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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **04/06/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

ON APPEAL FROM THE INDUSTRIAL TRIBUNAL

_____

GRACE BRYANT

Appellant

-and-

NESTLE UK LIMITED

Respondent

_____

Before: McCloskey LJ, O'Hara J and Rooney J

_____

Representation

Appellant: Martin Wolfe, QC and Sean G Doherty, of counsel, instructed by D Hayes Solicitors Ltd
Respondent: Barry Mulqueen, of counsel, instructed by Eversheds Sutherland Solicitors

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ROONEY J (delivering the judgment of the court)

Introduction

[1] On 23 October 2019, Grace Bryant ("*the appellant*") brought proceedings in the Industrial Tribunal ("*the Tribunal*") against Nestle UK Ltd ("*the respondent*"), her former employer, complaining that she had been unfairly dismissed when the respondent terminated her employment, purportedly on the ground of redundancy, with effect from 28 July 2019.

[2] On 1 July 2020, the appellant, having received from the respondent discovery of certain documents, intimated for the first time her contention, in a formal pleading, that the termination of her employment had been unlawful on the further ground of age discrimination. The appellant thereafter, on 11 August 2020, sought to amend her claim to include this additional claim. By its decision transmitted to the parties on 16 December 2020, following a hearing on 9 November 2020, the

Tribunal determined that the appellant's application to amend would be refused. The appellant appeals to this court against this decision.

[3] The appellant, as indicated above, was legally represented in her appeal. She had no representation or assistance of any kind at first instance. The question for this court is whether the Tribunal erred in law in making the impugned decision.

Chronology

[4] The context of this appeal can be readily ascertained from an agreed chronology of material dates and events provided by the parties pursuant to direction of the court, which is hereby reproduced:

No	Date	Event
1	1 October 2012	Grace Bryant commences employment with Nestle UK Limited as a Clinical Network Representative.
2	21 May 2019	Nestle UK Limited notifies Grace Bryant of a possible redundancy of her role. Redundancy consultation process takes place over following 7 weeks.
8	3 July 2019	Details of Ms Bryant's redundancy confirmed via letter.
9	19 July 2019	Ms Bryant informs Nestle UK Limited that she wishes to appeal her redundancy. Ultimately this meeting was considered based on the written representations submitted by Ms Bryant and the appeal was dismissed.
10	28 July 2019	Grace Bryant's contract is terminated by reason of redundancy.
11	23 October 2019	Grace Bryant lodges a claim to the Industrial Tribunal in Northern Ireland against Nestle Nutrition UK, Vicky Woods and Kate Hardman on the grounds of unfair dismissal (the "Claim").
12	16 January 2020	Eversheds Sutherland, on behalf of Nestle UK Limited, Vicky Woods and Kate James-Hardman, lodge a response to the Claim. Eversheds Sutherland request that Nestle UK Limited are the only named respondent to the proceedings.
13	20 March 2020	Eversheds Sutherland serve a Notice for Additional Information on Grace Bryant.

14	23 March 2020	Preliminary Hearing by telephone conference is held. The claims against Vicky Woods and Kate James-Hardman are dismissed and various directions are made. Grace Bryant confirms her claim is one of unfair dismissal. The case is listed for hearing on 9 – 12 November 2020.
15	27 June 2020	Ms Bryant receives discovery in relation to her claim of unfair dismissal.
16	1 July 2020	Ms Bryant serves her Replies to Notices on the respondent, in which she asserts *"I believe the enforced removal of me from my job, amounts to unfair dismissal and I believe I was discriminated against on the grounds of age."*
17	4 August 2020	Eversheds Sutherland write to Ms Bryant via email advising that her Replies refer to a claim of age discrimination which is not currently before the Tribunal. Eversheds Sutherland advise Ms Bryant that should she wish to make a claim of age discrimination, she will need to make an amendment application.
18	11 August 2020	Ms Bryant lodges an amendment application to include age discrimination as part of the Claim, on the basis that she was made redundant so that a younger employee could take over her role (the "Amendment Application").
19	26 October 2020	Notice of a Preliminary Hearing to Determine a Preliminary Issue issued.
20	9 November 2020	Preliminary Hearing in respect of the Amendment Application held before Employment Judge Hamill. An oral decision dismissing the application is issued. Ms Bryant requests written reasons.
21	16 December 2020	Tribunal decision of Employment Judge Conor Hamill is issued refusing application.
22	30 December 2020	Grace Bryant requests reconsideration of the Tribunal's decision to refuse the Amendment Application.
23	26 January 2021	Notice of Appeal served.

24	2 February 2021	Further Preliminary Hearing with the Tribunal held in respect of the Claim. Tribunal confirmed it would issue written reasons to both parties in respect of the refusal of the application for a reconsideration of the decision not to permit the Amendment Application. The case was listed for a five day hearing from 7-11 February 2022.

The Tribunal's Decision

[5] The critical portion of the Tribunal's decision is contained in the lengthy paragraph [18]. Therein the tribunal made a series of statements, assessments and conclusions which may be summarised as follows:

(a) The appellant always had a clear belief from as early as May 2019 that she was the victim of age discrimination. The appellant was prepared to ventilate this belief to co-workers and to ACAS. Despite this belief, the appellant deliberately chose to ignore the statutory time limits.

(b) The appellant deliberately chose to withhold her allegation of age discrimination, something that she was not entitled to do, knowing or expecting that at some point in the future she might decide to bring an age discrimination claim.

(c) Time limits are there to be observed. They are for the benefit of all parties to ensure that matters are treated promptly and before the passage of time impacts on the ability of the parties to represent their interests.

(d) In regard to (c) above, the appellant acted in a manner that had the effect of disadvantaging the respondent and the appellant misled the respondent for tactical reasons.

(e) The appellant made a deliberate decision to decline to properly and fully set out her actual claim until it was opportune to do so.

(f) The appellant's decision to deliberately ignore the statutory time limit prejudiced the respondent and, given the substantial additional work and additional evidence which would be required, the balance of hardship fell in favour of the respondent.

(g) Having obtained the evidence that the appellant considered necessary to bring the claim based on age discrimination, she did not alert the respondent for some weeks and thereafter did not alert the Tribunal to the application to amend until 11 August 2020. No satisfactory explanation was given for this further delay.

(h) Although extensions to amend are permissible in cases where parties were completely unaware that they had a cause of action until they came into possession of information or documentation outside the time limit, for the reasons given, the Tribunal would not exercise its discretion in this case.

The Appeal

[6] The parties agreed the following formulation of the issues of law to be determined:

(i) Whether there was any evidence to support the Tribunal's conclusion that with regard to the timing and the manner in which the application for the amendment was made, the appellant had acted in a manner that had the effect of disadvantaging or misleading the respondent for tactical reasons.

(ii) Whether the impugned decision is perverse and involves an error of law because the Tribunal reached a decision that no reasonable Tribunal, on a proper appreciation of the evidence and the law, could have reached.

The Legal Principles

[8] In *Ferris and Gould v Regency Carpet Manufacturing Limited* [2013] NICA 26, Morgan LCJ (giving the judgment of the court) identified the relevant legal principles. By virtue of Article 130 (2) of the Employment Rights (Northern Ireland) Order 1996, it is for the respondent to demonstrate that the reason for dismissal was fair and whether, in the circumstances, the employer acted reasonably. The agreed formulation of the issues of law to be determined are not, of course, binding on this court. The question is whether the Tribunal erred in law in making the impugned decision is considered at paragraphs 16-27 below.

The Operative Statutory Provision

[9] Provision is made for an appeal from the Industrial and Fair Employment Tribunals to the Court of Appeal by Article 22 of the Industrial Tribunals (Northern Ireland) Order 1996 (NI 18) SI 1996/1921 (NI 18), which provides:

> "**22. - *Appeals from industrial tribunals***
>
> (1) *A party to proceedings before an industrial tribunal who is dissatisfied in point of law with a decision of the tribunal may, according as rules of court may provide, either-*
>
> *(a) appeal therefrom to the Court of Appeal, [see Order 60B Rules of the Court of Judicature (NI) 1980]; or*

(b) require the tribunal to state and sign a case for the opinion of the Court of Appeal [[see Order 94 r 2 Rules of the Court of Judicature (NI) 1980]."

In essence, the question for the Court of Appeal is whether the Tribunal, within the confines of the grounds of appeal, erred in law in some material respect or respects.

[10] In *Ferris and Gould*, Morgan, LCJ highlighted the following:

> *"[5] British Home Stores v Burchell [1978] IRLR 379 identifies three matters that must be established by the employer.*
>
> *"First of all there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further."*
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> *Iceland Frozen Foods Ltd v Jones [1983] ICR 17 gives guidance on the approach to the reasonableness of the decision to dismiss.*
>
> *"In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."*
>
> *These cases identify the four matters which the respondent must address in order to demonstrate that the dismissal was fair.*
>
> *[6] By virtue of paragraph 30 of Schedule 1 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 a tribunal must give reasons for any decision. Paragraph 30 (6) requires written reasons to include the following information:*

"*(a) the issues which the tribunal or chairman has identified as being relevant to the claim;*

(b) if some identified issues were not determined, what those issues were and why they were not determined;

(c) findings of fact relevant to the issues which have been determined;

(d) a concise statement of the applicable law;

(e) how the relevant findings of fact and applicable law have been applied in order to determine the issues; and

(f) where the decision includes an award of compensation or a determination that one party make a payment to the other, a table showing how the amount or sum has been calculated or a description of the manner in which it has been calculated."

[7] The leading authority on the adequacy of reasons for judicial decisions is English v Emery Reimbold & Strick Limited [2002] EWCA Civ 605. Lord Phillips MR stated that justice will not be done if it is not apparent to the parties why one has won and the other has lost and gave the following guidance:

> "*[I]f the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon. …*
>
> *When giving reasons a judge will often need to refer to a piece of evidence or to a submission which he*

has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision."

[8] The issue was addressed in this jurisdiction in Johansson v Fountain Street Community Development Association [2007] NICA 15 were Girvan LJ quoted with approval a passage in the judgment of Donaldson LJ in UCATT v Brain [1981] ICR 542:

> *"Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law. … Their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or as the case may be win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based on any such analysis. This, to my mind is to misuse the purpose for which reasons are given."*

[9] The issue was again more recently examined in Brent LBC v Fuller [2011] ICR 806. Mummery LJ dealt with the way in which the tribunal judgment should be approached at paragraph 30:

> *"The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."*

He went on in paragraph 46 to give guidance as to the manner in which the tribunal should approach its answers to the questions specified above:

> *"..when an employment tribunal asks a correct question, as this tribunal did about the reasonableness of the investigation into*

> *Mrs Fuller's conduct, it is better for the tribunal to give a specific answer to it in addition to its discussion of the facts, law and argument on the question. It should not be left to the parties, or the appeal tribunal or this court to have to work out the answer for themselves. Failing to answer the question could encourage an appeal and false optimism about the prospects of its success."*"

The Role of Appellate Court

[11] In *DB v Chief Constable of PSNI* [2017] UKSC *7* at paragraphs 38 - 40, Lord Kerr gave consideration to the proper approach to be taken by an appellate court to its review of the findings made by a judge at first instance. Referring to the applicable principles detailed by Lord Reed in *McGraddie v McGraddie* [2013] UKSC 58, Lord Kerr emphasised that an appellate court should intervene only if it is satisfied that the judge was *"plainly wrong."* The appellate court will be reluctant to interfere with first instance findings when the case involves oral testimony. However, according to Lord Kerr, the reticence on the part of the appellate court is not as strong *"… where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and consideration of contemporaneous documents."* (paragraph 80).

[12] The governing legal principles in respect of the powers of the Court of Appeal are set out by McCloskey LJ (giving the judgment of the court) in *Nesbitt v The Pallet Centre* [2019] NICA 67. Following a review of the authorities, the judgment expounds the relevant principles and the circumstances in which the *"error of law threshold"* may exist. In particular, the court highlighted the well-established principles in *Edwards v Bairstow* [1956] AC 14 at p. 36 (per Lord Radcliffe):

> *"When the case comes before the [appellate] court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood,*

each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

[13] Viscount Simonds added at p. 20:

"For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by the commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts, as they are sometimes called, do not, in my opinion, justify the inference or conclusion which the commissioners have drawn: not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is therefore a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand."

[14] At this juncture, it is worth repeating paragraphs [59] - [61] of the decision of this court in *Nesbitt:*

"[59] The Edwards v Bairstow principles have been applied by the Northern Ireland Court of Appeal in a variety of contexts. These include an appeal by case stated from a decision of the Lands Tribunal (Wilson v The Commissioner of Evaluation [2009] NICA 30, at [34] and [38]), an appeal against a decision of an industrial tribunal in an unfair dismissal case (Connelly v Western Health and Social Care Trust [2017] NICA 61 at [17] – [19]) and a similar appeal in a constructive dismissal case (Telford v New Look Retailers Limited [2011] NICA 26 at [8] – [10]). The correct approach for this court was stated unequivocally in Mihail v Lloyds Banking Group [2014] NICA 24 at [27]:

> *"This is an appeal from an industrial tribunal with a statutory jurisdiction. On appeal, this court does*

not conduct a rehearing and, unless the factual findings made by the tribunal are plainly wrong or could not have been reached by any reasonable tribunal, they must be accepted by this court."

[60] A valuable formulation of the governing principles is contained in the judgment of Carswell LCJ in Chief Constable of the Royal Ulster Constabulary v Sergeant A [2000] NI 261 at 273:

> *"Before we turn to the evidence we wish to make a number of observations about the way in which tribunals should approach their task of evaluating evidence in the present type of case and how an appellate court treat their conclusions. ……..*
>
> *4. The Court of Appeal, which is not conducting a rehearing as on an appeal, is confined to considering questions of law arising from the case.*
> *5. A tribunal is entitled to draw its own inferences and reach its own conclusions, and however profoundly the appellate court may disagree with its view of the facts it will not upset its conclusions unless –*
> *(a) there is no or no sufficient evidence to found them, which may occur when the inference or conclusion is based not on any facts but on speculation by the tribunal (Fire Brigades Union v Fraser [1998] IRLR 697 at 699, per Lord Sutherland); or*
> *(b) the primary facts do not justify the inference or conclusion drawn but lead irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse: Edwards (Inspector of Taxes) v Bairstow [1956] AC 14, per Viscount Simonds at 29 and Lord Radcliffe at 36."*

This approach is of long standing, being traceable to decisions of this court such as McConnell v Police Authority for Northern Ireland [1997] NI 253.

[61] Thus in appeals to this court in which the Edwards v Bairstow principles apply, the threshold to be overcome is an elevated one. It reflects the distinctive roles of first instance tribunal and appellate court. It is also harmonious with another, discrete stream of jurisprudence involving the well-established

principle noted in the recent judgment of this court in Kerr v Jamison [2019] NICA 48 at [35]:

> *"Where invited to review findings of primary fact or inferences, the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour, consistency and credibility …….. the appellate court will not overturn the judge's findings and conclusions merely because it might have decided differently ….."*

Next the judgment refers to Heaney v McAvoy [2018] NICA 4 at [17] – [19], as applied in another recent decision of this court, Herron v Bank of Scotland [2018] NICA 11 at [24], concluding at [37]:

> *"To paraphrase, reticence on the part of an appellate court will normally be at its strongest in cases where the appeal is based to a material extent on first instance findings based on the oral evidence of parties and witnesses."*

[15] The effect of the authorities considered above is that the error of law threshold may be overcome, thereby entitling the appellate court to intervene, in the following circumstances, inexhaustively:

(a) If the decision under appeal contains anything *ex facie* which is bad law and which bears upon the determination.

(b) If the determination under appeal is founded on facts that no person acting judicially and properly instructed as to the relevant law could have come to. This would include situations where there is no evidence to support the determination or the evidence is inconsistent with and contradictory of the determination, or a situation in which the true and only reasonable conclusion contradicts the determination.

(c) Where the primary facts do not justify the inference or conclusion drawn but lead irresistibly to the opposite conclusion, so that the conclusion reached may be regarded as perverse.

(d) Where the Tribunal has misdirected itself in law by a misunderstanding of the statutory language or otherwise.

(e) Where the Tribunal, although entitled to draw its own inferences and reach its own conclusions, does so on the basis of speculation rather than facts.

The Tribunal's Decision Analysed

[16] The Tribunal correctly identified its power to grant leave to amend the claim under Rule 25 of Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020. The Tribunal also had due regard to the decision of Mummery J in *Selkent Bus Company v Moore* [1996] ICR 836 at paragraph [22] which offered guidance for the Tribunal in the exercise of its discretion:

> *"Whenever the discretion to grant an amendment is involved, 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."*

[17] The Tribunal, correctly, recognised that there is no exhaustive list of all the circumstances in which an application to amend may arise and/or be granted. Relying on Harvey on Industrial Relations and Employment Law at paragraph 311.03 the Tribunal highlighted the following three categories of case:

> *"At distinction may be drawn between* [sic]*:*
>
> *(i) Amendments which are merely designed to alter the basis of an existing claim but without purporting to raise a new distinct head of complaint.*
>
> *(ii) Amendments which add or subtract a new cause of action which is linked to or arises out of the same facts as the original claim.*
>
> *(iii) Amendments which add or subtract a wholly new claim or cause of action which is not connected to the original claim at all."*

[18] The Tribunal also took into consideration the decision of the Court of Appeal in *Abercrombie & Ors v Aga Rangemaster Limited* [2013] EWCA Civ. 148 at paragraph [48] and, in particular, the issue as whether the amendment is a relabelling on facts already pleaded or a *"wholly new claim."* The Court of Appeal gave the following guidance -

> *48. The approach of both the Employment Appeal Tribunal and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old,*

> *the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted:* …
>
> *…Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time-limits by introducing it by way of amendment."* (paragraph 50).

[19] The Tribunal concluded that the proposed amendment to include the claim for age discrimination amounted to a new claim. We agree with this conclusion. The Tribunal then proceeded to consider whether, in the exercise of its discretion, the time limit for the presentation of this new claim should be extended. For the reasons summarised at [5] above, the Tribunal refused to allow an extension of time. The court will consider the Tribunal's reasons for its refusal seriatim.

[20] First, under the heading "Findings of Fact", the Tribunal stated that in May 2019 the appellant formed the belief that she was the victim of age discrimination when she learned that she was at risk of being made redundant by the respondent; that from May 2019 the appellant remained "*firmly of the belief*" that there was a conspiracy to remove her due to direct age discrimination; and that she ventilated this belief to a number of colleagues and also to ACAS. Notwithstanding all of the foregoing, the Tribunal reasoned, the appellant had failed to include a claim for age discrimination when she issued unfair dismissal proceedings in October 2019.

[21] None of the foregoing is based on any findings of fact. While the Tribunal makes reference to the appellant's evidence, documents filed on her behalf and submissions made on behalf of the respondent, no specific appropriate findings of fact are made, nor are any inferences drawn from the evidence.

[22] The thrust of the appellant's case to the Tribunal was that prior to receiving discovery from the respondent on 27 June 2020, she had a mere suspicion that she had been the victim of age discrimination. The basis of the Tribunal's determination that the appellant had a "belief" rather than a mere 'suspicion' that she was the victim of age discrimination is unspecified. The appellant's state of mind, howsoever characterised, had no supporting evidence until June 2020. She could point to nothing of an independent or objective kind. The Tribunal's decision fails to engage with any of these realities and makes no appropriate findings.

[23] Adopting the often cited dicta of Lord Devlin in *Hussien v Chong Fook Kam* [1970] AC 942 at 948:

> *"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'"*

Furthermore, as stated by Stephens J (as he was then) in *Begley v Cowlan & Sons* [2015] NIQB 62 at paragraph [18]:

> *"The adversarial system requires a plaintiff to both allege and to prove his claim, Graham v E & A Dunlop Limited [1977] NIJB 1, Savage v McCourt [2014] NIQB 38. If a plaintiff launches an action with no evidence to support it, then it may be struck out or stayed as an abuse of the process of the Court under Order 18, Rule 19(d)."*

[24] Next, the Tribunal undertook no examination of the discovery provided, thereby failing to engage with the cornerstone of the appellant's application. In our view, the discovered documents are inconsistent with and contradictory of the Tribunal's decision.

[25] Thirdly, the Tribunal considered that the appellant had "*… deliberately* [chosen] *to withhold her allegation of discrimination, something she is not entitled to do knowing or expecting that at some point in the future she might decide to bring a claim*" and had made a deliberate decision to decline to properly and fully set out her actual claim until it was opportune to do so. In our view, these aspects of the decision are not tenable. They are formulated in conclusionary and unreasoned terms. There is no underpinning evidence, finding of fact or reasonable inference to support them. There could be no advantage to the appellant by bringing a new claim out of time. Rather, to the contrary, it is axiomatic that any claimant who institutes proceedings out of time runs a real risk that the claim will be struck out as time barred.

[26] Fourthly, the Tribunal determined that the appellant, having deliberately ignored the statutory time limit, had prejudiced the respondent, particularly given the "*substantial additional work*" and "*additional evidence*" that would be required. This aspect of the Tribunal's determination appears to rely on the respondent's submissions detailed at paragraph [17] of the decision. However, no evidence was adduced before the Tribunal in support of the respondent's submissions. In essence, the submissions were bare and unsubstantiated assertions which the Tribunal has adopted without any elaboration or specificity and without making any supporting findings of fact. As such, the conclusion or inferences are not based on any facts but on speculation by the Tribunal. (See *Fire Brigades Union v Fraser* [1998] IRLR 697 at 699, per Lord Sutherland).

[27] Finally, the Tribunal considered that despite obtaining discovery on 27 June 2020 and forming the view that she had been subjected to age discrimination, the appellant had been guilty of further delay by not contacting the respondent for some weeks and by failing to make an application to amend until 11 August 2020. Both the parties' agreed chronology and the relevant documentary evidence demonstrate that this is plainly not correct. Rather, the appellant (to her credit) within four days of receipt of the discovery served Replies to Notices on the respondent asserting,

inter alia, "I believe the enforced removal of me from my job amounts to unfair dismissal and I believe I was discriminated on grounds of age." Four weeks later, approximately, the respondent's solicitors advised the appellant by email that if she wished to bring a claim for age discrimination, it would be necessary to make an amendment application to the Tribunal. The amendment application to include age discrimination as part of the claim was lodged seven days later. In summary, the Tribunal fell into fundamental error on this important issue.

The Court's Decision

[28] For the reasons given above, it is the unanimous decision of this court that the Tribunal's decision is unsustainable in law and the appeal is hereby allowed.

[29] The order of the court has the following components:

(i) Pursuant to Section 38(1)(c) of the Judicature (NI) Act 1978, the decision of the Tribunal is reversed.

(ii) Pursuant to Section 38(1)(e) the court extends the time limit to allow the appellant to amend to include an claim for age discrimination.

(iii) The respondent will pay the appellant's costs of the appeal, to be taxed in default of agreement.