2019 Annual Review of Employment NI Caselaw

High Award Cases

M Mercer v C&H Jefferson Solicitors 1083/15IT [Equal pay]

The Respondent sought to defend this equal pay claim on the basis that the Claimant was not undertaking 'like work' with her chosen comparators; that the reasons for the difference in pay between the Claimant and those comparators were unrelated to gender and were broadly as follows:

- Ownership and Control of Key Client Base;
- New Business Development;
- Proactive contribution to marketing to generate work for the Firm recognising the competitive market and the need to explore new ways of securing business for the future;
- Income generation beyond the level of salaried partner level;
- Potential for career development i.e. leadership skills, motivating a team of professional colleagues and support staff and involvement in aspects of quality assurance compliance (ISO);
- Recognition of Professional Reputation in journals such as Chambers and Legal 500;

The Tribunal examined evidence in relation to each factor and concluded that the Claimant was undertaking 'like work' and the reasons given did not satisfactorily explain the difference in salary of circa £29,500 less per annum. The Tribunal awarded the Claimant £273,250 in relation to back pay, arrears and interest and inserted an equality clause into her contract of employment to correct her salary going forward. Interestingly the Claimant generated more fee income than 3 of the comparators over several of the years in question.

P Breslin v M Loughrey 77/16FET & 1930/16IT

Injury to feelings award of £30,000 for discrimination on grounds of sex and religion. The Claimant was dismissed by text message after 5 weeks of employment and following a series of inappropriate remarks and incidents relating to the Claimant's religious belief and gender, grossly offending his religious devotion, interfering with religious statues in the Claimant's home and in what was described as a "campaign of control and denigration of the Claimant"

"The Tribunal is of the clear view that this case properly falls at the upper end of the scale. It is difficult to conceive of a more blatant and corrosive campaign of conduct conducted by the respondent, who additionally involved other members of staff in the humiliation of the claimant, in his home and at work.

The ultimate detriment was the late-night dismissal of the claimant, at the vindictive whim of the respondent. Her conduct before the dismissal had been sustained and deliberate, against someone whom she knew to be vulnerable, and whom she had deliberately put in a position of almost entire dependence on her for a job and for somewhere to live.

Her conduct during the entirety of the Tribunal case was groundlessly to portray the claimant as a thief and a liar.

The Tribunal therefore considers that the appropriate amount payable is £30,000 for injury to feelings, which amount the respondent is ordered to pay to the claimant."

Direct & Indirect Sex Discrimination

G Downey v G McCreery & Chief Constable of the PSNI 4182/18IT

The tribunal determined the claimant was discriminated against, both directly and indirectly, by the PSNI in relation to the application and enforcement of a policy. The issue arose in January 2018 when the PSNI introduced a version of a policy which sought to identify minimum standard requirements when it came to uniform and personal appearance, together with identifying safety equipment, to include safety masks. Part of this policy stated "*some police officers / police staff occupy roles where there is a routine possibility of respiratory exposure to occupational hazards. These officers/staff members may be required to wear Respiratory Protective Equipment (RPE) at short notice and must therefore always remain clean shaven whilst on duty."*

In February 2018, when the claimant had stated to his employer that he would not be removing his moustache on the basis that he believed such a request from his employer to be discriminatory, the PSNI, with little notice, transferred the claimant from his local Armed Response Unit (ARU) to a Road Trafficking Unit, suspended him from firearm use and requested that he shave off his moustache if he wished to return to the ARU. The claimant contended that this was a discriminatory act, given the fact there were female officers at that time who were non-compliant with the policy in so far as those females did not wear their hair above shoulder length, which presented a grab risk. The tribunal believed this to be direct sex discrimination, accepting the two female officers as adequate comparators.

Furthermore, and significantly, the tribunal determined that the application of the Corporate Appearance and Protective Equipment Standard (CAPES) Policy was indirectly discriminatory, as the PSNI were incapable of justifying the policy on Health and Safety grounds. The tribunal were not satisfied that the PSNI considered other alternative measures when the PSNI ordered that police officers were to be entirely clean shaven for the safety masks to be effective. The tribunal, in reaching this decision, determined that at the time the policy was introduced, the ARU unit would have been incapable of being deployed as their officers had not been tactically/operationally trained in the use of the safety masks, that the canisters attached to the masks had expired and the Equality Impact Assessment had been undertaken some five months after the introduction of the policy. The tribunal held this simply was not good enough.

The claimant received an award of £10,000.00 for injury to feelings and the tribunal also recommended that the PSNI review the operation and wording of the relevant section of the impugned policy.

Holiday Pay

Chief Constable of the Police Service of Northern Ireland and another v Agnew and others [2019] NICA 32

Holiday pay pre-PSNI Decision:

Historically employees only ever received their basic salary whilst on annual leave and seemingly without complaint. However a series of cases from 2011 onwards have, through the interpretation of EU law, established that other aspects of an employee's pay should also be included in the calculation and payment of holiday pay so that employees are not discouraged from taking or placed as a financial disadvantage as a result of taking their leave entitlement under the Working Time Directive.

The legal entitlement to annual leave is as follows:

- The Working Time Directive provides each worker in the EU with a legal minimum of 4 weeks paid leave per year (20 days for a 5 day week worker)
- The UK Working Time Regulations provides each worker in the UK with an additional 1.6 weeks paid leave per year (8 days for 5 day week worker)
- The contract of employment will often grants a greater entitlement than the statutory minimums set out above (eg a total 30-40 days per year)

In 2011, in ***Williams and others v British Airways plc (Case C-155/10)*** the European Court of Justice (ECJ) held that holiday pay entitlement (specifically the 4 weeks paid leave under the Working Time Directive) should not be limited to basic salary but must correspond to "normal remuneration" including in that case a "flying pay supplement" and a "time away from base allowance" which pilots normally received whilst at work. Normal remuneration was described as "Remuneration that is linked intrinsically to the performance of tasks which they are contractually obliged to perform" and it was noted that normal remuneration could also include payments linked to seniority, professional status or qualifications.

In 2014, in ***Lock v British Gas Trading Ltd (Case C-539/12)*** the ECJ held that holiday pay under the Working Time Directive (4 weeks per year) cannot be calculated based on basic salary and must include commission which is determined with reference to sales achieved. If sales based commission is not taken into account, the worker will be placed at a financial disadvantage when taking statutory annual leave, since no commission will be generated during their holiday period. In such circumstances, the worker might be deterred from exercising the right to annual leave, which would be contrary to the Directive's purpose.

The same year, an Employment Appeal Tribunal (EAT) decision in ***Bear Scotland Ltd v Fulton and others UKEATS/0047/13*** ruled that (a) non-guaranteed overtime constitutes "normal remuneration" and should be taken into account when calculating holiday pay for the purpose of the 4 weeks leave under the Working time Directive and (b) more than a 3 month gap between any alleged underpayments of holiday pay (or unlawful deductions) will break any series of deductions (for the purposes of an unlawful deductions claim) and as such the extent to which workers could make retrospective claims for underpaid holiday pay was significantly limited.

In light of the potential liability for backpay highlighted in Bear Scotland where a series of unlawful deductions could be established, **The Deduction from Wages (Limitation) Regulations 2014 (*SI 3322/2014*)** was introduced in Great Britain which imposed a statutory

cap of 2 years on any backpay for unlawful deductions claims brought in Great Britain on or after 1 July 2015. Regrettably, no equivalent legislation was introduced in Northern Ireland.

In ***Dudley Metropolitan Borough Council v Willetts and others UKEAT/0334/16*** the EAT further clarified the law, and held that voluntary overtime pay, out-of-hours standby payments and call-out payments should also be included in the calculation of holiday pay for the four weeks' leave under the Directive. This was so even though there was no obligation for workers to accept the offer of overtime, or to participate in the on-call rota.

The English Court of Appeal in ***East of England Ambulance Service NHS Trust v Flowers [2019] EWCA*** *confirmed that* voluntary overtime pay should be taken into account by the employer when calculating the four weeks' paid leave under the Directive, so long as the payments are sufficiently regular and paid over a sufficient period.

In response to the developing caselaw and prior to the PSNI decision, many employers in Northern Ireland adopted or were working towards a new working practice in relation to the calculation of holiday pay whereby the first 4 weeks of leave each year is allocated as Working Time Directive leave and for those first 4 weeks, holiday pay is paid on the basis of an employee's 'normal remuneration'. Whilst employers have taken various approaches to the calculation of 'normal remuneration' and what pay reference periods to use, in practice employers have often decided to use the average pay over the 12 week period immediately prior to the leave being taken given this is the calculation required by legislation to determine a week's pay for atypical workers. The calculations involved have however presented significant challenges for payroll. Once the first 4 weeks annual leave have been taken each year, the remaining annual leave is then payable at basic rate only, albeit some employers have elected to maintain 'normal remuneration' holiday pay throughout the leave year for pragmatic and industrial relations reasons.

What should be included in holiday pay when calculating an employee's entitlement to the 4 weeks leave under the Working Time Directive?

Applying the caselaw outlined above, the following elements of remuneration should be included in the calculation of holiday pay for the purposes of the 4 weeks leave entitlement under the Working Time Directive, assuming they are paid regularly or repeatedly over a sufficient period to count as normal remuneration:

- Commission payments
- Incentive bonuses
- Overtime pay including overtime premiums whether compulsory or voluntary, guaranteed or non-guaranteed
- Payments that relate to the "personal and professional status" of workers, such as those based on seniority, length of service or professional qualifications
- Productivity/performance bonuses
- Shift allowances and premiums (additional rates for working particular shifts, such as "time and a half")
- Standby payments and payments for emergency call-out duties

- Travel and other allowances that are treated as taxable remuneration

The following elements of remuneration should **not** be included in the calculation of holiday pay for the purposes of the 4 weeks entitlement under the Directive:

- Benefits in kind
- Bonuses not linked to workers' performance
- Expenses (including travel expenses) which reimburse workers for costs incurred.
- One-off bonuses and occasional payments

There remains a grey area over whether annual discretionary bonuses should be factored in when calculating holiday pay under the Directive. The Court of Appeal refused to speculate on this in *Lock* in 2016. A few examples are set out below for illustration purposes:

Productivity, attendance or performance bonuses

In ***Wood and others v Hertel (UK) Ltd and another ET/2603803/12*** the employees were entitled to an incentive bonus arrangement (known as "IBA"), comprising:

- A fixed element that simply related to hours worked (but which could be removed in the event of excessive absence, failure to work all agreed shifts in full, or resigning without giving proper notice).
- A performance-based element, paid if the employees reached agreed targets, and provided that they had not taken part in any unofficial or unauthorised industrial action.

The Tribunal found that the IBA formed part of the employee's normal remuneration for the purposes of calculating their holiday pay under the Directive and this was not challenged on appeal. The tribunal rejected the employer's argument that these bonuses were not part of normal pay and were not intrinsically linked to the performance of tasks the workers were required to perform under the contract. The tribunal also commented that the test is whether the payment is "intrinsically linked" to performance of tasks by the worker under their contract, not whether it is "exclusively" so. Therefore a bonus that depends on team, rather than individual, performance is also potentially within scope.

In ***Watson and others v London Borough of Newham ET3200063/2015; ET3200439/2015***, electricians were entitled to several different bonuses and allowances in addition to basic salary, although their holiday pay was paid on the basis of basic salary only. The allowances included a "job invoice value calculation" (JIVC), which was calculated according to job rates set out in a schedule of rates. Where the JIVC was in excess of basic pay, the electricians received the difference. The JIVC also included an additional element, which was effectively a bonus rewarding punctuality, work quality and customer satisfaction. The employment tribunal found that the JIVC, including the additional element, should be included in the calculation of holiday pay for the purposes of the 4 weeks leave entitlement granted by the Working Time Directive.

Annual discretionary (and other) bonuses

Bonuses are potentially one of the biggest grey areas and are likely to give rise to some creative arguments in future litigation. On the one hand, bonuses are generally intrinsically linked to performance of some element of the worker's contract and as such based on the caselaw outlined above may be deemed to fall within the scope of 'normal remuneration' (it is rare to see a bonus that is entirely unrelated to past or future services, although a Christmas bonus paid equally to all staff, regardless of service, might qualify). On the other, it is difficult to see how a genuinely discretionary annual bonus can be said to fall within the scope of "normal remuneration".

If an annual bonus is based solely on company performance with no personal performance component, there is a strong argument that, provided there is no financial disincentive to taking holiday, it would not be included in the calculation of holiday pay under the Directive.

If an annual bonus is deemed to be included in holiday pay calculations, it also raises a further issue as to what the appropriate pay reference period should be when calculating 'normal remuneration' for holiday pay under the Directive. That is, an employee could potentially argue that in order to comply properly with the Directive, an employer must use a 52 week pay reference period when calculating 'normal remuneration' to ensure that an annual bonus is fairly reflected in their holiday pay as a rolling 12 week average could unfairly disadvantage and deter staff depending on when they take their leave during the leave year.

Whilst the legal position regarding bonuses has yet to be clarified, it is notable that the direction of travel in the case law to date has been to encompass any form of performance related pay within the scope of holiday pay. To this end there is a distinct possibility that annual bonus payments will also be brought within the scope of holiday pay calculations as the case law evolves and employers should take this into account when considering future bonus arrangements.

Holiday pay post-PSNI Decision

In June 2019, the Court of Appeal in Northern Ireland in ***Chief Constable of the Police Service of Northern Ireland and another v Agnew and others [2019] NICA 32*** upheld the decision of the Industrial Tribunal at first instance that the PSNI was liable for unlawful deductions from wages relating to holiday pay claims from over 3500 members of staff. The claims are for sums due and owing to staff as additional hours, overtime payments and other allowances were not included in the calculation of holiday pay in addition to their basic pay as required for the 4 weeks of 'normal remuneration' annual leave granted under the Working Time Directive. The PSNI is facing back pay awards going back some 20 years to the implementation of the Working Time Regulations in 1998 and totalling circa £40million. Individual payments could be an average of £10k. The key findings are set out below and whilst the decision is subject to an appeal to the Supreme Court; it remains to be seen, what impact, if any, the appeal will ultimately have in relation to those findings and the extent to which holiday pay calculations will need to be tweaked or changed in response to same.

1. **A series of unlawful deductions is not broken by a gap of 3 months or more between deductions.**

   The Court of Appeal disagreed with the EAT in Bear Scotland, noting that the relevant legislation (ERO 1996) does not define what actually constitutes a series of deductions and as a matter of proper construction of the legislation, a series of deductions is not broken by a gap of 3 months or more between deductions. It is a question of fact to be determined in each case whether a deduction forms part of a series and if all deductions arise out of the fact that holiday pay was paid as basic pay and did not include overtime/allowances etc, the deductions are likely to form part of the same series. Holiday pay had been incorrectly calculated as basic pay on an ongoing basis in this case over many years, no equivalent of The Deduction from Wages (Limitation) Regulations 2014 exists in Northern Ireland to limit back pay to 2 years and as such employees could potentially take claims for back pay going as far back as 23rd November 1998, when the Working Time Regulations was originally implemented.

2. **The 4 weeks leave under the Working Time Directive is not used up first in a leave year and forms part of a "composite whole".**

   Again the Court disagreed with Bear Scotland, ruling that employers could not just allocate the first four weeks of the annual leave year as the 4 weeks accrued under the Directive and pay "normal remuneration" holiday pay for those 4 weeks and revert to basic pay for the remainder of the leave year. The Court of Appeal determined that the entitlement to leave granted by way of the Directive is merely a fraction of a composite whole which also includes an employee's entitlement under the Working Time Regulations and any additional leave granted under the contract of employment. For example, if a 5 day week employee has an annual entitlement to 20 days under the Directive, 8 days under the Regulations and an additional 2 days contractual leave giving 30 days per year in total, when they take a day's leave, 20/30ths of that day is attributable to their statutory rights under Working Time Directive and ought to be calculated and paid based on 'normal remuneration', the remaining 11/30ths is attributable to the employees rights under the Working Time Regulations and their contract of employment and can be calculated and paid based on basic salary.

3. **Reference periods for calculating 'normal remuneration' may vary.**

   At first instance, the Tribunal determined that the appropriate reference period or periods cannot be fixed in an arbitrary or general fashion. It depends on the facts of each individual case and as part of an individual analysis, absence from work related to maternity, maternity related illnesses, disability related illnesses, reserve force deployment or personal choice will need to be taken into account when determining an appropriate reference period for each case.

   The parties had accepted the findings of the tribunal that the appropriate reference period for assessing normal remuneration was a question of fact for each case, and that there may be different reference periods for different employees eg 12 weeks or

12 months immediately preceding the leave period. However, they asked the court for guidance as to what the appropriate reference period was likely to be in most cases (assuming there were no unusual features like maternity leave or illness). The court was not in possession of sufficient facts to make a determination as to what the appropriate period should be in each case. The court encouraged the parties to agree a "pragmatic, administration-friendly method" of calculation based on average pay over a rolling 12-month reference period immediately preceding the period of leave, but did not put any obligation on them to do so.
In terms of calculating past losses, the court also suggested using the multiplier 4/48 or 8.3% to calculate the additional holiday pay due on overtime payments etc which were not previously included when calculating holiday pay.

4. **The correct way to calculate holiday pay is to base it on working days not calendar days.**

   At first instance, the tribunal had calculated a daily rate for overtime by dividing the number of working days in the four-week leave period by the number of calendar days in the reference period . That was incorrect. It should have used the number of working days in the reference period. So 20 days holiday (or four weeks) should be calculated using the fraction 20/260 (or 4/52) or 7.69% and not 20/365.

Frequently asked questions arising from the PSNI Decision:

- **Does the PSNI case apply to all sectors of employment - public, private and third?**

  Yes the developing case law on the calculation of holiday pay applies to all sectors equally (albeit the press seem to be focusing on the impact on public sector budgets).

- **Do employers have to pay average pay for all holidays or just the 20-day entitlement under the Directive or the 28-day entitlement under the Regulations?**

  Employers must calculate holiday based on ‘normal remuneration’ for the 4 weeks under the Directive (20 days for a 5-day week employee). For administrative and pragmatic reasons, some employers are electing to calculate and pay all holidays based on ‘normal remuneration’ rather than further complicate matters by paying for example 20/30ths based on normal remuneration and 10/30ths at basic rate as outlined above.

- **What pay reference period(s) should be used to determine average normal pay?**

  There is no definitive ruling on this as things stand at the moment and part of the challenge arising is that the Courts are advocating that one size will not fit all and what might be a fair reference period for one member of staff may not be the same for another, within the same organisation, which is wholly unsatisfactory for employers - it could be 12 weeks or 12 months ie each time an employee takes annual leave, an

assessment is made of what constitutes an 'normal' week's pay based on average of the 12 weeks or 12 months immediately prior to the annual leave period.

In practice, we are looking at a number of options ranging from calculating normal remuneration based on a 12 week or 52 weeks average each time an employee requests leave to the more pragmatic (but riskier) options of averaging an employees pay on a quarterly, biannual or annual basis to avoid individual calculations each time an employee requests annual leave.

- **What does 'normal remuneration' mean and what should we include in the calculation of holiday pay?**

  The EAT emphasised in *Willetts* (approved in *Flowers*) that the overarching principle is that holiday pay must correspond to normal remuneration, and pay would only be considered normal if it was paid regularly or repeatedly over a sufficient time (echoing similar comments in *Bear Scotland*). It did not say what a sufficient time would be, and left this to the judgement of tribunals to determine on the facts of each case. However, it agreed with the tribunal in that particular case that overtime worked one in every four or five weeks was sufficiently regular to count as normal.

  There is no set definition and the case law continues to develop. A key point cited by the ECJ is that an employee should not be financially worse off during their annual leave compared to when they are in work as this may discourage them from taking their annual leave. We know it includes any payment or allowance including voluntary overtime where it is undertaken with a degree of regularity and may include employees who do not routinely undertake overtime throughout the year but for example consistently work overtime at specific times of the year eg Christmas rush, seasonal workers. One of the examples of 'normal remuneration' cited by the Tribunal in the PSNI case was a police officer who undertakes overtime during the marching season each year. Isolated, one off or occasional payments may not form part of 'normal remuneration' but this will be assessed where necessary on an individual basis. In terms of the PSNI litigation, in the absence of agreement between the parties, individual police officer cases will go back before the Tribunal for determination as to what constitutes 'normal remuneration' in their individual circumstances.

What steps should employers take now?

(1) **If you have not already done so, employers should take immediate steps to ensure that going forward holiday pay is being calculated on the basis of 'normal remuneration' for at least 4 weeks of annual leave each year**.

Whilst uncertainty remains as to the correct reference period when calculating an employee's normal remuneration, doing nothing is simply no longer an option and the Courts are increasingly critical of employers who have not taken steps to implement the evolving case law on the Working Time Directive.

Practical Suggestion:

Calculate ‘normal remuneration’ based on an average of the last 12 weeks or 12 months pay immediately prior to leave being taken and pay the employee using the fractional method outlined above, pay eg 20/30ths of the annual leave entitlement on the basis of the ‘normal remuneration’ rate and 10/30ths at basic rate.[NB the fraction will depend on the overall leave entitlement under the contract of employment]

Whilst any working practices should be kept under annual review as the caselaw develops, there are currently two reasons why using an average of the last 12 months may be the preferred direction of travel:

(a) Legislation is scheduled to take effect in Great Britain from April 2020 which will actually fix the appropriate reference period for calculating holiday pay for workers without normal working hours at 52 weeks. This legislative change was a recommendation of the Taylor Review which has been actioned within the Government’s Good Work Plan and is intended to avoid potential distortions in holiday pay caused by fluctuations in overtime etc through the course of a year.

(b) The Court of Appeal in the PSNI Decision encouraged the parties to agree a "pragmatic, administration-friendly method" of calculation based on average pay over a rolling 12-month reference period immediately preceding the period of leave, but did not put any obligation on them to do so.

(2) Calculate potential liability for backpay and consider whether action is appropriate to reduce the risk of extensive back pay claims.

The Court of Appeal has confirmed in the PSNI Decision that an employee/worker in Northern Ireland may be entitled to backpay going back to the implementation of the Working Time Regulations in November 1998. Subject to the outcome of the appeal and unless legislation is brought in to limit back pay in Northern Ireland in line with the situation in GB which limited back pay claims lodged from July 2015 onwards to 2 years; employers in Northern Ireland are facing potential backpay claims back to 1998 and employees could lodge those claims en masse with the Tribunal at any time.

If an organisation were to make a payment of, for example, 2 years backpay (adopting an 8.3% calculation to overtime and any other normal remuneration payments not previously included in holiday pay for the last 2 years) alongside a step change in payments going forward, it is possible that this may deter employees from lodging claims with the Tribunal for further backpay.

Any payment of back pay may of course prompt Tribunal claims right back to 1998 and this is a matter for employers to carefully consider having regard to the nature of the workforce generally. Taking no action equally carries risk, particularly as the

media will continue to report the passage of the PSNI Decision to the Supreme Court.

There is no doubt that the law on the calculation of holiday pay under the Working Time Directive presents a number of challenges for employers in Northern Ireland which do not currently have definitive answers or satisfactory solutions and the position is likely to remain unclear for at least the next 12-24 months pending the outcome of the PSNI appeal.

Para 37 & 38 of PSNI Tribunal Decision

37. The tribunal is faced with an entirely unsatisfactory position. The EU and domestic legislative provisions are unclear and less helpful than they might have been. It would have been a relatively simple task for at least the domestic legislation to set out clear, albeit necessarily arbitrary, rules for determining how normal pay is to be determined in each individual case. There would of course have been winners and losers. However employers and employees would at least have known with reasonable clarity the extent of their liabilities and of their rights. It could have avoided much of the current litigation. It could have defined more closely how normal pay should be calculated. It could have defined what a "series" meant in the 1996 Order, rather than leaving it to judicial interpretation and, in many cases to individual analysis depending on the facts of each particular case.

In short, the legislature could have avoided a situation where, even after years of holiday pay litigation, employers and employees are unclear how to approach the calculation of holiday pay.

38. However, we are where we are.

<u>Harassment Investigations & Unfair Dismissal</u>

WX v North West Regional College 6766/17IT

The Claimant was dismissed for gross misconduct in relation to incidents that occurred on 15 and 16 March 2016 on an Erasmus trip in Europe. The Claimant was on a trip alongside two colleagues accompanying a number of students on behalf of the college at an event held in conjunction with a university in that country.

The incident in the hotel corridor involved the Claimant and his colleague Ms A and was not witnessed by anyone. Both sides alleged that there was an encounter involving lewd and offensive language and behaviour and unwanted conduct of a sexual nature, but each blamed the other for it and gave very different versions of events. The encounter took place at approximately 2.45 am in the corridor of the second floor of the hotel outside Ms A's room. The claimant's room was on the first floor of that hotel.

The claimant also made a number of counter allegations including:

(1) That Ms A had arrived drunk and dishevelled for the bus in Londonderry and was in no fit state to go on the trip from that point;

(2) That the claimant had expressed to his wife before embarking on the trip his

reluctance about going on it due to his concerns about Ms A's behaviour and drinking and that Ms A had been "grooming" him prior to the trip;

(3) That Ms A and the trip leader Mr B had neglected their duties generally on the trip due and were drinking;

Further there was a fraught encounter between the Claimant and Ms A in the hotel lobby in the early evening of 16 March 2016 and Mr B had overheard some of it. Ms A's account included a statement that in that encounter she was very upset, she said she had told Mr B about the previous night, and in response the Claimant had said: "Just so you know it takes two" and was thus trying to put the blame on her for the incident that had happened during the night. Mr B stated that Ms A was very upset and that he overheard the claimant saying "it takes two" to her. The respondent's case in Tribunal was that the claimant denied saying these words repeatedly during the internal processes and only belatedly gave an alternative account of the words. The Claimant's account of this was that Ms A reacted abusively to him and stated that she said she would tell Mr B and the claimant's reaction to that was "What about the state of you I must too".

The Claimant was suspended pending investigation and ultimately dismissed in August 2017, following a disciplinary hearing in relation to the following charges:

You acted inappropriately and unprofessionally towards [Ms A], a colleague, during a College approved Erasmus trip to Portugal in that you:

1 engaged in unwanted physical conduct of a sexual nature;

2 used explicit, offensive and obscene language of a sexual nature;

3 behaved in an inappropriate, degrading and hostile manner, exerting intimidating pressure on [A] when attempting to gain access to her room;

(4 Not upheld)

5 failed to show remorse after this incident and making unsubstantiated and false allegations about responsibility for the incident, eg apportioning blame toward [A] by telling her "it takes two";

7000 pages of evidence & 9 witness gave evidence over a 10 day Tribunal hearing. The Tribunal concluded that the dismissal was fair. Evidence gathered during the internal investigation included the following:

- Ms A complained to Mr B after the incident ie later in the morning of 15 March 2016.

- Ms A had sent several texts (one of which stated: "[WX] is a nightmare") and tried to make phone calls in a short period soon after the first incident (ie around 3.00 am) and this included trying to contact a colleague back in Londonderry.

- That Ms C (the then line manager of Ms A) received a detailed report of the allegation from Ms A on 6 April 2016 when Ms A returned to work after the Easter holidays. The context was that Ms A was asking if she could be

excused working at the campus where the claimant was based. Ms C's evidence to the Investigating Managers was that Ms A gave a detailed account to her, that she tried to persuade Ms A to report the matter, and that Ms A was extremely upset and had spoken in confidence to her so that she felt she could not do anything about it without Ms A's authority.

- That a complaint was made by Ms A on 19 May 2016 to HR as Ms A had by that point learnt that the claimant had gained promotion which meant that she would have a lot more dealings with him because he would become her manager. She had however raised it with Ms C prior to the advertisement of the post.

- The claimant had neither mentioned nor complained about the alleged behaviour of Ms A in the incident on 15 March 2016.

The claimant's case throughout the disciplinary process was that Ms A's complaint was made as part of a conspiracy by Ms A and her friend Mr B to thwart his promotion and to that end they had fabricated the account of what allegedly happened on the trip.

The Tribunal noted that the Claimant's tack from the start of the disciplinary process was to discredit the character of Ms A by saying that she was bad at her job generally; that she was a drinker generally; that she was extremely drunk on the bus; that she was a "serial accuser"; and by making an insinuation that she and Mr B had an inappropriately close relationship - essentially making the case that she was not worthy of belief but "*a cheating lying party girl who was prepared to desert her post and her duties".* There was no evidence to substantiate these serious allegations and moreover the evidence controverted some of the specific allegations raised eg the bus driver confirmed Ms A was not drunk on the bus.

The Claimant further repeatedly referred to the Claimant both during the internal disciplinary process and the Tribunal process as a "serial accuser". Ms A had once before complained about the behaviour of a male colleague and this had resulted in a PSNI investigation. The colleague then pleaded guilty to a criminal charge and he received a suspended sentence. That member of staff resigned from his employment before he could be disciplined.

The Tribunal found that it was reasonable for the disciplinary panel to conclude that the matters of character and consistency raised by the claimant were either not relevant or did not outweigh their reasoned conclusions on the key issues and their assessment of Ms A, Mr B and the claimant's accounts in the context of all of the witnesses' evidence. The Tribunal also found that it was reasonable for the panel to form an adverse view of the claimant's veracity as they had ample reason to do so.

In dismissing the claim, the Tribunal was satisfied that the Respondent made the decision to dismiss after careful deliberation and that it weighed heavily upon the Board of Governors that the claimant had such a long clear record. This was not a rubber-stamping exercise and due consideration was given to whether or not dismissal was an appropriate sanction. It was reasonable for the decision-makers to bear in mind their duty of care going forward to staff and students in deciding on the penalty given the gravity of the charges found against the claimant. The Claimant was also afforded a rigorous and independent appeal which was ultimately unsuccessful. Given the very serious nature of the allegations the decision to dismiss was not unfair.

The Tribunal was satisfied that dismissal was the appropriate sanction in accordance with equity and the substantial merits of the case. The relevant managers were faced with

serious allegations by both sides and they therefore conducted a thorough and focussed investigation and disciplinary process. They had ample evidence to support Ms A's account and had ample grounds to doubt the claimant's account and his veracity. They reasonably discounted the claimant's counter-allegations and evidence as having little or no relevance or weight. Given the gravity of the charges found against the claimant and the Respondent's duty of care to staff and students the penalty of dismissal was appropriate.

Redundancy

Paul Gordon v MSM Contracts Ltd 12857/18IT

The Claimant's dismissal by reason of redundancy was deemed unfair and the Tribunal awarded the Claimant £12,327.54. The Respondent failed to comply with steps 1 & 2 of the statutory dismissal procedure and also failed to provide the Claimant with employment particulars.

The Claimant was made redundant from his Assistant Site Manager post in June 2018. The Tribunal was satisfied this was a genuine redundancy situation due to the completion of work on three hotel sites around the same time.

The Tribunal concluded there was a 70% probability the Claimant would have been dismissed in any event by reason of redundancy had the statutory dismissal procedure been followed but had the Respondent given active consideration to suitable alternative employment when it first contemplated making the Claimant redundant as it should have, it might have found something even at a lower level such as labouring that could have been offered to the Claimant in the meantime until the residential projects kicked in. By the time suitable alternative employment was considered at the appeal stage, *"the cupboard was bare"* and an offer of a sub-contracting role, albeit made in good faith, was not by definition alternative employment.

The Tribunal remarked *the notable absence of any structured decision making by the respondent in relation to the redundancy situation that arose. It was dealt with in a very haphazard and piecemeal way by the respondent. It bears the character of an 'off the cuff' decision without any consideration of the size or nature of the redundancy pool or the criteria that would determine who should be in it. There appears to have been a degree of self de-selection by other potential members of the pool. While the respondent gave a credible explanation as to what had become of the other assistant site managers there was no evidence of any coherent redundancy plan. In these circumstances it is difficult to perceive any selection as such. Rather it was clearly the case that an ad hoc decision was made to dismiss the claimant. The Respondent was not even aware that the claimant was a full-time employee and was under the impression that he was agency staff. While this was rectified in terms of the appropriate period of notice being given once the manager was appraised of the claimant's employment status the die was very much cast at this stage with no attempt by the respondent to either consult properly or take steps to arrange a proper process which would have involved as a minimum the establishment of a pool for redundancy and consideration of appropriate criteria. While this might give the impression of using a sledgehammer to crack a nut it is no more than a proper process demands and may result in a small pool with limited but relevant criteria.*

Kieran Robinson v Portview Fit-Out Limited 5364/18IT

The Claimant was made redundant in December 2017. The reason advanced was a restructure of the Systems Department. The 3 areas which the Claimant had managed were

to be split into 3 separate units, each with its own manager and the Tribunal was satisfied that this was a genuine redundancy situation and in the alternative, the restructure would have constituted a 'some other substantial' reason for dismissal.

The Respondent is an interior fit out contractor for the world's leading brands across the UK, Ireland and France. It employed 85 employees and has a turnover of £48-49 million for the year in question.

3 new Directors were appointed to Board at ages 42,34 & 33 who were all younger than the Claimant at 48. The Claimant was not offered the opportunity to apply nor was he considered for appointment to Board and in turn alleged ageism. In making the 3 appointments, the Respondent made reference to "wise heads on young shoulders". Further a reference to "a new perspective and set of experiences" as the company "faced the future" were deemed consistent with a view that a younger group of people because of their youth are better able to plan for the future, have new perspectives and experiences and are more likely to be there for a longer period into the future. As such age might well have been a factor but the age discrimination claim was dismissed as it was not lodged within the statutory 3 month time limit.

The Tribunal concluded that the Respondent did not act fairly and reasonably in dismissing the Claimant as there was available suitable alternative employment which the Respondent failed to offer. The Respondent was creating 3 new posts and had three persons within the Department, although the two other employees were not managers and were junior to the Claimant. The Respondent only offered the Claimant the chance to apply for the posts, to be like any other candidate. It did not give careful consideration to the possibility of directly offering the Claimant another job. The Claimant was unfairly dismissed by reason of redundancy and awarded £57,609.36.

Kelly Rock v Medical Communications 2015 Limited & Adrian Maginnis 21/18IT

The Claimant worked as Marketing Manager in a publishing company and was recruited for the launch of a particular product. She was made redundant in October 2017 whilst on maternity leave and after approximately 11.5 month's service.

The employer failed to follow 3 step statutory dismissal procedure. No consultation into ways of avoiding redundancy or exploring if there were other options.

The month before, the last potential customer had withdrawn its interest in the product and the employer decided to abandon the product. The employer was in considerable financial difficulties and had to enter a repayment schedule with HMRC in order to pay monies owed. The post for which the Claimant was recruited was no longer needed and was redundant. A sales post vacancy was not a suitable alternative post given the Claimant did not have, according to her CV, experience in sales and the Respondent has assessed her sales skills as not one of her strong points. In absence of suitable vacancy, Claimant could not benefit from the Regulation 10 of the Maternity and Parental Leave Regulations (Northern Ireland) 1999.

Given the reason for redundancy and the purpose of her appointment, the Tribunal accepted that the Claimant alone comprised the pool from which the redundancy was made. No one else was recruited for that purpose or working on that product and as such it was reasonable to restrict the selection pool to the Claimant alone.

The Tribunal was satisfied that the reason for the Claimant's dismissal was redundancy and that her dismissal did not have anything to do with her pregnancy or maternity leave. The claims of unfair dismissal and discrimination on the grounds of maternity were dismissed.

Steve Veck v Hospital Services Limited 1368/17IT

The Claimant was unfairly selected for redundancy and as such was unfairly dismissed. Further the Respondent did not enquire sufficiently into suitable alternative employment. [Remedy was to be addressed separately].

At the point when the Respondent decided to dismiss the Claimant by reason of redundancy a potential redundancy situation arose due in the main to the loss of a contract. However, there was no evidence that the Respondent approached the potential redundancy situation in a structured manner. The disappearance of the Claimant's role and his high salary were clearly the critical factors as far as the respondent was concerned. While these were legitimate considerations and it made business sense to take them into account, the Respondent did not address the redundancy issue correctly and lawfully. The Claimant was unfairly selected for redundancy and further that the respondent did not enquire sufficiently into suitable alternative employment.

An individual consultation meeting took place with the claimant but there was no evidence of any attempt to identify a pool or appropriate criteria. There was no credible evidence that the respondent genuinely applied its mind to the issue. The Respondent's submission that the claimant was in a pool of one was not based on the decisionmaker's consideration of the matter at the time but appeared to be ex post facto reasoning. The decisionmaker had no knowledge of the workforce prior to taking over the business and in a transfer situation it was incumbent on the new employer to make proper enquiries as to who should be in the pool.

The focus was clearly and understandably on the claimant as he was a high earner with a significantly reduced workload due to the loss of a contract, but the Respondent failed to address the matter properly through the prism of a redundancy process. There was no redundancy procedure, no evidence that the Respondent considered who should be in the redundancy pool and no selection criteria. In the absence of any evidence of proper consideration of these matters it could not be satisfied that the respondent acted reasonably in selecting the Claimant for redundancy.

The Respondent should have revisited the issue when a sales job came up at a later stage in the notice period when an employee such as the Claimant might be more interested in other roles. While the Claimant had said nothing that would have suggested that he would have been interested in a sales role, the Respondent ought to have at least considered the Claimant for this position.

Keyboard Warriors - How to deal with unwarranted remarks and inappropriate email communication in internal procedures

Far too often, HR Departments are on the receiving end of hostile or inappropriate email communication where the tone and content of the email strays past the line of professional and appropriate communication. Every employee has the right to be treated with dignity and respect in the workplace, including HR and those dealing with disciplinary and grievance matters. Whilst recognising that the stress and sensitivities of particular ER processes can lead to robust exchanges of views and colourful correspondence; there is no excuse for personal insults, unwarranted criticism, derogatory remarks, shouty capitals or repetitive and

oppressive levels of contact - inappropriate conduct and behaviour should not be tolerated. Given the impact of this behaviour on the recipients, ignoring it simply isn't an option. A graduated approach is necessary and an employee should always receive an informal warning in the first instance, identifying the inappropriate behaviour or conduct and making clear that disciplinary action may be warranted if it continues. Following through with disciplinary action and indeed training our staff how to deal with inappropriate written and verbal communication is essential.

Anthony McCullagh v Campbell Catering (NI) Ltd t/a Aramark 4135/17IT & 1733/18IT

The claimant complained about the response of a HR Co-Ordinator to his email of 22 June 2017 when he stated: "*As I said in my last email, which as usual Aramark has not even got the manners to acknowledge … .*"

The Company's response from the HR Co-Ordinator of 22 June 2017 included the following:-

"*Please note your comment about the company not having "manners" to acknowledge your email is not appropriate and I would advise you to carefully consider the tone and content of future emails. Email correspondence is acknowledged at the earliest opportunity and we will ensure that your complaints are addressed within the grievance procedure. Should you continue to express your dissatisfaction in inappropriate terms, you should be aware that it may warrant consideration under the disciplinary procedure. I trust this will not be the case going forward".*

The Claimant alleged that this 'threat of disciplinary action' contributed to his constructive dismissal. The Tribunal disagreed. The Tribunal concluded that this was a reasonable response to the Claimant's email as it was clearly an attempt to 'nip in the bud' an issue with the tone of the claimant's correspondence as a whole. The Tribunal found that it did not amount to nor contribute to a breach of contract.

<u>Costs</u>

J McWilliams v Dr Moore 5906/18IT

G Simpson v Wholesale Electrical Supplies (NI) Ltd 2641/16IT

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