THE INDUSTRIAL TRIBUNALS

CASE REFS: 336/13 and 1010/13

CLAIMANT: **Agatha Wonder Hurle**

RESPONDENT: **Musgrave Retail Partners NI Ltd**

DECISION

The unanimous decision of the tribunal is that the claimant's claims of unlawful direct discrimination on racial grounds and victimisation on racial grounds are dismissed.

Constitution of Tribunal:

Chairman: **Mr S A Crothers**

Members: **Mrs S Butcher**
Mr D Hampton

Appearances:

The claimant appeared and represented herself.

The respondent was represented by Mr Doherty, Barrister-at-Law instructed by J Blair, Employment Law Solicitors.

BACKGROUND AND CLAIM

1. The claimant presented two claims to the tribunal, on 10 February 2013 and 24 May 2013 respectively. The first of the two claims involved allegations of non-display of certificates. The second claim related to a number of alleged incidents.

2. Pursuant to a Pre-Hearing Review held on 5 August 2013, leave was given for a limited amendment to the claimant's second claim and other more substantive amendments were refused. The claimant's claims of direct discrimination and victimisation on racial grounds (and specifically on the ground of colour), were denied by the respondent.

ISSUES BEFORE THE TRIBUNAL

3. The issues before the tribunal were as follows:-

   (1) Was the claimant unlawfully discriminated against on racial grounds, ie, colour?

   (2) Is there a claim for unlawful victimisation before the tribunal and, if so, was the claimant victimised on racial grounds, ie, colour?

SOURCES OF EVIDENCE

4. The tribunal heard evidence from the claimant and, on behalf of the respondent, from Kieran Kelly, Store Manager, Duibhin Murphy, Deli Assistant, Aisling Kelly, General Assistant, Caroline Kane, former Deli Assistant, and currently part-time Supervisor, Leila-May Sergeant, Senior Store Manager, and Caoilfhionn Dorman, Tills Assistant. The tribunal also considered relevant documentation placed before it during the hearing.

FINDINGS OF FACT

5. Having considered the evidence insofar as same related to the issues before it, the tribunal made the following findings of fact, on the balance of probabilities:-

   (i) The claimant commenced work as a Deli Assistant with Supervalu in Coleraine on 12 September 2005. This entity was transferred to the respondent in 2009. It was not disputed that the claimant was an employee of the respondent from the commencement of her employment with Supervalu.

   (ii) The claimant currently holds a Chartered Institute of Environmental Health, Advanced Certificate in Food Safety (17 June 2004), a City and Guilds NVQ 3 in Professional Cookery (6 July 2010), and a Highfield HABC Level 3 Award in Supervisory Food Safety in Catering (QCF) (awarded on 7 August 2012). Although reference was made to the Certificates granted in 2004 and 2010, the claimant in her claim form to the tribunal focuses on the Certificate ("the 2012 Certificate") emanating from an assessment which she sat on 27 July 2012 along with a colleague, Klara Hovadova. The claimant passed the assessment, but her colleague did not. The claimant's 2004 Advanced Certificate in Food Safety required a refresher course within three years. This had not been done, although technically the Certificate was not out of date, at least as far as the Chartered Institute of Environmental Health was concerned. However, it is clear to the tribunal that whilst certificates put up by Caoilfhionn Dorman in 2009 were properly in date in terms of refreshment, some of these became out of date in 2010/11 (as refresher courses had not been undertaken), but were still on display.

   (iii) The tribunal is satisfied that any allegations made by the claimant regarding unlawful racial discrimination in relation to the Certificates dated 17 June 2004 (Advanced Certificate in Food Safety) and 6 July 2010 (City and Guilds NVQ 3 in Professional Cookery), are out of time and, in light

particularly, of the Pre-Hearing Review and the nature of the limited amendment allowed, it would not be just and equitable to extend time so as to give the tribunal jurisdiction to consider such allegations relating to these Certificates.

(iv) The 2012 certificate arrived in the respondent's premises towards the end of August/beginning of September 2012 with a post-it note on the envelope from Andrew Walsh, the Trainer, stating that Klara Hovadova had failed the assessment and requesting Leila-May Sergeant to contact him with a view to organising a re-sit for her. This was arranged for 27 September 2012. The tribunal accepts Leila-May Sergeant's evidence that she did not display the claimant's certificate on the wall at the deli counter lest this might upset Klara Hovadova. Instead she put the claimant's certificate in a desk drawer in the office with the intention that, should Klara Hovadova pass the examination, both certificates would be displayed on the wall. The claimant obtained a copy of the certificate from Leila-May Sergeant in the middle of September but seems not to have raised the issue as to why a copy had not been displayed. Leila-May Sergeant handed the management of the store back to Kieran Kelly at the end of September 2012, but, owing to an oversight, failed to mention to him that the claimant's certificate was in the desk drawer.

(v) The tribunal accepts that there was no real system in place for the display of certificates. As stated previously, in some instances, certain certificates remained on display even though they were out of date as refresher courses had not been completed. The tribunal accepts that the claimant's 2012 Certificate was placed on display at the end of February 2013, and her earlier Advanced Certificate was displayed in May 2013.

(vi) In relation to case reference 1010/13 presented to the tribunal on 24 May 2013, the tribunal is satisfied, insofar as the claimant makes any allegations of unlawful racial discrimination relating to 2005/2006, that these are very considerably out of time and there is no reason why the tribunal should exercise its discretion to extend time on a just and equitable basis.

(vii) The claimant focussed mainly on three incidents. In her witness statement to the tribunal she refers to Wednesday 1 April 2013 whereas, in the amendment allowed at the Pre-Hearing Review on 5 August 2013, reference is made to Wednesday 3 April 2013. The tribunal is satisfied that the correct date is 3 April 2013. (1 April 2013 was a Monday and not a Wednesday). The other two incidents occurred on 4 May 2013 and 11 May 2013.

(viii) The incidents involve allegations against Duibhin Murphy and Aisling Kelly. The claimant contended that she had been victimised on racial grounds and directly discriminated against on racial grounds during these incidents. However, the tribunal has no reason to doubt the veracity of the evidence from Duibhin Murphy and Aisling Kelly that at the time of the incidents they were unaware of the claimant having presented her first claim to the tribunal on 10 February 2013. The effect of the tribunal's finding on this point, is that the claimant cannot establish a case for victimisation on racial grounds.

(ix) The tribunal was made aware throughout the hearing that the claimant's claims related to unlawful discrimination on the ground of her colour. It also observed that the majority of the respondent's witness statements were unchallenged by the claimant. However, the tribunal carefully considered the areas in the respondent's witness statements which were challenged by the claimant.

(x) In relation to the incident on 3 April 2013, the tribunal carefully considered the evidence placed before it together with the notes of the alleged incident prepared by Duibhin Murphy and Aisling Kelly. It is satisfied that there was a fall out between the claimant and Duibhin Murphy arising out of the manner and tone in which she addressed the claimant in relation to the large number of dishes in the sink and in asking what she was cooking. The claimant was upset by this incident. Duibhin Murphy felt it necessary to speak to Aisling Kelly and another management colleague who advised her to take a note of the incident.

(xi) The incident on 4 May 2013 involved Aisling Kelly and the claimant. Again, the tribunal carefully considered the evidence in relation to this incident and the very limited nature of the claimant's cross-examination of Aisling Kelly. The tribunal accepts that Aisling Kelly could not remember the incident and her assertion that she would not have spoken to the claimant in the way alleged. Furthermore, the tribunal is satisfied that Aisling Kelly did not think that the claimant was incapable of answering customers.

(xii) The final incident occurred on 11 May 2013. On that date Aisling Kelly asked the claimant what she was cooking. She said to the claimant that she (the claimant) had used every pot available. The tribunal is satisfied that Aisling Kelly did raise her tone of voice but that this did not amount to her shouting at the claimant or being deliberately rude.

(xiii) The claimant made an allegation that she had been requested to go to the freezer for four days in a row to tray up items for the deli counter. She was concerned that she might develop bronchitis and referred the tribunal to a General Practitioner's report relating to a chest infection in 2003, during other employment. The tribunal is satisfied from the evidence that this alleged episode occurred at the beginning of 2012, and therefore appears to be out of time. The respondent, however, did not challenge the jurisdiction of the tribunal on this point, and the tribunal therefore concludes that the respondent accepts that this was part of a chain of events. Caoilfhionn Dorman was eight months pregnant at the material time and could not deal with the freezer items. Furthermore, Klara Hovadova had just started work and was being trained by Caoilfhionn Dorman. The claimant and Caroline Kane were therefore the only two staff available to perform the freezer duties. The claimant refused to do so on this occasion. Caoilfhionn Dorman had observed the claimant standing at the sink waiting for dishes and thought that her time would be better spent attending to the freezer duties. Caroline Kane had already commenced dinner duties. Caoilfhionn Dorman informed Kieran Kelly who in turn spoke to the claimant in Caoilfhionn Dorman's presence. She informed him that she had a chest issue and that she could not be in a cold environment. The tribunal accepts that the claimant had not previously brought this to Kieran Kelly's attention

and that her personnel file did not reveal any such issue. Kieran Kelly invited her to furnish evidence of her condition and advised her that if she had a problem she should come to him and tell him. There is no evidence before the tribunal to persuade it that the respondent knew of any pre-existing medical condition such as a chest infection or that the claimant was at risk of developing bronchitis.

THE LAW

6. The relevant legal principles are adequately set out in the respondent's submissions annexed to this decision.

SUBMISSIONS

7. The tribunal carefully considered the respondent's written submissions together with further oral submissions from the respondent's counsel and from the claimant on 15 October 2013. The claimant had been afforded time to consider the respondent's written and oral submissions.

CONCLUSIONS

8. The tribunal, having carefully considered the evidence together with the submissions and having applied the principles of law to the findings of fact, concludes as follows:-

   (1) The tribunal is satisfied that the claimant has not proved facts from which the tribunal could conclude in the absence of an adequate explanation that unlawful racial discrimination on the ground of colour has occurred either in relation to the display of certificates or in relation to the incidents relied on by the claimant. The onus of proof does not therefore shift to the respondent to provide an adequate explanation for any alleged treatment. The claimant's claims of unlawful racial discrimination on the ground of colour are therefore dismissed.

   (2) Although there is a protected act for the purposes of a victimisation claim, there is no basis for such a claim in light of the tribunal's finding that the relevant individuals did not have knowledge of a claim having been presented to the Office of the Industrial Tribunals. This claim is also dismissed.

Chairman:

Date and place of hearing: 14-15 October 2013, Belfast.

Date decision recorded in register and issued to parties:

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS
AND THE FAIR EMPLOYMENT TRIBUNAL

Case Ref Nos: 336/13IT & 1010/13IT

AGATHA WONDER HURLE

Claimant

-v-

MUSGRAVE RETAIL PARTNERS NI LIMITED

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF RESPONDENT

THE RELEVANT LEGAL PRINCIPLES

DIRECT DISCRIMINATION

1. Article 3(1) of the Race Relations (Northern Ireland) Order 1997 ('RRO') provides:-

   "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 ... ."

2. Article 5 provides that 'racial grounds' means any of the following grounds, namely colour, race, nationality or ethnic or national origins.

3. It is for the claimant to make out his case for discrimination based on race. Article 52A of the RRO provides:-

   "Where, on the hearing of the complaint, the complainant prove facts from which the tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent –

(a) *has committed such an act of disclosure 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,*

(c) *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."*

4. The English Court of Appeal provided guidance on how to apply the burden of proof in the case of *Igen Ltd v Wong [2005] EWCA Civ142.* The court pointed to a two-stage test. The claimant must firstly show facts from which the tribunal could, in the absence of an adequate explanation, conclude that the respondent had committed an unlawful act of discrimination. Once the tribunal has so concluded the burden then shifts to the respondent to prove that he did not commit an unlawful act of discrimination.

5. In the subsequent English Court of Appeal decision of *Madarassy v Nomura International PLC [2007] IRLR 246*, Lord Justice Mummery said:–

"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities the respondent had committed an unlawful act of discrimination.Could conclude' in Section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it."

6. Lord Justice Mummery went on to say:-

"Section 63(A) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if

they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situation with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the Tribunal could properly infer a prima facie case of discrimination on the proscribed ground."

7. In the case of *Laing v Manchester City Council [2006] IRLR 748*, Mr Justice Elias said:–

"The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, "there is a nice 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 as to why he behaved as he did and it has nothing to do with race"."

8. The English authorities have been endorsed by the Northern Ireland Court of Appeal. In the case of *Nelson v Newry and Mourne District Council [2009] NICA 24*, Lord Justice Girvan referred to *Madarassy* and said:–

"This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the tribunal could properly conclude, in the absence of adequate explanation, that the respondent has committed an act of discrimination. In Curley v Chief Constable [2009] NICA 8, Coghlin LJ emphasised the need for a tribunal engaged in determining

this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination."

9. Unreasonable or unfair conduct is not sufficient to shift the burden of proof (*Bahl v. Law Society* [2003] IRLR 640). It is not appropriate or legitimate to infer discrimination on grounds only that the reasons for the respondent's treatment of the claimant are unreasonable or unjustified (*Glasgow City Council v. Zafar* [1998] IRLR 36 (HL)). Further still, in the case of *Rice v. McEvoy* [2011] NICA 9, Girvan LJ held, applying *Zafar* (para. 32):

"In deciding the issue whether the claimant has been treated less favourably by the alleged discriminator the conduct of the hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer."

10. Despite the numerous cases that exist on burden of proof Underhill P highlighted recently in *Hussain v. Vision Security Ltd* [2011] Eq LR 699 (para. 16) that "*the process of drawing an inference, including deciding whether "Igen stage one" is satisfied, is a matter for factual assessment and, as we have said, situation-specific. We deprecate the development of sophisticated quasi-rules of law governing that exercise...*"

11. It is submitted that the two stage process is not always necessary, and that it is very important to ask the question, what was the reason for the treatment - *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 (HL).

12. As well as being mindful of the provisions relating to the burden of proof, it should also be remembered direct discrimination assumes a comparison as between the treatment of different individuals. To make that comparison, however, the cases of complainant and comparator must be such that there must be no material difference

between the circumstances of the two.[1] Lord Hoffmann pointed out in *Ahsan v Watt (formerly Carter)* [2007] UKHL 51, [2008] 1 All ER 869:

'It is probably uncommon to find a real person who qualifies under s 34 as the statutory comparator. For the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are materially different is often likely to be disputed. In most cases, however, it will unnecessary for the Tribunal to resolve this dispute because it should be able by treating the putative comparator as an evidential comparator and having due regard to the alleged differences in circumstances and other evidence to form a view on how the employer would have treated the hypothetical person who was a true statutory comparator. If the Tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator.'

VICTIMISATION

13. Victimisation is dealt with in Article 4 of the RRO which states:–

4(1) A person ('A') discriminates against another person ('B') in any circumstances relevant for the purposes and any provision of this Order if –

(a)he treats 'B' less favourably than he treats or would treat other persons in those circumstances;
(b)he does so for a reason mentioned in paragraph 2.

(2) The reasons are that–

(a) 'B' has –

(iv) alleged that 'A' or any other person has (whether or not the allegations so states) contravened this Order; or

[1] See Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 at para 39

(b) 'A' knows that 'B' intends to do any of those things or suspects that 'B' has done, or intends to do, any of those things."

14. The reverse burden of proof provisions set out in Article 52A of the RRO do not apply to claims of victimisation under the RRO. See Oyarce (Appellant) v. Cheshire County Council (Respondent) Equality and Human Rights Commission (Intervener) [2008] EWCA Civ 434 [2008] IRLR 653 and Harveys division L [797.01] on the equivalent English provisions.

Sean Gerard Doherty BL
Counsel for the Respondent