. It was also a situation where serious allegations of discrimination, bullying and harassment had been raised. It is somewhat surprising that the respondent felt that such matters could be properly dealt with in the course of a telephone call. It indicates again to this Tribunal that the respondent did not regard either the disciplinary process or the grievance process as a serious matter.

74. The appeal was re-arranged for 22 April 2013 in London. It was conducted by Ms Ecob. As previously indicated, Ms Ecob was unable to attend at the Tribunal hearing and not provided a witness statement in advance of the hearing. She was not available for cross-examination. The notes of her appeal hearing and appeal decision, which appear in the bundle, were therefore not formally proven and not open to proper questioning on behalf of the claimant. The Tribunal therefore has to be careful in attaching the appropriate degree of weight to these documents.
75. The claimant did not allege unlawful discrimination on the ground of age or religious belief against Ms Ecob in relation to her decisions.
76. Ms Ecob did not uphold either appeal. In relation to the alleged conversation in the Lagan Bar which was raised in the context of the claimant's grievance, Ms Ecob was satisfied that the statement which had been provided by a member of the public to the claimant's husband had been shown to both Mr Caldwell and Ms McKay for comment during the course of their interviews even though this does not appear to have been specifically recorded in either set of notes. Ms Ecob did not address the fact that the conversation took place in a public bar and that the claimant had been identifiable as the subject of that conversation. No action was apparently recommended or apparently took place in respect of this against Mr McMichael, Mr Caldwell or Ms McKay.

Importantly, no action was taken in relation to the allegation that Mr McMichael had said that he would not be asking too many questions in the course of this procedure. In fact, it does not appear to have been a matter which concerned Ms Ecob.

77. In relation to the disciplinary appeal, the matter was dealt with briefly, if not perfunctorily, in the last one and a half pages of the appeal decision. Ms Ecob recited the four allegations which had been upheld by Mr Jamison at the disciplinary hearing. She determined that there had been no evidence that documentation had been falsified and decided not to uphold that specific allegation. She also decided that the claimant had been guilty of a breach of cash-handling procedures in relation to the handling of tips but that this was not a matter of gross misconduct meriting dismissal. It would have been merited a written warning of some kind. The remainder of Ms Ecob's findings are unclear and it is particularly regrettable that she was not able to attend this hearing and that she was not able to provide a witness statement, albeit an unsworn witness statement, dealing with these matters. In any event, Ms Ecob concluded that the allegations were '*phrased poorly*'. It would appear that this comment refers not just to the two allegations dealt with above but to all four allegations. It further appears that Ms Ecob re-worded the charges to refer to a failure to properly keep receipts and records relating to the individual expenditures of NVQ money which had been held by the claimant in the office safe. Although Ms Ecob, like everyone else involved on behalf of the respondent in this matter, did not take the obvious step of interviewing or attempting to interview either Mr Frazer or Mr Fraser to determine whether or not the claimant had prior authorisation for the manner in which she lodged NVQ bonus cheques in the respondent's bank account, recorded the lodgement of those cheques in the respondent's cheques in the respondent's accountancy system and withheld equivalent amounts of cash for expenditure on staff incentives, Ms Ecob does not clearly indicate whether she concluded that the claimant had such prior authority.

This, given the history of the case and the manner in which it has been approached throughout, appears to the Tribunal to have been crucial. It was simply not addressed by Ms Ecob. Ms Ecob apparently did not conclude that there had been any dishonesty or theft on the part of the claimant. She appears to have upheld the dismissal solely because receipts and records of individual expenditures in respect of staff incentives and team-building had not been retained by the claimant. There is no reference in that part of the appeal decision to the need to ensure some form of consistency between the claimant's position and the position of Mrs Mulholland. If, which is unclear, Ms Ecob had concluded that the claimant had prior authorisation for this practice from prior Operations Managers, she would have had to necessarily conclude that the claimant had sought and had gained appropriate authorisation for the practice from those relevant line managers. That is a far more crucial issue than the differences in scale between the expenditures in Central Station and Great Victoria Street Station. Those can be explained by the differing training needs in the two areas. Mrs Mulholland had asked the claimant for advice. The claimant was not her line manager. The question then to be posed was whether Mrs Mulholland had, apparently like the claimant, asked for authority from the appropriate line manager. Mrs Mulholland appears to state that she had spoken to Mr McMichael about this. This was apparently not considered by Ms Ecob.

Decision – unlawful discrimination

78. The Tribunal has concluded that there was a serious and ongoing level of friction between the claimant and Mr McMichael. It has also concluded that Mr McMichael was the primary mover in relation to the suspension of the claimant. It has concluded that there were serious and persistent errors in the investigation process and in the disciplinary and appeal processes. It has concluded that the defence put forward by the claimant was never properly investigated. It concludes that the statements from the claimant's deputy manager and from Mrs Mulholland go a long way to supporting the claimant's clear position. The Tribunal also concludes that it is highly unlikely that any senior manager such as the claimant, Mrs Mulholland or Mrs Campbell, would have adopted the NVQ procedure without prior authorisation and equally unlikely that any such senior manager would have continued such a procedure without prior authorisation. On the balance of probabilities, therefore, the Tribunal concludes that the claimant had received prior authorisation from Mr Frazer and Mr Fraser. It also concludes it was more likely than not that Mr Harrison and indeed Mr Scott were aware of the procedure taking place. Mr Scott, in particular, was also aware of money being maintained in an envelope in the office safe. The issue of whether or not Mrs Mulholland had told Mr McMichael of this practice was never properly investigated.
79. The provisions relating to the shifting burden of proof have been discussed many times in case law and most relevant extracts are set out above. It is not the position that all the claimant has to do is to simply raise the possibility of unlawful discrimination having taken place. The claimant must go further and must establish a prima facie case of discrimination. Putting it another way, the claimant must establish facts on which a reasonable Tribunal, disregarding any possible explanation, could properly infer unlawful discrimination had taken place. A difference in status, ie a difference in age or religious belief; and a difference in treatment, ie that the claimant was suspended and dismissed and Mrs Mulholland was not either suspended or dismissed, is not in itself sufficient. As the Court in *Laing* stated:-

“It is the obligation of the Tribunal to focus on the issue on discrimination.”

Looking at the facts as found, the Tribunal concludes that the only reasonable inference it can draw is that the claimant was treated unfairly and badly but that that treatment was provoked by a mixture of personal animus between the claimant and Mr McMichael and by general incompetence on the part of the respondent. There is no evidence upon which the Tribunal could reasonably infer that the treatment was motivated by either religious belief or age.

The law does not provide that the burden of proof has been reversed and that it falls automatically on the respondent. It only shifts if the facts proven establish a prima facie case of unlawful discrimination. That first stage has not been satisfied here.

The claims of unlawful discrimination on the grounds of religious belief and age are therefore dismissed.

Relevant findings of fact – unfair dismissal

80. The first issue for the Tribunal to determine is whether the dismissal was for one of the potentially fair reasons in the 1996 Order. In this case, the only reason put forward by the respondent is ‘conduct’. The onus on proof is on the respondent to establish, on the balance of probabilities, that this was the reason for the dismissal.
81. It is clear that there was personal friction between the claimant and Mr McMichael. It is however clear that some degree of fault could reasonably be attached by an objective employer to the claimant, in that the claimant, and indeed Mrs Mulholland, did not keep adequate receipts or records setting out expenditure under the NVQ procedure. The respondent, while substantial criticisms can be made of their processes and of their general approach to the claimant, appear to have been motivated throughout by the claimant’s conduct, primarily in relation to the NVQ scheme. The Tribunal therefore concludes that on balance of probabilities the respondent has established that the reason for the dismissal was conduct. It was not for any other reason. That does not, of course, mean the dismissal was fair; it only means that the dismissal was potentially fair. That has to be judged by reference to the statutory test.
82. The investigation by Mr Golden was perfunctory, incomplete and inadequate. Obvious matters were not explored by Mr Golden. Mr Frazer and Mr Fraser were not interviewed to test the claimant’s defence. All the NVQ students were not interviewed. There were five very short interviews with members of staff. The deputy manager of Central Station was not interviewed. The issues relating to the NVQ procedure in Great Victoria Street Station, which was managed by Mrs Mulholland, were not explored. The statements of Mrs Mulholland in relation to that procedure and in relation to the level of knowledge by management of the procedure were not explored. E-mails sought by the claimant were not followed up and were not provided by the respondent to Mr Golden. It is simply inexcusable for an experienced investigator holding the role of Head of Fraud Investigation and Analysis to simply have a request from the claimant for e-mails go ‘off my radar’. It indicates that the investigation was not a proper or real investigation. There was no evidence of any effort on the part of Mr Golden to consider the defence put forward

by the claimant. It seems clear that there was no consideration given to the obvious issue of whether or not two senior managers and a deputy manager were likely to have put this procedure into practice, and to have operated the procedure for some time, without clear authority from Operations Managers and without some significant degree of active knowledge and participation by Operations Managers.

On the Court of Appeal has pointed out in **Spence** (above), the respondent is, as a matter of fairness, under a particular obligation to forward documents which may be of assistance to the claimant in contesting the charges. The failure to provide the requested e-mails in this case is a significant failure on the part of the respondent.

Furthermore, as Elias J pointed out in **A v B** (quoted in **Roldan** above) a conscientious investigator should focus not just on evidence which might point towards guilt. He should also focus on any potentially exculpatory evidence. Mr Golden failed to do so. Indeed the respondent continually failed to do so in relation to the possibility of prior authorisation and in relation to the requested e-mails.

83. Mr Farrugia's involvement also creates problems for the respondent. Mr Farrugia interviewed Mrs Mulholland and knew specifically that Mrs Mulholland had, according to her, told Mr McMichael, shortly after he had been appointed, of the NVQ procedure as it applied in Great Victoria Street Station. That information and indeed other information which was relevant to the claimant's defence was not passed on to Ms Ecob who was hearing the appeal. Indeed it appears that this information was not investigated at all. It seems to have been either ignored or to have been actively swept under the carpet. That failure to highlight potentially exculpatory evidence and to pursue consistency between the claimant and Mrs Mulholland was again a significant fault on the part of the respondent.
84. The decision to single the claimant out for suspension also appears to have been unfair. The decision to suspend was clearly a decision taken primarily by Mr McMichael. Some active attempts appear to have been made to conceal that position and to give the impression that the decision to suspend the claimant was a decision taken by Mr Golden.
85. Mr McMichael appears to have conducted an active investigation into the claimant while at the same time he was expecting to hear and determine the disciplinary charges. That in itself perhaps did not significantly affect the outcome since Mr McMichael was eventually removed from the disciplinary process. However it does indicate to the Tribunal that the respondent was not approaching this matter fairly and openly.
86. The Tribunal concludes that the fourth charge, ie the charge of '*suspicion of theft*' was not just properly worded and was effectively nonsense. It was actively inserted by Mr McMichael. Whether that was done under advisement, or not, is not a crucial issue. It was added. As worded, it made no sense. There was no evidence of theft or personal gain. After listening the respondent's witnesses, the Tribunal concludes that no one in the respondent's organisation appears to have believed theft had occurred.
87. The disciplinary hearing conducted by Mr Jamison was also unfair. The e-mails again requested by the claimant were not provided. Mr Jamison was

apparently fobbed off by someone on the respondent organisation by a simple statement that they were '*not available*'. No evidence has ever been produced to establish why the e-mails were not available. It seems inexplicable that this could have been the case at that time. Mr Jamison was given the disciplinary pack on his arrival in Belfast on 22 February 2013 when it would have been obvious to anyone that was not going to be sufficient. Mr Jamison had to arrange a second day of hearing. If the respondent had been approaching this matter openly and fairly, the Tribunal would have expected to have seen that the disciplinary pack had been supplied in advance to Mr Jamison.

88. Mr Jamison did not have access to the notes of the meeting between Mr Golden and Mrs Mulholland. He did not therefore have access to Mrs Mulholland's particular views in relation to the practice in Great Victoria Street Station and the level of knowledge on the part of Operations Managers and, in particular, on the part of Mr McMichael. Mr Jamison accepted in cross-examination that this was relevant information and that it should have been checked. Again, if the respondent had been approaching this matter openly and fairly, Mr Jamison would have been given access to these notes and would have properly investigated the claimant's defence.
89. Mr Jamison did not speak to Mr Frazer or to Mr Fraser and again he accepted in cross-examination that he should have spoken to them. That appears to the Tribunal to have been a basic and obvious step for any reasonable employer to have taken.
90. When Mr Jamison had some form of exchange with Mr Harrison, the third Operations Manager, it was not produced to the claimant for discussion and was not produced to this Tribunal. Finally, Mr Jamison accepted in cross-examination that the attitude shown by the claimant in the initial response to the query from Mrs Holland and indeed to the investigatory process was open and transparent and did not indicate any dishonesty on her part. This is not a point which he considered when he reached his conclusion and dismissed the claimant. He also accepted that if he had investigated the matter properly and if he had accepted that the claimant had prior authorisation for the NVQ procedure, the only remaining substantive issue was one of poor recordkeeping in which case an appropriate penalty would have been a Final Written Warning.
91. It is therefore clear the matter was not investigated or considered properly when judged against an objective standard of reasonableness and that the respondent's decision to dismiss at first instance was not a decision which a reasonable employer, acting properly, could have made.
92. The appeal process has, as indicated elsewhere in this decision, to be approached carefully. For whatever reason, Ms Ecob has not prepared a witness statement for this Tribunal. She did not give evidence and was not available for cross-examination. No medical evidence has been produced to this Tribunal to explain her non-availability and no application had been made for a postponement.
93. The charges on appeal appear to have been re-written and re-worded to suit the respondent. In any event, the substance of the ultimate decision on appeal appears to have been that the claimant had failed to keep proper records and receipts for her expenditure under the NVQ scheme. This is a matter upon which a reasonable

employer could not properly have dismissed the claimant. As the GB Court of Appeal pointed out in the cases of **Bowater**, **Fuller** and **Roldan** (see above) the function of an Employment Tribunal is not to simply rubberstamp the decision of the employer on fairness. The employer is not the arbiter of 'fairness'. That is a decision for the Tribunal to reach provided it uses an objective and not a subjective standard. It seems clear that no one ever asked the claimant, or indeed asked Mrs Mulholland, for receipts. In both instances these managers would have been better advised to have carefully returned every receipt. However, against an objective standard, the failure to have done so cannot be regarded as misconduct justifying, in all the circumstances of this case, summary dismissal or dismissal at all.

A reasonable employer, in the circumstances of this case, could only have realised that Mrs Mulholland was in exactly the same position and that Mrs Mulholland was not dismissed and had received only a Final Written Warning. The obvious inconsistency in treatment in what can only be regarded as analogous circumstances, would, on its own, be sufficient to render the dismissal of the claimant unfair.

Decision – unfair dismissal

94. The Tribunal therefore concludes that the decision to dismiss the claimant, in all the circumstances of this case, was not a decision which a reasonable employer could have reached. The decision to dismiss was procedurally and substantively unfair. The failures in the investigations and disciplinary process were gross. The ultimate decision by Ms Ecob to approve the dismissal was not one which a reasonable employer could have reached. Furthermore, the claimant's position was substantially the same as Mrs Mulholland who was given only a Final Written Warning. In circumstances such as these, a reasonable employer could not properly have differentiated between the claimant and Mrs Mulholland. For all these reasons, the decision to dismiss is therefore unfair.

Contributory conduct

95. Before approaching the question of remedy, the Tribunal must first determine whether the claimant contributed to her unfair dismissal within the meaning of Article 156(2) and 157(6) of the 1996 Order, and if so, whether it would be appropriate to apply a percentage reduction to either the basic or compensatory awards, or to both.
96. As the Great Britain Court of Appeal stated in **SMALL** (see above), the issue of alleged contributory fault, as with issues of alleged discrimination, requires a different approach to the approach taken in relation to alleged unfair dismissal. The latter requires the application of an objective test of reasonableness with care being taken to avoid the danger of the Tribunal substituting a subjective view as to misconduct or as to the decision to dismiss. The issue of contributory fault, however, necessarily involves a consideration by the Tribunal of the claimant's conduct and a subjective determination, on the evidence, of whether or not there had been some form of blameworthy conduct and whether or not any such conduct had contributed to the dismissal.

97. The Tribunal has already concluded, in the context of the discrimination claims, that the claimant had, on the balance of probabilities, received prior approval from her first and second Operations Managers for the NVQ procedure. Her evidence was clear and consistent. It was supported by evidence from Mrs Campbell. It was consistent with evidence volunteered by Mrs Mulholland in interviews with the respondent. It was also clear that the lodging of the NVQ cheques and the recording of those cheques had been done openly. It was also clear that when information was requested by Mrs Holland about the NVQ procedure, that information was also provided openly and without prevarication. Mrs Holland was given the names of two junior employees whom she could contact in the claimant's absence. The cash was retained in the office safe where it could have been inspected at any time. There has been no evidence that that cash had ever been used for anything other than staff incentives or team building. The respondent's witnesses in cross-examination did not suggest any form of dishonesty on the part of the claimant. The tips policy appears to have been little known. No action appears to have been taken against Mrs Campbell or indeed against any other manager who was unaware of the recent change in policy. The respondent did not consider the actions of Mrs Mulholland as worthy of dismissal (or even of suspension) even though she operated the same procedure and had similarly claimed that this had been a known procedure. Mrs Mulholland also claimed that Mr McMichael had been aware of the procedure and that she had discussed the procedure with him in or about October/November 2012.
98. The decision of Mrs Ecob to uphold the dismissal on appeal appears to be based on the claimant's failure to fully record expenditure on team building and staff incentives and to keep receipts. That failure was also a failure of Mrs Mulholland who was not suspended or dismissed. It is also clear that the claimant, and indeed Mrs Mulholland, had never been asked by any Operations Manager or by the auditor for such receipts. Clearly, any manager in the claimant's position would have been well-advised, if only from the point of self-preservation, to have meticulously kept, retained and periodically submitted such records and receipts, even if no one appeared to have been particularly interested in them. However, the Tribunal concludes that this cannot be regarded as significant blameworthy conduct contributing to the dismissal of the claimant. The degree of blame attributable to the claimant on the context of her dismissal is so small that it would not be worth making a reduction at all – *York v Brown [EAT/262/84]*. There is therefore no reduction for contributory conduct.

Mitigation

99. The claimant was clearly under an obligation to take reasonable steps to mitigate her loss by obtaining alternative employment following her dismissal.
100. The claimant did not actively pursue alternative employment while her internal appeal was pending. At this stage the claimant was still an employee. Given the treatment afforded by the respondent to Mrs Mulholland who was in essentially the same position, the claimant would have been entitled to be optimistic about her appeal. The Tribunal concludes that the claimant, in pursuing her appeal and in awaiting the result, did not fail in her duty to mitigate her loss in the period between her dismissal and her receipt of the appeal decision on or about 30 May 2013.

101. Thereafter the claimant made one or two job applications per month. She was prepared to work in areas involving a commuting distance of 25 – 30 miles each way. She did not consider employment at a significantly lower salary and sought posts offering at least £25,000 per annum. She had not obtained alternative employment. She accepted that, following this hearing, she might have to consider jobs offering a lower salary.
102. She did not consider temporary employment at any stage. She accepted in cross-examination that it would have been open to her to have sought temporary employment simply as a temporary measure or as a possible route to permanent employment.
103. The Tribunal concludes that while it was entirely understandable that the claimant should have initially sought employment at a similar salary level, she should have been prepared at an earlier stage to drop her sights to a lower salary level. The Tribunal also concludes that the claimant should have been prepared to look for and to accept temporary employment at any stage.
104. The Tribunal accepts that the scope for alternative employment at or about the claimant's original salary level was limited and that one or two job applications per month was not unusual in itself. However, as indicated, the Tribunal has concluded that the claimant should have lowered her sights earlier and also should have sought temporary employment.
105. This is not an exact science. The Tribunal in assessing the appropriate level of compensatory award must consider the evidence before it and must, as an industrial jury, conclude when and at which level, alternative employment could reasonably have been obtained. It should not automatically assess loss of earnings in every case by always including the period between the date of dismissal and the date of hearing. The date of hearing can be affected by a range of factors, including the complexity of the case and the workload of the Tribunal. In many cases, the length of this period has nothing to do with what compensation is just or equitable.
106. The Tribunal therefore concludes, on the balance of probabilities, that alternative employment at perhaps £300.00 per week net could have been obtained some 26 weeks after the end of May 2013, ie after the confirmation of the appeal decision.

The Tribunal cannot apply an indefinite multiplier. The Tribunal must assess, on the balance of probabilities, when alternative employment at the original level should be obtained. It appears reasonable to allow a continuing loss from the end of November 2013 for a further 26 weeks to reflect a salary reduced by £138.15 per week net (together with an appropriate amount to reflect the loss of pension contributions and health insurance of premiums). The Tribunal, as an industrial jury, concludes that suitable alternative employment should have been obtained by that stage.

Remedy calculation

107. The basic award was agreed at **£6,525.00**.

108. The appropriate figures for loss of statutory rights is not fixed but the Tribunal concludes, given the length of the claimant's employment, is that the appropriate figure is **£500.00**.

109. The pension loss (the employer's contribution) was £868.24 per annum and the personal health insurance loss was £578.00 per annum. The agreed approach to calculating loss was to calculate the loss of those contributions and premiums. That equates to a weekly net loss of **£27.81**.

110. The period from 13 March 2013 up to 30 May 2013, and for 26 weeks thereafter, amounts to 37 weeks. The financial loss for each of those weeks was:-

$$\begin{array}{rcl} \pounds 438.15 + \pounds 27.81 & = & \pounds 465.96 - \\ 37 \times \pounds 465.96 & = & \pounds 17,240.52 \end{array}$$

111. The future financial loss thereafter was $\pounds 465.96 - \pounds 300.00 = \pounds 165.96$

$$26 \text{ weeks} \times \pounds 165.96 = \pounds 4,314.96$$

112. For the purposes of the compensatory award, the initial financial loss was £21,555.48.

113. The claimant could and should have mitigated that loss by seeking temporary employment at any stage following the confirmation of her dismissal. This again is not an exact science. However, the Tribunal reduces the financial loss figure by 20% to reflect this possibility. The final financial loss figure is therefore £17,244.38.

114. The unfair dismissal award is therefore:-

Basic award	£ 6,525.00
Compensatory award (including £500.00 for loss of statutory rights)	£17,744.38
Total	£24,269.38

115. The claimant claimed Jobseekers' Allowance from 29 May 2013 to 4 December 2013. The attention of the parties is drawn to the recoupment notice attached to this decision:-

(i) Monetary award (the full amount awarded disregarding recoupment)
£24,269.38

(ii) Amount of prescribed element (the compensatory award for loss of wages from dismissal to the conclusion of the hearing)
£17,244.38

(iii) The relevant dates for the prescribed element (the date of the dismissal and the date the Tribunal concluded) –

(a) 13 March 2013

(b) 14 March 2014

(iv) The amount by which (i) exceeds (ii) £ 7,025.00

Breach of contract

116. The breach of contract claim concerns two bonuses which the claimant alleged should have been paid to her. The first such bonus was dependent on the claimant having met financial targets. The claimant accepted that she had not met those targets but sought to argue that this failure to meet the targets was due to a decision by the respondent in relation to the staff restaurant. The claimant did not produce any evidence of a breach of contract on the part of the respondent. That claim is dismissed.
117. The second bonus was dependent on the claimant having been in employment when it was due. It fell due after her dismissal and was not paid. Again the claimant could not point to any breach of contract on the part of the respondent and that claim is dismissed as a breach of contract claim. The Tribunal has heard insufficient evidence on which it can determine any sum of bonus which might have been payable and which might have been part of any compensatory award for unfair dismissal.
118. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Vice President:

Date and place of hearing: 10 – 14 March 2014, Belfast

Date decision recorded in register and issued to parties:

CLAIMANT: Elaine Marks

RESPONDENT: Select Service Partner UK Ltd

ANNEX TO THE DECISION OF THE TRIBUNAL

**STATEMENT RELATING TO THE RECOUPMENT OF JOBSEEKER'S
ALLOWANCE/INCOME -RELATED EMPLOYMENT AND SUPPORT ALLOWANCE/
INCOME SUPPORT**

1. The following particulars are given pursuant to the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations (Northern Ireland) 1996; The Social Security (Miscellaneous Amendments No.6) (Northern Ireland) 2010.

(a) Monetary award of	£24,269.38
(b) Prescribed element of	£17,244.38
(c) Period to which (b) relates:	13 March 2013 – 14 March 2014
(d) Excess of (a) over (b)	£7,025.00

The claimant may not be entitled to the whole monetary award. Only (d) is payable forthwith; (b) is the amount awarded for loss of earnings during the period under (c) without any allowance for Jobseeker's Allowance, Income-related Employment and Support Allowance or Income Support received by the claimant in respect of that period; (b) is not payable until the Department of Social Development has served a notice (called a recoupment notice) on the respondent to pay the whole or a part of (b) to the Department (which it may do in order to obtain repayment of Jobseeker's Allowance, Income-related Employment and Support Allowance or Income Support paid to the claimant in respect of that period) or informs the respondent in writing that no such notice, which will not exceed (b), will be payable to the Department. The balance of (b), or the whole of it if notice is given that no recoupment notice will be served, is then payable to the claimant.

2. The Recoupment Notice must be served within the period of 21 days after the conclusion of the hearing or 9 days after the decision is sent to the parties (whichever is the later), or as soon as practicable thereafter, when the decision is given orally at the hearing. When the decision is reserved the notice must be sent within a period of 21 days after the date on which the decision is sent to the parties, or as soon as practicable thereafter.
3. The claimant will receive a copy of the recoupment notice and should inform the Department of Social Development in writing within 21 days if the amount claimed is disputed. The tribunal cannot decide that question and the respondent, after paying the amount under (d) and the balance (if any) under (b), will have no further liability to the claimant, but the sum claimed in a recoupment notice is due from the respondent

as a debt to the Department whatever may have been paid to the claimant and
· regardless of any dispute between the claimant and the Department.