

THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL

CASE REFS: 252/20FET
2098/20IT

CLAIMANT: Gavan McKendry
RESPONDENT: Sammy Mellon and Sons Ltd

JUDGMENT ON A PRELIMINARY HEARING

The judgment of the tribunal is as follows:-

- (1) The claimant's claim form does not contain a claim for breach of contract/notice pay or a claim for holiday pay/unauthorised deductions from wages.
- (2) The claimant is granted leave to amend his claim form to include a claim of breach of contract/notice pay and a claim for holiday pay/unauthorised deductions from wages by way of a "re-labelling" of his original claim.
- (3) The draft 'Schedule of Loss' document is a without prejudice communication for the reasons set out below and therefore inadmissible.

CONSTITUTION OF TRIBUNAL

Employment Judge (sitting alone): Employment Judge Orr

APPEARANCES:

The claimant was represented by Mr R Cushley, Barrister-at-Law, instructed by Cleaver Fulton Rankin Solicitors. (By WebEx).

The respondent was represented by Mr S Fisher, Solicitor, Fisher Law. (By WebEx).

REASONS

1. This Preliminary Hearing was arranged to consider the following:-

- (1) Does the claimant's claim as currently drafted contain a claim for breach of contract/notice pay and/or holiday pay?

- (2) If not, should the claimant be permitted to amend his claim to include a claim for notice pay/holiday pay/breach of contract?
 - (3) Whether a document – a draft Schedule of Loss is privileged as asserted by the claimant’s representative.
 - (4) An application to consider the adequacy of the respondent’s replies to Notices for Additional Information and Discovery.
 - (5) An application to consider the adequacy of the claimant’s response to Notices for Additional Information.
2. The parties and their representatives were ordered to exchange and lodge written submissions on each of the issues to be determined at the Preliminary Hearing no later than 16 April 2021. The tribunal is grateful to the representatives for their respective written and oral submissions.
 3. At hearing the claimant’s representative no longer argued that the claimant’s claim form contained a claim for holiday pay; his application related solely to an application to amend the claim form to include such a claim.
 4. Case Management Orders pursuant to Part 6 of the ***Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (NI) 2020*** in relation to issues (4) and (5) are contained in a separate Record of Proceedings issued to the parties’ representatives.

BACKGROUND

5. The claimant presented his claim form to the tribunal on 24 January 2020 claiming unfair dismissal and religious belief/political opinion discrimination.
6. The respondent presented its response on 9 March 2020 resisting the claims.
7. This claim has been the subject of three previous Preliminary Hearings on 19 November 2020, 11 February 2021 and 26 March 2021 and is listed for hearing on **5-7 July 2021**.
8. There is no dispute that the claimant in his claim form at paragraph 6.3 expressly stated that he was paid for a period of notice and he specifically stated three weeks.
9. The parties agreed that, at a time when the claimant was self-representing, he forwarded a document entitled ‘Schedule of Loss’, dated 07/11/2020 to the Labour Relations Agency for the purposes of settling his claim. The respondent’s representative in written submissions described this as *“for conciliation purposes”*.
10. The parties agree that this document was emailed to the respondent’s representative on 16 February 2021 in response to an email dated 10 February 2021. The email dated 16 February 2021 is as follows:-

“I note that in the CMPH you said you had not seen a copy of the “schedule of loss” prepared by my client. I have attached this for your information so

you can make better sense of my email below. (There is no dispute between the representatives that the 'email below' is a reference to the email dated 10 February 2021).

Just to reiterate, this is not my client's schedule of loss, but rather a document that he had prepared himself and sent through to the LRA at an earlier stage in proceedings prior to my involvement in the matter. This was for the purposes of indicating what he was expecting for settlement purposes. I had assumed that the LRA had sent this through to your client and/or you already.

Kind regards"

11. In the email dated 10 February 2021, the final two paragraphs are preceded by the words "without prejudice". There is no dispute between the parties that these two paragraphs relate to settlement negotiations.
12. No witnesses were called by either party. The hearing proceeded by way of contentions and by reference to the documentation submitted by the representatives. Facts as agreed by the parties have been recorded in this judgment.

THE LAW

13. Mr Cushley referred the tribunal to the following authorities:-
 - (i) **Abercrombie & Others v Aga Rangemaster Ltd [2013] EWCA Civ 1148.**
 - (ii) **Daintrey Ex Parte Holt [1898] 2 QUB116.**
 - (iii) **Jones v Longley [2016] EWHC 1309.**
 - (iv) **Peifer v Castlederg High School [2008] NICA 49.**
 - (v) **McKinstry v Moy Park [2015] NICA 12.**
 - (vi) **Rush & Tompkins Ltd v Greater London Council [1989] AC 1280.**
 - (vii) **Schering Corporation v Cipla Ltd [2004] EWHC 2587(CH).**
 - (viii) **Selkent Bus Company Ltd, trading as Stagecoach Selkent v Moore [1996] ICR 836.**
 - (ix) **Halsbury Law of England Extract.**
 - (x) **Harvey on Industrial Relations and Employment Law, Volume 4, Division P1 Practice and Procedure, Paragraph 356.**
 - (xi) **McGill v Ulster Independent Clinic [2010] NICA 33.**
14. Mr Fisher referred the tribunal to the following authorities:-
 - (i) **Three Rivers (No.6) [2005] 1AC 610.**
 - (ii) **Pearson Education Ltd v Prentice Hall India Private Ltd [2005] EWHC 636.**
 - (iii) **Digicel (St Lucia) Ltd v Cable and Wireless Plc [2009] EWHC 1437(CH),**
 - (iv) **Order 12 of the Rules of the Court of Judicature (Northern Ireland) 1980.**
 - (v) **Lipkin Gorman v Karpnale Ltd [1989] 1WLR 134.**
 - (vi) **NW Salt Company Ltd v Electrolytic Alkali Co. Ltd [1913] 3KB422**

- (vii) **Valentine on Civil Proceedings.**
- (viii) **Clinton v Chief Constable [1991] 2NIJB53.**
- (ix) **Harvey on Industrial Relations and Employment Law, Division P1, Practice and Procedure, Paragraphs 421-450.**

Amendment

15. Under Rule 25 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020, the tribunal has the power to make an order granting leave to amend a claim or response.
16. Guidance on the way in which a tribunal's discretion is exercised in relation to amendments is set out in **Selkent Bus Company v Moore 1996 ICR 836** by Mr Justice Mummery:- (paragraphs 22-24)

“Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

...

What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively but the following are certainly relevant;

(a) *The nature of the amendment*

Applications to amend are of many different kinds, ranging, on the one hand from the correction of clerical and typing errors, the addition of factual details to existing allegations and the additions or substitution of other labels for facts already pleaded to, or, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) *The applicability of statutory time-limits*

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time-limit should be extended under the applicable statutory provisions

(c) *The timing and manner of an application*

An application should not be refused solely because there has been a delay in making it. There are no time-limits laid down in the Rules for the making of amendments. The amendments can be made at any time before, at, or even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now

being made; for example, the discovery of new facts or new information appearing from documents disclosed in discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result from adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

17. In **Vaughan v Modality Partnership (EAT) [2021] ICR 535** Judge Taylor in considering an amendment application rehearsed the **Selkent** principles and subsequent authorities and made the following observations:-

*“13. No consideration of an application for amendment is complete without reference to **Selkent [1996] ICR 836**. It is so familiar that it is especially easy to quote it without reflecting on the core principle it elucidates. The key passage is at paragraph 843D:-*

“whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it”.

14. *Mummery J reiterated this point at paragraph 844B:-*

“whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment”.

15. *The history and central importance of this test was analysed by Underhill J (President), as he then was, in the, unfortunately unreported, case of **Transport and General Workers’ Union v Safeways Stores Ltd** 6 June 2007, in which he also concluded that on a correct reading of **Selkent** the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment, but was a factor to be taken into account in the balancing exercise.*

16. *The list that Mummery J gave in **Selkent** as examples of factors that may be relevant to an application to amend (“the **Selkent** factors”) should not be taken as a checklist to be ticked off to determine the application, but are factors to take into account in concluding the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment. Mummery J specifically stated he was not providing a checklist at paragraph 843F: “What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively.”*

17. *This is not a new point. Underhill L J returned to a consideration of **Selkent** in **Abercrombie & Others v Aga Rangemaster Ltd [2014] ICR 209** and noted at paragraph 47:-*

*“it is perhaps worth emphasising that head (5)” – the **Selkent** factors – “of Mummery J’s guidance in **Selkent’s** case was not intended as prescribing some form of a tick box exercise. As he makes clear, it is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance which he identifies under head (4)” – the balance of hardship and injustice.*

18. *Representatives and Employment Judges will be well advised to keep copies of **Safeway** and **Abercrombie** in their files of key authorities together with the ubiquitous copy of **Selkent**”.*

...

18. **Harvey** identifies the three well established categories of amendment (paragraph 311.04):-

“A distinction may be drawn between:-

- (1) Amendments which are merely designed to alter the basis of an existing claim but without purporting to raise a new distinct head of complaint.*
- (2) Amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as the original claim.*
- (3) Amendments which add or subject a wholly new claim or cause of action which is not connected to the original claim at all.”*

19. Underhill LJ in the Court of Appeal in **Abercrombie & Others v Aga Rangemaster Ltd at (2013) EWCA Civ 148** considered the issue of whether an amendment is a ‘re-labelling’ (Category 2) or a ‘wholly new claim’ (Category 3) and gave the following guidance:

“... The approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted. (Paragraph 48)

...

... Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and a fortiori in a re-labelling case – justice does not require the same approach: NB that in High Court proceedings amendments to introduce

“new claims” out of time are permissible where “the new cause of action arises out of the same facts or substantially the same facts as are already in issue” (Limitation Act 1980) Section 35(5)”. (Paragraph 50)

20. In **Vaughan v Modality Partnership (EAT) [2021] ICR 535** Judge Taylor endorsed Underhill LJ’s approach in **Abercrombie & Others v Aga Rangemaster Ltd [2013] EWCA Civ 1148** as follows:-

*“Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting **Selkent** factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment? If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters of whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis of instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim. (Paragraph 21).*

Refusal of an amendment will self-evidently always cause some perceived and prejudice to the person applying to amend. (Paragraph 22)”.

21. The legal authorities are clear that where a claimant proposes to include a wholly new claim or cause of action (*Category 3 amendment*), the tribunal must have regard to the relevant time limits and, if the claim is out of time, to consider whether the time should be extended under the relevant statutory provision. In this regard, **Harvey** confirms that:

*“even though it is necessary for the tribunal to consider the time limits they are only ‘a factor albeit an important and potentially decisive one’, in the exercise of the overall discretion whether or not to grant leave to amend, which remains the relative injustice/hardship test”. [as per **Harvey** paragraph 312.07]*

22. In **British Coal v Keeble [1997] IRLR 336** the EAT confirmed that on the question of time limits and any extension of same, a tribunal would be assisted by the factors mentioned in Section 33 of the Limitation Act 1980, which deals with the exercise of discretion by the courts in personal injury cases.

“It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular to:-

- (a) *the length of and reasons for the delay;*

- (b) *the extent to which the cogency of the evidence is likely to be affected by the delay;*
- (c) *the extent to which the party sued had cooperated with any request for information;*
- (d) *the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and*
- (e) *the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."*

23. The paramount consideration in an amendment application is the relative injustice and hardship involved in refusing or granting an amendment.
24. The decision of amendment is one for the discretion of the Industrial Tribunal and one which is based on the facts of each case having regard to the overriding objective as set out below.

Without Prejudice Communications

25. The relevant legal principles applicable to 'without prejudice' communications were considered by the Northern Ireland Court of Appeal in ***Philip McKinstry v Moy Park [2015] NICA.***

"Without prejudice communications

[21] The "without prejudice" rule stretches back to cases emanating from the late 18th century. It is a crucially important concept in civil litigation.

[22] Communications made between parties to a dispute that are written or made with the aim of genuinely attempting to settle that dispute cannot usually be admitted in evidence nor made the subject of a disclosure order whether in the proceedings (if any) to which the dispute gives rise or in any other litigation in which similar or related issues arise. There is no privilege over the fact that such communications have occurred, rather the privilege is limited to the contents of such communications.

*[23] It is fundamental to the operation of the "without prejudice" rule that such communications are made for these purposes, since the courts will not apply this privilege to communications which have a purpose other than settlement of the dispute. Hence in ***In Re Daintrey, ex parte Holt [1893] 2 QB 116*** at 119 Vaughan Williams J said:*

"In our opinion the rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation ... The rule is a rule adopted to enable disputants without prejudice to engage in discussion for the purposes of arriving at terms of peace and unless there is a dispute or negotiations and an offer this rule has no application."

[24] The basis of the rule has traditionally been seen as lying partly in public policy and partly in the express or implied agreement of the parties to the relevant negotiations.

[25] The public policy aspect was asserted in **Rush and Thompkins Ltd v Greater London Council [1989] AC 1280** at 1299 per Lord Griffiths as follows:

*"The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is no more clearly expressed than in the judgment of Oliver LJ in **Cutts v Head [1984] Ch 290**, 306:*

*'That the rule rests, at least in part, upon public policy is clear from many authorities and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resorting to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in **Scott Paper Co v Drayton Paperworks Limited (1927) 44 RPC 155, 156** be encouraged fully and frankly to put their cards on the table ... The public policy justification in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for a settlement being brought before the court of trial as admissions on the question of liability'."*

[26] That the rule is also apparently based on an implied agreement that enables parties to "without prejudice" negotiations to vary the application of the public policy basis of the rule by extending or limiting its reach is well illustrated in **Unilever Plc v The Proctor and Gamble Company [2000] 1 WLR 2436** where Robert Walker LJ said at p2445:

"The rule also rests on 'the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence'."

[27] It is pertinent to observe that whatever the form that negotiations may take, genuine negotiations with a view to settlement are protected from disclosure whether or not the "without prejudice" stamp has been applied expressly to the negotiations. Lord Griffiths in **Rush and Thompkins** at 1299 said:

"The ... rule applies to exclude all negotiations generally aimed at settlement whether oral or in writing from being given in evidence. ... However the application of the rule is not dependent upon the use of the phrase 'without prejudice' and if it is clear from the

surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial."

[28] Hence, particularly significant in the context of the instant appeal, unless at the time of the relevant communications there was an extant dispute between the parties, the communications are not covered by the privilege. Foskett, 7th Edition, on "The Law and Practice of Compromise" declares:

"In one sense this does not in reality form any exception to the without prejudice rule; it represents a manifestation of circumstances in which the rule never truly comes into play."

Overriding Objective

26. The overriding objective is contained in Rule 2 of Schedule 1 to the ***Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020***:-

"The overriding objective of these Rules is to enable tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable:-

- (a) Ensuring that the parties are on an equal footing.*
- (b) Dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) Avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) Avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) Saving expense.*

The tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it, by these Rules. The parties and their representatives shall assist the tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the tribunal."

SUBMISSIONS OF THE PARTIES

27. In summary the claimant's application was as follows:-

Amendment

- (1) That on the face of the claim form a claim of breach of contract/notice pay is not expressly stated, however when the claimant's claim form is considered in its totality and in the round, it can be "inferred" that the claim form contains a claim of breach of contract/notice pay.

- (2) The claimant completed his claim form as a 'litigant in person', without the benefit of legal advice; that the claimant was confused as to what he had been paid on the termination of his employment as it had never been set out to him in writing by the respondent; and he did not appreciate the difference between notice pay and redundancy pay when completing Section 6.3 of the claim form.
- (3) The claimant should be permitted to amend his claim form to include a claim of breach of contract and a claim for holiday pay as these are 'Category 2 amendments' namely "*amendments which add or substitute a new cause of action which is linked to or arises out of the same facts as the original claim*". In this regard the claimant relies on the fact that the claims of notice pay/breach of contract and holiday pay flow from exactly the same set of facts as his original claim of unfair dismissal; specifically these claims arise only from the termination of the claimant's contract of employment.
- (4) The amendment application was not made previously because the claimant understood that his claims of holiday pay/unauthorised deduction from wages and breach of contract/notice pay were already included in the claim form; they are claims of relatively small value which require little or no further evidence and do not require the calling of any additional witnesses. Pursuant to the overriding objective they should properly be considered alongside the claimant's unfair dismissal claim.
- (5) The amendments do not prejudice the respondent, nor does the respondent allege any form of prejudice. The mere fact of having to respond to a claim is not real prejudice.
- (6) The respondent's written submissions on the amendment issue represent a fundamental failure to understand the nature of amendment applications in the tribunals, specifically that statutory time-limits relate only to Category 3 amendments as per **Selkent**.

"Without Prejudice"

- (7) That the document entitled 'Schedule of Loss' was forwarded by the claimant, to the Labour Relations Agency for the purposes of settlement of his claim. It is clearly a 'without prejudice' communication made during the currency of a dispute between the parties and made for the purposes of settling the dispute. It is therefore inadmissible as per **Halsbury Laws of England, Volume 12, paragraph 663**. The respondent, in its written submissions, accept that the document was for the purposes of conciliation. Privilege was not waived by the claimant in the email dated 16 February 2021 as this email was part of an email chain of without prejudice negotiations during an extant dispute and per **Halsbury's Laws of England, Volume 12, paragraph 663** "*cannot be generally admitted in evidence regardless of whether or not it is expressed to be made without prejudice*".

28. In summary the respondent's contentions are:-

Amendment

- (1) From a clear unambiguous reading of the claimant's claim form, it contains no claim for breach of contract/notice pay or holiday pay. In this regard the respondent's representative relies on the claimant's specific answer to paragraph 6.3 of the claim form in which he expressly states that he received three weeks' notice. Furthermore there is nothing expressly or impliedly contained within Section 7.4 - "*Details of claimant's claim form*" which makes a claim for breach of contract/notice pay or holiday pay.
- (2) In an application for amendment the tribunal need only concern itself with the issue of the applicable statutory time-limits. The tribunal is "a creature of statute" and it cannot exercise any other discretion save for deciding whether or not it was reasonably practicable for the claimant's claims of holiday pay/unauthorised deductions from wages or notice pay/breach of contract to be lodged within the statutory time-limits.

"Without Prejudice"

- (3) To attract without prejudice and/or litigation privilege, the document must have been created for the sole or dominant purpose of conducting litigation which is either in progression or in contemplation as per Lord Carswell in ***Three Rivers (No.6) [2005] 1AC 610***.

The respondent's written submissions on this issue continue as follows:-

"It is accepted that at the time of its creation ... litigation was (and is) in progress, but the document was created not for its conduct but in respect of a Labour Relations Agency conciliation. Nor does the document evince any compromise, such as would render it privileged on without prejudice grounds; the claimant is stating his case at what he perceives is its height. The document has therefore not been made "for the purposes of a genuine attempt to compromise a dispute between the parties". ("Phillips on Evidence 19th Edition, para 24-13). It should therefore be admitted in evidence".

"The question of whether a document is without prejudice should be determined objectively ... An objective analysis of the Schedule of Loss is that there is no proposed compromise, no genuine attempt to compromise, no admissions and therefore no privilege. It is a document setting out facts as the Claimant understands them and his perception of his treatment, all of which will presumably be rehearsed in his witness statement ...".

- (4) Privilege was waived by the claimant's representative when he forwarded the 'Schedule of Loss' in the email dated 16 February 2021. The written submissions on behalf of the respondent states – "*That email is instructive – it seeks to explain the document's provenance, but pertinently does not assert any without prejudice privilege in respect of it*". At the Preliminary Hearing, the respondent's representative argued that failure to mark the email of 16

February 2021 'without prejudice' waived the privilege although conversely he accepted at the Preliminary Hearing that the legal authorities are clear that a document need not be marked 'without prejudice' for it to be so.

CONCLUSION

Amendment

29. The tribunal determines that the claim form as drafted does not contain a claim for breach of contract/notice pay. On consideration of the claim form, the claimant expressly states that he received three weeks' notice pay. Ms Cushley asserted on behalf of the claimant that the claimant understood this to be a redundancy payment, however no evidence was adduced on behalf of the claimant to this effect. Accordingly the tribunal finds from a clear and straightforward reading of the claim form that it does not contain a claim for breach of contract/notice pay.
30. In applying the legal principles set out above, including the relative balance of injustice in whether or not to allow the amendments and taking into consideration the overriding objective, the tribunal makes the following determinations:-
- (1) The proposed amendments amount to Category 2 amendments – namely *“amendments which add or substitute a new cause of action which is linked to or arises out of the same facts as the original claim”*. The tribunal accepts Mr Cushley's argument that the claims of breach of contract and holiday pay arise only by reason of the termination of the claimant's contract and plainly arise out of the same facts as the claimant's original unfair dismissal claim.
 - (2) In light of the tribunal's finding, that this is a 'relabelling', linked to or arising out of the same facts, the applicability of statutory time-limits does not arise.
 - (3) The amendments will not involve any substantially different areas of enquiry from the original claim of unfair dismissal. The respondent raises no argument that additional evidence, witnesses or hearing time will be required if the amendments are permitted; nor is there any suggestion that additional costs will be incurred by the respondent by reason of same. There will be no delay to the proceedings, there is no element of surprise to the respondent and the respondent has ample time and ability to defend these claims.
 - (4) Contrary to Mr Fisher's submissions, the legal position has long been held that an application for leave to amend should not be refused solely because there has been a delay in making the application. There are no time-limits laid down in the Rules for the making of amendments. They can be made at any time, before, at, or even during the hearing of the case. Whilst there has been delay in the making of this application; the reasons for this relate to the claimant's understanding that the claims of holiday pay and breach of contract/notice pay were contained within the claim form. The tribunal takes into consideration the fact that the claimant was a litigant in person at the time he completed his claim form. The authorities are clear, delay in making an amendment application is a discretionary factor to be taken into account as part of all the circumstances that a tribunal should consider when balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Whilst delay is unsatisfactory, the delay

and the reasons for delay do not solely determine an amendment application. (*Tribunal emphasis*).

- (5) The application for amendment has been made in advance of the hearing and in advance of the exchange of witness statements. The tribunal is satisfied that there is no prejudice to the respondent in allowing the amendments.
- (6) In assessing and taking into account all the circumstances and balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it, the hardship occasioned to the respondent in allowing the amendment is minimal.

31. Accordingly, the claimant is granted leave to amend his claim by way of a “re-labelling” of his claim, to include a claim for holiday pay/unauthorised deductions from wages and a claim for notice pay/breach of contract
32. The respondent is permitted to amend its response form in respect of these new claims. For the avoidance of doubt, any amendment must relate to these new claims only and must be lodged in the tribunal office and served on the claimant’s representative within 14 days of receipt of this judgment.

Without Prejudice Communications

33. There is no dispute between the parties that the document entitled ‘Schedule of Loss’ was prepared by the claimant and forwarded to the Labour Relations Agency for the purposes of settlement. As per Mr Fisher’s written submissions the document was created “*in respect of a Labour Relations Agency’s Conciliation*”, at a time when litigation was in progress.
34. The respondent’s submissions on this issue appear to conflate ‘litigation privilege’ with ‘without prejudice communication’s privilege’. The tribunal had difficulty reconciling the respondent’s representatives written submissions and his oral submissions; it was accepted on behalf of the respondent that an extant dispute existed and that the document was shared with the Labour Relations Agency for the purpose of settlement, however the respondent’s representative also argued to the contrary that “*the document has therefore not been made for the purposes of a genuine attempt to compromise a dispute between the parties*”.
35. The tribunal determines that the document dated 17/11/20 entitled ‘Schedule of Loss’, sent to the Labour Relations Agency by the claimant is a without prejudice communication as per ***McKinstry v Moy Park [2015] NICA***. It is clearly a “*communication made between parties to a dispute that are written or made with the aim of genuinely attempting to settle that dispute*”. Accordingly the document is inadmissible as a without prejudice communication.
36. Furthermore, the tribunal is satisfied that there was no waiver of privilege by the email dated 16 February 2021. As per ***Rush & Tompkins Ltd v Greater London Council [1989]*** as set out above, the application of the ‘without prejudice communication’ exception is not dependent upon the use of the phrase ‘without prejudice’. The final email in the chain is not marked ‘without prejudice’. However the tribunal is satisfied that it is part of a chain of emails containing ‘without

prejudice communications' for the purposes of settlement negotiations. This is clearly evident from their content. Furthermore it is clear from the surrounding circumstances that the parties were seeking to resolve the claim.

37. For the avoidance of doubt the tribunal's finding that the document is inadmissible by reason of the without prejudice communication privilege rule both in November 2020 when it was sent to the Labour Relations Agency by the claimant and in February 2021 when it was forwarded by the claimant's solicitor in the email dated 16 February 2021.

Costs Application

38. Mr Cushley made an application for costs at the end of the hearing.
39. I direct that any application for costs on behalf of the claimant must be fully set out in writing to both the tribunal and the respondent's representative detailing the legal and factual basis for the application, together with a full schedule of all costs being claimed, including the amount claimed and the hourly rate (if applicable). Thereafter a Preliminary Hearing will be arranged to determine the application if there is no agreement between the parties.

Employment Judge:

Date and place of hearing: 22 April 2021, Killymeal House, Belfast.

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