Neutral Citation No. [2014] NICA 66 | *Ref:* **COG9388**

Judgment: approved by the Court for handing down | *Delivered:* **08/10/2014**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPEAL FROM THE DECISION OF AN INDUSTRIAL TRIBUNAL

BETWEEN:

MARTIN SHEIL

Claimant/Respondent

and

STENA LINE IRISH SEA FERRIES LTD

Respondent/Appellant

Before: MORGAN LCJ, COGHLIN LJ and TREACY J

COGHLIN LJ (delivering the judgment of the court)

[1] This is an appeal from an Industrial Tribunal sitting in Belfast between 7 and 11 October 2013 which determined that Martin Sheil ("the respondent") had been unfairly dismissed from his employment with Stena Line Irish Sea Ferries Ltd ("the appellant") and that he had also been subjected to unlawful harassment on the grounds of sexual orientation. The Tribunal dismissed other claims brought by the appellant in respect of discrimination and victimisation on the grounds of sexual orientation and trade union activities. The Tribunal awarded the respondent a total of £37,513.32 in respect of compensation for unfair dismissal and £7,500 in respect of unlawful harassment. For the purposes of the appeal the appellant was represented by Frank O'Donoghue QC and Mr Mulqueen while Mr Lyttle QC and Mr McEvoy appeared on behalf of the respondent. The court wishes to express its appreciation of the industry, analysis and eloquence of counsel demonstrated in the preparation and delivery of their written and oral submissions. For the purpose of the proceedings the respondent was supported by the Equality Commission.

The Factual Background

[2] The respondent is some 51 years of age and, at the time of his dismissal for gross misconduct on 12 December 2012 he had been employed by the appellant company for more than 10 years during which period he had never been the subject of any previous complaint. The incident that led to the respondent's dismissal occurred on Friday 2 November 2012 during the morning shift. The respondent and a number of other port operatives were engaged as "tug" drivers. A "tug" is a lorry cab which does not have a trailer or load attached. At about 7.15-7.30am the tugs were engaged in loading the Heysham vessel when it seems that the vehicle driven by the respondent approached the vehicle driven by a fellow employee, William Gilmore. It seems that the respondent then left his tug and entered the cab of Mr Gilmore's vehicle. According to a third operative Brian English, whose attention was drawn to the tugs driven, respectively, by the respondent and Mr Gilmore, the respondent started shouting at Mr Gilmore and then jumped from his tug and ran up into the back of Mr Gilmore's vehicle. Mr English approached the vehicle and said that he saw the respondent punching Mr Gilmore around the head and face.

[3] Mr English said that he climbed into Mr Gilmore's tug and used physical force to remove the respondent who shouted "this isn't the end of this". According to Mr English Mr Gilmore's face was bleeding and his safety glasses were broken.

[4] The respondent claimed that, during the course of a journey in a work's minibus on the previous day, 1 November 2012, Mr Gilmore had made a number of homophobic comments which were directed at the respondent including the observation that "some people in here should come out of the closet". The respondent believed that this remark was aimed at him and he gave evidence before the Tribunal that, over the previous year, Mr Gilmore had made various similar remarks about his personal life and sexual orientation. That evidence was corroborated by Mr Jim Fenton who gave evidence before the Tribunal. Mr Gilmore denied making any such remarks which were later to become the subject of the harassment complaint by the respondent but the tribunal preferred the evidence of Mr Fenton in relation to this topic to that of Mr Gilmore whom they found to be an "unconvincing witness." The finding of harassment has not been appealed.

[5] Mr English told the Tribunal that later on the morning of the alleged assault the respondent had come to him and said:

> "I know you don't want to know but he was laughing at me and that's why I done it."

That evening Mr English reported the matter to the foreman, Mr Gourley. The respondent told the tribunal that he himself had not reported the matter as he would have been uncomfortable raising issues in relation to his sexual orientation.

[6] The 2 November 2012 was a Friday and on Monday 5 November Mr Howard Hillis, the appellant's General Manager, received a telephone call from Mr Gourley reporting an assault by one employee upon another employee. According to the finding of fact recorded by the Tribunal the victim was not named at that stage and Mr Hillis told the foreman to advise the alleged victim to report the matter officially since it appeared to be of a serious nature. Mr Hillis was later informed of the identity of the alleged victim, namely Mr Gilmore. Mr Hillis asked Mr Gilmore to attend his office where he advised him that he should report the matter in writing to the Human Resources Department and that he should also consider reporting it to the police. Mr Gilmore indicated that he wished to think it over before taking any further action although he was informed by Mr Hillis that the matter would be investigated by the company in any event because of the seriousness of the allegations. On the evening of 5 November 2012 Mr Gilmore handed Mr Hillis a letter stating that he was now making an official report. The letter read as follows:

> "I am writing to inform you about an incident that occurred last week.
>
> On Friday November 2nd at approximately 7.00am Mr Martin Sheil assaulted me. The assault took place in VT1 during the load up of the AM Heysham vessel. I have no clue as to why he would do this and have decided to ask for your assistance investigating this matter.
>
> If you have any questions regarding this matter please do not hesitate to contact me at the above address (ie his home address) or in VT2."

It seems that Mr Gilmore also reported the incident to the police but provided them with few details.

[7] The appellant's Duty Operations Manager, Robert Spruth, was directed to investigate the matter and an investigatory hearing took place on 8 November 2012. Mr Gilmore told Mr Spruth that he had been asked to assist the respondent with loading the top deck of the Heysham vessel because the respondent appeared to be doing this slowly and not particularly accurately. He said that he had been laughing at a remark made by another crew member about the respondent's driving and that he had "smirked" at the respondent when he later had to swerve out of the way of the respondent's tug. Mr Gilmore claimed that the respondent said that he was going to knock the smirk off his face, left his tug, entered Mr Gilmore's vehicle and climbed on top of Mr Gilmore. Mr Spruth then asked Mr Gilmore a series of questions that are recorded in the minutes of the meeting as follows:

"RS: Did he punch?

WG: Not that I can remember.

RS: Did he strike you in any way?

WG: Couldn't possibly say I was shocked, but if Brian wasn't there, I was at his mercy. He pushed me very forcibly. I didn't know about the blood until after. Brian pulled him off and he went and got into his tug and said `this is not finished'. And I said `you're right'.

RS: So Brian English saw all this?

WG: He heard the shouting. At first I thought it was a lorry driver pulling him off. I could see nothing; I just had my arm around Marty holding him.

RS: After you said `you're right' what happened?

WG: Just drove away and continued working."

Mr Gilmore denied having done or said anything that might have provoked the alleged assault by the respondent and maintained that he and the respondent had not spoken for over 2 years.

[8] Mr English also attended the investigatory meeting and confirmed that he had seen the respondent on top of Mr Gilmore punching him.

[9] A letter was written to the respondent inviting him to an investigatory meeting with Mr Spruth and informing him that the meeting was to provide him with an opportunity to give an explanation for an allegation of assault on Friday 2 November 2012. The respondent attended the meeting accompanied by Mr Cunningham, his union representative. Mr Cunningham indicated that they were not prepared to continue the meeting without seeing details of all allegations and relevant documents and he also raised issues about alleged failure to observe the respondent's rights as a trade union official. Mr Cunningham indicated that he wished to raise grievances against both Ms Barlow, who had written the letter suspending the respondent on full pay pending an investigation into the allegation of assault, and Mr Spruth. The Tribunal felt that there was likely to be substance in the complaints that Mr Cunningham's behaviour at the meeting was rude, aggressive and intimidating. Mr Cunningham agreed that the grievances would be put in writing and the meeting was adjourned. Ms Barlow stated that the company would be in contact. The investigatory meeting was not reconvened and Mr Spruth

recommended that the allegation against the respondent should be considered at a disciplinary hearing. At paragraph 15 of the decision, the Tribunal recorded that, while Mr Cunningham's behaviour was not of central importance, it did give "some indication" as to why the meeting was not reconvened.

[10] On 16 November 2012 the respondent raised formal grievances against both Ms Barlow and Mr Spruth. His complaint against Ms Barlow was that her decision to suspend him had constituted a pre-determination of guilt and, in addition, as a shop steward he should not have been suspended without his regional industrial officer and branch office being informed. The grievance against Mr Spruth was that he had been guilty of pre-determination and that he had refused to permit the respondent to see the details of the allegations made against him. In the course of cross-examination before the Tribunal Mr Spruth confirmed that he was not aware of the appellant's rules relating to grievances when he took the decision to recommend a disciplinary hearing and he accepted that he could have sought advice from the respondent's Human Resources or legal department. He accepted that he would have "stopped the clock" had he been aware that was consistent with the grievance procedure.

[11] On 21 November 2002 Mr Cunningham wrote to the appellant about the investigatory meeting with the respondent. Ms Barlow, the appellant's HR manager, replied on 26 November 2012. She stood over the conduct of the meeting and denied that the appellant had ignored the respondent's grievance which she said had not been received until 20 November 2012. She stressed that the appellant was very concerned about the aggressive stance adopted by Mr Cunningham. Mr Cunningham subsequently replied to this letter on 28 November 2012.

The Disciplinary Hearing

[12] On 20 November 2012 Ms Barlow wrote to the respondent inviting him to attend a disciplinary meeting stating that the purpose of the meeting was to discuss the allegation of assault and to determine whether the respondent's actions had amounted to gross misconduct. Ms Barlow pointed out that, if such a finding was reached, summary dismissal was a possible outcome. She enclosed copies of the disciplinary rules and procedures, the letter of complaint, the statements of Mr Gilmore and Mr English and the minutes of the investigatory meeting of 15 November 2012.

[13] The disciplinary hearing took place on 29 November 2012 and was conducted by Mr Adlington. The respondent attended together with his union representative, Mr Cunningham. At the outset of the hearing Mr Cunningham raised the subject of the respondent's grievance and suggested that if that was upheld the meeting would have to revert to the investigatory stage. He suggested that, in such circumstances, the disciplinary hearing should not proceed. The respondent intervened to indicate that he wanted to get the matter over as soon as possible and return to some degree

of normality. There was a heated exchange between Mr Cunningham and Mr Adlington at the end of which the respondent requested a short recess. When the hearing reconvened Mr Cunningham stated that, against his advice, the claimant wished to continue with the hearing.

[14] The hearing then restarted and the respondent was asked to provide his account of the events that had taken place on 2 November. The respondent explained that Mr Gilmore had made derogatory comments about his sexuality in the minibus on 1 November and that similar remarks had been made over several weeks. The names of the other passengers in the minibus were provided. The respondent said that on 2 November, Mr Gilmore drove past him laughing and smirking. He said that he pulled his vehicle alongside Mr Gilmore to ask him what he was laughing about. Mr Gilmore looked surprised. The respondent was upset and told Mr Gilmore to stop the nonsense about the stuff in the minibus. He wanted to clear the air and have it over and done with. He referred to having been called "a fruit" to which he said Mr Gilmore responded "sure you are a fucking fruit". The respondent said that Mr Gilmore then grabbed the top of his coat and he fell forward on top of Mr Gilmore. He said they had to be separated by Mr English. When questioned by Mr Adlington about the remarks allegedly made in the minibus and why he had not raised a grievance with management the respondent explained that it had been his intention to speak to Mr Gilmore on the Friday morning since he felt that he could deal with the comments "as a mature man" and sort the matter out. During the course of further questioning the respondent denied that he had struck Mr Gilmore or subjected him to any physical force. Mr Cunningham raised a number of points about the investigatory statements and pointed out inconsistencies in Mr Gilmore's evidence.

[15] On 3 December 2012 Mr Adlington conducted two further investigatory meetings with Mr Gilmore and Mr English but did not speak to Mr Browne, Mr Watson or Mr Fenton whose names had been given by Mr Cunningham during the course of the disciplinary hearing as fellow passengers in the minibus on 1 November. Mr English largely repeated the contents of his original statement. Mr Gilmore confirmed his original account but added that the respondent was "raining blows" on him and that he had been scared by the protective goggles that he had been wearing. He said that he had not wanted to report the matter straight away because he did not wish anyone to loss their job. He said that he had told everyone that he had fallen because he did not want the matter to go further. In his evidence to the Tribunal Mr Gilmore said that, by the time of the second interview, he changed from making no comment to the allegation of blows raining down on him because he had become aware that he had become the subject of lies told by the respondent.

The Respondent's Grievance

[16] On 6 December 2012 the respondent and Mr Cunningham attended a grievance investigation meeting with Ms Dianne Poole when they were given an opportunity to discuss the grievance. Ms Poole also obtained a report from Ms Burgess about the investigatory meeting with Mr Spruth. On 11 December 2012 the respondent was informed by letter that his grievances had not been upheld. Ms Poole stated that the decision to suspend had not been a pre-determination of guilt but was felt necessary in order to conduct a fair investigation into an allegation of serious assault. She also stated that she considered that there was no merit in the complaint of failure to notify the trade union of the suspension. She rejected the complaints about the letter inviting the respondent to the investigatory meeting expressing herself to be satisfied that the allegation was clearly identified in the invitation letter. She also referred to Mr Cunningham's conduct during the investigation of the meeting.

Dismissal of the Respondent

[17] On 12 December 2012 the respondent was dismissed for gross misconduct constituted by the offence of assault. Mr Adlington's letter of dismissal included the following:

> "You were given every opportunity to explain an account for your actions in relation to this incident and having listened to your explanations I consider them to be unsatisfactory for the following reasons:
>
> After consideration of the evidence presented by all parties including follow up with the complainant and an eye witness following the disciplinary hearing with you and the information provided by yourself during the disciplinary hearing I have reason to believe that the above alleged offence was committed by you. The reasonable belief is based on the evidence available to me and is strengthened by the independent witness who has been interviewed twice and has confirmed the situation that he witnessed on 2 November 2012.
>
> Regardless of whether there had been prior verbal communication between you and the complainant the company has a grievance procedure in place which is there for both the benefit of the company and the employee should it be required by either party. The use of the procedure may have prevented such an incident

> occurring in the first instance should you have deemed the treatment of yourself severe enough to initiate it."

[18] Mr Adlington went on to say that he had been unable to identify any adequate explanation for the incident or any mitigating factors, apart from the respondent's length of service. He advised the respondent of his right to appeal. It is to be noted that Mr Adlington did not inform the respondent of his post hearing further interviews with Mr Gilmore and Mr English and he did not carry out any interviews of the other passengers in the minibus on 1 November whose names had been provided.

The Appeal Process

[19] On 20 December 2012 the respondent submitted a letter of appeal in which he denied any assault upon Mr Gilmore, drew attention to the original account given by Mr Gilmore in which he had stated that he "can't remember" and "couldn't possibly say" that he had been punched, that Mr English bore him a personal animosity, that Mr Gilmore had been the aggressor and that there was a clear bias on behalf of the appellant in terms of taking action against him and not Mr Gilmore.

[20] On 17 January 2003 the respondent and Mr Cunningham attended an appeal hearing conducted by Mr Howard Hillis, the appellant's Port Operations Manager in Belfast. The respondent gave his account of the incident and background. He complained about the initial investigatory meeting and the treatment of his grievance. He asked whether the three witnesses that he had named were followed up by Adlington. He said that the statements of Mr English and Mr Gilmore were self-contradictory. Mr Hillis subsequently conducted interviews between 23 and 25 January 2013 with four of the other employees who had travelled with the respondent and Mr Gilmore in the minibus on 1 November. It is to be noted that neither the fact that these interviews were being conducted nor their contents were communicated to the respondent. One of the individuals stated that he had not heard any comment specific to the respondent but confirmed that there was always lots of banter. Another also stated that there were always comments in the minibus but agreed that Mr Gilmore had mumbled something about someone "coming out of the closet" and everyone knew that this was a reference to the respondent. He said that comments had previously been made by all the gang in relation to the respondent and his sexuality but it was seen as "banter". He did not recall any such comments being made when the respondent was present and said that Mr Gilmore and the respondent simply "didn't like each other". A third individual confirmed the evidence of the respondent about the nature and content of the comments that had been made but said that the respondent just ignored it all the time.

[21] On 11 February 2013 Mr Hillis wrote to the respondent confirming that he was upholding Mr Adlington's decision to dismiss for gross misconduct. His conclusions were set out as follows:

"The incident was officially reported by Mr Gilmore on Monday 5 November and management initiated formal procedures as per company policy. I am satisfied the procedures in relation to suspension, investigation and discipline were all as per company policy and at no time was there any bias towards yourself as you claim.

The grievances forwarded were subject to separate investigation and were dealt with accordingly.

Interviews with those personnel you claim were present when Mr Gilmore made comment to you and who were not interviewed during the initial investigation do not provide any further clarity on the alleged incident."

The Legal Framework

[22] The relevant provisions of Article 130 of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") provide as follows:

"130-(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show that –

(a) the reason (or, if more than one, the principle reason) for the dismissal, and

(b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this paragraph if it –

(b) relates to the conduct of the employee,

(3) Where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted

reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

[23] Between paragraphs 37 and 40 of the decision the Tribunal provided a careful analysis of the relevant jurisprudence relating to substantive unfairness in connection with a dismissal. The passages therein cited from Rogan v South Eastern Health and Social Care Trust [2009] NICA 47 and Dobbin v City Bus Limited [2008] NICA 42 have again recently been approved by this court in Antrim Borough Council v McCann [2013] NICA 7. The Tribunal set out the relevant provisions of statutory dismissal procedure at paragraph 41 of the decision and referred to the case of Polkey v Dayton Services Limited [1987] 3 All England Reports 974 at paragraph 42.

The tribunal's decision with regard to unfair dismissal

[24] In the course of considering the fairness of the dismissal of the respondent the Tribunal looked at, in turn, the appellant's investigation, the disciplinary hearing and the appeal therefrom. At paragraph 52 of the decision the Tribunal recorded that it was important to note that:

> "… issues in relation to the investigation of alleged misconduct feature in both the question of whether a dismissal is substantively unfair and whether it is procedurally unfair."

[25] The Tribunal noted that the invocation of the appellant's investigatory and disciplinary procedures were somewhat unusual in that neither of the protagonists had reported the incident of 2 November 2012 and that the matter had been brought to management's attention by Mr English. The Tribunal considered that the investigatory interview conducted by Mr Spruth with the respondent had been unsatisfactory mainly due to the stance adopted by the respondent and Mr Cunningham. Nevertheless, the Tribunal considered that Mr Spruth ought to have done more to ensure that the meeting was reconvened so as to afford the respondent an opportunity to give his side of the case. This meant that the disciplinary proceedings commenced with only one half of the picture on record. However, the Tribunal did not consider that this was a "fatal flaw in itself".

[26] The Tribunal recognised that the respondent was given a full opportunity to state this case during the disciplinary hearing before Mr Adlington. During that hearing the respondent provided Mr Adlington with the names of three individuals, apart from Mr Gilmore, who had either witnessed or been involved in the previous homophobic comments. The Tribunal recorded that Mr Adlington "… did not

consider that the derogatory remarks about the claimant's sexuality warranted further investigation" and that it was clear that Mr Adlington did not consider "whether the allegations made by the claimant constituted mitigating circumstances". In the view of the Tribunal that constituted a "serious defect in the disciplinary process" as a result of which the disciplinary hearing was flawed.

[27] At paragraph 56 of the decision the Tribunal recorded that it was necessary to consider the process as a whole and accepted that it was quite possible for defects in a disciplinary hearing to be cured on appeal. It observed that it was to the credit of Mr Hillis that he was prepared to go further than Mr Adlington and interview the employees alleged to have witnessed the minibus incident. It found that it was difficult to fault his conduct of the appeal which appeared to have been "scrupulously fair". However, the Tribunal took the view that all of the good work performed by Mr Hillis was undermined by one serious flaw which was that, on any reckoning, he should not have conducted the appeal because of his involvement at an earlier stage in the process. The Tribunal felt that it was "conspicuously unfair" to the respondent for Mr Hillis to conduct the appeal from the disciplinary hearing given that he had "strongly encouraged" a reluctant Mr Gilmore to make a complaint of assault.

[28] The Tribunal expressed its conclusion with regard to the issue of unfair dismissal at paragraph 58 of the decision in the following terms:

> "In our view the flaws in the investigatory and disciplinary procedure rendered the dismissal substantively unfair. As we have indicated in the context of whether or not the dismissal was fair it is not the job of the Tribunal to determine what happened on 2 November 2012. That is for the employer to determine having carried out a reasonable investigation. Mr McAvoy had invited us to conclude that no reasonable employer could have found the claimant guilty of assault. We think that this is going too far. In our view it would have been possible for the respondent to have arrived at a finding that the claimant had been guilty of assault if the process had been properly handled."

Discussion

[29] Industrial Tribunals are often referred to as "industrial juries" and it is important to remember the extent to which the decisions of such bodies benefit from the contribution of the lay members of the panel with their extensive knowledge and practical experience of both sides of industry. In such circumstances this court should bear in mind that it should not be over-prescriptive in terms of the degree of analysis that it applies to the reasoning and fact finding of such a Tribunal.

[30] However, both reasoning and fact finding have a significant role to play in the construction and formulation of Tribunal decisions. With regard to the former we bear in mind Rule 30 of the IT Rules of Procedure and in particular Rule 30(6) which provides as follows:

> "(6) Written reasons for a decision shall include the following information –
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> (a) the issues which the Tribunal or Chairman has identified as being relevant to the claim;
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> (b) if some identified issues were not determined, what those issues were and why they were not determined;
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> (c) findings of fact relevant to the issues which have been determined;
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> (d) a concise statement of the applicable law;
>
> (e) how the relevant findings of fact and applicable law have been applied in order to determine the issues;
>
> (f) where the decision includes an award of compensation or a determination that one party make a payment to the other, a table showing how the amount or sum has been calculated or a description of the manner in which it has been calculated."

In many respects the statutory obligation simply clarifies the general duty to provide adequate reasons for judicial decisions since, if it is not apparent to the parties why one has won and the other has lost, justice will not have been done. As Lord Phillips MR observed in English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605:

> "The essential requirement is that the terms of the judgment should enable the parties and an Appellate Tribunal readily to analyse the reasoning that was essential to the judge's decision."

We also note the similar observations of Morgan LCJ delivering the judgment of this court in Ferris & Gould v Regency Carpet Manufacturing Ltd [2013] NICA 26 at paragraphs [7]-[9]. In the Antrim Borough Council case, referred to earlier in this

judgment at paragraph [23], Girvan LJ delivering the judgment of the court said at paragraph [3]:

> "[3] In its decision dated 29 June 2012 the Tribunal purports to set out what it called 'findings of fact' in [4]-[51]. As not infrequently happens in such decisions the recorded 'findings of fact' are not limited to the conclusions reached by the Tribunal on the evidence adduced but interspersed with a resume of disputed evidence. This does not assist an appellate court which on occasions is left with a record of what a witness is reported to have claimed or said in the course of the hearing without the Tribunal making clear what conclusion it has reached on the relevant evidential material. In formulating its decision a Tribunal should follow the course of succinctly recording the relevant evidential material and set out its analysis of the evidence where this is necessary and set out its conclusions from its analysis of the evidence. It can then set out its findings of fact. Such findings will emerge from the conclusions arising from undisputed evidence or from the Tribunal's conclusion reached after analysis of disputed evidence."

[31] As we have already noted earlier in this case the Tribunal did not consider it appropriate to determine what actually occurred on 2 November 2012. However, it seems to us that such a determination was likely to be significant in reaching a conclusion as to whether the relevant belief was genuinely held by the appellant and, if so, whether it was reasonable in the circumstances.

[32] There are a number of matters that give this court some concern about the reasoning and fact finding of the Tribunal:

(i) As noted earlier in this judgment the Tribunal found that the disciplinary hearing conducted by the appellant was flawed because Mr Adlington failed to interview the persons alleged to have witnessed the homophobic comments directed to the respondent prior to the alleged assault. It seems clear that Mr Adlington did consider this evidence and in his letter to the respondent of 12 December 2012 he gave the following reason for not pursuing the matter further:

> "Regardless of whether there had been prior verbal communication between you and the complainant the company has a grievance procedure in place which is there for both the benefit of the company and the employee should it be required by either party. The use

> of the said procedure may have prevented such an incident occurring in the first place should you have deemed the treatment of yourself severe enough to initiate it."

That was consistent with the evidence that Mr Adlington had given to the tribunal in the course of which he also maintained that, in any event, even if the assault had been a reaction to such comments it would not have changed his decision since the respondent would have effectively taken the law into his own hands. There is no reference to such evidence on the part of Mr Adlington in the Tribunal's decision. On the other hand we also note that the Tribunal did not make any reference to the further interviews of Mr Gilmore and Mr English carried out by Mr Adlington after the hearing nor to his failure to disclose the contents of such interviews to the respondent.

(ii) It seems fairly clear that, whatever the faults on the part of Mr Adlington, the Tribunal considered that the defect in the disciplinary process had the potential to be cured by the "scrupulously fair" conduct of the appeal by Mr Hillis. However, the Tribunal considered that all his ostensibly good work was undermined by one serious flaw namely, that 'upon any reckoning', Mr Hillis should not have conducted the appeal due to his involvement at an earlier stage in the process. It then becomes necessary to carefully scrutinise the Tribunal's finding of fact as to that involvement.

[33] The facts found by the Tribunal commence at paragraph 4 of the decision and at paragraph 8 thereof the Tribunal recorded Mr Hillis receiving a telephone call from Mr Gourley on 5 November 2012 informing him that an assault had been perpetrated by one employee upon a fellow employee. The victim was not named and the Tribunal found that Mr Hillis told Mr Gourley to "*advise*" (our emphasis) the alleged victim to report the matter. Mr Hillis subsequently asked Mr Gilmore to attend his office and the Tribunal again recorded that, upon that occasion, he "*advised*" (our emphasis) Mr Gilmore that he should report the matter in writing to the HR Department. It seems that Mr Gilmore indicated that he would think the matter over before taking any further action and Mr Hillis then told him that no matter what he decided the matter would be investigated by the company because of the seriousness of the allegations. By paragraph 53 of the decision the finding that Mr Hillis had advised Mr Gilmore had become a statement that he had "*encouraged*" (our emphasis) him to make an official complaint and by paragraph 56 that wording has been converted to a statement that Mr Hillis "*strongly encouraged*"(our emphasis) a "reluctant" Mr Gilmore to make a complaint of assault. There does not appear to be any explanation in the remainder of the Tribunal's decision as to how or why this change in phraseology occurred.

[34] The question as to whether involvement of a person at an early stage in the process of investigation/discipline would have the effect of excluding him or her

from subsequent conduct of an appeal depends essentially upon fact and context. In Rowe v Radio Rentals Ltd [1982] IRLR 177 the claimant's immediate superior, the area manager, decided that he would have to be dismissed for breach of company rules. The area manager reported his decision to the regional controller who said that because a trade union representative was involved the claimant should be suspended until the Union was informed. The subsequent appeal was heard by the Regional Controller to whom the area manager outlined the facts. In delivering the judgment of the Employment Appeal Tribunal Browne-Wilkinson J made the following observations at paragraph 13:

> "There may be some exceptional cases (which we cannot now think of) in which the rule that justice must appear to be done might apply to the full extent that it applies to a judicial hearing. But, in general, it is inevitable that those involved in the original dismissal must be in daily contact with their superiors who will be responsible for deciding the appeal: therefore, the appearance of total disconnection between the two cannot be achieved. Moreover, at the so-called appeal hearing (which in this and many other cases is of a very informal nature) the initial dismissor is very often required to give information as to the facts to the person hearing the appeal. It is therefore obvious that rules about total separation of functions and lack of contact between the appellate court and those involved in the original decision simply cannot be applied in the majority of cases. It seems to us that the correct approach is that indicated by Lord Denning in Ward v Bradford Corporation [1971] 70 LGR 27 at page 35:
>
> > 'We must not force these disciplinary bodies to become entrammeled in the nets of legal procedure. So long as they act fairly and justly, their decision should be supported.'"

[35] In Byrne v BOC Ltd [1992] IRLR 505 the claimant was alleged to have claimed excessive overtime. The Pensions Manager, Mr Pegg, directed that further investigations should be carried out and, when they had been completed, Mr Pegg subsequently carried out his own checks of the documentation and arrived at a more substantial overclaim than had been produced by the initial calculation. Mr Pegg then took part in a consultation with a member of the personnel department and the employee relations manager for the purpose of considering the appropriate disciplinary sanction. Acting on the basis that the sanction would be that of instant dismissal Mr Pegg then directed a disciplinary hearing should be held immediately. The dismissal of the claimant was confirmed by the disciplinary hearing and

Mr Pegg conducted the subsequent appeal. In delivering its decision the EAT recorded at paragraph 23 that:

> "In the present case Mr Pegg was undoubtedly far more heavily involved in the investigation and preparation of disciplinary proceedings than was Mr West in Rowe v Radio Rentals [1982] IRLR 177. Mr Pegg himself verified the critical documentary material, that is to say the weekly time sheets and monthly overtime claims form completed by Mrs Byrne, and he came to a somewhat different conclusion regarding the amount of the excess claims made by Mrs Byrne than had Mr Platter who did the original investigation. Moreover, it was Mr Pegg's calculation rather than Mr Platter's that was adopted by Mr Pratt when he put the charges to Mrs Byrne. It is impossible to avoid the conclusion that Mr Pegg personally played a significant part in investigating the charge against Mrs Byrne. Secondly, Mr Pegg was personally involved, together with Mr Pratt, in consulting the personnel department of BOC to find out what the appropriate procedure and penalty would be."

[36] In the event, the majority in the EAT consisting of the lay members decided that, on the basis of the evidence, the conclusion that Mr Pegg was in reality a judge in his own cause was "inescapable".

[37] According to the Tribunal's findings the involvement of Mr Hillis in the preliminary matters was significantly less than either than of Mr Rowe or Mr Pegg. Mr Hillis had been informed by the foreman of the alleged assault and an independent witness had confirmed what had taken place. It was in such circumstances that Mr Hillis had 'advised' Mr Gilmore to make a complaint and to inform him that the evidence of the third party made some form of investigation inevitable. On the facts recited in the Tribunal's decision it is rather difficult to understand the basis upon which 'advised' eventually became 'strongly encouraged'. On the other hand, the Tribunal does not appear to have made any reference to the fact that Mr Gilmore appears to have attended Mr Hillis in his private office on 5 November 2012 and apparently expressed some concerns about the respondent's alleged paramilitary connections. There is no reference to Mr Hillis directing photographs to be taken of Mr Gilmore's injuries. Despite giving Mr Hillis credit for conducting interviews with the witnesses relating to the pre-assault homophobic comments, the Tribunal does not appear to refer to the fact that such interviews took place was not drawn to the attention of the respondent nor were the witnesses' statements disclosed to him or his representatives.

Contributory Fault

[38] At paragraph 60 of the decision, the Tribunal considered the issue of contributory behaviour and recorded that:

> "… We consider that the claimant was partly to blame as on his own case because he decided to confront Mr Gilmore whereas he could and should have reported Mr Gilmore's behaviour to management. We take into account the difficulties faced by the claimant, who would effectively have had to 'out' himself and we consider that it would have been just and equitable to reduce any compensatory award by 10 percent on the basis of the claimant's contributory behaviour."

While it does appear from this passage that the Tribunal found as a fact that the respondent had "decided to confront" Mr Gilmore, such a finding appears to be the closest that the Tribunal ever approaches to a factual determination of what took place during the course of the confrontation. There was a radical and direct conflict of evidence between the accounts given by the respondent and Mr Gilmore but the Tribunal, at paragraph 52 of the decision, specifically reminded itself that, in the context of the unfair dismissal claim, it was not appropriate for the Tribunal to determine what actually occurred on 2 November 2012. We note that, with regard to the alleged history of homophobic comments, the Tribunal preferred the evidence of Mr Fenton and referred to Mr Gilmore as an "unconvincing witness" but this is to be contrasted with the complete absence in the decision of any reference to the Tribunal's view of the testimony of Mr English as to what took place on 2 November. The evidence of Mr English clearly confirmed the occurrence of a serious assault by the respondent upon Mr Gilmore and, indeed, it was the report of such an assault by Mr English that commenced the investigation.

[39] Contributory fault may have the potential to reduce the basic award where there is a finding of unfair dismissal in accordance with Article 156(2) of the Employment Rights (Northern Ireland) Order 1996 ("the 1996 Order") and Article 157(6) of the same Order which provides that:

> "Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

[40] The Employment Appeal Tribunal ("EAT") considered the role of contributory fault in unfair dismissal cases in Steen v ASP Packaging Limited [2013] WL 5336120. In the course of delivering the judgment of the EAT, Langstaff J referred to the equivalent legislative provisions in England and Wales and went on to make the following observations:

"11. The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following:

(1) It must identify the conduct which is said to give rise to possible contributory fault,
(2) Having identified that it must ask whether that conduct is blameworthy.

12. It should be noted in answering this second question that in unfair dismissal cases, the focus of a Tribunal on questions of liability is on the employer's behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the enquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is upon what the employee did. It is not upon the employer's assessment of how wrongful that act was; the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Employment Tribunal to establish and which, once established, it is for the Employment Tribunal to evaluate. The Tribunal is not constrained in the least when doing so by the employer's view of wrongfulness of the conduct. It is the Tribunal's view alone which matters.

13 (3) The Tribunal must ask … if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent, there can be no reduction …, no matter how blameworthy in other respects the Tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent, then the Tribunal moves to the next question, (4).

14 This, (4) is to what extent the award should be reduced and to what extent it is just and equitable to reduce it?"

The Polkey Reduction

[41] The Tribunal summarised the effect of the decision of the House of Lords in Polkey v Dayton Services Ltd (1987) 3AllER 974 at paragraph 42*(a)* to *(c)* of the decision. The Tribunal dealt with the impact of Polkey upon its decision at paragraph 59 in the following terms:

> "59 It is therefore necessary for us to consider in percentage terms the chance that the claimant would have been dismissed anyway. We are not satisfied that the respondent has shown that there was more than a 50 percent chance that it would have dismissed the claimant anyway. The dismissal was, therefore, unfair. We regard the procedural failings in this case as being of a serious nature. However, as we have indicated above, it would have been possible for the respondent to have dismissed the claimant fairly and we therefore consider that when we come to consider remedies any compensatory award will be subject to a Polkey reduction to reflect the chance of dismissal which we measure at 20 percent."

[42] Once again, it is difficult to establish the findings of fact and reasoning employed by the Tribunal for the purpose of reaching such percentages.

Disposal

[43] Earlier in this judgment, we noted the concept of the Industrial Tribunal as an 'industrial jury'. This Court does not have the same specialist expertise in employment matters enjoyed by such a Tribunal. In that context we remind ourselves of the words of Mummery LJ in Brent LBC v Fuller [2011] ICR 806 when, dealing with the way in which Tribunal judgments should be approached, he said at paragraph 30:

> "The Tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an Employment Tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process: being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellant weaknesses to avoid."

Similar views have been expressed in this Court by Girvan LJ in Johansson v Fountain Street Community Development Association [2007] NICA 15. However, it remains an essential requirement that the parties and appellate court should be able to identify the relevant facts and reasoning therefrom which were critical to the Tribunal's decision. In this case the Tribunal moved from a finding of fact that Mr Hillis 'advised' Mr Gilmore to make a complaint to a finding that he had 'strongly encouraged a reluctant Mr Gilmore to make a complaint' and that, as a consequence, Mr Hillis' role had completely undermined the disciplinary hearing. In our view, such a conclusion was not adequately supported by relevant facts or reasoning. The authorities cited above emphasise how important the factual context may be in such circumstances. In addition, the Tribunal reached percentage assessments of contributory fault and the Polkey chance of dismissal without

attempting to resolve the clear factual conflict between Mr Gilmore and the respondent as to what had taken place on 2 November. In such circumstances, after careful consideration and not without a degree of reluctance, we consider that the appeal should be allowed and the matter remitted for consideration by an alternative Tribunal.

[44] Mr Lyttle urged us not to remit the matter for a further hearing informing the court that, in such circumstances, the respondent would not be supported by the Equal Opportunities Commission since the only remaining issue would be that of unfair dismissal. The suggestion being that the Commission supported causes of action rather than the individual. We find that suggestion rather surprising given the high reputation that the Commission and its work enjoys in this jurisdiction and the fact that, in any event, the question of whether or not and, if so, to what extent and/or with what effect the respondent was subjected to homophobic comments, is likely to remain a live issue.