

# THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL

CASE REFS: 3/20FET  
24559/19IT

CLAIMANT: Claimant A

RESPONDENT: National Crime Agency

## JUDGMENT ON A PRELIMINARY HEARING

The judgment of the tribunal is as follows:-

- (1) By consent of the parties, the tribunal grants the claimant leave to amend his paragraphs 8, 9, 15, 18 and 19 of his IT1 claim form in the terms sought in his amendment application, and the tribunal grants leave to the respondent to present an amended ET3 response to respond to the amended claim; and
- (2) The tribunal refuses the claimant leave to amend his claim by the inclusion of the amendment set out at paragraph 21 of the amendment application; for the reasons set out below at paragraphs 25 to 39 of this judgment.

### CONSTITUTION OF TRIBUNAL

Employment Judge (sitting alone): Employment Judge Gamble

### APPEARANCES:

The claimant was represented by Mr R Smyth, Barrister-at-Law, instructed by Edwards and Co. Solicitors.

The respondent was represented by Ms N Murnaghan, QC and Ms L Maguire, Barrister-at-Law, instructed by the Crown Solicitor's Office.

### BACKGROUND

1. The claimant presented an ET1 claim form on 8 November 2019 making a claim of discrimination on grounds of age and religious belief against the respondent. At that time, his employment was continuing.

2. At a Case Management Preliminary Hearing conducted on 15 December 2020, the claimant's representative informed the tribunal that the claimant intended to make an application, seeking leave to amend his claim form. At that Preliminary Hearing, the claimant's representative informed the tribunal that the amendment application would not include a claim of constructive unfair dismissal, and that the application arose in relation to recovery of losses for discrimination, following the claimant's resignation.
3. The tribunal ordered that the claimant should serve his application setting out the extent of the amendment sought by 31 December 2020. The tribunal ordered that the respondent should set out its position in relation to the amendment and, if applicable, any reasons for objection by 15 January 2021. The tribunal provisionally listed a Preliminary Hearing to consider the amendment application, if required, on an 'in person basis' on 5 February 2021.
4. The claimant's representative served a copy of the amendment application on the tribunal on 22 December 2020. That amendment included the amendments to paragraphs 8, 9, 15, 18 and 19 which were consented to at this hearing and the following additional wording at paragraph 21:

"...The Claimant tendered his resignation on 10<sup>th</sup> March 2020 in writing with effect from 25<sup>th</sup> May 2020. He will say this was as a result of the Respondent's discriminatory treatment as detailed above and delay referred to in para 15 and has and will sustained further financial loss. The Claimant will also say that the above discriminatory treatment and delay constituted a fundamental breach of the implied trust and confidence term and that he has been constructively unfairly dismissed."

The respondent's representative confirmed that the respondent did not consent to the proposed amendments on 15 January 2021.

5. The tribunals' building, Killymeal House, was closed on 18 January 2021 as a consequence of the Covid-19 pandemic and the hearing to determine the amendment application which had been listed for 5 February 2021 could not proceed. A Case Management Preliminary Hearing was conducted on 5 February 2021. At that Preliminary Hearing, the respondent's representative sought an 'in person' hearing to determine the amendment application. The tribunal listed a further Case Management Preliminary Hearing on 16 April 2021, by which time it was anticipated that the tribunals' building would have reopened, and there would be greater clarity about arrangements for hearings.
6. A Case Management Preliminary Hearing was conducted on 16 April 2021. An 'in person' hearing to determine the application was listed on 14 May 2021. The parties further agreed that if the claimant was unable to attend in person, the hearing would take place on a fully remote basis.

7. The hearing listed on 14 May 2021 to determine the amendment application was converted to a Case Management Preliminary Hearing, which was conducted by WebEx. At that Preliminary Hearing, the tribunal considered further issues about the conduct of the hearing. The parties made applications for an Order under Rule 44, which were considered at a Case Management Preliminary Hearing conducted on 17 June 2021. An 'in person' hearing was listed to take place in Adelaide House on 20 September 2021, to determine the amendment application. At that time, it was ordered that if an 'in person' hearing was not possible, the amendment application should be considered at a hearing in Killymeal House, with the claimant participating remotely, as the overriding objective would favour the amendment application being determined without further delay.
8. On 2 September 2021, the tribunal made a Case Management Order pursuant to Rule 44, on the joint application of the parties and in terms agreed by them. An Order made under Rule 44 is appended to this decision.

## **PROCEDURE**

9. During the hearing, the respondent's representative was invited to clarify whether any element of the claimant's application was unopposed. The respondent's representative confirmed that the amendments sought by the claimant and set out in the numbered paragraphs 8, 9, 15, 18 and 19 were not opposed by the respondent. She further confirmed that the amendment set out in paragraph 21 of the application (see paragraph 4 above) was opposed by the respondent.
10. The claimant gave direct evidence by way of a witness statement. He was cross examined. The tribunal also considered the bundles submitted on behalf of the parties, which contained the claimant's resignation letter, the written submissions of the parties' representatives and legal authorities.
11. The tribunal is grateful for the written submissions and supplementary oral submissions made at the conclusion of the evidence.

## **RELEVANT LAW**

### **Amendment**

12. The representatives of the parties made reference to the following authorities and commentary in their submissions.

#### **The claimant:**

***Selkent Bus Company v Moore [1996] IRLR 611***

***Prakash v Wolverhampton City Council UKEAT/0140/06***

***Jesuthasan v Hammersmith and Fulham London Borough Council [1998] IRLR 372***

**Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650**

**Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148**  
**Home Office v Bose [1979] ICR 481**

**Harvey on Industrial Relations and Employment Law at paragraphs 312.15-17**

**Transport and General Workers Union v Safeway Stores Ltd**  
**UKEAT/0092/07/LA**

The respondent:

**Porter v Bandridge [1979] IRLR 221**

**Palmer and Saunders v Southend on Sea Borough Council [1984]**  
**IRLR 119.**

**Selkent Bus Company v Moore [1996] IRLR 611**

**Mensah v Royal College of Midwives [1995] (unreported) EAT**

**Harvey on Industrial Relations and Employment Law at paragraphs 311.05**

13. 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.*

23

*(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.*

24

*(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.)*

14. In **Abercrombie** Underhill LJ 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.”*

He continued 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.”*

15. In the **Transport and General Workers’ Union** case, Underhill J (as he then was) 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. At paragraph 10 of the judgment, he stated:

*“[10] The issue was revisited in Selkent Bus Co Ltd v Moore [1996] IRLR 661, [1996] ICR 836, where an em-ployee who had made a claim for “ordinary” unfair dismissal sought leave, more than three months after the effective date of termination, to amend his originating application to include a claim for “automatic” unfair dismissal on the basis that he had been dismissed because of his membership of, or activities on behalf of, a trade union. The Employment Tribunal granted leave. The Employment Appeal Tribunal allowed an appeal. Mummery P gave some general guidance as to how applications for leave to amend, including applications for amendments raising a new cause of action, should be approached. Somewhat surprisingly, the Appeal Tribunal does not appear to have been referred to Kelly. Point (4) in Mummery P’s guidance (p 843F) was put as follows:*

*“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.”*

*That is, of course, the Cocking test. He continued:*

*“(5) 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 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.*

*(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, section 67 of the Employment Protection (Consolidation) Act 1978 [now s 111(2) of the Employment Rights Act 1996].*

*(c) The timing and manner of the application . . . .”*

*Point (b) might, if taken out of context, be read as implying that if the fresh claim is out of time, and time does not fall to be extended, the application must necessarily be refused. But that was clearly not what Mummery P meant. As Waller LJ observed in *Ali v Office of National Statistics* [2004] EWCA Civ 1363, [2005] IRLR 201, at para 3, point (b) is presented only as a circumstance relevant to the exercise of the discretion; and the reasoning of the Appeal Tribunal on the actual facts of the case clearly turns on the exercise of a “Cocking discretion” rather than the application of an absolute rule (see in particular points (3) and (4) at pp 844-5). (This was indeed also how the case had been put by the employers (see p 841B-E).) Thus the reason why it is “essential” that a tribunal consider whether the fresh claim in question is in time is simply that that is a factor – albeit an important and potentially decisive one – in the exercise of the discretion.” (Tribunal’s emphasis.)*

16. **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.”*

**Harvey** states that *“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]*

17. In **Jesuthasan v Hammersmith and Fulham London Borough Council [1998] IRLR 372** an amendment to include a claim of unfair dismissal and redundancy payment in addition to the timeous claim of racial discrimination was permitted in light of the decision of the House of Lords in **R v Secretary**

**of State for Employment ex p EOC [1992] IRLR 176** which disapplied qualifying conditions in respect of those claims for part time workers.

18. In **Home Office v Bose [1979] ICR 481**, The EAT allowed a claimant to add a claim of unfair dismissal to a claim of race discrimination. In that case, the particulars of the race discrimination claim were sufficient to found an unfair dismissal claim.

19. **Relevant Time Limits**

**Employment Rights (Northern Ireland) Order 1996**

**Complaints to industrial tribunal**

**145.—(1)** A complaint may be presented to an industrial tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this Article, an industrial tribunal shall not consider a complaint under this Article unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

20. **‘Not reasonably practicable’**

**Porter v Bandridge [1979] IRLR 221** establishes that the onus of proving that it was not reasonably practicable to present the claim within the requisite time period is upon the applicant.

**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 held:

*“...‘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.”*

21. **Fair Employment and Treatment (Northern Ireland) Order 1998**

**Period within which proceedings must be brought**

**46.—(1)** Subject to paragraph (5) to Article 46A, and to any regulations under Article 22 of the Employment (Northern Ireland) Order



2003, the Tribunal shall not consider a complaint under Article 38 unless it is brought before whichever is the earlier of—

- (a) the end of the period of 3 months beginning with the day on which the complainant first had knowledge, or might reasonably be expected first to have had knowledge, of the act complained of; or
- (b) the end of the period of 6 months beginning with the day on which the act was done.

...

- (5) A court or the Tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

### **The Employment Equality (Age) Regulations (Northern Ireland) 2006**

#### **Period within which proceedings to be brought**

48.—(1) An industrial tribunal shall not consider a complaint under regulation 41 (jurisdiction of industrial tribunals) unless it is presented to the tribunal before the end of the period of three months beginning when the act complained of was done.

...

- (4) A court or tribunal may nevertheless consider any such complaint or claim which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

In **Mensah v Royal College of Midwives EAT/124/94 (17 November 1995, unreported)**, Mummery P said at 11G–H: *'An act occurs when it is done, not when you acquire knowledge of the means of proving that the act done was discriminatory. Knowledge is a factor relevant to the discretion to extend time. It is not a pre-condition of the commission of an act which is relied on as an act of discrimination'*.

## 22. **'Just and Equitable'**

In determining whether it is just and equitable to extend time and the prejudice to the respective parties in granting or refusing the extension of time, it may be helpful to consider the so called Keeble factors from the case of **British Coal v Keeble [1997] IRLR 336**, in particular:

- “(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.”*

However, as noted in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**

*“rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) “the length of, and the reasons for, the delay”. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.”*

## **THE CLAIMANT’S EVIDENCE**

23. The evidence put forward by the claimant was that:

- (i) due to Covid, he was working from home, following the submission of his resignation on 10 March 2020 until his last day of work on 25 May 2020;
- (ii) he informed his solicitor of his resignation on 19 March 2020;
- (iii) he had no access to the respondent’s premises during this period;
- (iv) following an arranged visit for collection of personal belongings from his place of work in April 2020, he realised that some documentary material including a photocopy of his original resignation letter, with “wet signature” was missing and he arranged for a colleague to locate these and deliver them to his home address;
- (v) he relocated to a new position outside the jurisdiction on 16 June 2020 and initially worked from home before relocating abroad on 3 July 2020;
- (vi) his barrister raised queries and requested a copy of his resignation letter on 9 September 2020, he travelled home on 23 September 2020 and replied to his barrister’s queries on 15 October 2020;
- (vii) his “ink signature resignation letter” was provided to his solicitor on 16 October 2020; and

(viii) on 23 October 2020, he left the jurisdiction again.

24. The claimant stated that he was not legally qualified, that he had not considered the significance of his resignation letter to his employment claim or any related timing issues and that this was a stressful time for him due to leaving his job,

Covid restrictions, starting a new job abroad and the tribunal process itself before concluding that “it was not always easy for me to keep matters related to the Employment Tribunal at the front of my mind.”

25. During cross examination, when asked whether there was anything in the intervening 3 months that had prevented him from lodging the further claims, the claimant replied that “it was not at the forefront of my mind” and that it had been a “very busy period”. He also stated that when he informed his solicitor of his resignation on 19 March 2020, he merely told her that he had resigned and was taking up a new position. He stated that he did not say it was because he was disillusioned at that time. The claimant also agreed during cross examination that there would have been events between November 2019 and March 2020 to explain why he had decided to resign and went on to state that “events were ongoing and various” between the submission of his claim and his resignation. His evidence around whether he had an electronic copy of the resignation letter was unclear and contradictory. He stated that this was on a work PC. He was unsure if he had emailed a copy to a personal email account, but stated “I have a scan of it ... I could have emailed it. I’m not sure.” He agreed that from 30 April 2020, he had a copy of the resignation letter in his home. He also agreed that he knew the reasons for his resignation without locating this copy of the letter. In addition, when it was put to the claimant during cross examination that he was saying that it wasn’t feasible to lodge the additional claims until he had got the original letter [and sent it to Counsel on 16 October 2020], he replied “I didn’t say it wasn’t feasible – I said it was the first time I gave it.”

## **ASSESSMENT OF THE CLAIMANT’S EVIDENCE**

26. The tribunal did not find the claimant’s evidence to be credible or convincing. Some of his oral evidence was characterised by answers of “can’t recall”, “can’t say” and “I’d have to check”. The tribunal found his evidence about whether he held an electronic copy of the resignation letter in his possession vague and difficult to understand.

## **RELEVANT FINDINGS OF FACT AND CONCLUSIONS**

27. The claimant resigned from his employment on 10 March 2020, with his last day of work being 25 May 2020. In his resignation letter, the claimant referred to the actions of the respondent in failing to recognise his skills or deal expediently with a resultant grievance and asserted that these actions continued to damage his reputation as an experienced investigator and his

career prospects within the respondent organisation.

28. The tribunal is satisfied that the claimant's claim form which was presented on 8 November 2019, does not, and could not as a matter of logic, include any factual or legal pleading relating to his resignation dated 10 March 2020, which took effect on 25 May 2020, some 6 months after the presentation of his claim form. The facts are therefore different from **Jedusathan**, where the Court of

Appeal noted that no new factual enquiry was required and no new facts were pleaded and can also be distinguished **Bose**, where sufficient facts for the unfair dismissal claim had already been included in the claim form.

29. The amendment sought makes an entirely new factual allegation which changes the basis of the existing claim. The new factual allegation is the claimant's resignation in response to his treatment by the respondent and the new legal claims are constructive unfair dismissal and discriminatory dismissal. The amendment sought is a substantial alteration extending considerably the scope of the claim already pleaded and pleads new causes of action. In light of this, the tribunal has considered whether those complaints are out of time and, if so, whether the relevant time limits should be extended under the applicable statutory provisions.
30. The tribunal finds that the claimant did not bring any claim arising from his resignation before the expiry of the limitation period, which in respect of the unfair dismissal and age discrimination claim was 25 August 2020, and in respect of allegations of religious discrimination arising from the fact of his resignation (which is not pleaded in the ET1 claim form) is likely to have been earlier, that is the expiry of three months from the date of knowledge of the act complained of. (See Article 46(1)(a) of the Fair Employment and Treatment (Northern Ireland) Order 1998, set out at paragraph 21 above.)
31. The claimant's representative did not put the tribunal on notice of the amendment application until the Case Management Preliminary Hearing conducted on 15 December 2020. The complaints of constructive unfair dismissal and discriminatory dismissal have therefore been brought 17 weeks outside the relevant statutory time limits.
32. The claimant has not satisfied the tribunal that it was not reasonably practicable for him to have brought his claim for constructive unfair dismissal before the expiry of the relevant time limit (25 August 2020) for the following reasons:
- (i) the claimant was aware of his resignation and the reasons for it from, at the latest, 10 March 2020;
  - (ii) the claimant's evidence was that he was able to inform his solicitor of the fact of the resignation on 19 March 2020;

- (iii) that communication was only 9 days after the submission of the letter in which he referred to the failure by the respondent to “recognise [his] skills or deal expediently with a resultant grievance”;
  - (iv) the claimant had a copy of the resignation letter in his possession from at least 30 April 2020;
  - (v) the claimant has been legally represented throughout the period;
  - (vi) the claimant’s evidence was that he did not relocate abroad until 3 July 2020;
  - (vii) the claimant has not provided an adequate reason as to why it was not possible for him to give instructions or pursue a further claim either before or during the period 3 July 2020 until the expiry of the limitation period;
  - (viii) the tribunal does not accept that the delay in providing an “ink signature resignation letter” to the claimant’s legal advisers on 16 October 2020 was an adequate reason for not bringing the further claims of constructive unfair dismissal and discriminatory dismissal within time, as the claimant was in possession of all the relevant facts relating to his resignation without reference to that “ink signature resignation letter” and he already had copy in his possession from at least 30 April 2020;
  - (ix) the claimant’s evidence during cross examination, in relation to the suggestion that it wasn’t feasible to bring the claim until he had given the “ink signature letter” to his representative, when he stated “I didn’t say it wasn’t feasible – I said it was the first time I gave it.”; and
  - (x) the claimant’s evidence, that the bringing of the additional claims was not at the forefront of his mind, does not equate to it not being feasible for him to have brought the additional claims within time.
33. Even if the tribunal has erred in finding that that it was not reasonably practicable for the claimant to have brought his claim of constructive unfair dismissal within the time limit, the tribunal further concludes that that claim was not brought within such further period as the tribunal considers reasonable, given that the claimant was in contact with his legal advisers throughout the period and the tribunal was not informed of the amendment application until 15 December 2020. No explanation has been advanced on behalf of the claimant to account for the further delay between the provision of a copy of the “ink signature resignation letter” on 16 October 2020 and the intimation of the application on 15 December 2020.
34. The tribunal is likewise not persuaded that it is just and equitable to extend the time limit in respect of the discriminatory dismissal claim, given the length

of delay and the failure to provide a credible explanation for that delay.

35. The applicability of time limits and the reasons for the delay are factors for consideration in the overall balancing of the relative injustice and hardship involved in refusing or granting an amendment.
36. In considering the application generally, the tribunal has also, per **Selkent**, considered the timing and manner of the application as one of the factors in deciding whether it should exercise its discretion in granting leave for the amendment.
37. The tribunal is not satisfied with the reasons put forward by the claimant for the delay in making his application for the following reasons:
  - (i) the tribunal did not find the claimant's evidence set out at paragraph 23 above to be a credible reason for the delay in bringing the additional claims;
  - (ii) the claimant was legally represented throughout the period from his resignation to the submission of his amendment application, and his witness statement records that on 19 March 2020 he informed his solicitor that he had resigned from his employment with the respondent; and
  - (iii) the claimant did not give any explanation of the delay in making the application after the provision of a copy of the "ink signature resignation letter" to his legal representative on 16 October 2020.
38. The tribunal has considered the submissions made by the parties as to the balance of injustice and hardship. The claimant's representative argued that the claimant would lose the right to bring the additional claim if the application was refused. He also submitted that the respondent had not adduced any evidence of actual prejudice if the amendment application was granted. The respondent's representative relied on the claimant's admission during cross examination that there were further (as yet unspecified) events between the submission of his claim and his resignation to support her submission that the respondent could only speculate as to the potential prejudice which might arise to the respondent in the absence of those matters being fully particularised. She submitted that there may well be prejudice to the respondent in terms of the number of documents referred to at the hearing, the time taken to complete the interlocutory process, the length of the hearing and an increase in the number of witnesses, but until the further facts relied on were pleaded she was not in a position to call evidence to address these points. In her submission, the respondent would face the injustice and hardship of having to face a claim brought outside time, in the face of the respondent's continued lack of knowledge of the extent of the likely delay and additional costs.
39. In her written submission, the respondent's representative also stated:

*“Undoubtedly the cogency of the evidence that will relate to the reasons for the resignation will have been deleteriously affected, given the passage of time.”*

40. The tribunal is satisfied that the balance of injustice and hardship test favours the refusal of leave for amendment for the following reasons:
- (i) the claims for constructive unfair dismissal and discriminatory dismissal are new claims based on the fact of a resignation which is not included in the IT1 claim form;
  - (ii) those claims have been brought outside the relevant statutory time limits and the tribunal has concluded that time should not be extended; and
  - (iii) the tribunal is not satisfied with the explanation given by the claimant for the length of delay in making the application.

In light of the claimant being unable to show any prejudice beyond not being allowed to pursue the additional claims and the respondent having no evidence of actual prejudice beyond the prejudice to the respondent in having to face the additional claims in the event leave was granted, the matters listed at paragraphs (ii) and (iii) above are, in these circumstances, decisive factors in the balancing exercise (per **Transport and General Workers’ Union** – see paragraph 15 above.) Accordingly, leave is not granted for the additional claim at paragraph 21 of the application and set out at paragraph 4 above.

41. The other amendments sought by the claimant and comprised at paragraphs 8, 9, 15, 18 and 19 of his IT1 claim form in the terms sought in his amendment application are granted, on consent. These amendments are so-called category 1 amendments.

## **ADDENDUM**

42. The claimant’s representative pursued an argument that the claimant ought, irrespective of the outcome of this amendment application, be able by way of remedy sought recover losses flowing from the claimant’s resignation. The claimant’s representative was unable to provide any authority to support this proposition. For the avoidance of any doubt, the tribunal does not agree that the claimant is entitled to seek to recover losses flowing from his resignation on the basis that this was both a discriminatory and constructive unfair dismissal in the absence of a pleading within the case to that effect. The making of such a case required the granting of leave to amend the claim. That leave has been refused.

## **FURTHER CASE MANAGEMENT ORDERS**

43. The claimant is ordered to provide a copy of claim form, setting out the permitted amendments with underlining, and to serve any amended witness statement to reflect the outcome of the amendment application within 7 days of receipt of this Judgment.
44. The respondent is ordered to provide a copy of the amended response form, setting out any amendments with underlining, within 28 days of receipt of this Judgment.
45. A further Case Management Preliminary Hearing will be convened to make further Case Management Orders and to list the case for hearing. In advance of that Preliminary Hearing, the parties are invited to submit a draft timetable and to liaise with the office to identify suitable dates for listing.

**Employment Judge:**

**Date and place of hearing: 20 September 2021, Killymeal House, Belfast.**

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



# THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL

## Restricted Reporting Order

Pursuant to Rule 44(1)(b) The Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 and incidental to the previous Order granting anonymity to the Claimant.

1. This Order prohibits the publication in Northern Ireland of identifying matter in a written publication available to the public or its inclusion in a relevant programme for reception in Northern Ireland in relation to the claimant.
2. The extent to which the facts of this case can be reported is limited to the facts and matters contained in the judgment of the tribunal to which this Order is appended.
3. The words “identifying matter” and “written publication” have the meanings set out in Article 13(2) of the Industrial Tribunals (Northern Ireland) Order 1996.
4. If any identifying matter is published or included in a relevant programme in contravention of this restricted reporting order the following persons shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale –
  - (a) In the case of publication in a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical;
  - (b) In a case of publication in any other form, the person publishing the matter; and
  - (b) In a case of matter included in a relevant programme –
    - (i) Any body corporate engaged in providing the service in which the programme is included and
    - (ii) Any person having functions in relation to the programme corresponding to those of an editor of a newspaper.

**Employment Judge:**

**Date:**