THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL

CASE REF: 17570/20

CLAIMANT: **Elizabeth McKearney**

RESPONDENT: **Arthur Cox**

JUDGMENT ON A PRELIMINARY ISSUE

The judgment of the tribunal is that the claimant is permitted to amend the claim to include a claim of age discrimination in the terms set out below.

CONSTITUTION OF TRIBUNAL

Vice President (sitting alone): **Mr N Kelly**

APPEARANCES:

The claimant was represented by Mr G Grainger, Barrister-at-Law, instructed by Worthingtons Solicitors.

The respondent was represented by Mr T Warnock, Barrister-at-Law, instructed by Arthur Cox Solicitors.

ISSUES

1. The preliminary issues before the tribunal for determination were:

   (i) what claims are currently and properly before the tribunal;

   (ii) whether the claimant's application to amend the claim to include a claim of age discrimination and a claim of failure to consult should be permitted, including time limitation issues.

2. In relation to the first preliminary issue, it was not in dispute between the parties that the original ET1 lodged by the claimant in the tribunal on 30 June 2020 raised allegations of unfair dismissal, unauthorised deduction from earnings (holiday pay), breach of contract (holiday pay), sex discrimination, part-time working discrimination and redundancy pay. It was also not in dispute that the claims alleging sex discrimination, part-time worker discrimination and redundancy pay were not registered by the tribunal because the required information had not been

given. It was accepted by all parties that the original ET1 did not raise claims in relation to either age discrimination or failure to consult. Therefore no decision is necessary in relation to the first preliminary issue. It is clear that, subject to this amendment application, the only claims currently and properly before the tribunal are claims of unfair dismissal, unauthorised deduction from wages (holiday pay), and breach of contract (holiday pay).

3. The second preliminary issue concerned applications to amend the ET1 to include claims of age discrimination and of failure to consult. It was confirmed between the parties in correspondence, and again before the tribunal, that no more than 19 people had been involved in the relevant redundancy exercise and that therefore the statutory requirement to consult was not applicable. The application to amend the ET1 to include a claim of failure to consult was discontinued and no decision is therefore necessary in relation to that part of the second preliminary issue.

4. The only issue remaining for the tribunal to determine was therefore whether the claimant should be permitted to amend her ET1 to include a claim of age discrimination.

RELEVANT LAW

5. Regulation 48 of the Employment Equality Age Regulations (Northern Ireland) 2006 provides that:

> *"(i) 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."*

6. That three month period may be extended under Regulation 15 of the Employment (Northern Ireland) Order 2003 (Dispute Resolution) Regulations (Northern Ireland) 2004.

7. That three month time limit may be extended in any event under Regulation 48(4) of the 2006 Regulations which states:

> *"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."*

8. The power to extend the time limit on *"just and equitable"* grounds is a broad discretion to be exercised on the part of the tribunal. There is no presumption in favour of an extension of time. The onus remains on the claimant in each case to persuade the tribunal that it is just and equitable to extend time in all the circumstances of the case, given the overall context that time limits provided by statute are generally meant to be obeyed.

9. In ***Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327,*** Sedley LJ stated:

> *"There is no principle of law which indicates how generously or sparingly the power to enlarge time is to be exercised."*

10. Langstaff J stated in ***Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*** that a claimant applying for an extension of time must provide an answer to two questions:

> *"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and, insofar as it is distinct, the second is the reason why after the expiry of the primary time limit, the claim was not brought sooner that it was."*

11. In ***British Co Corporation v Keeble [1997] IRLR 336***, the EAT confirmed that the discretion to grant an extension of time on *"just and equitable"* grounds is as wide as the discretion given to civil courts under the Limitation Acts. On that basis, the tribunal is required to consider the hardship and prejudice which each party would suffer as a result of either granting or refusing the extension and to have regard to all the other relevant circumstances; in particular:

    (a) the length of and the 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 parties sued had co-operated with any requests for information;

    (d) the promptness with which the claimant acted once he or she knew of the facts given rise to the cause of the action; and

    (e) the steps taken by the claimant to obtain appropriate professional advice once she knew of the possibility of taking action.

12. Where the claimant relies on ignorance or a lack of complete understanding of the right to make a specific claim, the assertion of ignorance on the part of the claimant must be genuine and must be reasonable. The tribunal must address specifically the alleged lack of knowledge. (See ***Bowden v Ministry of Justice UKEAT/0018/17*** and also ***Averns v Stagecoach Inn Warwickshire UKEAT/0065/08***)

13. In ***Bowden v Ministry of Justice UKEAT/0018/17*** the claimant, a part-time Judge brought his pensions claim at a point when he was nearly ten years out of time. He sought an extension of the statutory time limit. He had asserted that he had been totally ignorant of the ***O'Brien*** litigation and that he did not know that he had any right to make a tribunal claim in respect of the pension disparity between fee-paid and full-time Judges. The Employment Judge who initially heard the application for an extension of time refused that extension because the claimant knew of the difference in pensions between fee-paid and full-time Judges and that, in that knowledge, he had not taken any steps to secure redress. The EAT determined that that had been the wrong approach. The real issue had been whether the claimant had been truthful in saying the he did not know of the right to make a claim and, if so, whether his ignorance was reasonable. The Employment Judge had wrongly conflated knowledge of the facts that could potentially give rise to a claim and knowledge of the legal right to make a claim.

14. In ***Selkent Bus Company Limited v Moore [1996] IRLR 661,*** the EAT discussed the principles applicable when assessing an application to amend a claim by bringing what is essentially a new claim. In that case Mummery J set out various general principles. Those included the nature of the amendment, the applicability of time limits, the timing and manner of the application and all other relevant circumstances in balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. It is clear that in the present case, the application to amend is an application to bring an essentially new claim. The contents of the claim form were almost entirely related to the redundancy selection procedure and, to a lesser extent, to the issue of holiday pay. The ticking of two boxes in relation to sex discrimination and part-time worker discrimination, which were not registered by the tribunal, does not alter that position. To bring an entirely new claim (and an entirely new type of claim) is not a simple relabelling exercise.

    That does not, in itself, prevent the tribunal granting such an amendment. There is a danger in all of this of adopting an unnecessarily and inappropriately rigid approach based on the various pieces of case law accumulated over the years. This is a simple and relatively straightforward matter. The tribunal has to weigh all the circumstances; including in particular the prejudice that might be caused to the claimant and to the respondent. The tribunal then has to decide what is *"just and equitable"*. Mummery J stated in ***Selkent:***

> *"(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."*

RELEVANT FACTS

15. The claimant gave evidence and was cross-examined. The parties made detailed submissions on the basis of that evidence and on the papers. The tribunal makes the following findings of fact.

16. The respondent is a legal partnership which specialises in commercial law.

17. At the relevant times, the claimant had been a salaried partner in the Finance Department of that firm and, along with four associate solicitors, dealt with property finance.

18. The claimant was made redundant on 9 April 2020.

19. The claimant lodged an ET1 on 30 June 2020 as a result of that redundancy.

20. The claimant completed that ET1 on-line. That completed form included eight typed pages of narrative under the heading *"Details of your claim"*, in paragraph 7.4.

21. Those eight typed pages dealt in detail with the claim of unfair dismissal/unfair selection for redundancy and, to a lesser extent, with the claim of unauthorised deduction from earnings/breach of contract in relation to holiday pay. Those eight pages did not contain any particulars of a claim of sex discrimination, a claim of part-time worker discrimination or a claim of age discrimination. There was no reference to any of those claims in the narrative in paragraph 7.4.

22. Paragraph 7.1 of the on-line ET1 asked the claimant to:

> *"Please tick the box(es) to indicate the type of complaint you wish the tribunal to consider."*

23. The three boxes under paragraph 7.1, marked (a), (b) and (c), referred to unfair dismissal, redundancy pay and holiday pay. The claimant ticked those boxes.

24. Paragraph 7.2 referred to claims of discrimination. It contained eight boxes. Those referred to age, disability, equal pay, part-time working, race, religious belief/political opinion, sex discrimination and sexual orientation.

    The claimant ticked the boxes for sex discrimination and for part-time worker discrimination. The claimant did not include any details or particulars for those two claims and those claims were rejected and not registered by the tribunal. No application has been made by the claimant to have that decision, not to register those claims, reconsidered by the tribunal. No additional details or particulars of claims of sex discrimination and part-time worker discrimination were provided at any stage by the claimant.

25. The claimant, when completing paragraph 7.2, did not tick the box marked *"age"* and, as indicated above, no reference was made by the claimant to any such potential claim in paragraph 7.4.

26. The claimant had been placed in a redundancy pool with the other partners in the Finance Department as a whole.

    The claimant wished to allege that an appropriate redundancy pool would have been the claimant together with four named associates who had worked in the part of the Finance Department which dealt with matters of property finance and who therefore did the same type of specialised work as the claimant. Those four named associates were all younger than the claimant.

27. The substance of the proposed claim for age discrimination is that the claimant had been both directly and indirectly discriminated against by the respondent on grounds of her age in the redundancy selection procedure, contrary to the Employment Equality (Age) Regulations (Northern Ireland) 2006.

28. The redundancy selection meetings were conducted remotely and were recorded by the claimant. There appears to be no dispute about the accuracy of those recordings. Equally, there appears to be no dispute about the availability of documentation relating to the redundancy selection exercise. Relatively little time has passed, and memories are fresh. Furthermore the interlocutory procedure, much less the witness statement procedure, has not commenced in this case and any additional claim of age discrimination would not require the parties to alter or rework any Notices, Replies or witness statements.

29. The redundancy of the claimant had a significant financial impact on the claimant. She had received the minimum statutory award in respect of her redundancy and she had been the major earner in her household. Her financial circumstances were therefore such that she made the decision not to seek specialist legal advice from a specialist employment lawyer.

30. The claimant had had no employment law experience. She had never worked in that area of law. The tribunal accepts that, in particular in large legal firms, solicitors tend to specialise in a narrow area of law and that the mere fact of being a solicitor does not indicate to anyone, or should not indicate to anyone, that that person can be regarded as either qualified, competent or experienced to practice employment law either on their own behalf or on behalf of someone else. The EAT in ***Bowden*** (above) was prepared to consider whether a part-time Judge had been reasonably ignorant of the right to claim in respect to unlawful discrimination, even though, in that case he had been ten years out of time.

31. The claimant completed the ET1 with the help of three family members who were all solicitors. Unfortunately, like the claimant, they had had no experience or qualification in employment law.

32. The claimant did not think of contacting the Equality Commission to seek further advice in this matter. She had been simply unaware of the possibility of an age discrimination claim in the circumstances of her case. On that basis, her decision not to contact the Equality Commission had been understandable.

33. The claimant explained that she had ticked the boxes for sex discrimination and part-time worker discrimination simply because they were on the on-line form. It did not occur to her to tick the box marked *"age"*.

34. The claimant had learnt about the possibility of using her house insurance, to fund legal advice and representation from a specialist lawyer in respect of her claim, during a chance encounter in a supermarket with another individual with whom she had worked previously. The claimant had then contacted her insurance company promptly ie on the next day. Her potential claim was immediately referred by that insurance company to Worthingtons Solicitors. She met Mr Niall McMullan, a partner in that firm, a few days later on 23 October 2020.

35. The claimant gave Mr McMullan details of her claim on 23 October 2020 and Mr McMullan advised her of the possibility of a claim of age discrimination.

36. Mr McMullan wrote promptly on 11 November 2020 to the tribunal, copied to the respondent, indicating that the claimant wished to apply for leave to amend her claim to include a claim of age discrimination.

37. The tribunal accepts that the claimant had been unaware of the possibility of using her house insurance to fund legal representation and legal advice from a specialist solicitor in respect of her claim and that once that was made clear to her, she acted promptly in contacting the insurance company. The tribunal is also satisfied that the insurance company acted promptly and that Mr McMullan acted promptly on her behalf.

38. The application to amend the claim to include a claim of age discrimination had therefore been made some three months after the expiry of the relevant statutory time limit, although the respondent had been aware, once it had been served with the ET1, of a tribunal claim in respect of the claimant's redundancy selection.

DECISION

39. The tribunal is satisfied that the claimant was an experienced and qualified solicitor. However her experience had been exclusively in a particular area of law. The tribunal is satisfied that she had no knowledge of employment law and that her only involvement in the general area of employment law had been a brief module in the course of her attendance at the IPLS, before the legal provisions relating to age discrimination were enacted.

    On that basis, the tribunal does not think it would be appropriate to treat her in the same way as it would treat a solicitor who had been experienced and knowledgeable about employment law or indeed in the same way as it would treat a tribunal lay representative who had been experienced in relation to employment law. The tribunal would, in the circumstances for the present application, regard the claimant simply as an educated individual with a general understanding of litigation but no more than that. Employment law is a particularly difficult and obscure subject to many; including to many senior members of the legal profession. The tribunal therefore concludes that the claimant's ignorance of the right to claim in respect of age discrimination had been reasonable.

40. The tribunal is satisfied that the claimant's decision not to seek specialist legal advice, given her particular financial circumstances, had been understandable and reasonable. She did the best she could on the basis of her own knowledge and the knowledge of three family members. However neither she, nor her three family members, had had any knowledge or experience in this particularly difficult and specialised area of law.

41. Once it had been raised with her that there was a possibility of using her house insurance to secure specialist legal advice or representation, she did so promptly. The insurance company and Worthingtons Solicitors acted equally promptly.

42. The present claim is a claim in respect of the redundancy selection procedure and, to a lesser extent, the question of holiday pay. The respondent is already in a position where it knows that it will have to explain in detail its redundancy selection procedure and indeed its thinking behind that redundancy selection procedure. Equally the relevant documentation is readily to hand and the relevant meetings have been recorded. Furthermore the present litigation has not really commenced and no work, of any significance, has been done in respect of the interlocutory or witness statement procedure which would need to be redone if an amendment were to be granted.

43. The additional evidence required from the respondent to deal with a claim of age discrimination will be relatively minimal. The precise ages of the four associate solicitors working in relation to property finance would be readily available. The motivation of individuals within the respondent partnership in respect of the redundancy selection procedure will have to be explored in any event and the additional element of age discrimination would add little to the time spent in the interlocutory procedure, witness statement procedure or in cross-examination that exercise.

44. The crucial issue is balancing potential prejudice and hardship caused to the claimant or to the respondent and then to determine what is just and equitable in

the circumstances of this case.

45. The hardship or prejudice to the claimant if the amendment were refused would be significant. She would be prevented from pursing what she argues is a significant part of her claim.

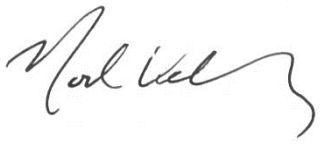
46. It is not appropriate for the tribunal to make a ruling in respect of the merits of any age discrimination case at this stage. However such a claim is at least arguable on the undisputed facts. This is not a claim where the proposed amendment can be regarded, on the limited facts available at this stage, to be hopeless.

47. The hardship or prejudice to the respondent if the amendment was granted is minimal. The selection procedure and the rationale behind that procedure will have to be examined in any event. Little additional evidence will be required. The relevant documentation has been preserved and the meetings have been recorded.

48. Balancing the potential hardship and prejudice that might be caused to the parties in relation to this amendment application, and taking into account all the relevant circumstances as set out above, the tribunal concludes, on balance, that the amendment application should be permitted.

49. The claim is therefore amended to include a claim of direct and indirect discrimination in respect of the redundancy selection procedure, contrary to the Employment Equality (Age) Regulations (Northern Ireland) 2006. The respondent will lodge an amended response ***within 28 days*** of the date on which this Preliminary Judgment issues.

50. A further CMPH by WebEx is listed for ***9.30 am on 20 August 2021*** to consider the possibility of an earlier full hearing and, if that is possible, to determine the location, dates and format of any such hearing.



Vice President:

Date and place of hearing: **13 May 2021, Belfast.**

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