THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL

CASE REFS: 2067/20IT
2068/20IT

CLAIMANTS: **Claimant A (1)**

Claimant B (2)

RESPONDENT: **Respondent C (1)**

Respondent D (2)

Respondent E (3)

Respondent F (4)

JUDGMENT ON A PRELIMINARY HEARING

The judgment of the tribunal is as follows:-

(1) in relation to the claim of claimant A:

the tribunal grants claimant A leave to amend his claim in the terms sought in the amendment application dated 27 November 2020; and

(2) in relation to the claim of claimant B:

(a) the tribunal grants claimant B leave to amend her claim in the terms sought in paragraphs 1 to 8 inclusive and paragraph 13 of the amendment application dated 27 November 2020; and

(b) the tribunal refuses claimant B leave to amend her claim in the terms sought in paragraphs 9 to 12 inclusive of the amendment application dated 27 November 2020;

for the reasons set out below at paragraphs 22 to 24 of this judgment.

CONSTITUTION OF TRIBUNAL

Employment Judge (sitting alone): Employment Judge Gamble

APPEARANCES:

The claimants were represented by Ms L Gillen, Barrister-at-Law, instructed by John

Fahy and Co, Solicitors.

The respondent was represented by Mr O Friel, Barrister-at-Law, instructed by Worthingtons, Solicitors.

ANONYMISATION

1. The tribunal, on the tribunal's own initiative, given the nature of the allegations which have given rise to these claims and that they are denied, orders that all of the parties to this claim are anonymised in this judgment pursuant to Rule 44, as the tribunal considers that it is necessary to do so in the interests of justice and in order to protect the Convention rights of the claimants. In making this Order, the tribunal has given full weight to the principles of open justice, noting that the Hearing took place as a public hearing, listed on the weekly hearing schedule, on the tribunal website.

2. As this Order has been made on the tribunal's own initiative and without the parties having had the opportunity to make representations before the Order was made, any party, or other person with a legitimate interest, may apply to vary or set aside this Order and if such an application is made, it will be considered and determined at a further Preliminary Hearing.

BACKGROUND

3. Claimant A, a male, and claimant B, a female, were both employees of respondent D, which operates as an Advice Centre. Respondent C was a manager in respondent D. Respondents E and F were co-workers with the claimants. Claimant A resigned from his employment on 6 December 2019. Claimant B remains an employee, but is absent on long term sick leave.

4. The claimants presented their claims to the industrial tribunal by way of a single claim form dated 3 December 2019, with additional pages to provide the personal details and employment details of each claimant. This claim form was received by the tribunal on 9 December 2019 and was therefore presented on that date. The claimants were not represented at the time when the claim form was presented. The claim form was accepted and registered as a claim of discrimination on grounds of sex and sexual orientation in respect of each claimant. Separate claim reference numbers were allocated in respect of each claimant. The claim form lodged on behalf of the claimants did not adequately particularise the claims being pursued by each claimant. The claim being pursued by claimant A, a male, and claimant B, a female, was that each of them *"was treated unlawful (sic) and discriminated against as a woman and treated less favourable (sic) on gender grounds and to that of my work colleague in relation to comments made by my manager…."*. The claim form also purported to include a claim of defamation on behalf of each claimant. The claim form enclosed a grievance letter in respect of each claimant dated 4 October 2019.

5. Separate ET3 responses were presented on 24 March 2020 in respect of each claim on behalf of all the respondents. The responses, which were in similar terms, denied the allegations contained in the claimant's ET1 claim form dated 3 December 2019 *"in their entirety"*. In respect of claimant A's claim, the response

stated "*in particular it is denied that there was a breach of the claimant's terms and conditions of employment as alleged or at all"* and that *"it is further denied that the claimant was victimised or harassed as alleged at all".* In respect of claimant B's claim, the response stated that the respondents *"in particular deny that the claimant has been subjected to unlawful discrimination on grounds of sex as alleged or at all."* The ET3 response forms contended that the tribunal had no jurisdiction to entertain a complaint of defamation and/or slander, whilst maintaining a denial of those allegations in respect of claimant A. The response forms contended that the allegations raised were not matters that related to the claimants' employment, but related solely to a personal dispute between claimant B and her family. The response forms provided a factual background and set out that the outcome of both claimants' grievances, which were not upheld. The responses also included details of the outcome of the grievance appeals in respect of each claimant, which issued on 20 November 2019. The ET3 responses were accepted and copied to each claimant by email on 26 May 2020.

6. A Case Management Preliminary Hearing was conducted on 22 October 2020 by telephone conference. The claimants represented themselves. By consent, the claims were ordered to be heard and considered together. The tribunal was informed by claimant A that the claim form had been submitted by claimant B and that it was not correct. Claimant A informed the tribunal that he had resigned from his employment on 6 December 2019 as a result of the treatment he had received. Claimant B informed the tribunal that she had been absent from work on an extended period of sick leave and was now in receipt of Employment Support Allowance, although technically she remained "on the books" with respondent D. She informed the tribunal that she had discussed bringing an amendment application in respect of her claim with a solicitor. Both claimants were informed that the tribunal had no jurisdiction to consider defamation claims and were urged to seek advice if it was their intention to bring such claims in another court and were informed that there were strict time limits in respect of such claims. Both claimants were signposted to sources of advice and information, informed of their right to make an application to amend their claims and informed of the relevant legal principles which would apply in considering any application. Both claimants, in the event that they intended to pursue an amendment application, were directed to do so in writing to the tribunal and copied to the respondents' representative by 27 November 2020, setting out the nature of the amendment sought.

7. By letter dated 27 November 2020, Messrs John Fahy & Co, who had come on record as representative on behalf of both claimants, wrote to the tribunal setting out details of the amendment sought in respect of each claimant. In respect of claimant A, leave was sought to amend the contents of his claim form to include a claim with regards to the manner in which the grievance and grievance appeal were dealt with, ultimately culminating in his constructive dismissal. In respect of claimant B, leave was sought to amend the contents of her claim form to include further detail of the existing claims and also to add an additional claim of disability discrimination, which it was asserted had arisen subsequent to the lodgement of the ET1. Details of the amendments sought in respect of each claimant are set out below, with the addition of paragraph numbers in respect of claimant B's amendment application for ease of reference:

Claimant A

"Further to my grievance outlined above, [Claimant B] and I were invited to a grievance meeting on 15 October 2019. The grievances were heard together. The meeting was conducted under the Second Respondent's grievance policy by [Mr X], Chairman of the Second Respondent's Board. We were notified of our employer's rejection of our grievance on 20 October 2019. I contended that the way in which our grievance (sic) were investigated; considered and decided was unfair and I disagree with the outcome.

Claimant B and I lodged appeals against the outcome under the Second Respondent's policy, and we were invited to a hearing on 7 November 2019 at the City Hotel. This was conducted by the Second Respondent's Board Members [Y] and [Z]. The outcome was communicated to us on the 20 November 2019 and the original decision was upheld. I further contend the way in which this appeal was investigated; considered and decided was unfair and I disagree with the outcome. I also do not think it was appropriate or fair for the First Respondent's friend to have played a decision-making role in this.

We exercised all methods and means of appealing the unreasonable, bullying and unfair treatment within the Second Respondent.

[Claimant B] and I think it's astonishing that the Board Members concluded that this was a 'family matter' and this is an attempt to abdicate their duty of care and responsibility towards us as employees in what was clearly a workplace issue involving multiple members of their staff and incidents on work property.

Prior to 10 September 2020 (sic), I can't say that I noticed much difference in the office towards me, although I know it was a different story from [claimant B]. However since 10 September 2020 (sic) incident, I felt sick with stress and worry. These problems at work spilled over into my personal life, and this was an incredibly distressing time for my wife and I. My wife has met claimant B and they get along. When I had to tell about the nonsense that was being spread at work for fear of it getting back to her indirectly, she was understandably in floods of tears and said that my colleagues were trying to ruin my reputation.

I was certified as unfit to work and did not return prior to my constructive dismissal. I gave my employer a chance to rectify this situation through the grievance and appeal process, but was left bitterly disappointed. There were actual breaches of my contract, such as breaches of company policy and the implied term of trust and confident (sic) was also broken, as the treatment by my employer, its employees, servants and/or agents was so unfair and unreasonable.

As a result of this, I was forced to resign, as I could no longer work for my employer following the breaches. This was a decision which I did not take likely (sic), and thought deeply about, particularly given the financial implications for my family and I, but the effect that everything was having on

my mental health was a more pressing concern. I couldn't work for or with people who had treated me the way they did.

I resigned by letter dated 6 December 2019.

I submit a claim for constructive dismissal under Article 127(1)(c) of the Employment Rights (Northern Ireland) Order 1996 and seek compensation and/or any other relief that the tribunal may deem fit."

Claimant B

"1. Further to my grievance outlined above, [claimant A] and I were invited to a grievance meeting on the 15 October 2019. The grievances were heard together. The meeting was conducted under the Second Respondent's grievance policy by [Mr X], Chairman of the Second Respondent's Board. We were notified of our employer's rejection of our grievance on the 20 October 2019. I contend that the way in which our grievance (sic) were investigated, considered and decided was unfair and I disagree with the outcome.

2. Claimant A and I lodged appeals against the outcome under the second respondent's policy, and we were invited to a hearing on the 7 November 2019 at the City Hotel. This was conducted by the Second Respondent's Board Members [Y] and [Z]. The outcome was communicated to us on the 20 November 2019 and the original decision was upheld. I further contend that the way in which this appeal was investigated; considered and decided was unfair and I disagree with the outcome. I also do not think it was appropriate or fair for the First Respondent's friend to have played a decision-making role in this.

3. We exercised all methods and means of appealing the unreasonable; bullying and unfair treatment within the Second Respondent.

4. [Claimant A] and I think it's astonishing that the Board Members concluded that this was a 'family matter' and this is an attempt to abdicate their duty of care and responsibility towards us as employees in what was clearly a workplace issue involving multiple members of their staff and incidents on work property.

5. Further, I was told by [respondent C] that we were being monitored at work, and that she could provide details of occasions in which I was allegedly in claimant A's office. This was humiliating and disconcerting for me, to think that my colleagues had been tasked to watch my movements and report back. [Respondent C] also told me that I should resign as a result of this malicious gossip, and so I do not understand how the grievance and appeal outcomes could refer to a 'family matter'. This is something that was happening to me at work; caused by my colleagues and over which [Respondent C] attempted to make me resign and threatened to discipline me, under company policy.

6. A few months before the 10 September 2019, I noticed that there was a change in atmosphere in the office. Colleagues started to appear lingering

outside the doors, and I could feel that they were keeping an eye on me. I also knew that there was gossip; and I was either ignored or subjected to snide comments. A colleague told me to 'stay out of [claimant A]'s room'; and on another occasion a colleague said, '[claimant A is] while stressed' [sic].

7. Claimant A wasn't subjected to any of these comments or behaviour. It's also notable that [respondent C] only singled me out for confrontation; and only I was threatened with disciplinary action and subjected to attempts to coax a resignation. I was treated less favourably due to my gender.

8. The allegations are without foundation; defamatory; and have caused untold damage in my life and claimant A's. That's not to mention the hurt they have caused to his wife, who I know and consider a friend. Notwithstanding this, it's unfortunate in our society that often females can bear the brunt of such allegations, and that's exactly what has happened in my case.

9. I have been absent for work-related stress since 10 September 2019 and have not returned to work. I was diagnosed with a mental illness as a result of the treatment of my employer; their employees; servants and/or agents and continue to take medication to this day.

10. I consider myself to be disabled for the purposes of section 1 of the Disability Discrimination Act 1995 ("the DDA") as a result of this.

11. Notwithstanding this, and notwithstanding my employer's duty to me as a staff member absent on long-term stress, I have not once been referred to Occupational Health; neither have I been asked to attend a meeting or contacted to see how I am. I feel completely "left at sea" by my employer, who seems to have adopted the attitude that I am no longer part of the workplace. This treatment of me is in breach of the second respondent's policy and its obligations under the DDA.

12. I respectfully submit that I have been discriminated against on grounds of gender and harassed contrary to the Sex Discrimination (Northern Ireland) Order 1976. I have been discriminated against contrary to the DDA and there has been a failure to make reasonable adjustments.

13. I seek compensation; declaratory relief and any other relief which the tribunal sees fit to impose."

8. On 8 December 2020, the respondents' representative confirmed that the amendment applications were objected to in their entirety by the respondents.

9. A further Case Management Preliminary Hearing was conducted by WebEx on 10 December 2020, Ms Gillen made oral submissions on the categorisation of the amendment applications, on which the respondents' representative confirmed she would take further instruction. The respondents were ordered to set out their final position in relation to the amendment applications by 23 December 2020. The parties sought an 'in person' hearing in respect of the amendment application. An 'in person' Preliminary Hearing was listed for 7 January 2021 to consider:

"whether the claimants should be granted leave to amend their claims in the terms sought".

10. On 23 December 2020, the respondents' representative wrote to the tribunal in the following terms:

"The nature of Claimant B's amendment application was outlined as follows:

1. *Adding additional facts to existing allegations/claim of sex discrimination (which includes harassment) – category 1.*

2. A new claim of disability discrimination to include direct discrimination and failure to make reasonable adjustments – category 3.

Subject to clarification from the claimant side as to the precise part(s) of the proposed amendment would constitute additional facts in relation to the existing sex discrimination allegations/claim, the respondents confirm agreement in principle to the inclusion of same; acknowledging that same could have been provided by way of additional information through the interlocutory process in any event.

We confirm that the respondents objected to the proposed inclusion of a new claim of disability discrimination.

The nature of Claimant A's amendment application was outlined as follows:

1. *A new claim of constructive dismissal – relabelling amendment category 2.*

We confirm the respondent subject to the proposed inclusion of a new claim of constructive dismissal and will further contend that the nature of the amendment sought is a category three amendment under Selkent principles."

11. The preliminary hearing did not take place on the listed date of 7 January 2021 as one of the claimants was required to self-isolate as a close contact of a Covid-19 positive case and the tribunal did not at that time have technology installed to allow the hearing to take place on a hybrid basis. The parties' views were sought as to whether the hearing could be conducted on a fully remote basis. The parties were in agreement that an 'in person' hearing would be preferable.

12. The tribunals' building closed for a second time on 19 January 2021 as a result of the Covid-19 pandemic. A further Case Management Preliminary Hearing was conducted by WebEx on 1 June 2021. A Preliminary Hearing to determine the amendment application was listed to take place 'in person' on 28 June 2021. The parties agreed that evidence would be required and that evidence in chief would be given by way of written witness statements. The claimants were ordered to serve their witness statements in respect of the amendment application by 14 June 2021. The parties were ordered to exchange skeleton arguments by 18 June 2021 and to provide a hardcopy bundle for use in the hearing by 28 June 2021.

PROCEDURE

13. At the outset of the Preliminary Hearing, in light of the content of respondents' representative's correspondence set out at paragraph 10 above, the parties' representatives were invited to clarify whether any element of claimant B's application was unopposed. The tribunal rose to facilitate clarification of this issue. Following this, Mr Friel confirmed that the amendments sought by claimant B and set out in the numbered paragraphs 1, 2, 3, 4, 5, 7, 8 and 13 at paragraph 7 above were not opposed by the respondents. He further confirmed that the amendments set out in paragraphs 6, 9, 10, 11 and 12 were opposed by the respondents.

14. Claimant A and claimant B both gave direct evidence by way of a witness statement. Claimant A also gave supplementary oral evidence in chief, in the circumstances outlined in paragraph 15 below. Both he and claimant B were cross examined. Claimant B was also re-examined. The tribunal also considered the documents comprised in the hardcopy bundle, as well as the ET3 responses presented in respect of each claim (which were not included in the hearing bundle), in determining the amendment application.

15. An issue arose at the Preliminary Hearing regarding the introduction of additional documentary evidence. Mr Friel sought to adduce a certificate of training about which he wanted to cross-examine claimant A. As a consequence of this, Ms Gillen sought to adduce claimant A's contract of employment. These documents had not been included in the hard copy bundles for the tribunal's use, which had been subject to quarantine, for public health reasons. Following discussion and clarification from the Premises Officer on the requirements of the Risk Assessment, the tribunal was unable to receive these additional hardcopy documents during the hearing and did not permit the sharing of hardcopy documents between participants during the hearing. It was agreed that claimant A would give additional oral evidence in chief and be cross examined about these documents, excerpts of which were read to claimant A and to the tribunal, as appropriate, by the representatives.

16. The tribunal became aware that claimant A had an ongoing family crisis during the course of the hearing. The tribunal afforded Ms Gillen and her instructing solicitor the opportunity to confer with claimant A to ascertain whether he wished to seek an adjournment of the hearing or for the hearing to proceed. Having done so, Ms Gillen confirmed that claimant A wished to proceed with the Preliminary Hearing and he confirmed this to me again at the outset of his oral evidence.

17. The parties' representatives provided written skeleton arguments and made supplementary oral submissions at the conclusion of the evidence, for which the tribunal is grateful.

RELEVANT LAW

Amendment

18. The representatives referred to and relied upon the cases cited and commented on in **Harvey on Industrial Relations and Employment Law** at division PI, paragraphs 311 onwards and the principles derived from **Selkent Bus Company v**

Moore [1996] IRLR 61. In addition, Mr Friel referred to **Chandhok v Tirkey [2015] IRLR 195. Chandhok** was an appeal arising from the refusal of an Employment Judge to strike out parts of a claimant's witness statement that had no basis in the pleaded case. Langstaff P observed:

> *16 …The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1.*
>
> *17 I readily accept that tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before employment tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence…. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute."* (Tribunal's emphasis.)

The tribunal did not derive assistance from **Chandhok,** given that arose on an appeal against a refusal to strike out parts of the claimant's claim on grounds of justiciability. **Chandhok** specifically recognises that there is a purpose in considering whether to permit or deny amendment applications.

19. Ms Gillen and Mr Friel were referred to the recent Employment Appeals Tribunal decision in **Vaughan v Modality Partnership (EAT) [2021] ICR 535** and invited to make submissions on it. A summary of the commentary from **Harvey** to which both representatives made reference and the relevant legal principles derived from the case law is set out below.

(1) The discretion of a tribunal to regulate its procedure includes a discretion to grant leave for the amendment of the originating application and/or notice of appearance.

(2) The seminal decision of the Employment Appeals Tribunal in **Selkent Bus Company v Moore [1996] IRLR 611** established that:

> *"19 …the discretion to grant leave is a judicial discretion to be exercised in a judicial manner, ie in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions.*

…
21 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…. (Tribunal's emphasis.)

22 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 additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, 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.

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(b) The applicability of 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, eg, in the case of unfair dismissal, s.67 of the 1978 Act.

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(c) The timing and manner of the 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 may be made at any time – before, at, 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 on 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 of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision." (Tribunal's emphasis.)

(3) **Harvey on Industrial Relations and Employment Law** sets out the law on amendment applications and identifies three categories of amendment:

"*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."

(4) **Harvey** at paragraph 312ff summarises the legal principles that can be distilled from the cases on how those categories of amendment should be analysed and treated:

(a) "Amendments falling within category (i) are not affected by the time limits, as the nature of the original claim remains intact, and all that is sought to be done is change the grounds on which that claim is based. (It is to be noted that, when determining whether the proposed amendment falls within the existing claim as pleaded, or constitutes an entirely new claim, regard is to be had to the whole of the ET1, and not just to the general description of the complaint in box 1: Ali v Office of National Statistics [2004] EWCA Civ 1363, [2005] IRLR 201 at para 39.)…" [para. 312]

(b) "So far as category (ii) is concerned, the tribunals and courts have always shown a willingness to permit a claimant to amend to allege a different type of claim from the one pleaded if this can be justified by the facts set out in the original claim. It is usually described as putting a new 'label' on facts already pleaded. …. The position is, therefore, that, if the new claim arises out of facts that have already been pleaded in relation to the original claim, the proposed amendment will not be subjected to scrutiny in respect of the time limits, but will be considered under the general principles applicable to amendments, as summarised in Selkent." [para 312.01] (Tribunal's emphasis.)

(c) "In order to determine whether the amendment amounts to a wholly new claim, as opposed to a change of label, it will be necessary to examine the case as set out in the original application to see if it provides a 'causative link' with the proposed amendment (see Housing Corpn v Bryant [1999] ICR 123, CA). … in Foxtons Ltd v Ruwiel UKEAT/0056/08 (18 March 2008, unreported) Elias J held that a tribunal had erred in allowing an amendment to add an out-of-time sex discrimination claim to an existing unfair dismissal claim in the mistaken belief that it was simply a re-labelling exercise. Although the claimant had made an observation in her claim form that she may have been the victim of sex discrimination, this did not provide the necessary link between the case as originally pleaded and the amendment. Elias J stated that (at para 12):

> *"[I]t is not enough even to make certain observations in the claim form which might indicate that certain forms of discrimination have taken place; in order for the exercise to be truly a re-labelling one, the claim must demonstrate the causal link between the unlawful act and the alleged reason for it. In other words, in this case it would have to*

identify not merely that there had been some discrimination but that the dismissal was by reason of sex discrimination." [para 312.08]

…However, although there may be an absence of a link between the case as pleaded in the original claim and the proposed amendment, this will not be conclusive against the amendment being allowed. In Evershed v New Star Asset Management UKEAT/0249/09 (31 July 2009, unreported), Underhill J pointed out that it is no more than a factor, the weight to be given to it being a matter of judgment in each case (para 24). When considering whether to allow an amendment, an employment tribunal should analyse carefully the extent to which the amendment would extend the issues and the evidence." [para 312.09]

(d) *"It is only in respect of amendments falling into category (iii) —entirely new claims unconnected with the original claim as pleaded—that the time limits will require to be considered. "* [para 312.05] *… Judge Hand [in Galilee v Commissioner of Police of the Metropolis UKEAT/0207/16] held that the guidance given by Mummery J in Selkent and the use of the word 'essential' should not be taken 'in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues should be decided before permission to amend can be considered' (Galilee at para 109 (d))"* [para 312.06]

(e) *"… 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 set out in Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650, and in Selkent.* [para 312.07] *…in Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07 (6 June 2007, unreported)… an employment judge refused to allow a new out-of-time claim under the consultation provisions of TULRA and TUPE to be made by way of amendment to existing proceedings containing claims for unfair and wrongful dismissal. The new claim was out of time; the claimant could not rely on the 'not reasonably practicable' escape clause; and the judge considered that she had no alternative but to refuse the amendment. Underhill J allowed the claimant's appeal, pointing out that 'an employment tribunal has a discretion in any case to allow an amendment which introduces a new claim out of time' (para 7)."* [para 312.16]

(f) *"It is well established that causes of action arising after the date of presentation of a claim can be made by way of amendment to that claim, thereby obviating the need for the claimant to issue fresh proceedings (Prakash v Wolverhampton City Council UKEAT/0140/06 (23 June 2006, unreported); Okugade v Shaw Trust UKEAT/0172/05 (11 August 2005, unreported)). As in the case of any application to amend, the discretion to allow or refuse such an amendment must be exercised in accordance with the Selkent principles (see Prakash at para 65). Examples of such amendments are where a claimant wants to add a claim of post-termination victimisation relating to the provision or non-provision of an employer's reference (Okungade); or wants to plead a different date of dismissal and alter the basis of the claim as a result of events that occurred following the presentation of the original claim (Prakash); or wants to add further claims for unpaid holiday pay in respect of periods since the commencement of the proceedings (Amey Services Ltd v Aldridge UKEAT/0007/16 (12 August 2016, unreported))."* [para 312.17]

(5) In **Prakash**, the Employment Appeals Tribunal held that a tribunal has jurisdiction to exercise its discretion to allow a claim that is presented prematurely to be amended so as to permit a claim to be included that could not have been included when the claim form was originally presented, because the claim had accrued at a later date.

(6) In **Abercrombie** Underhill LJ stated at paragraph 48 of the judgment that, when considering applications to amend which arguably raise new causes of action, the correct approach is

> *"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 inquiry 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."*

(7) In **Vaughan** Judge Taylor reviewed the relevant legal principles derived from the case law and provided further guidance on determining amendment applications:-

> "*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***

…

21. *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.*

22. *Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek*

a discretionary amendment later.

23. As every employment lawyer knows the Selkent factors are: the nature of the amendment, the applicability of time limits and the timing and manner of the application. The examples were given to assist in conducting the fundamental balancing exercise. They are not the only factors that may be relevant.

24. It is also important to consider the Selkent factors in the context of the balance of justice. For example:

24.1. A minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing.

24.2. An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.

24.3. A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

25. No one factor is likely to be decisive. The balance of justice is always key.

26. Rather like Charles Darwin who, when pondering matrimony, wrote out the pros and cons, there is something to be said for a list. It may be helpful, metaphorically at least, to note any injustice that will be caused by allowing the amendment in one column and by refusing it in the other. A balancing exercise always requires express consideration of both sides of the ledger, both quantitively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice."

Time Limits

(8) The parties' representatives agreed that, in respect of extension of time limits, in discrimination claims, the relevant test is the 'just and equitable' test and in respect of unfair dismissal claims, the relevant test is whether it was reasonably practicable for the claim to have been presented in time and, if not, whether the claim was presented within a reasonable time thereafter.

'Just and Equitable'

(9) The just and equitable test requires the consideration of the so called Keeble factors from the case of **British Coal v Keeble [1997] IRLR 336** which confirmed that in considering an extension of time on the 'just and equitable' ground, the court or tribunal can consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

"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 her 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*."

'Not reasonably practicable'

(10) **Palmer and Saunders v Southend-On-Sea Borough Council [1984] IRLR 119** is considered the leading case on the construction and application of the "not reasonably practicable" extension. The Court of Appeal in England and Wales rejected restricting the meaning of the phrase 'reasonably practicable' to that which is reasonably capable *physically* of being done. At paragraphs 34 and 35 the Court held:

> *"In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However we think that one can say that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' is to take a view too favourable to the employee. On the other hand 'reasonably practicable' means more than merely what is reasonably capable physically of being done – different, for instance, from its construction in the context of the legislation relating to factories: compare* Marshal v Gotham *(1954) AC 360. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word 'practicable' as the equivalent of 'feasible' as Sir John Brightman did in* Singh's *case and to ask colloquially and untrammelled by too much legal logic – 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' – is the best approach to the correct application of the relevant subsection.*
>
> *What, however, is abundantly clear on all the authorities is that the answer to the relevant question is pre-eminently an issue of fact for the Industrial Tribunal and that it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It will no doubt investigate what was the substantial*

cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Industrial Tribunal to investigate whether at the time when he was dismissed, and if not then when thereafter, he knew that he had the right to complain that he had been unfairly dismissed; in some cases the Tribunal may have to consider whether there has been any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for it to know whether the employee was being advised at any material time and, if so, by whom; of the extent of the advisors' knowledge of the facts of the employee's case; and of the nature of any advice which they may have given to him. In any event it will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there has been any substantial fault on the part of the employee or his advisor which has led to the failure to comply with the statutory time limit. Any list of possible relevant considerations, however, cannot be exhaustive and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal taking all the circumstances of the given case into account."

(11) In **Wall's Meat Company Ltd v Khan [1979] ICR 52 CA** Brandon LJ stated:

"The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will further not be reasonable if it arises from the fault of the complainant in not making such enquires as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisors in not giving him such information as they should reasonably in all the circumstances have given him."

RELEVANT FINDINGS OF FACT

20. **In respect of claimant A:**

(a) Claimant A's claim form, which incorporated both his own and claimant B's grievance letters, dated 9 October 2019, asserted that there had been a breach of his terms and conditions of employment and that he had been unfairly treated with reference to the Dignity at Work Policy. His grievance letter also made reference to the need to treat employees with dignity and respect and to an alleged managerial failure to promote dignity at work which had "undermined [his] reputation at work". He had also alleged that he had been "humiliated and

disrespected." He stated that *"[Respondent D] advocates that mutual trust and respect are key tenets of the employment relationship…"*

(b) The tribunal assessed claimant A to be an honest and straightforward witness and, having accepted his evidence as contained in his witness statement and given in cross examination, finds the following facts:

i) The claim form was signed by claimant A on 3 December 2019.

ii) He submitted his letter of resignation on 6 December 2019.

iii) Claimant A believed that the tribunal would take his resignation letter into account and would consider his resignation letter which was sent around that time when the matter was heard.

iv) Claimant A is not legally qualified. Although he attended a one day training course at some time in 2017 that included an employment law element, this course was at a very basic level and covered terms and conditions, holiday entitlement, redundancy entitlement and grievances in the workplace. The module covered this material at speed and not in depth. His role in respondent D was as a benefits adviser. His main duty was providing advice on welfare reform. He did not routinely provide employment advice and when he did, it was only on annual leave, notice entitlement or calculation of pro-rated holiday pay. Complex employment queries were referred to the legally qualified Assistant Manager.

v) Claimant A tried to access legal advice before his resignation, but was unable to find a local solicitor who specialised in employment law and decided to represent himself. He did not contact any of the network of Citizens Advice Bureaux because he considered that it would have presented them with a conflict of interest.

vi) He was of the belief that his claim had to be submitted to the tribunal by 9 December 2019 in order to have been brought within the limitation period.

vii) The period after his resignation was very difficult for claimant A. The circumstances which are the subject of his claim and his amendment application and the consequences of them had caused him very considerable stress, in terms of his family life and impacted on his thinking and reasoning.

viii) Claimant A was not able to access legal advice, initially as a result of the effect on his personal life and latterly because of the pandemic.

ix) Once claimant A became aware that his claim was limited to the matters included in his form at the Case Management Preliminary Hearing on 22 October 2020, and that the tribunal would not consider his resignation as part of his complaint, he acted promptly in securing legal advice and making the application within the time allowed by the tribunal for him to do so.

21. **In respect of claimant B:**

(a) Claimant B's claim form incorporated the content of her own and claimant A's grievance letters dated 9 October 2019. Those letters make reference to ongoing monitoring of her interactions with claimant A.

(b) The tribunal assessed claimant B to be an honest and straightforward witness and, having accepted her evidence as contained in her witness statement and given in cross examination, finds the following facts:

i) Claimant B consulted her GP on 16 September 2019 and was prescribed medication in respect of her depression and anxiety in February 2020.

ii) Claimant B did not have the benefit of legal advice when she completed the claim to the tribunal. She had carried out some online research and had spoken to a gentleman in the Equality Commission, who did not provide any advice on the claim that she could bring. He did inform her that her claim had to be lodged by 10 December 2019.

iii) She did not include in her claim form the allegation that there had been a change in the office atmosphere, as set out in paragraph 6 of her amendment application. The reason she didn't put everything into her form was that she intended to put a summary of the main points in and that some things that come back to her after she put in her grievance to her employer. The grievance was intended to be a summary of her complaint. She was also concentrating on getting the claim form in before the deadline.

SUBMISSIONS OF THE PARTIES ON THE BALANCE OF INJUSTICE AND HARDSHIP

22. **Summary of Ms Gillen's submissions:**

i. The balance of hardship is the "paramount test" in **Selkent**.

Submissions in respect of claimant A:

(ii) The entirety of claimant A's proposed amendment relates to his constructive dismissal on 6 December 2019 which post-.dates the preparation of the ET1 claim form.

(iii) Claimant A could not have claimed constructive dismissal when his form was completed and it was subsequently that he considered himself to have been constructively dismissed.

(iv) Claimant A will rely on facts pleaded in his claim form in his constructive unfair dismissal claim and will assert that there was a breach of the implied term of trust and confidence, which was cumulative.

(v) The amendment application requires the relabelling of some of the facts pleaded to fit the constructive unfair dismissal claim and the addition of a new fact, namely his resignation. Ms Gillen informed the tribunal that she accepted that the amendment is a 'category three' amendment, for which time limits must be considered, although she also described it as a 'hybrid amendment'.

(vi) If the amendment is a 'category three' amendment, the tribunal must consider whether it was reasonably practicable for claimant A to present his claim of constructive unfair dismissal by 6 March 2020, when the statutory time-limit expired, and if not whether he lodged his claim within a reasonable period thereafter.

(vii) It was not reasonably practicable for claimant A to lodge his claim by 6 March 2020 due to his misunderstanding of his legal rights. His position as an adviser on welfare reform should not be held against him and that events which took place in March 2020 were beyond everyone's control and resulted in solicitors firms being closed during that period and the claim being considered at a Case Management Preliminary Hearing for the first time on 22 October 2020. During the period between the expiry of the time limit and the Case Management Preliminary Hearing, claimant A wasn't aware of the full extent of his claim that was before the tribunal and was not aware that the tribunal would not consider his resignation letter. He had tried to obtain advice from two solicitors, he had looked online and he had not been able to consult with Citizens Advice due to the perceived conflict of interest. Having become aware of the glaring error at the Preliminary Hearing he sought legal advice thereafter and lodged his amendment application within the directed timescale.

(viii) The claim is still at an early stage.

(ix) Greater hardship would be caused to claimant A if his amendment application was not allowed as he would be denied redress for the financial and personal hardship in relation to his claim.

(x) Little real hardship would be caused to the respondents in allowing the amendment, as the hearing would not be extended to any significant degree, given that the response deals with matters relating to claimant A's and claimant B's grievance and appeal hearings. No additional witnesses will need to be called and the only increase in hearing time will be to consider any additional legal submission.

(xi) The respondents have adduced no evidence of any actual prejudice to them and in particular no evidence had been submitted that any witness would no longer be available.

Submissions in respect of claimant B

(i) Paragraph 6 of claimant B's amendment application is a 'category one' amendment, as her grievance letter refers to ongoing monitoring. The claimant's allegation of a change in atmosphere are addressed to respondent E and respondent F, the third and fourth respondents, as well as

respondent C, the first respondent. The amendment is merely adding detail and a description of matters which could have been particularised through replies.

(ii) Paragraphs 10 to 12 of the amendment application are accepted to be a 'category three' amendment bringing an entirely new claim. This claim relates to how claimant B's employer has dealt with her absence from in or around January 2020. The claim form, which incorporates her grievance letter, refers to the impact on claimant B's health, leading to her going off sick from work, and visiting her doctor due to stress and anxiety.

(iii) Claimant B's direct disability discrimination claim is that she was treated less favourably than other colleagues due to her disability, in not being able to return to work and in not having been kept in touch with. This is also advanced as a failure to make reasonable adjustments, which it is asserted as an ongoing act. Ms Gillen stated that it was open to the claimant to bring a fresh claim. However, the claimant was pursuing this aspect of the amendment application in accordance with the overriding objective to save costs.

(iv) The claim is still at an early stage.

(v) Greater hardship would be caused to claimant B if her amendment was refused as her Disability Discrimination claim would not be considered as part of this claim and she has suffered financial and personal hardship in relation to his claim.

(vi) The respondents have adduced no evidence of any actual prejudice to them and in particular no evidence has been submitted that any witness would no longer be available.

23. **Summary of Mr Friel's submissions**

(i) The law was uncontroversial and both parties rely on the same authorities, of which **Selkent** was seminal.

(ii) The tribunal is required to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

(iii) The tribunal is required to categorise the nature of the amendment and the applicability of time limits and consider the timing and manner of the application.

(iv) The tribunal should consider the **Keeble** factors in relation to the amendment.

(v) If the amendments were allowed the respondent would suffer both actual prejudice and forensic prejudice. The actual prejudice they would sustain is in having to meet claims which have been brought outside the statutory time limit. The forensic prejudice is that memories may fade and this will impact on the quality of the evidence before the tribunal.

Submissions in respect of Claimant A

(i) The claim form makes no reference to dismissal and on this basis the amendment is a 'category three' amendment, based on new facts and raising a new cause of action.

(ii) The amendment application is brought grossly outside of the statutory time-limit.

(iii) Claimant A was an adviser in respondent D and had some experience of employment law queries. He was aware of the three month time limit and on the basis of his own evidence he had adequate time to lodge his claim form, including a claim of constructive dismissal, by 10 December 2019.

(iv) Claimant A attempted to speak to a number of solicitors who didn't have the necessary employment law experience. He ought to have made attempts to contact other solicitors with the requisite experience and he did not make any approach to the Law Centre.

(v) Claimant A didn't pay much attention to his claim form and didn't include all of the details, rather he just appended his grievance. When he did so, he did so at his own peril. His apathy and lack of interest should be fatal to the amendment application. The tribunal ought to find that it was reasonably practicable for claimant A to have brought his claim within the statutory time-limit (that is by 6 March 2020). There was no evidence adduced that he had acted promptly since that date.

(vi) It is accepted that the pandemic has caused delay, including delay in listing the Case Management Preliminary Hearing. However the timing of a Preliminary Hearing should not be a material factor in deciding whether to allow an amendment application.

(vii) The respondents would suffer greater prejudice in allowing the amendment application, in that they would have to meet a claim of constructive unfair dismissal which is brought considerably out of time. The hearing time would be increased as the cross examination of the claimant would be longer and there would be additional submissions needed on constructive unfair dismissal at the end of the hearing.

(viii) **Vaughan** does not change the law on determining amendment applications but is helpful in reminding the tribunal that it must take into account a number of factors and that hardship and injustice lie at the core of this exercise. Some factors should weigh more heavily.

Submissions in respect of claimant B

(i) In respect of paragraph 6 of claimant B's application, whilst accepting that that amendment is a 'category one' amendment, the application to amend has been made almost a year after lodging the claim form and no reason had been advanced as to why she could not have included this allegation when she brought her claim.

(ii) If the amendment was allowed, the respondents would be denied the opportunity to challenge this allegation or any discrepancies with the claim form. In Mr Friel's submission, there would be no prejudice to claimant B as it could be included as part of her evidence to the tribunal.

(iii) The amendment comprised in paragraphs 9 to 12 is a 'category three' amendment. The claimant has not referred to disability at all in her initial claim form. The additional claim in the amendment application has not been fully particularised.

(iv) The amendment has been brought outside the time for bringing a claim as she was aware of her disability from at least January 2020 on the basis of her evidence and she did not take action to amend her claim until November 2020.

(v) The complaint of disability discrimination is unconnected in any way to the facts that have been put forward in her initial claim form.

(vi) The respondents would be prejudiced by having these matters heard and considered together as they are unconnected to the first claim, which is a claim of sex discrimination. Accordingly, the hearing of claimant B's claim would require new facts and new evidence to be considered that would extend the length of this hearing and require additional witnesses.

CONCLUSIONS WITH REASONS

Decision in respect of claimant A's application:

24. The tribunal, having carefully considered the evidence of claimant A, the relevant law and the submissions of the parties, grants claimant A leave to amend his claim in the terms sought because the tribunal is satisfied that the balance of injustice and hardship test is in favour of allowing the amendment. If the amendment was refused, the claimant would suffer the greater hardship in that he would be prevented from seeking redress in respect of a very significant aspect of his claim. In undertaking the requisite balancing exercise, the tribunal has taken in to account the following:

i) Claimant A's claim form, which comprises both his and claimant B's grievance letters, already include alleged facts of central importance relating to the alleged breach of his contract of employment (see paragraph 17 a. above), which will fall to be considered as part of his existing claim and will be relied upon as part of his unfair dismissal claim;

ii) Claimant A resigned on 6 December 2019. Accordingly, at the date he signed his claim form, (albeit not at the date his claim was form was presented – that is received by the tribunal) his constructive dismissal claim had not crystallised through his resignation and could not have been brought when he signed his form;

iii) the limitation period for his unfair dismissal claim expired on 6 March 2020. The tribunal is satisfied that claimant A believed that his claim had to be submitted by 9 December 2019 and that his actions after he submitted the

claim form were consistent with his mistaken belief that the tribunal would take matters which occurred around the time of the presentation of his claim into account;

iv) the respondents' response denies that there has been a breach of contract and introduces the outcome of the grievance process and the appeal process which will be relied on by claimant A, in his constructive dismissal claim. Mr Friel did not dispute that the tribunal would hear evidence from the respondents' witnesses on the matters of grievance and appeal hearings, which has been introduced by them and is relied upon by them in their response. Accordingly, there will be little, if any, actual injustice and hardship from granting claimant A leave to amend the claim in the terms sought as these matters have been pleaded by the respondents in their response;

v) there was no evidence adduced of any actual forensic prejudice which will be sustained by the respondents in the circumstances;

vi) the claim is at an early stage of case management and any potential prejudice to the respondent can be addressed by allowing the respondents to lodge an amended response;

vii) Ms Gillen had suggested that the amendment sought on behalf of claimant A was a 'category three' amendment. The factual matrix does not easily lend itself to strict questions of classification. The tribunal concurs with her alternative assessment that the application is "hybrid" in nature, as it seeks to add additional facts and an additional label to facts which are already pleaded. The tribunal concurs with the observation in **Abercrombie** that the correct approach is 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 inquiry than the old. When this approach is taken the tribunal considers that the amended pleading will not involve substantially different areas of inquiry and the tribunal is satisfied that there is, in the particular circumstances, the requisite causative link between what is already contained in the claim form and the amended pleading (see paragraph 19(4)(c) above);

viii) if the tribunal has erred in finding that the claim is rooted in facts already pleaded and is more akin to a relabelling and the pleading does raise new facts and a new head of claim (requiring the tribunal to consider time limits), the tribunal is satisfied that it was not, in the particular circumstances of this case, reasonably practicable for claimant A to have presented his claim within the statutory time limit because his honest, but mistaken, belief that the tribunal would take into account his resignation was an impediment for the purposes of **Wall's Meat**. The tribunal has also taken account of claimant A's evidence regarding his personal circumstances and the pandemic related factors and is satisfied that it was not reasonably practicable for him to have brought his claim of constructive unfair dismissal by the statutory time limit. The tribunal rejects Mr Friel's submission that the application should be refused because it was technically possible for the form to have been held back and submitted after this resignation as this would reduce the limitation period to three days, not three months, from the effective date of termination;

ix) the tribunal is satisfied that claimant A acted promptly once his mistake became apparent; and

x) even if the tribunal has erred in this finding, the question of time limits is only one of the factors to be taken into account in the balancing exercise. The tribunal in accordance with **Vaughan**, endorsing Underhill J in **Transport and General Workers' Union**, is satisfied that the fact that an amendment would introduce a claim that was out of time is not decisive against allowing the amendment, but is a factor to be taken into account in the balancing exercise.

Decision in respect of claimant B's application:

25. The tribunal grants leave for the amendments sought by claimant B which were not opposed by the respondents, on the basis that these are additions of factual details to existing allegations and do not raise any new distinct head of complaint. Accordingly, the tribunal grants leave for the amendment sought by claimant B and set out at paragraphs 1, 2, 3, 4, 5, 7, 8 and 13 of her application.

26. The tribunal also grants claimant B leave to amend her claim to include paragraph 6 of the application, that:

> *"A few months before the 10 September 2019, I noticed that there was a change in atmosphere in the office. Colleagues started to appear lingering outside the doors, and I could feel that they were keeping an eye on me. I also knew that there was gossip; and I was either ignored or subjected to snide comments. A colleague told me to 'stay out of [claimant A]'s room'; and on another occasion a colleague said, '[Claimant A is] while stressed'(sic)"*

as the tribunal is satisfied that the balance of hardship test is in favour of allowing the amendment. This is because:

i) Mr Friel accepted in his submission that this aspect of the amendment application fell within 'category one';

ii) both claimant B and claimant As' grievance letters, which formed part of their single claim form, refer to ongoing monitoring within the workplace;

iii) this detail could have been provided, without controversy, in Replies to Notices;

iv) the respondents will be able to call evidence to rebut this allegation, which Ms Gillen has confirmed is directed at the first, third and fourth respondents;

v) the amendment has been pursued at an early stage of the proceedings and the respondents will suffer little, if any prejudice, if the amendment is granted as the hearing will not be significantly extended by the allowing of the amendment;

vi) the refusal of the amendment is potentially significant given that the respondents' defence of the proceedings is premised on their assertion that the issues between them and Ms Gallagher were a private family matter: and

vii) any potential prejudice to the respondents can be remedied by allowing them to lodge an amended response.

The tribunal does not agree with Mr Friel's suggestion that even if claimant B's amendment application was refused, the claimant could still make reference to this matter in her statement of evidence.

27. The tribunal refuses leave to claimant B to amend her claim in the terms set out in paragraphs 9 to 12 of her amendment application. That refusal is, for the reasons set out below:

i) there is no injustice and hardship to claimant B if she brings a further claim and the tribunal accepts Ms Gillen's submission that the disability discrimination is an ongoing act and concludes, having assessed the evidence, that that claim has been brought within time;

ii) even if the further claim is not accepted as having been brought within time, the tribunal is still satisfied that there is greater injustice and hardship to the respondents in allowing this part of the application than to claimant B in refusing this part of the application, because:

a. the tribunal observes that the amendment application in respect of the alleged disability discrimination is not well particularised and if it is included in its current form, it is likely to cause further delay in the case coming on for hearing, whilst the precise nature of that claim is properly particularised;

b. the tribunal considers that claimant B's complaint about ongoing disability discrimination is entirely separate from the matters in the joint claim form and does not have a sufficient 'causative link' to persuade the tribunal that amendment of the existing claims is the correct course of action;

c. the amendment application, if allowed, would also extend the length of the hearing, with different witnesses being required for this separate and additional head of claim which arises from treatment beyond the September 2019 incident and its immediate aftermath, when it was considered on a grievance and appeal;

d. the refusal of this part of the amendment does not deprive the claimant of her existing claims before the tribunal, which will still be heard, as amended; and

e. it is not clear to the tribunal if the disability discrimination claim is to be pursued against all of the respondents or just the second respondent, respondent D. If the disability claim is not being pursued against the other respondents, they will suffer the prejudice of additional time in hearing whilst allegations that do not pertain to them are considered as amendment would mean that all of the claims would be heard and considered together.

28. A further Case Management Preliminary Hearing will be convened for the purpose of listing the cases for Final Hearing and giving the necessary case management orders to ensure that the interlocutory process is completed and witness statements

served in preparation for the hearing.

29. The respondents are granted leave to present amended responses in respect of the claims, in so far as they are amended in consequence of the grant of leave in this judgment, within 28 days of the date of issue of this judgement.

Employment Judge:

Date and place of hearing: **28 June 2021, Adelaide House, Belfast.**

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