

THE FAIR EMPLOYMENT TRIBUNAL

CASE REF: 187/05FET
1405/05
210/05FET
1422/05

CLAIMANTS: Stephen Mooney & Riccardo Cafolla

RESPONDENT: Andras House Ltd

DECISION

The unanimous decision of the Tribunal is that the claimants were subjected to unlawful discrimination contrary to Articles 3 and 19 of the Fair Employment and Treatment (Northern Ireland) Order 1998. The tribunal awards compensation to Mr Mooney in the sum of £11599.85 and compensation to Mr Cafolla in the sum of £16110.91

Constitution of Tribunal:

Chairman: Ms J Knight

Panel Members: Mr M Gallagher
Mr W Holland

Appearances:

The claimants were represented by Mr K Denvir Barrister-at- Law instructed by Campbell Stafford Solicitors.

The respondent was represented by Mr P Moore of Peninsula Business Services Limited.

A. Issues

The claimants both lodged complaints claiming they had been unfairly dismissed, for unpaid wages and notice pay and that they had been subjected to unlawful discrimination contrary to the Fair Employment and Treatment (Northern Ireland) Order 1998, following their dismissal for gross misconduct by the respondent.

By an order dated 22 August 2006, the Vice President ruled that the claimants' claims should be heard and considered together.

Preliminary Issue

At the outset of the hearing the Tribunal was required to determine as a preliminary issue whether it had jurisdiction to consider the claimants' claims of unfair dismissal and for

notice pay. The tribunal heard submissions from the parties' representatives and considered the legal authorities to which it was referred by the parties, including the cases of **Bedford Unemployed Workers & Welfare Rights Centre v Khan EAT/726/96 23 July 1996** and **Schulz v Esso Petroleum Co Ltd [1999] 3 All ER 338**. The tribunal made a ruling, which was delivered orally to the parties on the 1 May 2007 and again on 22 August 2007. Mr Denvir expressly confirmed to the tribunal on 23 August 2007 that the claimants did not seek to challenge the decision of the tribunal on the preliminary issue. The decision is set out in full:

- 1) "Mr Mooney was summarily dismissed without notice pay on 22 June 2005. He lodged an appeal against this decision by letter dated 28 June 2005, which was heard on 7 July 2005. The original decision to dismiss was affirmed; therefore the effective date of termination of employment is 22 June 2005.
- 2) Mr Mooney lodged his originating complaint with the Office of Industrial Tribunals and the Fair Employment Tribunal on 14 October 2005 in which he made claims of unfair dismissal, for unpaid wages and political and religious discrimination contrary to the Fair Employment and Treatment (Northern Ireland) Order 1998.
- 3) Mr Cafolla was summarily dismissed without notice pay on 22 June 2005. He lodged an appeal against this decision by letter dated 29 June 2005 which was heard on 7 July 2005. The original decision to dismiss was affirmed; therefore the effective date of termination of employment is 22 June 2005.
- 4) Mr Cafolla lodged his originating complaint with the Office of Industrial Tribunals and the Fair Employment Tribunal on 7 October 2005 in which he made claims of unfair dismissal, for unpaid wages and political and religious discrimination contrary to the Fair Employment and Treatment (Northern Ireland) Order 1998.
- 5) Both claimants sought legal advice following notification of the appeal decision which was sent by letters to the claimants dated 22 July 2005.
- 6) At a Pre Hearing Review on the 1 September 2006, the Vice President of the Fair Employment Tribunal decided that the letters of appeal constituted a statutory grievance for the purpose of Article 20 of the Employment (Northern Ireland) Order 2003 for the reasons set out in that decision.
- 7) Mr Denvir confirmed that the claimants' grievances contained in the letters of appeal related only to the complaints of religious and political discrimination and did not contain a reference to the issues of notice pay and unpaid wages.
- 8) It was accepted on behalf of the claimants that the originating claims had been lodged outside the prescribed 3 month time limits for lodging complaints of unfair dismissal and breach of contract contained in the Employment Rights (Northern Ireland) Order 1996 and the Industrial Tribunals Extension of Jurisdiction (Northern Ireland) Order 1994.
- 9) The reason advanced on behalf of the claimants for the late presentation of the claims was that the claimants believed that the 22 July 2005 was the effective date of dismissal and that time began to run against them as from that date.

- 10) On this basis it was argued that it was not reasonably practicable for the claimants to comply with the three month time limit. No other explanation was put forward as to why the claimants had not complied with the time limits.
- 11) It was only realised by the claimants after they had received legal advice in the Autumn of 2006 that the effective date of termination was in fact 22 June 2006.
- 12) In relation to the unfair dismissal claims, Article 145 of the Employment Rights (Northern Ireland) Order 1996 provides that a tribunal does not have jurisdiction to consider a complaint of unfair dismissal unless it is presented
 - (a) before the end of the period of three months beginning with the effective date termination; or
 - (b) within such further period as the tribunal considers reasonable where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that three month period.
- 13) A similar time limit is prescribed in respect of cases of breach of contract by the Industrial Tribunals Extension of Jurisdiction (Northern Ireland) Order 1994.
- 14) However, in breach of contract cases, there is a further requirement upon claimants to lodge a statutory grievance imposed by Article 19(2) and (3) of the Employment (Northern Ireland) Order 2003 which provides that a claimant may not present a complaint to a tribunal if the complaint is subject to the statutory grievance procedure and he has not put his grievance in writing and waited 28 days before lodging proceedings.
- 15) Therefore as the claimants accept that they did not comply with this requirement, the tribunal determines that it does not have jurisdiction to deal with the complaints of unpaid notice pay. These complaints are therefore dismissed.
- 16) In relation to the complaints of unfair dismissal, the tribunal is satisfied that there is no extension of time by reason of the statutory disciplinary procedures. This is because the claimants were aware that the disciplinary procedure had come to an end before the conclusion of the original three month time limit. [Regulation 15 of the Employment (Northern Ireland) Order 2003 Dispute Resolution Regulations (Northern Ireland) 2004.]
- 17) Therefore the issue for the tribunal is whether it should exercise its discretion under Article 145(2) (b) of the 1996 Order.
- 18) The fact that the claimants had lodged appeals under the internal disciplinary procedure does not, without more, stop time running against a claimant, or extend the period for lodging the complaint.
- 19) The onus is on the claimants to prove that it was not reasonably feasible to lodge the complaint within the three month time limit.
- 20) Apart from the claimants' mistaken belief about the correct effective date of termination, no other reason was advanced as to why it was not reasonably feasible for the claimants to comply with the time limit.

- 21) Having carefully considered the authorities to which it was referred by the parties, the tribunal is satisfied that in the circumstances of this case, there is no evidence before it upon which it can exercise its discretion to extend the time limit.
- 22) In the **Schulz** case the claimant became unwell and unable to give instructions to his solicitors during the last six weeks of the limitation period. There is no suggestion in this case that either claimant was unable to give instructions to their solicitor due to illness or for any other reason.
- 23) The **Khan** case can be distinguished on the basis that in that case the claimant had lodged her claim within the three month time limit for both the unfair dismissal and discrimination cases. Therefore on a proper construction this was a re-labelling of the claim which had already been presented. It is quite different from this case in which the originating complaint was lodged outside the original limit.
- 24) The tribunal took into account that the claimants had the benefit of legal advice from a solicitor experienced in dealing with employment law.
- 25) On this basis the tribunal unanimously decides that it was reasonably feasible for the claimants to have lodged the complaint within the original three month time limit and therefore the tribunal does not have jurisdiction to entertain the complaints of unfair dismissal. The complaints of unfair dismissal are therefore dismissed.
- 26) We shall now proceed to deal with the claimants' claims of unlawful discrimination contrary to the provisions of the Fair Employment and Treatment (Northern Ireland) Order 1998 as amended."

Therefore the issue to be determined by the tribunal was whether the respondent had subjected the claimants to unlawful discrimination on the grounds of their religious belief/political opinion in the events leading up to and culminating with their dismissal on 22 June 2005.

B. Sources of Evidence

The tribunal considered the evidence of Constable Brian Treacy, the claimants, Mr Mooney and Mr Cafolla, Ms Catherine Doherty, Ms Shelley Boyle, Mr Gabriel Mullaley, Mrs Rosemary Ryan, Mr Lee Madden and Mr Gary Gaynor. The tribunal was referred to various documents, some of which were contained in bundles prepared by the parties prior to the hearing and some of which were produced at various stages during the hearing. The tribunal indicated at the outset of the hearing that it would not consider any document other than those to which it was specifically referred. The witness statements of the respondent's witnesses dealt with events which occurred after 29 May 2005. Mr Moore declined to make an application to the Tribunal for leave to amend those witness statements.

C. Findings of Fact

There was little agreement between the parties in relation to factual matters, therefore after carefully considering the evidence before it the Tribunal found the following relevant facts to be proven on a balance of probabilities:

1. The respondent, Andras House Ltd, which is one of a group of companies in the Andras House Group, opened Days Hotel in May 2003. The Chief Executive is Mr Gareth Kirk who is based at Andras House the group headquarters. He is the line manager of Mr Lee Madden, then the General Manager of Days Hotel. Mr Madden is a Roman Catholic with a perceived nationalist background. The Assistant Manager of Days Hotel is Mr Gary Gaynor. The Human Resources Department is based in Andras House and the Human Resources Manager was Brenda Ferris from August 2004 until she left the respondent's employment in or about Easter 2005. Mrs Rosemary Ryan was the Group Human Resources Manager and a Personal Assistant to Lord Rana, the owner of the Andras House Group. She has since left the respondent's employment. Days Hotel is situated in Hope Street, Belfast, adjacent to the Loyalist Sandy Row area. It has some 70 or 80 employees from both Protestant and Roman Catholic backgrounds but the respondent was unable to give the Tribunal an accurate breakdown of the religious affiliations of the workforce in Days Hotel at the relevant time.
2. Both claimants were based in Days Hotel. Stephen Mooney is a Roman Catholic of a Nationalist background from West Belfast. He was employed by the respondent, Andras House Ltd as Assistant Food and Beverage Manager from 12 May 2003 until his dismissal on 22 June 2005. He was initially employed as Restaurant Supervisor but was quickly promoted to the position of Assistant Food and Beverage Manager. His Line Manager was the second claimant, Mr Riccardo Cafolla.
3. Mr Cafolla is a Roman Catholic with a Nationalist background. He resides in the University area of Belfast. His employment with the respondent commenced on 28 April 2003 and ended on 22 June 2005 when he was dismissed. Within a month of the commencement of his employment he was promoted to the position of Food and Beverage Manager. Mr Cafolla was line managed by Mr Madden, with whom he had a good working relationship up until March or April 2005. In February 2005 Mr Madden awarded Mr Cafolla the highest marks of any manager within the hotel in that month's performance review.
4. Both claimants claimed they had not been provided with a written statement of their terms and conditions of employment. The respondent contended that both claimants had been provided with written terms and conditions but did not produce copies of these documents or the personnel files of either claimant to the Tribunal. The Tribunal therefore concluded on a balance of probabilities that the respondent did not give the claimants individual written statements of their terms and conditions although there was a staff handbook which set out the general conditions of employment which was kept in the back office and was available for inspection.
5. The tribunal noted that the respondent's disciplinary procedure provides in cases of minor misconduct for a formal verbal warning for a first offence; a written warning for the second; a final written warning for the third; followed by dismissal for the fourth offence. In cases of major misconduct, a first offence attracts the penalty of a written warning; a final written warning for the second and dismissal for the third. Offences of gross misconduct usually attract the penalty of summary dismissal. Examples are listed for each category of offence and the tribunal noted that whether an offence is defined as minor or major misconduct or major or gross misconduct could be a matter of degree depending on the circumstances. The process provides that before

disciplinary charges are instituted, an investigation of the circumstances surrounding the allegation will be carried out.

6. There was a dispute between the parties as to Mr Mooney's normal contractual working hours. Mr Madden contended that all full-time weekly paid staff were required to work 40 hours per week. Mrs Ryan stated that they were required to work 42 ½ hours per week. It was however evident from payslips of Mr Mooney that some weeks he worked in excess of 40 hours and others less than 40 hours per week. One of Mr Cafolla's responsibilities was to draw up the roster for weekly paid kitchen and restaurant staff including Mr Mooney. The number of hours allocated to each member of staff was determined by Mr Cafolla's projections based on upcoming events and the numbers of guests staying in the hotel. On the basis of the evidence before it the Tribunal formed the view that weekly paid staff worked a varying number of hours each week as and when required by their line manager and were paid on the basis of hours worked. It can be seen from Mr Mooney's payslips that some weeks he worked less than 40 hours and other weeks, more than 40 hours. There was no increased overtime rate paid to Mr Mooney for hours worked in excess of 40 hours. His net average weekly earnings were £260 per week.
7. Mr Cafolla was paid on a monthly basis at a rate of £1,375 per month ie $\frac{1}{12}$ of the annual rate. His normal contractual hours were 40 hours per week but it was common case that he regularly worked hours greatly in excess of this, sometimes up to 60 or 80 hours per week. However as a manager he did not get paid any overtime for these extra hours. In or about Christmas 2004 Mr Cafolla took on the duties of Head Chef because of difficulties experienced in filling this position. He did not receive any payment for these additional hours until March 2005. A handwritten memo from Gary Gaynor to the wages department confirmed that Mr Cafolla was authorised to receive overtime payment for March and April 2005. He received the hourly rate for any overtime hours worked in these months as there was no increased overtime rate.
8. The claimants were entitled to take breaks during the day and it was confirmed by Mr Madden that they were not required to remain on the premises while taking these breaks, provided the Duty Manager was made aware of their whereabouts, for health and safety reasons. The tribunal accepted Mr Cafolla's evidence that he regularly conducted meetings with suppliers and other managers off the premises of Days Hotel. The Tribunal considered the evidence of Mr Mullaley in this regard may have been influenced by the fact that he is employed by a supplier company to the respondent.
9. Mr Cafolla was responsible for staffing matters in the Food and Beverage Department including matters of discipline. However before he could initiate disciplinary action against a member of staff he had to obtain the authority from either Mr Madden or Mr Gaynor. The Smith brothers, both residents of Sandy Row were employed as kitchen porters. Mr Cafolla regularly recommended disciplinary action against both these employees for persistent lateness and poor timekeeping. They clocked in late and clocked out early on a regular basis. One of the brothers Stephen Smith received 7 final written warnings between the 27 January 2005 and 5 March 2005. He was dismissed on 17 March 2005 and the letter of dismissal was signed by Mr Madden. His brother Stewart Smith was also given a number of final written warnings before his dismissal shortly afterwards. Mr Cafolla carried out a disciplinary investigation on

7th February 2005 into alleged clocking offences by another employee Mr Wilson Magee. The investigatory minutes show that Mr Cafolla conducted the investigation and that he suggested that late clocking could amount to falsification of records. The tribunal was not told whether disciplinary charges were instituted against Mr Magee following this investigation.

10. From Christmas 2004 the hotel, its staff and residents were subjected to a number of attacks emanating from the Sandy Row area. There were a number of stone throwing incidents and criminal damage to cars in the Days Inn Hotel car park. Staff taking cigarette breaks in the doorway at the rear of the hotel, were subjected to verbal sectarian abuse and Mr Cafolla had told the Tribunal that he had increasing concerns for the safety of hotel staff and himself as he walked to and from work. In early 2005 a Catholic female employee told Mr Cafolla that she had been approached by two "locals" from Sandy Row, who had addressed her by name and given her a white rose, which she took to symbolise death. The tribunal accepts that this report was made to Mr Cafolla which increased his fears about the safety of staff.
11. Approximately a week after Christmas 2004 Mr Mooney was on duty at the hotel and received an anonymous phone call threatening Mr Cafolla. The caller said "that F-er will pay. You tell him he will not F--- with my brothers he is a dead man walking." Mr Mooney reported this phone call to Mr Cafolla who was not on duty at the time and subsequently made a report of this incident to Mr Madden. The police were informed about this incident. With hindsight, the claimants suspected that this call was linked with the Smith brothers who had recently been disciplined by Mr Cafolla.
12. The PSNI Crime Prevention Office carried out a crime prevention survey on the Days Inn Hotel car park on 24 January 2005. The Crime Prevention Office sent a letter to Mr Gaynor on 16 February 2005 which set out a number of recommendations to reduce car crime in the car park including criminal damage to vehicles and the theft of vehicles.
13. On 18th February 2005 a number of kegs of beer were stolen from the hotel. CCTV footage identified that employees of the hotel from the Sandy Row area were responsible for the theft. Following this incident, Mr Cafolla contacted the police again on 22nd March and a meeting was arranged for the following day. The tribunal was not told whether there were any criminal charges preferred against any person following this incident.
14. The meeting took place at Andras House with Mr Cafolla, Mr Kirk and Mr Madden from Days Hotel and Constable Gail Haddock and Constable Martin Treacy of the PSNI. Concern was expressed that the oil tank situated at the rear of the premises could be set on fire and that members of staff could be subject to physical attack coming to and from the hotel. Constable Haddock also made a number of recommendations in relation to staff safety including that where possible staff should travel to and from work by taxis that they should travel together and preferably not walk to work. She made recommendations in relation to staffing levels and increased night security and that there should be an operator for CCTV and an additional blind spot camera. She recommended that the oil tank should be caged and that there should be a fire drill for staff and that the hotel should liaise with the fire service and community representatives. The recommendations were confirmed in a follow up letter from Constable Haddock to Mr Madden dated 18 April 2005.

15. An e-mail from Constable Treacy dated 23 March 2005 records the discussion at the meeting: "The beer keg incident and sacking of 2 local employees has resulted in a series of incidents that lead the management and staff to be very concerned about their personal safety. Cafolla witness to the keg theft lives at xxxxxxxx and has been threatened. He has been given advice about travelling to and from work. The address has been alerted at Call Management AL, general advice was also given in relation to all staff, staffing levels manning of CCTV. Advice was also given about the physical security of the hotel and site – cage for oil tanks/grills/security phone. Kirk also expressed serious concern about threats to set fire to the hotel or oil tanks outside the hotel this weekend when they have nearly full occupancy. He will be liaising with the new inspector. They were advised to carryout a fire drill, engage the tank." The e-mail confirmed that there has been previous contact between management and local community representatives. It recorded that "Management believes that the stolen kegs were taken to the Royal Bar." (A licensed premises in Sandy Row).
16. On 1 April £1000 was stolen out of the food and beverage cash envelope from the safe over the weekend. Mr Mooney had been responsible for lodging the envelope into the safe and did not have access to the safe keys on this occasion. The lodgement was witnessed by another person. Mr Cafolla carried out an investigation and called in the police. No one ever was charged in relation to this theft. Mr Mooney told the tribunal that he believed that had there not been a witness to him making the lodgement, that he would have been accused by the respondent of taking the money. The tribunal considered that there was no evidence to support this assertion as he was not in fact ever accused of having taken the money by the respondent. An investigation was carried out by Mr Cafolla as his immediate line manager and at this stage Mr Mooney still had a good working relationship with Mr Madden and Mr Gaynor.
17. On 6 April 2005 Mr Cafolla instructed John McFadden, a Protestant employee from the Sandy Row area and Michael Gormley, a Catholic from the Markets area of Belfast to clear rubbish from the outside rear of the hotel. Shortly afterwards Mr McFadden came back into the hotel and told Mr Cafolla, who was in a meeting with Mr Madden, that he would not lift the rubbish. Mr Cafolla told Mr McFadden hat it was his responsibility to carry out a reasonable management instruction and that failure to carry out a reasonable management instruction could amount to gross misconduct. However Mr McFadden continued to refuse to lift the rubbish. In the meantime Mr Gormley continued to lift the rubbish outside but came in to take a break when it started to rain.
18. Mr Cafolla informed Mr Madden that this was the fourth time that Mr McFadden had been warned about his conduct. Mr Cafolla's expressed opinion was that Mr McFadden should be dismissed for gross misconduct. Mr Madden agreed with Mr Cafolla's view at this stage and instructed him to go to the Head Office to ask Ms Ferris, the Human Resources Manager, to send a letter of dismissal on grounds of gross misconduct to Mr McFadden.
19. Mr Cafolla had been in Andras House for approximately half an hour when he received a telephone call from Mr Madden. He told Mr Cafolla that Mr McFadden's mother, who was employed by the respondent in the housekeeping department, had

come in to see him “in tears”. She told Mr Madden that she had “put in a good word for the hotel round the local community” and that “the word on the street in Sandy Row was that there was a new Catholic general manager in the hotel who was out to sack all the Protestants.”

20. Mr Madden told Mr Cafolla not to dismiss Mr McFadden. Mr Cafolla objected strongly because he saw this as giving in to an indirect threat of a sectarian nature. Further he considered that it set a bad precedent to other staff and undermined his authority as Mr McFadden’s Line Manager. Nevertheless Mr Madden insisted that the decision be reversed.
21. Mr Cafolla was extremely aggrieved by Mr Madden’s change of attitude which he discussed with Ms Ferris, who appeared to support his position that the decision should not have been changed on those grounds. Mr Kirk came into the Human Resources office and enquired as to what had been going on. The Tribunal accepts that Mr Cafolla was correct in his suspicion that Mr Madden had contacted Mr Kirk to discuss the incident. Mr Kirk referred to Mr Madden’s decision not to let Mr McFadden go and told him that his dismissal would cause more trouble for the hotel and be bad for business. Mr Kirk asked Mr Cafolla whether he was not being too harsh. Mr Cafolla disagreed and pointed out that Ms Ferris expressed support for him but that Mr Kirk commented that given the recent trouble maybe it would be better to “let this one lie” as it may create more tension, potentially resulting in more trouble for the hotel. Afterwards Mr Cafolla discussed this with Mr Mooney who was critical of the stance taken by Mr Kirk and Mr Madden in the handling of this matter.
22. Mr Madden told the Tribunal that he had spoken with Mr McFadden shortly after this incident. He told the Tribunal that Mr McFadden was soaking wet and was “within his rights” to refuse to carry out the instruction given by Mr Cafolla. He stated that Mr McFadden was crying and in a distressed state and that Mr Madden had told him to go on home to get himself sorted out. Mr Madden told the Tribunal that he meant that Mr McFadden should return to work when he had composed himself but that in fact Mr McFadden did not return to work for approximately 2 weeks and only after he was sought out by the respondent and asked to return by the hotel. He was brought back to work as a Night Porter for which he received a higher rate of pay. The tribunal concluded that in effect Mr McFadden had effectively terminated his employment and had walked out of the hotel which is supported by a memorandum dated 2nd June 2005 prepared by Mr Gaynor for the attention of Mr Madden which states that “We backed RC handling of JM when he walked out of the hotel and defended this position to other staff and managers”. Despite this the respondent sought him out following the petrol bombing incident and offered him a better paid job. No disciplinary charges were instituted against him. The Tribunal did not find Mr Madden’s evidence to be credible in this regard because this version of events was raised for the first time during the hearing and was not mentioned in his witness statement. The Tribunal is satisfied that this incident marked a change in the relationship between Mr Madden and Mr Cafolla and consequently Mr Mooney, who was regarded as Mr Cafolla’s supporter.
23. A serious incident occurred on 12 April 2005 in which Days Hotel was attacked with petrol bombs. Although there was only surface damage smoke got into a cavity wall and the hotel had to be evacuated. One of the petrol bombs was directed at the oil tank close to the perimeter fence however fortunately it remained undamaged.

Following this incident Constable Haddock visited the hotel again on 14 April 2005. She pointed out that the oil tank was vulnerable to people intent on arson. She suggested a number of options to secure the oil tank including enclosing it with a fire resistant tank chamber constructed of brick, concrete or other suitable material, enclosing it with close welded mesh fencing to prevent a petrol bomb from getting close to the tank and burning through or that the tank could be placed on the top of a catch pit of a capacity 10% greater than the oil content of the tank. She also suggested that waste situated next to the oil tank should be relocated. Following the incident of the petrol bombing of the hotel a member of staff, Ms Mary McVeigh, the sister of Stephen Mooney handed in her resignation and staff were feeling threatened.

24. Mr Madden had met with local representatives of the UDA following the petrol bomb incident and received assurances that there would be no further attacks on the hotel from the Sandy Row area. The claimants asserted that they were not informed about this meeting and Mr Cafolla stated that if he had been so informed he would have been greatly reassured about staff safety. Mr Madden told the tribunal that the meeting was held in the Days Hotel restaurant. He believed that both claimants would have seen the meeting taking place and he stated that he had informed all managers of this meeting the next day. The tribunal was satisfied that Mr Madden did not inform either claimant about this meeting and that neither claimant was aware that it had taken place.
25. Following the recommendations of the police Mr Cafolla stated that he raised with Mr Madden on numerous occasions that they carry out the recommendation in relation to fire drills and the recommendation to cage the oil tank but that nothing was done. He also suggested to Mr Madden that the safe keys be taken away from duty managers as they were too easily accessible. This was one of the suggestions by the police after the theft of the kegs of beer.
26. Mr Cafolla informed the Tribunal that Mr Madden and other senior managers did not implement the recommendations made by the Crime Prevention Officer and that he became increasingly concerned about staff safety. Mr Mooney told the Tribunal that he was informed by police visiting the hotel around this time that Mr Madden "didn't give a F--- about staff safety." Mr Mooney did not identify the police officer concerned and this was not raised with Constable Treacy during his evidence. On balance the tribunal did not find this aspect of Mr Mooney's evidence to be credible and concluded that this was not said to him. Mr Madden told the tribunal that all of the recommendations were implemented with the exception of those relating to the oil tank. This was because he stated the Fire Service has advised the respondent that these could be more dangerous. There is evidence that the respondent did contact the Fire Service but there is no written advice to this effect. The tribunal was urged to infer from this that no such advice was received. The tribunal declined to draw this inference. However there was no evidence before the tribunal as to what steps Mr Madden had taken actually to implement the recommendations and the tribunal concluded that if any such action had been taken, it was not apparent to staff, including the claimants. On 12 April 2005 Mr Cafolla rang Brenda Ferris to arrange a meeting to discuss staff safety and what he considered to be Mr Madden's lack of concern. They arranged to meet on 14 April 2005.
27. The claimants felt that they were being cold shouldered by Mr Madden and Mr Gaynor because they had raised concerns about staff safety and because of the

incident concerning Mr McFadden. Mr Mooney told the Tribunal that his float was counted twice and he was told that it was short. It was contended that Mr Madden stopped speaking to Mr Cafolla and started to communicate with him by memo about matters which they would previously have discussed. By way of example the tribunal was referred to a memo dated 16 May 2005 sent to Mr Cafolla by Mr Madden which pointed out amongst other things that different coloured napkins had been placed on the same tables in the restaurant. The safe float was removed from Mr Cafolla's control and that the late bar for which Mr Cafolla had had direct responsibility was disbanded without prior consultation with him. Mr Cafolla said he was excluded from attending an important Head of Departments meeting at the Ramada Hotel in May 2005 and also food tastings and other events that he had attended with his Line Manager prior to raising his concerns.

28. The claimants stated that they made Brenda Ferris aware that they felt they were being cold shouldered during several meetings they had arranged with her. Mr Cafolla stated that he was afraid to meet Ms Ferris at head office for fear of recriminations from Mr Madden. He therefore arranged to meet with her in a coffee shop across from the office during work breaks. Mr Cafolla claimed on one occasion he asked Ms Ferris to record his suspicion that Mr Madden was compiling a file on himself and Mr Mooney with a view to ousting them from their employment. He requested that she keep her notes confidential and not to disclose them to Mr Madden or Mr Kirk. On another occasion he claims that he gave her a sealed letter detailing his concerns and asked her to place it in his personnel file. Mr Cafolla did not retain a copy of this letter. Mr Cafolla's personnel file was not produced during the course of the Tribunal hearing and the Tribunal was informed that searches by the respondent had not turned up the sealed letter. Neither the claimants nor the respondent called Ms Ferris to give evidence but the tribunal accepts that the claimants did raise concerns with Ms Ferris.
29. Mr Cafolla tried on a number of occasions to arrange a meeting with Mr Madden who refused to meet to discuss his concerns about staff safety and the John McFadden episode. At one stage he agreed to a meeting with Ms Ferris being present but pulled out of this at the last minute on the basis that he would not meet with anybody outside of the hotel. Mr Madden confirmed to the tribunal that he had received a telephone call from Ms Ferris from Andras House about arranging a meeting with Mr Cafolla and possibly Mr Mooney but that she did not specify the reason for the meeting. Mr Cafolla then tried to contact Lord Rana through Mrs Ryan in order to arrange a meeting with Mr Madden. Mrs Ryan confirmed that Mr Cafolla telephoned her in order to contact Lord Rana because Mr Madden would not meet with him. The tribunal accepted Mr Cafolla's contention that Mrs Ryan told him that it would probably not be in his best interests to involve Lord Rana. The tribunal concludes that Ms Ryan contacted Mr Madden following this conversation because when Mr Cafolla returned to Days Hotel afterwards, Mr Madden asked him why he had tried to contact Lord Rana. Following this however, Mr Madden did agree to meet with Mr Cafolla.
30. On 30 May 2005 a meeting took place between Mr Cafolla and Mr Madden in the Lincoln Room in Days Hotel. No other person was present. Mr Cafolla had prepared a document containing points and issues which he wished to raise with Mr Madden. This document was before the tribunal and the issues mentioned included the decision to re-employ Mr McFadden; concerns about the activities and affiliations of some of the hotel staff and their possible connections with the attack on the hotel;

further alleged misconduct on the part of Mr McFadden, including an incident where he allegedly pretended to throw a stone at Mr Mooney's car and then said to Mr Mooney that the Smith brothers may not know his car but that he did and occasions where he had made derogatory comments to waiting staff. He questioned the legitimacy of the reasons given for the closure of the late bar. Mr Cafolla made handwritten notes on this document to record Mr Madden's responses. He did not consider that Mr Madden took the meeting seriously and alleges that he kept yawning and looking at his watch and that he asked twice whether the meeting was going to take much longer.

31. Afterwards Mr Cafolla discussed this meeting with Mr Mooney. Neither claimant was satisfied with the responses received from Mr Madden. Consequently on 3 June 2005 Mr Mooney and Mr Cafolla went to Andras House and informed Mr Kirk that they wished to instigate a formal grievance against Mr Madden concerning staff safety and harassment. At this stage Ms Ferris had left the respondent's employment. Shortly after the claimants left Andras House Mr Cafolla received a telephone call from Mr Madden asking him as to his whereabouts. The tribunal concluded that Mr Kirk had contacted Mr Madden to inform him that the claimants intended to make a formal complaint about him. When he returned to the hotel Mr Madden questioned Mr Cafolla as to whether he and Mr Mooney had left the hotel on Sunday 29 May 2005 at approximately 6.00 pm.
32. Mr Cafolla subsequently telephoned Mr Mooney to advise him of this conversation. Mr Mooney was unable immediately to recall whether he had been rostered to work that day. The documentation shows that on 29 May 2005 Stephen Mooney had been rostered to work from 7.00 am until 3.30 pm. The clock-in record shows that he came into work at 7.56 am and clocked out again at 6.21 pm. Mr Cafolla was not on duty that day but came in to make up the order for the kitchen. He clocked in at 4.29 pm and out again at 9.15 pm. CCTV footage showed that Mr Cafolla and Mr Mooney left the hotel at approximately 4.30 pm and returned again approximately 2 hours later. Both claimants accepted that they did leave the hotel without clocking out. They contended that they went to the Europa hotel to discuss staff safety issues and their grievance against Mr Madden. It was the claimants' case that they were unable to locate the duty manager before leaving the hotel but had told the supervisor, Ms Catherine Doherty that they were leaving the hotel.
33. Mr Cafolla told the tribunal that he believed that disciplinary action was being instituted against himself and Mr Mooney in retaliation to their complaint against Mr Madden. On 7 June 2005 Mr Cafolla posted a letter to himself in which he recorded the discussion at the meeting with Mr Kirk on 3 June 2005 because he feared that Mr Kirk would deny that they had raised a formal complaint. The sealed envelope was produced by Mr Cafolla at the hearing. It was not denied by the respondent that the claimants had raised a complaint to Mr Kirk on 3 June 2005 therefore the tribunal did not find it necessary to inspect the contents of the letter.
34. On 8 June 2005 both claimants went to a restaurant in Great Victoria Street which is owned by a friend of Dr Rana. They explained to this person that they wished to arrange a meeting with Dr Rana and asked him to speak to Dr Rana on their behalf. Nothing further came of this meeting.

35. On 9 June 2005 both claimants received a letter from Mr Madden informing them that they were suspended pending the disciplinary process and inviting them to a disciplinary meeting on 10 June 2005. The letter to Mr Cafolla stated that the grounds for commencing formal action was that he left his place of work for nearly 2 hours without clocking out and that video evidence was also available. It was stated that “this matter was regarded as potentially gross misconduct which may result in summary dismissal in the absence of a satisfactory explanation”. A copy of the disciplinary procedure was enclosed. The claimants were advised of their right to be accompanied by a fellow employee or trade union official. Separate disciplinary hearings were conducted for both claimants. The tribunal was provided with the minutes of both of the disciplinary meetings.
36. The record of this meeting with Mr Mooney was headed “disciplinary minutes.” The meeting commenced at 1.10 pm. Mr Madden, Ms Helen McNamara, note taker, Mr Mooney and Ms Doherty who accompanied Mr Mooney were present. It is recorded that Lee Madden “gives a formal introduction – formal disciplinary hearing held in accordance with disciplinary rules. Chaired by Lee. No decision will be reached today.” Mr Madden outlined that the “issue of concern is that you left your place of work without clocking out for 2 hours”. Mr Madden confirmed that Mr Mooney had received a copy of the clock-in records. Mr Mooney stated that he had been discussing staff safety and other issues and that he did not want to raise any other matters “as it would be detrimental to the outcome of the disciplinary”. Mr Madden asked him whether he wished to see the video evidence. Mr Mooney declined as he did not dispute that he had left the hotel without clocking out. At the conclusion of the meeting Mr Madden explained that he would not be making a decision today and “explains the appeals process”. It was recorded that the meeting closed at 1.13 pm.
37. The record of the meeting with Mr Cafolla is headed “disciplinary minutes” and the word “investigation” is handwritten on the page. Mr Madden, Ms McNamara, Mr Cafolla and Ms Doherty were present. It is recorded that the meeting started at 1.30 pm. Mr Madden opened the meeting by stating it was a formal disciplinary hearing. Mr Cafolla asked whether he had been suspended and he was informed by Mr Madden that he had not yet been suspended but that he would be suspended after the meeting. The record shows that Mr Madden asked Mr Cafolla “do you understand the allegation, Lee explains this.” Mr Cafolla replied “I was out on company business discussing staff safety and other ongoing issues.” Mr Cafolla viewed the video evidence. He had no questions arising out of the video evidence and did not wish to raise any other issues as he “feels that any other factors would be detrimental to the hearing”. He was informed by Mr Madden that he would consider all the evidence and inform him of the decision to issue a disciplinary penalty “which has not been decided yet.” Mr Cafolla requested an explanation as to why “the rules and regulations posted out are different to those in the handbook” and he asked for the answer in writing. The meeting closed at 4.30 pm and Mr Madden confirmed that Mr Cafolla was on suspension on full pay “which could lead to (his) dismissal.”
38. Mr Madden’s recollection was vague but he told the tribunal that he would have sought advice from Peninsula after the meetings with the claimants on 10 June 2005. The tribunal was satisfied that the word “investigation” was only written later by Mr Madden after he had received advice from Peninsula Business Services. At the time of the meetings the tribunal is satisfied that Mr Madden was conducting a disciplinary hearing rather than an investigatory meeting.

39. Mr Mooney received a further letter from Mr Madden further to the meeting on 10 June 2005 which advised that he was suspended on full pay following the “allegations of falsification of records” and requiring him to attend a disciplinary hearing to be held on 17 June. The matters of concern were now stated to be “deliberate falsification of records in that you clocked in and then left the building, returned and clocked out”. The meeting commenced at 11.00 am and present were Helen McNamara, Mr Madden, Ms Doherty and Mr Mooney. The record shows that Mr Mooney asked why there is a further disciplinary meeting to which Mr Madden replied “additional questions need to be asked”. Mr Madden asked Mr Mooney to clarify what the issues were that necessitated him and Mr Cafolla leaving the hotel on 29 May and why he felt it necessary to leave the hotel when there are conference rooms and 244 bedrooms. Mr Mooney responded that he had left the hotel because he did not feel secure to discuss staff issues and staff safety there. When asked what authority he had to leave the building, he stated that there was no duty manager available so he left the building with the line manager after trying to locate the duty manager in the back office and the restaurant. He stated that he went on without notifying the duty manager because it was imperative that he and Mr Cafolla discuss these issues at the Europa Hotel. Mr Mooney stated that he felt that he had the authority from his line manager to leave the hotel. When asked whether he wished to add anything for the record he stated that he had done his best for the company during his employment as had his line manager and found the charge of deliberate falsification of records to be “offensive”. The hearing ended at 12.30 pm. Mr Madden reminded Mr Mooney that he was still suspended on full pay and that the decision would not be made that day but would be sent to him in writing and advising about an appeals procedure depending on the decision made.
40. Mr Cafolla was waiting for Mr Mooney in the car park during the meeting. Afterwards Mr Madden came out and gave him a letter inviting him to a second disciplinary meeting on 20 June 2005. The matters of concern were now stated to be that he had “deliberately falsified records”. The disciplinary meeting took place on 20 June 2005 at 10.10 am. Mr Madden asked him what efforts he had made to find the duty manager on 29 May 2005. The video evidence shows him coming in at 16.43 and leaving at 16.44. Mr Cafolla stated that he had checked in the back office and she was not there. Therefore he had informed the supervisor where he was going. Mr Madden rejected his suggestion that it was custom and practice to tell the supervisor when a manager is leaving the hotel. Mr Madden raised the question as to why Mr Cafolla was not wearing his uniform and when asked of the relevance of this was informed that it showed intent to mislead people into thinking that he was not on duty. Mr Cafolla was asked why he had not notified Mr Madden subsequently that he had left the building on 29 May. Mr Cafolla asked Mr Madden to clarify why the disciplinary procedures sent out with the notifications of each of the two disciplinary meetings were different. He expressed his view that the disciplinary process was a complete farce and was continuing harassment because he had lodged a complaint against Mr Madden with Andras House. The meeting closed at 11.45 am. Mr Madden told Mr Cafolla that he would not be making a decision that day and that the letter will contain an appeals procedure.
41. Following the second disciplinary hearing Mr Madden sent a letter dated 22 June 2005 to Mr Mooney informing him that he was summarily dismissed and that as such was not entitled to notice or pay in lieu of notice. He was advised of the right of

appeal. It was stated that “The matter of concern was deliberate falsification of records and that you clocked in, left the building, returned and clocked out”. Mr Mooney’s explanation was considered “unsatisfactory because company business must be dealt with within the hotel property. When on shift all staff must be present in the hotel and when leaving on breaks the duty manager must be made aware of your absence. Little was done to locate the duty manager before you left. As you are unable to discuss the issues you left to deal with I currently have no explanation for your absence. When leaving the building for any period of time beyond your stated break you must clock out of the hotel premises. As this is not the case I have no other explanation for your behaviour other than falsification of records time sheets.” A letter in similar terms terminating his employment was sent to Mr Cafolla dated 22 June 2005.

42. Mr Mooney wrote to Mrs Ryan on 28 June 2005 to notify her of his intention to appeal against the dismissal by letter dated 28 June 2005. He outlined the grounds of his appeal. He denied deliberate falsification of records and stated that he had the permission of his line manager to leave the hotel. He stated that the real reason for the disciplinary proceedings was to divert attention from the fact that he was about to initiate a formal grievance against the general manager based on staff and personal safety concerns, harassment and general operational issues. He further alleged that other employees in similar circumstances had not been similarly disciplined. Mr Cafolla lodged a letter of appeal on similar terms dated 29 June 2005.
43. Mrs Ryan was tasked to deal with the appeal hearings as Ms Ferris had left the company. Her position was initially Personal Assistant to Lord Rana but she assumed responsibility for personnel matters because of her personnel background and the fact that she has qualifications with the Chartered Institute of Personnel Development. With the appointment of Ms Ferris towards the beginning of August 2004 Mrs Ryan took a step back from personnel responsibilities but became involved again after Brenda Ferris left in Easter 2005. There was a weekly meeting of general and group managers and Mrs Ryan would attend that meeting if any personnel issues were raised. She described her role as being “reactive” in that she would respond to queries as and when raised by managers, rather than proactive.
44. Mr Cafolla’s appeal took place on 7 July 2005. Mr Cafolla was not accompanied on this occasion due to the unavailability of Ms Doherty. Kelly Braik was present to take notes. At the outset of the hearing Mrs Ryan informed Mr Cafolla that she was conducting the appeal as a review hearing rather than a re-hearing. Her understanding of the disciplinary appeal procedure was that if an employee was appealing on the grounds that he or she had not committed the offence the appeal should take the form of a re-hearing. Mrs Ryan told the tribunal that she understood that Mr Cafolla was appealing only on the basis that the dismissal was too harsh, even though he denied deliberate falsification of records. Furthermore Mr Cafolla outlined to her the nature of his complaints against Mr Madden highlighting the alleged failure of Mr Madden to support him in the John McFadden incident. He also referred to his difficulties in arranging the meeting with Lee Madden to discuss issues of concern. Mrs Ryan recalled Mr Cafolla’s version of the events on 29 May 2005; namely that on the day in question that led to his suspension Riccardo Cafolla arrived at the hotel and clocked in as normal. By this stage he had already worked over 40 hours that week and as he does not receive overtime in reality there was no reason to clock in but he did. Once he had clocked in he went to locate Stephen

Mooney and the two of them left to get a coffee outside of the hotel. When he returned to the hotel he worked for a couple of hours doing the ordering and then clocked out when he had finished. Mrs Ryan asked why he clocked in and out and whether he received time off in lieu. Mr Cafolla replied that it was “automatic” and that “he does it without thinking but that he wasn’t going to be paid for these hours.”

45. Mr Mooney’s appeal took place on 18 July 2005. Kelly Braik took notes and the claimant was not accompanied due to the unavailability of Ms Doherty. The appeal hearing took the form of a review hearing. The record of the appeal hearing shows that Mr Mooney gave an account of the events and his concerns of matters prior to 29 May 2005. The record shows that Mrs Ryan did not make any inquiry at all with Mr Mooney as to his version of the events of 29 May 2005.
46. Following the appeal hearings Mrs Ryan sent a letter dated 18 July to Mr Mooney upholding the decision to summarily dismiss him on the grounds that “you did by your own admission leave the hotel for a period even though you were in the company of your line manager, but you had clocked in and you did accept the additional overtime paid for this period of absence. As per the company handbook, falsifying records such as timesheets falls under gross misconduct. In addition you have brought no new evidence to convince me that the decision was too severe.” She advised that this decision was final. Mr Cafolla received a similar letter dated 18 July 2005 which stated that the decision to dismiss him was to be upheld because “for the past 2 months, you had been receiving overtime pay due to the additional hours you had been working to fill in for a chef. At the time of the incident you were aware that you were being paid overtime as you had received it the previous month and the general manager had informed you that he was approving overtime also for June. This falls under falsification of records which is gross misconduct and you have brought no new evidence to convince me that the decision was too severe.”
47. Mrs Ryan confirmed to the Tribunal that she had proceeded on the assumption that the claimants had been paid for the 2 hours that they had been absent from the hotel after clocking in on 29 May 2005. However she told the tribunal that she had no recollection at all as what documentation she had before her at the appeal hearings. The tribunal did not believe her. She could not recollect whether she had the claimants’ personnel files, the clocking records for 29 May or the work rota, wages records or any documentary proof that the claimants had been paid for the hours for which they were absent on 29 May 2005. She stated that on a day-to-day basis general managers would contact either Peninsula or Ms Ryan for advice in relation to employment matters. Mrs Ryan would contact Peninsula if an employment matter arose. Mrs Ryan stated that she had simply sent all the documentation in relation to the claimants to Peninsula and then had acted on their advice. She believed that this would have been in the form of e-mails. The Tribunal ordered the respondent to provide copies of the advice given to it and Mrs Ryan by Peninsula. The ruling of the Tribunal is appended to this decision. After an adjournment of the hearing to enable the respondent to consider its position, Mr Moore indicated that his client did not wish to challenge the decision of the Tribunal to order disclosure of these documents. However the Tribunal was informed that the respondent had not been able to locate any documentation referring to the advice given by Peninsula to the respondent. The Tribunal did not accept this as a credible explanation. The Tribunal has proceeded on the basis that Mrs Ryan’s actions reflect the advice given to her by Peninsula. There

was no evidence before the Tribunal that Mrs Ryan had made any further inquiries following the appeal hearings or made any attempt to investigate any of the matters raised by the claimants during their appeal hearings.

48. At a Case Management Discussion on 29 May 2007 the Tribunal reconvened the case for hearing on 21-23 August 2007. It was indicated that Mrs Ryan would be required to give further evidence and Mr Moore told the Tribunal that the reconvened dates were suitable for Mrs Ryan. However on 21 August 2007, Mr Moore indicated that Mrs Ryan was not in attendance to give further evidence to the Tribunal because she had gone on holiday to Corfu and would be out of the jurisdiction until 27 August 2007. No explanation was given to the Tribunal as to why Mrs Ryan had apparently chosen to treat the Tribunal with contempt. The Tribunal infers from this that Mrs Ryan wished to obstruct the Tribunal in its task and that she did not wish to answer further questions in cross examination as to the conduct of the claimants' appeals and what might have become of the communications between herself and Peninsula.
49. The Tribunal inspected the clock-in records for 29 May 2005 and the staff rota. The clock-in records shows a "raw in" time of 7.56 and a "raw out" time of 18.21. The Tribunal also inspected Mr Mooney's payslips and an overtime approval form completed by Mr Cafolla. He is paid an hourly rate of £6.00 at the effective date of termination. In fact for that week the roster report shows that Mr Mooney was rostered to work for 45 ½ hours in total. His payslip for that week shows that he was paid for 43 ½ hours. The overtime approval form for Mr Mooney for the week ending 29 May 2005 appears to show that Mr Cafolla authorised 5 hours overtime for Stephen Mooney. Mr Gaynor told the Tribunal that he amended the authorised overtime figure when he was preparing the wages instructions the following Monday to reflect the fact that Mr Mooney had been absent from the hotel for 2 hours on 29 May. The roster for each week is verified against the time reports and is provided to Andras House by Mr Gaynor usually on a Monday morning. The time point system allows the input of the roster and this usually reveals any anomalies. The tribunal is therefore satisfied that Mr Mooney was not paid for the two hours for which he was absent on 29 May 2005.
50. In relation to Mr Cafolla the Tribunal is satisfied that he did not receive payment for the 2 hours for which he was absent from Days Hotel on 29 May. He is paid on a monthly basis and the pay records available show that he received £1375 for each month i.e. 1/12 of his annual rate for each month in 2005 except for May and June he was paid 59 ½ hours overtime on 27 May 2005 for overtime hours worked by him in March and April 2005. His last payslip was for £2125.91 made up of £951.90 earnings, £793.25 for holiday pay and £380.76 statutory holidays. The 29 May 2005 falls within Mr Cafolla's final payslip. Therefore the Tribunal is satisfied that he did not in fact receive payment for the 2 hours. Further the Tribunal is satisfied that in any event there was no danger that the respondent would have paid Mr Cafolla in respect of these hours, given the contention of Mr Madden that he had viewed the CCTV footage the following day and had alerted Mr Gaynor about this discrepancy.
51. The tribunal is satisfied that a proper investigation by Mrs Ryan would have revealed that neither claimant had been paid for the two hours. Further the tribunal is satisfied that Mrs Ryan did not even consider the appropriateness of the severity of the charges or the penalty imposed, in the circumstances.

52. Following receipt of Mrs Ryan's letter Mr Cafolla claimed social security benefits approximately 4 weeks after receiving notification of the outcome of the appeal. He received a letter from the DSS advising him that he could not claim benefit because Days Hotel had stated that he had left voluntarily. The tribunal found it surprising that incorrect information was provided by the respondent so short a time after Mr Cafolla had been dismissed. It was suggested that this was evidence of vindictiveness on the part of the respondent which would attract aggravated damages. The tribunal is satisfied that this caused unnecessary inconvenience to Mr Cafolla and added to his injury to feeling.

53. Mr Cafolla commenced employment at the Galgorm Castle Hotel in Ballymena on 28 September 2005. His average net earnings with the respondent at the time of dismissal were agreed to be £246 per week, his net earnings in new employment is £403.61 per week. It was submitted on behalf of Mr Cafolla that the Tribunal should deduct the sum of £179.80 per week travel allowance for petrol so that his earnings would then be £223.81 per week. The parties agreed that Mr Cafolla had sustained loss of statutory rights in the sum of £270 and job search expenses of £500.00.

54. Mr Mooney was unemployed for three weeks following his dismissal. He decided that because of the respondent's treatment of him that he would not seek employment in the hotel trade. He initially obtained part time employment with Belvoir Park Golf Club from 13 July 2005 until 27 October 2005 with an average weekly wage of £142.86 per week and with Nursing and Care Direct from 16 October 2005 until 27 March 2006 for which he earned £370 per week. However he decided to leave the position with Nursing and Care Direct due to health reasons and because he was becoming emotionally involved with clients' circumstances. He therefore obtained part time employment as a waiter at Galgorm Castle Estates from 5 October 2005 until 25 March 2006, when his position became full time. The tribunal was satisfied that Mr Mooney ceased to have loss of earnings as from 16 October 2005. The parties agreed that Mr Mooney sustained loss of statutory rights in the sum of £270 and job search expenses of £100.00.

D. The Law

Article 3 of the Fair Employment and Treatment (Northern Ireland) Order 1998 prohibits discrimination on the ground of religious belief or political opinion.

Article 3 (2) provides that "a person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of this Order if -

(a) on either of those grounds he treats that other less favourably than he treats or would treat other persons;

Article 3(3) A comparison of the cases of persons of different religious belief or political opinion under paragraph (2) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

PART III of the 1998 Order deals with discrimination against applicants and employees in the employment field

Article 19(1) provides that “It is unlawful for an employer to discriminate against a person, in relation to employment in Northern Ireland, -

- (b) where that person is employed by him –
 -(iii) by dismissing him or by subjecting him to any other detriment.”

Burden of proof

Article 24 of the **Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003** inserts **Article 38A** into the **1998 Order** which provides for the statutory reversal of the burden of proof in cases of religious/political discrimination:

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

- (a) has committed an act of unlawful discrimination or unlawful harassment against the complainant, 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.”

The tribunal must answer two questions in deciding whether there has been direct discrimination on grounds of religious belief or political opinion: Firstly, whether the claimants were treated by the respondent less favourably than it treated or would have treated another person with different religious belief/political opinion in the same or not materially different circumstances. Secondly, if so, was such less favourable treatment on racial grounds. The tribunal was mindful that “The fact that for the purposes of the law of unfair dismissal, an employer has acted unreasonably, casts no light whatsoever on the question whether he has been treated less favourably for the purposes of the Act (of 1976)”; as per Lord Browne Wilkinson in **Zafar v Glasgow City Council 1988 36**.

The tribunal considered and applied the guidance of the Court of Appeal in the case of **IGEN Limited and others v Wong, Chamberlin Solicitors and another v Emokpae, Brunel University v Webster 2005 IRLR 258**. The Court of Appeal ruled that the guidance issued by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd** in respect of sex discrimination cases, which has been applied in relation to race and disability discrimination, would be applied in amended form as set out below:

- (1) Pursuant to section 63A of the 1975 Act, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is

unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the claimant. These are referred to below as "such facts".

- (2) If the claimant does not prove such facts he or she will fail.
- (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
- (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
- (5) It is important to note the word "could" in section 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
- (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
- (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.
- (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
- (9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.
- (10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

- (11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
- (12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
- (13) 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 discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

This guidance applies equally to complaints of religious/political discrimination.

The tribunal considered relevant case law relating to cases of political and religious discrimination, some of which were referred to by Counsel for the parties in their submissions; in particular:

***Gerald Duffy v Ulsterbus* unrep. 84/01FET 28/02 FET, 140/02, 30th March 2007; *Igen v Wong* [2005] IRLR 258; *Sinclair Roche & Temperley v Heard* [2004] IRLR 763; *McDonagh v Thom (t/a The Royal Hotel Dungannon)* [2007] NICA 3; *Fire Brigades Union v Fraser* [1998] IRLR 697; *Glasgow City Council v Zafar* HL [1998] IRLR 36; *Qureshi v London Borough of Newham* [1991] 264 CA; *Smith v Manchester* [1974] 17 KIR 1 CA; *Foster v Tyne & Wear County Council* [1986] 1 All ER 567, 570; *Wilkinson v Belfast City Council* 423/04FET(13th April 2007); *Laing v Manchester City Council* [2006] IRLR 748; *Madarassy v Nomura International PLC* [2007] EWCA Civ 33; *Macdonald v Advocate-General for Scotland* [2003] IRLR 512; *Shamoon v Chief Constable of the RUC (HL)* [2003] ICR 337; *Nagarajan v London Regional Transport* [1999] ICR 877; *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96; *Vento v Chief Constable of West Yorkshire Police (No.2)* [2003] IRLR; *Ministry of Defence v Cannock* [1994] IRLR 509, [1994] ICR 918, EAT, *Smyth -v- Croft Inns* [1995] N.I. 292.**

E. Conclusions

- 1) The tribunal was satisfied that there was no actual comparator on these facts with whom the claimants could compare their treatment. The parties accepted that the correct comparator was a hypothetical comparator and for the claimants it was suggested that the hypothetical comparator should be a

Protestant member of staff who had raised a protest about staff safety and who had lodged a grievance against the manager concerned.

- 2) Mr Moore made no suggestion as to the characteristics of the hypothetical comparator but helpfully referred the Tribunal to the judgment of the House of Lords in ***Shamoon –v- Chief Constable of the RUC 2003 IRLR 285*** and in particular to the statements of Lord Nicholls at Paragraph 11 that; “...employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as (she) was. Was it on the proscribed ground which is the foundation of the application? Or was it for some other reason? If the latter the application fails. If the former, there will usually be no difficulty in deciding whether the treatment afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.”
- 3) The tribunal considered that the appropriate hypothetical comparator was a Protestant manager with a perceived Loyalist background employed in a hotel located adjacent to a Nationalist area who were accused of offences of gross misconduct and who had previously made a complaint that their manager had failed to support them against a background of attacks of a sectarian nature against the hotel. The tribunal considered that the manner in which the respondent had treated Mr McFadden and the Smith brothers was relevant to the issue of how the hypothetical comparator would have been treated.
- 4) The tribunal also considered the possibility that it could be argued that the respondent would have treated the hypothetical comparator in the same way had similar attacks emanated from a “republican/nationalist” community. However the tribunal was satisfied that even had this argument been advanced on behalf of the respondent (which it had not), it could not succeed following the reasoning of the Northern Ireland Court of Appeal in the case of ***Smyth -v- Croft Inns [1995] N.I. 292***.

Hutton LCJ, stated at page 305 (d-g) "If any employer owned a bar in a Protestant neighbourhood, patronised by Protestants, in which he employed a Roman Catholic barman, and a second bar in a Roman Catholic neighbourhood, patronised by Roman Catholics, in which he employed a Protestant barman, and that the employer dismissed both barmen on the grounds that the customers in the respective bars did not like being served by a barman of religious belief which differed from their own, then on the appellants argument the employer would not be guilty of religious discrimination because he did not treat either barman less favourably than the other. I consider this argument as fallacious. In my opinion, the employer will be guilty of religious discrimination against both barmen".

- 5) The tribunal was satisfied that the claimants had established the following facts:
 - i. From April 2005 and the “John McFadden incident” a conflict had arisen between the claimants and Mr Madden as to how to deal with disciplinary issues involving staff from Sandy Row in the context of the attacks of a sectarian nature on the hotel and its staff.

- ii. The claimants persistently tried to contact Mr Madden to discuss staff safety and disciplinary issues and were openly critical of what was perceived to be his failure to take appropriate action. This culminated with the claimants notifying the Mr Kirk that they wished to instigate a formal grievance against Mr Madden, which was connected with the sectarian attacks on the hotel.
- iii. Mr Madden and other senior managers did not wish to instigate any disciplinary action against John McFadden as they feared this would precipitate further attacks on the hotel.
- iv. The tribunal is satisfied that the attacks on the hotel were probably carried out by disgruntled employees/ex employees from the Sandy Row area in retaliation to disciplinary action taken by the claimants and Mr Madden. The tribunal is further satisfied that the attacks were sectarian in nature and directed in particular to Catholic employees of the hotel, including the claimants, because “the word was on the street that a Catholic general manager was out to sack all the Protestants” and following Mr Madden’s meeting with the local UDA, serious attacks on the hotel stopped, although the tribunal accepts that comments continued to be made to Mr Mooney by Mr McFadden.
- v. The decision to discipline the claimants was taken only after they had lodged their complaint with Mr Kirk, even though Mr Madden was aware prior to 3 June 2005 that the claimants had left the hotel without clocking out on 29 May 2005.
- vi. Mr Madden substituted the more serious offence of deliberate falsification of records for the initial “charges” which might have fallen into the less serious category of major misconduct. The tribunal concluded that the reason for this was that Mr Madden had decided from the outset that the claimants were to be dismissed.
- vii. The tribunal was satisfied that in fact the claimants were not guilty of deliberately falsifying records and further had not been paid for the two hours they were absent on 29 May 2005. The respondent did not carry out a proper disciplinary investigation prior to instituting disciplinary action against the claimants and the tribunal is satisfied that the respondent did not follow its own appeals procedure.
- viii. The tribunal was satisfied that the respondent treated the Smith brothers and Mr McFadden more leniently than the claimants in respect of the disciplinary process. The tribunal took into account that Mr Cafolla could only act as authorised by Mr Madden and Mr Gaynor. The Smith brothers were given repeated “final written” warnings when the disciplinary procedure permitted dismissal. Mr McFadden was not disciplined for walking out of the hotel on April 2005. By contrast the claimants were dismissed for gross misconduct without the respondents considering whether a lesser penalty was appropriate in view of the claimants’ clear disciplinary record.
- ix. The respondent was obstructive in the manner in which it complied or failed to comply with disclosure orders made by the tribunal both prior to and during the hearing and the tribunal was satisfied that the respondent

deliberately withheld relevant documentation, with particular reference to the appeal hearings.

- 6) The tribunal concludes that it **could** be inferred from these facts that the claimants were dismissed for reasons connected with their religious beliefs/political opinion. Therefore the tribunal turns to the explanation of the respondent to determine whether the treatment was in no sense whatsoever on the prohibited grounds. The tribunal was mindful that the respondent's witnesses had not given any evidence in chief in relation to any of the events which had occurred prior to the 29 May 2005. The explanation given for the claimants' dismissals is that the claimants had deliberately falsified records and as a consequence had been paid for the two hours they were absent from the hotel on 29 May 2005. The tribunal has already found facts contrary to this explanation and therefore considers that the respondent does not discharge its statutory burden.
- 7) Accordingly the tribunal finds that the respondent did unlawfully discriminate against the claimants on grounds of their religious belief/political opinion.

F. Remedy

- 8) The tribunal determined that it is appropriate to award the claimants damages, assessed on the same basis as damages for a statutory tort, in that as far as is possible compensation should put the claimant into the position they would have been but for the unlawful conduct of the respondent. **Ministry of Defence v Cannock [1994] IRLR 509.**
- 9) It was submitted by Mr Denvir BL that the tribunal should award the claimants damages pursuant to **Smith v Manchester [1974] 17 KIR** in addition to compensation for injury to feelings. It was further suggested that the claimants were entitled to receive aggravated damages in view of the manner in which the respondent had presented its defence of the action and in the wilful suppression of material evidence. The tribunal did not consider that it was entitled to award "Smith v Manchester damages" for loss of marketability and promotion opportunity in circumstances where neither claimant suggested that they had sustained personal injury as a consequence of the respondent's actions. The tribunal took into account that both claimants were now earning more than they did in their employment with the respondent.
- 10) The tribunal decided that it would award each of the claimants' compensation for loss of earnings and other agreed pecuniary loss, together with compensation for injury to feeling. The tribunal did not accept Mr Cafolla was financially worse off in his present employment given that his earnings were evidently substantially higher. The tribunal was not provided with any vouching documentation in relation to his alleged petrol expenses. The tribunal determined that the proper measure of compensation for injury to feeling for Mr Mooney is at the top end of the lower band of **Vento**, namely £5000.00. The tribunal was agreed that the proper level of compensation for Mr Cafolla should be at the lower end of the middle band in the sum of £7500.00 because of the additional injury to feeling arising out of the respondent's action in giving inaccurate information to the DSS. The tribunal was satisfied that the claimants

were entitled to receive aggravated damages in addition to an award for injury to feeling because it considered that the respondent had acted in a high handed manner in the way in which it dealt with issues relating to disclosure of documentation and in the failure, without satisfactory explanation of Mrs Ryan to attend at the reconvened tribunal hearing even though she had previously indicated that the date was suitable for her. The tribunal determined that the appropriate figure for aggravated damages in respect of each claimant is £2500.00.

- 11) The Tribunal considered that interest should be awarded pursuant to the Fair Employment Tribunal (Remedies) Order (Northern Ireland) 1995; and that interest on the award for injury to feelings should be from the date of the act of discrimination (on or about 22 June 2005) to the date of calculation, namely 30 November 2007. In relation to the award for pecuniary loss the Tribunal concluded the interest should be calculated from the mid point date, namely 19 August 2006 to the date of calculation, namely 30 November 2007.
- 12) Therefore the tribunal calculates compensation as follows:

Mr Mooney

Net Average earnings had claimant not been dismissed

£260 x 17 weeks [22/06/05-16/10/05] £4420.00

Less

Actual Earnings

Galgorm Castle [5/10/05-16/10/05] £100

Belvoir Park Golf Club [13/07/05-16/10/05]

£142.86 x 13 weeks £1857.18 **2462.82**

Plus

Loss of Statutory Rights **270.00**

Job Search expenses **100.00**

Injury to Feelings 5000.00

Aggravated Damages 2500.00

Interest

On £5000 x 8% 22/06/05-30/11/07 £976.44

On £2833 x 8% 19/08/06-30/11/07 £290.59 **1267.03**

TOTAL COMPENSATION £11599.85

Mr Cafolla

Net Average Earnings had claimant not been dismissed			
£246 x 14 weeks [22/06/05-28/09/05]			3444.00
Plus			
Loss of Statutory Rights			270.00
Job Search Expenses			500.00
Injury to Feelings			7500.00
Aggravated Damages			2500.00
Interest			
On £7500 x 8% 22/06/05-30/11/07	£1464.66		
On £4214 x 8% 19/08/06-30/11/07	£ 432.25		
			1896.91
TOTAL COMPENSATION			£16110.91

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

Chairman:

**Date and place of hearing: 30 April 2007 to 9 May 2007, 21 to 23 August 2007
and 11 September 2007, Belfast**

Date decision recorded in register and issued to parties: