# THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL

**CASE REF: 744/20**

**CLAIMANT:** **Lijin Raj**

**RESPONDENT:** **Ashers Baking Company Limited**

## JUDGMENT ON A PRELIMINARY HEARING

The unanimous judgment of the tribunal is as follows: -

(i) The claimant's application for leave to amend his claim in accordance with the proposed draft amendments lodged in the Office of the Tribunals, in an email dated 15 April 2021, in so far as it relates to a claim of race discrimination, **is granted** and the said claim is so amended.

(ii) The claimant's application for leave to amend his claim to include a claim for unlawful deduction of wages is **not** granted.

(iii) The respondent, if it wishes to present an amended response to the claimant's claim, so amended, is ordered to do so **within 28 days from the date this decision is issued to the parties.**

(iv) As a consequence of the tribunal's said decision, the tribunal has made various case-management directions/orders as set out at paragraph 58 of this decision.

**CONSTITUTION OF TRIBUNAL**

**Employment Judge (sitting alone):** **Employment Judge Sturgeon**

**APPEARANCES:**

**The claimant was represented by his partner, Ms Rookes, assisted by an interpreter, Ms S Vipinachandran (by WebEx).**

**The respondent was represented by Mr Mason of Mark Mason Employment Law (by WebEx).**

## BACKGROUND

1. The claimant presented his claim form to the tribunal on 26 December 2019 claiming unfair dismissal and race discrimination.

2. The respondent presented its response on 3 February 2020 resisting all claims in their entirety.

3. This claim has been the subject of two previous Preliminary Hearings, on 3 November 2020 and 19 March 2021, and is listed for hearing from 8-11 November 2021.

4. Following the first Preliminary Hearing on 3 November 2020, it was ordered that an agreed statement of the legal and factual issues should be provided to the tribunal by 5 February 2021. However, the parties were unable to settle these legal and factual issues. When the claimant served replies to a Notice for Additional Information, these replies raised certain matters which the respondent's representative submitted were outside the scope of the claim which had been brought to this tribunal.

5. Accordingly, a further Preliminary Hearing was held on 19 March 2021 to deal with the respondent's objection to the additional matters raised. It was the respondent's contention that the additional matters raised both new factual matters and new heads of claim.

6. At the Preliminary Hearing on 19 March 2021, the claimant was ordered to write to the respondent and to the tribunal, by 16 April 2021, setting out the precise amendment to his claim form in red and indicating whether or not such claims advanced race discrimination and/or religious discrimination. The claimant was also directed to identify the factual basis for each claim being advanced.

## ISSUES

7. The preliminary issues for determination before this tribunal were therefore :-

   (i) whether or not an amendment application is necessary; and

   (ii) if so, whether or not the claimant should be given leave to amend his claim as sought.

## AMENDMENTS REQUESTED

8. The respondent very helpfully clarified, in its submission document of 7 May 2021, which amendments it consented to and which it did not. At the outset of this Preliminary Hearing, the scope of the amendments requested was further narrowed as the claimant confirmed that it no longer wished to amend the claim to pursue a religious discrimination claim. For the avoidance of doubt, the precise amendments requiring consideration by this tribunal were therefore as follows:-

   *"When I initially applied for the job, I applied for the role of night shift supervisor, I was offered this role on the basis of a trial period which I accepted. Upon completion of this, I was told that Daniel had watched the*

*cameras and said I did not show initiative. I was given no training whatsoever for the role of night shift supervisor and was immediately assigned to work on the machinery. When Richard Stewart began the role of night shift supervisor some months later, he was offered training and, to the best of my knowledge, was not offered the job on the basis of a trial. I believe this is discriminatory and that I was taken advantage of because I was foreign……..*

*…….To summarise:*

*I believe I was a victim of discrimination when I was offered a supervisory position under false pretences as I don't believe it was ever intended that I would assume this role. Months later Richard Stewart joined the company and was offered training for a role of supervisor and was not required to complete a trial period."*

9. The claimant confirmed, at the outset of this Preliminary Hearing, that the above amendments were further examples of race discrimination only.

10. However, throughout the course of this Preliminary Hearing, the claimant also confirmed that it wished to also pursue a claim for unlawful deduction of wages. It is the claimant's case that, from 19 June 2019 until 26 June 2019, he should have been paid at the supervisor role rate of pay, as that was the rate of pay he was initially offered, as opposed to the operator role rate of pay. The claimant also contended that the failure to pay him at the night supervisor role rate of pay was a further act of race discrimination. Despite the Employment Judge directing the claimant to notify the respondent of all the amendments it wished to make by 16 April 2021, this amendment was not communicated to the respondent, in writing, in the claimant's email of 15 April 2021

**THE LAW**

*Amendment*

11. The tribunal has the power to make an order granting leave to amend a claim or response under Rule 25 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020.

12. Mr Justice Mummery, in the case of ***Selkent Bus Company v Moore 1996 ICR 836***, provides guidance on the way in which a tribunal's discretion should be exercised in relation to amendments *(paragraphs 22-24)*:-

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

...

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

*(a) The nature of the amendment*

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

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

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

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

*An application should not be refused solely because there has been a delay in making it. There are no time-limits laid down in the Rules for the making of amendments. The amendments can be made at any time before, at, or even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made; for example, the discovery of new facts or new information appearing from documents disclosed in discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result from adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision*."

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

"*A distinction may be drawn between:-*

*(1) Amendments which are merely designed to alter the basis of an existing claim but without purporting to raise a new distinct head of complaint.*

*(2) Amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as the original claim.*

*(3) Amendments which add or subject a wholly new claim or cause of action which is not connected to the original claim at all*."

14. In the case of ***Mist v Derby Community Health Service NHS Trust [2016] UKEAT/0170/15***, HH Eady QC again confirmed that, when considering issues of

amendment, the approach that must be adopted remains that laid down in ***Selkent Bus Company Ltd v Moore [1996] ICR*** 836 and, in particular, where an application was to add a claim out of time that would not be determinative and neither would any failure of explanation for the delay. It was emphasised the paramount consideration remains the relative injustice and hardship in refusing or granting an amendment.

15. The ***Selkent*** principles have been recently reaffirmed in the case of ***Vaughan v Modality Partnership (EAT) [2021] ICR 535.*** In that case, Judge Taylor noted the following:-

> "*13. No consideration of an application for amendment is complete without reference to **Selkent [1996] ICR 836**. It is so familiar that it is especially easy to quote it without reflecting on the core principle it elucidates. The key passage is at paragraph 843D:-*
>
> > *"whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it".*
>
> *14. Mummery J reiterated this point at paragraph 844B:-*
>
> > *"whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment".*
>
> *15. The history and central importance of this test was analysed by Underhill J (President), as he then was, in the, unfortunately unreported, case of **Transport and General Workers' Union v Safeways Stores Ltd** 6 June 2007, in which he also concluded that on a correct reading of **Selkent** the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment, but was a factor to be taken into account in the balancing exercise.*
>
> *16. The list that Mummery J gave in **Selkent** as examples of factors that may be relevant to an application to amend ("the **Selkent** factors") should not be taken as a checklist to be ticked off to determine the application, but are factors to take into account in concluding the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment. Mummery J specifically stated he was not providing a checklist at paragraph 843F: "What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively."*
>
> *17. This is not a new point. Underhill L J returned to a consideration of **Selkent** in **Abercrombie & Others v Aga Rangemaster Ltd [2014] ICR 209** and noted at paragraph 47:-*
>
> > *"it is perhaps worth emphasising that head (5)" – the **Selkent** factors – "of Mummery J's guidance in **Selkent's** case was not*

*intended as prescribing some form of a tick box exercise. As he makes clear, it is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance which he identifies under head (4)" – the balance of hardship and injustice.*

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

*…*

16. In the Court of Appeal case of ***Abercrombie & Others v Aga Rangemaster Ltd at (2013) EWCA Civ 148,*** Underhill LJ further examined the issue of whether an amendment is a 're-labelling' (Category 2) or a 'wholly new claim' (Category 3) and gave the following guidance

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

*…*

*… Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and a fortiori in a re-labelling case – justice does not require the same approach: NB that in High Court proceedings amendments to introduce "new claims" out of time are permissible where "the new cause of action arises out of the same facts or substantially the same facts as are already in issue" (Limitation Act 1980) Section 35(5))". (Paragraph 50)*

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

*"Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting **Selkent** factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment? If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters of whether witnesses remember the events*

*and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis of instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim. (Paragraph 21).*

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

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

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

19. Hence, the paramount consideration in an amendment application is the relative injustice and hardship involved in refusing or granting an amendment.

20. It is also important that an application to amend sets out the terms of the proposed amendment, in the same degree of detail as would be expected had it formed part of the original claim. In the case of ***Chief Constable of Essex Police v Kovacevic EAT 0126/13***, the EAT confirmed that tribunals should ensure that the terms of any such proposed amendments are clearly recorded.

21. Overall, the decision of amendment is one for the discretion of the Industrial Tribunal and one which is based on the facts of each case having regard to the overriding objective as set out below.

*Time Limits – Race Discrimination*

22. Regulation 65 of the Race Relations (NI) Order 1997 (hereinafter "the 1997 Order") 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."*

23. That three month time limit may be extended under Regulation 65(7) of the 1997 Order 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."*

24. 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.

25. 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 extend time is to be exercised."*

26. 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."*

27. 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:

    (1) the length of and the reasons for the delay;

    (2) the extent to which the cogency of the evidence is likely to be affected by the delay;

    (3) the extent to which the parties sued had co-operated with any requests for information;

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

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

28. In the recent case of ***Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWWCA Civ23,*** the application of the above so called *"Keeble factors"* received further consideration by Underhill LJ. He cautioned against "a rigid adherence to a checklist" which can "lead to a mechanistic approach to what is meant to be a broad general discretion." He commented that the best approach for a tribunal in considering the exercise of the just and equitable discretion is to assess all the factors in the particular case that it considers relevant, including, in particular, the length of, and the reasons for, the delay.

*Time Limit – Unlawful Deduction of Wages*

29. Article 55 (2) of the Employment Rights (NI) Order provides that:-

> *"…..an industrial tribunal shall not consider an unlawful deduction of wages claim before the end of the period of three months beginning with—*
>
> *(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or*
>
> *(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received."*

30. The three month time limit may be extended under Article 55 (4) which states that:

> *"Where the industrial tribunal is satisfied that it was not reasonably practicable for a complaint under this Article to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."*

*Overriding Objective*

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

> *"The overriding objective of these Rules is to enable tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable:-*
>
> *(a) Ensuring that the parties are on an equal footing.*
>
> *(b) Dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) Avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) Avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) Saving expense.*
>
> *The tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it, by these Rules. The parties and their representatives shall assist the tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the tribunal."*

## SOURCES OF EVIDENCE

32. The tribunal heard evidence from the claimant. The tribunal had regard to the claimant's claim form, the respondent's response form, Case Management Preliminary Hearing records of 3 November 2020 and 19 March 2021, a letter from the claimant's representative dated 15 April 2021 setting out the extent of the amendments required and submissions from the respondent dated 7 May 2021. The tribunal also had regard to the oral submissions on behalf of both parties.

## SUBMISSIONS OF THE PARTIES

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

    (1) The claimant, being a litigant in person, and represented by his partner, had no legal experience and therefore did not realise that he could combine various aspects of his alleged mistreatment under one claim.

    (2) The claimant was unaware that there were different types of discrimination, i.e. race, religion, sexual orientation etc. The claimant only became aware of the various types of discrimination at the first CMPH on 3 November 2020.

    (3) The claimant accepted that he did not mention the matter regarding recruitment in his claim form and it is this matter which forms the main amendment to the claimant's claim. However, the claimant submitted that it was sent in a letter to Mr McArthur prior to a claim being filed and that it was also raised with Mr Mason during the Discovery process. The claimant contended that his lack of experience, with employment tribunals, meant that he believed that the matter could be dealt with even though it had not been mentioned in the claim form but, as it arose out of his employment situation, it could be considered.

    (4) The claimant contended that this was a very serious matter and that it should be heard before the tribunal.

    (5) Throughout the course of this Preliminary Hearing, it became clear that the claimant was also wanting to amend his claim to include an unlawful deduction of wages claim. The claimant had not articulated this in the email of 15 April 2021 which set out the claimant's amendments. The claimant submitted that he should have been paid at the supervisor role rate of pay, as that was the rate of pay he was initially offered, as oppose to the operator role rate of pay. The claimant also contended that the failure to pay him at the night supervisor role rate of pay was a further act of race discrimination.

34. In summary, the respondent's submissions were as follows:-

    (1) The respondent accepted that the issue of the discrepancy between the role the claimant was recruited to and the role he ultimately took up, on completion of a trial period, was raised in correspondence from Andrea Rooks to the respondent dated 30 November 2019. The respondent contended that this demonstrated that the issue was in the claimant's mind, at this time, and therefore the respondent was entitled to assume that this issue was not pursued by the claimant when it was left off his claim form

which was dated less than one month later, 26 December 2019.

(2) The respondent further submitted that, allowing this allegation to be included in the claimant's claim form would have a prejudicial impact of widening the issues that the tribunal had to consider, it would add to the discoverable documentation and it would potentially require the respondent to call additional witnesses and therefore lengthen the hearing.

(3) The respondent further submitted that the balance of prejudice is in favour of not allowing this particular amendment.

(4) The respondent also argued that all parties should be on equal footing and that it was important not to go too far in favour of the claimant and put the claimant at an unfair advantage.

(5) With regard to the unlawful deduction of wages claim, the respondent submitted that all amendment applications should be in writing but that this particular aspect of the claim had not been committed to writing.

(6) Finally, the respondent contended that the new facts and heads of claim are Category 3 amendments and should not be allowed as they are significantly out-of-time and would lead to additional time or cost to the hearing.

**RELEVANT FINDINGS OF FACT AND CONCLUSIONS**

35. Applying the legal principles as set out at paragraphs 11 to 31 above, the tribunal has made the following relevant findings of fact and conclusions:

36. The tribunal determines that the claim form, in its original form, pleaded race discrimination and unfair dismissal. It was common case between the parties that the claimant did not have the requisite qualifying service for such an unfair dismissal claim and therefore this claim is not being pursued.

37. One of the amendments, sought by the claimant, pleads a new head of claim (i.e. unlawful deduction of wages). This head of claim was not previously raised in the claimant's original claim form.

38. The additional amendment, in relation to the role the claimant was recruited to, sought by the claimant, also pleads new facts not previously pleaded. The new facts pleaded (set out at 8 above) are a further example of race discrimination.

39. The tribunal is satisfied that the amendments sought add new areas of complaint. The claim, as currently constituted, focuses on the claimant's dismissal. The proposed amendment relates to events unconnected to the claimant's dismissal but for a period of time before the dismissal.

40. The tribunal is not satisfied that the proposed amendments fall within the first classification in ***Harvey*** nor is the tribunal satisfied that the proposed amendments fall within the second classification in ***Harvey***.

41. The proposed amendment to include an unlawful deduction of wages claim is clearly a category three amendment as it raises a new distinct head of claim.

42. With regard to the proposed amendment to cite further examples of race discrimination claim, which has already been pleaded in the original claim form, the tribunal is not satisfied that the further examples are linked to or arise out of the same set of facts as the original claim. The tribunal is therefore satisfied that the further examples of race discrimination proposed amendments fall under the third category of amendment set out in the ***Selkent Bus*** case as they add a new area of complaint.

43. The alleged unlawful deduction of wages act occurred in June 2019. The further example of race discrimination occurred in October/November 2019. This application to amend the claim to plead new facts further demonstrating race discrimination and unlawful deduction of wages, has clearly been made outside the relevant statutory time limits. Both amendments therefore require the exercise of the tribunal's discretion to extend time.

*Unlawful deduction of wages claim*

44. Within the claimant's original ET1, there is no mention of the claimant not being paid at the correct rate of pay. Despite reference being made to the claimant's rate of pay at the CMPH on 19 March 2021, by the Employment Judge dealing with CMPH, the claimant also made no reference, in his amendment document of 15 April 2021, to wanting payment for the supervisor rate of pay for the week of 19 June 2019.

45. The first mention of seeking payment at the supervisor rate of pay for week commencing 19 June 2021 was raised at the preliminary hearing on 17 May 2021. No reason was offered by the claimant as to why it was being raised at such a late stage nor as to why it was not set out in the amendment document. While the claimant indicated that he didn't quite understand the different categories of discrimination, a perusal of the claimant's claim form would indicate that he was aware of the different types of claims, at least, that could be made – within the claim form, the claimant has ticked the box for both race discrimination and unfair dismissal. The claimant was therefore clearly aware of how to fill in a claim form and list the different types of claim pleaded.

46. It is the tribunal's view that if the claimant was in clear contemplation of seeking payment for this alleged deduction to his wages, he had ample time to do so before 17 May 2021. It was reasonably practicable for him to have raised it within the ET1 or, failing that, to have raised it within the amendment document he submitted on 15 April 2021. He did not do so and the tribunal is of the view that the claimant had therefore no contemplation of ever raising such a claim.

47. The tribunal therefore finds that the claimant's unlawful deduction of wages claim has been raised outside of the statutory time limit, that it was reasonably practicable for the claimant to have raised this claim within the initial thee month time limit, or a reasonable period of time thereafter, but that the claimant did not do so. This amendment of the claimant's claim is therefore not granted.

*Race Discrimination claim*

48. The claimant lodged his race discrimination claim and his unfair dismissal claim on 26 December 2019 exactly one month after being dismissed. This matter was not case managed until November 2020 due to the closure of the tribunal building as a result of the Covid-19 lockdown. As soon as it was brought to the claimant's attention, at a CMPH on 19 March 2021, that he would have to amend his claim to include the new facts, in his race discrimination claim, not previously pleaded, he did so promptly.

49. When setting out the nature of the amendments requested, the claimant clearly set out those facts which he felt were examples of race discrimination and labelled them accordingly. For the avoidance of doubt, the claimant did not set out that the non-payment of the supervisor role rate of pay was a further act of race discrimination.

50. The subject matter of this amendment application clearly adds another dimension to this case which will need to be considered. That said, while it is probable there will require to be some further additional evidence given at the hearing of this matter, that might not have been the case prior to any such amendment, the tribunal was not satisfied that any such additional evidence would significantly increase the amount of evidence which would require to be heard and determined by the tribunal or indeed the length of the hearing.

51. 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. The claimant will be prevented from pursuing what he believes is another important strand of his race discrimination claim and, indeed, one that the respondent is already aware of.

52. Furthermore, on the basis of the submissions made by the respondent's representative, the tribunal was not satisfied that there was any real prejudice to the respondent if the said amendment is allowed. While any amendment will have to be defended by the respondent, there was no suggestion that all relevant witnesses will not be available to defend the claim. The tribunal was satisfied that the hardship or prejudice to the respondent if the amendment was granted is minimal. It will require, at the most, an additional two witnesses to deal with what is a very net point i.e. why the claimant was not employed for the job advertised.

53. Moreover, in granting the amendment, there is no delay caused to the proceedings in this case. Preparation for the case is at the initial stages and so there is no prejudice caused to the respondent in having to either amend witness statements or draft further additional witnesses at an advanced stage of proceedings.

54. The paramount consideration, in accordance with the principles laid down in ***Selkent***, remains the relative injustice and hardship to the parties in refusing or granting the amendment. While such an issue is often difficult to determine in carrying out the balancing exercise referred to by Mummery LJ in ***Selkent***, after taking account of the tribunal's conclusions, as set out in the previous sub-paragraphs, the tribunal has decided that, when deciding the relevant injustice and hardship involved in granting and refusing the proposed amendment, the greater hardship and injustice will be for the claimant, if the application was refused.

55. The tribunal is also mindful of the overriding objective of the Tribunal which is to ensure that cases are dealt with fairly and justly and to ensure that parties are on an equal footing.

56. Therefore, the tribunal has decided that the claimant's application for an Order for leave to amend his claim, in the terms set out at paragraph 8 above, is granted and the tribunal orders that the said claim of the claimant is now so amended. For the avoidance of doubt, however, the claimant did not set out that the non-payment of the supervisor role rate of pay was a further act of race discrimination. The amendment is granted only to the extent of the amendment set out at paragraph 8 above.

57. The respondent, if it wishes to present an amended response to the claimant's claim, as so amended, is ordered to do so within ***28 days*** from the date this decision is issued to the parties.

58. In light of the tribunal's decision, as set out above, in relation to the application to amend the claimant's claim, the following Orders are now made in accordance with Part 6 of the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020:-

**(1) <u>Issues</u>**

An agreed statement of the legal and main factual issues is to be lodged, with the Office of the Tribunals, seven days following the completion of the interlocutory process, referred to below.

**(2) <u>Discovery/Additional Information</u>**

The parties are ordered to serve any amended Notices for Discovery and/or Additional Information ***by Friday 6 August 2021*** and to respond ***by Friday 20 August 2021***. The claimant and any witness he wishes to call must provide a signed and dated witness statement to the respondent's representative ***by 5.00 pm on Friday 17 September 2021***. The respondent and any witness it wishes to call must provide a signed and dated witness statement to the claimant's representative ***by Friday 15 October 2021***. Oral evidence of written supplementary witness statements in response to the respondent's witness statements will only be permitted with leave of the tribunal where good reason is shown.

**(3) <u>Schedule of Loss</u>**

The claimant must provide to the respondent's representative a schedule of all financial loss claimed by the claimant, setting out in particular the nature and amount of any such loss claimed and how that sum is made up ***by 5.00 pm on Friday 17 September 2021***.

**(4) Bundles**

The previous direction given at the CMPH on 3 November 2020 regarding the lodgement of bundles remains. Bundles should be lodged ***by 12 noon on 1 November 2021***.

**(5) Dates of Hearing**

The dates of hearing will remain listed from ***8-11 November 2021***.

**(6) Progress Review Preliminary Hearing**

A Progress Review Preliminary Hearing will take place on ***Thursday 21 October 2021 at 10.30 am***. The purpose of this Progress Review Preliminary Hearing is to ensure that the dates listed for hearing and the time allocated to the hearing is still sufficient and to deal with any other matters raised by the parties.

**(7) Further Matters**

Parties and their representatives should note that if any matters arise which require a further Order by the tribunal, they should immediately the Office of the Tribunals of that matter so that a further Preliminary Hearing can be arranged **promptly**.

**Employment Judge:**

**Date and place of hearing: 17 May 2021, Belfast.**

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