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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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AND IN THE MATTER OF AN APPEAL FROM THE OFFICE OF INDUSTRIAL TRIBUNALS

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BETWEEN:

SERGE TAGRO

Claimant/Appellant;

-and-

ROYAL MAIL GROUP

Respondent/Respondent.

_____

Before: Morgan LCJ, Girvan LJ and Sir John Sheil

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MORGAN LCJ

[1] This is an appeal from the decision of the Industrial Tribunal issued on 7 October 2011 dismissing the appellant's claim of unfair dismissal and discrimination on the grounds of disability and race. The appellant appeared on his own behalf and Mr Hopkins appeared on behalf of the respondent.

Background

[2] The appellant is from the Ivory Coast in Africa and his first language is French. In its original decision the Tribunal did not record that he was also a British citizen although this was noted in the review decision issued on 24 February 2012.

He worked for the respondent from 7 April 2007 until 10 June 2010 as a postman based in the Dungannon Office.

[3] The respondent has an Attendance Procedure which was agreed with the appellant's union, the Communication Workers Union. The procedure sets out minimum standards of attendance for all the respondent's employees. It provides for a series of warnings to give employees an opportunity to improve their attendance. Warnings at different stages under the Attendance Procedure may be triggered where the employee incurs in excess of the following periods of absence:-

(i) Stage 1 – 4 absences or 14 days in a 12 month period;
(ii) Stage 2 – 2 absences or 10 days in any 6 month period in the next 12 months;
(iii) Stage 3 – 2 absences or 10 days in any 6 month period during the next 12 months.

Where an employee arrives at a Stage 3 hearing dismissal is one of the options open to the respondent.

[4] On 24 March 2008 the respondent triggered Stage 1 of its Attendance Procedure because the appellant had been absent on 10 August and 22 December 2007 and on 7 January and 23 March 2008. The respondent uses the services of an occupational health provider called Atos which provides medical advice to the respondent as to the fitness or otherwise of employees to be in work or continue work. Whilst the interviews can be on a face to face basis they are usually conducted by telephone. All the interviews conducted by Atos with the appellant throughout his employment with the respondent were carried out by telephone without any face to face encounter or physical examination. On 3 April 2008 Atos carried out a medical assessment. The appellant suffered from a skin complaint which he had disclosed at interview for his post. Atos concluded he was fit for his full contractual duties and responsibilities. The report added that management could support continuous attendance at work if alternate duties could be provided when the swelling of lesions on his heels and ankles developed. He was advised to wear soft shoes and cotton socks whenever possible.

[5] On 7 April 2008 the appellant attended a Stage 1 hearing. At the meeting he was offered the choice of having a representative attend with him but did not avail of that option. He also stated that he did not have a copy of the respondent's Attendance Procedure at the Stage 1 hearing. The tribunal concluded that even if that were the case, which the respondent denied, the appellant had sufficient information to know what was happening, why he was at a Stage 1 hearing and the implications of the same. That was a conclusion which was open to the tribunal on the evidence. The outcome was that the respondent gave the appellant a Stage 1 warning on 15 April 2008.

[6] On 5 December 2008 Stage 2 of the Attendance Procedure was triggered by reason of 2 further absences from 19 to 27 September 2008 and 5 December 2008. He was off work for 7 days. On 29 December 2008 the respondent invited the appellant to attend a Stage 2 hearing. The hearing took place on 31 December 2008 and the appellant was given a Stage 2 warning.

[7] The appellant sustained a shoulder injury on 23 July 2009 during the working day while using the respondent's van. A medical enquiry was carried out by Atos on 28 July 2009 by telephone arising from this injury at work. Atos recommended that he receive physiotherapy. Atos drew to the attention of the respondent that the financial cap for the provision of physiotherapy had been reached and specific authorisation was needed to follow it up in relation to the appellant. Atos also recommended that the respondent consider reducing the lifting that the claimant had to do to 8 kilograms, that his driving be reduced and that his manager have a weekly dialogue with him.

[8] None of these recommendations was followed up. Evidence was given that there was a change of managers at or about this time and that the retiring manager had an extended holiday but no satisfactory explanation was offered. On 30 July 2009 the appellant's doctor referred him for physiotherapy through the National Health Service. Atos provided another medical report on 18 September 2009 following a request from the respondent. In the report Dr Scott stated that the appellant's skin rash should settle down within twelve months but might cause occasional problems with work because of pain. His neck injury, he stated, should recover over the following few months.

[9] On 22 September 2009 the respondent informed the appellant that Stage 3 of the Attendance Procedure had been triggered on 30 July 2009. The appellant had been off work from 1 to 4 April 2009 and on 30 July 2009. These absences amounted to 4 days. The letter informed him that consideration would be given to his dismissal. The letter came from Mr O'Hagan. On 23 September 2009 the appellant's general practitioner wrote to him to state that a diagnosis had been made of his ongoing dermatological condition. The Stage 3 hearing took place on 25 September 2009. The appellant was accompanied by Mr Shilliday his union representative. One of the issues in the hearing was whether the absence from work on 30 July 2009 was as a result of an injury at work because the Attendance Procedure did not apply to such absences. Mr O'Hagan decided not to implement the dismissal option but to refer the appellant back to Stage 2 of the Attendance Procedure.

[10] On 5 October 2009 Mr Crookes became the appellant's manager. Atos provided another report on 6 October 2009. In that report they made two recommendations, to reduce the repetitive lifting done by the claimant and to review the safety of his driving. Neither recommendation was considered by his manager, Mr Crookes, although he indicated that he had seen the medical report. Again physiotherapy was recommended and the funding issue was again drawn to the

respondent's attention. Mr Crookes requested physiotherapy for the claimant on 7 October 2009. During an interview with Mr Crookes on the same day the appellant denied that he was injured on a delivery which his manager interpreted as meaning he had not been injured at work.

[11] The appellant's general practitioner referred him to physiotherapy on 4 February 2010. He received five sessions of physiotherapy from that date. On 7 April 2010 the respondent sought a medical report on the appellant from Atos under Stage 3 of the respondent's Attendance Procedure. A report dated 18 April 2010 was provided. In the report Dr Hynes outlined his medical and absence history. Under a heading entitled "Current capacity for work" Dr Hynes stated that the appellant was currently on sick leave with symptoms of stress and depression for which he was undergoing treatment at that time. He said the most likely prognosis was that the appellant's depression would improve. It was not possible, he further stated, to give a precise timescale for a return to work. In relation to the appellant's joint problems Dr Hynes stated that based on the available evidence at that time that this was not likely to affect his attendance at work in the long term. Dr Hynes also intimated that he would anticipate a return to his normal duties. The doctor indicated that ill-health retirement would not seem appropriate and the appellant's illness, in his view, did not fall within the Disability Discrimination Act.

[12] The respondent wrote to the appellant on 6 May 2010 indicating that the Stage 3 Attendance Procedure had been triggered by reason of 3 absences totalling 12 days since his previous warning. Mr O'Hagan indicated to him that dismissal on the grounds of unsatisfactory attendance was being considered. However, he indicated before making such a decision the appellant was invited to a formal interview on 12 May 2010. The Stage 3 hearing was conducted by Mr O'Hagan. The appellant was in attendance and was accompanied by his union representative, Mr Shilliday.

[13] Mr O'Hagan wrote to the appellant on 20 May 2010 indicating that he was dismissing him because of his unsatisfactory attendance. He stated in his letter:-

> "… I have concluded your current attendance record is unacceptable and, taking everything into account, is unlikely to improve in the foreseeable future. Moreover there are no mitigating circumstances that would make it unreasonable to dismiss you."

In his notes of the Stage 3 hearing Mr O'Hagan has recorded, in terms of his views on what he had heard from the claimant:-

> "Past performance is a good indicator of future attendance and I do not believe there will be any improvement from Mr Tagro. As I have not been convinced that Mr Tagro's attendance will improve in

> the future I believe that dismissal is a proper outcome in this case."

[14] The appellant appealed his dismissal on 21 May 2010. Dr Ronan Brannigan, his general practitioner, provided a letter on 7 June 2010 stating:-

> "TO WHOM IT MAY CONCERN
>
> This gentleman has a skin condition called erythema nodosum. This causes painful skin lesions to appear on his legs. He also has associated ankle and knee pain which can impact on his walking."

The appellant's appeal against dismissal was heard by Mr McCreight on 22 June 2010. The respondent's Attendance Procedure permits an appeal against a decision to dismiss. Such an appeal is a re-hearing of the case. The appellant's appeal was not in the form of a re-hearing. In fact Mr McCreight's notes of the appeal hearing recorded a comment from him in the following terms:-

> "I have read through your notes of interview with Mr O'Hagan and I am aware of the content. I have also read through Mr O'Hagan's conclusion notes. I am therefore fully aware of what you have already said in mitigation and feel that going over the same ground would be unnecessary and I assure you that I will be taking everything already said into consideration. I would welcome anything else that you may have to say in your defence. This said over to you."

Mr McCreight indicated to the appellant that he would speak to others involved before making his decision.

[15] Mr McCreight sent two copies of the notes to the appellant on 25 June 2010, for his agreement or for any amendments that he believed were necessary. On 8 July 2010 the appellant wrote to Mr McCreight. He sought some changes to the notes of the appeal meeting. He then set out under the title of, "Grievances I wish to raise", a number of matters, including allegations of discrimination on the basis of disability and race, and failure to follow the statutory grievance procedure. Mr McCreight replied by letter of 23 July 2010 in which he stated he would take account of the grievances in a full investigation of the appeal.

[16] Mr McCreight wrote again to the appellant on 13 August 2010. In that letter he stated that he had hoped to have his decision issued by the end of that week but due to further enquiries that he had to make in relation to the additional grievances

it had not been possible to do that as he was awaiting additional information. He went on to indicate that he would be on annual leave and would not be able to finish the case until the week commencing 23 August 2010. The appellant wrote to Mr McCreight on 10 September 2010 saying that he believed the delay in replying to the grievances was unreasonable as was the delay in the outcome of his appeal hearing of 22 June 2010. He added that he believed, as he had done a protected act under the anti-discrimination legislation, that he may have been treated less favourably by the respondent for having done the protected act. He stated that he believed himself to have been a victim of further and continuing victimisation due to race and/or disability discrimination.

[17] On 17 September 2010 Mr McCreight replied to the appellant's letter of 10 September 2010. He outlined the history of the appeal. He said that he was investigating the grievances raised by the claimant and that he had sought the appellant's consent to obtain a further medical report from Atos on 27 August which had been arranged for 17 September. Mr McCreight added that he could not conclude the appeal nor deal with the grievances until he had seen the outcome of the Atos assessment. Atos carried out an assessment with the claimant by telephone on 17 September 2010.

[18] In the medical report Dr Hynes commented that the information available to him suggested that the appellant would be fit to carry out his normal duties on post deliveries at present although he was aware that he had been dismissed. He further commented that the most likely prognosis was that symptoms linked to the skin condition would settle down with treatment. Dr Hynes went on to comment:-

> "I have reviewed the further medical evidence from Serge's GP. Based on my assessment, previous assessments and the GP letters, in my opinion Serge suffers from an underlying skin condition with some general effects that have not had significant effects on activities of daily living. On that basis my view remains that his condition is unlikely to be covered by the Disability Discrimination Act. I would, however, describe his condition, and the associated joint problems, as an underlying medical condition causing sickness absence as outlined above and in my previous report. I can only give an opinion on whether the DDA is likely to apply. A definitive decision can only be made by a court or tribunal."

[19] On 28 September 2010 Mr McCreight wrote to the appellant advising him that he had not found anything new in his discussions that would justify him in overturning the decision to dismiss him. In his appeal decision Mr McCreight recorded:-

> "The best indicator of future attendance at work is past attendance record. I have no confidence that Mr Tagro would be able to achieve regular and effective attendance to the standards Royal Mail expects of all its employees. I am therefore unable to find anything in mitigation of his failure to meet these standards to justify retaining him as a Royal Mail employee. Primarily it is my decision to not uphold the appeal of Mr Tagro on the basis that his attendance record has been unacceptable and on the balance of probabilities further sick absences will be taken…
>
> … Royal Mail, in view of its responsibilities and work in delivering mail on a daily basis to customers, must be able to depend on the reliability of its workforce in terms of attendance. …
>
> It is my belief that in a Network Organisation like ours, each individual acts as a link in the chain and an unreliable absence level is perhaps more of a problem than it would be in some other industries. I believe therefore that in all the circumstances described it is reasonable to conclude that as an employer Royal Mail may now reasonably arrive at a decision that "enough is enough" and that dismissal is an entirely reasonable response at this stage."

[20] In addition to the issues arising from his absences the appellant was also in correspondence with the respondent about misdelivery of mail. He first received counselling on 29 December 2007 because of misdelivery. He had a further counselling session on 4 June 2009 for the same reason. On 20 October 2009 the respondent carried out a fact-finding interview with the appellant and Mr Crookes about misdelivery of mail.

[21] The appellant wrote to the respondent on 7 November 2009. In that letter he accepted that he had misdelivered some mail and apologised. He sought statistics on other misdeliveries and raised the issue of race discrimination and the suggestion that management was attempting to get rid of him. Mr Crookes wrote to the claimant on 26 November 2009 inviting him to a meeting to consider the appellant's misdelivery. At the meeting on 4 December 2009 the appellant raised bullying and harassment for the first time. Mr Crookes invited him to make his complaints formal instead of merely mentioning them. The appellant also suggested that others had been guilty of misdelivery but he did not mention any names. The respondent accepted others had been guilty of misdelivery of mail but following representations

or a reprimand had improved. Later the same day the claimant wrote a letter of grievance alleging race discrimination against Mr Crookes and Derek Greenaway.

[22] On 21 December 2009 Mr Brady met with the appellant in relation to his complaint of bullying and harassment. At the meeting he reiterated his complaints of race discrimination against Mr Crookes and Derek Greenaway. He stated he had been treated differently regarding his deliveries. He also said that the workplace had become threatening and uncomfortable and he had not been provided with physiotherapy in relation to his shoulder accident which he had sustained in July and about which the recommendation had been made for physiotherapy by Atos in July 2009.

[23] Mr Brady spoke to the appellant, Mr Crookes and Mr Greenaway. He did not speak to anyone else or attempt to obtain any objective evidence as to how Mr Crookes or Mr Greenaway had treated the appellant or if any other members of staff had observed a threatening or uncomfortable atmosphere or had witnessed any of the other matters about which he complained. Mr Brady did not ascertain how many other misdeliveries there were in the Dungannon office in an effort to discover whether the appellant's treatment for his misdeliveries differed from that which had been afforded to others. No explanation was sought as to why physiotherapy, recommended in July 2009 and followed up on 7 October 2009 by Mr Crookes had still not been provided by the time of the grievance meeting on 21 December 2009. Mr Brady wrote to the claimant on 25 January 2010 to inform him that his complaint of bullying and harassment had not been upheld.

[24] Mr Crookes administered a reprimand to the appellant for misdelivery on 21 December 2009. On 7 January 2010 he appealed. The respondent's disciplinary conduct code provides for an appeal by way of a re-hearing of the case in its entirety. The appeal procedure also allows for further investigation to be carried out by the person conducting the appeal. In those circumstances the code requires the holder of the appeal to make the employee fully aware of any relevant new information or new evidence and to give him sufficient time to consider it with his representative. Mr Martin, who conducted the appeal, did not rehear the case in its entirety. Rather he sought any new points that the appellant wished to make. Mr Martin did not inform the appellant that he had spoken to Mr Crookes nor did he reveal the nature or outcome of that discussion. On 26 January 2010 Mr Martin sent the notes of the appeal hearing to the appellant seeking his agreement to the notes. On 9 February 2010 the appellant was notified that his appeal against the reprimand was unsuccessful.

The tribunal's conclusions

[25] The tribunal had before it claims in respect of disability discrimination, unfair dismissal and race discrimination. Section 1(1) of the Disability Discrimination Act 1995 (the 1995 Act) provides that a person has a disability for the purposes of the Act

if he has a physical or mental impairment which has a substantial and long term adverse effect on his ability to carry out normal day to day activities. Section 3A(1) of the 1995 Act provides that a person discriminates against a disabled person if, for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and he cannot show that the treatment in question is justified. By virtue of Paragraph 2(1) of Schedule 1 of the 1995 Act the effect of an impairment is a long term effect if it has lasted at least 12 months or the period for which it lasts is likely to be at least 12 months or it is likely to last for the rest of the life of the person affected.

[26] The tribunal accepted that the appellant suffered from erythema nodosum which causes painful lesions to appear on the appellant's legs. He has associated ankle and knee pain which can impact on his walking. This impairment has lasted for at least 12 months and will continue to affect the appellant. The tribunal concluded, however, that the evidence did not establish that the impairment did not have a substantial adverse effect on the appellant's ability to carry out his day to day activities. The claim under the 1995 Act therefore failed.

[27] It next considered the claim for unfair dismissal. Although the stated reason for dismissal referred to conduct, the tribunal found that the reason for the dismissal was the breach of the Attendance Procedure which constituted some other substantial reason of a kind such as to justify dismissal under Article 130(1)(b) of the Employment Rights (Northern Ireland) Order 1996. It was satisfied that the appellant had a fair opportunity to have his position considered and was represented at each stage of the three stage process. Any delay in the appeal process was explained by continuing investigations, holiday periods and delay in arranging a medical report. The appellant's breach of the Attendance Procedure was a sufficient reason for dismissing him and any deviations from the stated procedure were not material.

[28] The appellant's case on racial discrimination was that he had been treated less favourably than others on racial grounds. The tribunal noted that the respondent's other employees were British or Irish and white whereas the appellant was African and black. As noted above the appellant was a British citizen but nothing turns on this. The tribunal concluded that the appellant had established less favourable treatment on a number of grounds.

[29] The appellant was injured on 23 July 2009. Atos recommended physiotherapy but nothing appears to have occurred as a result of that. When Mr Crookes followed up on the request for physiotherapy on 7 October 2009 it does not appear to have been addressed. The tribunal was not provided with an explanation for this lamentable delay. However it was clear that from July 2009 the respondent's budget for the provision of physiotherapy had been exhausted. The respondent also referred to the fact that the manager had changed. Mr Crookes had replaced the former

manager on 5 October 2009 and the leave period of the previous manager before that date was a possible explanation. The respondent's witnesses also referred to "a mix-up" or "confusion". Mr Shilladay, the appellant's union representative received physiotherapy within two weeks of it being needed. The tribunal concluded, therefore, that the appellant had received less favourable treatment because of the failure to provide him with physiotherapy.

[30] The tribunal also criticised Mr Brady's investigation of the appellant's complaint of bullying and harassment describing it as very flawed. The complaint was in part that the workplace had become threatening and comfortable. Mr Crookes and Derek Greenaway were specifically complained about as being guilty of the bullying and harassment of the claimant. In the course of the investigation Mr Brady spoke only to the claimant and Messrs Crookes and Greenaway. He made no attempt whatsoever to investigate if the workplace had indeed become a threatening or uncomfortable place by speaking to any other employees in the workplace, or even ascertaining if anyone else had made such a complaint. Although there was no evidence that this investigation was any different from any other carried out by Mr Brady or anyone else employed by the respondent the tribunal concluded that this constituted less favourable treatment.

[31] There were a number of matters which the tribunal rejected. The appellant claimed that he was reprimanded for misdelivery of mail and others were not. The tribunal stated that at least one other person was reprimanded for misdelivery of mail but there was in fact no record to that effect. The tribunal did look, however, at whether others were not reprimanded as frequently as he was, or whether the tolerance of misdelivery was greater before the reprimand was activated, or more use was made of informal methods to avoid misdelivery but there was no evidence before them to support any of those contentions. The tribunal concluded, therefore, that the appellant was not treated less favourably in this regard.

[32] The appellant alleged that Mr Crookes and Derek Greenaway had bullied and harassed him which he believed amounted to race discrimination. However, the tribunal found that there was little or no evidence against Derek Greenaway to enable any conclusion to be reached that he had treated the appellant less favourably. The tribunal considered that Mr Crookes did deal with the appellant firmly and implemented the various procedures to his detriment. There was no evidence that he would have treated other employees any differently. In relation to the reprimands for misdelivery of mail the claimant had misdelivered mail. Mr Crookes could legitimately deal with the claimant as he had done. It could not be concluded that this action by Mr Crookes amounted to less favourable treatment. The tribunal also considered that the application of the Attendance Procedure was in accordance with normal practice. There was no evidence that other employees were not similarly treated in the same or similar circumstances.

[33] The tribunal rejected the claim of racial discrimination. In relation to the failure to provide physiotherapy the tribunal noted that there was evidence to support the fact that there had been a change of manager in the summer of 2009. It was also established that the financial cap for physiotherapy had been exceeded by the time of the recommendation in respect of the appellant. Mr Brady had carried out a flawed investigation of the bullying and harassment claim but the tribunal recognised that a contributory factor was Mr Brady's undue deference to fellow managers. The tribunal concluded that the less favourable treatment did not establish what it called a prima facie case of race discrimination and accordingly held that the burden of proof did not shift to the respondent.

Discussion

[34] Article 22(1)(a) of the Industrial Tribunals (NI) Order 1996 provides that a party to proceedings before an industrial tribunal who is dissatisfied in point of law with a decision of the tribunal may appeal to the Court of Appeal. As the appellant is a personal litigant it is necessary to examine the notice of appeal and the skeleton argument carefully in order to establish those points which are put forward as points of law as distinct from those matters where the appellant simply disagrees with the conclusions reached by the tribunal albeit that the conclusions were open to the tribunal on the evidence.

[35] In relation to the unfair dismissal claim the appellant contends that he only received the respondent's code of conduct in the course of discovery and the Attendance Procedure on the first day of the industrial tribunal hearing. The tribunal was informed by the appellant that he had not received the Attendance Procedure at the Stage 1 hearing but the tribunal concluded that he had sufficient information to know what was happening and the implications of same. He had been offered the chance to have a representative. In relation to the remaining stages he was represented at all times and there is no suggestion that his union representative did not have the relevant documents nor that he was other than diligent in carrying out his duties.

[36] The appellant agrees that he was provided with a written contract of employment. His complaint is that the Code of Conduct was not attached to it. There was no free standing claim in relation to this pursued before the tribunal and no issue of law therefore arises in respect of it. The appellant submits that the issue for the tribunal was whether the tribunal acted reasonably in concluding that breach of the Attendance Procedure justified the dismissal. That was the test applied by the tribunal. The appellant submits that the employer must properly investigate his ground of complaint against the employee but that is what the employer did through the Attendance Procedure. The tribunal concluded that the dismissal was fair. It properly identified the basis for the dismissal as some other substantial reason (see Wilson v Post Office [2000] IRLR 834). I can find no error of law in the tribunal's reasoning.

[37] The claim under the 1995 Act failed because the tribunal concluded that the appellant's condition did not have a substantial and long term adverse effect on his ability to carry out normal day to day activities. That is a statutory requirement before the Act is engaged. The evidence demonstrated that the respondent carried out a number of assessments in relation to the appellant's condition. The only evidence submitted by the appellant at the hearing indicated the prolonged nature of the medical condition but did not contend that the condition adversely affected the carrying out of normal day to day activities. The medical evidence for the respondent expressly concluded that there was no substantial and long term adverse impact on day to day activities. The tribunal's conclusion was in accordance with the evidence before it and no error of law is detectable.

[38] The remaining issue concerns race discrimination. Article 6(2) of the Race Relations (Northern Ireland) Order 1997 (the 1997 Order) provides that it is unlawful for a person, in the case of a person employed by him in Northern Ireland, to discriminate against that employee by dismissing him or subjecting him to any other detriment. Article 3(1) of the 1997 Order says that a person discriminates against another if on racial grounds he treats that other less favourably than he treats or would treat other persons. Article 52A deals with the burden of proof.

> "52A. - (1) This Article applies where a complaint is presented under Article 52 and the complaint is that the respondent-
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> (a) has committed an act of discrimination, on grounds of race or ethnic or national origins, which is unlawful by virtue of any provision referred to in Article 3(1B) (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"

[39] The equivalent English provisions were considered by the Court of Appeal in Igen v Wong [2005] All ER 812. The court pointed to the need for a Tribunal to go through a two stage decision making process. The first stage requires the complainant to prove facts from which the Tribunal could conclude in the absence of inadequate explanation that the respondent had committed the unlawful act of discrimination. Once the Tribunal has so concluded the respondent has to prove that he did not commit the unlawful act of discrimination. This was further explained in Madarassy v Nomura International Plc [2007] EWCA Civ 33 where, dealing with the equivalent sex discrimination provisions, the court said:

> "56. The court in **Igen v. Wong** expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
>
> 57. 'Could conclude' in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint."

[40] These cases have been approved and followed in this jurisdiction notably in Curley v Chief Constable [2009] NICA 8 and Nelson v Newry and Mourne Council [2009] NICA 24 and were recently approved in Hewage v Grampian Health Board [2012] UKSC 37. I am satisfied that these principles to which the tribunal made express reference were applied by the tribunal. It concluded that a properly directed tribunal could not have concluded on the basis of the evidence as a whole adduced by the appellant that racial discrimination had been established at the first stage. The appellant's case that the respondent was determined to get rid of him was not

consistent with the fact that when he first was assessed at Stage 3 of the Attendance Procedure he was not dismissed but returned to Stage 2. When Mr Crookes had taken over as manager he had requested physiotherapy for the appellant within 2 days. The tribunal rejected the submission that the imposition of the reprimand was less favourable treatment after a full review of the evidence. The dismissal of the appellant was fair.

[41] For the reasons given none of the points of law argued give rise in my view to any error of law. I would dismiss the appeal.

GIRVAN LJ

[42] I agree with Morgan LCJ.

SIR JOHN SHEIL

[43] The Tribunal in its decision of 7 October 2011 held that the claimant "has failed to establish a prima facie case of race discrimination. The burden therefore does not shift to the respondent". Accordingly the Tribunal dismissed his claim for race discrimination.

[44] The Race Relations (Northern Ireland) Order 1997, Article 3(1)(a) provides that a person discriminates against another in any circumstances relevant for the purposes of any provision of this order if on racial grounds he treats that other less favourably than he treats or would treat other persons. Article 5(1) of the 1997 Order provides that "racial grounds" means any of the following grounds, namely colour, race, nationality or ethnic or national origins. Article 6(2)(c) of the Order makes it unlawful for a person to discriminate against an employee by dismissing him or subjecting him to any other detriment. Article 52A deals with the burden of proof and provides as follows:

"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 of race or ethnic or national origins, which is unlawful by virtue of any provision referred to in Article 3(1B)(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."

[45] At paragraph 9(1) and (2) of its decision the Tribunal stated that the claimant is "African and black" while the other employees of the respondent are "Irish or British and white so there is a difference in status between the claimant and his comparators" and "that the claimant was treated less favourably than other employees of the respondent"; his first language was French. At paragraph 5(16) the Tribunal stated:

"A medical inquiry was carried out by ATOS with the claimant on 28 July 2009 by telephone arising from his injury at work on 23 July 2009. ATOS recommended that the claimant receive physiotherapy. ATOS drew to the attention of the respondent that the financial cap for the provision of physiotherapy had been reached and specific authorisation was needed to follow it up in relation to the claimant. ATOS also recommended; that the respondent consider reducing the lifting that the claimant has to do to 8kgs; that his driving be reduced; and that his manager have a weekly dialogue with him."

The Tribunal then goes on to state at paragraph 5(17):

"None of these recommendations was actioned. The reason for these omissions is unknown. Some speculation was advanced about changes of managers or a mix up or confusion but no explanation was offered."

At paragraph 5(24) the Tribunal found that ATOS provided another report on the claimant on 6 October 2009 and went on to state:

"In that report they made two recommendations; to reduce the repetitive lifting done by the claimant; and to review the safety of his driving. Neither recommendation was considered by his manager, Mr Crooks, although he indicated that he had seen the medical report. Again physiotherapy was recommended and the funding issue was again drawn to the respondent's attention. Mr Crooks requested physiotherapy for the claimant on 7 October 2009."

But, as appears from paragraph 9(3)(b) the Tribunal stated that this request for physiotherapy "does not appear to have been addressed". In the same sub-paragraph the Tribunal goes on to state:

"The Tribunal was not provided with an explanation for this lamentable delay. However it is clear from July 2009 that the respondent's budget for the provision of physiotherapy had been exhausted.

The respondent also refers to the change of manager. Mr Crooks had replaced the former manager on 5 October 2009 and the leave of the previous manager before that date as possible explanations. The respondent's witnesses also referred to 'a mix up' or 'confusion' as explanations.

Mr Shilladay, the claimant's union representative received physiotherapy within two weeks of it being needed. This amounts to less favourable treatment in the view of the Tribunal."

I have already referred to the Tribunal's statement at paragraph 5(17) that "some speculation was advanced about changes of managers or a mix up or confusion but no explanation was offered".

[46] With regard to the claimant's complaint of bullying and harassment at work the Tribunal found at paragraph 9(3)(d) that the investigation of this complaint was "very flawed" and went on to say:

"The complaint was in part that the workplace had become threatening and (un)comfortable. Conor Crooks and Derek Greenaway were specifically complained about as being guilty of the bullying and harassment of the claimant. Yet as part of the investigation Mr Brady spoke only to the claimant and Messrs Crooks and Greenaway. He made no attempt whatsoever to investigate if the workplace had indeed become a threatening or uncomfortable place by speaking to any other employees in the workplace, or even ascertaining if anyone else had made such complaint. The Tribunal is satisfied that this amounts to less favourable treatment."

[47] The learned Lord Chief Justice in his judgment has referred to the leading authorities in this jurisdiction and in the rest of the United Kingdom. In Hewage v Grampian Health Board [2012] UKSC 37 Lord Hope also reviewed the leading authorities in this field and stated that no further guidance was required by the court as to the effect of the relevant statute. While bearing in mind that Lord Hope stated at paragraph 31 that "the prima facie case of race discrimination must be proved, and it is for the claimant to discharge that burden", I am of the opinion that the claimant in the present case had proved a prima facie case of race discrimination and that the burden of proof to rebut that prima facie case shifted to the respondent and that the Tribunal was in error in finding that it had not done so. I therefore would have allowed this appeal.

[48] In respect of the findings of the Tribunal against the claimant and in favour of the respondent in respect of disability discrimination and unfair dismissal, I do not

consider that there was any error of law in respect of either of those two findings.