

# THE INDUSTRIAL TRIBUNALS

CASE REF: 6103/18

**CLAIMANT:** Terence McDonnell

**RESPONDENTS:** 1. Portglenone Refrigeration Services Limited  
2. Seamus Magill

## DECISION

The unanimous decision of the tribunal is as follows:

- (1) The claim of sex discrimination is dismissed.
- (2) The claimant was unfairly dismissed and is awarded compensation in the sum of £13,007.10

## CONSTITUTION OF TRIBUNAL

**Employment Judge:** Ms Ó Murray

**Members:** Mrs E Gilmartin  
Mr W McCreight

## APPEARANCES:

The claimant represented himself assisted by his wife and Ms J Montgomery.

The respondent was represented by Ms S Treacy of Peninsula Business Services Limited.

## THE CLAIM

1. The claimant claimed unfair dismissal and sex discrimination in the form of victimisation. The respondent's case was that the claimant was automatically unfairly dismissed for failure to follow the statutory dismissal procedure but that there was no discrimination.

## SOURCES OF EVIDENCE

2. For the claimant, the tribunal heard oral evidence and had written statements from the following witnesses:-
  - (i) The claimant who provided an initial statement and then a supplementary statement after he had received the respondents' statements.

- (ii) Jennifer Montgomery who was one of two female colleagues who had complained of sexual harassment;
3. For the respondent the tribunal heard oral evidence and had written statements from the following witnesses:-
- (i) Seamus Magill, the second respondent and a director in the first respondent company. All references in this decision to Mr Magill refer to Mr Seamus Magill;
  - (ii) Darren Magill, installation manager whose evidence was, in the end, not relevant to our deliberations and his evidence therefore does not feature in this decision;
  - (iii) Declan Maguire, a salesman who from 2009 had worked alongside the claimant;
  - (iv) Hugh Fitzsimons, the director of the parent company in the Republic of Ireland;
  - (v) Jenny Carey, the office administrator who took notes at the redundancy meeting.
4. The claimant's sought to introduce in evidence the written statement of Alison Gilmore stating that Ms Gilmore was not available to give evidence due to ill-health, albeit that no medical evidence was produced in that regard. The claimant was given the option of requesting a Witness Order to compel the attendance of Ms Gilmore but decided to proceed without her evidence. The Employment Judge explained that her statement would as a consequence not be taken into account at all given that she would not be attending to give evidence.
5. Initially the claimant had sought to introduce Ms Montgomery's statement without Ms Montgomery attending to give evidence. The claimant then contacted Ms Montgomery and she attended voluntarily to be subject to cross-examination. In the event Ms Montgomery remained for the remainder of the hearing and assisted the claimant by questioning one of his witnesses on his behalf.
6. In the claim form the claimant sought compensation only. In his statement the claimant mentioned reinstatement but did not pursue that at hearing. The hearing proceeded on the basis of a claim for compensation only.

## THE ISSUES

7. The issues for the tribunal were therefore as follows:-
- (i) As it was conceded that there was an automatic unfair dismissal for failure to follow the SDP, that aspect of the case related solely to value. The respondents had made it clear in the course of the Case Management process that the respondents were not raising **Polkey** issues nor were issues of contributory conduct being raised. The respondents had also conceded that it was not part of the respondents' defence that the claimant had been offered suitable alternative employment.

- (ii) The discrimination claim was a claim of victimisation under the Sex Discrimination (Northern Ireland) Order 1976 (as amended). The claimant's case was that he was treated adversely over a period and ultimately dismissed for a spurious redundancy because he had supported two female colleagues in their complaint of sexual harassment which was made in 2012. The claimant's point was that he had raised the issue of this adverse treatment of his two female colleagues in 2012 at the time of complaint, and also on an on-going and frequent basis between that date until the date he left in 2018.
- (iii) The issue in the victimisation claim therefore was whether or not any adverse events occurred as alleged by the claimant and, if so, whether they were connected to the protected act (namely the support given to his two female colleagues) in the requisite way.

## THE LAW

- 8. Discrimination on the ground of sex is outlawed by the Sex Discrimination (Northern Ireland) Order 1976 as amended (SDO).
- 9. It is for the claimant to prove facts from which the tribunal could conclude that an act of less favourable treatment on grounds of the protected act occurred. If the claimant proves such primary facts the burden of proof shifts to the employer to prove that any detrimental acts were in no sense whatsoever related to the protected act.
- 10. Provisions on unlawful victimisation are outlined at Article 6 of SDO. In this case it is for the claimant to prove facts from which the tribunal could conclude that he was treated less favourably than a hypothetical comparator who did the protected act of support as defined by the claimant.
- 11. It is not enough for a claimant to show a difference in status and a difference in treatment but he must show "something more" in order that the tribunal could conclude that any detrimental acts were because of the protected act. This is the import of the **Madarassy** decision and the following appellate decisions illustrate how tribunals should approach the shifting of the burden of proof in these cases.
- 12. The Court of Appeal in the case of **Nelson v Newry & Mourne District Council [2009] NICA - 3 April 2009** dealt with 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. The court stated:

*"22 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 to 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."*

13. In **S Deman v Commission for Equality and Human Rights & Others [2010] EWCA Civ 1279**, the Court of Appeal 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.
14. The right not to be unfairly dismissed is enshrined in the Employment Rights (NI) Order 1996 (as amended) (ERO). At Article 130 of ERO it is stipulated that it is for the employer to show the reason for the dismissal and that the reason falls within one of the fair reasons outlined at Article 130(2). In this case as unfair dismissal for breach of the SDP was conceded, the unfair dismissal claim related solely to value.
15. The Statutory Disciplinary and Dismissal Procedure (SDP) is set out in the Employment (NI) Order 2003 (Dispute Resolution) Regulations 2004 and in the Employment (NI) Order 2003. Essentially there are three steps in the minimum disciplinary and dismissal procedure. Step one involves the employer writing to the employee setting out the grounds for the proposed action and inviting the employee to a disciplinary meeting to discuss the matter. Step two involves holding a meeting and notifying the employee of the decision and the right of appeal. Step three involves inviting the employee to an appeal meeting if the employee avails of the appeal process and notifying the employee of the appeal decision. If there is breach of the SDP the dismissal is automatically unfair.
16. Compensation for unfair dismissal is assessed in accordance with Articles 152-161 of ERO. Article 157 states where relevant as follows:
  - (1) *... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*
  - (2) *The loss referred to in paragraph (1) shall be taken to include:-*

- (a) *any expenses reasonably incurred by the complainant in consequence of the dismissal, and*
- (b) *subject to paragraph (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.”*

## **FINDINGS OF FACT AND CONCLUSIONS**

17. All witnesses produced written statements. The claimant produced a supplementary statement in answer to the respondents' witnesses' statement. The tribunal assessed all of the evidence both written and oral together with the claim and response forms and the documents to which it was referred during the hearing to find the following facts proved on a balance of probabilities. The tribunal applied the legal principles to the facts found in order to reach the following conclusions. It is important to note that this decision does not record all of the competing evidence but records the principal findings of fact drawn from all the evidence presented to the tribunal.

### **Credibility**

18. We had concerns about the reliability and credibility of both Mr Seamus Magill and of the claimant on some issues. Our concerns about their evidence did not however taint all of their evidence and we therefore accepted their evidence on some issues and rejected their evidence on some issues as set out below.
19. We found Ms Montgomery to be an honest and convincing witness who gave her evidence in a measured way. She was reluctant to be involved in these proceedings at all but when she attended was consistent and impressive in the way she gave her evidence.

### **Introduction**

20. The respondent is a company providing refrigeration equipment and an installation and maintenance service, to businesses and shops in Northern Ireland and is a subsidiary of a company based in Dublin of which Mr Fitzsimons is the managing director. The business in Northern Ireland was headed by the second respondent Mr Seamus Magill who was managing director of the first respondent.
21. This case primarily concerns a group of four colleagues who worked in the office of the respondent company: Ms Montgomery and Ms Gilmore, both of whom worked in administration and accounts; the claimant, who worked in administration/project management; and Mr Maguire, who was a salesman. It was common case that there were no relevant issues raised with managers until an incident which occurred in March 2012.
22. The claimant worked for the respondent company from 2005 until he was made redundant with effect from 9 March 2018.

### **The 2012 Incident**

23. This incident occurred in the office on Friday 31 March 2012 and involved Mr Maguire, a cleaner and Ms Montgomery. It was common case that the cleaner

made the comment after having cleaned the office: *“That’s a lot more Protestant looking now”*. The allegation was that Mr Maguire laughed at that comment and that Ms Montgomery was offended by the cleaner’s comment and by Mr Maguire’s reaction. We will refer to this comment as “the Protestant comment”.

24. Ms Montgomery complained to the claimant and it was uncontested that the claimant then contacted Mr Seamus Magill the next day (a Saturday) and met with him that day to complain on behalf of Ms Montgomery. The claimant’s evidence was that he also told Mr Magill on that day that there had previously been inappropriate comments made by Mr Maguire to both Ms Montgomery and Ms Gilmore. Mr Magill denied that he was told this by the claimant that day.
25. Mr Magill met both Ms Montgomery and Ms Gilmore the following Monday and his evidence was that he had pressed both women about any other comments and asked them specifically if there had been any “sexual comments” but that neither woman would give him any details. Essentially Mr Magill’s point was that he could do nothing further in relation to alleged comments by Mr Maguire because he had not been given any more information despite him pressing for it. In contrast, Ms Montgomery’s evidence was that she had given Mr Magill details of the sexual comments which she alleged had been made by Mr Maguire to both her and Ms Gilmore over a period.
26. We assessed carefully the evidence of the claimant, Mr Magill and Ms Montgomery on this point and we prefer the evidence of the claimant and Ms Montgomery for the following principal reasons:
  - (i) It was clear that the claimant had said enough (about alleged comments of a sexual nature) to Mr Magill on the Saturday to have Mr Magill bring both women into see him on the Monday. The only allegation that involved both women was the allegation of sexual harassment, in the form of comments, rather than the Protestant comment which was made in the presence of Ms Montgomery only.
  - (ii) Mr Magill stated that the reason he had specifically asked the two women whether or not sexual comments were involved was because it was two women who were alleging that inappropriate comments had been made. We do not find this plausible in a context where the complaint was about a comment about religion. We therefore find that the fact that Mr Magill raised the issue of sexual comments supports the account given by the claimant and also by Ms Montgomery that specific reference was made by the claimant on the Saturday, and by Ms Montgomery and Ms Gilmore in the meeting with Mr Magill, to alleged sexual comments.
  - (iii) Mr Magill’s actions after the meeting with the two females support the evidence of the claimant and Ms Montgomery. Mr Magill spoke to Mr Maguire and gave him a verbal admonishment. He also accepted Mr Maguire’s suggestion that he worked from home for a while whilst a new office was built to ensure that Mr Maguire and the two women would be in separate rooms. Mr Magill was clear in his evidence that this arrangement that Mr Maguire work from home was inconvenient for the business but he nevertheless agreed to it. We find that these actions support Ms Montgomery’s account that she had complained of comments of a sexual

nature particularly as the primary focus of her complaint about the Protestant comment was on the cleaner who had made it.

27. Examples were given by Ms Montgomery in evidence to this tribunal, of the detailed allegations of sexual harassment (in the form of alleged comments by Mr Maguire) that she and Ms Gilmore made to Mr Magill in the meeting in 2012.
28. In submissions Ms Treacy conceded that, if we accepted Ms Montgomery's account of the complaint made in the meeting with Mr Magill about the comments, then that would amount to her having raised an allegation of sexual harassment. For this reason it is unnecessary to set out in this decision the detail of the alleged comments. At this point we make clear that we do not make a finding on whether or not the allegations against Mr Maguire were true as this is not relevant to this case. For this reason the questioning in tribunal was focussed on the fact of the complaint and the content of the complaint as it is sufficient for a victimisation claim that there was an allegation of sexual harassment in order to engage the Sex Discrimination Order. The first key issue in tribunal was whether a complaint of sexual harassment was made to Mr Magill at all. Our finding is that there was such a complaint made by the two women to Mr Magill in March 2012 following the claimant's having raised such a complaint with Mr Magill.
29. We find from an assessment of all of the evidence on this point that Mr Magill was told both about the Protestant comment, which he clearly took very seriously indeed, and whilst he was also given details of allegations of other inappropriate comments of a sexual nature, his focus remained on the Protestant comment.
30. The second key issue for the claimant in his victimisation case is that he must establish that he committed a protected act. It is therefore for the claimant to show that he supported the two complainants in relation to their sexual harassment complaint in the manner alleged by him. The acts of support relied upon by the claimant in this case in that regard are as follows:-
  - (i) That he brought the complaints to the attention of Mr Magill immediately after the incident involving the Protestant comment, ie in March 2012;
  - (ii) That he had brought this matter up on a regular and continuing basis from 2012 until the women both left in 2015 and after that on a continuing basis until he was dismissed in 2018.
31. The claimant's case was that he was treated detrimentally from 2012 to 2018 on an increasingly frequent basis because of the protected acts.
32. By early 2015 both women had left employment. There was some dispute as to whether or not Ms Gilmore's departure was connected to her alleged treatment, however, the reason for both women leaving in 2015 was not relevant to our case. The date of them leaving was relevant in relation to our assessment of the plausibility of the claimant's assertion that he brought up their treatment on a regular basis after 2015.
33. We accept that the claimant raised the complaint of sexual harassment in March 2012. We do not accept however that the claimant referred to this matter thereafter as frequently as he stated and we do not accept at all that he made any



complaint about this on a constant basis between 2015 (when the women left) and his dismissal for redundancy in 2018.

### **The Working Relationship between the Claimant and Mr Maguire**

34. The relationship between the claimant and Mr Maguire was agreed to have been relatively amicable until the 2012 incident involving the Protestant comment. After that point it was common case that the relationship deteriorated to the extent that the claimant had written contact only with Mr Maguire at the claimant's request. It was also uncontested that Mr Maguire had to show himself how to use AutoCad (a key computer programme) in order to do his job and Mr Magill's point to us was that this amounted to the claimant being obstructive in not communicating with Mr Maguire about AutoCad as the claimant was proficient in it. The claimant had also agreed that he had refused to give the Wi-Fi password in work to Mr Maguire and Mr Magill's evidence was uncontested that he had had to intervene to ensure that Mr Maguire was given this password as he would otherwise have been hampered in his work. It was therefore common case that the relationship between the two men had deteriorated substantially to the extent that it affected the work of both of them adversely.
35. The claimant introduced evidence in relation to audio recordings made on Mr Maguire's work phone, as his point in tribunal was that he had wanted written communication from Mr Maguire in work as he believed that Mr Maguire was recording all encounters on the phone and in the office. It was common case that there was also CCTV footage of the claimant melodramatically pinning himself against the wall when passing Mr Maguire in the corridor. The parties agreed that the tribunal did not need to view that CCTV footage. The point made by the Mr Magill was that this showed the poor relationship between the claimant and Mr Maguire. The claimant's point on that was that he was mimicking this behaviour which Mr Maguire allegedly engaged in with the claimant on an ongoing basis.
36. We found these issues of audio recordings and CCTV footage to be, at best, ancillary to the issues in this case. The audio recordings were made in 2010 and 2011 ie prior to the incident in 2012. The claimant became aware of the existence of these recordings when he found the files on Mr Maguire's laptop and this appears to have been an element in the souring of their relationship. The point for us was that it was clear from all the evidence that the relationship between the two men had deteriorated so badly that it was affecting the way they dealt with each other and the way each conducted their work.
37. The claimant's evidence was that he expected to be dismissed in 2015 shortly after the two female complainants had left. It was his case that there then ensued a campaign by Mr Magill (aided by Mr Maguire) to push him out of the company over a number of years. The claimant's only explanation for this campaign taking a further three years was that the claimant had been in hospital. However it transpired that in the three-year period between 2015 and 2018 the claimant was in hospital for a couple of single days, had a few hospital appointments and had a two-week period in hospital in 2017.
38. Having assessed all the evidence presented to us, we reject the claimant's case that Mr Seamus Magill embarked on a campaign to push him out of the company

over six years beginning in 2012. Our primary reasons for this conclusion are as follows:-

- (i) We found it to be inherently implausible due to the long period involved, particularly after 2015 when the two women had left.
- (ii) Mr Maguire made a complaint of alleged bullying against the claimant in August 2017. Mr Magill could have used that as a pretext for getting rid of the claimant at that time if he had been minded to do so.
- (iii) There was an incident in 2017 when the claimant agreed that he had phoned Mr Magill when Mr Magill was driving home and essentially ranted down the phone to him to the extent that Mr Magill had to hang up and spoke to the claimant the next day to say that his phone call had been abusive and was unacceptable. The claimant agreed that this had occurred but his point on this was that Mr Magill had made an unspecified derogatory comment to him before he had left the office and the claimant therefore felt that it was justified for him to ring his boss when he was on his way home to be abusive to him on the phone. Mr Magill could have used that as a reason at the very least to discipline the claimant, or to sack him, if it had been his intention from 2012 to get rid of him.
- (iv) We accept the evidence of Mr Magill that the claimant's behaviour had become obstructive in relation to providing information to Mr Maguire and in dealing with him to the extent that Mr Magill had to act as a go-between. The fact that the managing director had to intervene in this way was clearly not conducive to both the claimant and Mr Maguire being efficient in work. The claimant did not dispute that it was he who was the cause of this way of working but, rather, he sought to justify it by reference largely to the recordings. Mr Magill could have used this action by the claimant as a reason to discipline him if his aim was to push the claimant out of the company.
- (v) The lack of co-operation on the claimant's part with Mr Maguire meant that Mr Magill was more involved, as was Mr Maguire, in aspects of the work that had previously been done by the claimant. The claimant was thus contributing to the reduction in his role. We therefore accept Mr Magill's evidence that the claimant had effectively allowed his work to reduce as evidenced by his lack of co-operation with Mr Maguire which led to Mr Maguire and Mr Magill doing some tasks the claimant had been involved in, and, in particular by the claimant's performance of the audit of the Henderson sites as set out below.

### **The Henderson Audit**

39. In early 2018, Mr Magill gave the claimant the task of performing an audit of 80 Henderson sites. It was common case that this was a very important customer, it was a very important project and there was a deadline of September in relation to it. It was also uncontested that the claimant had told Mr Magill that it would take him approximately eight weeks to conduct this audit and to produce the necessary report.

40. The claimant then decided of his own volition to set up a system whereby he would remain in the office and engineers, who were doing maintenance work at these sites, would tick boxes on a form in relation to certain matters on the sites instead of the claimant attending the sites to conduct the audit and compiling a report the way Mr Magill had asked him to.
41. Due to the claimant's actions only a maximum of 13 of the 80 sites had been done in an eight-week period before the claimant left in March 2018. The end result was that the company had to conduct an intensive audit to ensure that all the sites were assessed in the right way by the deadline in September.
42. The claimant's point in tribunal was that he had been given this work unreasonably on top of his other work. We accept Mr Magill's uncontested evidence which was that the claimant had been told that this was very important work and that he should drop everything else and carry out the audit in the way that he had been asked. We accept Mr Magill's evidence which was that the claimant's failure to do the job the way he had been told and his failure to do more of the site visits was indicative of his attitude to his work and was an example of the claimant doing less over a period and effectively diminishing his own role.
43. During the hearing the claimant referred to the store manager and storeman jobs and, on the one hand, said that this was part of his work which is now done by others but on the other hand the documents were clear that it was the claimant who had previously suggested to the respondent that they should take on staff to carry out these roles. The claimant then complained in tribunal that the taking on of these two members of staff took part of his job away and that this was part of the campaign to diminish his role to ensure that he would be lined up for redundancy. We reject the claimant's point on this as it was inherently contradictory and because this part of the case was only added at the time of the tribunal hearing. We conclude that this evidence supports the respondents' point about the claimant diminishing his own role.
44. Mr Magill's point, which we accept, was that it was he who suggested the store job to the claimant as he was trying to find things for the claimant to do because his role had diminished due to the obstructive way he was working and that Mr Magill offered this type of job to him in an effort to give him something to do. The same reasoning underpinned Mr Magill's decision to allocate him the project of auditing the Henderson stores.

### **The Redundancy**

45. The claimant's claim about his redundancy was that in 2018, a spurious redundancy was devised and he was targeted because of his support of the female members of staff in 2012. He further made the point that his replacement was Mr Andrew Dunwoody.
46. It was agreed by the claimant that the respondents' staff costs had increased as outlined in Mr Fitzsimons' evidence. Mr Fitzsimons decided that overheads had to be reduced, that a reduction of staff was the way to achieve this and there was therefore a redundancy situation. Mr Fitzsimons was not involved in the day-to-day running of the operation in Northern Ireland as that was the responsibility of Mr Seamus Magill.

47. The claimant at one point in the hearing sought to have this tribunal conduct essentially an assessment of the health of the respondents' business at the relevant time in an attempt to show that there was no redundancy required at all. It is not our task to go behind the business decision of the managing directors that they reduce costs by making a redundancy, in circumstances where it was agreed by the claimant (from the accounts which he had seen and from his own knowledge) that staff salaries had gone up. The reason for staff salaries going up was not relevant to our considerations.
48. Mr Fitzsimons made the decision that there had to be a redundancy in the form of one member of staff and it was Mr Seamus Magill who decided who would go. Whilst Mr Fitzsimons was involved in that discussion with Mr Magill he accepted Mr Magill's assessment as managing director of the Northern Ireland company that it was the claimant's role that had to go because it had diminished largely due to the claimant's own actions in the way he went about his work.
49. Whilst we have found that Mr Magill was aware of the nature of the allegations of sexual harassment we had no evidence that he had shared that detail with Mr Fitzsimons. We accept Mr Fitzsimons' evidence which was that the only comment he was aware of was the Protestant comment.
50. Mr Fitzsimons and Mr Magill gave evidence of the discussions they had about which roles to make redundant and cogent reasons were given for not making an engineer redundant. Essentially the claimant was chosen because someone in administration had to go and the claimant was earmarked as he had become less productive.
51. In summary therefore we reject the claimant's case that it was an act of discrimination to choose him for redundancy as we accept that there was a redundancy situation and the reason for choosing the claimant was not tainted by discrimination as we find that that reason was unconnected to the support given by the claimant to the two complainants of sexual harassment.

### **Mr Dunwoody's Role**

52. This case was refined in the course of five Case Management Discussions and in the course of the interlocutory process and for most of that time the claimant was represented by experienced employment lawyers. The claimant in that process did not refer to any posts amounting to a replacement of his role as his focus was on Mr Dunwoody (who was taken on in 2017) whom he described as his replacement. Mr Dunwoody worked for both the Northern Ireland and Republic of Ireland companies by splitting his time between them.
53. We accept the respondents' case that Mr Dunwoody's role was a technical, specialised role and was not the equivalent of the claimant's role which was primarily an office-based administrative and project management job. Our primary reasons for so finding are as follows:-
  - (i) Mr Dunwoody was a highly-qualified refrigeration engineer who designed and installed refrigeration systems, including new systems, and was trained

in, for example, CO2 systems. The claimant did not possess these qualifications.

- (ii) Mr Dunwoody's earnings were at a high rate because there is a shortage of this type of specialist engineer. At the relevant time Mr Dunwoody's earnings were far in excess of those of the claimant and even now the claimant earns substantially less than Mr Dunwoody. This continuing disparity in earnings supports Mr Magill's point which was that Mr Dunwoody was a highly specialised engineer and was not the equivalent of the claimant.
- (iii) The claimant in submissions for the time made the point that he could have been trained in the CO2 element of Mr Dunwoody's job. We find that this point, which was belatedly made, detracts from the claimant's veracity and supports Mr Magill's point that the two jobs were entirely different.

### **The Alleged Adverse Treatment**

- 54. The principal allegations of adverse treatment between 2012 and 2018 relate to the allegations set out below.
- 55. The claimant complained of a reduction of his involvement in site visits, business trips and business lunches. We have assessed all of the evidence in relation to these matters and we are not satisfied that the claimant has proved that there was the reduction in his involvement which he alleged.
- 56. In particular, we do not accept the claimant's evidence that his visits to sites reduced as he alleged. We accept Mr Magill's evidence which was that when they gave the claimant the opportunity to do site visits (the Henderson's audit) he decided himself not to conduct the site visits, and that the claimant's involvement in site visits in general did not reduce as alleged.
- 57. The claimant complained that Mr Magill was abusive to him on an ongoing and increasing basis after 2012. Mr Magill candidly accepted that he could be very cross and annoyed if people were being unhelpful. The claimant stated in his statement; "*Seamus was known for being bad-tempered and verbally aggressive at times but nothing was directed at me in the early days and it didn't bother me.*" We do not accept the picture painted by the claimant which was that he was singled out to be a victim of abusive behaviour by Mr Magill after 2012 especially in circumstances where the claimant felt it appropriate to ring Mr Magill to rant down the phone to him and to be abusive to him. In addition, after the claimant left it was discovered that the claimant had punched two holes in the wall behind his desk and had covered it up with a poster. The claimant agreed that he had punched at least one of the holes but said that it was in frustration at alleged behaviour by Mr Maguire to another member of staff. We therefore do not accept the claimant's picture of himself as someone who was being bullied by Mr Magill or anyone else.
- 58. The claimant alleged that he had not received a pay rise since 2012. We accept the respondent's evidence which was that the claimant was not the only member of staff who received no pay rise in that period. The claimant in the course of preparation of this case was provided with details of the earnings and pay rises of all staff and failed to show from that information less favourable treatment in the form of him being singled out by a pay rise not being given to him. The evidence

presented to us showed that some people received pay rises and others did not. We therefore reject the claimant's point that this was an act of discrimination against him because he failed to show less favourable treatment connected to the protected act.

59. The claimant alleged that there was adverse treatment in relation to the provision of a reference by Mr Magill after he left the respondents' employ. We reject that claim as it was clear from the documents that Mr Magill accepted the changes made to the draft reference by the claimant. The final version of the reference was the one redrafted by the claimant with the only amendment made by Mr Magill being that the claimant was described as "one-of" the project managers. We do not accept that the content of this reference amounted to detrimental treatment of the claimant. A point was made by the claimant that being described in this way might lead a prospective employer to think that he had been made redundant because he was not a good project manager. There was no evidence to support this suspicion by the claimant and indeed he now works in a job at a substantially higher rate of pay than he had with the respondent. In addition Mr Magill gave a favourable verbal reference on the telephone when he was contacted by one of the companies for which the claimant later worked.
60. In summary we reject the claimant's case that he was subjected to the course of adverse treatment as alleged and we find that any detriment in relation to a pay rise was not connected to his having supported the two complainants in their allegation of sexual harassment. We therefore reject the claim of victimisation. We find that there was a redundancy situation and the claimant was chosen for reasons unconnected to any support he gave to the complainants of sexual harassment. The dismissal therefore does not amount to an act of discrimination as alleged. The dismissal was however unfair as set out below.

### **Unfair Dismissal**

61. No procedure whatsoever was followed in relation to the redundancy as the claimant was simply called to a meeting and told without warning that he was being made redundant. This was in breach of the SDP and therefore automatically unfair. At that meeting were Mr Magill, the claimant and Ms Carey who attended as notetaker.
62. We found Ms Carey to be an honest and convincing witness and accept her description that the claimant was shocked but there was no animosity in the meeting and it appeared to be amicable. There was a five or ten minute period when Ms Carey had left the meeting, believing it to be over, and during that time the claimant and Mr Magill were on their own in the room.
63. Mr Magill averred that the claimant stated in that meeting that the way the two women had been treated was "*not right*" in the context of telling Mr Magill that there were a couple of people in the company he "*needed to keep an eye on*". We accept Mr Magill's evidence which was that this referred to something that had happened 6 years before and this was nothing to do with the redundancy. Ms Carey re-entered the room and we accept her evidence that there was no apparent animosity between the two men and they were having a chat. We accept her evidence that

the claimant proceeded to spend some time gathering up his effects and saying goodbye to people in the office. We therefore reject the claimant's case that he was treated in a peremptory fashion and ushered quickly out of the office on that day.

### **Compensation**

64. The claimant received a redundancy payment, notice pay and holiday pay totalling £12,987.28. The redundancy payment was equal to the basic award and is therefore offset against (and cancels out) the basic award element of any unfair dismissal compensation.
65. The effective date of termination (EDT) is 9 March 2018. The claimant received Jobseekers Allowance (JSA) in the sum of £1,532.43 after the EDT until he obtained a new job approximately seven months later, starting that job on 15 October 2018. The JSA is not deducted from compensation as it will be subject to recoupment by the Social Security Agency.
66. The first job did not involve a company car but his earnings were £32,000 per annum. The claimant obtained his current job on 19 March 2019 and it involves earnings at a substantially higher level than he had with the respondent and includes a company car. The loss of wages claim therefore relates solely to the seven month period when the claimant was on benefits as he has been earning a higher rate of pay since 15 October 2018.
67. The claimant claimed expenses as set out below. Expenses incurred as a result of being unfairly dismissed can be claimed provided they were reasonably incurred as a result of the dismissal and the sums claimed must be reasonable.
68. The claimant claimed interest on two loans which he took out as his evidence was that he was compelled to take out the loans in order to feed his family. When the claimant left the respondent's employment he received a cash payment of over £12,000. In circumstances where the claimant had such a large cash sum we reject the claim that he is entitled to interest on those loans as the claimant has not proved that the requirement for the loans was caused by the dismissal.
69. The claim originally included a claim for the use of a company car and at all points in preparation for the tribunal the claimant denied the respondents' point that the car that he had used was a pool car. During the tribunal hearing the claimant conceded that the company car was in fact a pool car and was not for his personal use and we find therefore that he is not entitled to compensation for the loss of use of that as it was a pool car. This belated change in evidence tainted the claimant's evidence generally for us.
70. The claimant bought a second-hand car and claimed approximately £2,614.20 (unvouched) in respect of the cost of that car. The claimant had made no attempt to sell that car prior to the tribunal hearing giving as his reason that he was so busy with the claim and working that he did not have time to do it. It was not made clear to us as to why the claimant needed a car to search for a job. The claimant was also not entitled to a car with the respondent. We therefore reject any claim that use of a car forms part of his loss and we reject any claim that that cost was an expense reasonably incurred due to his dismissal.

71. With the first job the claimant obtained after dismissal he did not have a car and there was a distance to travel. The issue for us is whether or not expenses for travel to work can be claimed in this case. Our view is that it is not reasonable to attribute this expense to the dismissal. The claimant lived five minutes away from the respondents' premises and was not entitled to travel expenses to and from home. Both the first and second jobs the claimant obtained after his dismissal were substantially better paid. We reject the claimant's claim for compensation on this point. The respondent relied on the EAT decision in ***Simrad Ltd v Scott [1997] IRLR 147*** in this regard. We accept that it is not enough for the claimant to say: 'but for the dismissal I would not have incurred this cost.' This expense was not reasonably incurred as a result of the dismissal. To award a sum under this heading would award the claimant a bonus ie travel expenses from home to work.
72. The claimant is entitled to a percentage uplift on his compensatory award for the admitted failure to follow the SDP in dismissing him. Ms Treacy sought a 10% uplift and the claimant sought a 50% uplift. We have decided to award a 50% uplift in the following circumstances:-
- (i) The company had brought in Peninsula in 2012 to have relevant employment documents drafted well in advance of the period in issue in this case. We were given no valid reason as to why Mr Magill and Mr Fitzsimons failed to contact Peninsula to check the procedure in relation to dismissing the claimant. The only point made by Mr Magill was that he did not think it was a HR issue as both men had decided there was a redundancy situation and Mr Magill had decided who should go.
  - (ii) There was no particular urgency in dismissing the claimant when they did and therefore managers did have time to seek and obtain advice if they needed it.
  - (iii) This was a relatively large operation with approximately 40 staff in Northern Ireland and a base in the Republic of Ireland. There was no valid excuse given to us for failing to seek advice earlier either from Peninsula or from any other source, for example the LRA, or on-line, to see whether or not there was a procedure to go through.
73. The claimant claimed loss of holiday entitlement and clarified that he was not alleging a failure to receive his holiday pay in the period prior to the EDT. It was the claimant's point that he would have had holidays during the period after he left the employer. He is not entitled to compensation in that regard over and above the loss of wages and we reject that aspect of the claim.
74. The claimant also alleged that he was entitled to holiday pay in relation to days that he attended the tribunal hearing and CMDs. The claimant is not entitled to compensation for that.
75. The claimant also alleged that he should have received a pay rise and that his future loss should include pay at that level. We have rejected the claimant's case on the pay rise and on Mr Dunwoody being a comparable employee and that element of the compensation is therefore rejected.
76. There is no injury to feelings award as the discrimination case has been dismissed.



77. The respondent argued that the claimant had been off sick during the period after he was employed. We accept the claimant's clarification which was that the two week period in hospital when he was sick related to a period before he left the respondent's employ. We have therefore not deducted that from the calculation of loss of wage.

78. The calculation of compensation is therefore as follows:

EDT: 9 March 2018

The claimant's net weekly pay £417.92.

Loss of statutory industrial rights:	<b>£500.00</b>
Loss of wages to the date of the new job 19 weeks x £417.92 (agreed figure):	<b>£7,940.48</b>
Loss of pension benefit (agreed figure):	<b><u>£230.92</u></b>
Total compensatory award:	£8,671.40
50% uplift on the compensatory award:	<b><u>£4,335.70</u></b>
Total compensation:	<b><u>£13,007.10</u></b>

**Recoupment Table**

A. Monetary Award	£13,007.10
B. Prescribed Element relating to the period Between the EDT and the date of Promulgation of the decision	£13,007.10
	<hr/>
A – B =	0

79. Your attention is drawn to the attached recoupment notice which forms part of the decision.

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

**Employment Judge:**

**Date and place of hearing: 13-17 May 2019, Belfast.**

**Date decision recorded in register and issued to parties:**