THE INDUSTRIAL TRIBUNALS

CASE REF: 14279/20

CLAIMANT: **Polachan Moonjelly Pathrose**

RESPONDENT: **Ashgrove Care Home, Four Seasons Health Care Limited**

JUDGMENT

The unanimous judgment of the tribunal is that:-

(1) The respondent did not directly discriminate against the claimant on grounds of his race and that claim is dismissed.

(2) The respondent indirectly discriminated against the claimant on grounds of his race in the manner in which it conducted its disciplinary procedure, without justification, contrary to Articles 3(1A) and 6(2) of the Race Relations (Northern Ireland) Order 1997.

(3) The claimant was unfairly dismissed contrary to Article 130 of the Employment Rights (Northern Ireland) Order 1996.

(4) The claimant is awarded £14,800 (net) for loss of earnings and £500.00 for loss of statutory rights in respect of financial loss for the unlawful discrimination and unfair dismissal. The claimant is awarded £10,000.00 for injury to feelings in respect of the unlawful discrimination. The claimant is also awarded a basic award of £6,000.00 in respect of the unfair dismissal. Interest of £4,723.03 has been added to the total compensation awarded for unlawful discrimination.

(5) The total amount of compensation awarded to the claimant is £36,023.03

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Tiffney**

Members: **Mr I Carroll**
Mrs F Cummins

APPEARANCES:

The claimant was represented by Mr M Quigley, Barrister-at-Law, instructed by Carson Thompson Solicitors.

The respondent was represented by Ms E McIlveen, Barrister-at-Law, instructed by Murphy's Solicitors.

BACKGROUND

1. The respondent is a residential care home owned by Four Seasons Health Care Limited.

2. The claimant was employed by the respondent as a care assistant from 12 December 2011 until his summary dismissal on the grounds of gross misconduct on 7 January 2020.

3. On 1 May 2020, the claimant presented a claim to the tribunal claiming race discrimination and unfair dismissal and sought compensation for loss of earnings and injury to feelings by way of remedy.

4. In its response, the respondent contended the claimant had been fairly dismissed on two grounds. First, on grounds of gross misconduct for having made a false claim of suffering from a medical condition, arthritis, that prevented him from carrying out alternative duties. Second, on the basis it was not reasonable to continue to employ the claimant due to the continued lack of progress of an external safeguarding investigation into the claimant's alleged mishandling of two patients. The respondent also denied it had subjected the claimant to discrimination on grounds of race.

THE ISSUES

5. A list of agreed legal and factual issues in dispute was included in the hearing bundle. The parties also helpfully provided an agreed chronology. Through discussion at the outset of the hearing, it was clear that the issues document was not comprehensive. Mr Quigley and Ms McIlveen agreed they would benefit from additional time to consider the issues and were given the remainder of the first day of hearing to do so. During this discussion Ms McIlveen indicated that the respondent believed the claimant's race discrimination claim had not been adequately pleaded. This was the first time this issue had been raised with the claimant and the tribunal. The Employment Judge directed the respondent to put the claimant on written notice of the extent of this objection and any associated application the respondent wished to make whereupon that matter would be addressed at the start of the second day of hearing. This matter was not pursued by the respondent. A revised agreed list of issues was presented to the tribunal in advance of the second day of hearing. Further agreed revisions were made thereafter. Key revisions were as follows:

    (i) On the first day of hearing, the claimant withdrew his claim of harassment on grounds of race. Therefore, that claim is dismissed.

    (ii) On the third day of hearing, the tribunal was informed that the claimant was no longer pursuing a claim of direct race discrimination in relation to being assigned to work in the respondent's Carlingford premises on 2 specified dates in February 2019. Therefore, those specified claims are dismissed.

    (iii) On the first day of hearing the tribunal was informed the respondent wished the tribunal to consider whether any award to the claimant in respect of his

unfair dismissal claim should be reduced on the ground of contributory fault, or *"Polkey"*.

(iv) On the fourth day of hearing, the tribunal was informed the respondent was not pursuing a time limitation point in respect of the claimant's direct and indirect race discrimination claims.

6. The parties confirmed to the tribunal at the submissions hearing that the final agreed legal and factual issues in dispute were as follows: -

Legal Issues

Direct Race Discrimination

"(1) Did the respondent directly discriminate against the claimant on grounds of his race contrary to Articles 3(1)(a) of the Race Relations (Northern Ireland) Order 1997 ("the RRO") due to the following: -

(a) A failure to provide an interpreter at the following meetings.

(i) 26/02/2019
(ii) 30/07/2019

(b) The decision to proceed to a disciplinary hearing on the basis of what was said during those meetings.

(c) The decision to dismiss on the basis of what was said during those meetings.

The comparators are hypothetical comparators being employees who are fluent in English.

Indirect Race Discrimination

(1) Did the respondent indirectly discriminate against the claimant in the manner in which it conducted its disciplinary procedure contrary to Article 3(1A) of the RRO as follows: -

(a) Failing to provide an interpreter at the following meetings.

(i) 26/02/2019
(ii) 30/07/2019

In this regard, was the following a provision, criterion, or practice (PCP): -

(b) The carrying out of meetings in English without an interpreter.

(c) Substantial disadvantage alleged by the claimant

(i) Inability to properly participate in the meetings dated 26/02/19 and 30/07/19 due to not being fluent in English.

(ii) Dismissal for gross misconduct on the basis of what was alleged to have been said during the above meetings."

7. At the submissions hearings counsel confirmed that the direct and indirect race discrimination claims engaged Article 6 of the RRO, specifically Article 6(2).

8. It was clarified in the claimant's written submissions that the protected characteristic relied on by the claimant was his national origin. The claimant is from India and thus English is not his native language.

9. In respect of the direct discrimination claim, the characteristics of the hypothetical comparator were further clarified in the claimant's written submissions. The claimant submits that the hypothetical comparator was a native English speaker employed by the respondent and by implication fluent in English.

10. Although it is not necessary to identify a "pool for comparison" the claimant identified a pool in the following terms in written submissions. The claimant is part of a group of non-native speakers, all of whom possess this characteristic by virtue of their national origin. The claimant contends he and this group are disadvantaged by the PCP identified as they are unable to properly participate in these meetings in comparison to employees of the respondent who, by virtue of their national origin, are native English speakers and thus fluent in the English language.

11. The extent to which the respondent challenged the claimant's indirect discrimination claim was twofold. Firstly, the respondent accepted the chosen PCP could in law amount to a PCP. However, on the facts the respondent contended that this PCP was not applied in its organisation and pointed to the fact the claimant was supported by an interpreter at all meetings from 12 September 2019 onwards. However, it is not in dispute that prior to the meeting on 12 September, the claimant attended two meetings with the respondent in English at which no interpreter was provided. Secondly, in terms of personal disadvantage, the respondent disputed that the claimant was unable to properly communicate at these two meetings. The respondent did not present any argument in respect of objective justification. This was despite the tribunal affording the parties several opportunities to further consider/revise the agreed issues, the direction of the Employment Judge (on the second day of hearing) that the respondent's position in relation to all aspects of the indirect claim should be addressed in its written submissions and the tribunal providing a further opportunity to the respondent to address these matters in oral submissions.

Unfair Dismissal

(2) Did the respondent unfairly dismiss the claimant contrary to Article 130 of the Employment Rights (NI) Order 1996 ("the ERO") in relation to the following:-

(a) **Procedural Unfairness**

(i) Was the investigation flawed to there being no interpreter in attendance at the investigatory meeting of 30/07/2019?

(b) **Substantive Unfairness**

(i) *Did the respondent rely upon evidence from the meetings of the 26/02/2019 and 30/07/2019 meetings to come to a finding of gross misconduct?*

Remedy

"(3) What remedy, if any, is the claimant entitled to?

(6) Should the claimant's award be reduced on the basis of Polkey and/or contributory conduct?

Factual Issues

(1) Did the claimant at any point ever state that he suffered from Arthritis?

(2) Why was the claimant not offered an interpreter at the meetings on 26/02/19 or 30/07/19?

(3) When was the decision taken to discipline the claimant? Who made this decision? Why was this decision taken?

(4) What was the disciplinary charge that the claimant was disciplined for?

(5) Did the claimant delay in signing the authorisation form to enable the respondent to access his GP notes? If so, what was the reason for this delay?

(6) Is there any reference to arthritis or arthralgia in the claimant's medical notes? If not, why not?

(7) Did the respondent explore alternative work for the claimant while the safeguarding investigation was ongoing?

(8) Was the claimant fit to work in the kitchen while the safeguarding investigation was ongoing?

(9) What efforts did the claimant make to effectively mitigate his loss?

Race Discrimination

(10) When did the claimant first raise allegations of race discrimination?

(11) Did the failure to provide an interpreter at the meetings on 26/02/19 and 30/7/19 amount to indirect race discrimination?

(12) Why was the claimant disciplined? Was this decision in any way related to its race?

(13) Why was the claimant dismissed? Was this decision in any way related to his race?

(14) What injury to feelings has the claimant suffered as a result of any acts of discrimination?"

Counsel for the respondent clarified that factual issues 5, 6 and 8 solely related to the respondent's arguments in respect of ***Polkey*** and contributory fault. However, issue 6 was not in dispute. The issue of contributory fault was not addressed in submissions and it was entirely unclear how these issues were relevant to ***Polkey*** (see paragraphs 115-117).

CASE MANAGEMENT

Mode of Hearing

12. There were a number of Case Management Preliminary Hearings, ("CMPH"). The hearing was listed for 5 days commencing on 1 November 2021 and proceeded on those dates as arranged. All evidence was heard by the third day and the parties were given the fourth day to prepare written submissions. Oral submissions were made on the fifth day of hearing.

Reasonable Adjustments/Special Arrangements

13. The claimant is from Kerala in India and his native language is Malayalam. At the request of his representative, a Malayalam interpreter was provided by the tribunal in order that the claimant could give his evidence in his native language and could effectively participate in and follow the proceedings. The interpreter participated remotely with no objections from either party. The proceedings were interpreted for the claimant, save for parts where Mr Quigley indicated it was not necessary when legal arguments were being made.

Authenticity of a Document

14. At a CMPH on 28 October 2021, the respondent queried the authenticity of the claimant's GP note, dated 1 August 2019. Directions were given by the Vice-President in relation to this matter. At the start of this hearing, Ms McIlveen confirmed to the tribunal that in light of written confirmation from the GP surgery that the medical note was written and signed by the claimant's GP, the respondent was satisfied this medical note was authentic and could be tendered in evidence without further input from the GP. Considering this, the tribunal was surprised by some of the submissions made for the respondent in relation to this document.

SOURCES OF EVIDENCE

15. The witness statement procedure was used in this case. The respondent was permitted to adduce brief oral evidence-in-chief from one of its witnesses (Ms Lorraine Thompson) in relation to two matters. First, regarding a draft safeguarding report concerning the claimant which was introduced by the respondent during the hearing (see paragraph 18). Secondly, regarding an aspect of the claimant's working pattern raised by the claimant in cross-examination. The claimant declined the opportunity to give oral evidence in relation to the draft report.

16. The claimant gave evidence on his own behalf. The following witnesses gave evidence on behalf of the respondent: -

    (i) Ms Lorraine Thompson, former Regional Manager in the respondent's

Northern Ireland Region. Ms Thompson held a meeting with the claimant on 26 February 2019, corresponded with the claimant in relation to his suspension and referred the claimant to Occupational Health for assessment.

(ii) Ms Elaine McShane, former Regional Manager in the respondent's Northern Ireland Region. Ms McShane heard the claimant's grievance and dealt with the claimant's appeal from dismissal.

17. The respondent chose not to present any evidence from the Investigating Manager, Ms Karen Moriarty or the manager who took the decision to dismiss the claimant at first instance, Ms Ann Begley. Both individuals were no longer employed by the respondent but were involved in events centrally relevant to the issues in dispute. When making findings of fact in respect of these issues, the tribunal took account of where the burden of proof lay, i.e., whether it lay with the claimant (in the discrimination claims), or the respondent (the reason for dismissal) or was a neutral burden (the fairness of the dismissal in all of the circumstances), whether the claimant's evidence was challenged by direct evidence from the respondent and/or the relevant contemporaneous documents referred to by the parties. Where appropriate the tribunal drew an adverse inference from the respondent's failure to present direct evidence. This was limited to issues pertaining to the unfair dismissal claim and only to those where it was not possible to make a finding of fact from the evidence relied on.

18. The parties presented an agreed hearing bundle running to 222 pages. With the agreement of the claimant, the tribunal permitted the respondent to add two further documents (a draft safeguarding report and an OHS referral) into the bundle. The tribunal has taken account of all relevant documentation to which it was referred during the hearing. The parties also presented written submissions supplemented by oral submissions and comments on each other's submissions at the hearing. The written submissions are appended to this judgment.

RELEVANT LAW

Legal Provisions

Direct Race Discrimination

19. The statutory test for direct discrimination is set out in Article 3 of the RRO. Insofar as is relevant and material Article 3 provides as follows: -

> *"(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."*

The issue of comparison is dealt with in Articles 3(3) of the RRO and provides as follows:-

> *"A comparison of the case of a person of a particular racial group with that of a person not with that group under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not*

materially different, in the other."

20. Racial grounds is defined in Article 5(1) and expressly includes "*nationality or ethnic or national origins*".

21. Discrimination within the context of employment is expressly prohibited under Article 6(2) of the RRO which provides as follows:-.

> *"(2) It is unlawful for a person, in the case of a person employed by him at an establishment in Northern Ireland, to discriminate against that employee –*
>
> *(a) in the terms of employment which he affords him; or*
>
> *(b) in the way he affords him access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, about refusing or deliberately omitting to afford him access to them; or*
>
> *(c) by dismissing him or subjecting him to any other detriment."*

22. The key elements of direct discrimination are twofold; namely less favourable treatment, a reason for which was racial grounds.

Indirect Race Discrimination

23. The statutory test for indirect discrimination under the RRO is set out in Article 3 (1A) as follows:-

> *"A person also discriminates against another if, in any circumstances relevant for the purposes of any provision referred to in paragraph (1B) he applies to that other a provision, criterion or practice which he applies or would apply equally to persons not of the same race or ethnic or national origins as that other, but –*
>
> *(a) which puts or would put persons of the same race or ethnic or national origins as that other at a particular disadvantage when compared with other persons;*
>
> *(b) which puts or would put that other at that disadvantage; and*
>
> *(c) which he cannot show to be a proportionate means of achieving a legitimate aim.*

Article 3(1B) expressly refers to Part II of the RRO which relates to discrimination and harassment in the employment field and encompasses Article 6 of the RRO. A comparison for a claim of indirect discrimination is governed by Article 3(3) of the RRO set out above.

24. All four conditions rehearsed in Article 3(1A) must be met before a successful claim for indirect discrimination can be established. However, in this case the respondent did not advance any argument to the tribunal by way of justification.

Race Discrimination - Burden of Proof

25. The burden of proof is set out in Article 52A of the RRO which provides insofar as is relevant and material:-

> *(2) Where, on the hearing of the complaint, the complainant proves facts for 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."*

Unfair Dismissal

26. The right not to be unfairly dismissed is enshrined the Employment Rights (Northern Ireland) Order 1996 ("the ERO"). It is stipulated within Article 130 of the ERO that it is stipulated that it is for the employer to show the reason for the dismissal and that the reason falls within one of the fair reasons outlined at Article 130(2). One of the potentially fair reasons for dismissal relates to the conduct of the employee (listed at Article 130(2)(b)). Should the tribunal find that the employer has dismissed for a potentially fair reason, it must then go on to consider whether the dismissal was fair or unfair in accordance with Article 130(4) which states:-

> *"(4) 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."*

It is for the employer to show the reason for the dismissal and that it is one of the potentially fair reasons listed in the ERO. If the employer discharges that burden there is then a neutral burden as to whether or not the dismissal is fair or unfair in all of the circumstances.

27. Contributory fault is addressed in Article 157 of the ERO (1996) which states;

"(6) 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."

Principles of Law

28. In addition to the above-mentioned legal provisions, the parties provided a composite bundle of authorities. The authorities referred to by each party in their written submissions are listed below. The key authorities are referred to in the summary of the relevant legal principles in this judgment.

The Claimant's Authorities

(i) **Connolly v Western Health and Social Care Trust [2017] NICA 61; [2020] NIJB 7.**

(ii) ***Rice v Dignity Funerals [2018] NICA 41.***

(iii) ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11.***

(iv) ***Essop v The Home Office (UK Border Agency); Naeem v Secretary of State for Justice [2017] UKSC 27; [2017] 3 ALL ER 551.***

(v) ***Igen Ltd v Wong; Chamberlin Solicitors v Emokpae; Brunel University v Webster [2005] EWCA Civ 142, [2005] IRLR 258, [2005] ICR 931, [2005] 3 All ER 812***.

The Respondent's Authorities

(i) ***McDonagh and Ors v Thom, t/a Royal Hotel Cookstown [2007] NICA 3***.

(ii) ***Dziedziak v Future Electronics Ltd [2012] UKEAT 0270***.

(iii) ***Tagro v The Royal Mail Group [2013] NICA 30***.

(iv) ***Kelly v Covance Laboratories Ltd UK EAT/0186/15/LA.***

(v) ***Szczesny-Bury v Robinson Services Ltd [2019] NICA 52***

(vi) ***Taylor v OCF Group Ltd [2006] EWCA Civ 702***

Direct Race Discrimination

29. The House of Lords in ***Shamoon*** emphasised (at paragraph 110) that the treatment complained of must be less favourable rather than merely different treatment and it is less favourable treatment as compared to a person, actual or hypothetical, who is "*in the same position in all material respects as the victim save only that he, or she,*

is not a member of the protected class".

Indirect Race Discrimination

30. The Supreme Court in the combined cases of ***Essop and ors v Home Office (UK Border Agency) & another case 2017 ICR 640, SC*** endorsed the conventional understanding of the structure of indirect discrimination claims and identified "salient features" of indirect discrimination. The Supreme Court considered indirect consideration as defined in Section 19(1) of the Equality Act 2010. As the wording of Section 19 mirrors that of Article 3(1A) of the RRO this is a persuasive authority in this jurisdiction. The Supreme Court overturned two judgments of the Court of Appeal that had concluded it was necessary to show *why* the PCP put people sharing a protected characteristic at a disadvantage. The Supreme Court rejected this interpretation, noting that it eroded the distinction between direct and indirect discrimination.

31. Baroness Hale emphasised that in contrast to direct discrimination, the first salient feature of indirect discrimination is that there is no need to show or explain the reasons why a particular PCP puts one group at a disadvantage when compared with others. It is enough that it does. Baroness Hale noted that usually the reason will be obvious but in other cases it will not. The reason for this distinction, lies in the different aims behind outlawing direct and indirect discrimination. The aim of prohibiting direct discrimination is to achieve equality of treatment. Whereas the concept of indirect discrimination assumes equality of treatment in the sense that the PCP is applied indiscriminately to all – but that PCP which on the face of it appears neutral but may have a disproportionately adverse impact on people that share a protected characteristic. It is outlawed with a view to achieving a level playing field, i.e., equality of results in the absence of justification. It is designed to eradicate hidden barriers which are not easy to anticipate or recognise. Baroness Hale pointed out that implying a "reason why" question into the formulation of indirect discrimination would weaken the protection afforded by that statutory provision and could result in the continuation of discrimination.

32. The second salient feature of indirect discrimination is the requirement of a causal link between the PCP and the particular disadvantage suffered by the group and the individual.

33. The third salient feature is that the reason for the disadvantage need not be unlawful in itself or even be under the control of the employer. This recognises that the reasons for a disadvantage in any case could be numerous and/or varied, for e.g. due to genetics, social norms or traditional employment practices. Both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem.

34. The fourth salient feature is that there is no requirement that the PCP in question puts every member of the group sharing the particular protected characteristic at a disadvantage. Baroness Hale noted that if this was requirement then indirect discrimination would present more like direct discrimination as it would mean that the PCP would become a proxy for the protected characteristic.

35. The fifth feature is that it is commonplace for the disparate impact, or particular

disadvantage to be established on the basis of statistical evidence. Baroness Hales reflected on the aim of statistical evidence which is to show a correlation between particular variables and particular outcomes and assess the significance of those correlations but noted that a correlation is not the same as a causal link. In this particular case the claimant does not rely on statistical evidence.

36. A final salient feature is that it is always open to the respondent to show that the PCP is justified – i.e. that there is a good reason for the particular PCP which is proportionate means of achieving a legitimate aim.

37. Baroness Hale in ***R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors IRLR 136, SC*** pointed out that direct and indirect discrimination are mutually exclusive. You cannot have both at once. This is because of their fundamental difference which is that direct discrimination can never be justified whereas indirect discrimination can if it is a proportionate means of achieving a legitimate aim. The claimant in this case recognised that the alleged discriminatory acts could not amount to direct and indirect discrimination and invited the tribunal to consider whether they amounted to direct discrimination before considering whether they amounted to indirect discrimination.

Shifting the Burden of Proof

38. As regards direct discrimination, shifting the burden of proof was considered in this jurisdiction by the Court of Appeal in the case of ***McCrory & Others v McKeith [2016] NICA 47***. This case concerned a disability discrimination claim but the burden of proof test is identical in FETO. The court held:-

> *"This provision and its English analogue have been considered in a number of authorities. The difficulties which tribunals appear to continue to have with applying the provision in individual cases indicates that the guidance provided by the authorities is not as clear as it might have been. The Court of Appeal in* ***Igen v Wong [2005] 3 ALL ER 812*** *considered the equivalent English provision and 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 an adequate 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. In an annex to its judgment, the Court of Appeal modified the guidance in* ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 333****. It stated that in considering what inferences and conclusions can be drawn from the primary facts the tribunal must assume that there is no adequate explanation for those facts. Where the claimant proves facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex then the burden of proof moves to the respondent. To discharge that onus, the respondent must prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of sex. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to be adduced to discharge the burden of proof. In* ***McDonagh v Royal Hotel Dungannon [2007] NICA 3*** *the Court of Appeal in Northern Ireland commended adherence to the* ***Igen*** *guidance."*

39. In the case of ***Madarassy v Nomura International PLC [2007] IRLR 247***, the English Court of Appeal provided further clarification of the tribunal's task at the first stage of considering whether the claimant has proven facts from which the tribunal could conclude in the absence of an adequate explanation, that the respondent has committed an act of discrimination. The Court of Appeal emphasised that the full context of the evidence presented by the claimant and also by the respondent to contest the complaint, should be considered. The court stated:-

> *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient matter from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination; '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 claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage, the tribunal needs to consider all the evidence relevant to the discrimination complaint such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the complainant were of like with like as required by Section 5(3) and available evidence of all the reasons for the differential treatment.*

40. In ***Nelson v Newry and Mourne District Council [2009] NICA 24*** the Court of Appeal noted that the approach to the shifting of the burden of proof set out in ***Madarassy*** requires a tribunal to consider allegations of discrimination in the context of the relevant factual matrix out of which the claimant alleges unlawful discrimination. The whole context of surrounding evidence must be considered in deciding whether the tribunal could properly conclude, in the absence of an adequate explanation that the respondent has committed an act of discrimination. The Court of Appeal went on to note that in ***Curley v Chief Constable of the Police Service of Northern Ireland and ANOR [2009] NICA 8,*** Coughlin J emphasised the need for a tribunal to focus on the fact that the claim to be determined is an allegation of unlawful discrimination. A tribunal must retain this focus when applying the provisions of the burden of proof and in doing so be cognisant of the need to stand back and focus on the issue of discrimination.

41. If the claimant does not prove facts from which the tribunal could conclude that the respondent has committed unlawful discrimination/unlawful harassment, then the claim fails. If the claimant does prove such facts, then the burden of proof moves to the respondent to prove on the balance of probabilities the treatment afforded to the claimant was not on grounds of the protected characteristic (direct discrimination), or was not for a reason related to the protected act (victimisation), or that the claimant was not subjected to unwanted conduct on the protected ground (harassment). In assessing the respondent's explanation for the treatment complained of, the tribunal must be satisfied that the explanation is adequate to

discharge the burden of proof

on the balance of probabilities. As highlighted in ***McCrory***, a tribunal will normally expect cogent evidence from the respondent to discharge the burden of proof. If the tribunal does not accept the respondent's explanation on the balance of probabilities, then it must find for the claimant.

42. Whilst the mechanics of the burden of proof prescribes a two stage test, this test is not to be applied too slavishly or mechanically. An alternative way to deal with the burden of proof, which is often used by the tribunal if there is uncertainty as to whether the burden has shifted, is to consider the explanation put forward by the respondent for the treatment complained of. If having done so, the tribunal is satisfied on the balance of probabilities that the respondent has presented a coherent and adequate explanation for the treatment which is in no way influenced by the protected characteristic, (or in the case of victimisation, the protected act) then the claimant's claim of discrimination fails. This approach was endorsed in ***Laing v Manchester City Council [2006] IRLR 748 EAT*** where the EAT stated (at paragraph 71):-

> *"There still seems to be much confusion created by the decision in **Igen v Wong**. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race…"*

43. The EAT went on to state (at paragraph 75)

> *"The focus of the tribunal's analysis must at all times be the question whether they can properly and fairly infer race discrimination. If they are satisfied that the reason given by an employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is an end of the matter. It is not improper for a tribunal to say, in effect, 'there is a real question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation … and it has nothing to do with race."*

44. With regard to indirect discrimination, the relationship of the four elements of indirect discrimination, was considered by the EAT in ***Dziedziak*** judgment. Based on Mr Justice Langstaff's comments on this issue it is evident that in respect of the four elements, the burden lies with the claimant to establish the first, second, and third elements of the statutory definition, i.e.;

    i. that there was a PCP;

    ii. that it disadvantaged those sharing the protected characteristic generally (particular disadvantage to the group or disparate impact);

iii. that what was a disadvantage to the general created a particular disadvantage to the individual who was claiming (personal disadvantage).

If the claimant can do so, only then does it fall to the employer to justify the PCP as a proportionate means of achieving a legitimate aim.

Awards for Injury to Feelings

45. The Court of Appeal in ***Vento v Chief Constable of West Yorkshire Police (No 2) ICR 318, CA*** set down three broad bands of injury to feelings award and gave guidance as to the range of award that is appropriate depending on the seriousness of the discrimination question. These bands have been subsequently updated to reflect inflation. The relevant uplift for this claim (presented to the tribunal on 1 May 2020) was contained in the Presidential Guidance in England and Wales and in Scotland on 27 March 2020. For those claims presented on or after 6 April 2020, the bands are:-

- a lower band of £900 to £9,000 (for less serious cases);

- a middle band of £9,000 to £27,000 (for cases that do not merit an award in the upper band), and

- an upper band of £27,000 to £45,000 (for the most serious cases), with the most exceptional cases capable of exceeding £45,000.

Although not strictly applicable in this jurisdiction they are persuasive guidance particularly given the endorsement of the higher courts that tribunals should take account of inflationary changes.

Unfair Dismissal

46. The approach to be adopted by the tribunal in a misconduct case is set out by Arnold J in **British Home Stores Ltd v Burchell 1980 ICR 303** as follows:-

> *"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, it must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances…"*

47. The Northern Ireland Court of Appeal decision in ***Rogan v South Eastern Health & Social Care Trust [2009] NICA 47*** reiterated the task for the tribunal in a misconduct dismissal case. In doing so, it endorsed the ***Burchell*** approach and that relayed in the other seminal judgment of ***Iceland Frozen Foods Ltd v Jones [1983] ICR 17***. In summary, the test is whether the dismissal was within the band of reasonable responses for a reasonable employer. The tribunal must not substitute its own view for that of the employer but must assess whether the employer's act in dismissing the employee fell outside the band of reasonable responses for a reasonable employer to adopt in the circumstances. The assessment applies to both procedure and penalty.

48. The Court of Appeal in Northern Ireland further examined the approach that a tribunal should adopt in claims of unfair dismissal in the case of ***Connolly v Western Health & Social Care Trust [2017] NICA 61***. Counsel for the claimant cited this judgment in his written submissions and quoted from the minority judgment of Gillen J (paragraph 28) wherein Gillen J provides guidance to the tribunal when applying the statutory test set out in Article 130(4) of the ERO. The guidance provided by Gillen J echoes the guidance provided in the legal authorities on this matter set out above. The tribunal found this judgment of particular relevance as, like the present case, ***Connolly*** concerned the summary dismissal of an employee gross misconduct. Ms Connolly was dismissed for a first offence. The issue in contention was whether the misconduct had been sufficiently serious etc.

49. The case was the subject of two separate appeals to the Court of Appeal but the references in the written submissions of counsel for the claimant and herein are to the later appeal. The majority of the Court of Appeal in ***Connolly*** concluded that the decision of the respondent to dismiss the claimant, in all the circumstances of the case, was not a decision which a reasonable employer could reasonably have reached.

50. Deeny LJ reflected on the legal principles that apply when a tribunal is assessing the reasonableness of an employer's decision making. In doing so Deeny LJ referred to the decision of the Court of Appeal in England in the case of ***Laws v London Chronicle Ltd [1959] 2 All ER 285*** which considered whether an employee was unfairly dismissed having been summarily dismissed for an act of disobedience. The Court of Appeal determined that the tribunal at first instance was right to hold that the dismissal was unfair. Deeny LJ described the judgment of strongly persuasive authority in this jurisdiction and quoted, with emphasis, a passage from the judgment of Lord Evershed M.R. who having reviewed older authorities, concluded (at page 288);

> "*I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds…..that the disobedience must at least have the quality that it is "wilful"; it does (in other words) connote a deliberate flouting of the essential contractual conditions."*

51. In reaching the majority decision, whilst Deeny LJ endorsed the "band of reasonable responses" interpretation of Article 130(4)(a) of the ERO endorsed by Gillen J in his minority judgment, he emphasised that tribunals must apply the

statutory test as a whole. In essence the reasonable responses approach must be applied alongside Article 130(4)(b) which of "*equal status*" and requires a decision to be determined; "*in accordance with equity and the substantial merits of the case."* Deeny LJ noted that this part of the statutory test was a mixed question of law and fact.

52. Section 1 of the 2011 Labour Relations Agency Code on Disciplinary and Dismissal Procedure (the Code) provides guidance regarding disciplinary procedures. In ***Lock v Cardiff RYL Co. Ltd [1998] IRLR 358***, the EAT (Morison J presiding) emphasised that Industrial Tribunals should always have regard to the provisions of the Code even when the parties themselves do not refer to it. This tribunal took the provisions of the Code into account when assessing the fairness of the claimant's dismissal and found the following extracts of particular relevance to the present case.

53. With reference to the law on unfair dismissal paragraph 5 of the Code emphasises that employers are required to act reasonably when dealing with disciplinary issues. The Code acknowledges that what is classed as reasonable behaviour will depend of the circumstances of each case, and is ultimately a matter for the tribunals to decide. It does however outline core principles of reasonable behaviour which include: -

> "*Make sure that disciplinary action is not taken until the facts of the case have been established and that the action is reasonable in the circumstances*
>
> *Deal with issues reasonably and without unnecessary delay*".

54. Paragraph 64 the Code notes good disciplinary procedures should have certain qualities which include that they be non-discriminatory and require management to conduct a reasonable investigation before any disciplinary action is taken.

Contributory fault

55. The approach to be taken by the tribunal in addressing this issue was described thus by the EAT, Langstaff J presiding, in ***Steen v ASP Packaging Ltd. (2014) ICR 56***;-

> *"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."*

"Polkey" Reduction

56. The respondent argues that a "***Polkey***" reduction should be applied in this case, if the tribunal finds that the dismissals were procedurally unfair. This argument refers to the principle set down in the landmark judgment of ***Polkey v AE Dayton Services Ltd (1988) ICR 142***, which is that if the dismissal is held to be unfair solely on procedural grounds, the compensation awarded to the employee should be reduced to reflect the likelihood that he/she would have been dismissed in any event had the employer followed proper procedure. In such circumstances, the

tribunal is entitled when assessing the compensatory award payable for an unfair dismissal to make a reduction to the compensatory award on the grounds that the failure to adhere to a fair procedure made no practical difference to the decision to dismiss.

57. Subsequent cases have provided helpful guidance to the tribunal with regards to the application of the ***Polkey*** principle. That guidance suggests that, irrespective of the type of case or the nature of the unfairness, tribunals will be expected to consider making a ***Polkey*** reduction whenever there is evidence to support the view that the employee would have been dismissed if the employer had acted fairly. This assessment requires the tribunal to consider both whether that employer could have dismissed fairly and whether it would have done so. Inevitably that assessment will involve some speculation, but Elias J emphasised in ***Andrews v Software 2000 Ltd [2007] IRLR 568***, the key question is whether the tribunal can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice.

RELEVANT FINDINGS OF FACT

58. Based on the sources of evidence referred to at paragraphs 15-18, the tribunal found the following relevant facts proven on the balance of probabilities. Save where indicated, the facts are not in dispute. This judgment records the key findings of fact necessary for determination of the issues and does not record all the competing evidence.

59. The claimant is from Kerala in India. He moved to Northern Ireland in 2006 and has worked for the respondent in Ashgrove Care home ("the home") since December 2011, primarily in the role of Care Assistant.

60. The staff employed in the home were diverse in terms of race/nationality. The manager is from India, the deputy manager, from Romania and the main cohort comprised of staff from Northern Ireland, the Republic of Ireland and other parts of Europe.

61. The claimant initially worked for the respondent in its kitchen. However, washing dishes for a prolonged period each day caused the claimant to experience pain and stiffness from his shoulders to his elbows. The claimant mentioned this issue to his GP and was advised to find another job. There is no record of this discussion in the claimant's GP notes and records. It was the claimant's case that this was a casual conversation; a matter he raised with the doctor when he was attending an appointment for another family member. The respondent challenged this evidence. The tribunal regards the claimant's evidence to be credible because it is consistent with his evidence on this point throughout. Secondly, the claimant's GP note lends support to his account. Additionally, the claimant followed the GP's advice in that he found a new job by successfully applying for the care assistant post. The claimant did not experience the same discomfort in his shoulders and elbows in this new role.

<u>The Claimant's Ability to Communicate Effectively in English</u>

62. The claimant's native language is Malayalam. His proficiency in communicating in English is an issue in contention. This is a very important issue as the claimant's

ability to effectively communicate at two meetings with the respondent on 26 February 2019 and on 30 July 2019, without the aid of an interpreter, is centrally relevant to the claimant's claims. This is because what the claimant said or was understood to have said at these meetings prompted a chain of events which ultimately led to the claimant's dismissal for gross misconduct.

63. The claimant maintained he struggles to effectively communicate in English (both verbally and in writing). He can struggle to understand what is being said to him in English and relies heavily on his wife to help him communicate in English, particularly with written communications, as her command of written and spoken English is very good. The claimant accepted he can follow English when it is spoken in short simple sentences and understood 50-60% of the questions asked on cross-examination without the aid of the interpreter. The claimant found local accents posed the greatest barrier for him fully understanding spoken English. The respondent challenged the veracity of the claimant's evidence on his ability to effectively communicate in English generally and specifically during the two above-mentioned meetings. In support of its position, the respondent pointed to the claimant's residence in Northern Ireland for a significant number of years and to the undisputed fact that the claimant did not raise any communication issues with the respondent since the commencement of his employment in 2011 until after the second of the above-mentioned meetings on 30 July 2019.

64. The tribunal accepts the claimant's evidence on this point and finds that the claimant struggles to effectively communicate in English orally and in writing. The tribunal reached this finding based on the following: -

(i) The claimant's need to communicate orally in English in his role as care assistant was limited due to a number of factors notably; the duties of the role were predominantly repetitive manual tasks, the residents of the home were permanent so he was familiar with their needs, he tended to work alongside a colleague whom he would rely on to communicate with a resident if required and his line manager was from India which obviated the need to speak to the manager in English.

(ii) Duties which required written communications were limited to the completion of pro-forma documents which were simple in structure and thus easy to follow.

(iii) The claimant was accompanied by his wife to an Occupational Health appointment in April 2019 to help him communicate with the doctor (see paragraph 75).

(iv) The claimant's unchallenged evidence was that his wife transcribed his written communications in the hearing bundle and his witness statement into English.

(v) Having observed the claimant throughout the hearing it was obvious to the tribunal that the claimant was not fluent in English. The claimant's demeanour and interactions with the interpreter throughout the hearing were such that we were wholly satisfied the claimant required the support of the interpreter to fully understand the questions asked of him in cross-examination and to understand what was being said by others during the

hearing. This finding is further supported by the fact that the respondent provided a Malayalam interpreter for all meetings which followed the meeting on 30 July 2019.

(vi) The claimant spoke in English at various points during the hearing. When he did so, we found it difficult to fully understand the claimant, primarily because of his strong accent. This observation accorded with the claimant's evidence that colleagues struggled at times to understand him due to his accent.

65. In summary, based on our assessment of the evidence presented and our observations of the claimant, we find as a fact that the claimant's command of the English language is basic. Whilst he can communicate unaided in the daily performance of his duties, his requirement to do so is limited and largely predictable. The claimant is not proficient in communicating in English, orally or in writing. Therefore, effective oral communication with the claimant in English about any matter of detail, complexity and/or importance, would require the support of an interpreter. Otherwise, those communications would not be reliable. We are also satisfied the respondent's managers ought to have appreciated this fact during the two meetings with the claimant on 26 February and 30 July 2019.

Meeting on 26 February 2019

66. The claimant attended a meeting with Lorraine Thompson on 26 February 2019. No one else was in attendance. The purpose of this meeting was to discuss two allegations levelled against the claimant. As the allegations raised safeguarding concerns, the claimant could not work directly with the residents in the care home pending the outcome of an external safeguarding investigation. During this meeting Ms Thompson informed the claimant of her intention to redeploy him to a role in the home's kitchen in the interim.

67. This meeting is important to this case as it is the first of the two meetings during which the respondent contends that the claimant falsely claimed to suffer from arthritis and was consequently unable to work in the kitchen. These two alleged false claims formed the basis of the following disciplinary charge of gross misconduct levelled against the claimant.

> *"It is alleged that you falsely claim to have a medical condition that prevented you from carrying out alternative duties."*

That charge was upheld, and the claimant was summarily dismissed.

68. Prior to the claimant's dismissal, he had never been diagnosed as suffering from arthritis and there was no reference in the claimant's GP notes and records to arthritis or to any of the symptoms the claimant said he experienced whilst working in kitchen in 2011.

69. The claimant informed Ms Thompson that he could not work in the kitchen due to a health condition. However, there is a conflict of evidence as to what exactly the claimant said to Ms Thompson to justify this. Ms Thompson is clear the claimant said it was because he suffered from arthritis; whereas the claimant maintained he told her he suffered from pain and stiffness that was "*like an arthritis".* No notes were taken of this meeting by either party during or after their discussion. The most

contemporaneous report of what is alleged to have been said is an email from Ms Thompson's email to a Ms Cousins, sent after her meeting with the claimant that day.

70. Having assessed the credibility of this conflicting evidence and the relevant documents arising from this meeting opened to the tribunal, we find as a fact on the balance of probabilities the claimant did not say that he suffered from arthritis but rather said he had a condition like an arthritis in terms of symptoms. This is because the claimant's recall of what he said at this meeting regarding his symptoms whilst working in the kitchen was consistent with what others reported he said on this subject at subsequent meetings, notably the report of the respondent's Occupational Health Service (hereinafter referred to as "OHS") of 3 April 2019 and the minutes of the meeting on 30 July 2019. In contrast, Ms Thompson's evidence to the tribunal on this point was inconsistent with the account in her email of 26 February 2019. For example, Ms Thompson's evidence was that the claimant stated cold water exacerbated his hands due to arthritis but made no reference to water in her email of 26 February 2019 and referred to shoulders in that email, not hands.

71. The tribunal also accepts the claimant's evidence that he found it difficult to explain his symptoms in English and resorted to pointing to his shoulders and arms to indicate where he experienced the pain and stiffness. Although Ms Thompson could not recall whether the claimant did this, it is recorded in the respondent's minute of the next meeting on 30 July 2019 that the claimant made similar gestures. This lends support to the claimant's evidence and we are satisfied that if the claimant gestured at the second meeting at which his health condition was discussed it is more likely than not that he made similar gestures at the first meeting.

72. As the claimant is not fluent in English, the tribunal finds it entirely plausible that Ms Thompson genuinely and quite possibly reasonably understood the claimant to have said he suffered from arthritis. We are also alive to the possibility he did say this. However, we are clear this is not significant. This is because the wording of the disciplinary charge accused the claimant of making a false report which denotes an intent to deceive the respondent. Therefore, we find as a fact that what the claimant meant to say as opposed to what he said/is understood to have said is the critical issue, especially given the communication barrier. On the facts, the tribunal is wholly satisfied the claimant was trying to communicate that he suffered from a condition like arthritis, the symptoms of which were exacerbated by working in the kitchen.

73. Having assessed the evidence, the tribunal finds that Ms Thompson held this meeting without an interpreter because she failed to appreciate the claimant required an interpreter. Given the claimant's lengthy period of employment with the respondent, the tribunal does not criticise Ms Thompson for attempting to discuss the safeguarding and related redeployment issue with the claimant without an interpreter. Moreover, it is undisputed that the claimant did not raise any communication issue at this meeting. However, during this discussion, it should have been obvious to Ms Thompson particularly when the claimant resorted to gesturing, that he required an interpreter to properly discuss these matters. It should also have been clear that without the aid of an interpreter neither Ms Thompson nor the claimant could be satisfied they were effectively communicating

with each other. We therefore find that it was not reasonable for the respondent to rely on Ms Thompson's interpretation of what the claimant said, specifically her view that he said he suffered from arthritis. The tribunal also finds that from this point on the respondent should have provided the claimant with an interpreter to ensure that communications with the claimant were effective and reliable.

74. Following this meeting the claimant was suspended with pay pending the safeguarding investigation into the allegations levelled against the claimant. In a follow up letter of 1 March 2019 from Ms Thompson, the claimant was informed he was being referred to OHS given the absence of any reference to his condition of arthritis in his personnel file. We find it significant that this letter informed the claimant that should he be deemed by OHS to be capable to work alternative duties and he again refused, this may result in the termination of his paid suspension. Whilst no redeployment policy was opened to the tribunal, this statement suggests the respondent intended to revisit the issue of redeployment following the OHS assessment. As no evidence was presented to suggest this happened, the tribunal finds as a fact the redeployment question was not revisited.

OHS Review and Report

75. The claimant's wife accompanied him to the OHS appointment to aid his communications with the doctor. Following assessment, the resulting OHS report dated 3 April 2019, recorded the claimant's historical shoulder problems whilst working in the kitchen but contained no report of the claimant stating he had arthritis. The OHS doctor concluded the claimant was fit and well, had no underlying health conditions and was fully fit for contractual duties.

76. The respondent invited the claimant to a meeting on 30 July 2019. The invite letter clarified the purpose of the meeting was to allow the claimant to respond to an allegation he; "*deliberately misled the company by inventing the diagnosis of arthritis – which resulted in the company placing you on paid suspension".* The respondent presented no evidence to account for the significant 4-month gap between the OHS report and this invitation. The tribunal is critical of this inexplicable delay given the gravity of the respondent's suspicion.

77. The respondent's approach illustrates that its mind was closed to the distinct possibility that this was a case of crossed wires. Considering the claimant's lack of fluency in English we find this single-minded outlook was unreasonable.

Draft Outcome of Safeguarding Investigation

78. On 21 June 2019, the respondent received a draft outcome of the external safeguarding investigation by email. The draft report was reviewed and approved by Ms Thompson as Designated Officer. However, no final report was sent to Ms Thompson. The claimant was not aware of the existence of this draft report. At the time of this hearing the claimant had not been informed of the outcome of the safeguarding investigation.

First Investigation Meeting on 30 July 2019

79. Although no direct evidence was presented, Ms McIlveen contended this was not a formal meeting under the respondent's disciplinary procedure. We find the status of this meeting to be immaterial because on the facts it was a very significant meeting.

This is because evidence of what the claimant said at this meeting was centrally relevant to the decision to proceed to a disciplinary hearing, formed the basis of the disciplinary charge and was relied on to uphold the charge at first instance and appeal.

80. The minutes record the claimant stated he experienced stiffness in his joints, "*indicating his shoulders and elbows*" due to washing dishes and that his doctor advised him that due to "*the difficulties he was having*", he should no longer work in the kitchen role. The tribunal accepts the claimant's evidence that he did not state at this meeting that he suffered from arthritis. This is because no direct evidence was presented by Ms Moriarty or any witness for the respondent to counter this. Secondly the reference in the minutes to the claimant stating he had arthritis was in Ms Moriarty's summary of the timeline which given the communication barrier, was not reliable and was not consistent with Ms Thompson's account (see paragraph 83). At the conclusion of this meeting the claimant confirmed he would provide evidence of his discussion with his GP and agreed to give his written authorisation for the respondent to contact his GP about his condition.

81. No interpreter was provided at this meeting. Having assessed the evidence presented the tribunal finds that on the balance of probabilities this was because Ms Moriarty failed to appreciate an interpreter was required. This finding is based on the absence of any reference to a communication barrier in any of the documents created by Ms Moriarty and on the fact that an interpreter was provided at the next meeting, following the claimant's request for one. We are also satisfied Ms Moriarty should have appreciated an interpreter was required. This is because the claimant's limited ability to speak in English is self-evident. Any doubt about this should have been dispelled when the claimant resorted to gesturing during the meeting. By this point Ms Moriarty should have realised the claimant required an interpreter to effectively communicate at what was a very important meeting where precision in communication was paramount. Without this, Ms Moriarty could not be sure that the claimant could understand and respondent to the serious allegation under discussion.

82. The respondent's failure to provide an interpreter placed the claimant at a substantial disadvantage at this meeting as he could not properly participate. It undermined the reliability of the evidence gathered during the meeting, including Ms Moriarty's report that the claimant stated he suffered from arthritis. It gravely undermined the procedural and substantive fairness of the subsequent disciplinary process which was founded upon what the claimant said or was understood to have said at this meeting and at the earlier meeting with Ms Thompson on 26 February 2019. That deficiency in the respondent's process and the resultant disadvantage to the claimant was not minimised by the presence of the claimant's trade union representative as he too had to communicate with the claimant in English.

83. The unreliability of the information gathered at this meeting was further compounded by the inconsistencies in the respondent's own records. By way of illustration, the record of Ms Thompson's account of what the claimant told her on 26 February 2019 in the minutes of this meeting is inconsistent with Ms Thompson's own account in her email to Ms Cousins. Arthritis in the claimant's "shoulders" becomes arthritis in his "hands". The claimant's arthritis is reportedly affected by the "cold" in Ms Thompson's email whereas in the minutes it becomes "warm water". The tribunal finds that Ms Moriarty's failure to fact check Ms Thompson's report of what the claimant told her about his condition of arthritis and its impact on

him to be a further serious weakness in the respondent's investigation into the claimant's conduct.

Contact with the Claimant's GP

84. Ms Moriarty wrote to the claimant on 31 July 2019 seeking his consent to obtain a medical report from his GP so the respondent could assess the validity of the claimant's assertion he was diagnosed with arthritis in 2011.

85. On 1 August 2019, the claimant attended his GP for a surgery consultation. His GP notes record this as an "*advice request*". The claimant obtained a signed letter from his GP dated 1 August 2019. The respondent accepted that this letter was written and signed by the claimant's GP (see paragraph 14). The letter bears the hallmarks of a document emanating from a GP practice and the tribunal had no reason to question its authenticity. The key portion of this document is a handwritten entry as follows: -

> "*This man is unfit for kitchen duties due to arthralgia*."

This is the first reference to the condition of "arthralgia" and it is the claimant's case that this is the first time that he ever heard of this condition. The tribunal accepted the credibility of the claimant's evidence given the lack of any reference to this condition in his GP notes and records.

86. The claimant provided this note from his GP to the respondent. In response Mr A Wright, Human Resources Advisor, wrote to the claimant on 21 August 2019 and inaccurately observed that the GP note "*states you have been diagnosed with arthritis".* Mr Wright indicated the respondent regarded the GP note as insufficient evidence of any diagnosis and asked the claimant to provide written authorisation to enable the respondent to contact his GP for further details. No explanation was given in this letter or indeed at any point thereafter as to why the respondent considered the GP note to be insufficient. We find this letter evidenced the respondent's sole focus was on its suspicion the claimant made a false claim of suffering from arthritis. There appeared to be no scope within the mind of the respondent to reflect on the credibility of this belief considering the communication barrier and/or the GP's view the claimant was unfit to work in the kitchen. The tribunal finds this rigid view to be unreasonable in the circumstances. We are also clear that the content of the GP note would prompt any reasonable employer to revisit the redeployment issue.

Second Investigation Meeting – 12 September 2019

87. The purpose of this meeting (outlined in two invite letters of 27 August and 5 September) was to provide the claimant with an opportunity to respond to the allegation he had; "*deliberately misled the company by inventing a diagnosis of arthritis which resulted in the company placing you on paid suspension*". We find this again underscores the respondent's one-dimensional approach.

88. On 2 September 2019, the claimant emailed the respondent and requested a Malayalam interpreter attend the meeting. This request was facilitated. The respondent provided the claimant with a Malayalam interpreter at all subsequent meetings in the disciplinary process. By implication, the tribunal finds as a fact that

the respondent accepted the claimant required the support of an interpreter to effectively communicate. This request and the respondent's facilitation of it, was another sign which should have prompted the respondent to query the reliability of its communications with the claimant on 26 February and 30 July 2019 and its associated suspicion the claimant was dishonest. On the facts, this sign had no such effect.

89. The minutes record that the GP note was discussed at this meeting. Ms Moriarty explained she still required the claimant's consent to contact his GP so *"a more thorough and formal report be provided"*. The claimant denied telling Ms Thompson he had arthritis and confirmed he did not have arthritis but rather suffered from arthralgia, as confirmed by his GP. It is recorded in the minutes that the claimant's explanation for not making this clear at the first investigation meeting was because he had not fully understood the questions at that meeting. We find that this explanation should have prompted the Investigating Manager to query the veracity of her line of inquiry, particularly given the content of the GP note which supported the claimant's account. On the facts, it did not.

90. Consistent with his position throughout, the claimant repeated the recommendation of his GP in 2011 that he avoid working in the kitchen due to joint pain. There is no record in the minutes of any discussion with the claimant about how he acquired the GP note or how the condition of arthralgia affected him. We find this to be a significant oversight particularly given that Ms Moriarty's considered the GP note to be inadequate.

The Claimant's Grievance

91. On 14 September 2019, the claimant lodged a grievance with the respondent. The claimant dictated the grievance, but it was written by his wife. In the opening section the claimant reiterates that he told Ms Thompson he previously had *"joint pain and stiffness like an arthritis when in the kitchen in 2011."* He referred to his GP report which verified this and alleged the respondent was subjecting him to racial discrimination. This is the first time the claimant raised an allegation of discrimination with the respondent. The claimant expressed his frustration that the respondent misinterpreted what he had said and kept insisting he said he had arthritis. The claimant described this approach as *"bullying and harassment due to my ethnicity."*

Investigation Report dated 16 September 2019

92. A two-page investigation report was prepared by the Investigating Manager; the conclusion of which was that the relevant concern progress to a disciplinary hearing. Having assessed the evidence presented the tribunal finds as a fact that the disciplinary investigation and resultant report were inadequate. This is particularly so given the severity of disciplinary charge. This finding is based on the following: -

    (i) No witnesses were interviewed as part of the investigation process. The genesis of the suspected false claim was a discussion between the claimant and Ms Thompson. Therefore, at a minimum Ms Thompson should have been interviewed.

(ii) What the claimant was alleged to have told Ms Thompson was not fact checked and the report replicates the factual inconsistencies in the minutes of the meeting of 30 July 2019 about what the claimant allegedly told Ms Thompson.

(iii) The investigation report made no reference to important matters notably; the claimant's lack of proficiency in English, the absence of an interpreter at the two key meetings and his revelation he had not fully understood the questions at the second key meeting. These omissions severely undermine the veracity and logic of Ms Moriarty's conclusion she could see; *"no way in which LT* (Ms Thompson) *could have misinterpreted PPs* (the claimant) *assertion of arthritis, which lines up with my understanding from our first meeting."* The tribunal infers from these omissions that the Investigating Manager either remained ignorant of the communication barrier, or at the very least failed to appreciate its significance to the matter under consideration.

(iv) No explanation was given to explain why the GP note was considered insufficient. This was unsatisfactory because its contents pointed to a case of crossed wires rather than the deliberate invention of a medical condition.

(v) There was no follow up with the claimant's GP despite provision of the claimant's written authority, al be it presented a few hours past an extended deadline. Ms Moriarty inferred from this delay that the claimant had something to hide. Given the severity of this inference and the clear relevance of the GP note to the suspicion of dishonesty, any deemed deficiencies in the medical evidence should have been followed up with the claimant's GP to ensure all relevant facts were established.

(vi) Within the investigation report, Ms Moriarty interprets the reference in the GP note to the claimant having arthralgia as evidence which supports the suspicion the claimant previously stated he suffered from arthritis. No explanation is given for this reasoning. On the facts this is an illogical view which illustrates a one-sided approach. No acknowledgement is given to the alternative explanation proffered by the claimant – i.e., that he was referring to symptoms he experienced due to arthralgia during his discussions with Ms Thompson and Ms Moriarty.

(vii) The GP note is not listed in the written evidence submitted along with the investigation report. We infer from this that it was excluded by the Investigation Manager and find as fact that it was not provided to the decision-makers at first instance and appeal. Therefore, a key piece of evidence was ignored.

93. The claimant understood that Ms Moriarty decided the matter should progress to a disciplinary hearing. The respondent presented no direct evidence on this issue. Having assessed the evidence presented, the tribunal finds as fact that Ms Moriarty took this decision. As to why this decision was taken, the tribunal considered the claimant's direct evidence that it was because of his race, the absence of direct evidence from the respondent on this issue and the contemporaneous documents. Having done so, the tribunal finds as fact on the balance of probabilities the decision was taken because Ms Moriarty had a steadfast belief the claimant had

informed her and Ms Thompson that he had arthritis, and this amounted to dishonesty and her associated failure to either recognise the communication barrier or appreciate its significance. This is because the contemporaneous paper trail of the disciplinary investigation strongly points to this finding.

The Disciplinary Charge

94. The claimant was issued with two separate letters inviting him to a disciplinary hearing on two different dates. The wording of the disciplinary charge differed in each letter and the second letter referred to an additional matter to be considered (see paragraph 96 below). The respondent provided no explanation for this.

95. Although identification of the relevant disciplinary charge was as an issue in dispute, it transpired that both parties agreed and the tribunal so finds, that the pertinent charge was contained in the second invitation letter dated 19 December 2019 and quoted a paragraph 67 above. Both parties also agreed that they respectively understood the medical condition to be "arthritis".

96. This letter made it clear that this charge, (categorised as gross misconduct) was one of two matters to be considered at the hearing. The second matter was the progress of the external safeguarding investigation and the reasonableness of continuing to employ the claimant given his inability to carry out his duties. The letter specified that determination of either matter could result in termination of the claimant's employment.

Disciplinary Hearing and Outcome

97. The disciplinary hearing took place on 30 December 2019. The hearing was chaired by Ms A Begley and Mr A Wright attended as a note taker. The claimant was accompanied by his union representative, Mr A McCann and supported by an interpreter.

98. The claimant challenged aspects of the investigation report at the disciplinary hearing. He denied ever stating he had arthritis and explained he did not refer to his condition of arthralgia at the first meeting with Ms Moriarty as he was unaware of the term but noted he had described the symptoms of this condition. The claimant challenged the adequacy of the OHS assessment and noted that the OHS report referenced the shoulder problems he had experienced with whilst previously working in the kitchen.

99. Ms Begley's outcome letter dated 7 January 2019 identified two breaches of the respondent's disciplinary rules which the respondent considered to be gross misconduct as follows: -

- *"It is alleged that you falsely claimed to have a medical condition that prevented you from carrying out alternative duties.*

- *I also detailed that consideration would be given to the reasonableness of continuing with your employment, in light of your ongoing safeguarding investigation."*

100. On a common sense reading of the outcome letter it is clear Ms Begley regarded the ongoing safeguarding investigation as an additional allegation of gross

misconduct. This matter was not advanced as a charge of gross misconduct before the disciplinary hearing. The tribunal is satisfied that no reasonable employer would treat this matter as misconduct, let alone gross misconduct. Ms Begley's treatment of this matter is also at odds with the respondent's response to this claim which did not describe this as a conduct matter.

101. Ms Begley ultimately concluded that the claimant's actions set out in the charge of making a false claim, constituted gross misconduct and the claimant should be summarily dismissed with immediate effect. No specific justification was provided within the body of the outcome letter for upholding this charge. Ms Begley also concluded the decision to dismiss the claimant was "*equally made*" due to *"the continued lack of progress in your safeguarding investigation".* We considered the claimant's evidence he was dismissed due to his race, the absence of direct evidence from the decision maker and the relevant contemporaneous documents. Having done so we find as a fact on the balance of probabilities this decision was taken because Ms Begley concluded that the dishonesty charge was proven and equally because she was under the misapprehension that the external safeguarding investigation had not progressed. The tribunal finds that these conclusions were not reasonable in all the circumstances due to the following facts: -

(i) The tribunal finds that Ms Begley failed to critically analyse the evidence presented to support the dishonesty charge. In particular, she failed to consider the impact of the claimant's communication difficulty at the two key meetings on the reliability of the evidence presented to uphold the disciplinary charge. This is because if she had this would be referenced in the hearing minutes and outcome letter. However, there are no such references.

(ii) Ms Begley makes no reference to the inconsistencies in Ms Moriarty's description of what the claimant is alleged to have said to Ms Thompson on 26 February 2019 and the email of the same date sent by Ms Thompson to Ms Cousins. The tribunal infers from this that she failed to appreciate the differences which also illustrates a lack of critical analysis of the evidence presented to support the dishonesty charge.

(iii) The claimant's GP note was of central relevance to the dishonesty charge. Therefore, the exclusion of that evidence from the evidence presented to Ms Begley undermined the validity and reasonableness of her decision to uphold the dishonesty charge.

(iv) The alternative decision to dismiss relied on by Ms Begley was procedurally and substantively flawed. Firstly, the tribunal finds as a fact that the progress of the safeguarding investigation was not investigated before this decision was taken. This is because the respondent presented no evidence to suggest it had and instead presented evidence that at the relevant time the external investigation had in fact progressed considerably with a draft report issued to Ms Thompson in June 2019. Ms Begley made no reference to this progress in her outcome letter and on that basis the tribunal finds she was unaware of this important piece of information. Secondly, the matter was not advanced as a conduct matter before the hearing. Finally, this characterisation was patently unfair as the progress of an external

investigation could not by any reasonable consideration be regarded as misconduct, let alone gross misconduct.

Disciplinary Appeal

102. The claimant appealed the decision to dismiss him by a letter of 13 January 2020. His appeal focused on the absence of an interpreter on 30 July 2019 and the consequent confusion this caused. On the facts, the tribunal finds this to be a valid and compelling ground of appeal.

103. The appeal hearing took place on 19 March 2020 and was chaired by Ms E McShane. The claimant attended, accompanied by his union representative. An interpreter was also present.

104. The purpose of the meeting was to consider the claimant's grievance and appeal against this dismissal. The appeal functioned as a review of the original decision to dismiss the claimant rather than a fresh re-hearing. Ms McShane maintained the sole matter considered by her at the appeal was Ms Begley's conclusions regarding the dishonesty charge. The tribunal accepts this was the case as there is no reference to the second ground justifying the claimant's dismissal, in the minutes of the appeal hearing or the appeal outcome.

105. Ms McShane upheld the decision to dismiss the claimant on ground of gross misconduct; concluding that the claimant made a false claim that he suffered from a medical condition, which Ms McShane understood to be arthritis. As justification for this decision the outcome letter cited the following documents; Ms Thompson's email of 26 February 2019 and the letter of suspension dated 1 March 2019, both of which refer to the claimant's refusal to be redeployed to a role in the kitchen due to suffering from arthritis, the OHS assessment which concluded the claimant was fit for contractual duties and the minutes of the 30 July 2019 meeting which record that the claimant stated he had arthritis.

106. Having assessed the competing direct evidence and the relevant contemporaneous documents, the tribunal is satisfied that Ms McShane upheld the decision to dismiss the claimant due to her belief that there was sufficient evidence to support the dishonesty charge. However, the tribunal finds that belief was unreasonable due to the following facts: -

    (i) Ms McShane could not recall if she saw or considered the GP letter of 1 August 2019. The tribunal has found that she did not as it was not included in the investigation report. Furthermore, as the GP's opinion was clearly relevant to the disciplinary charge if Ms McShane had considered it as part of her deliberations she would have remembered. This finding is also supported by the fact that there is no reference to this conflicting opinion in the appeal outcome letter. The failure to consider this important evidence undermines the reasonableness of the conclusion that the charge was proven.

    (ii) The tribunal finds that Ms McShane failed to give due consideration to the claimant's primary ground of appeal relating to the language barrier and associated lack of an interpreter at the meeting on 30 July 2019. Ms McShane conceded in cross-examination that she had no recollection of checking whether the claimant had the benefit of an interpreter at this

meeting, or of considering the impact a lack of an interpreter had on the reliability of Ms Moriarty's evidence the claimant stated he had arthritis at that meeting. Furthermore, Ms McShane's observations on this issue in the appeal outcome fail to appreciate the obvious disadvantage a non-fluent English speaker would experience discussing heath related issues. For example, with reference to the language barrier, Ms McShane observed she found it hard to believe that prior to 12 September 2019 the claimant was not aware of the respondent belief he had arthritis given he had stated so on more than one occasion. This observation fails to appreciate that it was not until 12 September 2019 that an interpreter was provided and the language barrier finally removed. It also ignores the uncontested fact that at every relevant meeting where the claimant had the benefit of an interpreter or his wife (at the OHS assessment), the claimant did not assert that he had arthritis. In fact, at the meeting on 12 September and the disciplinary and appeal hearings, the claimant insisted he never stated he had arthritis but rather he had condition "*like arthritis."*

(iii) Ms McShane's conclusion that there was no language barrier and communication with the claimant was clear is at odds with her acknowledgement in cross-examination that the claimant required the assistance of an interpreter at the disciplinary hearing and the appeal hearing and communicated with her via the interpreter for at least part of the appeal hearing. On the facts the tribunal finds this key conclusion to be fundamentally flawed and unreasonable. There clearly was a communication barrier which undermined the reliability of Ms Thompson and Ms Moriarty's interpretations of what the claimant said or was trying to say in English which in turn undermined the evidence grounding the disciplinary charge.

(iv) The tribunal finds that the inconsistencies in the reports of what Ms Thompson alleges the claimant said on 26 February 2019 were not considered by Ms McShane at the material time. This is because if they were she would have remembered her deliberations, however she could not. The tribunal finds this to be a further oversight in the appeal process which was particularly grave given that Ms Thompson was the only witness to the claimant's alleged original claim of arthritis which triggered the disciplinary process and was not interviewed as part of the disciplinary investigation.

(v) The original sanction of summary dismissal was upheld on appeal. In reaching this conclusion Ms McShane noted that the claimant's false claim*; "resulted in your full paid suspension for 10 months*". The respondent relied on this impact of the claimant's alleged dishonesty as justification for the sanction. However, this element of the charge can only be relevant to sanction if, on the evidence it was reasonable to conclude the claimant made a false report. On the facts, the sum of the evidence pointed away from any such conclusion. Also, the length of time the claimant remained on paid suspension was at least partially due to the respondent's unexplained delay in speaking to the claimant about the OHS report and its sole focus on its suspicion the claimant had deliberately set out to deceive. The tribunal has found this to be a wholly unreasonable approach in the relevant circumstances.

Impact of the lack of an Interpreter at the first two meetings

107. The claimant gave evidence of his frustration and upset at being accused of lying about suffering from arthritis when he did not have the benefit of an interpreter. This impact was exacerbated by the fact that despite providing an interpreter at all meetings following the meeting on 30 July, the respondent refused to entertain the possibility that the claimant had been misunderstood at these two key meetings. Instead, the respondent remained steadfast in its belief the claimant had lied at these meetings with the intent to deliberately mislead the respondent. That hurt and frustration is expressed by the claimant in his evidence to the tribunal (paragraph 17 of his witness statement): -

> *"Nobody cares at all that I struggle with English and they decided that any mistake I made because I was a liar and not because English is not a language I am comfortable with. It made me feel very embarrassed and ashamed that I was going to lose my job, and not be able to care for my family, because I couldn't speak good enough English."*

108. The tribunal finds it reasonable for the claimant to be upset by the respondent's fixed belief that he was deliberately lying at both meetings and conversely its failure to entertain the distinct possibility that he was unable to communicate effectively in English about his health condition and how working in the kitchen had affected this condition.

109. The tribunal has found the claimant's lack of fluency in English placed him at a disadvantage at the meetings on 26 February 2019 and 30 July 2019 where no interpreter was provided.

110. The respondent's steadfast focus on what Ms Thompson and Ms Moriarty heard him say made it imperative that the claimant spoke with precision. As a non-native English speaker who was not fluent in the language, the claimant could not do this without the support of an interpreter and was thus at a distinct disadvantage compared to employees of the respondent who are native English speakers. There was therefore a clear correlation between the PCP and this particular disadvantage suffered by the claimant.

111. The claimant's dismissal was principally grounded in the alleged false reports the claimant made at both meetings where the PCP was applied. However, the claimant's dismissal was not a disadvantage arising from the PCP. It was a step removed as it was caused by the particular disadvantage the experienced by the PCP identified, i.e., his inability to effectively communicate/participate at meetings held in English without the support of an interpreter. This is an important but fine distinction. This is because on the facts there is a clear and strong connection between the particular disadvantage suffered by the claimant due to the PCP and his dismissal. Therefore, the ultimate price paid by the claimant for the particular disadvantage caused by the PCP was the loss of his job the loss of job security. Having held this role for nine years, the tribunal has no hesitation in accepting the claimant's evidence that he experienced significant stress and difficulty sleeping both during the disciplinary investigation and after his dismissal.

Mitigation of Loss of Earnings

112. The respondent did not dispute the amounts claimed in the claimant's schedule of loss but the adequacy of the claimant's steps to mitigate his loss was explored in cross-examination. We find the claimant took adequate and timely steps to mitigate his loss of earnings. This is because we accept the claimant's evidence that the Covid-19 pandemic delayed his ability to find a new job given the general negative impact the pandemic and the first national lockdown had on the general job market. The claimant contracted Covid-19 in or around 20 April and was ill for a period in April 2020 which delayed his job search. The claimant applied to Translink to be a bus driver but failed the mathematics test. We also accept the claimant's evidence that his wife made phone calls to local nursing homes with a view to securing work for the claimant. The claimant ultimately obtained employment on 27 September 2020 by which point the claimant had mitigated his loss of earnings. In these circumstances we are satisfied that this was a reasonable period.

Contributory Fault

113. Aside from its contention that the claimant was guilty of the conduct set out in the charge, the respondent made no submissions in relation to contributory fault and thus did not identify any aspect of the claimant's conduct which caused or contributed to his dismissal. Notwithstanding this, Article 157(6) requires the tribunal to identify any such conduct. On the facts the tribunal did not identify any aspect of the claimant's conduct which could give rise to contributory fault. The claimant was charged with claiming to suffer from arthritis at two meetings to avoid redeployment. The claimant's conduct at these meetings cannot reasonably be considered culpable conduct contributing to his dismissal as he did not have the requisite support of an interpreter.

114. Much was made by the respondent (re ***Polkey***) about the claimant's delay providing authority to contact his GP on the basis it suggested the claimant had something to hide. We find, this cannot be regarded as culpable conduct because in providing medical evidence from his GP so quickly after the meeting on 30 July, the claimant acted reasonably and evidenced he had nothing to hide. Whereas in contrast, the respondent acted unreasonably in not presenting this evidence to the decision makers and/or by failing to contact the GP because it deemed the note to be inadequate.

Polkey

115. The respondent's argument for a ***Polkey*** reduction was premised on the tribunal determining that the absence of an interpreter at the 30 July meeting was a procedural defect. The respondent contended if this defect had been rectified, the claimant would have been dismissed in any event because aside from the letter from the claimant's GP, there was no evidence to support the claimant's assertion, he was unfit for kitchen duties during the period of paid suspension until his dismissal in January 2020. Despite Ms McIlveen confirming at the outset of the hearing that the respondent accepted the GP letter was authentic and no further input from the GP was required, the respondent persisted with a ***Polkey*** argument which contradicted this position. In summary it submitted the evidence from the GP was weak due to the absence of a reference to arthritis/arthralgia/joint pain or stiffness in the claimant's GP notes and records over the relevant periods. The respondent contended there was something odd about the GP letter. It further contended the claimant's delay in providing the respondent with authorisation to

contact his GP suggested he had something to hide. We find that the respondent's acceptance that the GP letter was authentic fatally damages the logic of this ***Polkey*** argument.

116. On the facts found, we find this argument was also fatally undermined due to the following:-

(i) The claimant was dismissed for making a false claim of suffering from arthritis. The issue of his fitness to work in the kitchen is only relevant if it was reasonable for the respondent to conclude the claimant made a false claim. On the facts it was not.

(ii) The procedural deficiency and the evidence relied on to justify the dismissal were inextricably linked. Therefore, it cannot reasonably be argued that but for that procedural deficiency the claimant would still have been dismissed.

(iii) The sufficiency of the GP note was queried in the disciplinary investigation, but was not followed up by Ms Moriarty, despite the claimant authorising the respondent to do so. Before the GP letter was disregarded, the respondent should have made further inquiries with the GP surgery. Furthermore, arthralgia is not a well-known condition and it is distinctly unlikely the claimant would have conjured up this diagnosis or hoodwinked a medical professional to do so. No such suggestion was put to the claimant internally or in cross examination.

(iv) The GP letter did not factor into either decision-maker's decision to uphold the dishonesty charge. Therefore, its perceived weakness, is retrospective and thus irrelevant.

117. Whilst much was made by the respondent about the GP letter at the hearing in respect of ***Polkey***, we are satisfied that for the above reasons this argument was fatally flawed. We are clear the GP letter did two things. It suggested the claimant's alleged false claims were not deliberate but were miscommunications. It also raised a legitimate question as to whether the claimant was in fact fit to work in the kitchen. The GP letter was at odds with the finding of the OHS doctor. Without further enquiry it is not possible to determine whether the claimant was in fact fit to work in the kitchen. However, in the absence of reliable evidence of dishonesty on the part of the claimant that matter should have been pursued under its redeployment process not its disciplinary process.

CONCLUSIONS

118. This is a claim of direct and indirect race discrimination and unfair dismissal. The allegations of direct and indirect race discrimination relate to the disciplinary process, including the ultimate decision arising from that process to dismiss the claimant which was upheld on appeal.

Direct Race Discrimination

119. The alleged acts of direct discrimination are interlinked and are considered in turn;

(i) *A failure to provide an interpreter at the meetings on 26 February and 30 July 2019*.

On the facts, this omission prevented the claimant from effectively communicating at both meetings. The claimant's limited ability to communicate in English was obvious to the tribunal and should have been obvious to Ms Thompson and Ms Moriarty during their meetings with the claimant. That realisation should have prompted them to adjourn their respective meetings and arrange the provision of an interpreter to alleviate this disadvantage particularly given the nature and importance of the subject matter under discussion.

The precise nature of the claimant's comparison was set out in the claimant's written submissions. The claimant contends that a hypothetical native English speaker would not have been asked by the respondent to participate in a meeting where they were unable to fully understand what was being said to them. In contrast the respondent required the claimant to do this on two occasions and thus as a non-native English speaker he was unable to properly participate in these meetings. The tribunal regards this hypothetical comparison to be conceptually difficult. This is because, as emphasised in ***Shamoon*** the hypothetical comparator should be in the same position in all material respects as the claimant save for the difference in their protected characteristic. By implication, like the claimant, the hypothetical comparator's inability to understand would be because the meeting was not held in in English, their native language. As the respondent operates in a country where English is the native language it is difficult to envisage a circumstance where this comparison would materialise.

Setting the conceptual issue aside, assuming the tribunal accepted the validity of the comparison and was satisfied it pointed to less favourable treatment, the claimant did not present facts from which the tribunal could conclude the non-provision of an interpreter was because of his national origin. Therefore, the claimant failed to shift the burden of proof. The tribunal determined it was not appropriate to draw an adverse inference from Ms Moriarty's failure to give evidence to shift the burden. This was because Ms Thompson gave evidence. She held the first meeting with the claimant without an interpreter. No allegation of discrimination was put to her during cross-examination.

Furthermore, on the facts, the reason why the claimant was not provided with an interpreter at both meetings was not influenced by the claimant's national origin but rather was due to the failure of both managers to appreciate there was a communication barrier at these meetings. The fact the respondent provided an interpreter at all meetings after the claimant alerted it to his need for one supports this conclusion and points away from a finding that the failure to provide an interpreter at the outset had anything to do with race.

(ii) *The decision to proceed to a disciplinary hearing on the basis of what was said during those meetings.*

This decision was made by Ms Moriarty. It was argued for the claimant that because Ms Moriarty took this decision in the knowledge the claimant

required an interpreter, but no interpreter was present at either key meeting was sufficient evidence to shift the burden of proof. The tribunal does not accept this because the claimant failed to present any evidence that the chosen hypothetical comparator would be treated more favourably than he was in the same or similar circumstances. Additionally, on the facts, Ms Moriarty failed to either recognise the communication barrier, or at the very least, failed appreciate its negative impact on the cogency of the evidence gathered at the two key meetings. Whilst this was clearly wrong, the claimant failed to present compelling facts from which the tribunal could conclude her poor judgment had anything to do with race.

On the facts found, the decision to proceed to a disciplinary hearing was rooted in the respondent's strong suspicion the claimant had deliberately lied at the two key meetings about suffering from arthritis to avoid redeployment in favour of paid suspension. These reasons are reflected in the investigation report and disciplinary charge. Whilst on the facts, this rationale was blinkered and unreasonable, there was no evidence that it was influenced by the claimant's national origin.

(iii) The decision to dismiss the claimant both at first instance and at appeal.

The claimant relied on the same argument set out at sub-paragraph (ii) above to shift the burden of proof in this instance. The tribunal does not accept this argument for the same reasons set out at sub-paragraph (ii) above. In so doing the tribunal accepts the respondent's submission that it is significant that it was not put to Mc Shane or any of the respondent's witnesses at the hearing that it was the claimant's case that the reason for his dismissal was connected to his race. Therefore, the claimant has failed to shift the burden of proof.

On the facts, the decisions to dismiss the claimant at first instance and at appeal were reached because both decision makers decided to uphold the disciplinary charge of gross misconduct. Those decision-makers failed to give due regard to the communication issue. Whilst this oversight and the resultant decisions were unreasonable in the circumstances, no evidence was presented to suggest that that the claimant was dismissed on grounds of national origin.

120. We also found it significant that the claimant's allegations of direct race discrimination were made in the context of a diverse workforce in terms of racial/national origins. In the absence of evidence to suggest race was a reason for the impugned conduct of the respondent, this racial diversity points away from any such conclusion. Therefore, for the reasons set out herein, the claimant's claims of direct race discrimination are dismissed.

Indirect Race Discrimination

121. The PCP relied upon by the claimant is the holding of meetings in English, without an interpreter. It was the claimant's case that as a rule of thumb the respondent holds its meetings in English without an interpreter. The claimant did not specify whether this was a provision, criteria, or practice. On an objective analysis we conclude this was a practice. The respondent accepted this practice could in law

amount to a PCP but argued that on the facts it did not apply in this case because the claimant was not required to attend all meetings without an interpreter. Additionally, the respondent pointed to the fact no evidence was sought from the respondent to support the claimant's assertion this PCP applied.

122. The tribunal rejects this argument as it misunderstands the identified PCP. The tribunal is satisfied the PCP did apply in the respondent organisation. As an employer operating in a locality where English is the native language, the tribunal, as an industrial jury has no hesitation is concluding that this was a deeply embedded and wholly understandable practice. Over the period of claim this practice was applied twice to the claimant. It was only departed from when the claimant asked for an interpreter. The tribunal regards the respondent's provision of an interpreter at all subsequent meetings as tacit acknowledgement that the claimant was disadvantaged at the two previous meetings because, due to his nationality, he was a non-native English speaker.

123. The claimant identifies non-native English speakers as the group of which he is a part. They, like the claimant are part of this group by virtue of a protected characteristic which is their national origin. The claimant contends he and this group are at a particular disadvantage by the PCP in comparison to employees of the respondent, who by virtue of their national origin, are native English speakers. Based on the tribunal's general knowledge of the working population, we are satisfied that this is an appropriate pool which can realistically and effectively test the allegation of indirect discrimination.

124. No statistical evidence was presented by the claimant to show disparate impact to the group of which the claimant is a part. Whilst Baroness Hale noted is ***Essop*** that provision of such evidence is commonplace, the corollary is that it is not an essential component. The nature of the PCP and the comparison made are such that we are satisfied as a matter of common-sense that meetings conducted in English without an interpreter would put a significant number in the claimant's group, including others of the same national origin as the claimant, at a particular disadvantage in respect of their ability to effectively communicate in comparison to native English speakers. This is particularly so in meetings like those attended by the claimant where the subjects under discussion are complex and/or unfamiliar. Owing to different levels of fluency, we appreciate that this will not be the case for all individuals in this group. However, the particular disadvantage does not need to be felt by everyone in the identified group as confirmed in the fourth salient feature in ***Essop***.

125. As a result of the PCP, the claimant was unable to effectively communicate at both meetings due to not being fluent in English and thus was personally disadvantaged in comparison to the respondent's employees who are native English speakers. The claimant's inability to properly participate was best evidenced by the claimant resorting to gesturing to convey what he was trying to say and his request for an interpreter. The claimant's inability to effectively communicate at both meetings precipitated a chain of events which led to the claimant being subject to disciplinary proceedings and summarily dismissed. Thus, the impact of the personal disadvantage experienced by the claimant was far reaching.

126. For these reasons, the tribunal is satisfied the claimant has on the balance of probabilities proven the first, (PCP) second (particular disadvantage to a group

sharing a protected characteristic) and third (personal disadvantage) elements of the statutory definition of indirect discrimination and thus discharged the burden of proof in relation to this claim of indirect discrimination on grounds of race, specifically, national origin. As the respondent did not advance any justification defence, the claimant's claim of indirect discrimination in relation to the way the respondent conducted its disciplinary procedure, contrary to Articles 3(1)A and 6(2) of the RRO is upheld.

Unfair Dismissal

127. This is a claim of unfair dismissal in which the claimant alleges he was unfairly dismissed because of the respondent's failure to follow a fair procedure (procedural unfairness) and because the decision to dismiss in the circumstances of the case was unfair (substantive unfairness). The distinction between procedural and substantive unfairness was blurred in this case. The important issue in assessing the fairness of a dismissal is the statutory test set out in Article 130 of the ERO. The tribunal applied the relevant law to the facts found to reach the following conclusions on the agreed issues: -

128. On the facts, we conclude that the principal reason for the claimant's dismissal was his conduct. This is a potentially fair reason under Article 130. The precise conduct which formed the basis of the disciplinary charge was the claimant's alleged deliberate dishonesty in claiming to suffer from arthritis on two occasions: initially at the meeting with Ms Lorraine Thompson on 26 February 2019 and at a follow up meeting with the Investigating Manager, Ms Karen Moriarty on 30 July 2019. The respondent characterised this conduct as gross misconduct warranting summary dismissal. The claimant accepted (and the tribunal concurs) that deliberately lying to an employer about suffering from a medical condition to avoid redeployment, could reasonably amount to gross misconduct. The claimant queried whether this was the only matter which formed the basis of the decision at first instance to dismiss. We address this matter below (point (iv) of paragraph 130).

129. The next element of the statutory test requires the tribunal to consider whether the respondent's decision to dismiss the claimant is fair or unfair having regard to the reason shown by the respondent. In determining the question of fairness, the tribunal must consider whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee. That question of reasonableness must be determined in accordance with equity and the substantial merits of the case. In assessing this question, the tribunal considered the procedural and substantive fairness of the decision to dismiss.

Procedural Fairness

130. The tribunal unanimously concludes that there were several procedural failings in the disciplinary process which undermined the fairness of the dismissal, some fatally so. They are as follows.

    (i) The lack of an interpreter at the first investigatory meeting on 30 July 2019 was a fatal procedural failing in view of the claimant's limited ability to communicate in English and an act of indirect race discrimination. The

respondent relied on what the claimant allegedly said at that procedurally defective and discriminatory meeting to formulate and uphold the disciplinary charge of dishonesty. This fatally undermined the fairness of the subsequent decisions to dismiss the claimant and led to a dismissal tainted by discrimination. This inextricable link between this meeting and the disciplinary charge meant the provision of an interpreter at all subsequent meetings did not rectify this procedural defect.

(ii) The tribunal was not persuaded by the respondent's argument that it was significant that it was not until after 30 July 2019 that the claimant or his union representative expressed any concerns about the claimant's ability to communicate. When an employee is struggling to participate in an employer led process due to a communication barrier, it is illogical and unreasonable for the employer to place the onus on the employee to ensure he understood what was said to him and that he too was understood until that barrier is removed.

(iii) The advancement of two differently worded disciplinary charges was a procedural flaw. However, we are satisfied this flaw was not fatal to the procedural fairness of the decision to dismiss. This is because both parties understood the disciplinary charge, cited at paragraph 67 to be the one under consideration at the disciplinary hearing. Also, there was no material difference between this charge and the original charge advanced because the parties understood "medical condition" referenced in this charge to be "arthritis".

(iv) Ms Begley's introduction of the lack of progress of the safeguarding investigation as an additional "conduct" issue and her reliance on same as a matter grounding the claimant's dismissal were further procedural flaws. Under no circumstances could this matter reasonably be classed a conduct matter. Also, on the facts, this matter had not been adequately investigated, if at all. Although significant, this flaw was not fatal as the only charge considered and upheld at appeal was the charge of dishonesty.

Substantive Fairness

131. The tribunal unanimously concludes that the decision to dismiss the claimant was substantively unfair for the following reasons.

(i) On the facts, the evidence the decision makers relied on to uphold the charge of making false claims was not reliable because of the claimant's lack of fluency in English and the absence of the support of an interpreter. By implication, the respondent's belief that the claimant stated at either meeting that he suffered from arthritis, or, more importantly, that the claimant intended to say he suffered from this condition is not reasonable as it is not based on reliable evidence. This unreasonableness was compounded by the claimant's medical evidence which pointed away from an intent to deliberately deceive the respondent.

(ii) Furthermore, as the respondent's failure to provide the claimant with an interpreter at both meetings amounted to indirect race discrimination its decision to dismiss the claimant based on what he was alleged to have said

at these meetings is tainted with discrimination contrary to Article 6(2)(c) of the RRO.

132. In addition to these central reasons, the decision to dismiss the claimant was also substantively unfair due to the following principal reasons.

(i) The disciplinary investigation was inadequate. Ms Thompson's view that the claimant stated he had arthritis was a key, arguably central piece of evidence relied on to support the dishonesty charge. Despite this, Ms Thompson was not interviewed. Her account was not even fact checked, as illustrated by the differences in her account in her email compared to her account rehearsed in the minutes of the 30 July meeting.

(ii) The investigation overlooked relevant matters, notably the claimant's communication difficulties and its effect on the cogency of the evidence of a false report. His GP letter was not given due consideration despite raising the distinct possibility that the claimant's refusal to work in the kitchen was a capability not a conduct issue. Any doubt about the adequacy or reliability of this evidence could and should have been followed up, but it was not.

(iii) The inadequacies of the disciplinary investigation and resultant report were compounded as the decision-makers failed to recognise or adequately consider the above-mentioned issues vis-à-vis the question of whether the charge of dishonest conduct should be upheld. This was wholly unreasonable. Both decision makers knew the claimant required the assistance of an interpreter and the communication issue was the central ground of appeal. The offending conduct was the making of a false report when the claimant was labouring under a communication barrier. In these circumstances we are satisfied any reasonable employer would deem what the claimant meant to say, as opposed to what he actually said, to be crucially relevant. This is particularly so when there was medical evidence which supported the claimant's insistence that he was unfit to work in the kitchen and had been misunderstood or he had miscommunicated at the two meetings. Their lack of critical analysis is further evidence by their failure to consider the inconsistencies in the accounts of Ms Thompson.

133. In summary, on the facts and for the reasons set out herein the claimant's dismissal by reason of gross misconduct was neither procedurally nor substantively fair. This is because the evidence relied on to formulate and uphold the charge was based on two communications with the claimant when he was without the aid of an interpreter. The holding of meetings in English without an interpreter amounted to indirect discrimination of the claimant on racial grounds. Therefore, the decision to dismiss the claimant was tainted with discrimination and thus automatically unfair. Furthermore, the charge accused the claimant of being dishonest the gravity of which amounted to gross misconduct. Dishonesty by its nature requires a deliberate intent to deceive. Applying the dicta in ***Connolly***, gross misconduct requires deliberate or wilful conduct. In this case there was no reliable evidence that the claimant's
conduct was deliberate or wilful. Instead, the evidence pointed to a miscommunication/misinterpretation, on one or both sides and suggested that the matter may have been a capability rather than a conduct matter.

134. In the relevant circumstances, the tribunal unanimously concludes that the decision to dismiss was not within the band of reasonable responses of a reasonable employer. The respondent acted unreasonably in concluding that the disciplinary charge should be upheld and that it was a sufficient reason for dismissing the employee having regard to equity and the substantial merits of the case. Therefore, the claimant's unfair dismissal claim pursuant to Article 130 of the ERO is upheld. That dismissal was also a discriminatory dismissal contrary to Article 6(2)(c) of the RRO.

Contributory Fault and Polkey Reduction

135. On the facts, we are satisfied there was no contributory fault on the part of the claimant.

136. For the reasons set out at paragraph 115–117, the respondent presented no evidential basis to discharge its burden in relation to its argument on ***Polkey*** outlined herein.

COMPENSATION

137. The tribunal has found in the claimant's favour in relation to his claims of indirect race discrimination and unfair dismissal. Both claims are interlinked as the disadvantage suffered by the claimant because of the indirect discrimination; namely his inability to effectively communicate at two key meetings prompted a chain of events which led to his dismissal. For the reasons set out herein, that dismissal was therefore a discriminatory dismissal. The claimant sought injury to feelings and compensation for the financial loss arising from his dismissal.

138. A schedule of loss was provided by the claimant's side. The figures for the basic and compensatory awards were agreed subject to liability. However, the claimant's claim for 8 weeks unpaid notice pay was wrongly expressed as part of the basic award. That claim forms part of the 37-week period that the claimant claims financial compensation and thus is part of the compensatory award. Similarly, the agreed figure for the loss of statutory rights was wrongly included in the basic award. That claim also forms part of the compensatory award. Because the claimant's financial loss flowed from a discriminatory dismissal the agreed compensatory award forms part of the award made for the claimant's discrimination claim. The claimant was in receipt of Universal Credit over the relevant period of financial loss. As the award for financial loss forms part of the compensation for discrimination, the recoupment provisions do not apply.

Financial Compensation

139. The calculation of financial compensation is set out below.

Effective Date of Termination (the EDT): 7 January 2020

Agreed net weekly wage amounts to £400.00

Compensatory Award (agreed)

Loss of Statutory Rights:	£ 500.00

Loss from EDT to 27 September 2020 (the date of new employment) = 37 weeks(agreed):	£14,800.00
TOTAL Financial Compensation:	**£15,300.00**

Injury to Feelings

140. The claimant did not identify the appropriate ***Vento*** band or level of compensation for injury to feelings. The claimant invited the tribunal to consider his evidence, notably paragraph 17 of his witness statement as evidence of the distress he suffered because of the respondent's discriminatory conduct and the considerable length of the disciplinary process, a process precipitated by the discrimination. The tribunal considered the evidence and in doing so was cognisant of the claimant's understandable frustration at being repeatedly misinterpreted by the respondent especially when those misunderstandings could and should have been dispelled through the provision of an interpreter at the 30 July meeting. That frustration was expressed in the claimant's letter of grievance and his demeanour when giving evidence at the hearing. The repeated failure of the respondent to take the many opportunities presented to reconsider its approach to this matter elongated the process and added to this frustration. We also considered the inevitable stress and upset caused to the claimant due to his unjust dismissal from a role he held for over 8 years.

141. We also had regard to the fact that the incidents of indirect discrimination whilst serious, were limited to two incidents and that in response to the claimant's request, the respondent provided an interpreter in a timely fashion.

142. Weighing these factors in the balance and cognisant that compensation for injury to feelings should be comparable to physical injuries and aim to compensate the claimant, not punish the respondent, we deem an award at the lower end of the middle band of Vento in the amount of £10,000 to be a fair, reasonable and just award in the circumstances of this case.

Financial Compensation	£15,300.00
Award for Injury to Feelings	£10,000.00
TOTAL Compensation for Discrimination:	**£25,300.00**

Interest on Compensation for Discrimination

143. The tribunal has a discretion to include interest on the compensation awarded to the claimant under the RRO pursuant to the Race Relations (Interest on Awards) (NI) Order 1997 and can do so without the need for an application by a party. The tribunal is satisfied that interest should be included in this award in accordance with Article 6 of the 1997 Order and is of the opinion that doing so would not cause serious injustice to the respondent. The relevant dates are as follows:-

Date of first act of discrimination is 26 February 2019.

Date of calculation is 1 July 2022.

The mid-point between these dates is 29 October 2020.

144. Interest on loss of earnings is from the mid-point date to date of calculation which is 611 days. Interest on £15,300 at 8% per annum is £1,224 and the daily rate is £3.35:-
£3.35 x 611 days = £2,046.85

145. Interest on award for injury to feelings is from the date of act of discrimination to date of calculation which is 1222 days. Interest on £10,000 at 8% per annum is £800.00 and the daily rate is £2.19:-

£2.19 x 1222 days = £2,676.18

146. **TOTAL Interest** £2,046.85
£2,676.18

£4,723.03

Basic Award

147. In light of the tribunal's finding that the claimant's dismissal was an unfair dismissal pursuant to Article 130 of the ERO, the tribunal awards the claimant the basic award which the parties agreed amounts to £6,000.00. The claimant's claim for a compensatory award has been made under the RRO as the dismissal was deemed to be a discriminatory dismissal.

TOTAL Compensation for Unfair Dismissal: **£6,000.00**

Summary

148. The claimant suffered indirect race discrimination and was unfairly dismissed and is entitled to the following compensation:

(i)	Total compensation for discrimination:	£25,300.00
(ii)	Interest on compensation for discrimination:	£ 4,723.03
(iii)	Basic Award:	£ 6,000.00
	TOTAL	**£36,023.03**

149. This is a relevant decision for the purposes of the Race Relations (Interest on Awards) Order (Northern Ireland) 1997 (in relation to the award for race discrimination) and the Industrial Tribunals (Interest) Order (Northern Ireland) 1990 (in relation to the award for unfair dismissal).

Employment Judge:

Date and place of hearing: **1, 2, 3 & 5 November 2021, Belfast.**

This judgment was entered in the register and issued to the parties on: