

THE INDUSTRIAL TRIBUNALS

CASE REF: 5780/19

CLAIMANT: Robert Innes-Kells

RESPONDENTS:

1. Cannon Hygiene Limited
2. Jonathan Shearer
3. Caroline Graham

DECISION

The unanimous decision of the tribunal is that the claim of unlawful discrimination on the ground of sexual orientation is dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: Mr J Leonard

Members: Mrs C Stewart
Mr A Carlin

APPEARANCES:

The claimant appeared in person and was unrepresented.

The respondents were represented by Mr I McGlashan of Watershed Europe Ltd.

THE CLAIM, THE RESPONSE AND THE BACKGROUND

1. By claim form dated and submitted to the Office of Tribunals on 16 February 2019 the claimant claimed unlawful discrimination on grounds of sexual orientation against the three named respondents in these proceedings. The claim was subsequently clarified to include a claim for harassment on grounds of sexual orientation. In paragraph 7.2 of the claim form, when requested to provide the date or dates upon which the matter about which the claimant was complaining happened, the claimant inserted the single date "16/11/18" and indicated that the discrimination was ongoing, by inserting "YES". Accordingly, any ongoing discrimination alleged was only indicated by the claimant to have commenced on 16 November 2018 and only to have continued from that date and not from any earlier time. This is of note in connection with the modification of the claimant's claim in the

course of the oral hearing, more of which is referred to below. The first-named respondent was the claimant's then current (and now former) employer. The second-named respondent, Mr Jonathan Shearer, was at the material time (and still is currently, at the hearing date) the respondent's Service Centre Manager for Belfast and the claimant reported directly to him. The third-named respondent, Ms Caroline Graham, worked as an Administrator for the respondent and reported to Mr Shearer. The first-named respondent (hereinafter referred to as "Cannon") conducted business from an address at Abbey Business Park, Mill Road, Newtownabbey, County Antrim BT36 7BA. It was from that Newtownabbey location that the claimant's employment by Cannon was directly controlled and managed. Cannon's business in Northern Ireland included the management and collection of clinical and other hazardous waste and the supply and servicing of such equipment as hand dryers, fragrance units and vending machines throughout Northern Ireland.

2. The business activities of Cannon which concern this case involved the employment of Hygiene Technicians who operated the business service by making calls to various customers of Cannon, including pharmacies, doctors' surgeries and various business concerns. Some of these customers were alluded to in the evidence received by the tribunal. The claimant was employed by Cannon as a Hygiene Technician. He commenced in that employment on 14 June 2013. For the purpose of this decision, it is confirmed that the claimant identifies himself as being gay. The claimant's claim is in respect of alleged unlawful discrimination and harassment on grounds of the claimant's sexual orientation, contrary to the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003. The claim, as initially presented by the claimant to the tribunal, notwithstanding case management by the tribunal, posed a little difficulty and required clarification, even up to the conclusion of the oral hearing. The claimant had imported directly into his claim form the specific text of a workplace grievance that had been raised by him by email sent by the claimant dated 17 December 2018 to Cannon's HR Business Partner – South, Mr Ian Smith. The text in question (at full font size) ran to in excess of 8½ pages within the claim form. That material in the claimant's claim form then had to be read in conjunction with the claimant's witness statement to provide further clarification of the claim - and indeed further clarification was thereafter necessitated. Notwithstanding directions made at a Case Management Discussion conducted by the Vice-President on 10 June 2019, timetabling the production of witness statements and dealing with other matters, the claimant's witness statement was not communicated to the tribunal until an email was received by the tribunal on 27 November 2019, a relatively short time prior to the scheduled oral hearing. Further, as the oral hearing proceeded the claimant provided additional clarification concerning the precise nature and extent of his claim. Regrettably it has to be said, the foregoing was attended to by the claimant in a manner which was indicative of the fact that aspects of the claim were still being formulated and directed by him, upon an apparently ad hoc basis and in a somewhat unfocused manner, as the hearing proceeded. As a self-represented lay litigant, the tribunal sought to afford to the claimant a reasonable degree of accommodation and latitude in that regard. This was done without objection on the part of the respondents' representative. To give perhaps one example of the foregoing, annexed to the claimant's witness statement submitted to the tribunal on 27 November 2019 was a copy of an email purporting to be authored by a Ms Zoe Patrick. This copy email was depicted by the claimant as constituting, as he referred to it, a "witness statement". However, when further pressed, the claimant indicated to the tribunal on the first day of the hearing that he did not know if Ms

Patrick was going to attend the tribunal to provide oral evidence. Indeed, it was not until the second day that the claimant confirmed that Ms Patrick would not be in attendance. For that reason, the tribunal attached no weight whatsoever to that latter document, Ms Patrick's "witness statement". (For the avoidance of doubt, the tribunal adopted a similar attitude to some of the respondents' witness statements which had been tendered in response to the tribunal's directions, but where the respondent's representative had made a decision, as the case proceeded, notwithstanding the fact that these persons were in attendance at tribunal, not to call these witnesses). The same issue concerning somewhat unfocused planning and case preparation on the claimant's part applied to the issue of whether or not a specific series of alleged events ranging in time from 2015 up to 2018 (and indeed later - to the date of the tribunal hearing) were to be viewed by the tribunal as constituting merely matters of context or (the alternative possibility) whether the claimant was intending to argue the existence of a continuing course of alleged discriminatory conduct. On account of these matters, as will be further observed below, the hearing required ongoing case management in order to clarify essential issues and the relevance of any evidence sought to be adduced.

3. In the respondents' response to the claimant's claim the respondents collectively set forth their response to the various issues raised and matters alleged in the claimant's claim form. In summary, the respondents denied any unlawful discrimination whatsoever and fundamentally disputed some of what were alleged to be matters of fact asserted within the claimant's claim form.
4. Notwithstanding the case management hearing of 10 June 2019 held before the Vice-President and the provision to the respective parties of specific information regarding interlocutory procedures and indeed the specific directions made by the Vice-President in respect of the witness statement procedure, such directions which had been expressly made and which were properly communicated to the parties were not adhered to regarding the provision of signed and dated witness statements by each party to the other, in accordance with specified timetabling. The respondents' explanation advanced by the representative was that the respondents had no clear idea of the claimant's case. That was so, indeed, up to the commencement of the oral hearing. The explanation was therefore that the respondents were unable properly to finalise their witness statements. In respect of the claimant, the specific direction made by the tribunal was that the claimant was to provide a signed and dated witness statement in respect of both liability and remedy no later than 30 August 2019. The claimant failed to do so: no explanation was afforded. As mentioned, an email encompassing the claimant's witness statement, unsigned, was not transmitted to the tribunal until 27 November 2019. The oral hearing then proceeded with an initial indication on the part of the respondents' representative that the representative was intending to call a list of named witnesses. That list was subsequently modified in the light of the further clarification of the claimant's evidence and the extent of his case to the tribunal. All this ought to have been fully and properly addressed following the clear directions of the Vice-President in the Case Management Discussion. However, in default the matter required to be actively case-managed by the tribunal at hearing. The claimant adopted the content of his claim form and his (emailed) witness statement as constituting his evidence-in-chief; the claimant was cross-examined by the respondents' representative and there were some questions from the tribunal panel. For the respondents' side, the representative (in the course of the hearing modifying his original intention) called witnesses who gave evidence under oath or affirmation

and who adopted their respective written statements as being their evidence-in-chief. These witnesses were: Mr Jonathan Shearer, Ms Caroline Graham, Mr Michael Donaldson, who was Operational Supervisor for Cannon's Belfast Service Centre and Mr Paul Doonan, who was a Delivery Lorry Driver for Cannon. Other witnesses were initially in attendance at hearing on behalf of the respondents but these persons were not called to give evidence. The witnesses called, after adopting their respective witness statements as evidence-in-chief, were cross-examined as applicable by the claimant. In order to assist the tribunal in case management, the tribunal requested the production of a timeline of relevant matters and issues and a statement of legal and factual issues. The respondents' representative undertook to attend to this, by agreement with the claimant. At the conclusion of the oral hearing the respondents' representative provided written submissions comprising a basic outline of the relevant legal principles stated to be applicable and an interpretation of the evidence adduced and the claimant followed upon conclusion of the hearing with oral submissions, in brief form.

THE APPLICABLE LAW

Sexual Orientation Discrimination

5. The relevant statutory provisions are comprised in the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 ('the 2003 Regulations') as follows:-

"Discrimination on grounds of sexual orientation

3(1) For the purposes of these Regulations, a person ('A') discriminates against another person ('B') if -

(a) on grounds of sexual orientation, A treats B less favourably than he treats or he would treat other persons; or

(2) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, than the other."

6. Discrimination in employment is referenced in Regulation 6(2) as follows:-

"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.

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

7. Regulation 4 of the 2003 Regulations provides:-

"(4) For the purposes of these Regulations a person ('A') discriminates

against another person ('B') if he treats them less favourably than he treats or would treat other persons in the same circumstances, and does so by reason that B has –

...

(d) alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of these Regulations.”

Harassment on grounds of sexual orientation is provided for in Regulation 5 as follows:-

“5(1) For the purposes of these Regulations, a person (“A”) subjects another person (“B”) to harassment where, on grounds of sexual orientation, A engages in unwanted conduct which has the purpose or effect of –

(a) violating B’s dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.”

8. Regulation 24 of the 2003 Regulations, regarding liability of employers and principals, provides as follows:-

“24.—(1) Anything done by a person in the course of his employment shall be treated for the purposes of these Regulations as done by his employer as well as by him, whether or not it was done with the employer’s knowledge or approval.

(2) Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of these Regulations as done by that other person as well as by him.

(3) In proceedings brought under these Regulations against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.”

Regulation 34 of the 2003 Regulations, regarding the tribunal’s jurisdiction, provides as follows:-

“34.—(1) A complaint by any person (“the complainant”) that another person (“the respondent”) –

- (a) *has committed against the complainant an act to which this regulation applies; or*
- (b) *is by virtue of regulation 24 (liability of employers and principals) or 25 (aiding unlawful acts) to be treated as having committed against the complainant such an act, may be presented to an industrial tribunal.”*

9. Regulation 35 of the 2003 Regulations 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 34 applies; and*
 - (b) *is by virtue of Regulation 24 (liability of employer and principals) ... to be treated or having committed against the complainant such an act,*

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

Regulation 41 of the 2003 Regulations, regarding time limits, provides as follows:-

“**41.**—(1) *An industrial tribunal shall not consider a complaint under regulation 34 (jurisdiction of industrial tribunals) unless it is presented to the tribunal before the end of –*

- (a) *the period of three months beginning when the act complained of was done; or*
- (b) *in a case to which regulation 43(6) (armed forces) applies, the period of six months so beginning.*

(2) -

(3) *A court or tribunal may nevertheless consider any such complaint or claim which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.*

(4) *For the purposes of this regulation and regulation 39 (help for persons in obtaining information etc) –*

- (a) *when the making of a contract is, by reason of the inclusion of any term, an unlawful act, that act shall be treated as extending throughout the duration of the contract; and*

- (b) *any act extending over a period shall be treated as done at the end of that period; and*
- (c) *a deliberate omission shall be treated as done when the person in question decided upon it, and in the absence of evidence establishing the contrary a person shall be taken for the purposes of this regulation to decide upon an omission when he does an act inconsistent with doing the omitted act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the omitted act if it was to be done.”*

Shifting Burden of Proof

10. The Burden of Proof Directive 97/80/EC as extended to the United Kingdom in 1998 provided as follows:-

“(17) whereas plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the National Courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory;

(18) whereas the Court of Justice of the European Communities has therefore held that the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.”

11. Article 4(1) of the Directive provided:-

“Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of equal treatment.”

12. In regard to Regulation 35 of the 2003 Regulations and the correct approach regarding the assessment of whether discrimination has occurred and application of provisions regarding shifting of the burden of proof, the Northern Ireland Court of Appeal in **Nelson v Newry & Mourne District Council [2009] NICA** held as follows:-

“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 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 **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."*

Continuing Act of Discrimination

14. One fundamental principle of central importance to this case is the principle that, for the purpose of deciding whether complaints of unlawful discrimination are in time, where there is what the tribunal decides to have been an act extending over a period, time begins to run from the last of the acts within that period of scrutiny. This principle arises from the leading authority concerning whether an act can be said to be extending over a period, that being the case of **Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530** ("**Hendricks**"). In **Hendricks** a police officer in the Metropolitan Police Service, presented a claim complaining of race and sex discrimination going back over a period of 11 years. The tribunal considered that there was a prima facie case on the basis of the claimant's untested allegations, that there was a policy, rule or practice that could be detected as a result of which female officers and officers from ethnic minorities were treated less favourably than white male officers. The Employment Appeal Tribunal upheld the Commissioner's appeal against that ruling. On appeal to the Court of Appeal, the employment tribunal's decision was restored.

Mummery LJ held as follows:-

- "47. *On the crucial issue whether this is a case of "an act extending over a period" within the meaning of the time limits provisions of the 1975 Act and the 1976 Act, I am satisfied that there was no error of law on the part of the Employment Tribunal.*
48. *On the evidential material before it, the tribunal was entitled to make a preliminary decision that it has jurisdiction to consider the allegations of discrimination made by Miss Hendricks. The fact that she was off sick from March 1999 and was absent from the working environment does not necessarily rule out the possibility of continuing discrimination against her, for which the Commissioner may be held legally responsible. Miss Hendricks has not resigned nor has she been dismissed from (sic) the Service. She remains a serving officer entitled to the protection of Part II of the Discrimination Acts. Her complaints are not confined to less favourable treatment of her in the working environment from which she was absent after March 1999. They extend to less favourable treatment of Miss Hendricks in the contact made with her by those in the Service (and also in the lack of*

contact made with her) in the course of her continuing relationship with the Metropolitan Police Service: she is still a serving officer, despite her physical absence from the workplace. She is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period." I regard this as a legally more precise way of characterising her case than the use of expressions such as "institutionalised racism," "a prevailing way of life," a "generalised policy of discrimination", or "climate" or "culture" of unlawful discrimination.

49. *At the end of the day Miss Hendricks may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and that there was no "act extending over a period" for which the Commissioner can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the Service in matters of race and sex discrimination. It is, however, too soon to say that the complaints have been brought too late.*
50. *I appreciate the concern expressed about the practical difficulties that may well arise in having to deal with so many incidents alleged to have occurred so long ago; but this problem often occurs in discrimination cases, even where the only acts complained of are very recent. Evidence can still be brought of long past incidents of less favourable treatment in order to raise or reinforce an inference that the ground of the less favourable treatment is race or sex.*
51. *In my judgment, the approach of both the Employment Tribunal and the Appeal Tribunal to the language of the authorities on "continuing acts" was too literal. They concentrated on whether the concepts of a policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken, fitted the facts of this case: see **Owusu v. London Fire & Civil Defence Authority [1995] IRLR 574 at paragraphs 21-23; Rovenska v. General Medical Council [1998] ICR 85 at p.96; Cast v. Croydon College [1998] ICR 500 at p. 509. (cf the approach of the Appeal Tribunal in **Derby Specialist Fabrication Ltd v. Burton [2001] ICR 833** at p. 841 where there was an "accumulation of events over a period of time" and a finding of a "climate of racial abuse" of which the employers were aware, but had done nothing. That was treated as "continuing conduct" and a "continuing failure" on the part of the employers to prevent racial abuse and discrimination, and as amounting to "other detriment" within section 4 (2) (c) of the 1976 Act).***
52. *The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of*

the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

15. Accordingly, **Hendricks** demonstrates that there are several ways in which conduct might be said to be conduct extending over a period (sometimes referred to as being a "continuing act"). One example is where there is a policy, rule or practice in place in accordance with which there are separate acts of discriminatory treatment. Another example given in paragraph 48 of **Hendricks** is where separate acts of discrimination are linked to one another and evidence a continuing discriminatory state of affairs, as opposed to being merely a series of unconnected and isolated acts. In both these examples, the continuing act arises because of the link or connection between otherwise separate acts of discrimination.
16. The following extract from a recent Employment Appeal Tribunal case is of some assistance. Mr Justice Choudhury (President) in the case of **South Western Ambulance Service NHS Foundation Trust Appellant v Mrs C King [UKEAT/0056/19/OO]** stated as follows:-

"36. What these [underlined passages] make clear is that reliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time. The claimant must still establish constituent acts of discrimination or instances of less favourable treatment that evidence that discriminatory state of affairs. If such constituent acts or instances cannot be established, either because they are not established on the facts or are not found to be discriminatory, then they cannot be relied upon to evidence the continuing discriminatory state of affairs."

Unreasonable Behaviour and Discrimination

17. Unlawful discrimination may be inferred if there is no explanation for unreasonable treatment. However, this is not an inference from unreasonable treatment itself but from the absence of any explanation for it. In **Bahl v The Law Society [2004] IRLR 799** the Court of Appeal stated thus:-

"[101] In our judgment..... It is correct..... that racial or sex discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it. It is not the case that an alleged discriminator can only avoid an adverse inference by proving that he behaves equally unreasonably to everybody".

The case of **Bahl v The Law Society** also cited **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] IRLR 285**. There Lord Nicholls of Birkenhead referred to the question of whether the claimant received less favourable treatment than the appropriate comparator as 'the less favourable treatment issue' and the question of whether the less favourable treatment was on the relevant proscribed ground as 'the reason why issue'. At paragraph 11 he said:

“ Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.”

THE ISSUE TO BE DETERMINED AND MATTERS OF RELEVANT FACT DETERMINED FROM THE EVIDENCE

18. The issue to be determined may be simply stated: that is whether or not one or more of the named respondents caused the claimant to be unlawfully discriminated against and/or harassed on grounds of sexual orientation. In summary (and this will be further detailed below) from 2015 and onwards the claimant alleged the occurrence of a series of matters or incidents which culminated in the claimant instituting a grievance process. That latter grievance process coincided with a disciplinary investigation being instituted by Cannon against the claimant. However, after initially indicating to the tribunal at hearing that the alleged matters stemming from the earlier times, from 2015 and thereafter, were contextual only, towards the conclusion of the hearing of the case (and indeed made expressly and fully clear in the course of his oral submissions) the claimant arrived at a position where his contention was that there had been a course of discriminatory conduct visited upon him, commencing in 2015. His argument, voiced at the conclusion of the case, was that although at the material times he had not realised the nature and extent of the unlawful discrimination on the grounds of his sexual orientation, he was now, in hindsight, able to perceive this course of unlawful discriminatory conduct. On the basis of this argument the tribunal determined that it was necessary to examine any available evidence concerning what had initially been depicted as contextual matters only. These were now argued to constitute parts of a course of conduct. This was necessary in order to determine factual material of potential relevance and to assess if all or any part of this sustained the case, as clarified. Opposing this, the respondents' representative submitted that these alleged instances or events, if indeed any of these were properly to be determined by the tribunal as constituting matters of fact, had to be taken in isolation and viewed in terms of the statutory time issues. Accordingly, as the claimant had pursued no formal action in respect of these, any such ought to be deemed out of time. Thus, the tribunal had no jurisdiction to enable it to deal with these matters. On account of this it was necessary for the tribunal to hear and to determine certain evidence in respect of these alleged events or instances, from 2015 onwards. The evidence and any pertinent facts found are briefly mentioned below, together with the tribunal's conclusions thereafter. It is to be noted that in a number of instances the claimant made it clear that he had no allegations of unlawful or discriminatory conduct whatsoever against some of the persons mentioned in these proceedings. This latter includes certain senior Cannon personnel who were responsible for a disciplinary and grievance hearing and a consequent grievance appeal. Finally, notwithstanding the Vice-President's clear direction, it has to be remarked that no part of any evidence sought to be adduced by the claimant touched directly upon the matter of remedy.

THE EVIDENCE AND FINDINGS OF FACT MATERIAL TO THE ISSUES

19. On account of the oral and documentary evidence adduced, the tribunal determined the following material findings of fact, relevant to the issues:-
 - 19.1 As a Hygiene Technician the claimant was required to collect medical waste which was potentially hazardous material. On occasions, the claimant found that this waste being disposed of by Cannon's customers was not properly and safely packed for collection or there was some other issue of potential hazard. In accordance with Cannon's procedures (emphasised at that time in a Hygiene Technicians' course attended by the claimant) the claimant refused to collect this material. Mr Shearer's evidence was that the claimant was quite entitled to refuse to collect waste under such circumstances. He made it entirely clear in evidence that he fully supported the claimant in any decision reasonably made by him in that regard.
 - 19.2 A specific issue in that latter regard arose in respect of a large Chemists' premises in Belfast in the Summer or Autumn of 2015. The claimant's response in these instances appears to have been to leave a note for the customer explaining why he had not collected any improperly packed waste material. The tribunal had sight of some photographic evidence in respect of this issue. Mr Shearer indeed fully supported the claimant's decisions in that regard, as he confirmed to the tribunal in his oral evidence under cross-examination.
 - 19.3 There seems to have been an issue which arose from one particular note that had been left by the claimant which was described by the customer (although the full factual circumstances were not made entirely clear to the tribunal) as being a "cheeky note". Mr Shearer consequently determined that it was best to remove the claimant from that particular Chemists' collection destination and the claimant was assigned alternative collection routes. The claimant's perception of this was that he was being in some way "punished" by being deployed to alternative work patterns which he felt were much more demanding than hithertofore. The tribunal received evidence and inspected documents concerning the circumstances relating to this and such evidence has been fully taken into account in reaching any determination set out below.
 - 19.4 At the material time (Summer/Autumn of 2015) the claimant did not raise any formal grievance about this specific matter nor did he institute any formal proceedings of any type. The respondents denied that any alteration made by Mr Shearer to the claimant's work pattern in any way placed the claimant in any more disadvantageous or difficult a position than any other Hygiene Technicians and refuted the suggestion that the treatment accorded to the claimant was in any way connected to any type of unlawful discrimination.
 - 19.5 The claimant also raised a specific allegation that when he had effectively complained, Mr Shearer had stated to the claimant, "don't even go there or I am sure we can find more work to go on your runs". This alleged comment was asserted by the claimant to have been made by Mr Shearer to him in the context of the claimant's deployment to other work after the claimant had

ceased to do the Chemists' run. That was portrayed by the claimant as constituting (in the claimant's hindsight) an illustration of harassment and discriminatory treatment of the claimant and was the first in respect of a series of instances of such perceived treatment. At the hearing the claimant sought to attribute this to claimant's sexual orientation. Mr Shearer in evidence denied that these attributed words were uttered by him to the claimant. In the light of Mr Shearer's denial and in the absence of any corroborative evidence, for the reasons mentioned below the tribunal prefers Mr Shearer's evidence and does not conclude that there is anything to support the alleged conversation between Mr Shearer and the claimant. No formal grievance was raised by the claimant nor did he institute timely proceedings in respect of this allegation.

- 19.6 There was a regrettable and considerable divergence in this case between the evidence of the claimant, on the one part, and for example Mr Shearer, on the other. The tribunal was tasked with the determination in a number of instances, upon the basis of an assessment of cogency and credibility, which evidence was to be preferred. In some instances the contrasting evidence bore no corroboration, but in a number of other instances there was additional evidence available which assisted the tribunal in a determination of the more credible or consistent evidence. The tribunal found Mr Shearer's evidence throughout the course of the hearing to be generally cogent and credible and the tribunal generally determined Mr Shearer to be an honest and reliable witness throughout the proceedings, who displayed no tendency to distort or to embellish facts. In some instances, the tribunal found the evidence of the claimant to be less cogent and credible upon a number of disputed issues and versions of events.
- 19.7 The claimant further alleged that Mr Shearer had stated to a former colleague of the claimant (around the time of the foregoing matter in 2015) concerning the claimant, "it will teach him to pick and choose which work he does". That alleged comment was denied in evidence by Mr Shearer. There was no corroborative evidence tendered in aid of the claimant. Again, no formal grievance was raised by the claimant nor did he institute timely proceedings in respect of this. However, the claimant (very much reliant upon hindsight and in the course of the tribunal hearing) now purports to portray this allegation as constituting part of a course of allegedly unlawfully discriminatory conduct that had been visited upon him. In the light of Mr Shearer's denial and in the absence of any corroborative evidence, the tribunal prefers Mr Shearer's evidence and does not conclude that there is anything outweighing that to support the alleged conversation between Mr Shearer and the former work colleague.
- 19.8 In 2016 an issue arose concerning Cannon's contracted work in Newtownhamilton, County Armagh, which had been allocated to the claimant. At this location there was a pharmacy requiring regular waste collection. The claimant's policy appears to have been to attend the Newtownhamilton premises at the time the pharmacy was supposed to open (that being 9.00 am) and, if the premises were not opened promptly at that time, then to drive off and attend to the completion of the remainder of his work runs. This policy apparently caused the pharmacy to complain to Cannon and the claimant was requested to return to the Newtownhamilton

location to complete the contracted work. This connects to the claimant's perception that he was working very considerable hours beyond his contracted hours. The perception of excessive working hours appears to have given rise to a significant source of frustration and difficulty on the claimant's part.

- 19.9 Some two weeks or so after this customer complaint, in November 2016, Mr Shearer requested the claimant to return to the Newtownhamilton location and the claimant's allegation was that when he expressed reluctance to do so Mr Shearer stated to him, "if you don't like the workload then there is the f***ing door, there is plenty out there that would appreciate a job like this". There was no corroborative evidence to support the proposition that these words (or similar words) had been uttered by Mr Shearer to the claimant whether in this or in any other context. Again the tribunal is tasked with the factual determination of this allegation, in the absence of any independent corroboration or other evidence. In the light of Mr Shearer's denial, the tribunal cannot conclude that these words or similar words were spoken by Mr Shearer. Again, the claimant raised no formal grievance concerning this allegation nor did he take any form of timely proceedings in respect of this.
- 19.10 The claimant's next allegation was that in February 2017 Mr Shearer requested the claimant to do extra work and stated to the claimant that he did not want to hear "any f***ing excuses" (which were the words the claimant alleged). This was again vehemently denied by Mr Shearer in his evidence. There was no corroboration of the claimant's account that these words were spoken to him by Mr Shearer. The tribunal cannot conclude in the light of Mr Shearer's denial that these words were spoken by him. Again, the claimant raised no formal grievance concerning this allegation nor did he take any form of timely proceedings in respect of this.
- 19.11 In respect of all of the foregoing allegations ranging in time from 2015 to early 2017, it was the claimant's ultimately settled position (which he seemingly only arrived at towards the conclusion of his case - and indeed at the point of his concluding oral submissions - after having initially indicated to the tribunal that these were contextual matters only or "background" that the foregoing allegations constituted the earlier part of a specific course of allegedly unlawfully discriminatory conduct on the part of the respondents.
- 19.12 Same sex marriage is legal in the Republic of Ireland. The claimant and his partner were legally married in that jurisdiction on 21 August 2017. The claimant had changed his residential address from a Belfast address to an address at Cullybackey, County Antrim. The claimant's evidence was that he had approached Mr Shearer on a date which was not precisely specified but which appears from the evidence to have been perhaps in late September or October 2017. The claimant stated that he had handed to Mr Shearer a sheet of paper containing his new address and that he had also written the name by which he wished to be then called, "Robert Innes-Kells" and that he had made a request to Mr Shearer at the time that his name would be changed to that name on all official company documentation. The claimant's further allegation was that, in response, Mr Shearer had stated to the claimant that the claimant's marriage was not a proper legal marriage. It was clarified by the claimant that this alleged exchange took place whilst Mr

Shearer was walking across the works depot. However, there was no corroboration presented in evidence concerning the claimant's statement of these alleged events. Mr Shearer denied that this exchange had ever taken place. The tribunal cannot conclude in the light of Mr Shearer's denial that this occurred as described by the claimant. The tribunal was also provided with an explanation on behalf of the respondents that the claimant's name had not been changed on any driving licence details recorded by Cannon and that there were insurance implications and other issues regarding amending

driving personnel names, which had to be at all times recorded by Cannon in accordance with any registered driving licence details. Again, the claimant did not institute any formal grievance nor did he bring any timely proceedings in respect of these alleged matters.

19.13 A somewhat similar or corresponding allegation made by the claimant was that Mr Shearer had not acknowledged nor had he congratulated the claimant upon his wedding. The allegation continued that, in contrast, Mr Shearer had been very forthcoming with some congratulatory and positive comments concerning another work colleague who had been married around the same time. In the claimant's evidence that work colleague was clarified as being a Mr Patrick Moore. It was alleged that, by conducting himself in this way, Mr Shearer had caused the claimant to feel deflated. The claimant's specific allegation was that the motivation of Mr Shearer in this respect was unlawfully discriminatory, on grounds of the claimant's sexual orientation. In evidence Mr Shearer stated that he did not recall congratulating Mr Moore upon his marriage. He did say that another work colleague, Ms Lisa Pearson, was married some time before this and that he had not congratulated Ms Pearson and that this was not something that he would do routinely. Again, there was no formal grievance complaint raised nor were any timely proceedings instituted by the claimant in respect of this matter.

19.14 The claimant's next allegation was that in February 2018 he had reported to Mr Donaldson, Operations Supervisor for the Belfast Service Centre, that the claimant's work trolley had become defective and that the claimant had engaged in a conversation about this issue with personnel from Cannon's customer, ALMAC. The claimant alleged that he was approached by Mr Shearer a short time after this. The specific allegation was that Mr Shearer had said to the claimant, "never f***ing complain to the customer that you don't have the proper equipment to do your job. It reflects badly on us all". Whilst Mr Shearer denied using the words attributed to him by the claimant, in his evidence, he did state that he had provided at the time some advice to the claimant to the effect that, "you may think that you had ears that want to listen to you but all they do is tell their boss that you are complaining". The tribunal does not find sufficient evidence to conclude that Mr Shearer spoke the words attributed to him to the claimant. Again, the claimant did not raise any formal grievance nor did he institute any timely proceedings in respect of the foregoing allegation.

19.15 The claimant's next allegation was that in September 2018 he was due to conduct a service run at Rockport School. Due to some confusion the impression was created that the school wanted the service run to be completed and that the claimant had failed to do so. However, the service

indeed had been cancelled by the school. The claimant's complaint in regard to this specific matter was that what the claimant described as constituting an "apology" (which was otherwise portrayed as being an explanation on the part of Rockport School that it was the school which had cancelled the service) was not communicated to him and the impression was left that the claimant was in some way at fault. Regarding this allegation in respect of Rockport School, the claimant's oral evidence at tribunal was that Mr Shearer had given him, as he put it, an "absolute rollicking" concerning the matter and his alleged failure to fulfil the service call. That rather graphic depiction in the claimant's oral evidence is in contrast to the manner in which the alleged episode was depicted in the claimant's written evidence ("He said they were very unhappy the service was missed. He actually made it sound as though what I was saying was untrue, but didn't ask me if I could fit the service in on one of my other days in the area"). The respondents' representative took the opportunity to cite this as but one example of how the claimant had a tendency to expand upon or to modify his evidence and certain aspects of his case as it proceeded. The respondents' representative argued that this ought to be viewed by the tribunal as constituting a significant credibility issue attaching to the claimant's evidence generally. The tribunal will return to further observations regarding that submission below. Again, there was no formal grievance raised by the claimant regarding this matter nor were any timely proceedings taken.

- 19.16 A rather significant allegation made by the claimant was that he had been present in the office at some time in the Spring or early Summer of 2018 when Mr Shearer had shouted across the room to him, so everyone present was able to hear, "Bobby, now don't take this the wrong way, but between you and your – erm - husband, which one of you is the woman?" The claimant's allegation was that everyone present had looked for a response from the claimant. As part of a subsequent grievance complaint taken by the claimant arising from the specific allegation, any alleged witnesses to these words were not named, nor were any witnesses named in the claimant's claim form.
- 19.17 However, in the further context of a reply made by the claimant dated 18 November 2019 to a request for particulars made by the respondents of 12 August 2019 in these proceedings, the claimant sought to name witnesses to that alleged comment by Mr Shearer. The claimant in that formal reply named work colleagues, Alan Jamison, Stephen Pursell and Paul Doonan. All three of these persons produced witness statements in the tribunal case. However the only witness from these three named who was called to give evidence and to consequently adopt his witness statement was Mr Doonan. In evidence Mr Doonan denied that he had heard this conversation and categorically stated that this was untrue. Mr Doonan particularly sought to emphasise, in what was compelling and entirely credible testimony, that if this had taken place as alleged by the claimant, Mr Doonan would have been the first to speak up and say that it was out of order. He would have been offended and would not have allowed it. The reason afforded by Mr Doonan was that Mr Doonan had a close relative (identified to the tribunal) who was gay. The respondents' representative drew the tribunal's attention to the fact that it had been confirmed in evidence that the three office administrators, named as being Ms Cochrane, Ms Graham and Ms Patrick, would have

normally been in the office. However, these persons had not been called (by the claimant) to give evidence as witnesses concerning this allegation. For his part, Mr Shearer robustly denied that he had stated these or any similar words.

19.18 As this constitutes a significant allegation made against Mr Shearer by the claimant, the tribunal is required to arrive at a relevant factual determination in the light of a fundamental conflict in evidence. The tribunal's determination, as a matter of fact and in the context of the general tenor of the evidence in the case and the specific evidence from any available source concerning this point is that Mr Shearer, on balance, did not state these words as alleged by the claimant. It is of note that in his cross-examination of Mr Shearer, when he had ample opportunity to do so, the claimant did not take the rather fundamental and otherwise essential step of challenging Mr Shearer in respect of his denial in that regard. The tribunal is supported in its conclusion of fact by the rather self-evident proposition that if a party seeks to challenge a witness on such a fundamental issue as this, that party would be expected to challenge expressly the opposing evidence. However, that was not done and one must presume that this was an intentional omission on the part of the claimant and not merely an accidental omission upon such a fundamental point. This allegation is therefore not sustained, in the tribunal's considered determination.

19.19 The claimant's next allegation was that on 1 October 2018 he had an exchange with Mr Shearer regarding working hours. The alleged outcome of this exchange was that Mr Shearer stated to the claimant, "I am just asking you to play ball with me here, I'm sure it is coming to the time of the year when you are going to be asking for your unpaid leave. Remember I'm very flexible letting you take that". It was explained to the tribunal that the claimant normally required unpaid leave around Christmas time to attend specific social activities and that that leave had normally been accorded without difficulty in the past. The tribunal's assessment of any evidence in respect of this matter is that it constituted nothing other than the claimant expressing a degree of frustration in the context of an entirely normal exchange regarding specific working hours. Indeed, upon any proper assessment, this provided evidence concerning the respondents' flexibility regarding the claimant taking unpaid leave. Again, the claimant did not raise any formal grievance nor did he take proceedings in respect of this at the time.

19.20 The claimant's next allegation was that on 16 November 2018 he had parked his work van in a public car park in Glengormley. The claimant then went to get his hair cut during his break time. He then returned to the van. The claimant's allegation was that he was in the process of cleaning the van, as it had been used by a smoker and the claimant was a non-smoker and did not like the smell of cigarette smoke. The specific allegation was that Mr Shearer then drove up and, apparently speaking out the window of Mr Shearer's car, asked the claimant what he was doing. The claimant's allegation was that he explained to Mr Shearer that he was cleaning the van as it smelt badly of smoke and that, in response, Mr Shearer stated to the claimant that the claimant was being a "drama queen".

- 19.21 Mr Shearer's evidence to the tribunal was that he had become concerned as the claimant's van had been stationary for some time and, as it was in close proximity to the works depot, he had gone to check. He vehemently denied referring to the claimant as being a "drama queen". The uncontroverted evidence was that Mr Shearer was at the time engaged on his car phone in a telephone conversation with Mr Donaldson. Mr Donaldson's evidence to the tribunal was that Mr Shearer had told him that Mr Shearer had called the claimant's mobile phone but the claimant had not answered. Mr Shearer indicated that he was on his way to the Glengormley car park (where he was aware the van was stationary) to see whether the claimant was okay. Mr Donaldson's evidence was that he was then engaged on a telephone call with Mr Shearer on the latter's car phone and consequently that he had heard Mr Shearer ask the claimant if he was okay and heard that the claimant had said that he had just finished getting his hair cut. Mr Shearer, according to Mr Donaldson's evidence, then drove away and carried on talking to Mr Donaldson. Mr Donaldson was quite clear and forthright in his evidence that Mr Shearer did not call the claimant a "drama queen". The tribunal's conclusion, after having considered the available evidence, is that Mr Shearer did not refer to the claimant as being a "drama queen" on that occasion, notwithstanding the claimant's allegation.
- 19.22 Around this time the claimant had commenced a grievance process. He did that by initially sending an email on 15 November 2018 to Ms Joanne Bell, Cannon's HR Coordinator. In that email the claimant complained about what he stated to be an unreasonable workload and also about alleged conduct on the part of Mr Shearer. In no part of that communication did the claimant expressly or by implication refer to discrimination on grounds of sexual orientation. This was then followed up by further email sent by the claimant to Ms Bell on 19 November 2018 wherein the claimant complained of an alleged incident stated to have happened on 16 November with Mr Shearer. In regard to this, the claimant stated, "I'm not sure if I should describe it as victimisation, intimidation or harassment". Again the claimant did not expressly refer to the matter of sexual orientation discrimination or sexual orientation victimisation (or harassment) in the brief email.
- 19.23 By letter dated 20 November 2018 Iain Russell, Cannon's Regional Operations Director, invited the claimant to a grievance meeting scheduled to be held on 27 November 2018. There was further evidence adduced regarding the grievance process pursued by the claimant. However, it is of note that there has been no allegation raised in these proceedings specifically against any of Cannon's personnel administering that grievance process. Accordingly, the tribunal's considered view is that it is not necessary to record all of the considerable detail in respect of this. It is sufficient to say that the invitation to the scheduled grievance hearing appears not to have been received by the claimant.
- 19.24 Further to that, on account of events occurring on 27 November 2018 Cannon decided to commence a disciplinary investigation. Mr Iain Russell, in the absence of the claimant's attendance at the grievance meeting scheduled for 27 November 2018, wrote to the claimant by letter dated 28 November 2018 communicating his findings regarding the issues deemed to have been raised by the claimant in the grievance complaint, which were classified in

four parts: (1) unreasonable workload; (2) allegation of foul and intimidating language from the claimant's line manager; (3) work carried out in depot not included in daily working hours; and (4) allegation of line manager failing to renew equipment which has raised complaints and ultimately lost a customer. Mr Russell stated that he had had the opportunity to investigate these complaints and, in summary, the complaints were not substantiated and the grievance was therefore deemed closed.

19.25 In parallel with the foregoing, the claimant attended a disciplinary investigation meeting held on 29 November 2018. This meeting was chaired by Mr Shearer, with Ms Caroline Graham being a note-taker. One specific issue that the claimant sought to bring to the tribunal's attention was an allegation of excessive informality, indeed of a dismissive attitude, stated to be emerging and clear from the minutes of the investigation meeting conducted by Mr Shearer on that date. The claimant sought to lay considerable emphasis upon a (covert) recording which he made of the meeting where Mr Shearer had stated certain words to Ms Graham, the note-taker. Ms Graham had raised a query with Mr Shearer about what she ought to record in her role as note-taker and the claimant's interpretation of the words then spoken by Mr Shearer in response to Ms Graham was that Mr Shearer had said in reply, dismissively, "just write anything down".

19.26 The claimant's evidence was that he had indeed permitted a considerable number of people to listen to the recording that he had covertly made and he asserted that all of these people had agreed with his personal interpretation of the words spoken. The respondents' representative expressed considerable surprise that the claimant had taken that step (of making a covert recording and of permitting a considerable number of people to listen to that recording) but argued that the words actually spoken by Mr Shearer were actually, "just write everything down". Having listened carefully to the relevant part of the recording, the tribunal's considered conclusion was that it was, on account of the quality of the recording, impossible to ascertain whether Mr Shearer had indeed said "everything" or "anything". In any event and on account of the inherent ambiguity attaching to both expressions and in the context of the remainder of the material recorded from the meeting, the tribunal was unable to conclude that Mr Shearer's attitude towards the meeting, in general terms, was frivolous, dismissive or was anything other than proper and professional in conducting his dealings with the claimant on that occasion. This constitutes the tribunal's finding upon the point and there is nothing adverse determined against Mr Shearer (or Ms Graham) or concerning the manner in which the investigatory meeting was conducted.

19.27 By letter dated 30 November 2018, Ms Seana McCready, Cannon's Service Centre Manager, invited the claimant to a formal disciplinary hearing to be held on 7 December 2018. The claimant was afforded the right to be accompanied. The hearing had been arranged to consider an allegation of misuse of a company vehicle and it was clarified to the claimant that it could mean that his conduct amounted to gross misconduct in breach of Cannon's disciplinary policy. Enclosed with the letter was a copy of the investigation notes and a copy of Cannon's disciplinary policy. In response by letter dated 4 December 2018 the claimant stated that he was unable to attend the meeting as scheduled on account of prearranged leave.

- 19.28 By letter of 12 December 2018 Seana McCready rescheduled the meeting for 17 December 2018. However the meeting did not proceed as the claimant was by that stage on sick leave from work. Further, on 17 December 2018 the claimant sent to Mr Ian Smith (Regional HR Business Partner - South) what he stated to be a detailed summary of events and an approximate timeline, the text of which was then subsequently incorporated into his claim form presented to the tribunal. It was decided to task Mr Smith with the production of a detailed investigation report and the work was conducted by Mr Smith between 2 and 4 January 2019. Mr Smith produced an extensive report running to some 20 pages, together with appendixes.
- 19.29 In summary, Mr Smith's conclusion was that there were differing opinions on the versions of events and that the claimant ought to be afforded the opportunity to confirm or retract his versions of events and that a decision was required on the disciplinary and grievance outcomes separately. By letter of 8 January 2019 Ms McCready invited the claimant to a simultaneous grievance and disciplinary hearing scheduled for 10 January 2019, with the hearing to be conducted by Ms McCready. The claimant was afforded the right to be accompanied. The claimant attended the scheduled meeting on 10 January 2019 and it is unnecessary to address the content for the reason that this was not referred to expressly in the course of the hearing and the disciplinary outcome was that no further action was to be taken against the claimant. However, the grievance hearing outcome was that the claimant's workload was deemed not excessive and the offer was made to go through each work run with the claimant upon his return to work to ensure that it was manageable. It was confirmed that Mr Shearer had refused to acknowledge or apologise in respect of what the claimant alleged he had said, but that no one had corroborated the claimant's version of events and Ms McCready deemed no further action necessary. Other elements of the claimant's grievance had been answered by Mr Russell in his outcome letter which remained accurate. A way forward was suggested at the conclusion of Ms McCready's letter.
- 19.30 The claimant was afforded a right of appeal (concerning the grievance matter) and the claimant sought to appeal by letter of 15 February 2019. The claimant was invited by Mr Nick McGuinness, Cannon's Regional Operations Director, to an appeal hearing scheduled to take place on 28 February 2019. The appeal hearing duly proceeded and Mr McGuinness, by letter of 5 March 2019, confirmed the appeal outcome. This outcome was that the original decision on the grievance complaint was upheld. The letter recorded the grounds upon which the claimant had sought to appeal and the findings of Mr McGuinness. These findings, in summary, were that Mr Shearer and Ms Graham had done nothing wrong, based upon all the evidence and information available. At this point the claimant had been continuously absent from work on sick leave from 5 December 2018 and, indeed, he did not return to work pending conclusion of the contract of employment. It is unnecessary to determine any further findings of fact for the purpose of this decision concerning the complaint of unlawful discrimination and harassment upon grounds of sexual orientation.

SUBMISSIONS

20. The tribunal had the benefit of a detailed and comprehensive written submission from the respondents' representative in connection with the points advanced by the claimant in the case and the tribunal noted the various elements contained in that submission. The claimant advanced oral submissions which, as might be expected from a lay person, did not specifically address the legal technicalities concerning an unlawful discrimination case of this nature. In specific terms, (as mentioned above) the claimant did not initially seek to argue that there was a continuing course of unlawfully discriminatory events stemming from 2015. As he was an unrepresented lay person, the claimant was afforded the facility to elaborate upon any submission and some latitude. After little further thought and in the context of an explanation afforded on the part of the tribunal that there were significant time issues potentially affecting the various elements of the claimant's case, the claimant then stated that he considered all of the alleged events to constitute a course of ongoing unlawfully discriminatory treatment. The tribunal accordingly proceeds on the basis that this is the claimant's concluded submission. The respondents' representative argued that the various elements of the claimant's case were, in each case, out of time and indeed in some cases were very considerably out of time. It was accordingly submitted that the tribunal's discretion must not be fairly and properly exercised in favour of the claimant, in order to permit an extension of time in this regard. The tribunal will return below to certain elements of the claimant's submission and to the corresponding rebuttal of that submission on the part of the respondents' representative.

THE TRIBUNAL'S CONCLUSION

21. In this matter the claimant has sought to argue unlawful discrimination on grounds of sexual orientation and also harassment on such a ground. The claimant has sought to adduce a considerable amount of evidence in respect of the various allegations extending over a period of time, since 2015. One of the fundamental issues which is required to be addressed and determined by the tribunal is whether or not all or any part of the claimant's case had been brought within the requisite statutory time period. If that is determined not to be the case, the tribunal is required to determine whether there are grounds for an extension of time in respect of any one or more of the various elements of the claimant's case, upon grounds of justice and equity (for these are matters of alleged unlawful discrimination only). If either of those two factors is to be properly decided for the claimant, the next issue as is mentioned above, in the light of the decision of the Northern Ireland Court of Appeal (inter alia) in the case of ***Nelson v Newry & Mourne District Council [2009] NICA*** and following ***Igen v Wong [2005] 3 ALL ER 812***. This normally encompasses a two-stage 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 respondents or any one of them had committed an unlawful act or unlawful acts of discrimination. However, the process also has to be seen in the light of ***Laing v Manchester City Council [2006] IRLR 748***, as mentioned above. Once the tribunal has appropriately concluded, the respondent or respondents have to prove that it or they, as the case may be, did not commit the unlawful act or acts of discrimination. Thus the issue is whether or not the claimant has established facts from which the tribunal could properly make the assessment that the threshold regarding the burden of proof of unlawful discrimination has been attained and has thus passed to the respondents in the matter.

22. Taking the various elements of the claimant's case in turn, the tribunal's considered conclusion is as follows. In regard to the first of these allegations in time (that is to say 2015) in accordance with Cannon's policies the claimant had quite properly refused to collect hazardous waste material. The tribunal has accepted Mr Shearer's evidence that the claimant was quite entitled to so refuse. Cannon (and Mr Shearer) fully supported the claimant in that regard. A specific issue had arisen regarding a note left by the claimant with the customer (the "cheeky note"). Mr Shearer consequently determined it best to remove the claimant from that particular customer collection destination and to assign to the claimant alternative collection routes. Whilst the claimant's perception was that he was being "punished" by being deployed to alternative work, there is absolutely no evidence that, even if the claimant's subjective impression were in any manner justified, this was in any way connected to any motivation on Mr Shearer's part grounded upon or stemming from unlawful discrimination connected to the claimant's sexual orientation. There is absolutely nothing to support that interpretation in any of the evidence or in the applicable context.
23. In reaching a determination regarding this and various allegations succeeding this in time, the tribunal has borne in mind the helpful observations of Mr Justice Choudhury in ***South Western Ambulance Service NHS Foundation Trust Appellant v King*** as follows:- *".....reliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time. The claimant must still establish constituent acts of discrimination or instances of less favourable treatment that evidence that discriminatory state of affairs. If such constituent acts or instances cannot be established, either because they are not established on the facts or are not found to be discriminatory, then they cannot be relied upon to evidence the continuing discriminatory state of affairs."* This (the 2015 allegations) may be properly observed to be the earliest, in time, of a series of endeavours advanced by the claimant to connect some entirely normal (and indeed otherwise unremarkable) workplace issues to some manner of an alleged "overarching discriminatory state of affairs", as it has been expressed, otherwise a pattern of alleged unlawful discrimination. This was for the most part only articulated and clearly advanced by the claimant towards the conclusion of his case. The tribunal's determination in regard to this first instance (the 2015 decision to assign to the claimant alternative collection routes) is that, firstly, there arises nothing from the facts that would give rise to any suggestion of unlawfully discriminatory motivation or action on the part of Cannon (or the other respondents, including Mr Shearer) and thus nothing that would cause the burden of proof to shift to the respondents (under the legal principles above-mentioned, including the statutory provisions of Regulation 35 of the 2003 Regulations). Secondly, as the allegations cannot be properly said to connect to or to constitute the earliest part of any continuing act of unlawful discrimination, this allegation stemming from 2015 has to be seen in isolation in terms of the alleged occurrence and the time. The claimant has failed to establish this as being one of a number of constituent acts of discrimination or instances of less favourable treatment that might give rise to evidence of a discriminatory state of affairs. No action was taken by the claimant at the time and a claim was eventually submitted to the tribunal in February 2019, a number of years outside the time limit specified in Regulation 41 of the 2003 Regulations. As the allegation is properly to be taken in isolation and as a free-standing matter, it is considerably out of time. Time may however, for good and proper reason, be

extended upon grounds of justice and equity. In the tribunal's considered determination, there are no grounds to extend time and accordingly the tribunal does not have jurisdiction to deal with this aforementioned aspect of the claimant's claim.

24. The claimant had also raised a specific allegation that, in the context of the foregoing, Mr Shearer had stated to him, "don't even go there or I am sure we can find more work to go on your runs". This alleged comment had been portrayed by the claimant in the presentation of his case as constituting (very much in hindsight) an illustration of harassment of the claimant and unlawfully discriminatory conduct, connected to his sexual orientation. The tribunal has determined that there is nothing to support the proposition that these words, as alleged, were uttered by Mr Shearer to the claimant. Again, the claimant raised no formal grievance complaint nor did he take any form of proceedings in a timely manner arising out of this allegation. The claimant's claim was submitted in February 2019. As in respect of the previous allegation (and the subsequent allegations further mentioned below), the claimant must establish acts of discrimination or instances of less favourable treatment that evidence a discriminatory state of affairs and, if any such cannot be established, they cannot be relied upon to evidence a continuing discriminatory state of affairs. For the reason that the tribunal's determination is that there is nothing to support the proposition that these words were uttered by Mr Shearer, this accordingly cannot be relied upon to evidence the requisite continuing discriminatory state of affairs. Even if that latter had not been the tribunal's determination, in any event, this allegation is required to be viewed in isolation and as a free-standing matter. In the tribunal's considered determination, there are no grounds whatsoever upon which to extend time and accordingly the tribunal does not have jurisdiction to deal with this aspect of the claimant's claim and consequently it can go no further.
25. The claimant has further alleged that Mr Shearer stated to a former colleague, "it will teach him to pick and choose which work he does". There is nothing to corroborate the claimant's allegation and the person to whom that alleged comment was made has not been called to give corroborative evidence. This allegation has been denied by Mr Shearer. On balance, the tribunal does not determine that these words were stated by Mr Shearer. Again, no formal grievance was pursued by the claimant nor did he institute proceedings in a timely manner. Notwithstanding the fact that the claimant (in hindsight) purports to portray this allegation as constituting part of a course of allegedly unlawfully discriminatory conduct, in the tribunal's determination the claimant has failed to establish this as being one of a number of constituent acts of discrimination or instances of less favourable treatment providing evidence of a discriminatory state of affairs. Accordingly, this cannot be relied upon by the claimant. The claimant's claim was submitted considerably out of time. This allegation must be viewed in isolation as a free-standing matter. Again, in the tribunal's considered determination, there are no grounds to extend time and accordingly the tribunal does not have jurisdiction to deal with this aspect of the claimant's claim.
26. The tribunal next turns to the 2016 issue which arose concerning Cannon's Newtownhamilton contract. The claimant's prompt departure if the customer had not opened the premises at the appointed time had apparently caused the pharmacy to complain. The claimant was requested to return to the customer to complete the contracted work. The claimant harboured a perception that he was

working beyond his contracted hours and this seems to have given rise to some degree of frustration and difficulty. Such matters would (aside from issues of potential unlawful discrimination) otherwise be perceived as being perfectly normal interactive issues concerning personnel and managerial policies commonly encountered in many workplaces. In November 2016, Mr Shearer had requested the claimant to return to Newtownhamilton. The claimant's allegation was that when he expressed reluctance to do so Mr Shearer stated to him, "if you don't like the workload then there is the f***ing door, there is plenty out there that would appreciate a job like this". Firstly, there was no corroborative evidence supporting these words (or similar words) being uttered by Mr Shearer. Furthermore, even if such words had been spoken (and the tribunal is not persuaded that such words were indeed uttered), there is nothing in context indicating any unlawfully discriminatory motivation or action on the part of Mr Shearer. At best, if these words had indeed been spoken, this would have constituted an episode of, regrettable but otherwise relatively normal, workplace conflict between an employee and the person entrusted with implementing workplace management and staff deployment. It must be emphasised, in regard to the foregoing allegation, that this tribunal is not addressing any issues concerning anything other than the tribunal's discriminatory jurisdiction. (The allegation might perhaps have had a certain relevance to other potential jurisdictional matters, but these are not before the tribunal). As with the previous allegations, the claimant has failed to establish the foregoing as being a constituent act of discrimination or instance of less favourable treatment evidencing a discriminatory state of affairs. This, accordingly, cannot be relied upon by the claimant. Furthermore, the claim has been submitted considerably out of time. This is a free-standing matter and there are no grounds to extend time. The tribunal for this reason does not have jurisdiction to deal with this element of the claimant's claim.

27. The claimant's next allegation was that in February 2017 Mr Shearer, in his request to the claimant to do extra work, stated to the claimant that he did not want to hear "any f***ing excuses" (the words the claimant alleged). In the light of Mr Shearer's denial and the absence of any corroboration of the claimant's account and an assessment of general credibility, the tribunal does not uphold this factual allegation. The claimant raised no formal grievance concerning this allegation nor did he take any form of timely proceedings. The claimant has not established this as being a constituent act of discrimination or an instance of less favourable treatment supporting a discriminatory state of affairs and this cannot be relied upon by him. The claim is considerably out of time. This allegation is, again, a free-standing matter and there are no grounds to extend time. The tribunal does not have jurisdiction to deal with this aspect of the claimant's claim.
28. In respect of all of the foregoing allegations ranging in time from 2015 to 2017, it was the claimant's ultimately settled position that the foregoing allegations constituted the earlier part of a specific course of allegedly unlawfully discriminatory conduct on the part of the respondents. For the reasons indicated above, the tribunal does not conclude that any of these individual instances constitute a discriminatory state of affairs such as would be required to be established by the claimant in accordance with the principles mentioned above that emerge from authorities such as ***Hendricks*** and ***South Western Ambulance Service NHS Foundation Trust Appellant -v- King***.

29. The claimant and his partner were legally married in the Republic of Ireland in August 2017. The claimant changed his residential address. The claimant asserted that he approached Mr Shearer and handed to Mr Shearer a sheet of paper with his new address and that he had also written the name, "Robert Innes-Kells", by which he wished to be called. He asserts that he made a verbal request to Mr Shearer at that time that his name be accordingly changed on all official company documentation. The claimant's further assertion was that Mr Shearer had stated in response that the claimant's marriage was not a proper legal marriage. Again, this assertion was uncorroborated and Mr Shearer denied that this exchange had ever taken place. In the light of Mr Shearer's denial in his evidence and the absence of any corroboration of the claimant's account, the tribunal does not determine that there is sufficient evidence to uphold the allegation of either the passing of the piece of paper to Mr Shearer or that Mr Shearer had stated to the claimant that the marriage was not a proper legal marriage. The claimant raised no formal grievance concerning this allegation nor did he take any form of timely proceedings. In the tribunal's determination the claimant has not established the foregoing allegation as a matter of proven fact which might therefore constitute an act of discrimination or an instance of less favourable treatment supporting the existence of a discriminatory state of affairs. This cannot be relied upon by him. Any claim in this regard (stemming from October 2017) is considerably out of time. This allegation is free-standing and there are no grounds to extend time. The tribunal does not have jurisdiction to deal with this aspect of the claimant's claim. A somewhat similar allegation made by the claimant was that Mr Shearer had not acknowledged or congratulated the claimant upon his wedding but that, in contrast, Mr Shearer had been very forthcoming with some congratulatory and positive comments concerning another work colleague who had been married around the same time. It was contended that Mr Shearer had caused the claimant to feel "deflated", as he put it. The claimant's allegation was that the motivation of Mr Shearer was unlawfully discriminatory and on grounds of the claimant's sexual orientation. In the light of Mr Shearer's denial and the absence of any evidential corroboration of the claimant's account, the tribunal does not uphold this allegation as a matter of proven fact. The claimant raised no formal grievance concerning this allegation nor did he take any form of timely proceedings. Likewise, the claimant has not established the foregoing, Mr Shearer's failure to offer congratulations, as being a constituent act of discrimination or an instance of less favourable treatment supporting a discriminatory state of affairs. This cannot be relied upon by him. The claim is considerably out of time. This it is a free-standing allegation and there are no grounds to extend time and accordingly the tribunal does not have jurisdiction.
30. The claimant's next allegation was that in February 2018 the claimant had reported to Mr Donaldson that his work trolley had become defective and that the claimant had engaged in a conversation with personnel from Cannon's customer, ALMAC. The allegation was that Mr Shearer approached the claimant and said, "never f***ing complain to the customer that you don't have the proper equipment to do your job. It reflects badly on us all". Mr Shearer did state that he had provided at the time to the claimant some advice, as he recounted it, "you may think that you have ears that want to listen to you but all they do is tell their boss that you are complaining". Again, the claimant did not raise any formal grievance nor did he institute any proceedings in respect of the foregoing allegation. The tribunal's determination is that there is nothing either in the words alleged to have been spoken to him by Mr Shearer, or indeed in Mr Shearer's version, that demonstrates anything other than a slightly fraught workplace interaction concerning an entirely

routine matter, with no evidence whatsoever emerging of any action or motivation on Mr Shearer's part arising from a discriminatory disposition or purpose. This specific allegation serves as yet another illustration (one of many endeavours on the claimant's part advanced in this case) to ascribe a malign, discriminatory, motivation or unlawfully discriminatory conduct, to what was, in reality, something which was, upon the evidence, in no way connected with unlawful discrimination. This was nothing other than an entirely routine, if slightly heated, workplace interchange, where Mr Shearer was evidently concerned about the claimant speaking inappropriately to a customer of Cannon. The claimant has not established this as being a constituent act of discrimination or an instance of less favourable treatment supporting a discriminatory state of affairs. Accordingly, this cannot be relied upon by him and the claim is considerably out of time. This it is a free-standing allegation and there are no grounds to extend time and accordingly the tribunal does not have jurisdiction.

31. The claimant's next allegation was that in September 2018 he was due to conduct a service run at Rockport School. Because of confusion the impression was created that the claimant had failed to attend to this work, notwithstanding a customer cancellation. The claimant's complaint was that an "apology" (otherwise an explanation on School's part) was not communicated to him leaving the impression of the claimant being at fault. Examining the specific matter, at best it demonstrates a rather mundane workplace interaction concerning confused messages; there is no evidence whatsoever of action taken by Mr Shearer nor of any motivation on Mr Shearer's part connected to unlawful discrimination on grounds of the claimant's sexual orientation. Again the claimant seeks to place reliance upon a floating or overarching discriminatory state of affairs, but without that being anchored by specific acts of discrimination occurring over time. There was no formal grievance raised by the claimant nor were any timely proceedings taken within the statutory period running from this alleged occurrence, in September 2018. This cannot be a constituent act of discrimination nor an instance of less favourable treatment supporting the existence of a discriminatory state of affairs. As such it cannot be relied upon by the claimant and the claim is out of time. This allegation provides no grounds to extend time; accordingly the tribunal does not have jurisdiction.
32. The tribunal now turns to what indeed must be viewed as one of the more significant of a number of allegations made by the claimant. This specific contention was that the claimant (in late Spring/early Summer 2018) was present in the office when Mr Shearer shouted to him across the room, in the presence of witnesses, "Bobby, now don't take this the wrong way, but between you and your – erm - husband, which one of you is the woman?" The further significance of this allegation is that it formed part of a subsequent grievance complaint taken by the claimant. In a formal reply to a request for particulars, the claimant identified three witnesses: Alan Jamison, Stephen Purssell and Paul Doonan.
33. Mr Doonan was called to give evidence. The tribunal has determined that Mr Doonan's evidence was compelling and entirely credible. For the reasons mentioned above, the tribunal has not concluded that these words as alleged were spoken by Mr Shearer. As a finding of fact, therefore, this allegation is not substantiated. This, consequently, cannot form part of the claimant's case. Even if that were not to be so, the claimant raised no formal grievance nor did he take any form of timely proceedings. The claimant has not established this as being a constituent act of discrimination or an instance of less favourable treatment

supporting a discriminatory state of affairs. This cannot be relied upon by him and the claim is out of time. This it is a free-standing allegation and there are no grounds to extend time.

34. The claimant's next allegation was the 1 October 2018 alleged exchange with Mr Shearer regarding working hours, where the allegation was that Mr Shearer had stated to the claimant, "I am just asking you to play ball with me here, I'm sure it is coming to the time of the year when you are going to be asking for your unpaid leave. Remember I'm very flexible letting you take that". In regard to this, the tribunal's assessment was that it constituted nothing other than the claimant expressing frustration in the context of an entirely routine interaction regarding specific working hours and leave. Here the tribunal's assessment was that the claimant had, unsuccessfully, endeavoured to place reliance on a floating or overarching discriminatory state of affairs and that no formal grievance had been raised by the claimant nor were any timely proceedings taken. This cannot be relied upon by the claimant, the claim is out of time, and the allegation provides no grounds to extend time.
35. The claimant's next allegation concerns the events of 16 November 2018 when the claimant parked his work van in Glengormley. The claimant's allegation was that Mr Shearer had stated to the claimant that the claimant was being a "drama queen". The tribunal's determination, for the reasons indicated above, was that there was insufficient evidence to support of the claimant's allegation. Accordingly, nothing emerges from this to advance the claimant's case.
36. The tribunal, in its determination of the facts as indicated above, has addressed aspects of both the grievance and the disciplinary hearings in the matter. It is of note that the claimant has made clear that he has raised no individual allegations of unlawful discrimination against any of the persons involved in these respective processes, save Mr Shearer and Ms Graham. The tribunal has set out above the reasons for its conclusion that Mr Shearer's conduct of the disciplinary investigation process was not illustrative of any unlawfully discriminatory treatment or harassment on grounds of the claimant sexual orientation.
37. For the avoidance of doubt, the same conclusions as mentioned above are reached by the tribunal concerning any conduct of Ms Graham, either specifically in respect of the disciplinary investigation process or more generally in the matter. Nothing emerges from any of this to support the claimant's case against the second and third-named respondents. The same would apply to the grievance appeal process which was addressed by Mr McGuinness. There is nothing in any part of these formal processes giving rise to factual conclusions which would indicate any element of unlawful discrimination. For that reason it is unnecessary for the tribunal to address such issues as comparators for the purposes of unlawful discrimination (which indeed were not expressly identified by the claimant in his case, whether actual or hypothetical, save perhaps in respect of the issue of the alleged failure on Mr Shearer's part to congratulate him on his marriage). The tribunal returns to the fundamental proposition, in the light of the decision of the Northern Ireland Court of Appeal in **Nelson v Newry & Mourne District Council** following **Igen v Wong** that there is normally a two-stage process in discriminatory matters, the first stage of which requires the complainant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondents or any one of them have committed an unlawful act or unlawful acts of discrimination.

Examining everything advanced by the claimant, the tribunal's fully considered assessment is that the claimant has failed to satisfy the first stage in any aspect of his case and, accordingly, the case can advance no further.

38. Further, as is clear from *Hendricks* and *South Western Ambulance Service NHS Foundation Trust Appellant v King* and something that clearly emerges in this case, is that the claimant has been unable to place reliance upon some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time. He has, in every instance, failed to establish constituent acts of discrimination or instances of less favourable treatment that evidence any such discriminatory state of affairs.
39. These matters being so, there is no basis upon which the tribunal can find in favour of the claimant in respect of any of the issues that he has pursued in this case. Accordingly, the unanimous decision of the tribunal is that the claim of unlawful discrimination and harassment on the grounds of sexual orientation is dismissed in its entirety, without further order.

Employment Judge:

Date and place of hearing: 2, 3 and 4 December 2019, Belfast.

Date decision recorded in register and issued to parties: