THE FAIR EMPLOYMENT TRIBUNAL

CASE REF: 1409/19FET

CLAIMANT: **Ciara Campbell**

RESPONDENT: **Lisburn & Castlereagh City Council**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims of harassment, direct discrimination and victimisation on grounds of religious belief and/or political opinion are dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Tiffney**

Members: **Ms E Armstrong**
Mr M McKeown

APPEARANCES:

The claimant was self-represented.

The respondent was represented by Mr B McKee, Barrister-at-Law, instructed by Cleaver Fulton Rankin Solicitors.

THE CLAIM

1. On 6 November 2019 the claimant presented a claim to the tribunal claiming discrimination on grounds of religious belief and/or political opinion pursuant to the Fair Employment and Treatment (NI) Order 1998 ("FETO") against the respondent and constructive unfair dismissal against Grafton Recruitment. In advance of the hearing, the claimant withdrew her claim of constructive unfair dismissal which was dismissed by the tribunal on 19 July 2019. This tribunal heard the claimant's remaining claims of discrimination against the respondent.

THE RESPONSE

2. In its response form, the respondent denied the claimant's allegations of discrimination in their entirety. With regards to the harassment claim, the respondent maintained it had conducted a proper and reasonable investigation into both incidents of alleged harassment. The respondent asserted the first incident was resolved to the claimant's satisfaction and an inconclusive outcome was reached in relation to the second incident. The respondent contended the claimant

ended her placement before its investigation into the second incident had concluded. The respondent's response narrowed at the outset of the hearing and narrowed further at the submissions hearing (see paragraph 8 below).

3. The respondent introduced a number of jurisdictional issues during the case management process which were not addressed by the tribunal at a preliminary hearing. These issues were raised by the respondent at the outset of this hearing (see paragraph 12 below) and are reflected in the agreed list of issues.

ISSUES

4. An agreed list of legal and factual issues was included in the hearing bundle. This list was refined by the time of the hearing. In light of this refinement and following discussion at the outset of the hearing, during which the tribunal outlined the various types of discrimination for the benefit of the claimant, the final agreed issues were identified. At various intervals during the hearing, the claimant persistently maintained that the entire scope of her claim was encapsulated in the following final, agreed statement of issues.

Harassment

(1) Was the claimant subjected to unlawful harassment on the grounds of religious belief or political opinion contrary to Articles 3A and 20(2A) of FETO by the respondent?

In light of the nature of this claim and the respondent's concessions (see paragraphs 6-8 below) the answer to this question turned on two jurisdictional issues:-

(i) Whether the respondent can be liable for the claimant's complaints of harassment under Article 36 of FETO?

(ii) If so, whether, the claimant's complaint of harassment on 28 October 2018 was lodged outside the statutory time-limit of three months for lodging a complaint, and if so, whether it is just and equitable to extend time?

Direct Discrimination

(2) Whether the claimant's complaint of discrimination was lodged outside the statutory time-limit of three months for lodging a complaint, and if so, whether it is just and equitable to extend time?

(3) Subject to (1) above, whether the respondent discriminated against the claimant on the ground of religious belief or political opinion contrary to Articles 3(2)(a) & 20(2) of FETO?

Victimisation

(4) Was the claimant subjected to victimisation on the ground of religious belief or political opinion contrary to Articles 3(4) & 20(2) of FETO?

Remedy

(5) Should the claimant succeed in any or all of her above-mentioned claims, what is the appropriate remedy?

5. The claimant is a Roman Catholic and has no set political opinion. However the claimant contended that by virtue of her forename, she would be perceived to be a Nationalist.

6. It is common case that the claimant was not employed by the respondent. The claimant worked for the respondent as an agency worker via a placement arranged by her employer, Grafton Recruitment.

7. The claimant alleged that she was harassed contrary to FETO as a result of the conduct of a member of the respondent's golf course (referred to herein as "Mr A") on two occasions; on 28 October 2018 and 8 September 2019. It is also common case that Mr A was neither an employee nor worker of the respondent, but a third party. The claimant reported both incidents to the respondent but alleged the respondent failed to effectively deal with them which precipitated her decision to end her placement with the respondent on 3 October 2019.

8. During the hearing the respondent conceded that the conduct of the course member towards the claimant on both occasions met the legal definition of harassment contained in Article 3A of FETO but disputed that the respondent could be held liable under FETO for the conduct of a third party. The respondent also disputed that the incidents were part of an ongoing course of conduct and thus contended that the claimant's harassment complaint regarding the incident of 28 October 2018 was out of time. The respondent further conceded that the course member's conduct on 8 September 2019 met the legal definition of victimisation in Article 3(4) of FETO but disputed that the respondent was liable for this conduct under FETO for the same reason. No such victimisation complaint was raised or pursued by the claimant.

9. The claimant's claim of direct discrimination related to an alleged comment by Mr Skillen in November 2018 to the effect that he needed to take the claimant's complaint about Mr A seriously in order to protect a new member of staff from being treated the same way as the claimant. The claimant contended that Mr Skillen perceived this member of staff to be of the same religious belief as the claimant. The respondent raised a time limitation point in relation to the direct discrimination claim.

10. The claimant alleged that having complained about Mr A's conduct on 8 and 15 September 2019, she was victimised, contrary to FETO, by being excluded from the work rota from 16 September 2019.

CASE MANAGEMENT

11. A number of issues arose during the course of the hearing and were dealt with as follows:-

Jurisdictional Issues

12. In advance of the hearing, the respondent presented the tribunal and the claimant with skeleton arguments on two jurisdictional issues. In summary the respondent pointed to the fact that the allegations of harassment were levelled against a member of the respondent's golf course, who was neither an employee nor worker of the respondent but a third party. The respondent maintained that in light of this undisputed fact, there was no statutory basis under FETO for the respondent to be held liable for the alleged harassment of the claimant by this third party. The respondent also contended that the claimant's harassment claim in relation to the first incident was lodged outside of the statutory time limit. As the claimant was not legally represented and as determination of these issues would not dispense with the entire proceedings, the tribunal decided it was not appropriate to deal with either matter as a preliminary issue at the outset of this hearing. The tribunal encouraged the claimant to consider both skeleton arguments and, if possible, obtain legal advice, given that both issues were of central relevance to her harassment claim.

13. Given the significance and complexity of the jurisdictional issues pertaining to the harassment claim, the tribunal directed that the submissions hearing would not take place directly after the conclusion of the evidence but at a later date to afford both parties time to prepare and exchange written submissions in advance of the Submissions Hearing. In accordance with the overriding objective, for the benefit of the claimant, the tribunal directed the respondent to serve its written submissions on the claimant first and in doing so, the respondent agreed to set out the relevant legal tests in respect of each head of claim.

14. In advance of the Submissions Hearing, the tribunal referred both parties to the decision of the Employment Appeal Tribunal in the case of ***Conteh v Parking Partners Ltd [2011] ICR 341*** which addressed the legal issue of liability for third party harassment in the employment field.

Late Disclosure of Documents

15. During the course of cross-examination of Mr Scappiticci, a witness for the respondent; it transpired that both the claimant and Mr Scappiticci were both in possession of documents relevant to an issue in dispute regarding what was said during a meeting on 3 October 2019. However these documents had not been disclosed during the interlocutory process. The documents were not voluminous and were easily accessible. Therefore the tribunal directed the parties to disclose the relevant documents by close of business the following day.

16. The claimant and the respondent were afforded an opportunity to adduce additional oral evidence-in-chief in relation to these documents and to cross-examine each other's witnesses on this matter at the outset of the fourth day of hearing.

Anonymity Issue

17. In advance of the Submissions Hearing, the tribunal informed the parties that consideration would be given to whether an Order, pursuant to Rule 44 of Schedule 1 to the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020, should be made to prevent the public disclosure in this written judgment of the identity of the course member

alleged to have harassed the claimant and/or the identity of the claimant's named comparator in relation to her direct discrimination claim. The tribunal informed the parties that it would consider any representations they may wish to make in relation to this matter.

18. Rule 44 prescribes a number of circumstances in which a tribunal may make an order to prevent or restrict the public disclosure of any aspect of those proceedings. The pertinent provisions of Rule 44 to this case are as follows; -

"(1) A tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings. Such an order may be made in the following circumstances –

(a) where the tribunal considers it necessary in the interests of justice;

(b) in order to protect the Convention rights of any person; ..

(d) in relation to proceedings before the Fair Employment Tribunal, where the tribunal considers that - ..

(ii) the disclosure of evidence given by any person ("P") would create a substantial risk that P or another individual would be subject to physical attack or sectarian harassment.

(1) In considering whether to make an Order under this Rule, the tribunal is required to give full weight to the principle of open justice and to the Convention right to freedom of expression.

(2) Such orders may include – ..

(b) *an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the register or otherwise forming part of the public record*."

19. The case law on this issue emphasises that the principle of open justice is a general principle of our constitutional law and that derogations from this principle can only be justified when strictly necessary and if so, only to the extent necessary in order to secure the proper administration of justice ***(as per the EAT in A v British Broadcasting Corporation [2014] 2 WLR 1243).*** In this case the EAT determined that:-

> *"Where anonymity Orders are made, three Convention Rights are engaged and have to be reconciled. First, Article 6 which guarantees the rights to a fair hearing in public with a publicly pronounced judgment except where to the extent strictly necessary publicity would prejudice the interest of justice. Secondly, Article 8 which provides the qualified right to respect for private and family life. Thirdly, Article 10 which provides the right to freedom of expression and again is qualified."*

20. The tribunal in the present case determined that it was required to undertake a balancing exercise between the Convention Rights contained in Articles 6 and 10 and the principle of open justice, as against Article 8. In doing so, this tribunal was conscious of the principle enshrined in our constitutional law that the provision of public justice be done publicly.

21. The facts of the case before the Employment Appeal Tribunal (EAT) in ***Tyu v ILA Spa Limited [2019] 236/20*** echo the factual scenario in these proceedings. The EAT considered the appellant's appeal against the decision of the ET to reject her application for an Order that her name be redacted or anonymised in its written judgment of unfair dismissal proceedings brought by two of her relatives. The appellant had worked for the respondent but was not a party or witness to the proceedings. The judgment referred to the fact she had been suspected of dishonesty offences in the workplace which had been referred to the police by her employers. It also referred to the fact that employees told an internal investigation they were frightened by intimidatory behaviour of the appellant. The EAT allowed the appeal holding that the ET had erred in law; in its conclusion that the appellant's rights protected by Article 8 of the ECHR were not engaged; and in the alternative conclusion that if Article 8 rights were engaged, they did not outweigh countervailing rights protected by Articles 6 and 10 ECHR and common law principles of open justice. The EAT noted that the fact that the identity of the appellant was revealed and discussed during the public hearing of the dismissal claims was not necessarily fatal to the engagement of her Article 8 rights, particularly given as she had relied upon the reputational damage and associated distress caused by internet searches on her name, including by prospective employers, linking to the judgment. In failing to identify the appellant's Article 8 rights in play, the EAT found that the ET had failed to assess the nature and extent of the impact of the appellant's identity being revealed in a written judgment on the appellant, the proportionality of the interference with her Article 8 rights this would cause versus the proportionality of the interference with countervailing Article 6 & 10 rights and open justice principle if the application was granted. Thus, the requisite balancing exercise, assessing the degree of interference with the competing rights/principle was not conducted. The EAT substituted a finding that the appellant's Article 8 rights were engaged in relation to the right to the protection of reputation, given the contents of the judgment and her lack of former involvement in the proceedings and also in the privacy aspect in light of the reference to the police involvement. Due to lack of fact-finding with regards the extent of the impact alleged by the appellant and because of more than one outcome of the balancing exercise was possible, the issue as to whether the appellant's application under Rule 50 should be granted was remitted to the ET.

22. Following discussion of this matter at the outset of the Submissions Hearing, counsel for the respondent conceded that in light of the nature of the allegations of harassment levelled against the course member and the concessions made by the respondent regarding this conduct, the course members' Article 8 rights were engaged but submitted that the tribunal would need to hear from the course member in order to conduct the requisite balancing exercise between the principle of open justice and the competing ECHR rights. With regard to the staff member identified by the claimant as her comparator, counsel for the respondent submitted that her Article 8 rights were not engaged by virtue of the nature of the evidence about her.

23. The claimant submitted that whilst she would like the course member to be named in the written judgment, she informed the tribunal that she and her family would shop and socialise in the area where the course member resided and thus she was afraid for the safety of herself and her family if the course member was named in this judgment. The claimant expressed no view in relation to her named comparator.

24. Having considered the relevant legal principles, findings of fact and the submissions of the parties, the tribunal concluded that in relation to the course member, it was necessary and appropriate for the tribunal, of its own initiative, to issue an Anonymity Order, pursuant to Rule 44(3)(b) that the identity of the course member should not be disclosed in this written judgment. Instead, the course member is referred to herein as "Mr A". The tribunal reached this decision for the following reasons:-

    (i) It is recorded within this judgment that the tribunal finds that Mr A harassed the claimant in a manner which met the legal definition of harassment set out in Article 3A of FETO. At the material time, the tribunal also finds that Mr A strenuously denied the claimant's allegations of harassment. Mr A was not a party to these proceedings nor was he called to give evidence. In light of these facts and given the gravity of the allegations of harassment, the tribunal is satisfied that this written judgment engages Mr A's Article 8 rights, notably in relation to his reputation.

    (ii) Whilst conscious the tribunal did not hear from Mr A in relation to this matter, the tribunal is also conscious of the distinct possibility that Mr A is oblivious to these proceedings and thus unable to object to his identification in a written judgment. The tribunal is satisfied that it is more likely than not that if apprised of these proceedings and particularly the above mentioned findings of fact, Mr A would wish to be anonymised in the written judgment on the basis that if he was named, the nature and extent of the interference to his Article 8 rights, particularly his reputation, would be significant.

    (iii) The tribunal considers that this order is a necessary and proportionate step to safeguard Mr A's Article 8 rights. In support of this the tribunal is satisfied that the interference caused to Articles 6 and 10 of the ECHR and the common law principle of open justice, by virtue of this order, is nether wholesale or absolute. This is because, this was a public hearing throughout which Mr A was named. Furthermore the proportionality of this measure is further supported by the claimant's genuine concern for her safety and that of her family should Mr A be identified in this judgment.

    In light of the above-mentioned reasons, having weighed all of the competing factors in the balance, the tribunal concludes that the circumstances outlined in Rule 44 (1) (a), (b) and (d)(ii) apply and is satisfied the anonymity order is a necessary and proportionate step which can be reviewed following any application by a party or other person with a legitimate interest, pursuant to Rule 44(4).

25. With regard to the comparator named by the claimant to support her direct discrimination claim, the tribunal concluded it was not necessary to name this comparator in this judgment in order to safeguard the principle of open justice. This is because this staff member, who was repeatedly named throughout the proceedings, was not involved in any matter relevant to these proceedings but was simply named by the claimant as a point of comparison. Moreover, the tribunal made a finding of fact that the comparison drawn by the claimant and this staff member was not, for the purposes of FETO, a valid one. Therefore as the identity of the comparator is not important to the issues in dispute, the tribunal is satisfied that the interests of justice, notably the principle of open justice, is not in any way infringed by the non-identification of this comparator within this judgment.

Reasonable Adjustments

26. A witness for the respondent had a hearing impairment. In order to facilitate the full and effective participation of this witness at the hearing, the tribunal arranged for this witness to sit in the witness chair throughout the claimant's case in order that they could lip-read what was said by the claimant and counsel for the respondent.

Mode of Hearing

27. The hearing took place in Adelaide House, Belfast save for on the third day of hearing. On this day, the hearing proceeded in Killymeal House in order to facilitate one of the respondent's witnesses giving his evidence remotely. The arrangements put in place by the tribunal's Secretariat to hear cases in Killymeal House safely and in compliance with the legal requirements for a public hearing were outlined to the parties. The tribunal was satisfied that the arrangements in place complied with Article 6 requirements and the tribunal's Rules of Procedure 2020, notably Rules 38 & 40, in relation to a public hearing. Neither party objected to proceeding under these arrangements.

SOURCES OF EVIDENCE

28. The witness statement procedure was used in this case. The claimant sought and was permitted to give additional oral evidence-in- chief, in relation to her claim. That evidence related to her direct discrimination claim. The respondent was permitted to adduce additional oral evidence-in-chief to address the additional evidence of the claimant. At the hearing, each witness swore or affirmed to tell the truth, adopted their witness statement as their evidence and moved to cross-examination and where appropriate, brief re-examination.

29. The claimant gave evidence on her own behalf. On behalf of the respondent, the following witnesses gave evidence:-

    Mr R Skillen – Secretary Manager of the respondent's CHGC and Aberdelghy Golf Course.

    Mr M Scappiticci – Sports Services Area Manager (Local Facilities).

    Ms L Steele – Receptionist at CHGC.

30. The tribunal was presented with an agreed hearing bundle of 242 pages. The tribunal had regard only to those documents within the bundle or presented during the course of the hearing, to which it was referred by the parties or the witnesses. The tribunal also considered the written and oral submissions of the parties.

THE LAW

Relevant Legal Provisions

31. The Fair Employment Tribunal ("FET") was created pursuant to Article 81 of FETO. Its function is to exercise the jurisdiction conferred on it by FETO, or other relevant statutory provisions none of which are relevant to these proceedings. The different forms of discrimination are defined within FETO. Those relevant to these proceedings are set out below.

Harassment

32. Article 3A of FETO defines harassment as follows:-

> *(1) A person ("A") subjects another person ("B") in any circumstances relevant for the purposes of any provision referred to in Article 3(2B) where on the ground of religious belief or political opinion, 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 sub-paragraphs (a) and (b) of paragraph (1) only if, having regard to all the circumstances, including, in particular, the perception of B, it should reasonably be considered as having that effect."*

33. Unlike direct discrimination and victimisation, there is no need for the claimant to identify a comparator in order to establish harassment.

Direct Discrimination

34. Article 3(2)(a) provides insofar as is relevant and material to these proceedings:-

> *"A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of a provision of this Order, other than a provision to which paragraph 2A applies, if –*
>
> *(a) On either of those grounds he treats that other less favourably than he treats or would treat other persons …".*

35. In order to establish less favourable treatment Article 3(3) of FETO provides: -

> "*A comparison of the cases of persons of different religious belief or political*

opinion under paragraph (2) or (2A) must be such that the relevant circumstances in the one case are the same or not materially different, in the other."

36. Case law has expanded the protected characteristics of religious belief and political opinion to include perceived religious belief and perceived political opinion.

37. A key component of direct discrimination is the establishment of less favourable treatment of the claimant in comparison to how the chosen comparator (real or hypothetical) was or would have been treated. The second key component is proving facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent's less favourable treatment of the claimant was on the protected ground, in this case religious belief and/or political opinion (real or perceived).

Victimisation

38. Article 3(4) of the FETO defines victimisation insofar as is relevant and material to these proceedings:-

"A person ("A") discriminates by way of victimisation against another person ("B") in any circumstances relevant for the purposes of this Order if –

(a) he treats B less favourably than he treats or would treat other persons in those circumstances; and

(b) he does so for a reason mentioned in paragraph (5).

(5) The reasons are that –

(a) B has – …

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

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

(b) A knows that B intends to do any of those things or suspects that B has done, or intends to do, any of those things."

39. The act which the claimant does is called a "protected act". The core elements of victimisation are the same as direct discrimination with the only material difference being that the purported reason for the respondent's alleged less favourable treatment of the claimant is the claimant's protected act rather than the protected ground.

The Employment Field

40. FETO sets out specific fields in which the various types of discrimination referred to above are unlawful. The field applicable to this case is contained within Part III which outlaws discrimination and harassment in the employment field. Within this

section FETO makes a distinction between employment by employers of employees (including a person seeking employment) and engagement of workers by a person/entity that does not employ the worker.

41. The claimant was not an employee of the respondent but an agency worker. Article 20 of FETO extends protection to individuals like the claimant (referred to in FETO as "*contract worker*") employed by a person/entity (in this case Grafton Recruitment) but supplied to work for another, in this case the respondent (referred to in FETO as "*principal*") under a contract between the employer and the principal. It is common case that the claimant's working arrangement with the respondent fell within the scope of Article 20 and specifically Article 20(2) of FETO which provides that it is unlawful for a principal to discriminate against a contract worker and Article 20(2A) which provides that is unlawful for a principal to subject a contract worker to harassment.

Liability of the Employer/Principal

42. An employer or principal is liable for their own personal acts directly under Article 19 of FETO (vis-á-vis an employee) and Article 20 (vis-á-vis any contract worker working for them).

43. In cases where the employer employs other individuals, FETO extends the liability of the employer to anything done by a person in the course of their employment with that employer. FETO also extends the liability of a principal for anything done by any person as an agent for the principal.

44. Article 36 of FETO provides insofar as is relevant and material:-

> *"(1) Anything done by a person in the course of his employment shall be treated for the purposes of this Order 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 of that other person shall be treated for the purposes of this Order as done by that other person as well as by him.*
>
> *(3) Paragraph (2) applies whether the authority was –*
>
> *(a) express or implied; or*
>
> (b) *given before or after the act in question was done*".

45. Therefore the only scope by which an employer or a principal can be liable for the discriminatory conduct of others under FETO is if that other person was at the material time an employee of the respondent acting in the course of their employment or was a contract worker acting as an agent for the principal with the principal's express or implied authority given before or after the discriminatory conduct in question was carried out.

46. In this case, the allegation levelled by the claimant against the respondent is that it subjected the claimant to harassment falling within FETO by virtue of the conduct of a third party (Mr A) on two specified occasions.

47. Article 36 of FETO does not extend liability to employers or principals to the acts of third parties. This raises the question as to whether this tribunal has jurisdiction to hear the claimant's complaint of harassment levelled against the respondent. This question has been considered in a number of cases which are considered in the legal principles section below.

Time Limitation

48. Relevant proceedings for discrimination against an employer/principal on the grounds of religious belief and/.or political opinion may be presented to the tribunal in accordance with Article 38 of FETO. Proceedings under Article 38 must be brought within three months of the day on which the complainant first had knowledge of the act complained of (Article 46(1)(a) of FETO) or the end of the period of six months beginning with the day on which the act was done (Article 46(1)(b)). The tribunal may extend time if it considers that it just and equitable to do so (Article 46(5) of FETO).

Burden of Proof

49. The burden of proof is set out in Article 38A of FETO which provides:-

> *"Where, on the hearing on a complaint under Article 38, the complainant proved facts from which the Tribunal could, apart from this Article, conclude in absence of an adequate explanation that the respondent –*
>
> *(a) Has committed an act of unlawful discrimination or unlawful harassment against the complainant or*
>
> *(b) Is by virtue of Article 35 or 36 to be treated as having committed such an act of discrimination or harassment against the complainant;*
>
> *The Tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act."*

Relevant Principles of Law

50. In addition to the above-mentioned provisions of FETO, the parties referred to a number of authorities and provided a bundle of authorities. The authorities referred to are listed below. The key authorities are referred to in the summary of the relevant legal principles set out below.

The Claimant's Authorities

(i) ***Unite the Union v Nailard [2018] EWCA Civ 1203***

The Respondent's Authorities

Harassment and Victimisation

(i) ***Pearce The Governing Body of Mayfield Secondary School [2003] IRLR 512.***

(ii) ***Bessong v Pennine Care NHS Foundation Trust [2020] ICR 849.***

(iii) ***McCann v Extern [2014] NICA 1.***

The Burden of Proof

(i) ***McCorry & Others v McKeith [2016] NICA 47.***

(ii) ***Laing v The Manchester City Council [2006] IRLR 748.***

Time Limit

(i) ***British Coal Corporation v Keeble [1997] IRLR 336 EWCA***

(ii) ***Sennell v University of Ulster [1999] NICA 1931***

(iii) ***Habinteg Housing Association Ltd v Holleron UKEAT/0274/14***

(iv) ***Rathakrishnin v Pizza Express Restaurants Ltd [2016] 278***

(v) ***Edomobi v La Retraite RC Girls School UKEAT/0180/16***

(vi) ***Berry v Ravensbourne National Health Trust [1993] ICR 871***

(vii) ***Hendricks v The Commissioner of the Police of the Metropolis [2003] ICR 530***

Liability for Third Party Harassment

51. The question of liability of an employer/principal for the harassment of its employee/contract worker was considered by the House of Lords in the case of ***Pearce v The Governing Body of Mayfield Secondary School [2003] UKHL 34***. In the context of whether an employee subjected to harassment had a remedy against their employer under the Sex Discrimination Act 1975 (in force at the relevant time in England and Wales and now superseded by the Equality Act 2010). Ms Pearce was a Science Teacher who was subjected to a campaign of homophobic abuse by pupils in the school. Ms Pearce reported this to the Deputy Principal but the abuse continued. Ms Pearce brought complaints to the Employment Tribunal for sex discrimination. At that time there was no legislation in force prohibiting discrimination on grounds of sexual orientation. Ms Pearce's claims were dismissed by the Employment Tribunal, the EAT and the Court of Appeal on the basis that the Sex Discrimination Act 1975 was not concerned with discrimination on grounds of sexual orientation and thus the language used by the pupils to harass Ms Pearce did not fall within the ambit of the Act. Ms Pearce

brought her claim to the House of Lords. One of the points considered by the House of Lords was the question of employer liability for third party harassment. On this point the House of Lords was clear that the legislation provided no scope to attach liability to employers or principals for third party harassment. It held that the tribunal had erred in finding that the school as Ms Pearce's employer would have been liable for the campaign of abuse meted out to her by the pupils of the school had their abuse been on the grounds of sex rather than sexual orientation.

52. The House of Lords found that the tribunal had erred by relying on the decision of the EAT in ***Burton v De Vere Hotels Ltd*** to find that the employer would have been liable if the abuse had been on grounds of sex, because it could and should have taken steps to shield Ms Pearce and that its failure to do so amounted to direct sex discrimination. In essence that was the conclusion reached by the EAT in the ***Burton*** case where it held that in failing to remove two black waitresses from its banqueting room when they were the target of racist and sexist jibes by a guest speaker, the employer subjected the two waitresses to direct racial discrimination. The House of Lords in ***Pearce*** held that ***Burton*** was wrong decided because an employer's inadvertent failure to take reasonable steps to protect its employees from racial or sexual abuse by third parties could not amount to direct discrimination if its failure had nothing to do with the sex or race of the employees. Lord Nicolls of Birkenhead noted that an employer cannot be in a worse position for the racial or sexual harassment of its employees by third parties for whose behaviour it is not vicariously liable than it would be for sexual or racial harassment committed by the employer or its employees. In the latter the employer's conduct must meet the statutory definition of harassment and so for the former, the employer's conduct whether by an act or omission must by necessity also meet the statutory definition of direct discrimination.

53. The House of Lords noted that the approach of the EAT in ***Burton*** which prescribed that the tribunal should ask itself whether the event in question was something sufficiently under the control of the employer that he could, by the application of "good employment practice" have prevented the harassment or reduced the effect was not based on anything within the statute. Unless the employer's conduct satisfies the "less favourable treatment" test, the employer is not guilty of direct sexual or racial discrimination.

54. At paragraph 35 of the judgment, with regards to the ***Burton*** case, Lord Nicholls of Birkenhead noted that had the factual position been otherwise, i.e. had the employer permitted exposure of the black waitresses to racist remarks by a third party when it would not have treated white employees similarly in a corresponding situation, then this would have been a case of racial discrimination.

55. In criticising the EAT in ***Burton***, Lord Nicholls recognised that some would regard this analysis as highlighting a deficiency in the structure and scope of the discriminatory legislation. However Lord Nicholls noted (at paragraph 29):-

> "*Viewed in the broadest terms, the **Burton** decision has much to commend it. There is, surely, everything to be said in favour of a conclusion which requires employers to take reasonable steps to protect employees from racial or sexual abuse by third parties. But is a failure to do so "discrimination" by*

*the employer? Where the **Burton** decision is, indeed, vulnerable, is that it treats employer's inadvertent failure to take such steps as discrimination even though the failure had nothing to do with the sex or race of the employees."*

56. Lord Nicholls goes on to note (at paragraph 37):-

"I have already noted the desirability of employers taking reasonable steps to protect employees from sexual and racial harassment by third parties. But the discrimination legislation is targeted in precise terms. A fundamental feature of this aspect of the legislation is that attention is focussed on the conduct of the particular employer, not the conduct of a reasonable employer. Further the circumstances where an employer is liable for the acts of others are stated expressly in the legislation. It is not for the Courts to extend the ambit of the discrimination legislation, however desirable this may seem, under the guise of interpretation of provisions which are unambiguously clear."

57. Thus according to the House of Lords, employers and principals are not vicariously liable for harassment or discrimination of its employees or contract workers by a third party. The House of Lords judgment in Pearce has been followed by the Courts to date.

58. The case of ***Conteh v Parking Partners Ltd [2011] ICR 341***, ***EAT***, concerned an employee's claim against her employer for harassment on grounds of race under S3A of the Race Relations Act 1976 ("RRA") in relation to the actions of a third party (a client) of the respondent who was not under the control of the employer. Save for the different protected grounds, the statutory definition of harassment under the RRA mirrors the statutory definition of harassment in FETO. The EAT upheld the Employment Tribunal's decision that an employer was not liable for harassment under the RRA where a client subjected its employee to racial abuse. The EAT held that an employer could only be liable under the RRA for harassment carried out by a third party if the employer's failure to take action to safeguard the employee ***itself*** violated his or her dignity or led to the creation of an intimidating, hostile, degrading, humiliating or offensive environment. Whilst the Employment Tribunal found that the employer could have done more to address Ms Conteh's complaints of harassment against the client, the EAT agreed with the Employment Tribunal that the employer's inaction could not be said to have "created" the environment prescribed by the legislation. It accepted that more than one party could be responsible for such an environment; it could initially have been created by the acts of a third party and thereafter made worse by the employer's inaction but noted that this scenario would be rare and it was certainly not the case on the facts in ***Conteh***.

59. The approach of the EAT in ***Conteh*** was endorsed by the Court of Appeal in the case of ***Unite the Union v Nailard [2019] ICR 28 CA***. Whilst this case concerned a claim of harassment under the Equality Act 2010 ("EqA") in which the definition of harassment differs to that contained within FETO, those differences are not material to the issue of employer/principal liability for third party harassment and thus the ***Nailard*** is a persuasive authority in this jurisdiction on this issue.

60. In this case ***Nailard*** argued that liability for third party harassment was implicitly present in the definition of harassment contained in S26 of the EqA and remained intact notwithstanding the repeal of S40(2) of the EqA. However Lord Justice Underhill (giving the only judgment) rejected this argument on the basis that it could not be the case that Parliament had introduced a careful and explicit scheme providing for third party liability notwithstanding that such liability was already implicitly provided for elsewhere. Furthermore, he questioned the logic of Parliament expressly repealing that scheme if the effect were to leave in place an implied liability which was broadly equivalent but of uncertain scope. Therefore Lord Justice Underhill reconfirmed that the EqA no longer contains any provision making employers liable for failing to protect employees for third party harassment but noted that employers may be liable if the proscribed factor forms part of the reason for the employer's inaction. In doing so, Lord Justice Underhill confirmed that the position remains as analysed by the EAT in ***Conteh***.

61. Most recently in ***Bessong v Pennine Care NHS Foundation Trust [2020] ICR 849***, ***EAT***, the EAT stated that it was bound by ***Nailard*** to conclude that there is no explicit liability under the EqA on an employer for failing to prevent third party harassment. The contention in this case was that the Race Directive and the other EU Equality Directives (2000/78/EC, 2006/54/EC and 2004/113/EC) required Member States to outlaw third party harassment in certain circumstances; in particular where an employer has failed to protect or prevent his/her employee from foreseeable harassment by a third party. It was further submitted that the Race Directive did not require the employer's inaction in such circumstances to be related to any protected characteristic.

62. The Court rejected these attempts to in its view considerably broaden the scope of the legislation. In doing so the EAT noted that while the Directive did not stipulate that the unwanted conduct related to racial or ethnic origin must be conduct by the employer, that was merely because the Directive sought to adopt a definition for harassment that could be applied in numerous contexts, only one of which was employment. The EAT was very clear that the Directive sought to prohibit unwanted conduct related to race; this did not have the effect of imposing liability when there was no relationship between the conduct in question (in this case the employer's failure to act or take steps) and race. If the intent of the Directive had been to impose strict liability, the EAT considered that one might have expected to see some such explicit reference to this aim in the preamble or elsewhere, in the Directive.

63. In summary therefore, to establish liability of the respondent for the alleged conduct of Mr A, the claimant would need to show that either the respondent directly discriminated against her in its treatment of her relating to Mr A and/or that the respondent's action/failure to act to address her complaints against Mr A of itself amounted to harassment of her falling within the definition of Article 3A of FETO. The claimant did not advance either argument and reiterated this fact to the tribunal on a number of occasions during the hearing.

64. By way of a side note, as illustrated in the case of ***Nailard***, for a period of time the EqA expressly provided for employer liability for persistent harassment of their employees by third parties in specified circumstances (set out in what was S.40(2)-(4) EqA). However those provisions were repealed with effect from 1 October 2013

by S.65 of the Enterprise and Regulatory Reform Act 2013.

65. In this jurisdiction employers can be held liable for the sexual harassment of its employees by a third party in specified circumstances (set out in Article 82C of the Sex Discrimination (NI) Order 1976). The fact that this protection is expressly provided for in this Order but not in the other anti-discrimination legislation in this jurisdiction supports the conclusion reached by the judiciary in the cases outlined herein that it is for the legislators to plug any perceived gap in the law, not the courts.

Time Limitation

66. The case law addressing the scope of the just and equitable discretion is well settled. The leading authority in this jurisdiction is the judgment of the Court of Appeal in ***Fennel v The University of Ulster [1999] NICA 1931***. The Court of Appeal in this case, considered the judgment of the Court of Appeal in England and Wales in ***British Coal Corporation v Keeble [1997] IRLR 33.*** In doing so the Court of Appeal reminds the tribunal of the following legal principles:-

(i) the burden of persuading the tribunal to exercise its discretion to extend time is on the claimant;

(ii) it is question of fact for the tribunal;

(iii) the discretion to exercise time is multifactorial will include consideration of the length and time involved in the delay and the reason or reasons for it;

(iv) the test to be applied by the tribunal is whether the claimant can establish justification for the failure to submit the claim in time; and

(v) the discretion is very wide.

67. The existence of an in-time claim can be a factor the tribunal can legitimately take into account when considering whether to extend time (see ***Berry v Ravensbourne National Health Trust [1993] ICR 871***). In that case the extension was being sought in respect of a claim for racial discrimination regarding the dismissal of the claimant for which the claimant already had an unfair dismissal claim before the tribunal. In light of this there was a clear overlap of the facts in respect of both time and substance.

68. Related to the issue of time is whether there is a continuing act. A continuing act is defined in Article 46(6) of FETO. Pertinent provision in this case is Article 46(6)(b) which provides:-

> *"(b) Any act extending over a period shall be treated as done at the end of that period;"*

69. The concept of an act extending over time was considered by Mummery LJ in the case of ***Hendricks v The Commissioner of Police of the Metropolis [2003] ICR 530***. In its judgment, the Supreme Court emphasised that the key question for determining a continuing act is to ascertain whether there is evidence on the facts that the numerous alleged incidents of discrimination are linked to one another and

are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period". Focus should be on the substance on the complaints and determining the key question of whether those complaints amount to 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 specific act was committed. Whether the same individual or individuals are involved in the acts/omissions complained has been held to be a relevant factor in determining whether separate acts/omissions amount to a continuing act.

Shifting the Burden of Proof

70. Shifting the burden of proof was considered in this jurisdiction by the Court of Appeal in the case of ***McCrory & Others v McKeith [2016] NICA 47***. This case concerned a disability discrimination claim but the burden of proof test is identical in FETO. The court held:-

> *"This provision and its English analogue have been considered in a number of authorities. The difficulties which tribunals appear to continue to have with applying the provision in individual cases indicates that the guidance provided by the authorities is not as clear as it might have been. The Court of Appeal in* ***Igen v Wong [2005] 3 ALL ER 812*** *considered the equivalent English provision and pointed to the need for a tribunal to go through a two-stage decision-making process. The first stage requires the complainant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. Once the tribunal has so concluded, the respondent has to prove that he did not commit the unlawful act of discrimination. In an annex to its judgment, the Court of Appeal modified the guidance in* ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 333****. It stated that in considering what inferences and conclusions can be drawn from the primary facts the tribunal must assume that there is no adequate explanation for those facts. Where the claimant proves facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex then the burden of proof moves to the respondent. To discharge that onus, the respondent must prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of sex. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to be adduced to discharge the burden of proof. In* ***McDonagh v Royal Hotel Dungannon [2007] NICA 3*** *the Court of Appeal in Northern Ireland commended adherence to the* ***Igen*** *guidance."*

71. In the case of **Madarassy v Nomura International PLC [2007] IRLR 247**, the English Court of Appeal provided further clarification of the tribunal's task at the first stage of considering whether the claimant has proven facts from which the tribunal could conclude in the absence of an adequate explanation, that the respondent has committed an act of discrimination. The Court of Appeal emphasised that the full context of the evidence presented by the claimant and also by the respondent to contest the complaint, should be considered. 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.

72. In ***Nelson v Newry and Mourne District Council [2009] NICA 24*** the Court of Appeal noted that the approach to the shifting of the burden of proof set out in ***Madarassy*** requires a tribunal to consider allegations of discrimination in the context of the relevant factual matrix out of which the claimant alleges unlawful discrimination. The whole context of surrounding evidence must be considered in deciding whether the tribunal could properly conclude, in the absence of an adequate that the respondent has committed an act of discrimination. The Court of Appeal went on to note that in ***Curley v Chief Constable of the Police Service of Northern Ireland and ANOR [2009] NICA 8,*** Coughlin J emphasised the need for a tribunal to focus on the fact that the claim to be determined is an allegation of unlawful discrimination. A tribunal must retain this focus when applying the provisions of the burden of proof and in doing so be cognisant of the need to stand back and focus on the issue of discrimination.

73. If the claimant does not prove facts from which the tribunal could conclude that the respondent has committed unlawful discrimination/unlawful harassment then the claim fails. If the claimant does prove such facts then the burden of proof moves to the respondent to prove on the balance of probabilities the treatment afforded to the claimant was not on grounds of the protected characteristic (direct discrimination), or was not for a reason related to the protected act (victimisation), or that the claimant was not subjected to unwanted conduct on the protected ground (harassment). In assessing the respondent's explanation for the treatment complained of, the tribunal must be satisfied that the explanation is adequate to discharge the burden of proof on the balance of probabilities. As highlighted in ***McCrory***, a tribunal will normally expect cogent evidence from the respondent to discharge the burden of proof. If the tribunal does not accept the respondent's explanation on the balance of probabilities, then it must find for the claimant.

74. Whilst the mechanics of the burden of proof prescribes a two stage test, this test is not to be applied too slavishly or mechanically. An alternative way to deal with the burden of proof, which is often used by the tribunal if there is uncertainty as to whether the burden has shifted, is to consider the explanation put forward by the respondent for the treatment complained of. If having done so, the tribunal is satisfied on the balance of probabilities that the respondent has presented a

coherent and adequate explanation for the treatment which is in no way influenced by the protected characteristic, (or in the case of victimisation, the protected act) then the claimant's claim of discrimination fails. This approach was endorsed in ***Laing v Manchester City Council [2006] IRLR 748 EAT*** where the EAT stated (at paragraph 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…"*

75. The EAT went on to state (at paragraph 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 … and it has nothing to do with race."*

RELEVANT FINDINGS OF FACT

76. Based on the sources of evidence referred to at paragraphs 27-29 above, the tribunal found the relevant facts proven on the balance of probabilities. It is important to note that this judgment does not record all of the competing evidence but records only those findings of fact necessary for determination of the issues.

BACKGROUND

77. Castlereagh Hills Golf Course ("CHGC") is owned by the respondent. It offers golfers yearly course membership or a pay and play facility. Golfers can also seek membership of Castlereagh Hills Golf Club which uses the respondent's facilities within CHGC.

78. It is undisputed that at all material times the claimant was engaged by the respondent as agency worker, via her employer, Grafton Recruitment, to work in its reception in CHGC, as a receptionist.

79. As the claimant was also in full-time employment, she mainly worked shifts for the respondent at the weekend and since September 2018 the claimant predominantly worked one long shift on a Sunday; once per month in off-season and twice per month in peak season.

80. At the relevant time there were five reception staff and one administrative officer working in the respondent's reception staff at CHGC. Of this group, five were

engaged by the respondent via an agency due to the seasonal nature of the business; three were Roman Catholic and two were Protestant.

81. The claimant is a Roman Catholic and has no set political opinion. However she believes that due to her forename, she would be perceived as being a Nationalist. Given the Irish origin of the claimant's forename, the tribunal accepts that this is likely to be the case.

82. Whilst working for the respondent the claimant was line managed by Mr R Skillen. Mr Skillen is a Protestant. It is common case that the claimant and Mr Skillen had a very good working relationship. It was uncontested that since assuming the role of Secretary Manager, Mr Skillen had recruited four staff; two were Roman Catholic and two were Protestant.

83. Mr Skillen's direct line manager is Mr M Scappiticci. Mr Scappiticci reports to the Head of Service, Mr B Courtney. Both Mr Scappiticci, and Mr Courtney are Roman Catholic.

Harassment

84. The claimant's complaint of harassment relates to the conduct of Mr A on two separate occasions; on Sunday 28 October 2018 and on Sunday 8 September 2019. In summary both incidents concerned verbal comments made by Mr A to the claimant which were delivered in an aggressive manner. The first incident related to the Union flag. The second incident concerned the claimant's complaint about the first incident and the remedial action directed by the respondent, i.e. that Mr A apologise to the claimant.

85. It is undisputed that Mr A was not employed by, nor did he work for the respondent but was a third party of the respondent. He held annual full membership of CHGC and was a member of the CH golf club.

86. The clamant reported both incidents to Mr Skillen at the relevant time. A central plank of the claimant's harassment claim was that the respondent failed to deal with these complaints in a proper, effective or timely manner which left the claimant feeling vulnerable and unprotected in the workplace and caused her to terminate her placement with the respondent on 3 October 2019.

87. The tribunal's key findings in relation to the harassment claim are as follows:-

    (i) Mr A's conduct towards the claimant on both occasions met the statutory definition of harassment in FETO. However Mr A was a third party of the respondent; therefore the respondent could not be held liable for this conduct under FETO.

    (ii) The respondent's handling of the claimant's complaints in relation to both incidents was procedurally flawed. On the facts, those failings were caused by the incompetence of those handling the complaints and had nothing to do with the religious belief and/or political opinion of the claimant (real or perceived), or those protected grounds at all. Thus the poor handling did not amount to discrimination or harassment of the claimant on grounds of religious belief and/or political opinion contrary to FETO.

(iii) The two incidents of harassment amounted to a continuing act. Therefore had the respondent been liable for Mr A's conduct, both of the claimant's complaints of harassment were brought within the statutory time limit

Harassment – First Incident

88. On Sunday 28 October 2018, the claimant sent an email to Mr Skillen, copied to other senior staff (including Ms L Steele) complaining about Mr A's behaviour that day. The claimant reported that whilst working in the reception that day Mr A:-

(i) made remarks aimed at the claimant's religion;

(ii) asked her why the Union Jack flag had been taken down from the flag pole outside the golf club;

(iii) was "*furious*" and beckoned the claimant to come out of the reception's back office;

(iv) submitted a signed "Suggestions" card in the following terms: *"Why are the flags not flying proud"* (sic).

89. It is common case that the claimant advised Mr Skillen that she felt Mr A's remarks were directed at her because of her religion. Mr Skillen confirmed this was a serious matter and undertook to speak to HR. Mr Skillen did not contact HR. Instead he reported the matter to Mr Scappiticci, who reported it to Mr Courtney. Mr Scappiticci contacted HR and it was agreed that Mr Skillen would speak to Mr A. Mr Skillen reported all of his actions back to Mr Scappiticci who in turn reported back to Mr Courtney.

90. Mr A described his comments to the claimant as "banter" and told Mr Skillen that he did not know what the claimant's religious belief was. The tribunal finds that it was highly likely that the claimant's Christian name alerted Mr A to her religious background and in light of this, Mr A perceived her political opinion to be Nationalist. Mr Skillen advised Mr A that his behaviour was unacceptable and could be reasonably regarded as sectarian. Mr A apologised to Mr Skillen and agreed to apologise to the claimant.

91. Mr Skillen updated the claimant who confirmed that if Mr A apologised to her she would be content that the matter had been appropriately addressed.

92. The claimant's evidence was that Mr A's behaviour was unwanted, caused her upset and made her feel extremely uncomfortable given her religious belief and perceived political opinion. The tribunal had no hesitation in finding that the claimant's perception of Mr A's conduct and its impact on her were genuine and having regard to all of the circumstances could reasonably be considered as having that effect.

93. The respondent accepted and the tribunal so finds that Mr A's conduct towards the claimant met the statutory definition of harassment on grounds of her perceived religious belief and/or perceived political opinion. However that harassment was

perpetrated by a third party of the respondent and is not conduct for which the respondent can be held liable under FETO.

94. The respondent's handling of the claimant's complaint about this matter whilst swift and at first glance, effective; it was procedurally flawed. In particular the respondent failed to:-

(i) recognise and apply its own internal procedure;

(ii) maintain any records of its handling of the claimant's complaint;

(iii) take any steps by way of follow-up after it had agreed the appropriate remedial action with the claimant.

95. One of the claimant's criticisms was that her complaint was not dealt with in a timeous manner. The timing of the following events were in dispute; Mr Skillen's initial contact with the claimant, when he spoke to Mr A and when he reported back to the claimant about this discussion. Mr Skillen maintained he contacted the claimant on the morning 29 October 2018 which was his first day back to work following the weekend; he met with Mr A on 31 October 2018; he rang the claimant (on an unspecified date) to relay the meeting he had with Mr A which he followed up with a face to face discussion with the claimant when she was next on shift, on Sunday 18 November 2018. The claimant maintained that she sent a message to Mr Skillen one week after her email of complaint as she had not received any response. This prompted Mr Skillen to speak to her. The claimant insisted that it was weeks' later when Mr Skillen spoke with Mr A and reported back to her. In the absence of any contemporaneous documents recording these events, the tribunal concludes that that Mr Skillen's time line is likely to be accurate. This is because the claimant was understandably upset by the incident. Therefore if she had not heard anything from Mr Skillen for weeks on end as she has suggested, the tribunal believes she would have followed this matter up with Mr Skillen during this period and created and maintained a paper trail to record this.

96. The tribunal rejects the claimant's complaint that the respondent did not address her complaint in a timely manner. In light of the tribunal's finding on the timeline, the claimant's complaint was acknowledged in one day, it was actioned in 3 days and the claimant was informed of the outcome the next day she was on shift – in total a 3 week turnaround. By any objective consideration the tribunal finds that this was a timely response especially as the claimant works on a causal basis for the respondent and given that Mr A was not employed by the respondent.

97. The second aspect of the claimant's complaint about the procedure was that she had no formal meeting with the respondent's management and/or HR and no contact from HR with an outcome or by way of follow up. These facts were not contested by the respondent. The tribunal finds that the lack of a formal meeting with the claimant was not in the circumstances, a procedural failing, but the lack of record keeping and follow up with the claimant were procedural failings.

98. This was the claimant's first complaint of harassment. Although a serious matter Mr Skillen had discussed the matter with the claimant and his manager and his and his actions thereafter had, on the face of it, effectively addressed the matter. Therefore the fact that it was dealt with informally was not of itself a procedural failing.

However having upheld the complaint and agreed remedial action with Mr A and the claimant, a record should have been maintained. Mr Skillen accepted in cross-examination that his failure to maintain a record was a procedural failing. In addition, the tribunal finds that the respondent should have followed up with the claimant to ensure that Mr A had apologised and checked whether she had any residual or new concerns. This was particularly important given that the claimant was a lone worker who came into regular contact with members of the public and thus was vulnerable. Additionally she was likely to encounter Mr A again given his annual membership of the course and attendance pattern. These procedural flaws are all the more inexcusable given that the respondent is a local council and a large employer with the benefit of a HR function to advise and support the respondent deal with such matters.

99. The respondent had a policy in place aimed at addressing complaints of harassment by lone workers and reducing this risk, entitled "Personal Safety and Lone Working – Version 4 – May 2019" ("the lone working policy"). None of the witnesses for the respondent referred to this document in their evidence. The tribunal was informed that the respondent's legal representative included this policy in the bundle. Mr Scappiticci accepted in cross-examination that this policy applied to agency staff. The policy expressly sets out the respondent's approach to ensuring the personal safety of its staff at work, particularly lone workers who regularly deal with members of the public and specifically lists receptionists as falling into this category. A risk identified in the policy is work-related violence which can take many forms including; "*non-physical violence such as threats, harassment, intimidation, sectarianism*" (section 5). It also envisages that work-related violence may be perpetrated by non-employees. The policy prescribes actions that should be taken when potential work-related violence is identified. The specified actions include, a risk assessment, employee consultation, incident reporting and, if applicable, action against offenders. The policy requires <u>all</u> incidents of work-related violence to be reported through line management to the respondent's Health and Safety Section who will initiate formal investigations where applicable (tribunal's emphasis). The inference being that some matters would be dealt with informally. The tribunal finds that the claimant's complaint against Mr A fell squarely within the scope of this policy, particularly given that she was a lone worker. However the respondent was oblivious to this fact. Whilst dealing with the compliant informally was permitted by this policy, the wholesale failure of management to recognise that the claimant's compliant engaged this policy is a serious procedural failing. The tribunal finds this failing to be especially concerning given that advice was sought from HR and because Mr Skillen and Mr Scappiticci were both experienced managers, regularly trained in Equality and Diversity.

100. The tribunal finds that these procedural failings exhibit an overly casual approach by the respondent to a serious matter and fatally undermine the respondent's assertions that they handled the matter appropriately and took it seriously.

101. Mr Skillen, in his witness statement, maintained that after providing the claimant with an update on his meeting with Mr A, he heard nothing further from the claimant about the matter. However under the pressure of cross examination Mr Skillen accepted that, at some point thereafter, the claimant had informed him that Mr A told her he would not apologise to her in front of others. It is not clear when this happened but the claimant maintained that it was in March 2019. On the balance of probabilities the tribunal believes that in all likelihood this conversation took place

on 21 April 2019. This is because according to the respondent's records of Mr A's attendance at the golf course in 2019, this was the first date that he attended the course in 2019 and the claimant was on duty.

102. The tribunal finds that Mr Skillen's failure to follow this matter up with Mr A, report the matter to his line manager and report back to the claimant was another procedural failing.

Harassment - Time Limit

103. The claimant did not see Mr A for quite some time after the incident in October 2018. It is uncontested that Mr A's first attendance at CHGC was on 31 March 2019 and that the claimant did not report any issue with her interactions with Mr A between the first incident on 28 October 2018 and the second incident on 8 September 2019.

104. An issue in dispute is whether Mr A apologised to the claimant after the first incident. This is significant as Mr A's apology was a form of remedial action agreed by the respondent with the claimant. By implication, in order to resolve the claimant's complaint about the first incident and her associated concerns, it was imperative that Mr A apologised to her. The claimant asserts that in or around April 2019, Mr A approached her at the counter in reception and referred to the fact that he was to apologise to her as she had accused him of being sectarian. Mr A said he felt it was unfair and that he would not be apologising to the claimant in front of people. The claimant felt physically shaken by Mr A's reaction but made no written report to the respondent about this exchange.

105. Whilst Mr Skillen maintained in his witness statement that the claimant did not inform him that Mr A had not apologised; he conceded in cross examination that at some point in April 2019 the claimant informed him that Mr A had indicated he would not apologise to her in front of others. Furthermore the fact that the claimant was harassed on a second occasion by Mr A, which was connected to his agreement to apologise to the claimant is a clear indicator of a lack of remorse on the part of Mr A. In light of these facts, the tribunal concludes that Mr A did not apologise to the claimant and finds the claimant's account of her exchange with Mr A in circa April 2019 to be truthful and accurate.

106. The claimant acknowledged that on 28 October 2018, she believed Mr A's treatment of her was harassment of her on grounds of her religious belief and/or perceived political opinion and as such, she was aware that his treatment of her was unlawful. At this time, the claimant was also aware of sources of information about her legal rights and bringing proceedings and about sources of legal representation, notably the Equality Commission and the Law Centre. The claimant further acknowledged that there were no incidents of harassment between 28 October 2018 and 8 September 2019. The claimant did not bring a claim to the tribunal after the first incident as she felt that she had addressed the matter by raising the issue with the respondent and was satisfied that the matter would be resolved. The claimant gave no explanation as to why she did not issue proceedings when on her own account, she was informed by Mr A that he would not be apologising to her in front of so many people, at which point she concluded that he was not going to apologise to her, although the tribunal deems it significant that she did report this matter to Mr Skillen.

Harassment - Second Incident

107. On Sunday 8 September 2019 at approximately 6.40 a.m. Mr A entered the reception area where the claimant was working and in response to the claimant greeting him, is alleged to have approached the reception desk and told the claimant she was not to *"F****ing"* speak to him. The claimant alleged Mr A said that she had accused him of being sectarian, which he was not and that in fact he was only having a laugh with her. The claimant replied that she did not have to tolerate his behaviour and noted he had not apologised to her. The claimant maintained that no one witnessed the incident but that other course members arrived shortly thereafter.

108. The claimant reported the incident to Mr Skillen via a WhatsApp message at 8.00 am. Mr Skillen was not working that day but replied via WhatsApp message at 9.44 am to confirm he would ring the claimant later that day to discuss the incident. During their telephone call Mr Skillen informed the claimant that he would speak to HR and come back to her.

109. The claimant was next rostered to work for the respondent on Sunday 15 September 2019. Mr Skillen was on leave for a few days during the intervening week. Mr Skillen messaged the claimant at one minute past midnight on 15 September 2019 to note that should she have any hassle from Mr A that morning, she should ring him straight away and he would come up and speak with him. This was the first contact the respondent had with the claimant since the date of the incident. Given that the claimant was rostered to work on this date, the tribunal finds that the respondent should have contacted the claimant before the date of her next shift. The tribunal also considers it should have been obvious to Mr Skillen that the claimant would be concerned about coming into work on 15 September, given the gravity of her complaint, the historic incident, the distinct possibility she could encounter Mr A during her shift and the fact she was a lone worker. Whilst Mr Skillen's offer to come up to the golf club in response to any further incident, was well-intended, the tribunal regards it to be an offer made very late in the day; it was a reactive suggestion which did nothing to actually protect the claimant from a being exposed to further harassment. The fact Mr Skillen messaged the claimant at the eleventh hour evidenced to the tribunal that he knew the claimant was likely to be apprehensive about returning to work and required support. Whilst Mr Skillen was on leave, the tribunal notes that the respondent is a large organisation with dedicated HR support. Therefore Mr Skillen could and should have passed this matter on to his line manager and/or HR to discuss the claimant's complaint with her and identify any steps required to protect her pending investigation into her complaint.

110. Mr Skillen rang the claimant later on that day by way of follow up. Mr Skillen asked the claimant to send him a report of the incident on 8 September by email. The claimant did so. In her email the claimant reported that she felt physically shaken by Mr A's aggressive outburst and was worried about working that day knowing that the situation had not been dealt with.

111. The claimant characterised Mr A's conduct on 8 September 2019 as harassment on grounds of her religious belief and/or perceived political opinion. The respondent conceded from the outset that this incident met the statutory test for victimisation on

these protected grounds given the connection between Mr A's conduct and the claimant's previous compliant about him. The respondent also accepted and the tribunal so finds, that Mr A's conduct and its impact on the claimant could reasonably be regarded as conduct which met the statutory test for harassment on the grounds of her perceived religious belief and/or perceived political opinion. However, as Mr A was a third party of the respondent, no liability for this conduct attaches to the respondent under FETO.

112. The claimant's complaints against the respondent again focus on its handling of her second complaint which ultimately led the claimant to conclude that she could no longer work for the respondent. Based on the facts found below, the tribunal found all of the claimant's criticisms to be well founded. In summary key failings in the respondent's handling of the claimant's second complaint were:-

    (i) Its initial abdication of responsibility to CH golf club to handle the complaint.

    (ii) This caused unnecessary delay in the respondent's handling of the complaint.

    (iii) Its failure to recognise and apply its lone working policy.

    (iv) Its informal handling of the claimant's complaint.

    (v) Its failure to fully or properly investigate the claimant's complaint before informing the claimant of the outcome.

113. On Monday 16 September Mr Skillen spoke to Mr Scappiticci and Mr B Courtney about the claimant's email. Following discussion, Mr Courtney and Mr Scappiticci concluded that this was initially a matter for the golf club and directed Mr Skillen to inform the golf club of the claimant's complaint and request the club to interview Mr A about the incident. The respondent presented no evidence or rationale for this course of action which was at odds with how it handled the claimant's first complaint. The tribunal is at a loss to understand why the respondent did not deem it appropriate to deal with the matter itself or in tandem with the golf club given that; the complaint was made by one of its workers about one of its course members and fell squarely within the scope of the respondent's lone working policy. This approach caused unnecessary delay in the respondent's handling of the claimant's complaint.

114. The tribunal finds the respondent's contention that it treated the claimant's complaint seriously and in accordance with its policies and procedures to be untenable. This is because Mr Skillen and Mr Scappiticci handled the claimant's complaint with the benefit of HR advice. Despite this, neither of them could identify for the tribunal any policy of the respondent they were applying when addressing the claimant's complaint. The tribunal has no hesitation in concluding that the respondent should have applied its lone working policy. Its failure to do so was a serious procedural failing.

115. Mr Skillen contacted the Secretary of the golf club, Mr Moreland on 16 September 2019 and asked him to look into the claimant's complaint and report back. Mr Skillen informed the claimant that he was meeting with Mr Moreland on 20 September. Mr Moreland met with Mr A on 25 September 2019 and the minutes of

that meeting record that Mr A admitted to raising his voice when speaking to the claimant but denied using bad language and noted that a fellow golf member witnessed the exchange. The minutes also record that it was up to the respondent to determine if any further action was required.

116. Following contact from the claimant on 27 September 2019 Mr Skillen provided her with an update that day and invited her to meet with himself and Mr Scappiticci the following week. That meeting took place on 3 October 2019.

117. Before meeting with the claimant the following steps were taken:-

(i) Mr Skillen and Mr Scappiticci reviewed CCTV footage of the exchange between the claimant and Mr A.

(ii) Mr Scappiticci spoke to Mr Smart from HR and obtained advice.

(iii) Mr Scappiticci spoke informally to other reception staff about Mr A and their dealings with him.

118. On the facts, it was clear to the tribunal that the respondent was dealing with this matter informally. No contemporaneous notes of the above-mentioned steps were presented to the tribunal. As this was the claimant's second complaint of harassment on grounds of religious belief and/or political opinion about Mr A, the tribunal is satisfied this complaint warranted formal investigation. The tribunal also concludes that by way of good procedure and indeed common sense, the claimant and Mr A should have been spoken to at an early stage in the investigation to gather both accounts and all relevant facts at the outset. The respondent's failure to do so was a further procedural flaw which had the understandable effect of making the claimant feel that her complaint was not being progressed or treated with the gravity it deserved.

119. From their review of the CCTV footage Mr Skillen and Mr Scappiticci concluded that Mr A's body language suggested he was animated and irate whereas the claimant's body language suggested she was calm and non-threatening. No other person was visible in the CCTV footage but it did not definitively confirm whether anyone else was in the vicinity and may have overheard the exchange. The reception staff spoken to by Mr Scappiticci reported no particular issues with Mr A but it was noted that he could be loud.

120. The advice from HR was that given the nature of the incident and lack of witnesses, there was little at this stage that the respondent could do given the nature of the incident and the lack of witnesses. The tribunal finds this advice to be questionable given that it runs contrary to the following facts:-

(i) The respondent had yet to meet with the claimant or Mr A to get their versions of events and Mr A.

(ii) The CCTV footage supported the claimant's version of events.

(iii) The possibility that Mr A's fellow golf club member had witnessed the exchange meant that potential witnesses had not yet been interviewed.

121. No evidence was provided to the tribunal regarding what action was open to the respondent to take against Mr A. Although the terms and conditions of membership of the golf course were not opened to the tribunal, the tribunal infers that those terms permitted suspension or termination of course membership in specified circumstances. This inference is drawn from the acknowledgement by Mr Scappaticci during his meeting with the claimant on 3 October 2019 that there was not enough evidence to take either step (see paragraph 123 below) which suggests that both were actions open to the respondent. Given the severity of the claimant's allegation, the fact that Mr A had previously been found to have subjected the claimant to sectarian abuse and the fact that the CCTV footage supported the claimant's complaint, the tribunal is of the view that restriction or suspension of his membership pending investigation would have been a reasonable and appropriate step to protect both parties which was likely to be permissible in these circumstances under the CHGC terms of membership. It would also have been action consistent with the respondent's duty of care to the claimant. The respondent's failure to consider or take this action was a further procedural failing.

122. Mr Skillen and Mr Scappiticci met with the claimant on Thursday 3 October 2019 to discuss her complaint and provide an update on the steps they had taken following her complaint. Mr Skillen informed the claimant that having reviewed the CCTV footage he and Mr Scappiticci believed the claimant's version of events. However without audio or witnesses, Mr Scappiticci's evidence was that there was not enough evidence to suspend or terminate Mr A's membership of the course. The tribunal finds this conclusion to be illogical and premature given the facts at paragraph 121 above and the fact that Mr A had previously admitted to speaking to the claimant in an inappropriate manner and on this occasion admitted he raised his voice.

123. The respondent offered the claimant two measures of support which the claimant rejected. The first was that a Ranger to be on duty with her on Sunday mornings which was when Mr A tended to play golf. The second was the opportunity to work on Saturday instead of Sunday so as to minimise or eliminate the claimant's contact with Mr A.

124. At the end of the meeting on 3 October, the claimant handed in her keys and informed Mr Skillen and Mr Scappiticci that she was ending her placement with the respondent.

125. There was a dispute between the parties as to whether Mr Scappiticci informed the claimant during this meeting that the matter remained under investigation and that specifically they intended to speak to Mr A. The respondent insisted these facts were conveyed to the claimant during the meeting; the claimant was adamant that they were not. This point is significant as the claimant's evidence was had she been made aware of that the matter remained under investigation, she may not have ended her placement at the conclusion of this meeting. The tribunal finds that the claimant was not told that further inquiries were to be made. This is because such an important piece of information would have been reflected in the contemporaneous minutes of the meeting taken by Mr Skillen particularly given that the claimant ended her placement during this meeting. The tribunal regards these minutes to be the most reliable source of information as they were compiled at or close to the relevant time and were shared with the claimant before this hearing. Those minutes clearly support the claimant's contention that the respondent had

decided that nothing could be done in terms of suspension or termination of Mr A's membership and that the measures of support where not offered as a temporary measure as suggested in Mr Scappiticci's file note but rather as ways to address the complaint.

126. The tribunal finds that the measures offered to protect the claimant whilst well-intended, side-stepped the claimant's complaint of harassment which had not been properly investigated at this point. Therefore the tribunal finds that the claimant was entirely justified in feeling aggrieved both about the handling of her complaint and the outcome.

127. Mr Skillen and Mr Scappiticci met with Mr A on 9 October 2019 and Mr Skillen spoke to two individuals identified by Mr A. The respondent ultimately concluded that its investigation was inconclusive. It was therefore decided that the respondent would not take any further action and that the matter was closed. Mr A was informed of this outcome but cancelled his membership of CHGC on 15 October 2019.

128. The claimant did not allege that the reason for the poor handling of either of her complaints of harassment was on the ground of religious belief and/or political opinion, perceived or otherwise. Having considered the totality of the evidence, the tribunal is satisfied that there was no evidence of any such discriminatory reason. In forming this view the tribunal was cognisant of the following facts:-

(i) The claimant had a good working relationship with Mr Skillen.

(ii) The cohort of reception staff at the time were mixed in terms of religious belief and Mr Skillen had recruited staff of both religious persuasions.

(iii) The managers involved in this process were mixed in terms of religious belief and were predominantly Catholic.

(iv) Both complaints were addressed by the respondent, albeit poorly.

(v) The steps taken by the respondent to handle the claimant's complaints involved the input of a number or managers and the input and advice of HR. This evidenced an intention on the part of the respondent to handle the complaints correctly and diminished the possibility that the process was influenced by either protected characteristic.

(vi) The efforts of management to resolve the claimant's complaints, whilst procedurally poor and ineffective were genuine and well-intended. This is best evidenced by Mr Skillen's contact with the claimant when he was not working, his offer to come to the golf club on 15 September 2018 if required, his willingness to characterise Mr A's conduct on the first occasion as sectarian, the regular reporting of progress to line management and HR, the fact that he and Mr Scappittici believed the claimant's version of the second incident and the offer of options to minimise the claimant's future contact with Mr A.

These facts point away from any finding that the respondent's flawed approach was influenced in any way by either protected characteristic. They support the tribunal's

finding that the poor handling of the claimant's complaints was due to the fact that the people handling the claimant's complaints and those advising them, were unaware of the existence and/or applicability of the respondent's lone working policy and thus failed to apply this policy. This can only be described as incompetence which led to the adoption of an illogical and overly casual approach to what were serious complaints.

129. Equally the claimant did not contend that the respondent's poor handling of her complaints, itself amounted to unwanted conduct falling within the statutory definition of harassment on the ground of either protected characteristic. Having considered the totality of the evidence presented, including the claimant's perception of the respondent's handling of her complaints, the tribunal found no facts from which it could conclude that the respondent's procedural failings amounted to unlawful harassment of the claimant on either protected ground.

Direct Discrimination

130. The claimant alleges that shortly after her first complaint against Mr A on 28 October 2018, Mr Skillen informed her that he needed to deal with her complaint as a new member of staff had joined the respondent and Mr A's behaviour may put this member of staff off working for the respondent. The claimant identified the new staff member at the outset of the hearing. Whilst unaware of the religious belief or political opinion of this member of staff, the claimant believed that in making this comment Mr Skillen assumed the new member of staff was also a Catholic. Mr Skillen denied making this comment and did not believe that he would have been aware of staff member's religious belief at the material time. The claimant was not asserting that this colleague had raised any complaint of harassment on grounds of religious belief and/or political or indeed on any ground. Therefore the tribunal finds that the staff member was not in the same or similar circumstances to the claimant and was not an appropriate comparator. Notwithstanding this fact, in so far as the tribunal could discern the claimant interpreted Mr Skillen's comment to mean that he would treat her complaint seriously for the benefit of her comparator, not the claimant. Even if this were true, which the respondent disputes, on the claimant's own case, the reason for this could not have been religious belief as Mr Skillen perceived the staff member to have the same religious belief as the claimant.

131. The claimant was clear to the tribunal that this was the only alleged incident of less favourable treatment of her by the respondent on grounds of religious belief and/or political opinion. The tribunal found no evidence of any less favourable treatment of the claimant on either protected ground and regard any such finding as improbable on the facts, notably those rehearsed in paragraph 129 above.

Victimisation

132. As at 3 October 2019 the claimant had not been allocated any shifts with the respondent since her shift on 15 September. The claimant alleges that this was because of her protected act; namely her complaint against Mr A in September 2019 and thus amounted to victimisation. At the relevant time staff rotas were completed by Ms L Steele of the respondent. Ms Steele was aware that the claimant had made a further complaint against Mr A, as Mr Scappiticci had spoken to her about Mr A as part of his informal inquiries into the claimant's complaint; but she was not aware of the substance of this complaint. Given the informal approach

adopted by Mr Scappittici to these inquiries, the tribunal accepts the evidence of Ms Steele on this point and finds that she was not informed of, or thus aware of the substance of the claimant's complaint.

133. The tribunal accepted the evidence of Ms Steele in relation to the claimant's allegation of victimisation as credible. This was because it was consistent with contemporaneous documents, Mr Skillen's explanation to the claimant on 3 October 2019 and due to the uncontested fact that over the period 11 September – 9 October 2019, Ms Steele was on jury duty. The tribunal made the following findings of fact based on Ms Steele's evidence in relation to the question as to why as at 3 October the claimant had not been rostered to work another shift following her shift on 15 September. Ms Steele normally completed the monthly rota one month in advance. Whilst on jury duty, Ms Steele did not know until 5.00 pm each week day whether she would be called in for jury service the following day. This disrupted Ms Steele's working pattern and her ability to complete her duties. As the rota was already in place for September 2019 the real impact of this disruption was with regards to the compilation of the October rota and the need for shifts to be covered at the last minute over the period Ms Steele was on jury duty. Normal practice is for Ms Steele to send an email to reception staff to inquire as to their availability for the following month. However this email was not sent to the claimant or any other staff in September for the month of October due to Ms Steele being on jury service. As an interim measure, Ms Steele contacted staff by telephone on a daily basis to see if they could cover vacant shifts at the last minute. In doing so, Ms Steele called staff who did not have any other employment on the basis that they were more likely to be available and thus did not contact the claimant.

134. Ms Steele intended to telephone the claimant on Friday 4 October to speak to her about offering her a long shift, either the following Sunday, 6 October or the Sunday thereafter. However on this date, Ms Steele was informed by Mr Skillen that the claimant had terminated her placement. This fact is supported by the fact that the rota drawn up for October 2019, included the claimant's name and the timing of Ms Steele's intended phone call was aligned to the claimant's normal pattern of working on a Sunday. The tribunal attributed no significance in the fact that Ms Steele did not contact the claimant to cover any other shifts over the period of jury duty. This is because the claimant had already worked two long shifts in September and over the previous year the claimant had only worked two other shifts outside of her normal working pattern which would suggest that her ability to work additional shifts was limited, particularly given that she had a full time job. Therefore the tribunal finds it was reasonable for Ms Steele to assume that the claimant would not be available to cover any other shifts in September.

135. No evidence was presented to the tribunal to suggest that Ms Steele's handling of the rota over the relevant period that she was on jury duty was in any way influenced by the fact that the claimant had brought a complaint against Mr A in September 2019. Additionally the following facts support the opposite conclusion:-

(i) When Ms Steele spoke to Mr Scappiticci in early October, she provided him with information which supported the claimant's belief that Mr A's inappropriate behaviour was targeted at her personally.

(ii) The claimant accepted that Ms Steele's knowledge of the substance of the claimant's first harassment complaint against Mr A on 28 October 2018 did

not negatively impact the number of shifts offered to her thereafter. In fact the claimant's shift records reveal that in the two months following her complaint the claimant worked double her normal working pattern in winter of one shift per month.

(iii) The claimant also accepted that generally the respondent had always endeavoured to offer the claimant shifts that suited her availability.

136. In light of all of the facts, the tribunal finds that the reason why the claimant was not offered shifts after 15 September 2019 was due the disruption caused to the compilation of the rota because Ms Steele was on jury service, and her associated temporary strategy of offering vacant shifts to staff based on likely availability. It had absolutely nothing to do with the claimant's complaint against Mr A, either the fact of the complaint, or its substance.

CONCLUSIONS

137. The tribunal applied the legal principles to the facts found in order to reach the following conclusions:-

Harassment

138. The claimant characterised Mr A's conduct towards her on both occasions as unlawful harassment contrary to FETO. The respondent accepted and the tribunal so finds that Mr A's conduct on both occasions met the definition of harassment set out in Article 3A of FETO but concludes that no liability attaches to the respondent for this conduct under FETO. This is because the wording of Article 36 does not extend the liability of an employer or a principal to cover harassment of its employees or workers by a third party. This conclusion is supported by the case law on this issue. Notably the House of Lords in ***Pearce*** made it clear that even if there are compelling grounds for a tribunal to wish to attach liability on a respondent for the harassment of its worker by a third party, there is no legal basis to do so. Therefore it is not for this tribunal to infer jurisdiction when the courts of higher authority have repeatedly determined that it was not appropriate to do so and have stressed that it is a matter for the legislators.

139. The tribunal concludes that the claimant had every reason to feel let down by the respondent in terms of how it handled both of her complaints, especially her second complaint. However as the case law illustrates those failings do not fall within the scope of FETO unless those failings amounted to direct discrimination and/or harassment of the claimant as defined by FETO. The claimant advanced no such arguments and repeatedly confirmed this fact to the tribunal during the course of the hearing. Furthermore, no facts were proven from which the tribunal could have concluded that the respondent's poor handling of the claimant's complaints amounted to discrimination of the claimant on grounds of her religious belief and/or political opinion, real or perceived, or that these protected grounds influenced the respondent's approach in any way. Similarly there were no facts from which the tribunal could conclude that the respondent's handling of the complaints itself could reasonably be regarded as unwanted conduct falling within the statutory definition to shift the burden of proof. The facts at paragraph 129 above support these conclusions.

140. Looking at this matter from the alternative view most recently endorsed by the Court of Appeal in this jurisdiction in ***Nelson***, the tribunal finds that the totality of the evidence presented indicated that the reason why the claimant's complaints were poorly handled was because the relevant line managers and it seems the respondent's own HR function, failed to recognise and apply the respondent's lone working policy which was designed to deal with the claimant's complaints. In essence therefore the respondent's poor handling of the complaints was due to the incompetence and/or lack of knowledge of their own internal policy, on the part of those involved. It had nothing whatsoever to do with the real or perceived religious belief and/or political opinion of the claimant and nothing to do with those protected grounds at all.

141. In light of these conclusions the question of time limitation is not relevant. Had this been a live issue, the tribunal would have concluded that the two incidents of harassment formed part of a continuing state of discriminatory affairs extending over the relevant period of time so as to amount to a continuing act. Mindful of the guidance of the Supreme Court in ***Hendricks***, the tribunal formed this view for the following reasons:-

(i) The first incident was not resolved as Mr A did not apologise to the claimant after the first incident.

(ii) It was common case that both incidents of harassment were linked, not least because the perpetrator and victim were the same but also the subject matter of the second incident was connected to the first incident, specifically the requirement that Mr A apologise to the claimant.

(iii) Mr A had yearly membership of CHGC and whilst the records show that he did not attend the golf course for some five months after the first incident, there remained the possibility that he could attend. This possibility coupled with the fact that he normally attended on a Sunday when the claimant tended to work, meant that there was the possibility of a repeat offence after the first incident.

(iv) Whilst the claimant made no allegation of harassment against Mr A in between the two incidents, the facts reveal that Mr A indicated to the claimant in or around April 2019 that he was not remorseful. This caused the claimant to feel shaken and in the tribunal's view increased the risk of further discriminatory conduct by Mr A.

(v) The claimant raised this concern with Mr Skillen which underscored her belief that the first incident had not been properly resolved.

(vi) Mr Skillen failed to check that Mr A had apologised to the claimant, even after the claimant had informed him of Mr A's exchange with her on the subject of the apology. This oversight in the tribunal's view kept the risk of a further incident alive.

142. For these reasons the tribunal concludes that looked at in their totality, the two incidents were not only connected but the risk of a further incident following the first incident, highlighted most explicitly by Mr A's exchange with the claimant in April 2019, extended the impact of the first incident over the relevant period to the

second incident. In view of this conclusion, the claimant's complaints of harassment were lodged within the primary statutory time-limit but fall outside of the statutory jurisdiction of the tribunal due to the fact that the harassment was committed by a third party of the respondent.

Direct Discrimination

143. Firstly on the issue of time limitation, it is undisputed that the claimant's claim of direct discrimination related solely to the alleged comment made by Mr Skillen to the claimant in or around November 2018. As the claimant was a party to the conversation which gave rise to the alleged discriminatory remark logic dictates that she had knowledge of the discriminatory act from the outset. No argument to the contrary was advanced by the claimant. Therefore the time limit for lodging a claim in the tribunal would have been late February/early March 2019 at the latest. The claimant's claim was presented on 6 November 2019 and thus this claim was lodged well outside of the primary statutory time limit. The claimant presented no explanation for the significant delay in bringing this claim. On the basis of the facts found in relation to the issue of time regarding the first incident of harassment, the tribunal concludes that it is not just and equitable to extend time. This is because, in or around the time of this alleged incident the claimant confirmed that she was aware of her rights and was aware of various sources of information and representation for pursuing those rights and presented no evidence to suggest that she was impeded from bringing this claim within the normal time limit. Therefore the tribunal concludes it does not have jurisdiction to hear this claim.

144. Notwithstanding this conclusion, in view of the facts found, the claimant failed to identify an appropriate comparator. The new member of staff had not made a complaint of harassment and thus was not in the same or similar circumstances to the claimant. Therefore the claimant failed to identify any appropriate comparator. Even if a hypothetical comparator was applied to this alleged incident of direct discrimination, the claimant presented no facts from which the tribunal could conclude that the comparator would have been treated more favourably on either of the protected grounds relied on. Indeed viewed in the relevant factual context, (rehearsed at paragraph 129) the proven facts pointed away from any inference of discrimination on either protected ground. Therefore had the tribunal reached a different conclusion on the time limit issue, it would have concluded that the claimant's claim of direct discrimination on either or both protected ground was not well founded as the claimant failed to establish a prima facie case of direct discrimination to shift the burden of proof.

Victimisation

145. The tribunal concludes that the claimant's victimisation claim is unfounded for the following reasons:-

(i) At the material time Ms Steele was not aware that the claimant had made a protected act.

(ii) As at 3 October no member of staff had been placed on the rota for October 2019 in the normal way due to Ms Steele being on jury service and the associated disruption this caused to her ability to formulate the new rota.

Therefore, on the facts, the claimant was treated the same as her colleagues.

(iii) Whilst other staff were contacted by telephone over the relevant period to cover shifts on a last minute basis whereas the claimant was not; this was due to Ms Steele's assessment of who was most likely to be available to fill shifts at short notice based on other work commitments. It had nothing to do with the claimant's protected act or indeed either protected ground.

(iv) Ms Steele intended to telephone the claimant on 4 October 2019 but did not do so as the claimant ended her placement the previous day. This is supported by the fact that the claimant's name was on the October rota.

146. For the above reasons, the tribunal concludes that whilst the respondent's failure to compile a rota for October in the normal way could have been regarded with suspicion by the claimant at the time; on the facts, it was nothing more than an unfortunate coincidence which impacted all reception staff in the same way. The reason why the claimant was treated differently to other staff with regards to the covering of shifts from 16 September was for reasons wholly unconnected to her protected act. The claimant was going to be offered shifts in October but this intention was thwarted by the claimant's termination of her placement.

147. Finally, the tribunal agreed with the respondent that Mr A's conduct of the claimant on 8 September amounted to victimisation of the claimant in the general sense and could be deemed to meet the definition of victimisation in FETO. However this claim did not form part of the case presented to the tribunal by the claimant. Furthermore, the tribunal's conclusions with regards to liability of employers and principals for the acts of third parties has equal application to this matter and thus the tribunal concludes that had any such claim been advanced by the claimant, no liability could attach to the respondent for this discriminatory act.

SUMMARY

148. In summary therefore, in respect of the agreed issues the tribunal concludes as follows:-

(i) The claimant's claim of harassment against the respondent related to the conduct of Mr A which met the statutory definition of harassment set out in FETO and amounted to a continuing act. However the respondent cannot be held liable for Mr A's conduct under FETO as he was a third party. Therefore the claimant's claim of harassment against the respondent is dismissed due to a lack of jurisdiction.

(ii) The claimant's claim of direct discrimination was lodged outside of the statutory time limit and it was not just and equitable to extend time. Therefore the tribunal did not have jurisdiction to hear this claim. In the alternative, the claimant failed to present a prima facie case of direct discrimination to shift the burden of proof. Therefore the claimant's claim of direct discrimination is dismissed.

(iii) The claimant's claim of victimisation is not well-founded. The claimant was treated the same as her colleagues in relation to the October 2019 rota and

the respondent presented a non-discriminatory explanation why the claimant was not contacted by telephone from 16 September 2019 to cover vacant shifts on a last minute basis that was wholly unconnected to the claimant's protected act. Therefore the claimant's victimisation claim is dismissed.

Employment Judge:

Dates and place of hearing: **20, 21 and 22 July and 13 October 2021, Belfast.**

This judgment was entered in the register and issued to the parties on: