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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON AN APPEAL FROM AN INDUSTRIAL TRIBUNAL

INDUSTRIAL TRIBUNALS (NORTHERN IRELAND) ORDER 1996

BETWEEN:

STEPHEN WILLIAM NELSON

Claimant/Respondent

AND

NEWRY AND MOURNE DISTRICT COUNCIL

Respondent/Appellant

Before Higgins LJ, Girvan LJ and Coghlin LJ

GIRVAN LJ

Introduction

[1] This appeal comes before the court by way of a case stated from an Industrial Tribunal. It relates to a claim by the respondent Stephen William Nelson ("Mr Nelson") who claims to have suffered unlawful discrimination on the grounds of his sex by the appellant Newry and Mourne District Council ("the Council"). The Council disciplined Mr Nelson for asking for and taking bedding plants from another Council employee Ms O'Donnell. Mr

Nelson alleges that he was subjected to unlawful discriminatory disciplinary treatment as compared to the Council's disciplinary treatment of Ms O'Donnell. The Tribunal upheld his complaint and awarded him substantial compensation including compensation for injury to feelings. In reaching its decision the Tribunal concluded that Ms O'Donnell was an appropriate statutory comparator. It concluded that the differential disciplinary treatment of Mr Nelson and Ms O'Donnell called into the play the provisions of Article 63A of the 1976 Order which deals with the onus of proof and it decided that the Council had not established that the difference in treatment was not related to the gender difference between the two employees with the result that Mr Nelson succeeded on his claim.

[2] The Tribunal in the case stated poses five questions –

(i) Did the Tribunal err in law in determining that Ms O'Donnell was an appropriate comparator with the respondent under Article 7 of the 1976 Order as amended in light of the evidence?

(ii) Did the Tribunal err in law in its application of Article 63A of the 1976 Order?

(iii) Was the Tribunal correct in law in deciding that the respondent was discriminated against on the grounds of his sex?

(iv) Was the Tribunal's decision perverse or one which no reasonable Tribunal directing itself properly could have reached or alternatively was it wrong in law?

(v) Did the Tribunal err in law in confirming its original decision in circumstances where it acknowledged in the review dated 20 May 2008 that detailed reasons were in fact given by the respondent for its contentions that Ms O'Donnell was not an appropriate statutory comparator contrary to what the Tribunal had originally stated in its original decision dated 13 November 2007 at section 8 sub paragraph 2.

The factual background

[3] The claim arises out of an incident on 21 June 2005 which was notified to the Council in a letter from a person describing himself as "an angry ratepayer". The writer alleges that on 21 June a female Council employee driving a Council vehicle with a trailer transferred some bedding plants from the trailer into another Council vehicle driven by a male employee which had pulled up alongside her vehicle. The registration number of both vehicles was supplied by the ratepayer.

[4] An initial investigation by Ms Catherine Sweeney, the Council's Assistant Director of Administration (Personnel Department), identified the driver of the vehicle as Ms O'Donnell and identified Mr Nelson as a possible driver of the other vehicle as he had access to it and was on shift at the time when it was used. Ms O'Donnell was an acting ganger employed by the Council in its Parks and Garden's Department at its Greenbank offices in Newry. Mr Nelson was a caretaker of the Monaghan Road premises of the Council. Miss Sweeney held an investigatory meeting with Mr Nelson on 7 July. She did not give him prior notice and she did not offer him the right to be accompanied by his trade union representative. At the meeting he made no admissions and suggested that a number of other persons could have been driving. He subsequently took advice from his union on 8 July 2005. On 7 July Mr Haughey, Ms O'Donnell's line manager interviewed her. She was given 24 hours notice of the interview and was offered the right of representation which she refused. Ms O'Donnell was given a copy of the angry ratepayer's letter at this stage though a copy of the letter had not been given to Mr Nelson at the initial stages.

[5] On 25 July Ms O'Donnell was interviewed and she confirmed the incident as described by the anonymous letter. She said she did not know that the plants were for the personal use of Mr Nelson but admitted that she did not question the respondent when he pulled up beside her and asked for plants. As a result of the formal interview Mr O'Haughey recommended that she be formally disciplined with her conduct being viewed as gross misconduct. On 26 July the respondent was interviewed by Mr Earl Smyth, he was accompanied by Mr Phelim Jennings. He confirmed that he had been sent to Warrenpoint on 20 June 2005 and that he had asked Ms O'Donnell if she had any spare plants. She had given him a tray of plants which he had taken home.

[6] Ms Sweeney produced a "Report of investigation into the reported conduct of Mr Nelson, Caretaker" dated 4 August 2005. It contained some findings not borne out by the contents of the angry ratepayer's letter notably that the driver of the second van wore glasses which the original letter did not report. The Tribunal noted that it was headed as a report on the respondent's conduct not on the conduct of Mr Nelson and Ms O'Donnell.

[7] On 12 August 2005 Ms Sweeney wrote to Mr Nelson and gave him the date of 25 August for his disciplinary hearing. The Tribunal noted that, unlike Ms O'Donnell, at this stage he had not yet received a copy of the angry ratepayer's letter and his representative had to write to the Director to obtain a copy.

[8] The disciplinary hearing involving Mr Nelson took place on 7 September before Mr Dowey who found that a theft was committed by Mr Nelson, a caretaker with responsibility for handling Council property

regularly. He was found guilty of gross misconduct. He was given a final written warning lasting 24 months and was to be redeployed to a post where he would not be responsible for Council property and paid at the rate for that new post. This was effectively a demotion and it led to a reduction in his income. Mr Dowey's finding was that the plants were wrongly removed from Ms O'Donnell's van by Mr Nelson and that Mr Nelson had taken them to his home.

[9] On 8 September the Director of Administration offered Mr Nelson a right of appeal. By letter of 13 September the respondent took up the right of appeal on the grounds that he had permission from Ms O'Donnell to have the plants and that by being demoted he had suffered a loss of income. Since he had in addition received a final written warning he argued that he had suffered in effect three punishments. On appeal the decision was confirmed but a further right of appeal was given which Mr Nelson took up by letter of 23 December 2005. The appeal hearing was postponed twice, once at the instance of each party and it took place on 10 April 2006. The finding of gross misconduct was reduced to major misconduct and the written warning was reduced to 12 months duration. Although the decision to move him was upheld he was moved to another post at his existing grade. Ms O'Donnell's disciplinary hearing took place on 29 November 2005. It was found that she had behaved in a naive manner and was caught out by the other employee. She was found guilty of major misconduct with a final written warning to remain on her file for six months. She did not appeal.

[10] Before the Tribunal there was evidence relating to an undated memorandum issued by the Council instructing that all summer bedding plants were to be taken to either the nearest amenity site or Maguire's yard for compost recycling only and that no plants should be taken to the Council's depot at Greenbank or handed out to the general members of the public or to fellow employees. It stated that failure to comply with this might lead to disciplinary action. The Tribunal concluded on the evidence that it was likely that the memorandum in fact post dated the events in question. That was a finding of fact it was entitled to make on the evidence.

[11] In addition the Tribunal referred to the evidence relating to statements allegedly taken from and signed by Mr Larkin and Mr McArdle who were agency workers working with Ms O'Donnell. The Council accepted before the Tribunal that the signatures were not those of Mr Larkin and Mr McArdle. The Tribunal stated that although those signatures were not those of the alleged witnesses the Council put these highly suspect statements forward as evidence. The Council denied that they were put forward as evidence before the Tribunal. However it does appear that they had been put forward at an earlier stage in the disciplinary proceedings. The alleged evidence is not of itself relevant since Mr Nelson does not dispute that it was he in fact who took the plants in question on the relevant occasion. What might be of

potential relevance would be the light, if any, these matters could throw on the thinking and motivation of the persons who sought to put forward evidence intended to incriminate Mr Nelson.

The Tribunal Decision

[12] The Tribunal concluded that Mr Nelson was less favourably treated than Ms O'Donnell. It concluded that there were a number of inconsistencies of treatment –

(a) Mr Nelson was not initially provided with a copy of the letter from the angry ratepayer although Ms O'Donnell was.

(b) Ms O'Donnell was given 24 hours notice of the initial investigatory meeting whereas Mr Nelson was not given such prior notice and was caught "flat footed". The Tribunal considered that "as a result" he did not immediately admit to being the person in Warrenpoint who had taken the plants.

(c) Ms Sweeney referred to the driver in the van as apparently wearing glasses (which was not alleged by the ratepayer in his letter). The Tribunal inferred that Ms Sweeney had prejudged the issue in her own mind and considered Mr Nelson was the driver. Her report focused on the name of Mr Nelson. The report in respect of Ms O'Donnell was headed "Incident involving Grainne O'Donnell and Stephen Nelson".

(d) The Tribunal drew adverse inferences from the attempted use of statements of Mr Larkin and Mr McArdle which had not been signed by them and which they denied making.

(e) The Tribunal noted that the Council took an early view that the incident constituted "theft".

(f) Mr Nelson was accused of stealing the plants whereas Ms O'Donnell was only accused of providing the plants without authorisation. The Tribunal expressed difficulty in regarding the conduct of the claimant as being dishonest. The Tribunal considered it could not avoid the inference that the Council was very keen to accuse the claimant of theft. The Tribunal appeared to accept the evidence that there was a definite practice that even members of the public were able to obtain plants.

(g) It concluded that it would have been open to Ms O'Donnell to refuse to hand over the plants to Mr Nelson but there appeared to be a practice of handing over such plants.

(h) There was a considerable difference between the sanctions imposed on Mr Nelson and Ms O'Donnell. The Tribunal concluded that Ms O'Donnell was an appropriate actual comparator for the purposes of sex discrimination. At paragraph 8 of its decision it stated –

> "The claim of the claimant was based upon Ms O'Donnell being the comparator for the purposes of the statute. In accordance with the authority of the Shamoon case in which Lord Nichol (sic) said that in making the comparisons it is necessary to compare like with like so that the situation being compared must be such that the gender apart, that the situation of man and woman are in all material respects the same and this applies whether a Tribunal looks at an actual comparator or a hypothetical comparator. In the Shamoon case the important difference found was that the two males in respect of comparators had no complaints against them whereas the claimant in that case did have complaints as to her operation of the appraisal system.
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> 7. In this case whilst the respondent contended that in law Ms O'Donnell would not be an appropriate actual comparator, the respondent did not say why this was the case. This being the case, the Tribunal finds that as both employees were Grade 4's in the Council hierarchy and were both classed as ancillary and general staff that the situation of Ms O'Donnell could not be materially different to (sic) the situation in working terms of the claimant. They were both regarded as persons carrying responsibility. Mr Nelson was responsible for his buildings and Ms O'Donnell was responsible for her vehicles, tools and plants. We are further supported in this conclusion by the view of Mr Fulton Somerville in the appeals hearing transcript for 10 April 2006. Mr Somerville said "it is our view that Stephen himself is in a position similar to Grainne in that he has certain authorities but he knows where his authorities and permissions start and stop. Both were prosecuted under the disciplinary procedure for manual employees."

[13] Having concluded that Ms O'Donnell was an appropriate comparator the Tribunal then went on at paragraph 9 to state –

> "These conclusions having been reached, we consider that the burden of proof in this case in the absence of an adequate explanation for the behaviour of the respondent, now shifts to the respondent to prove that the respondent did not do the act complained of. If for example the Council had said that they were taking a strong view of the appropriation of Council property because this was an ongoing major problem in the Council it would have been the view of the Tribunal that this would have been an adequate explanation for their behaviour. However this evidence was not given and this contention was not put forward. There was no adequate explanation argued even in the alternative."

[14] The Tribunal awarded £25,091.21 for economic loss and £5,000 for injury to feelings. It did so on the basis that being accused of theft was a severe blow. The penalty involved a very public humiliating loss of standing in the Council. The process was flawed by unexplained inconsistencies in treatment and no proper reason for this was given. The Tribunal went on to conclude that it was hard to avoid the conclusion voiced by Mr Phelim Jennings that "someone was out to get this man."

The application for a review of the decision

[15] Following the Tribunal's decision given on 13 November 2007 the Council's solicitors wrote to the Tribunal and asked for a review of the decision under Rule 34(3)(e) of Schedule 1 of the Industrial Tribunals (Constitutional Rules of Procedure) Regulations (Northern Ireland) 2005. They referred to the statement in the decision that the respondent did not say why Ms O'Donnell would not be an appropriate actual comparator. The letter set out the matters which in fact had been raised. It was submitted that the following matters were raised as separate bullet points:-

1. The circumstances of the parties were not the same. Mr Nelson decided to appropriate Council property for his own purposes whereas Ms O'Donnell did not know that these plants were going to leave Council property and end up in Mr Nelson's garden.

2. At the pre-investigation stage one party, Ms O'Donnell was known to be the driver of one of the vehicles whereas Mr Nelson was not known to be the driver of the other vehicle. This resulted in different treatment at the initial stage.

3. The parties had different lines of authority conducting the investigations.

4. Mr Nelson failed to cooperate and advised the Council of his part in the matter whereas at the outset Ms O'Donnell was open and frank.

5. The parties had different trade unions which affected the speed of their disciplinary process and the manner in which the matters were conducted.

6. The parts played by each individual on any objective analysis were different. There was no collusion. One approached the other for plants. The other who provided the plants did not know the purpose of the request.

7. The job of caretaker and ganger were different roles with different levels of responsibility.

8. In relation to the difference in penalty Mr Nelson had a more severe penalty imposed upon him because there was an adjudication that he had committed theft. This adjudication was reached on the basis of his activity and his position of responsibility all of which were irrespective of sex. Ms O'Donnell's lesser penalty was due to factors including a different line of management, a different trade union and a different charge and her frank demeanour all of which were totally unrelated to sex.

[16] A review hearing did not take place until 11 March 2008 and a decision on that application did not take place until 20 May 2008. In its decision the Tribunal indicated that it had reviewed the decision paying careful regard to the points made by the solicitors in the letter. However, it went on to state that having done so it considered it proper and appropriate to confirm the original decision. The Council was correct in saying contrary to what was said at the second paragraphs of section 8 of the decision that detailed reasons were given by the Council for its contention that Ms O'Donnell was not an appropriate statutory comparator. The Tribunal at paragraph 4 stated –

> "The Tribunal took account of these matters in reaching its decision. The Tribunal took full account of all the matters set out in the bullet points of the letter of 26 November 2007. Accordingly we confirm the original decision of the Tribunal."

[17] In paragraph 9 of the case stated the Tribunal set out the matters which had been raised by counsel for the Council and which had not been referred to in its decision. It stated the Tribunal did not consider that any of the matters rendered Ms O'Donnell unsuitable as a statutory comparator.

The parties' contentions

[18] Miss McGrenera QC accepted that the Council could only succeed in the appeal if it could show that there was ex facie an error of law, a misdirection or a misapplication of the law in the Tribunal's decision or there was a material finding of fact unsupported by the evidence or contrary to the evidence or if the decision was perverse in the sense of offending reason or such that no reasonable Tribunal could have reached that decision. She further accepted in the light of what Lord Hope stated in Shamoon v. The Chief Constable of the RUC [2003] IRLR 285 that a generous interpretation ought to be given to a Tribunal's reasoning and it should not be subject to unduly critical analysis.

[19] Miss McGrenera challenged the Tribunal's conclusion that Ms O'Donnell was an appropriate statutory comparator. In its original decision the Tribunal contended that the appellant had not given any reasons to the Tribunal as to why Ms O'Donnell would not be an appropriate actual comparator. The Tribunal in its review decision and in the case stated did a volte face and contended that it had in fact taken into account the matters on which the Council relied to state that Mr Nelson and Ms O'Donnell were not true comparators. Its change of position, counsel argued, "beggared belief". There was no evidence given before the Tribunal that the claimant was being treated differently because he was a man. The Tribunal's process of reasoning was perverse. Applying the provisions of Article 63A in respect of the burden of proof the Tribunal did so in a flawed and mechanistic manner. There was a failure to stand back and consider all the surrounding evidence. Had the Tribunal properly done so it was bound to conclude that discrimination on the grounds of sex had not been shown. The Council did and was entitled to differentiate between the actions of Mr Nelson and Ms O'Donnell. There were differences which justified a different disciplinary outcome in the two cases. Each case was decided separately and it was simply not possible to conclude that a differential treatment of itself established a case of discrimination.

[20] Mr O'Hara, while recognising the wholly unsatisfactory way in which the Tribunal approached the matter, argued that not only was the conclusion that Ms O'Donnell was an appropriate comparator justified but it was an unavoidable conclusion. Whatever the shortcomings of the Tribunal's approach it reached the inevitably correct conclusion that Ms O'Donnell was a proper comparator. In relation to Article 63A counsel argued that the Tribunal had before it facts which showed that a man and a woman in similar circumstances were treated quite differently from as early as 8 July 2005 when Mr Haughey wrote his summary advising that there should be no disciplinary action against Ms O'Donnell but that there should be disciplinary action

against Mr Nelson. The Tribunal considered it difficult to regard as dishonest the conduct of Mr Nelson, a conclusion which counsel argued was inevitable. There was a prejudging of Mr Nelson to his detriment in Ms Sweeney's report in August 2005 and a prejudging of Ms O'Donnell to her benefit by Mr Haughey. Against the background of its findings the Tribunal's conclusion that the burden of proof was not discharged was inevitable or at least not a perverse conclusion by the Tribunal.

Discussion

[20] The first two questions posed in the case stated by the Tribunal raise as separate questions the issue whether the Tribunal erred in law in determining that Ms O'Donnell was an appropriate comparator under Article 7 of the 1976 Order and whether the Tribunal erred in its application of Article 63A. While the questions require separate consideration the two questions are interrelated.

[21] Article 63A(2) of the 1976 Order provides –

> "(2) Where, on the hearing of the complaint, the complainant proves facts from which the Tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent –
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> (a) has committed an act of discrimination or harassment against the complainant which was unlawful by virtue of Part III, or
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> (b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination 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 the act."

[22] 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 inadequate explanation that the respondent had committed the unlawful act of

discrimination. Once the Tribunal has so concluded the respondent has to prove that he did not commit the unlawful act of discrimination. In an annex to its judgment the Court of Appeal modified the guidance in Barton v. Investec Henderson Crosthwaite Securities Limited [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.

[23] In the post-Igen decision in Madarassy v. Nomoure International plc [2007] IRLR 246 the Court of Appeal provided further clarification of the Tribunal's task in deciding whether the Tribunal could properly conclude from the evidence that in the absence of inadequate explanation that the respondent had committed unlawful discrimination. While the Court of Appeal stated that it was simply applying the Igen approach, the Madarassy decision is in fact an important gloss on Igen. The court stated:-

> "The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts 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. 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 . . ."

That decision makes clear that the words "could conclude" is not to be read as equivalent to "might possibly conclude". The facts must lead to the inference of discrimination. This approach bears out the wording of the Directive which refers to facts from which discrimination can be presumed.

[24] 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.

[25] In Laing v. Manchester City [2006] IRLR 748 Elias J stated in paragraph 71:-

> "There seems to be much confusion created by the decision in Igen. What must be borne in mind by a Tribunal faced with a risk claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting of the burden of proof simply recognises that there are problems of proof facing an employee which 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.
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> 73. No doubt in most cases it would be sensible for a Tribunal to formally analyse a case by reference to the two stages. It is not obligatory on them normally formally to go through each step in each case.

> 74. The focus of the Tribunal 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 that is the end of the matter. It is not improper for a Tribunal to say in effect "there is 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."

[26] If Ms O'Donnell was not a true comparator then the Tribunal's chain of reasoning could not be upheld because it decided the case on the basis that she was. The parties took diametrically opposed positions on the question of whether she was a true comparator. Mr O'Hara pointed to the factors why she was a true comparator as relied on by the Tribunal. Both Ms O'Donnell and Mr Nelson were Grade 4 employees, both were ancillary and general staff, both carried responsibility, Mr Nelson as a caretaker in the building and Ms O'Donnell in relation to her vehicle, tools and plants; and both were prosecuted under the disciplinary procedures. Miss McGrenera pointed to the difference between the positions of Mr Nelson and Ms O'Donnell. Mr Nelson decided to appropriate Council property for his own purpose whereas Ms O'Donnell did not know that the plants were going to leave Council property and end up in Mr Nelson's private garden. Mr Nelson initially refused to admit his role and pointed to the possibility of other employees being involved in the taking of the plants whereas Ms O'Donnell was cooperative. The parties had two different lines of authority and investigations and had different union representatives which resulted in the enquiries having a different timetable. Mr Nelson carried a greater moral responsibility because he was taking the plants. The Council officers had formed a perfectly permissible view that Mr Nelson had in effect stolen the plants. These factors, it was argued, showed that the two cases raised different issues and that the differential treatment of Mr Nelson and Ms O'Donnell did not lead to any inference of sex discrimination.

[27] For discrimination to be established a comparison of the cases of persons of different sex must be such that the relevant circumstances in the one case are the same or not materially different from the other. The test for discrimination involves a comparison between the treatment of the complainant and another person (the statutory comparator actual or hypothetical of the other sex). Lord Hoffman pointed out in Asher v. Watt [2008] 1All ER 869:-

> "It is probably uncommon to find a real person who qualifies under Section 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."

[28] Faced with the allegations made by the angry ratepayer the Council was bound to investigate the circumstances; identify the individual employees involved in the incident, form a view as to what steps should be taken against the employees so identified; and determine what if any disciplinary sanctions should be imposed. Any investigation of the circumstances necessitated the forming of a view as to the comparative wrong doing of the individuals concerned and a decision as to the proper extent of disciplinary sanctions, if considered appropriate. In the circumstances of the case a conclusion by the Council that Mr Nelson was more culpable than Ms O'Donnell was a conclusion that an employer acting reasonably and logically was fully entitled to reach in the circumstances of the case. If the question of the Council's decision making were subjected to the tests of public law rationality it could not be sensibly argued that the Council acted irrationally or perversely in concluding that Mr Nelson was more culpable than Ms O'Donnell and that the disciplinary sanction that should be imposed on them should differ. The question in the present case however is not one to be determined by reference to the principles of Wednesbury unreasonabless but by reference to the question of whether one could properly infer that the Council was motivated by a sexually discriminatory intention. Even if an employer could rationally reach the decision which it did in this case, it would nevertheless be liable for unlawful sex discrimination if it was truly motivated by a discriminatory intention. However, having regard to the Council's margin of appreciation of the circumstances the fact that the decision-making could not be found to be irrational or perverse must be very relevant in deciding whether there was evidence from which it could properly be inferred that the decision making in this instance was motivated by an improper sexually discriminatory intent. The differences between the cases of Mr Nelson and Ms O'Donnell were such that the employer Council could rationally and sensibly have concluded that

they were not in a comparable position demanding equality of disciplinary measures. That is a strong factor tending to point away from a sexually discriminatory intent. Once one recognises that there were sufficient differences between the two cases that could sensibly lead to a difference of treatment it is not possible to conclude in the absence of other evidence pointing to gender based decision-making that an inference or presumption of sexual discrimination should be drawn because of the disparate treatment of Ms O'Donnell and Mr Nelson.

[29] Mr Nelson was the instigator of the removal of the plants. He intentionally sought to obtain the plants for his own private use which he must have known full well was an improper use of Council property. He did so during his employment. When the question first arose as to whether he might have been the person involved he did not simply stay silent while unrepresented, he sought to divert attention away from himself to others. His actions in relation to the taking of the plants and in relation to the earlier stages of the investigation were viewed by the Council as disclosing dishonesty, a viewpoint which it could legitimately have reached on the material before it. The Tribunal's difficulty in regarding the conduct of the complainant as being dishonest is somewhat difficult to understand. The Tribunal appears to have fallen into the temptation of reaching its own view on the circumstances of the comparable cases of Mr Nelson and Ms O'Donnell or at least been coloured by its own view. The true and proper question for the Tribunal to have focused on was whether the Council was motivated by discriminatory intentions, a question which involved inter alia considering whether the Council could rationally have concluded that Mr Nelson was more and Ms O'Donnell was less culpable.

[30] The decisions in relation to the cases of Mr Nelson and Ms O'Donnell involved decision making by some individuals common to each case but some of whom were not common to each. In the case of Mr Nelson his disciplinary case was considered at three levels, each acting independently of each other. In his case the ultimate tier decision making involved councillors of the Council itself. They reduced the level of disciplinary sanctions imposed. The fact that the investigations involved different individuals each charged with reaching conclusions of fact on the evidence and exercising a judgment on appropriate sanctions forms an important background to the case. There was no evidence from which it could be reasonably inferred that these various decisions were arrived at in a manner indicating collusion in favour of Ms O'Donnell as against Mr Nelson or indicating an intention to visit on Mr Nelson a disproportionate sanction because he was a man.

[31] While concerns were properly expressed by the Tribunal about the circumstances in which an attempt appears to have been made at one stage to improperly call in aid as evidence statements alleged to have been obtained from Mr Larkin and Mr McArdle which they subsequently disowned, the

Council's recourse to that evidence does not of itself point to a sexually discriminatory motivation and in fact the evidence was ultimately of no real relevance because Mr Nelson subsequently accepted that he was indeed the Council employee who took the plants.

[32] The Tribunal's decision in its original form did not adequately analyse any of the matters put forward on behalf of the Council which were relied on to show the rationality of the Council's reasoning process, as negativing the true comparability of Mr Nelson and Ms O'Donnell and as negativing a reasonable inference of discriminatory intent. The Tribunal's change of stance in its review decision does not reflect the wording of the decision. The case stated, accordingly, must be approached with considerable caution since its wording tends to support the Council's argument that the Tribunal by a process of ex post facto rationalisation has sought to avoid the consequences of its originally flawed reasoning.

[33] While we have considered carefully the possibility of remitting the entire case for rehearing before a freshly constituted Tribunal such a course, expensive in both time and cost, is unnecessary since it is open to this court to draw its own conclusion from the primary facts and the evidence adduced before the Tribunal. We have reached the conclusion that on the material before the Tribunal the differences between the cases of Mr Nelson and Ms O'Donnell were such that Ms O'Donnell could not be regarded as a statutory comparator and once it is recognised that the differences between the two cases were such as to justify an employer imposing different disciplinary sanctions there was no evidence from which an inference of sexual discrimination could be drawn and none was ultimately made out on the evidence.

[34] Accordingly we must allow the appeal. The five questions raised in the case can be compendiously reduced to the single question –

> "Was the Tribunal correct in law in deciding that the respondent was discriminated against on the grounds of sex?"

We answer that question "No".