Neutral Citation No: [2013] NICA 15 | *Ref:* **COG8785**

Judgment: approved by the Court for handing down | *Delivered:* **15/03/13**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM AN INDUSTRIAL TRIBUNAL
INDUSTRIAL TRIBUNALS (NORTHERN IRELAND) ORDER 1996

BETWEEN

JOHNATHAN MISKELLY

Claimant/Appellant

and

THE RESTAURANT GROUP UK LTD

Respondent

Before Girvan LJ, Coghlin LJ and Horner J

COGHLIN LJ (delivering the judgment of the court)

[1] This is an appeal from an industrial tribunal which issued its decision on 20 July 2012 after sitting to hear the appellant's claim between the 30th of April and the 2nd of May 2012. The appellant is a personal litigant who conducted his claim before the industrial tribunal and the appeal before this court himself while Mr Sean Doherty represented the respondent. The court is grateful to the parties and their representatives for the well prepared and carefully drafted written submissions and their succinct oral arguments.

[2] The respondent conducts business in a chain of restaurants known as "Frankie and Benny's" and, on the 1st June 2011, the appellant was appointed to be general manager of one of those restaurants that was scheduled to open in Bangor, Co Down, in late August 2011. Between the date of appointment and the opening of the Bangor restaurant the appellant was to take part in the respondent's "Manager in Training" (MIT) programme. However, he was dismissed with notice on the 26th of July 2011, his employment having lasted some eight weeks.

[3] Before the industrial tribunal the appellant advanced claims that his dismissal had been unfair, that he had been victimised by the respondent, that he had been the subject of discrimination on the grounds of race and that he was owed some £541.66 in respect of holiday pay as well as an undisclosed sum for breach of contract.

[4] After hearing the relevant evidence and the submissions of the parties the industrial tribunal determined that the appellant had been dismissed because he had not demonstrated the management skills that his application form in interview indicated that he possessed, that there were concerns that he would depart from the respondent's brand standards and that he had demonstrated a negative attitude towards his colleagues and the company. In the circumstances, the appellant's claims were dismissed although the tribunal did acknowledge that he had been deeply affected by his experience and had showed great determination to right what he believed to have been an injustice.

The Discovery Application

[5] Before this court the appellant made an application for discovery of the home, office and mobile telephone records of the chairman of the industrial tribunal together with the same records of Mr Sean Doherty, counsel instructed on behalf of the respondent, for the date of the 30th of April 2012. The basis of this application appears to be the appellant's allegation that, on the 1st of May 2012, in the tribunal's room, the President announced to Mr Doherty and the appellant that a discussion had taken place between herself and Mr Doherty during the evening of the previous day in the absence of the appellant. The appellant has claimed that, from that point on, he was not allowed to speak during the course of the hearing. We note that Mr Doherty empathetically denied that any such communication had taken place between himself and the chairman.

[6] Neither the chairman of the tribunal nor Mr Doherty are parties to the appeal before this court and, accordingly, there is no basis upon which this court could make an order for discovery in accordance with the provisions of Order 24 of the Rules of the Court of Judicature (Northern Ireland) 1980. We note that the chairman has formally denied that any such conversation took place and that the appellant has instituted a number of complaints that are currently under investigation.

The Lodging of the Appeal

[7] The tribunal decision was issued on 20 July 2012 and Order 60B Rule 1(2) of the Rules provides that notice of an appeal must be served on all parties to the proceedings within 6 weeks of receipt of the tribunal's decision by the appellant. Order 60B Rule 2 provides that *the* notice of appeal must be lodged in the central office within 7 days from service of the notice of appeal upon the respondent. In the course of giving judgement in this court in Magill v Ulster Independent Clinic [2010] NICA 33 Girvan LJ cited paragraph 59/3/5 of the 1999 Supreme Court Practice of

England and Wales as an accurate statement of practice in this jurisdiction and went on to state at paragraph 20 that:

> "As this passage makes clear it is the *service* of the notice of appeal which effectively commences the appeal, not the purported *lodgement* of a notice of appeal lodged in the court."

[8] In this case the appellant served a notice of appeal in "EAT Form 1" on the respondent by email dated 30 August 2012 and lodged a notice of appeal in the central office on the 5th of September 2012. In its skeleton argument the respondent has argued that the notice of appeal lodged in the Court Office was in a different format to that which had been served on the respondent and, in such circumstances, the respondent submits that no notice of appeal before this court has been served on the respondent. The respondent further argues that, therefore, the appellant has failed to comply with the rules of court relating to service and, as a result, is now out of time to bring this appeal.

[9] In the circumstances, this court has considered the difference between the two documents and, having done so, notes that the grounds of appeal identified in each document are the same. The practical differences appear to relate to formal matters such as the formats, the name and address of the appellant and the respondent, the date, location and judgement of the Industrial Tribunal and copies of the appeal documents. In Fontan v Teletech UK Ltd [2012] NICA 44 Morgan LCJ delivering the judgement of this court when dealing with an applicant who had not pursued her appeal because her application for a review of the decision of an industrial tribunal was outstanding observed at paragraph [8]:

> "We appreciate that the applicant is a personal litigant but it is her responsibility to ensure that she complies with Rules of the Court. It would have been open to her to apply for an extension of time within the six-week period prescribed for an appeal."

The principles applying to an application to extend time to lodge a notice of appeal were helpfully reviewed and articulated by Lowry LCJ in Davis v Northern Ireland Carriers [1979] NI 19 and approved by this Court in Magill. However, in this case there has not been a failure to lodge a notice of appeal, there is no evidence of any significant prejudice on the part of the respondent and, bearing in mind that the appellant is a personal litigant and that the alleged differences relate to formal drafting rather than substance, we decided to give consideration to the merits of the case and, to extend the time in the interests of justice in accordance with Order 3 Rule 5, if it was necessary to do so.

The Grounds of Appeal

[10] The appellant's grounds of appeal may be usefully summarised as follows:

(i) The tribunal misinterpreted the appellant's ET1 form and wrongfully dismissed the claim for unfair dismissal. In addition, the tribunal failed to acknowledge that the appellant had made a protected disclosure which led to his claim being pursued by the tribunal in the wrong direction. The tribunal also failed to appreciate that the appellant was claiming that his dismissal amounted to victimisation.

(ii) The respondent failed to comply with tribunal orders on more than one occasion without penalty.

(iii) The outcome of the appellant's case was decided by the alleged private discussion between the Chairman of the tribunal and the respondent's counsel and that was manifested by the Chairman taking an adverse view of the appellant from day 2 onwards. The Chairman of the tribunal wrongfully restricted the appellant to cross examination of one witness and failed to deal with several inconsistencies in the statement of that witness. The appellant claims that he was continually shouted down by the Chairman who badgered him and tried to impede him from giving his chosen answers.

(iv) On day 2 the Chairman wrongfully removed documents from the bundle of evidence which the appellant claims set out a history of illegal recruitment practices.

The Factual Background

[11] The tribunal helpfully set out its detailed findings of fact between paragraphs 22 and 58 of its written decision. It recorded that the respondent operates several chains of branded restaurants across the United Kingdom comprising in total some 400 premises and employing approximately 10,000 people. In April 2011 the respondent operated two restaurants in the Victoria Centre in Belfast and the plan was to open two additional Frankie and Benny's restaurants, one in Bangor in late August followed by another at Sprucefield in November. The MIT programme had been developed by the respondent at great cost in order to ensure that all new recruits were trained in the chain's brand standards, policies and procedures. Each recruit was provided with an MIT folder of training materials and had to complete a set of computer based training modules. The programme lasted from between 12-14 weeks with training being carried out mainly by a senior experienced General Manager and an Area Trainer both of whom reported to an Area Manager. In the appellant's case the person designated to conduct his training was Stephen Coulter (an Irishman) who was responsible for opening all Northern Ireland stores and whose line manager was Chris Thynne (a Scot), who was Senior Area Manager for parts of Scotland, Northern England and Northern Ireland. Gail Burns (an English lady) was the Area Trainer for the same area which included about 25 restaurants.

[12] Very shortly before the appellant started to work, the respondent had employed Gabrielle Caizzo (an Englishman) as the future General Manager at the Victoria Centre.

[13] The appellant made a number of complaints to Stephen Coulter about his training and the organisation of the Bangor restaurant. He expressed a belief that Gabrielle was receiving one-to-one training from Stephen Coulter whereas his training was being provided by less senior staff. He also felt that he should have been given the benefit of the two week in-house training placement at the respondent's restaurant in East Kilbride which had been afforded to Gabrielle Caizzo. In addition, the appellant complained about changes to his rota at short notice and his lack of involvement in the recruitment of kitchen staff for the Bangor premises. He said that he would have difficulty in communicating orally with those appointed as they were Polish. The appellant repeated these criticisms during a visit to the restaurant by Chris Thynne on 11 July 2011.

[14] On 14 July 2011 Gail Burns visited the Bangor restaurant and met the appellant. In common with her colleagues, Miss Burns placed great emphasis on the need to maintain and promote brand standards. During the course of her meeting with the appellant Miss Burns formed the view that he was very negative about the respondent company and its brand standards, especially with regard to his training. The appellant was informed by Miss Burns that the reason that Stephen Coulter had been spending time with Gabrielle Caizzo and that Gabrielle had been given the opportunity to go to East Kilbride was that a decision had been taken to "fast track" his training so that he could take over as General Manager in Belfast in order to permit Stephen Coulter to move to Bangor and provide full support for the appellant during the important opening period. It appears that the appellant expressed the belief that the practices of his previous employers were better and that he stated that things would be done "his way" when he took over at Bangor.

[15] On the 19th and 20th of July 2011 the respondent organised a training event in Edinburgh to be conducted by James Haigh, Assistant Human Resources Manager. While there was some difference between the parties with regard to the elements of the particular incident it was common case that, at one point, Gabrielle Caizzo told Mr Haigh that the kitchen staff for the Bangor restaurant were being recruited by an advertisement on a website aimed at Polish nationals. Angelique Salter, who was participating in the MIT scheme as Deputy Manager for the Bangor restaurant, agreed with Gabrielle and James Haigh indicated disapproval of that practice. Miss Salter also informed the appellant upon that occasion that she had seen his own job advertised on another website. When the appellant checked that site he saw an advertisement which read "General Manager – Northern Ireland – Belfast Area – location Bangor (BT20)". The respondent acknowledged that this had occurred but maintained that the vacancy in question was for the proposed new restaurant at Sprucefield, that the Bangor reference had been included in error and was soon rectified.

[16] On the 21st and 22nd of July 2011 the appellant together with Chris Thynne, Stephen Coulter and Gabrielle Caizzo took part in interviews to select the front of house staff for the Bangor restaurant. After the interviews were completed Mr Thynne asked to speak to the appellant and, after a short conversation, he handed him a letter inviting him to attend a disciplinary meeting on 26 July 2011 to determine whether disciplinary action should be taken against him as a result of shortcomings in his "general performance". The letter stated that dismissal was a possible outcome of the meeting and the appellant was told to stay at home in the meantime. The letter had been drafted by Mr Thynne who had also taken the decision to initiate disciplinary action. It appears that the letter did not contain any specific details of complaints or charges that the appellant would be required to meet. Mr Thynne also chaired the disciplinary meeting on 26 July 2011.

[17] At the disciplinary hearing the appellant was informed by Mr Thynne that he had received adverse reports about his performance in the MIT programme from Miss Burns and Mr Coulter. Mr Thynne also made his own observations relating to the appellant's lack of application, especially in the completion of his MIT folder, his expressed intention to depart from brand standards and a lack of commitment and enthusiasm for the job. By way of response the appellant complained that, despite his requests Gabrielle had been given preference in terms of training. He also maintained that his own performance compared favourably with other members of staff, criticised their performance and maintained that, rather than complaining about brand standards, he was suggesting improvement to service procedures based on his experience in his previous employment.

[18] In a letter dated the 27th of July 2011 Mr Thynne informed the appellant that his contract had been terminated with one week's notice. The reason given was the appellant's failure to maintain required standards. On the same day the appellant wrote a letter to Mr Thynne seeking to appeal. In that letter he criticised the disciplinary procedure and alleged that his job had been advertised on the internet, management had acted unreasonably in changing shift patterns and that he had not been given the same training opportunities as Gabrielle Caizzo.

[19] The appeal hearing took place on the 24th of August 2011 chaired by Mr Gavin Peace, Divisional HR Manager, who found the claimant to be "confrontational and aggressive". It appears that, at the conclusion of the appeal hearing, the appellant apologised to Mr Peace for "barking" at him. By letter dated the 13th of September 2011 Mr Peace informed the appellant that he had not found any reason to overturn the original decision to dismiss. That letter comprised some eight pages and set out a list of matters that had been investigated, the people who had been interviewed by Mr Peace and the results of the investigation which have been helpfully summarised by the Tribunal at paragraph 57 of their decision.

The Proceedings before the tribunal

[20 Prior to the substantive hearing a number of Case Management Discussions and pre-hearings took place and it is clear that considerable efforts were made to ensure that, as far as possible, the appellant understood the nature and purpose of the proceedings together with the need to focus clearly on the relevant issues and the evidence relating thereto in accordance with the overriding objective. It was clearly necessary to do so and we note that, at one discussion the Vice-President felt compelled to remind the appellant that the tribunal was not "a freestanding public inquiry into the workings of the respondent company." In so doing the tribunal was commendably seeking to comply with guidance provided by this court in cases such as Rogan v South Eastern Health and Social Care Trust [2009] NICA 47, Peifer v Castlederg High School and Western Education and Library Board [2008] NICA 49 and Veitch v Red Sky Group Ltd [2010] NICA 39. As Girvan LJ observed in the course of delivering the judgement of the court in Veitch at paragraph [21]:

> "The duty of the Tribunal is to ensure reasonable expedition and due diligence on the part of the parties to identify and properly pursue relevant points only and to exercise leadership in the proper management of the case."

[21] After recording its detailed findings of fact the tribunal set out to identify and analyse the relevant authorities and legal framework. The tribunal then proceeded to apply the relevant legal principles to the findings of fact and, having done so, it arrived at the conclusion that the appellant's claim should be dismissed.

The relevant Legislative Framework and Legal Principles

[22] The Race Relations (Northern Ireland) Order 1997 ("the 1997 Order") provides as follows:

> "**Racial Discrimination**
>
> 3-(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Order if –
>
> (a) on racial grounds he treats that other less favourably than he treats or would treat other persons.
>
> **Discrimination by way of victimisation**
>
> 4-(1) A person ('A') discriminates against another person ('B') in any circumstances relevant for the purposes of any provisions of this Order if –

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

(b) he does so for a reason mentioned in paragraph [2].

[2] the reasons are that –

(a) B has –…..

(iii) otherwise done anything under this Order in relation to A or any other person.

Meaning of 'racial grounds'

5–(1) Subject to paragraphs [2] and [3] in this Order –

'racial grounds' means any of the following grounds, namely colour, race, nationality or ethnic or national origins;

Burden of Proof: Industrial Tribunals

52A-(1) This Article applies where a complaint is presented under Article 52 and the complaint is that the respondent –

(a) has committed an act of discrimination, on grounds on race or ethnic or national origins, which is unlawful by virtue of any provision referred to in Article 3(1)(B)(a), (e) or (f), or Part IV in its application to those provisions, or

(b) has committed an act of harassment.

(2) Where, on the hearing of the complaint, 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 such an act of discrimination or harassment against the complainant;

(b) is by virtue of Article 32 or 33 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."

[23] The relevant provisions of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") are as follows:

"**The Right not to be Unfairly Dismissed**

126-(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Paragraph (1) has effect subject to the following provisions of this part (in particular Articles 140-144).

140-(1) Article 126 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than one year ending with the effective date of termination.

(3) Paragraph (1) does not apply if –

(ee) Article 134A applies.

Protected Disclosure

134A An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principle reason) for the dismissal is that the employee made a protected disclosure.

Meaning of 'Protected Disclosure'

67A In this Order a 'protected disclosure' means a

qualifying disclosure (as defined by Article 67B) which is made by a worker in accordance with any of Articles 67C – 67H.

Disclosures Qualifying for Protection

67B-(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following:

(a) that a criminal offence had been committed, is being committed is or likely to be committed;

(b) that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject;

(f) that information tending to show any matter falling within any one of the preceding sub-paragraphs has been, is being or is likely to be deliberately concealed.

Disclosure to Employer or other Responsible Person

67C-(1) A qualifying disclosure is made in accordance with this Article if the worker makes the disclosure in good faith –

(a) to his employer; or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to –

(i) the conduct of a person other than his employer; or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer,

> makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this part as making the qualifying disclosure to his employer."

Discussion

[24] The tribunal constituted the appropriate industrial court instituted for the purpose of resolving relevant employment issues and this court is confined to considering questions of law arising from the tribunal decision. The tribunal has the advantage of seeing and hearing the witnesses at first instance and it is fundamental to understanding the function of this court to appreciate that it does not conduct a general rehearing. Article 22 of the 1996 Order provides that a party to proceedings before an industrial tribunal who is dissatisfied *in point of law* (our emphasis) with a decision may appeal to this court. We remind ourselves of the observations of Girvan LJ in Carlson Wagonlit Travel Ltd v Robert Connor [2007] NICA 55 when he said at paragraph [25]:

> "In this case the decision of the Tribunal must stand unless the Tribunal made an error of law in reaching its conclusions; based its conclusions on material findings of fact which were unsupported by the evidence or contrary to the evidence; or the decision was perverse in the sense that no reasonable Tribunal properly directing itself could have reached such a decision."

In the course of delivering judgment in Yeboah v Crofton [2002] IRLR in the court of appeal in England and Wales Mummery LJ, referring to appeals based on perversity said at paragraph [93]:

> "Such an appeal ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has 'grave doubts' about the decision of the Employment Tribunal, it must proceed with 'great care': *British Telecommunications plc v Sheridan* [1990] IRLR 27 at paragraph 34."

See also the decisions of this court in Rooney – Telford v New Look [2011] NICA and Praxis Care Group v Hope [2012] NICA 8.

[25] One of the grounds relied upon by the appellant is that the tribunal "removed" his claim for unfair dismissal and failed to acknowledge that he claimed

to have made a protected disclosure thereby causing his claim to be pursued in the "wrong direction". During early exchanges of correspondence the tribunal did notify the appellant that his claim in respect of unfair dismissal had not been accepted because he lacked the continuous service requirement of at least one year. However, it is quite clear from paragraphs 16-18 of the tribunal's decision that there is no substance in the claim that the tribunal did not ultimately accept and consider the claim for unfair dismissal on the basis that the appellant claimed to have been a "whistle-blower." Somewhat unusually, after the hearing of evidence had concluded, the tribunal decided that it was in the interests of justice to permit the appellant to amend his claim to include "whistleblowing" (making a protected disclosure) as an addition or alternative to his claim of victimisation since both claims were based on the appellant's evidence that he had done a protected act. In permitting the amendment the tribunal quite properly recognised the need to give some latitude to the appellant as a personal litigant while ensuring that the overriding objective was pursued.

[26] The appellant's evidence to the tribunal was that he himself had expressed concern to James Haigh regarding the use of a Polish website to recruit employees as kitchen staff at the training event on the 19th and 20th of July 2011. In his letter of the 27th of July 2011 to Mr Thynne raising a number of concerns the appellant did refer to the fact that Gabrielle and Angelique had disclosed how kitchen staff jobs were only advertised in Poland and not in Northern Ireland but he did not assert that he had taken any part in such disclosure. The appellant sent the same letter, with some amendments, to James Haigh on the 28th of July 2011 as grounds for his appeal against dismissal. That copy of the letter recorded at point (vi) that it was Gabrielle and Angelique who had "disclosed to you in Edinburgh". On the 7th of November 2011 the appellant wrote again with regard to the Edinburgh incident in the following terms:

> "As mentioned previously, comments were made by both Gabrielle Caizzo and Angelique Salter to James Haigh on the 19th of July 2011 regarding the company's failure to advertise the kitchen positions for the Bangor site in Northern Ireland. It was stated by both these people that the kitchen jobs were only advertised in Poland. For clarification purposes this was openly discussed with everyone who attended the course in Edinburgh on the date mentioned. My adviser has suggested that this is a matter yet to be brought to the attention of both the EHRC and ECNI and at this moment in time I am inclined to agree. My adviser also believes that I was dismissed because I knew too much information, fell into the minority of the management team by being Northern Irish and my dismissal was in fact nothing to do with my alleged under performance."

[27] Perhaps most significant of all in the course of setting out his claims for the Tribunal in Form ET1 the appellant again attributed the relevant disclosure to Gabrielle Caizzo stating:

> "On 19th plus 20th July, at the only two day's official training I received in Edinburgh, Gabrielle Caizzo made a statement to James Haigh in front of a room full of people, clearly stating that the kitchen jobs for the new Bangor site due to open were never advertised in Northern Ireland, but were however advertised in Poland."

[28] The first time that the appellant made any claim that it was he who had made the relevant disclosure was in the letter to the Tribunal of the 20th of July 2011 which should have been dated the 20th of September 2011. In that letter to the Tribunal the appellant referred to the incident in Edinburgh "involving James Haigh (HR Manager), Gabrielle Caizzo and *myself* and asserted that he had raised a concern to Mr Haigh about restricting the kitchen jobs to Polish employees". That letter was sent on the day after the appellant had completed his form ET1 but after he claimed to have received advice from the Equality Commission.

[29] We note that the Tribunal did not make any finding as to the veracity of this claim although, in our view, it would have been entitled to do so on the basis of the evidence. The Tribunal determined that the claim did not meet the statutory grounds for a finding of victimisation contrary to the 1997 Order in the absence of any previous action taken under that Order. With regard to the alternative that this claim amounted to a "protected disclosure" the Tribunal determined that the appellant did not reasonably believe that the respondent had or intended to fail to do any of those matters set out in the statute and that the claim did not provide the ground to sustain a claim for automatic unfair discrimination. The Tribunal also recorded Mr Thynne's firm denial that he had any knowledge of any disclosure of any description having been made by the appellant in Edinburgh at the time when he took the decision to dismiss the appellant. We do not consider that the reasoning of the Tribunal can be faulted in relation to this ground of appeal which we accordingly reject.

[30] In support of his claim that he was subject to discrimination the appellant, who is a native of Northern Ireland, compared himself to Mr Caizzo, an English man, and asserted that because of his nationality the respondent had subjected him to the following unfavourable treatment:

(i) Constant changing of his rota without warning.

(ii) His job being advertised by the respondent on the internet.

(iii) Arranging for Mr Caizzo to attend the two week training course in East Kilbride and providing him with 1-2-1 training from Stephen Coulter while his training was provided by less senior staff.

(iv) The investigative, disciplinary and dismissal procedures carried out by the respondent.

[31] Between paragraphs 59 and 69 the Tribunal carefully and accurately set out the relevant legislation and authorities. The Tribunal specifically referred to the cases of Igen Ltd v Wong [2005] IRLR 258 and Madarassy v Nomura International PLC [2007] IRLR 246 together with the guidance contained therein. It also noted the decisions of this court in Nelson v Newry and Mourne District Council [2009] NICA 24 and Curley v Chief Constable of the Police Service of Northern Ireland [2009] NICA 8 which gave approval to the guidelines contained in Igen and Madarassy and directed tribunals to give full consideration to the 'factual matrix' which resulted in the claim and to stand back and focus on the issue of discrimination. The tribunal correctly recorded the proposition repeatedly emphasised in those authorities that the bare fact of a difference in status, in this case Northern Irish as opposed to English nationality, is not in itself sufficient material from which a tribunal can conclude that an act of unlawful discrimination has taken place.

[32] At paragraph 70 the tribunal then proceeded to analyse in some detail the factual foundation for the several allegations of unfavourable treatment. The tribunal considered that the respondent had provided a cogent, non-discriminatory and reasonable explanation for any difference in the sequencing of the training being provided to the appellant and Mr Caizzo. Mr Thynne on behalf of the respondent conceded that the changes in rota ideally should not have occurred but that the reality within the industry was that such changes were far from unusual. The tribunal recorded that there was no evidence that Mr Caizzo or any other member of staff had sustained fewer changes than the claimant and could thus be regarded as treated more favourably. The tribunal found that the advertisement of the appellant's job had been an unfortunate but minor error as a consequence of which the appellant had not suffered any detriment. It considered that the person alleged by the appellant to have been the source of discrimination, Mr Thynne, had only been minimally involved in that incident insofar as he had notified the relevant section of the respondent's workforce that advertisements were to be placed for employees for the Sprucefield restaurant and had taken no further part in the exercise. The tribunal accepted that elements of the procedures leading to the appellant's dismissal gave cause for concern including the fact that Mr Thynne was the investigating officer as well as the disciplinary officer, that the appellant should have been provided beforehand with greater detail of the allegations and the grounds upon which disciplinary action was to be instituted and that Mr Peace approved the content of the dismissal letter as well as chairing the hearing of the appeal. On the other hand, the tribunal recognised that this was not a case of unfair dismissal, the period of employment had been very short, the requirements of the Modified Dismissal Procedure of notice in writing of the offence, notice that

dismissal was a possible outcome, a discussion meeting and an appeal hearing had all been met. In the circumstances, the tribunal concluded that there was nothing to suggest that the dismissal and the procedures adopted prior to the dismissal determination had been tainted with unlawful discrimination on the grounds of race.

[33] We have already indicated that the tribunal's conclusion with regard to the absence of victimisation and/or a protected disclosure cannot be faulted. We have carefully considered the legal and factual analysis adopted by the tribunal in its approach to the claim of racial discrimination, which we consider to have been entirely appropriate. Having done so, we are quite unable to detect any error of law in their conclusion and, accordingly, we also reject this ground of appeal.

[34] At paragraph 71 of the decision the tribunal dealt with the appellant's claim that there had been a breach of the implied contractual term of trust and confidence based on the advertisement of his job on the industry website on 20 July 2011. As noted above the tribunal found that to have been an unfortunate but minor error. The tribunal referred to the well-known dictum of Lord Nicholls in Eastwood v Magnox Electric PLC [2004] IRLR 733 to the effect that such an implied term requires an employer to act responsibly, fairly and in good faith in the treatment of his employees in the conduct of his business. It also took into account the direction to consider the cumulative effect of the employers' conduct as a whole contained in the case of Woods v W M Car Services Ltd [1981] IRLR 347. The tribunal found that:

> "Looking at all the circumstances of this case, the tribunal has determined that the claimant was dismissed from his employment by Chris Thynne because in his opinion the claimant did not demonstrate the management skills that his application form and interview indicated he possessed. His attitude was very negative towards the company and colleagues but in particular, Chris Thynne had concerns that the claimant would depart from the respondent's brand standards. As General Manager of one of their restaurants, this was not acceptable to the respondent. The tribunal finds that this was the reason for the dismissal of the claimant."

In our view the tribunal, as a careful and properly directed industrial jury, was entitled to reach such a conclusion on the basis of the factual evidence and relevant legal framework. In such circumstances, we also reject that ground of appeal.

[30] We have considered the documentation that the appellant claims was wrongfully excluded from the hearing by the tribunal. It appears to consist largely of a number of media reports some 2/3 years old relating to investigations by the U.K. Border Agency at branches of the respondent's restaurants in England and Wales for the purpose of detecting and apprehending illegal immigrants and/or employees

lacking relevant documents. The respondent had objected to the inclusion of that material in the bundle on the grounds of relevancy and the tribunal referred to the matter at paragraph 10 of the decision. In the circumstances we agree with the view taken by the tribunal that the materials were irrelevant to the issues arising in these proceedings.

[31] The appellant has complained that the respondent failed to comply with tribunal orders without penalty. The orders in question relate to discovery and other interlocutory matters and the relevant delay/s a matter of some days. The respondent may well, upon occasions, have failed to comply precisely with tribunal orders but, as we have noted earlier, the proceedings were subject to case management and there is no suggestion that the appellant sustained any irredeemable prejudice as a consequence.

[32] Accordingly, this appeal must be dismissed.